AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Southern California

Sent via email and eComment portal

April 8, 2024

Rancho Santa Margarita City Council
c/o Amy Diaz, City Clerk
Rancho Santa Margarita City Hall
22112 El Paseo
Rancho Santa Margarita, CA 92688
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RE: April 10, 2024 City Council Meeting
Public Comment re Refusal of City to Comply with California Voting Rights Act's Safe Harbor Reimbursement Provision (Cal. Elec. Code § 10010(f))

Dear Members of the Rancho Santa Margarita City Council:

The ACLU Foundation of Southern California is committed to protecting the voting rights of all Californians, including the rights of historically disenfranchised communities. The California Voting Rights Act (CVRA) has been an important tool for the ACLU and other advocates to protect minority voting rights by addressing dilutive at-large systems throughout the state. It is thus concerning that the City is refusing to fully comply with the CVRA's safe harbor requirement that you reimburse prospective plaintiff's counsel Michelle Jackson for the cost of the work product generated to support the June 21, 2023 notice letter. *See* Cal. Elec. Code § 10010(f). It is further concerning that the City of Laguna Niguel is also now undermining the CVRA by taking the same approach of refusing to comply with the reimbursement provision. We urge you to avoid wasting hundreds of thousands of dollars in taxpayer funds defending a Section 10010(f) lawsuit and hold up your end of the safe harbor compromise by immediately reimbursing Ms. Jackson for all costs associated with the June 21 notice letter.

I. The City's Continued Refusal to Comply with its Mandatory Duty Under Section 10010(f) will Likely Result in Costly Litigation

The CVRA's safe harbor is an alternative dispute resolution process that allows a local government that receives notice letter to assess its risk of liability and avoid litigation by: 1) adopting a resolution of intent to transition to district-based elections within a specified time; and 2) reimbursing a prospective plaintiff following the transition for the fees and expenses associated with sending a notice letter. *See* Cal. Elec. Code §§ 10010(e)-(f). The reimbursement

provision is a key part of the compromise that the League of California Cities supported when the Legislature enacted the bill establishing the safe harbor in 2016.[1] In fact, the bill author added Section 10010(f) precisely to address local government concerns over the prospect of costly CVRA litigation by capping fees and costs at no more than $30,000, as adjusted for inflation.[2]

The City could have refused to transition, but it instead adopted a resolution of intent and ultimately moved to district-based elections as a direct result of the notice letter.[3] The City opted for the safe harbor process precisely to avoid "the potential extraordinary cost to defend [a CVRA] lawsuit" and to ensure that the prospective plaintiff's "ability to recover attorneys' fees . . . is restricted."[4] The Council was therefore aware before adopting the resolution of intent that the safe harbor imposes a mandatory duty on the City to reimburse Ms. Jackson for up to "approximately $37,500."[5] Despite this understanding, the City has continued to rely on meritless arguments to refuse to negotiate with Ms. Jackson. The City Attorney has at no point made a counteroffer and has outright denied Ms. Jackson's demand for reimbursement. Among the many arguments, discussed in more detail below, the City maintains that Ms. Jackson must agree to make the identity of the prospective plaintiff a matter of public record and must comply with litigation rules of disclosure for trial experts to corroborate pre-litigation consulting costs. The City's insistence on having Ms. Jackson comply with frivolous requests and its refusal to engage in good faith negotiations means that the City has already violated the CVRA's requirement that it issue a reimbursement within 45 days of the demand. Cal. Elec. Code § 10010(f)(1) (setting statutory deadline for payment and recognizing that reimbursement may be "in an amount to which the parties mutually agree").

If the City continues to refuse to pay Ms. Jackson, she could file a straightforward petition for a writ of mandate to enforce Section 10010(f) and for catalyst fees under Section 1021.5 of the California Code of Civil Procedure. *See Graham v. Daimler Chrysler Corp*., 34 Cal.4th 553, 568 (2004) (endorsing the catalyst theory, which permits an attorney to collect fees if a party changes their behavior because of the attorney's efforts). That litigation could, in turn, cost Rancho Santa Margarita taxpayers hundreds of thousands of dollars. In 2018, for example, the Whittier Unified School District also received a CVRA demand letter, availed itself of the safe harbor, and then refused to comply with Section 10010(f). *Law Office of Carlos R. Perez v. Whittier UHSD ("Perez")*, 87 Cal. App. 5th 463, 468-69 (2023). The school district's refusal to comply with the safe harbor prompted the attorney for the prospective plaintiffs to file an action for reimbursement. *Id*. at 469. Following a successful appeal by the attorney, the parties settled the lawsuit for $227,000, almost $200,000 more than Section 10010(f)'s cap on fees and costs. This number does not include the costs the school district incurred on its own attorneys and consultants for the initial transition, the reimbursement dispute, and the Section 10010(f)

[1] Assemb. Bill 350, Sen. Comm. on Approps., Aug. 11, 2016 Hearing Analysis Addendum (noting author agreed to add a safe harbor "for political subdivisions who are acting in good faith"); *see also* Assemb. Bill 350, Assemb. Comm. on Elec. and Redistricting, August 29, 2016 Hearing Analysis (hereinafter, "Assemb. Bill 350 Aug. 29 Assemb. Elec. Analysis") (showing support for bill from the League of California Cities, the League of California Cities Latino Caucus, and the City Clerks Association of California).
[2] Assemb. Bill 350 Aug. 29 Assemb. Elec. Analysis at 4-5 (quoting League of California Cities argument in support of safe harbor provision to cap fees for cities "making good faith efforts to switch to districts by ordinance").
[3] Schedule, Rancho Santa Margarita District Elections Website, https://drawrsm.org/schedule/.
[4] July 24, 2023 Rancho Santa Margarita Staff Report re Resolution of Intent to Transition from At-Large to By-District Elections at 2, https://cityofrsm.granicus.com/MetaViewer.php?view_id=2&clip_id=781&meta_id=59177.
[5] *Id*. at 4.

litigation. A copy of the settlement agreement is attached as Exhibit A. The City can avoid these exorbitant costs simply by following the law and reimbursing Ms. Jackson.

II. There is No CVRA Requirement to Make a Prospective Plaintiff's Identity a Matter of Public Record

The City has argued that it cannot reimburse Ms. Jackson unless she agrees to make the identity of the prospective plaintiff a matter of public record. There is no such public disclosure requirement in the CVRA's safe harbor provision or in any other relevant law. The absence of a public disclosure requirement is underscored by the fact that the City agreed to avail itself of the safe harbor without first requiring that Ms. Jackson make the prospective plaintiff's name public. Ms. Jackson has nonetheless offered to share the name of the prospective plaintiff with the City Attorney, which would protect the plaintiff from harassment and allow the City Attorney to confirm that the notice and reimbursement letters were sent on behalf of a prospective plaintiff with standing. The City Attorney has consistently rejected this offer, however, unnecessarily prolonging the safe harbor process beyond the statutory deadline.

The City relies on *Perez* to argue that Ms. Jackson must provide documentation identifying the prospective plaintiff that will become a matter of public record. Public disclosure and documentation, however, were not at issue in *Perez*. Instead, the court in *Perez* held that: 1) the term "prospective plaintiff" includes an individual who has not formally retained the law firm but who the law firm avers it will be able to name as a plaintiff; and 2) that reimbursement under Section10010(f) is not limited to out-of-pocket costs actually paid by the prospective plaintiff. 87 Cal. App. at 466. The court's opinion in *Perez* did not hold, or even suggest, that a lawyer must publicly divulge the name of a prospective plaintiff where litigation is unnecessary because a jurisdiction has availed itself of the safe harbor provision. While the attorney in *Perez* did agree to identify the prospective plaintiffs, *see id.* at 470-71, so has Ms. Jackson, and disclosure to the City Attorney will confirm that Ms. Jackson sent the demand letter and incurred costs on behalf of a plaintiff.

Importantly, public disclosure of individual plaintiffs is not guaranteed during active litigation. For example, in cases where, as here, there is a fear of harassment, courts routinely allow plaintiffs to proceed using a fictitious name. *See, e.g.*, *Doe v. Lincoln USD*, 181 Cal. App. 4th 758, 766-67 (2010) (collecting state cases where plaintiffs proceeded using a fictitious name); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067 (9th Cir. 2000) (noting that courts will allow parties to use pseudonyms when "nondisclosure of the party's identity 'is necessary . . . to protect a person from harassment, injury, ridicule or personal embarrassment'") (citation omitted). To the extent the City maintains that it needs the name of the prospective plaintiff for accounting purposes, that assertion is also incorrect. Under California law, fees and costs belong to the attorney. *Flannery v. Prentice*, 26 Cal. 4th 572, 590 (2001); *see also Perez*, 87 Cal. App. at 466 (attorney could seek reimbursement under Section 10010(f) even when prospective plaintiff had not paid any out-of-pocket costs). Ms. Jackson is thus the proper payee, not the prospective plaintiff. There is therefore no legal or practical reason why the City needs the name of the plaintiff, and the City's insistence on making this individual's identity a matter of public record raises concerns about potential harassment.

III. Section 10010(f) Does Not Incorporate Trial Expert Rules of Disclosure

Ms. Jackson already substantiated her costs by including detailed invoices from the consultant with her initial demand for reimbursement. *See* Cal. Elec. Code § 10010(f)(1) (listing a "detailed invoice for demography services" as an example of documentation that substantiates costs). Nonetheless, the City has also requested that Ms. Jackson turn over: the contract with the consultant, evidence that the consultant's business is registered, evidence that Ms. Jackson paid the consultant, and the consultant's contact information, curriculum vitae, work product, and employer identification number. Requiring additional information such as a curriculum vitae and the demographer's work product goes far beyond what the statute calls for and is thus inconsistent with basic principles of statutory interpretation. Moreover, portions of the City's request are inconsistent with ordinary litigation practices, none of which requires that a litigation or consulting expert have a business that is registered in a specific city or state.

Some of the City Attorney's excessive requests appear to be based on state and federal rules for trial expert disclosure. *See, e.g.*, Cal. Code Civ. Proc. §§ 2034.210-310; Fed. R. Civ. Proc. 26(a)(2) & (b)(4). Section 10010(f), however, does not incorporate trial expert rules of disclosure. State and federal rules of disclosure apply only in active litigation and only for experts who will testify at trial. *See id.* The trial expert disclosure rules also apply to both parties, i.e., if we accept that the City may demand "expert" disclosures, the City will also need to turn over their consulting analyses. What's more, the identity of *consulting* experts and their analyses are protected from discovery. *DeLuca v. State Fish Co., Inc.*, 217 Cal. App. 4th 671, 688 (2013) (in state court, communications with a non-testifying consultant are privileged and any analyses by that consultant constitute qualified work product that cannot be discovered without good cause); Fed. R. Civ. Proc. 26(b)(4)(D) (in federal court, non-testifying consultants retained "in anticipation of litigation" are exempt from discovery absent a showing of "exceptional circumstances"). The City's opinions of the consultant's findings or qualifications, including whether the consultant's business is properly registered, are therefore irrelevant to the City's right to corroborate the costs incurred by Ms. Jackson. If the City wanted discovery such as the contract between Ms. Jackson and the consultant or wanted to challenge the consultant's qualifications or analysis, the City could have litigated the matter. It did not, and Ms. Jackson's refusal to comply with these unreasonable requests is not a basis for the City to deny payment.

* * *

Ms. Jackson has already corroborated her fees and expenses by providing consulting invoices, her time entries, and receipts for other costs, and the City now has a mandatory duty to reimburse Ms. Jackson. We are extremely concerned that the City has taken an approach to the safe harbor provision that undermines the CVRA, that the City of Laguna Niguel is now also taking the same approach, and that this approach not only violates the law, but will no doubt chill other prospective plaintiffs from sending CVRA notice letters. We urge you to comply with the CVRA and immediately reimburse Ms. Jackson.

Sincerely,

Julia A. Gomez

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Senior Staff Attorney

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