

June 6, 2019

John Nagel
City Attorney

Via E-Mail Only
JNagel@sunnyvale.ca.gov

Melissa Tronquet
Assistant City Attorney

MTronquet@sunnyvale.ca.gov

Marguerite Mary Leoni

MLeoni@nmgovlaw.com

Re: CVRA Remedies Under Consideration at the June 11, 2019 Study Session

Dear Counsel:

This letter is to follow up and expand on the issues we discussed on our May 17, 2019 phone call. We sent you an email on May 8 expressing concern with a proposed election system to replace the City's current at-large election system involving a rotating 4-district and 3-district map in presidential and gubernatorial election years. We also stated our position on the "4+3" system: we do not believe this untested, eccentric system is a viable remedy for the City's alleged violation of the CVRA, especially when a traditional single-member district remedy is available.

We applaud the City's decision to replace its at-large election system, which we have alleged violates the CVRA because it unlawfully dilutes the ability of Asian American voters to elect candidates of their choice. *See* Cal. Elec. Code § 14027. Now, the City must choose an "appropriate remed[y] . . . tailored to remedy the violation," Cal. Elec. Code § 14029, or continue to face potential CVRA liability.

An appropriate remedy is one that is both lawful and fully remedies the violation. *See Harper v. City of Chicago Heights*, 223 F.3d 593, 599-600 (7th Cir. 2000) ("[I]f the jurisdiction fails to remedy *completely* the violation or if a proposed remedial plan itself constitutes a § 2 violation, the court must itself take measures to remedy the violation." (emphasis added and citation omitted)); *Cane v. Worcester Cnty., Md.*, 35 F.3d 921, 927 (4th Cir. 1994) ("A proposed plan is a legally unacceptable remedy if it violates constitutional or statutory voting rights—that is, if it fails to meet the same standards applicable to an original challenge of an electoral scheme." (internal quotation marks, ellipsis, brackets, and citation omitted)); *Dillard v. Crenshaw Cnty.*, 831 F.2d 246, 250 (11th Cir. 1987) ("The court should exercise its traditional equitable powers to fashion the relief so that it *completely* remedies the prior dilution of minority

voting strength and *fully* provides equal opportunity for minority citizens to participate and to elect candidates of their choice.” (citation omitted)).¹

First, the 4+3 plan is not a *full* and *complete* remedy for the City’s CVRA violation. A full and complete remedy to the City’s CVRA violation would provide Asian Americans an opportunity to elect Council seats roughly in proportion with their citizen voting age population (“CVAP”). See *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994) (proportionality is “a relevant fact” in “determining whether members of a minority group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice” (internal quotation marks and citation omitted)); *Montes v. City of Yakima*, No. 12-CV-3108-TOR, 2015 WL 11120964, *8 (E.D. Wash. Feb. 17, 2015) (“Rough proportionality is a significant indicator of whether an electoral plan provides an adequate remedy to a Section 2 violation.”). Asian Americans are approximately 35% of the City’s overall CVAP, roughly equal to between two and three seats on a seven-seat Council.

None of the proponents of the 4+3 proposal have shown the 4+3 proposal gives Asian American voters the opportunity to elect even a single seat on the Council. In contrast, under a traditional single-member six-district or seven-district plan, two districts can be drawn that give Asian American voters the opportunity to elect candidates of their choice. We have looked at the demographic data for the City of Sunnyvale and understand that it is possible, under either a six-district or seven-district system, to draw two districts in which the Asian American share of the City’s CVAP is over 45%. On the same maps, it is possible to draw a separate district in which the Latino CVAP is close to or over 30% (30.2% Latino CVAP under a 7-district map and 28.4% Latino CVAP under a 6-district map). Traditional single-member districts have been shown to increase diversity in local governing bodies.²

The City must choose to move forward with the plan that fully remedies the City’s CVRA violation. A traditional, single-member district system is the only proposed option that does so. In addition, the novelty and complexity of the 4+3 proposal and likelihood of voter confusion will threaten its chances of passing on the March 2020 ballot.

The 4+3 system is also not an appropriate remedy because it is an untested, complex voting system that may disadvantage a variety of voters and decrease voter participation in Sunnyvale elections. While no one can be certain of what voters will make of the 4+3 system

¹ California courts look to federal courts’ interpretation of the federal Voting Rights Act when interpreting the CVRA. See *Jauregui v. City of Palmdale*, 226 Cal. App. 781, 806-07 (2014); *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 667-69 (2006).

² See Justin Levitt & Douglas Johnson, *Quiet Revolution in California Local Government Gains Momentum*, Rose Institute of State and Local Government (2016), available at: <http://roseinstitute.org/wp-content/uploads/2016/11/CVRA-White-Paper.pdf>. A fact sheet compiled by the ACLU Center for Advocacy & Policy California, Asian Americans Advancing Justice California, and the Mexican American Legal Defense and Education Fund finding an increase in Latino representation in school districts that have switched to district-based elections is available at: <https://www.advancingjustice-alc.org/wp-content/uploads/2012/11/CVRA-Fact-Sheet-12-03-2018.pdf>.

because no other jurisdiction in the country uses such a system, studies have linked depressed voter turnout and increased ballot error in many population groups to the adoption and implementation of complex election systems.³ In remedying its CVRA violation, the City should be focusing on increasing voter participation among groups historically disenfranchised by the City's at-large system – adding complexity to its election system does not serve this goal. This is particularly true in a City like Sunnyvale, where a significant share of the City's voters are naturalized citizens forming new voting habits, or are interacting with the City's election system in a second language.⁴

A traditional single-member district plan is also more consistent with the federal Voting Rights Act, 52 U.S.C. § 10101 *et seq.*, which allows a plaintiff to challenge a jurisdiction's election system if they can show, among other things, that it is possible to draw a majority-minority district. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (requiring to establish liability under the federal Voting Rights Act that plaintiffs show a minority group is “sufficiently large and geographically compact to constitute a majority in a single-member district”). As the City of Sunnyvale's Asian American population grows,⁵ Sunnyvale may soon be able to draw one or more districts with Asian American majorities under a traditional single-member district system. If, at such time, the City uses an alternative election system in which a majority-minority district cannot be drawn, the City leaves its election system vulnerable to challenge under the federal Voting Rights Act.

³ *See* Francis Neely & Jason McDaniel, *Overvoting and the Equality of Voice under Instant-Runoff Voting in San Francisco*, California Journal of Politics and Policy, 7(4) (2015) (finding that the introduction of ranked-choice voting in San Francisco elections led to higher rates of ballot error for precincts with more African American, Latino, elderly, foreign-born, and less wealthy voters); Jason A. McDaniel, *Writing the Rules to Rank the Candidates: Examining the Impact of Instant-Runoff Voting on Racial Group Turnout in San Francisco Mayoral Elections*, Journal of Urban Affairs 0(0) (2015) (finding a significant decline in voter turnout among Black voters, white voters, young voters, and less educated voters after the adoption of instant runoff voting in San Francisco).

⁴ Compared to the rest of California and the nation, a disproportionately large share of Sunnyvale's voters are naturalized citizens, a disproportionately large share of Sunnyvale's immigrant population are recent arrivals, and a disproportionately large share of Sunnyvale's residents are limited-English proficient. Statistics from the 2013-2017 American Community Survey are available on American Fact Finder, available at: <https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁵ Asian Americans are the fastest growing racial group in California. *See* “A Community of Contrasts,” Asian American Center for Advancing Justice, 3 (2013), *available at*: https://www.advancingjustice-la.org/system/files/Communities_of_Contrast_California_2013.pdf (analyzing data from the 2010 Census).

We hope the Council will take these concerns into consideration as it evaluates election systems to include on the March 2020 ballot for voters' approval.

Sincerely,

A handwritten signature in black ink, appearing to read "Ginger L. Grimes". The signature is fluid and cursive, with the first name being the most prominent.

Ginger L. Grimes

GLG/kbm

cc: Jaqui Guzman
Deputy City Manager, City of Sunnyvale

Richard Konda
Asian Law Alliance

Jonathan Stein
Asian Americans Advancing Justice – Asian Law Caucus