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VIA ELECTRONIC AND US MAIL
Mr. Lawrence M. Daniels
Deputy Attorney General
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Re: Opinion No. 16-603

Dear Mr. Daniels:

I write on behalf of the League of California Cities[1] ("League") in response to your solicitation of views regarding whether the Voter Participation Rights Act ("VPRA") applies to charter cities. The League urges the Attorney General to conclude that the VPRA does not apply to charter cities because: (1) common principles of statutory interpretation dictate that the term "cities" as used in the VPRA does not include charter cities; and (2) the VPRA is not reasonably related and narrowly tailored to resolve a matter of statewide concern, and therefore cannot supersede a charter city ordinance calling for a municipal election on a non-statewide election date, even if holding an election on such date has produced low voter turnout in the past.

BACKGROUND

The VPRA requires political subdivisions to hold municipal elections on a statewide election date if, in the past, holding municipal elections on non-statewide election dates resulted in turnout at least twenty-five percent below the average turnout in that jurisdiction for the last four statewide general elections. The Act defines "political subdivision" as "a geographic area of representation created for the provision of government services, including, but not limited to, a city, a school district, a community college district, or other district organized pursuant to state law." (Elec. Code § 14051, subd. (a).) This definition originally mirrored the definition of "political subdivision" in the California Voting Rights Act ("CVRA").

The CVRA prohibits a political subdivision from utilizing an at-large electoral system that dilutes or abridges a protected class's opportunity to elect candidates. In *Jauregui v. City of Pamdale* (2014) 226 Cal. App.4th 781 (*Jauregui*), the Court of Appeal for the Second District held that the CVRA applied to charter cities where city-wide elections failed to protect minority voters from vote dilution. In response to this decision, the legislature amended the definition of

[1] The League is an association of 475 California cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee (LAC), which is comprised of 24 city attorneys from all regions of the state. The LAC monitors litigation affecting municipalities and requests from the Attorney General for views on pending requests for legal opinions. The LAC reviewed the Attorney General's request for views on Opinion No. 16-603 and identified the legal issues that it presents as being of concern to cities state-wide.

"political subdivision" in the CVRA to include charter cities. (Assem. Bill No. 277 (2015-2016 Reg. Sess.).)

DISCUSSION

I. Common Principles of Statutory Interpretation Dictate that the Term "Cities" As Used in the VPRA Does Not Include Charter Cities.

A statute's plain meaning controls its interpretation unless the words are ambiguous. (*People v. Maultsby* (2012) 53 Cal.4th 296; *DaFonte v. Up–Right, Inc.* (1992) 2 Cal.4th 593, 601.) A statute should be interpreted in light of its "context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction." (*Cossack v. City of Los Angeles* (1974) 11 Cal.3d 726, quoting *Alford v. Pierno* (1972) 27 Cal.App.3d 682.)

In determining whether the VPRA applies to charter cities, the operative word in the definition of "political subdivision" is "cities." Although in many contexts the word "cities" may be unambiguous, its use in California is anything but. The California Constitution authorizes cities to adopt a charter, which gives those jurisdictions greater autonomy over municipal affairs than that afforded to general law cities. (Cal. Const., art. XI, § 5.) In general law cities, the timing and method of municipal elections is governed by the Elections Code. (Elec. Code, § 10101.) In contrast, charter cities possess broad authority to enact city ordinances governing the timing and method of municipal elections. (Cal. Const., art. XI, § 5, subd. (b).) Because of the differences between general law and charter cities—and the varying degrees of control that the legislature may exercise over the conduct of their elections—use of the word "cities," alone, is ambiguous in the context of a law that purports to alter a city's ability to select municipal election dates.

Having determined that the word "cities" is ambiguous, we must look to the context within which the word is used to determine whether charter cities fall within its scope.

As explained above, although the definition of "political subdivision" in the VPRA originally mirrored that found in the CVRA, AB 277 amended the definition of "political subdivision" in the CVRA to read: "a geographic area of representation created for the provision of government services, including, but not limited to, a general law city, general law county, charter city, charter county, charter city and county, a school district, community college district, or other district organized pursuant to state law." (Elec. Code § 14026, subd. (c).) This definition differs substantially from its predecessor—it substitutes the words "general law city," "charter city," and "charter city and county" for the broad term "cities." Notably, although the legislature considered AB 277 and the VPRA during the same legislative session, the legislature did not amend the definition of "political subdivision" in the VPRA to include charter cities.

This set of facts implicates several common principles of statutory interpretation. First, courts should presume that the legislature intended every word, phrase, and provision of a statute to perform some useful function. (*Clements v. T. R. Bechtel Co.* (1954) 43 Cal. 2d 227.) This presumption applies with equal force to words added by amendment. (*People v. Kozden* (4th Dist. 1974) 36 Cal.App.3d 918.) Thus, "[a] substantial change in the language of a statute is presumed to indicate a change in its meaning." (*Hoffman v. McNamara* (1929) 102 Cal.App.

280.) Second, where different words are used on the same topic in different parts of a statute, it is presumed that the legislature intended a different meaning. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106.)

Construing the VPRA's definition of "political subdivision" to include charter cities would imply that the legislature's amendment to the definition of "political subdivision" in the CVRA was done in vain—if use of the word "cities," alone, includes charter cities, there would have been no need for the legislature to amend the definition of "political subdivision" in the CVRA. Moreover, because the legislature used different words to describe the entities that fall within the scope of the CVRA and the VPRA—both of which address the same topic, conduct of municipal elections, and fall within the same division of the Elections Code—it must be presumed that the legislature intended a different meaning. As such, an interpretation of the term "cities" in the VPRA that includes charter cities contravenes the principles of statutory interpretation outlined above, and must be avoided.

II. The VPRA Cannot Be Applied to Supersede a Charter City's Authority to Select the Date on Which to Hold a Municipal Election.

Article XI, section 5 of the California Constitution addresses the "home rule" powers of charter cities. Subdivision (a) provides:

> It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs…and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall…with respect to municipal affairs…supersede all laws inconsistent therewith.

Thus, "so far as 'municipal affairs' are concerned, charter cities are supreme and beyond the reach of legislative enactment." (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 12 (*Cal. Fed. Savings*).) Subdivision (b) of article XI, section 5 sets out a nonexclusive list of "core categories" that are, by definition, municipal affairs; the final two categories give charter cities exclusive authority to regulate the conduct of city elections and the manner of electing municipal officers. (Cal. Const. Art. XI, § 5, subds. (b)(3)-(b)(4).)

Although charter cities possess broad authority over municipal affairs, that authority is not absolute. In *California Fed. Savings & Loan Assn. v. City of Los Angeles*, the California Supreme Court set forth a four step analysis to determine whether a state law will prevail over a conflicting charter city ordinance. First, the city ordinance at issue must address an activity that can be characterized as a "municipal affair." (*Cal. Fed Savings, supra*, 54 Cal.3d at p. 17.) Second, a court must find that the case presents an actual conflict between city ordinance and state law. (*Ibid.*) Third, the state law must address a matter of statewide concern. (*Ibid.*) Finally, the state law must be reasonably related and narrowly tailored to resolution of the issue that is of statewide concern. (*Ibid.*) Although the request for opinion only addresses the third element of this four step analysis, all four elements are necessary in order for a state law to supersede a conflicting charter city ordinance. Thus, this comment letter will address all four elements.

A. The Timing of Municipal Elections Is a Municipal Affair.

"Conduct of city elections" is one of the few specifically enumerated core areas of autonomy for charter cities. (Cal. Const., art. XI, § 5, subd. (b)(3).) Article XI, section 5, subdivision (b)(4) provides: "plenary authority is hereby granted, subject only to the restrictions of this article, to provide the manner in which, the method by which, the times at which, and the terms for which the several municipal officers…shall be elected…." Thus, the timing of a municipal election is, by definition, a municipal affair.

B. In Theory, an "Actual Conflict" Between the VPRA and a Charter City Ordinance Governing the Timing of Municipal Exists.

Application of the VPRA to a charter city whose ordinance authorizes the conduct of a municipal election on a non-statewide election date, even though doing so in the past has resulted in turnout that was at least twenty-five percent below the average turnout in that jurisdiction in the last four statewide general elections, would result in an actual conflict. The VPRA addresses a matter that falls squarely within the authority granted to charter cities by the Constitution—the ability to determine the timing of municipal elections.

C. The VPRA Does Not Address a Matter of Statewide Concern Sufficient to Justify State Interference in the Conduct of Municipal Elections.

When a charter city ordinance implicates a municipal affair and a state law poses a genuine conflict with that ordinance, courts must determine whether the subject of the state law is a matter of statewide concern. (*Cal. Fed. Savings, supra,* 54 Cal.3d at p. 17; *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63 ["The fact, standing alone, that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue between state and municipal affairs."].) "The hinge of the decision is the identification of a convincing basis for legislative action originating in extramunicipal concerns, one justifying legislative supersession based on sensible, pragmatic considerations." (*Cal. Fed. Savings*, *supra*, 54 Cal.3d at p. 18.) "In other words, for state law to control there must be something more than an abstract state interest, as it is always possible to articulate some state interest in even the most local of matters." (*State Building & Construction Trades Council, supra,* 54 Cal.4th at p. 560.)

Here, the legislative history identifies three potential state interests served by the VPRA and by increasing voter turnout. Although two of these grounds may constitute matters of statewide concern in other contexts, none of these interests justify state interference in the timing of charter city elections.

1. Lessening the Costs That Off-Year Elections Impose on Taxpayers.

First, proponents of the VPRA's application to charter cities may argue that the VPRA involves a matter of statewide concern, because it seeks to reduce the administrative costs that local governments incur on non-statewide elections. (Assm. Com on Elections and Redistricting, Analysis of Sen. Bill 415 (2015-2016 Reg. Sess.) as amended on June 23, 2015, p. 3.) Although

reducing the costs of off-year elections may be a laudable goal, the California Supreme Court has made clear that the manner in which local tax proceeds are expended is not a legitimate statewide concern. (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 407.)

In *Johnson v. Bradley*, the Supreme Court considered whether a charter city ordinance that provided for partial funding of campaigns for city elective offices superseded a state law that prohibited the use of public money to fund political campaigns. (*Id.* at p. 392.) In rejecting the argument that the state law addressed a legitimate statewide concern in how local tax proceeds are expended, the Court explained, "we can think of nothing that is of greater municipal concern than how a city's tax dollars will be spent; nor anything which could be of less interest to taxpayers of other jurisdictions." (*Ibid.*) The Court reasoned that the municipality itself knew better what it wanted and needed to spend its tax dollars on than the state at large. (*Ibid.*)

Here, as in *Johnson*, the costs of municipal elections are borne by the cities that host them. Because the manner in which local tax proceeds are spent does not constitute a matter of statewide concern, reducing the costs that municipal elections impose on cities is not a sufficient basis to justify the VPRA's interference with a municipal affair.

2. Implementing the Equal Protection and Voting Rights Provisions of the California Constitution.

Next, proponents of the VPRA's application to charter cities may argue that the VPRA involves a matter of statewide concern, because it implements the equal protection and voting rights provisions of the state Constitution. (*Jauregui, supra*, 226 Cal.App.4th at p.800 [holding that implementing constitutionally mandated voting and equal protection rights constitutes a matter of statewide concern].)

In support of this argument, proponents might point to a statement by the author that the VPRA intends to address the fact that such elections produce an electorate, and in turn a city council, that "does not look like the general public as a whole." (Assm. Com on Elections and Redistricting, Analysis of Bill 415 (2015-2016 Reg. Sess.) as amended on June 23, 2015, p. 3.) However, this statement cannot be used as an indication of legislative intent. The opinion of an individual legislator as to his or her intent in authoring a particular piece of legislation is irrelevant in determining legislative intent, unless it is incorporated into a legislative resolution. (*People v. Wade* 63 Cal.4th 137, 143 ["the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation."].) The statement by the author in this case was not incorporated into a legislative resolution, and nothing in the text of the VPRA indicates that the legislature intended the VPRA to implement the equal protection and voting rights provisions of the state Constitution.

Even if the legislature did intend that the VPRA implement the voting rights and equal protection provisions of the state Constitution, it does not do so. A violation of an individual's equal protection and voting rights occurs where the "totality of the circumstances" reveal that "political processes leading to nomination or election…are not equally open to participation by members of a [protected class]…in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

(*Thornburg v. City of Palmdale* (1986) 478 U.S. 30, 43; *Jauregui, supra,* 226 Cal.App.4th at p. 800 ["California decisions involving voting issues quite closely follow federal Fourteenth Amendment analysis."].) The factors that a court should consider in evaluating the totality of the circumstances include:

> the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; 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, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members 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; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

(*Thornburg v. City of Palmdale, supra*, 478 U.S. at pp. 44-45.)

Here, there is no indication that low voter turnout implicates equal protection and voting rights beyond the author's bald assertion that non-statewide voting cycles result in the election of city councilors who do not "look like the general public." In *Jauregui, supra*, the Court specifically noted that neither party challenged the trial court's finding that the City's at-large election system resulted in minority vote dilution before concluding that the CVRA implemented equal protection and voting rights. (226 Cal.App.4th at p. 792.) Without any evidence here that low voter turnout in local elections leads to the existence of the above listed factors, it cannot be said that the VPRA implements the equal protection and voting rights provisions of the state Constitution, and thus addresses a matter of statewide concern.

3. Integrity in the Electoral Process.

Finally, proponents of the VPRA's application to charter cities may argue that the VPRA involves a matter of statewide concern, because it seeks to uphold the integrity of the electoral process. The Supreme Court recognizes that "the integrity of the electoral process, at both the state and local level, is undoubtedly a statewide concern," because "elected officials of the various municipalities chartered and non-chartered throughout the state of California exercise a substantial amount of executive and legislative power over the people of the state of California." (*Johnson v. Bradley, supra,* 4 Cal.4th at p. 409.)

In *Johnson v. Bradley, supra*, the court concluded that a state law that prohibited the use of public money to fund political campaigns did not implicate the integrity of the electoral process. (4 Cal.4th at p. 409.) The Court reasoned that the public financing of campaigns, as a means of eliminating improper influence of large private contributions, would not have a corrupting influence on elections (*Id.* at p. 410.)

Here, as in *Johnson*, the VPRA does not address the integrity of the electoral process, because holding an election on a non-statewide election date does not have a corrupting influence on elections. Voters in non-statewide elections are given the right to vote on the issues facing their respective municipalities, free from undue influence; the scheduling of a municipal election merely constitutes a *procedural* step in the local legislative process. As a result, the VPRA does not implicate the integrity of the electoral process.

D. The VPRA Is Not Reasonably Related and Narrowly Tailored to the Resolution of a Matter of Statewide Concern.

Even if increasing voter participation in municipal elections addresses a matter of statewide concern, a conclusion which the League finds highly suspect, the VPRA is not reasonably related and narrowly tailored to resolve any statewide concern.

1. Reasonable Relation.

A statute is reasonably related to the resolution of a matter of statewide concern where there is a fair relationship between the problem sought to be addressed and the proposed solution. (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 913.) Thus, a statute is reasonably related to the resolution of low voter turnout in municipal elections if it proposes a solution that would increase voter turnout in municipal elections. Unfortunately, the VPRA may actually frustrate this goal, because of a phenomenon known as voter roll-off.

Voter roll-off occurs when voters only fill out a portion of the ballot and leave other parts blank. (Ned Augenblick and Scott Nicholson, Ballot Position, Choice Fatigue, and Voter Behavior (2015) p. 2.) Political science research demonstrates that "making more decisions prior to a particular decision increases the likelihood of abstention as well as the reliance on heuristics (such as choosing the status quo [or the first name on the ballot]) on decision making." (*Ibid.*) In other words, as voters make their way down a ballot, they are less likely to vote on a particular item and, if they do vote, their decision is distorted by choice fatigue. One study found that, "[i]n statewide and local office races, lowering a given contest by one position increases the tendency to vote for the first candidate listed for that contest by 0.06 percentage points." (*Id.* at p. 5.) In addition, the study found that the proportion of "no" votes on the propositions that the researchers studied would have been, on average, 3.2 percentage points lower if the propositions had appeared at the top of the ballots instead of their actual positions. (*Ibid*.) The researchers estimate that this would have been enough to swing the outcome in 6 percent of all proposition contests studied. (*Ibid.*)

This research indicates that, because municipal elections that are consolidated on state-wide election dates fall to the bottom of the ballot, voters may not participate in municipal elections held in accordance with the VPRA more often than in municipal elections held on non-statewide election dates. (Elec. Code § 13109 [mandating order of precedence on the ballot in statewide election].) Moreover, the results of these elections may not reflect true voter preferences. As such, the VPRA is not reasonably related to increasing voter participation in municipal elections.

2. Narrowly Tailored.

A statute is narrowly tailored if the legislature has chosen the least restrictive means to further the articulated interest; it must target and eliminate no more than the exact source of the evil it seeks to remedy. (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 913.)

In *Jauregui, supra*, after finding that voter dilution of a protected class is a matter of statewide concern, the court concluded that the CVRA was narrowly tailored to address the matter of statewide concern. (226 Cal. App.4th at p. 802.) The court reasoned the CVRA only authorizes citizens to challenge city-wide elections if there is vote dilution and permits a court to impose reasonable remedies to alleviate the problem. (*Ibid.*) In other words, the CVRA can necessarily only interfere with municipal governance when the matter of statewide concern justifying state interference is present. (*Ibid.*)

The VPRA is distinguishable. Unlike the CVRA, the VPRA prohibits political subdivisions from holding *all* municipal elections on a non-statewide election date if doing so has resulted in turnout that is at least twenty-five percent below the average turnout in that jurisdiction in the last four statewide general elections. (Elec. Code § 14052.) This is so even where there is no evidence that low voter turnout has resulted in a violation of equal protection or the right to vote, or otherwise undermined the integrity of the electoral process. As such, the VPRA is not narrowly tailored to avoid unnecessary interference in municipal governance.

Conclusion

In sum, the timing of a municipal election is a municipal affair. In theory, there may be an actual conflict between the VPRA and a city's scheduling of a municipal election. Although implementing the equal protection and voting rights provisions of the California Constitution and ensuring the integrity of the electoral process may constitute matters of statewide concern in other contexts, the VPRA is not reasonably related to the resolution of these concerns, and is not a narrowly drawn remedy. Thus, Article XI, section 5 of the California Constitution bars the enforcement of the VPRA against charter cities.

Thank you for the opportunity to comment on the questions presented. Please do not hesitate to contact us with any questions, or to discuss this matter further.

Sincerely,

Alison Leary
Deputy General Counsel
League of California Cities