RUTAN
RUTAN & TUCKER, LLP

Jeffrey T. Melching
Direct Dial: (714) 641-3422
E-mail: jmelching@rutan.com

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Kevin Shenkman
28905 Wight Road
Malibu, CA 90265

Re: Response to March 5, 2021 Demand Letter Under California Voting Rights Act

Dear Mr. Shenkman:

I am the City Attorney for the City of Irvine ("City"). I write in response to your March 5, 2021, letter, which baselessly accuses the City of violating the California Voting Rights Act ("CVRA"). Your letter appears to be the same "form" letter that you have sent to jurisdictions throughout California over the past decade—apart from filling in a few City-specific blanks in the last five paragraphs—which strongly suggests that you have not undertaken a detailed analysis of the City's demographics or its elections. Had you done so, you would have realized that Irvine is a particularly poor candidate for one of your cookie-cutter threat letters, given the City's demographics and the consistent success in City Council elections of candidates who are members of a protected class.

The City is prepared to vigorously defend itself in the event of litigation, and it has already retained Gibson, Dunn & Crutcher LLP to serve as its litigation counsel should you elect to move forward. But we urge you to not to do so. This letter sets forth a few of the reasons why a CVRA lawsuit against the City would be frivolous, unreasonable, and without foundation—exposing your client and your office to possible liability for the City's litigation expenses, pursuant to Elections Code section 14030.

First, at-large voting systems "are not *per se* violative of minority voters' rights." (*Thornburg v. Gingles* (1986) 478 U.S. 30, 47.) And contrary to the suggestions in your letter, district-based elections are not inherently better for minority voters—to the contrary, there are myriad examples of jurisdictions using district-based schemes to diminish minority voting strength. (*E.g.*, *Gill v. Whitford* (2018) 138 S.Ct. 1916, 1924 [explaining the concepts of "cracking" (dividing "a party's supporters among multiple districts so they fall short of a majority in each one") and "packing" ("concentrating one party's backers in a few districts" even though spreading them across multiple districts would increase their electoral success)].)

For these reasons, a CVRA plaintiff must be able to do more than simply point to a handful of minority candidates who have lost at-large elections, and then speculate that things would be meaningfully different if the City had districted elections—which is all your letter does. Rather, a

CVRA plaintiff must prove "racially polarized voting" (Elec. Code, § 14028, subd. (a)) by establishing that a minority group is "politically cohesive" (meaning its members tend to vote similarly), and that "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances … —usually to defeat the minority's preferred candidate." (*Gingles*, 478 U.S. at p. 51.) In addition, a CVRA plaintiff must separately be able to demonstrate that the at-large system has diluted minority voting strength, such that an alternative voting scheme would enhance the ability of voters of a protected class to elect candidates of their choice or influence the outcome of elections. (Elec. Code, § 14027.) Your letter makes no effort to demonstrate any of these baseline requirements for a CVRA claim.

Second, given the City's unique demographics and diversity, it would be impossible to show that districts would enhance the ability of any protected class to elect candidates of its choice or influence election outcomes.

The City is diverse. Asian-Americans and whites each account for about 42% of the City's total population, and Latinos account for about 10%. Those numbers alone may not be so unusual in California. But what *is* unusual is the degree to which those different racial and ethnic groups are integrated throughout the City. You may be aware that the City has been ranked by *FiveThirtyEight*, a reputable statistics publication focusing on politics, as the ninth-most diverse city in the country and *the most integrated* of the country's 100 most populous cities.[1] In Irvine, then—unlike in other diverse cities that are *not* so integrated—people of all races and ethnicities live together in the same areas. This means there is no material concentration of the members of any protected class living in any given area of the City when compared to other areas—and for that reason, dividing the City into five districts would not give any particular district a significant concentration of any particular protected class. As a result, no group of voters would have a meaningfully better ability to elect candidates of their choice or influence the outcome of elections under a district-based system than they already have in the City's at-large system.

For instance, your letter asserts that Latinos comprise approximately 11% of the City's citizen voting age population ("CVAP"). Even if that were accurate, we believe that in light of the City's high degree of integration, it would still be impossible to draw a district in Irvine in which the Latino CVAP approaches even 20%.

We are aware, of course, that unlike the federal Voting Rights Act, the CVRA states "[t]he fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section, but may be a factor in determining an appropriate remedy." (Elec. Code, § 14028, subd. (c).) But this language does not render the City's demographics irrelevant. Indeed, in arguing this precise

[1] https://fivethirtyeight.com/features/the-most-diverse-cities-are-often-the-most-segregated/; https://www.ocbj.com/news/2015/may/21/irvine-ranked-most-diverse-city-us/

issue before the California Supreme Court in *City of Santa Monica v. Pico Neighborhood Association* (No. S263972), you have advocated for the following rule: "where a politically cohesive minority makes up *25% or more* of the citizen-voting-age population of a district, it will often be able to exercise meaningful electoral 'influence.'" (Italics added.) We disagree with your proposed 25% benchmark and believe that it trivializes the dilution element of the CVRA. But even under your proposed rule, Latino voters in Irvine would fall well short of the benchmark; they would have no greater electoral influence or opportunity to elect candidates in a district-based system. This precludes a vote-dilution claim as a matter of law.[2]

If you could maintain a lawsuit against the City notwithstanding the impossibility of any alternate election system giving Latinos greater electoral power, the CVRA would be unconstitutional, at least as applied to Irvine. It is one thing to order a city to draw districts along race-based lines when doing so will give a protected class electoral strength it never had before. It is quite another to order a city to engage in such race-conscious line-drawing when it will achieve no purpose. The U.S. Supreme Court has condemned "[r]acial gerrymandering," which threatens to "balkanize us into competing racial factions" and "to carry us further from the goal of a political system in which race no longer matters." (*Shaw v. Reno* (1993) 509 U.S. 630, 657.) Forcing the most integrated big city in the country to draw race-based districts would be a huge step backwards. "It would be an irony" if the CVRA "were interpreted to entrench racial differences by expanding a 'statute meant to hasten the waning of racism in American politics.'" (*Bartlett v. Strickland* (2009) 556 U.S. 1, 25-26.)

Third, as for Asian-American voters, you assert that they represent 39.2% of the City's total population—and presumably a smaller share of the City's CVAP. Given those numbers, it might theoretically be possible to draw a district in which the Asian-American CVAP is 50% or greater. But that would not give Asian-American voters any *greater* influence over electoral outcomes or ability to elect candidates than they enjoy today in the at-large system.

As an initial matter, your letter advances the misplaced and unconstitutional presumption that minority voters prefer only minority candidates, even though every court to consider that argument has rejected it. (See *Ruiz v. City of Santa Maria* (9th Cir. 1988) 160 F.3d 543, 551 ["We join our [nine] sister circuits in rejecting the position that the 'minority's preferred candidate' must

[2] To illustrate, your letter observes that Christopher Gonzales ran unsuccessfully for the Council in 2000 and unsuccessfully for Mayor in 2010. You have provided no data indicating that Mr. Gonzales was preferred by the City's Latino voters in either election. In any event, Mr. Gonzales earned a mere 6.3% of the 129,129 votes cast in the 2000 election, or 8,136 total votes. (https://legacy.cityofirvine.org/civica/filebank/blobdload.asp?BlobID=17609.) Even if we assume for argument's sake that all 8,136 of the voters who cast ballots for Gonzales in 2000 were Latino and that all of them were concentrated in a single district, that still would have been nowhere near enough for him to prevail in a winner-take-all district-based election.

be a member of the racial minority. To hold otherwise would … provide judicial approval to 'electoral apartheid.'"].)

Even if the stereotype that Asian-American voters prefer only Asian-American candidates were true, you overlook the fundamental fact that three of five current City Council Members (60% of the Council) are themselves Asian-American. In fact, since 2004, the Council has had *at least* one Asian-American member (with the exception of 2016-2018). For instance, after his election to the Council in 2004, Steven Choi was re-elected in 2008, and then he was elected Mayor in 2012 and 2014. And after his election to a two-year term in 2004, Sukhee Kang was re-elected in 2006; he was then elected Mayor in 2008 and 2010.

In the most flabbergasting portion of your letter, you provide three examples of purportedly unsuccessful Asian-American candidates in the 2016 Council election: Gang Chen, Anthony Kuo, and Farrah Khan. But Anthony Kuo and Farrah Khan were subsequently *elected to, and currently sit on, the Council*. In fact, Farrah Khan has been elected *twice* since 2016—once as a Councilmember in 2018, and then as Mayor in 2020. And as explained above, 60% of the current City Council is Asian-American, with Vice Mayor Tammy Kim serving alongside Mayor Khan and Councilmember Kuo, in a City where less than 39% of its eligible voters are Asian-American.

These basic facts contradict your narrative that the City's at-large election system has diluted Asian-American voting strength.

Furthermore, Asian-Americans and Pacific Islanders are not a homogenous group, as you appear to believe. Rather, they are *many* groups of people, who come from, or are descended from those who come from, various parts of the most populous continent on the planet. There is a multiplicity of languages and cultures in South Asia, East Asia, and the Pacific Island chains, so lumping together anyone whom the Census might roughly categorize as "Asian" is inappropriate. And we will note that Irvine is diverse even in this respect: All three of its siting Asian-American Councilmembers have different backgrounds—Mayor Khan is Pakistani-American, Councilmember Kim is Korean-American, and Councilmember Kuo is Chinese-American.

In sum, your letter evidences a flawed view of the CVRA, and it overlooks several key facts about the City's demographics and electoral history. You have provided no evidence, and the City is aware of none, that either (i) Council elections are racially polarized in a legally significant way (that is, that Latino or Asian-American voters are politically cohesive and yet the white majority usually votes as a bloc to defeat their preferred candidates); or (ii) the City's at-large electoral system dilutes the voting strength of any protected class. Therefore, any CVRA suit against the City would be frivolous, unreasonable, and without foundation.

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The City is well aware of the many other public entities that have voluntarily adopted district-based elections in response to your demand letters, which typically contain the same explicit threat you have made here, namely, years of litigation and many taxpayer dollars spent. The City is also well aware of the handful of prior court decisions involving the CVRA—including the Court of Appeal's recent decision in the *Santa Monica* case (which the Supreme Court is now reviewing), in which the court flatly rejected a vote-dilution theory similar to the one you advance here, and referred to your other arguments as "unprecedented and unwise." And regardless of other jurisdictions' success or defeat in CVRA suits, there is no other city in the State of California like Irvine. In fact, it would be difficult to imagine a worse candidate for a CVRA lawsuit than the City of Irvine.

The City Council supports the voting rights of protected classes, and just as strongly believes that your letter is a misguided attempt to force district-based elections on a jurisdiction where they are not needed, and in fact, not appropriate. The CVRA, and voting-rights laws more generally, are vitally important and serve noble public purposes. But it is also important not to bend them so far that they break—or to tarnish them by filing frivolous lawsuits that will serve only to make the judiciary and the public question their value. We respectfully suggest that next time you do your homework before making threats like this one.

Sincerely,

Jeffrey Melching
City Attorney, City of Irvine

cc: Mayor and Members of the City Council of the City of Irvine
Marianna Marysheva, Irvine City Manager
Theodore J. Boutrous Jr., Esq.
Marcellus McRae, Esq.
Kahn A. Scolnick, Esq.