

SCOTT J. RAFFERTY

ATTORNEY AT LAW

1913 WHITECLIFF COURT
WALNUT CREEK CA 94596

(202)-380-5525
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May 28, 2021

Ms. Miriam Lens

Clerk, City of Hayward

777 B Street, 4th Floor

Hayward, CA 94541

VIA CERTIFIED MAIL 7018 0680 0000 3664 0889 rec'd 6/2/21 8:12AM

Re: Possible Violation of California Voting Rights Act

Dear Ms. Lens:

Last year, a group of Asian residents contacted me regarding the need for neighborhood elections in Hayward. At the time, it was too late to require compliance in the 2020 elections, so I suggested that we refrain from starting the process of seeking voluntary compliance, which is subject to deadlines set forth in Elections Code, Section 10010.

I have reached the point where research conducted under my direction confirms that there is a possible violation of the California Voting Rights Act, Elections Code, Section 14026, et seq., based in part on the fact that the voting behavior of Asian citizens differs from that of the rest of the electorate. It is my practice to provide details of this evidence and of the benefits that neighborhood elections will provide in the specific case of Hayward. These will be forthcoming shortly. Given the delay in census data, my client is willing to negotiate extensions to maximize sustained public engagement in the process.

I would be grateful if you advise me if any other party has previously filed an active notice of possible violation. My clients look forward to working with your office and the city council in the collaborative fashion made possible by A.B. 350.

Sincerely,

A handwritten signature in dark ink that reads "Scott Rafferty". The signature is written in a cursive, flowing style.

Scott J. Rafferty

Miriam Lens

From: Miriam Lens
Sent: Wednesday, June 2, 2021 12:10 PM
To: rafferty@gmail.com
Subject: Re: California Voting Rights Act
Attachments: 210528 Rafferty to Lens (Hayward CVRA).pdf

Mr. Scott Rafferty,

This serves to acknowledge your communication. My office has received no other communications on this topic.

Regards,

Miriam Lens
City Clerk

City of Hayward | 777 B Street | Hayward, CA 94541

☎ Phone: 510.583.4401 | Fax: 510-583-3636 | * Email: miriam.lens@hayward-ca.gov

Website: <https://www.hayward-ca.gov/>



From: Scott Rafferty <rafferty@gmail.com>
Sent: Friday, May 28, 2021 2:06 PM
To: Miriam Lens <Miriam.Lens@hayward-ca.gov>
Subject: California Voting Rights Act

CAUTION: This is an external email. Do not click on links or open attachments unless you know the content is safe.

Please see the enclosed letter, sent by certified mail today.
I look forward to working with you.

Scott Rafferty
1913 Whitecliff Ct
Walnut Creek CA 94596
mobile 202-380-5525

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May 28, 2021

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March 10, 2024

Mayor Mark Salinas
City of Hayward
777 B Street, 4th Floor
Hayward, CA 94541
cc: Council Members

Re: Follow-Up Regarding Possible Violation of California Voting Rights Act

Dear Mayor Salinas and Council Members:

Almost three years ago, Neighborhood Elections Now (NEN) notified Hayward of its possible violation of the California Voting Rights Act (CVRA) and petitioned the council to create districts that empower minority neighborhoods and promote the participation and influence of Asian-American voters. I asked that the City disclose any prior notice, which would bar my clients from recovering the partial reimbursement of work product provided by Elections Code, §10010(f). I have received no response to either request. My clients were not committed to forcing this issue before the 2022 election, because the transition works best when started in the presidential election year, when the potential Asian-American and Latino vote shares are at their highest. They now propose compliance before the 2024 election.

The CVRA is a no-fault statute that prohibits at-large elections whenever they dilute the influence of a protected group, such as Asian-Americans. We are not required to prove discriminatory intent, which explains why no California jurisdiction has successfully defended against a CVRA action. I write to determine whether the council seeks an alternative to litigation, since a civil action is now timely.

Since we wrote to your city clerk in 2021, NEN has worked with the city governments of other large cities. America's largest city without districts, Santa Clarita (population 229,000), and Ontario (178,000) will convert to neighborhood-based elections this November. Glendale (197,000) and Lancaster (174,000) are also in transition. As result, Hayward has become the largest city in California (and quite possibly in the United States) to elect its council entirely at large.

Since the 1980s, the Asian-American communities of Hayward have grown steadily and now constitute 30% of the population. When we sent our notice, 30% of

eligible voters were Asian-American. This share has increased to 33%, making Asian-Americans the city's largest minority. It is possible to create at least one district that is majority Asian, which likely triggers liability under the federal Voting Rights Act. Citywide elections submerge the voting power that Asian-American voters would have if the city created majority and plurality districts.

An essential purpose of electoral districts is to incorporate minority communities into local political life. Campaigns neglect many of these communities because their historically low turnout renders them irrelevant in most at-large elections, creating a spiral of political disengagement. Citywide elections also make it difficult for grass-roots candidates to win by organizing campaigns within these neighborhoods. These factors combine to suppress the minority vote. Although Asian-Americans are 30% of eligible voters, they were only 20% of those who actually voted in the most recent election. Recent academic research proved how effective the CVRA has been. In 18 cities in California that converted from at-large to neighborhood elections, the voter turnout gap between Asian-Americans and the rest of the electorate fell by 25%.¹

No Asian-American has been elected to the city council. Only three Asian-Americans have even sought election, and only one (in 2008) enjoyed significant support. Although Supervisorial District 2 is 40% Asian-American and Hayward is its largest city, there was only one Asian-American candidate for appointment to the vacancy that occurred last year (and she did not live from Hayward). Last year, the council also filled two vacancies, but neither appointee was Asian-American.

Still, no Asian-American has been elected to the city council. Only three Asian-Americans have even sought election, and only one (in 2008) enjoyed significant support. Although Supervisorial District 2 is 40% Asian-American and Hayward is its largest city, there was only one Asian-American candidate for appointment to the vacancy that occurred last year (and she did not live in Hayward). Last year, the council also filled two vacancies, but neither appointee was Asian-American.

Many Asian-American neighborhoods have no residents on the council, three of whose members live in Fairway Park. A number of voters in the Asian-American community have supported member Zermeño, who lives closer to several Asian-American neighborhoods than the other incumbents. When he retires, Asian-Americans will not have an equal opportunity to aggregate their votes to elect even a

¹ Zachary L. Hertz, "Does a Switch to By-District Elections Reduce Racial Turnout Disparities in Local Elections? The Impact of the California Voting Rights Act," 22 ELECTION L. J. 213 (2023).

single council member – even though they constitute more than a third of the electorate.²

Each of the groups protected by the CVRA (Asian-Americans, Blacks, Latino, and Indigenous Peoples) has values, needs, and life experiences that differ from the rest of the electorate. It is not surprising that racially polarized voting, the primary element of minority vote dilution, is a nearly universal phenomenon. No jurisdiction in California has ever refuted polarized voting or dilution. Ballot questions and county elections clearly demonstrate that Asian-American voters in Hayward do indeed vote differently than the rest of the electorate. If the council requires, we can calculate and disclose which non-Asian-American incumbents have been supported or opposed by Asian-American voters, although this may not be necessary.

Single-member constituencies have been the dominant form of local government since Colonial times. Neighborhood elections have many benefits for voters of all races and for the quality of local governance. Districts eliminate winner-take-all slating and promote a council that is more informed as to the needs and values of every part of the city. They increase accountability, since each member can be reelected or retired by their own neighbors. It limits the control of special interests, since candidates are less dependent on raising funds to campaign across the entire city. Districting is also fiscally responsible, because the recurring costs by the city of conducting regular council elections are permanently cut in half. The costs of reimbursing NEN, which will support the city and its voters in this reform, will likely be recovered by a reduction in the costs of the November 2024 election. These economies will continue in every subsequent election.

It is important to recognize the historical context that led our state to champion the at-large movement in the early years of the 20th century. The CALIFORNIA PROGRESSIVE CAMPAIGN BOOK for 1914 (at 24) called New York's assimilation of immigrants "a fearful social blunder California is determined to avoid." It denounced the "delinquency and criminality of the second-generation alien," even though census data showed these birthright citizens to be as literate as "native stock," and predicted that Panama Canal would cause "an alien flood" from Europe. At-large election was the keystone of

² Dean Heather Gerken's seminal article, "Understanding the Right to an Undiluted Vote," 114 HARV. L. REV. 1663, 1680 (2001), explains dilution as impairing the right of minorities "to aggregate their votes effectively." "Single-member districts were historically chosen over at-large precisely to afford electoral minorities a chance to affect the political process." *id.*

“reforms” that also lengthened (from two years) and staggered terms, and allowed incumbents to appoint to vacancies, often after strategically timed retirements. Generations of these appointed successors survived decades of demographic and political change. A 1960 study calculated that 60% of city council members were still Republican, the reverse of voter registration, with an even greater bias (83% Republican) in the councils of large cities. The same study showed that a “substantial majority” were still white, male, Protestant Masons who had lived in “a better part of town” for ten years or more.³ The civil rights movement focused attention on the racially discriminatory impacts of at-large elections, which is why they were abandoned in most cities and school districts outside California and the South.

The restoration of district elections has usually benefited Latino and Black communities. But no ethnic minorities have suffered more egregious discrimination in California than Chinese, Japanese, and South Asian immigrants and their children. Hayward should honor their history and adopt districts that will incorporate Asian candidates and voters into the political life of the City.

CONCLUSION

Neighborhood-based districts will improve city governance to the benefit of all voters. Given the urgency of completing the process by May, in time for the November elections. This may still be possible without litigation, but the council would need to commit to comply as soon as possible. We are committed to supporting the city and the Asian-American community throughout a hearing process, so that the transition can be as economical and well-informed as possible.

Sincerely,

A handwritten signature in dark ink, reading "Scott Rafferty". The signature is written in a cursive, flowing style with a large, stylized 'S' and 'R'.

Scott J. Rafferty

³ Lee, POLITICS OF NONPARTISANSHIP at 56-57 (1960).

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WALNUT CREEK CA 94596 RAFFERTY@GMAIL.COM

March 21, 2024

Mayor Mark Salinas
City of Hayward
777 B Street, 4th Floor
Hayward, CA 94541
cc: Council Members

Re: The Council's Violations of the Brown Act and Voting Rights

Dear Mayor Salinas and Council Members:

Hayward is one of the largest cities in America without districts, which is why Asian-Americans, who constitute 34% of its eligible voters, have never been able to sponsor and elect a candidate of choice. I was disappointed to learn today that the City Council does not intend to comply voluntarily with the California Voting Rights Act (CVRA) in advance of the 2024 election. It is shocking that Hayward's incumbents do not recognize their constitutional duty to conduct a lawful election in this critical year, when democracy is under attack across our country. Districts in this presidential cycle are essential to promote Asian-American turnout and to provide the Asian-American community a reasonable opportunity to elect their first authentic candidate of choice.

In a further effort to perpetuate your incumbencies, it seems that the Council unlawfully tried to conceal this entire dispute from the public. When I reviewed the agenda for the closed session that you convened last night, I realized that it included neither "a record of the threat" (if you interpreted our letters as an explicit threat of litigation) or the more detailed disclosure of "facts and circumstances" needed to justify a closed session based on the possibility of litigation. Gov. Code, §54956.9(c); Fowler v. City of Lafayette (2020) 46 Cal.App.5th 360. This secret meeting intended to deprive the public of information to which you knew or should have known the public was entitled.

There is plenty of time to conduct the four required hearings. Your attorneys' claim that the registrar would reject maps submitted in early May 2024 as untimely assumed that I was easily deceived. I have spoken to County Counsel and am confident that Mr. Depuis will implement maps provided to his office before statutory deadline of July 3, 2024 (or later with the benefit of a court order).

The 90-hearing deadline is designed to promote and sustain public input. In a further attempt to evade and exhaust public attention, your attorneys proposed not only to delay public hearings until after the critical 2004 election but then to protract them over an extended period of time. Both aspects are unacceptable.

Your attorneys also threatened to fight my recovery of attorneys' fees. They erroneously believe that you can invoke a \$38,000 cap no matter how long you protract the process. You forfeited that right when you exited the "safe harbor" after the pandemic. While I have been generous in compromising fee claims during settlement, today's discussion makes similar accommodations unlikely. I take great risks and never abandon clients. Your lawyers' threat to deny legitimate fees has multiplied those risks, making litigation more necessary and ultimately more costly for the city.

Your attorneys acknowledge that districting is inevitable but made clear that they will spend extensive public funds to conduct one more unlawful at-large election. Experience shows that even when dilatory tactics prevail in court, the voters hold incumbents accountable when they use public funds to perpetuate unlawful election practices. Many voters of all races who care about democracy and the rule of law will not support officials who use public funds to protect their incumbencies at the expense of the rights of Asian-American citizens.

It was illegal and morally wrong to take these anti-democratic decisions in secret last night. They will prove to be politically and fiscally imprudent as well.

Sincerely,


Scott J. Rafferty

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March 22, 2024

Mayor Mark Salinas
City of Hayward
777 B Street, 4th Floor
Hayward, CA 94541
cc: Council Members

Dear Mayor Salinas and Council Members:

My clients have been collaborative partners who have helped numerous jurisdictions achieve very favorable resolutions to CVRA violations. It is unfortunate that the Hayward City Council and the City Attorney, after concealing our request from its constituents for more than two years, have attempted to intimidate them. Your attack on the voting rights of Asian-Americans in your city is an attack on democracy at the most critical time. It will not stand.

After writing the Council last night, I received the following unsolicited proposal from your attorneys. This proposal did not seek, and will not receive, any confidential treatment. It is fundamentally corrupt and makes any settlement more difficult. It demonstrates why the misdemeanor provisions of the Brown Act required the council to disclose the subject of its closed-door deliberations Tuesday night.

The City Attorney suggests that the City pay less than the partial reimbursement capped by §10010, which it acknowledges would relate to work already done. In the event that I was not available to serve the Asian-American community in future years (or unwilling to serve for free), it would provide no compensation for their representation at hearings. It proposes that I agree to a tolling agreement that would allow an illegal election in 2024 and contains no enforceable provisions to ensure that the City would ever comply with the CVRA.

- The Hayward City Council will adopt a resolution of intention to convert to district elections for the 2026 election cycle. The resolution will be adopted at either the April 16, 2024 or April 23, 2024 City Council meeting.
 - The resolution will specifically reference the letters you sent to the City in May 2021 and March 2024 as a way to mitigate risk of another attorney commencing a CVRA action against Hayward.
 - The resolution will specify that the process will begin on or about February/March 2025
- You will be paid \$38,000 to reimburse your costs to date.

- In consideration of the above, you agree not to sue to require districts for the 2024 election cycle and to execute an agreement to toll filing of a CVRA lawsuit against Hayward for a specified time period to allow the City to complete the transition process for the 2026 election cycle.

For your information, here are some data regarding cases that I have prosecuted. They belie your attorneys' defense that court actions must be filed as soon as the "safe harbor" period expires. Our patience in Ontario and Santa Clarita focused on achieving implementation in 2024, which is why Hayward's compliance is also timely.

City	§10010 Letter	Suit Filed	Fee Award
Ontario	1/8/20	12/3/20	\$300,000
W Sacramento	10/10/18	10/31/21	\$190,000
Santa Clarita	2/4/20	12/29/22	\$370,000

I have also litigated several school district matters, achieving similar outcomes. CVRA cases normally involve a fee multiplier of 2 to 2.5, which I waived in these cases. The risks associated with taking on these cases have substantially increased, so a substantial multiplier is likely now that Hayward has opted against voluntary compliance.

The courts' judgments specifically allowed Ontario and West Sacramento to continue to elect a mayor at-large. The racially discriminatory structure of city government is a matter of statewide concern, so in Hayward's case, the need to create effective Asian-American districts will likely preempt the City Charter on this issue.

It is corrupt to suggest that a minimal payment to me can shield the city from other attorneys challenging the unlawful 2024 election or from filing subsequent CVRA lawsuits. The proposed tolling agreement recognizes that the city can only "mitigate" the risk that the Shenkman/Parris/Rubin organization will refrain from prosecuting a CVRA action while the "tolling agreement" proposes to disable my clients. In 2014, Santa Clarita negotiated a "settlement" that paid Shenkman \$600,000 and allowed it to remain at large (until my clients' challenge). Rancho Cucamonga paid Shenkman \$400,000 for a settlement that allowed it to remain at-large for the 2016 presidential election, despite poorly researched allegations.¹ I am sure the bounties he negotiates to delay implementation have substantially increased.

Sincerely,



Scott J. Rafferty

¹ The complaint described Rancho Cucamonga as a city of 77,793 that was 53.8% Latino by population; in 2016, the city had a population of 176,707 that was 37% Latino.