

May 3, 2019

William P. Curley III
City Attorney
City of Mission Viejo
c/o Lozano Smith
515 S. Figueroa St., Suite 750
Los Angeles, CA 90071

Re: Cumulative Voting Provisions of Settlement Agreement
Southwest Voter Registration and Education Project v. City of Mission Viejo
Case Number: 30-2018-00981588-CU-CR-CJC

Dear Mr. Curley:

It has come to our attention that as part of a recent settlement agreement between the City of Mission Viejo and the plaintiff in the above referenced matter, that the parties agreed to implement a cumulative voting system for municipal elections.

While the Secretary of State's office expresses no opinion on the underlying merits of the California Voting Rights Act ("CVRA") claims filed, we are compelled to provide you with our view on the settlement provisions related to the adoption of cumulative voting for the City of Mission Viejo. In short, we do not find any authority for the adoption of cumulative voting for the City of Mission Viejo, a general law city.

As a preliminary matter, we note that Mr. Kevin Shenkman, who represents plaintiffs in your current action, also represented plaintiffs in an earlier CVRA claim against the City of Santa Clarita in *Soliz v. City of Santa Clarita*. In that action, which similarly sought to adopt a cumulative voting system as part of a 2015 settlement agreement, Los Angeles Superior Court Judge Terry A. Green invited our office to comment on whether the California Secretary of State's office required certification of a voting system prior to its use in the City of Santa Clarita. We stated that certification was required and as a result, the settlement agreement was invalidated by Judge Green.

Our position has not changed.

Secretary of State Padilla remains committed to ensuring that all people have an equal opportunity to participate in the electoral process. It is when barriers to participation are removed that our democracy

Ltr. To William P. Curley, III/City of Mission Viejo

May 3, 2019

Page 2 of 3

functions best. The California Voting Rights Act provides a critical pathway for those disenfranchised by racially polarized voting in at-large jurisdictions to have an equal opportunity to elect candidates of their choice.

However, the proposed use of cumulative voting as part of City of Mission Viejo municipal elections raises issues directly related to the ability of the Secretary of State's office to ensure the effective administration of elections in California.

The Secretary of State's office must ensure that it can fulfill its responsibility to administer the provisions of the California Elections Code and to protect the integrity of the electoral process. (Cal. Gov. Code § 12172.5). However, we cannot exercise authority that exceeds the scope of governing statutes.

First, general law cities are only allowed to hold plurality winner elections (See Cal. Elec. Code § 15452 and Gov. Code § 34871. Under the home rule provisions of the California Constitution, charter cities have additional options in administering their elections. (See Cal. Const. art. XI, § 5(b)).

Second, under California Elections Code section 19216, the Secretary of State requires the certification of voting systems. Section 19216 states, in relevant part:

“If a voting system or a part of a voting system has been certified or conditionally approved by the Secretary of State, it shall not be changed or modified until the Secretary of State has been notified in writing and has determined that the change or modification does not impair its accuracy and efficiency sufficient to require a reexamination and recertification, or conditional approval, pursuant to this article.”

Any voting system that has not been certified for the purpose for which it is intended to be used requires testing and certification by the Secretary of State's office. The voting system currently in use by Orange County has not been certified for cumulative voting elections.

As referenced above, even if a request to certify a voting system for a cumulative voting election were submitted to our office by a general law city, our office would not have the authority to proceed. A threshold question underlying voting system certification requests is whether any statutory authority permits use of a particular election method. As we stated previously with respect to the *Soliz* matter, we cannot identify any express statutory authority for the use of cumulative voting in California by a general law city.

The absence of such authority is critical for very practical reasons. The Elections Code does not define any cumulative voting ballot tabulation requirements – the very requirements that are used to develop testing and certification criteria. By way of comparison, when voters approved a charter amendment to authorize the use of instant runoff voting in the City and County of San Francisco, it specifically included vote tabulation methods that my office then used to develop testing and certification protocols. (San Francisco Charter § 13.102). Other *charter* cities – Oakland, Berkeley, San Leandro – that currently utilize instant runoff voting, also adopted similar ordinances, and the legislature is currently considering two bills that would provide for instant runoff voting in certain congressional special elections or municipal or school district elections. (See SB 212 (Allen); and SB 641 (Allen)).

Ltr. To William P. Curley, III/City of Mission Viejo

May 3, 2019

Page 3 of 3

As such, the proposed use of cumulative voting in municipal elections in a general law city must be authorized by the legislature. In the absence of such statutory authority, it is our view that the City of Mission Viejo is not authorized to use cumulative voting.

If you have any further questions, please feel free to contact our office.

Sincerely,

Steven J. Reyes

cc: Neal Kelley, Orange County Registrar of Voters