TO: Governing Board
Natomas Unified School District

FROM: Roman J. Muñoz

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RE: California Voting Rights Act

I. VOTING RIGHTS LITIGATION

Voting rights lawsuits have primarily focused on school districts utilizing an entirely at-large election system.

II. ANALYSIS OF ANY POTENTIAL PROBLEM

The first step in analyzing a possible violation of the state or federal Voting Rights Acts is to determine whether or not there is an at-large election system in place. Then, if an at-large election system is used, further analysis of past elections, including the candidates and voter turnout among various groups, may be examined to determine whether it could be argued that this election method is impairing the ability of a protected class to elect candidates of its choice. At that point, census data would also be analyzed to identify any possible protected classes, and to determine which groups are represented during each election.

III. APPLICABLE LAW

A. Federal Voting Rights Act ("VRA")

In June of 2009, the U.S. Supreme Court issued a decision regarding the federal VRA. Specifically, the Court was addressing Section 5 of the VRA, which requires federal approval for changes in election laws, or redistricting in particular jurisdictions, mostly in the south. This decision upheld the section generally, but made it easier for small jurisdictions to end federal supervision of election procedures. This decision could impact school districts with territory in Merced, Monterey, Kings, or Yuba counties some of which are required to seek preclearance of any new election procedures under Section 5.

B. California Voting Rights Act ("CVRA")

School districts that elect its board members using an at-large election method continue to face potential litigation from voting rights plaintiffs who are targeting school districts and maintaining that under the CVRA, members should be elected by trustee area where candidates living in a trustee area are elected by the voters living in that same area.

An at-large method of election means any of the following methods of electing members to the governing body of a political subdivision: (1) the voters of the entire jurisdiction elect the members to the governing body, (2) the candidates are required to reside within given areas of the jurisdiction and the voters of the entire jurisdiction elect the members to the governing body,

and (3) combining at-large elections with district-based elections. (Elections Code § 14026.) A district-based election is "a method of electing members to the governing body of a political subdivision in which the candidate must reside within an election district that is a divisible part of the political subdivision and is elected only by voters residing within that election district." (*Ibid.*)

C. Interplay with Federal Law: the Federal Voting Rights Act

Like the CVRA, Section 2 of the VRA also creates liability for vote dilution. (42 U.S.C.A. § 1973.) Vote dilution refers to the impermissible discriminatory effect that a district plan has when it operates to cancel out or minimize the voting strength of racial groups. (*Id.*)

D. Burden of Proof and Proof of Past Discrimination as a Factor

Under both the CVRA and the VRA, the burden of proof falls on the plaintiff to generally show that there is a voting practice that dilutes a member of a protected class's right to vote.

Under the VRA, the Supreme Court has identified three requirements, known as the *Gingles* requirements, which a plaintiff must show in order to prevail: "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district …. Second, the minority group must be able to show that it is politically cohesive …. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a block to enable it … usually to defeat the minority's preferred candidate." (*Thornburg v. Gingles* (1986) 478 U.S. 30, 50-51.) Once this analysis is complete, the court must decide, based on the "totality of the circumstances," whether the challenged practice impermissibly impairs the ability of the minority group to elect their preferred representatives. (*Ruiz v. City of Santa Maria* (1998 9th Cir.) 160 F.3d 543, 550.) Under the totality analysis, courts often rely on a non-exhaustive list of factors prepared by the Senate Judiciary Committee.[1] *Id.* As such, proof of past discrimination is one of many factors to be considered and even relatively long-past discrimination also appears to be a consideration. (*See Sierra v. El Paso Independent School District* (1984) 591 F.Supp. 802 [finding past discriminatory practices including a poll tax had the continuing effect of lowering participation of Mexican-Americans in elections].)

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[1] The so-called "Senate factors" are: (1) the extent of any history of official discrimination in the state or political subdivision affecting the right of a member of a minority group to register, vote, or participate in the democratic process; (2) the extent to which voting in government elections is racially polarized; (3) the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group (for example, unusually large election districts, majority vote requirements, prohibitions against bullet voting); (4) exclusion of minorities from a candidate slating process; (5) the extent to which minority group members in the state or political subdivision bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; (7) the extent to which minorities have been elected to public office in the jurisdiction; (8) the extent to which elected officials are unresponsive to the particularized needs of minorities; and (9) the policy reason for the jurisdiction's use of the challenged practice. *See* S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07. Factors two and seven are the most important. *See Gingles*, 478 U.S. at 48 n. 15, 106 S.Ct. 2752.

With the CVRA, the California Legislature intended "to provide a broader cause of action for vote dilution than was provided for by federal law." (*Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 669.)[2] Specifically, the California Legislature wanted to eliminate *Gingles*' first requirement that "plaintiffs must show that a compact majority-minority district is possible." (*Ibid*.) As the Assembly Committee on the Judiciary stated, "[T]his bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown)." (*Ibid.* [citing Assembly Committee on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended April 9, 2002, p. 3].) Although the fact that members of a protected class are not geographically compact or concentrated does not preclude a finding of a violation of the CVRA, it may be a factor in determining the appropriate remedy. (*Ibid*.)

The CVRA is violated if it is established that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision. Factors such as the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns are probative, but not necessary factors to establish a violation of the Act.

The occurrence of racially polarized voting may be determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class. One circumstance that may be considered in determining a violation of the Act is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action based on the Act. In multi-seat at-large election districts, where the number of candidates who are members of a protected class is fewer than the number of seats available, the relative group-wide support received by candidates from members of a protected class will be the basis for the racial polarization analysis.

It is also important to note that a finding of an intent to discriminate is not required under either Act.

Electoral devices such as at-large elections are not per se violative of the VRA. (*See e.g. Haft v. Dart Group Corp*. (1993 DC Del) 841 F.Supp. 549; *see also Gingles* (supra) (rejecting the notion that at-large seats are always illegal under the VRA).) As noted, under the VRA, a

[2] In *Sanchez*, the appeals court upheld CVRA because it is race neutral, and does not favor any race over others or allocate burdens or benefits to any group on the basis of race. Instead, it simply gives a cause of action to members of any racial or ethnic group that can establish its members' votes are diluted through the combination of racially polarized voting and an at-large election. As such, the CVRA is not subject to strict scrutiny and withstands a rational basis analysis.

court will analyze the *Gingles* factors and the totality of the circumstances. (*See Vecinos de Barrio Uno v. City of Holyoke* (1995) 880 F.Supp. 911 [finding that at-large elections for city council violated the VRA where although Hispanic voter turnout was low, votes were cohesive; a recent mayoral race had involved racial appeals and all Hispanics who had run for city council had been unsuccessful]; *U.S. v. Charleston County* (2002) 318 F.Supp.2d 302 [holding a VRA violation existed where statistical data over the most recent twelve-year period established that white-bloc voting was sufficient to defeat the combined efforts of non-white voters and there was cohesion in white voting eclipsing 90% while non-white voters were defeated in 78.6% of elections where they acted cohesively]; *but see Clay v. Board of Educ.* (1995) 896 F.Supp. 929 [holding no violation where there was no electoral discrimination against African-Americans, and any polarized process did not cause consistent defeat of minority candidates so access to the political process was not impaired].) The language of the CVRA, stating that at-large methods of voting may not be imposed in a particular manner, indicates that there would similarly be no per se violation by the mere happening of an at-large election and it is likely that the California courts will approach the analysis similarly (without the requirement of *Gingle* factor one) and analyze the factors identified above.