

SCOTT J. RAFFERTY

ATTORNEY AT LAW

1913 WHITECLIFF COURT
WALNUT CREEK CA 94596

(202)-380-5525

RAFFERTY@GMAIL.COM

November 13, 2017

VIA CERTIFIED MAIL

Mr. Arne Simonsen
Clerk
City of Antioch
200 H Street [94509-1285]
P.O. Box 5007
Antioch, CA 94531-5007

RECEIVED

NOV 17 2017

**CITY OF ANTIOCH
CITY CLERK**

Re: California Voting Rights Act

Dear Mr. Simonsen:

Last month, several jurisdictions in our county received a "demand letter" from attorney Kevin Shenkman, who has written other jurisdictions regarding the California Voting Rights Act ("CVRA") on behalf of the Southwestern Voter Registration Education Project. Since these communications involve litigation, the recipients have decided not to release them yet. However, the Dublin Unified School District ("DUSD") has made a similar letter public.¹

In 2001, the Legislature determined that the use of at-large elections (by cities and districts that are characterized by racially polarized voting) dilutes the influence of minority voting blocks. The CVRA created a private right of action to require the jurisdiction to elect its governing body from single-member districts.

Mr. Shenkman typically asserts that a district has "racially polarized voting" without a scintilla of evidence. In his letter to DUSD, he tries to excuse the lack of any good faith basis for this allegation. Mr. Shenkman cites Elections Code 14028(a) and asserts that, "to establish a violation of the CVRA, a plaintiff must generally show" racially polarized voting. In actuality, Section 14028(a) unconditionally requires a showing of racially polarized voting. "The failure of minority candidates to be elected to office does not by itself establish the presence of racially polarized voting." Jagueri v. Palmdale, (2014) 226 Cal. App. 4th 781. It is essential to present ecological regressions of demographic studies to prove racially polarized voting, which is the prerequisite for a court to impose district based elections. See Elections Code 14046(e).

In 2016, the Legislature created a safe harbor to enable cities voluntarily to adopt district elections prior to such costly litigation. AB 350 requires a prospective plaintiff to send a notice to a city or district that their use of at-large elections "may violate the

¹<https://www.dublin.k12.ca.us/cms/lib/CA01001424/Centricity/Domain/1/Shenkman%20Letter%20re%20CVRA.pdf>

CVRA.” Election Code 10010(f) allows the attorney sending such a notice to recover up to \$30,000 for the costs of demographic studies and other work product generated to support the notice. The law is intended to allow the city to consider the evidence by staying the plaintiff’s right to sue for 45 days, at which point litigation can proceed if the city has not enacted an ordinance agreeing to single-member districts.

In neighboring jurisdictions, Mr. Shenkman has provided no evidence. By demanding that cities commit to single-member districts prior to any study, Mr. Shenkman may be attempting to provoke litigation. His letter to DUSD boasts of his success in Jaguero, in which the plaintiffs’ attorneys reportedly claimed \$3.4 million in fees. The few jurisdictions that have resisted districting have uniformly failed.²

The consideration of so fundamental a change in local government should be determined collaboratively in full consultation with the community. I share my client’s strong belief that the people of Antioch have a right to a detailed study before making a decision that affects their democratic rights. I note, however, that [AB 350](#) gives priority to the first plaintiff to give notice. Therefore, on behalf the Bay Area Voting Rights Initiative (“BAVRI”), I give notice of our good faith belief that at-large voting dilutes minority electoral influence in Antioch, thus violating [Elections Code Section 14047](#). I am optimistic that I can work with the City of Antioch on behalf of my client to resolve this issue for less than the \$30,000 cap set by the Legislature. On the basis that Antioch accepts the need for a formal demographic study pursuant to [Section 10010\(f\)](#), my client will not file litigation until at least 45 days after a Council meeting at which the study is presented.³

PRELIMINARY EVIDENCE OF RACIALLY POLARIZED VOTING

Racially polarized voting occurs when some candidates preferred by one race or language group receives a higher level of support from that group than from the electorate at-large. This differential is inferred by comparing the vote share in precincts in which different percentages of the voters belong to the race or group in question.

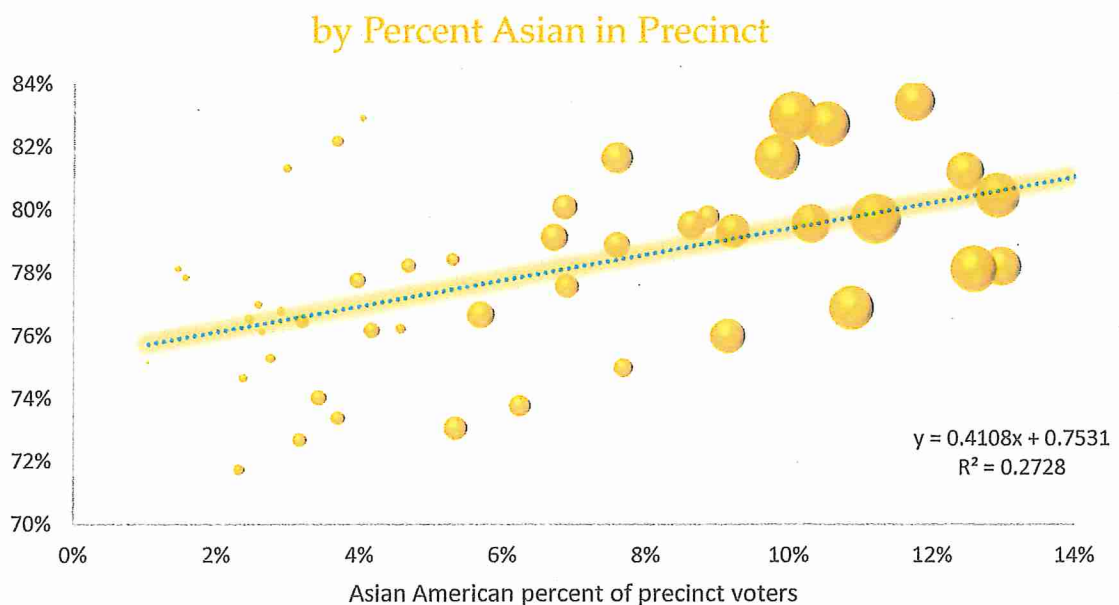
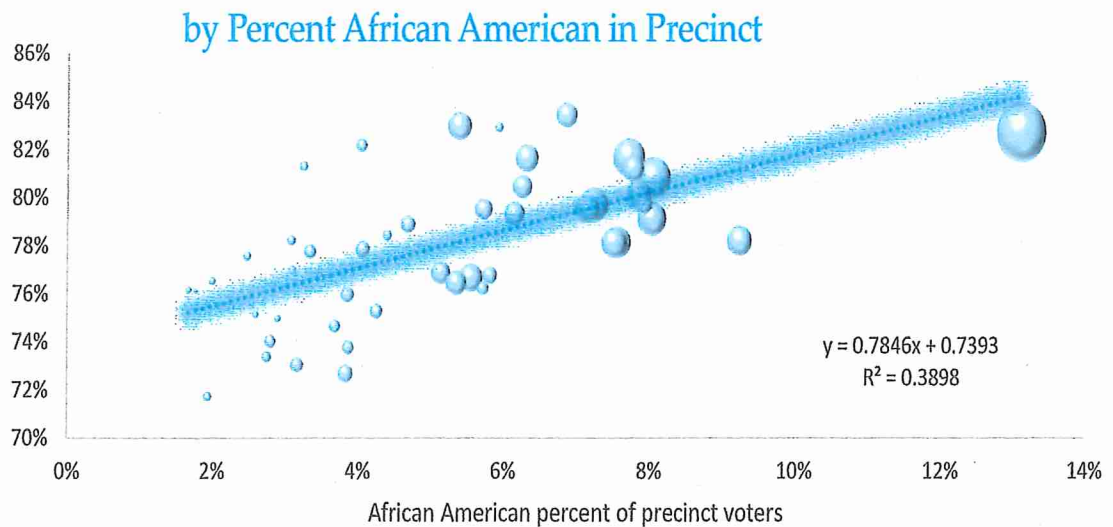
A claim of vote dilution can be tested by plotting each candidate’s performance in each precinct against a horizontal axis indicated how the precinct varies from the city’s average racial composition. Dilution may be indicated if candidates preferred by the group show lower levels of support as the percentage of non-group voters in the precinct increases, while other candidates outperform their citywide average in the non-

² Sanchez v. City of Modesto (App. 5 Dist. 2006) [51 Cal.Rptr.3d 821](#), 145 Cal.App.4th 660, *review denied, cert. denied* 552 U.S. 974 (2007); Rey v. Madera Unified School Dist. (App. 5 Dist. 2012, [203 Cal.App.4th 1223](#)).

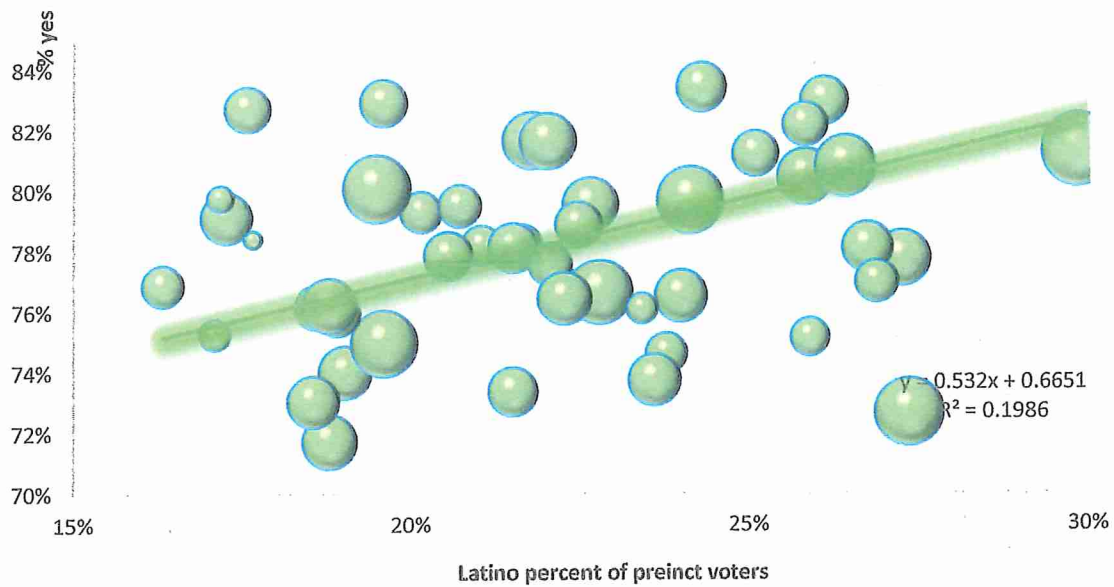
³ Another prospective client whose attorney was willing to dispense with compensation for such a study could conceivably start the 45-day clock by filing a notice after this is received. In that case, BAVRI will file and seek a stay so that Antioch has a full opportunity to act based on evidence.

minority precincts.

Ballot measures that relate to the rights and privileges of a protected class may also provide evidence of racial polarization. Prop. 58 (2016) repealed most of Prop. 227 to allow public schools to offer instruction in languages other than English. On this issue, Antioch's Asian, Latino, and African American communities acted as a relatively unified voting bloc. In fact, the African American community provided the strongest support, despite the highest incidence of limited English proficiency in the Asian and Latino communities.

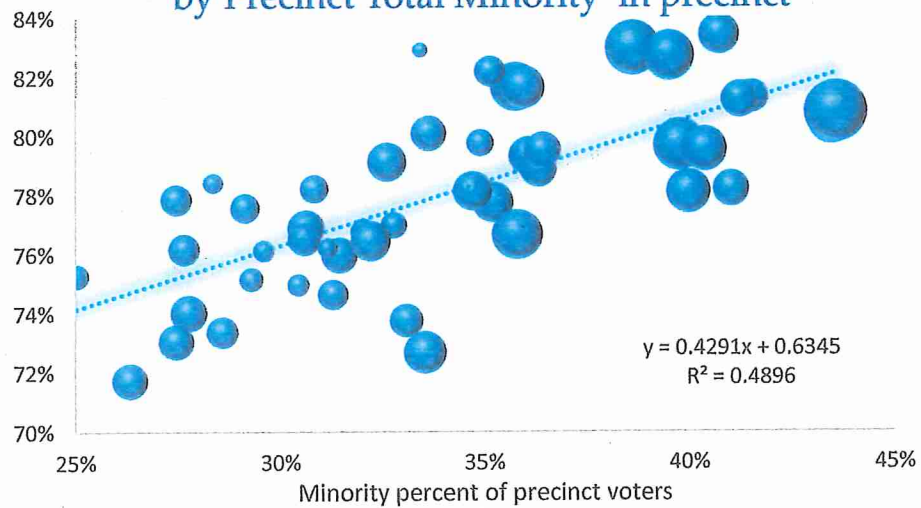


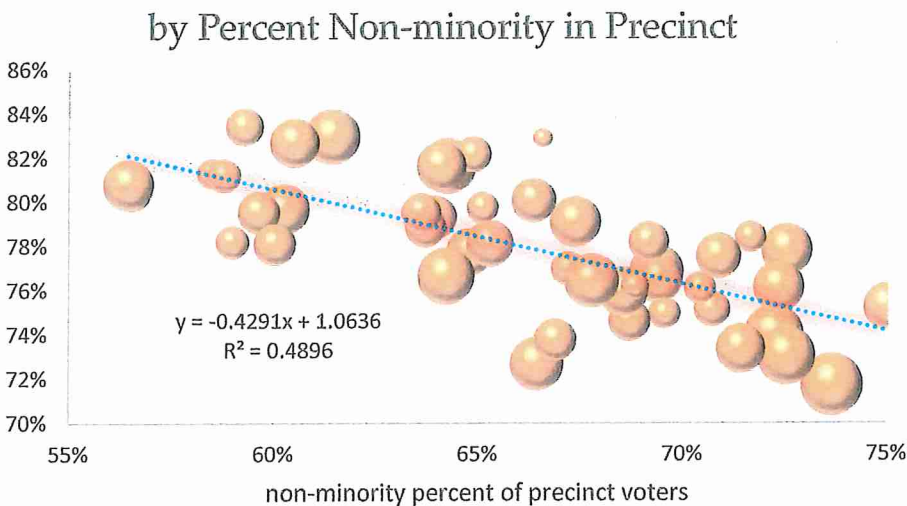
by Percent Latino in Precinct



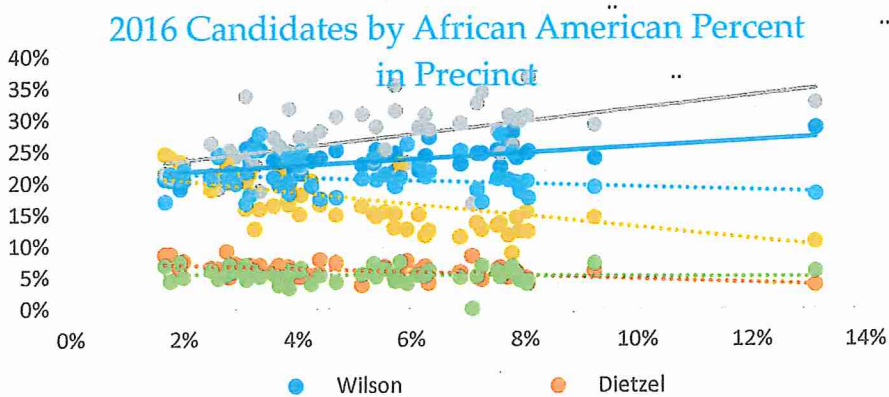
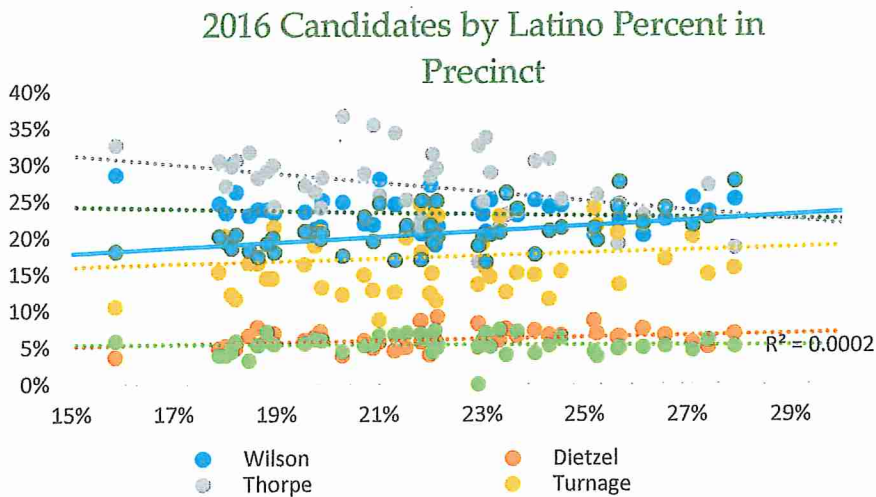
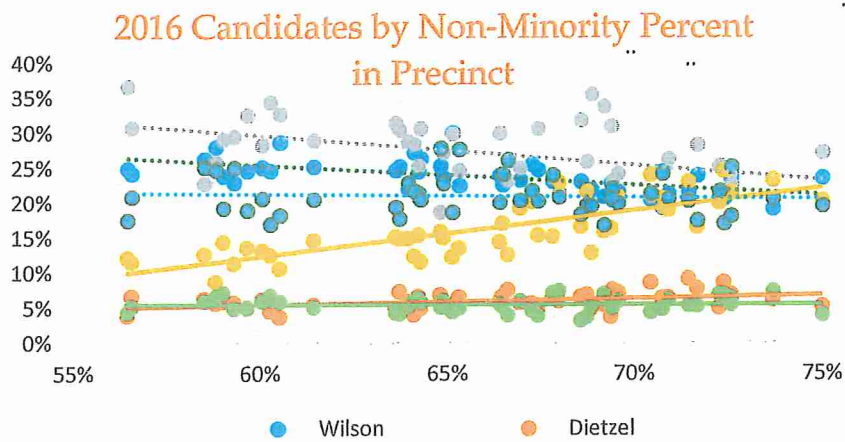
Polarization is also clear when the preferences of the combined minority community is compared with the voting patterns of white voters, as inferred from the precincts with the smallest minority population.

by Precinct Total Minority in precinct





Communities of interest based on race and language may be less united with regard to council elections, however. A similar analysis of the 2016 election results shows that, with very few exceptions, every white candidate did better the fewer minority voters were in the precinct. Similarly, the African American candidates fared far better in the communities with the largest number of black voters. The Latina candidate had a marked advantage in the Latino precincts. At the precinct level, there is substantial evidence that Antioch voters disproportionately vote for candidates of their own race. The solid trendlines reflect the candidate for the racial group whose percentage of the precinct increases along the x-axis. These trendlines increase, while the dotted lines of other candidates have a negative slope. For every one percent black voters increased in a precinct, Lamar Thorpe's margin increased .57%. In Latino precincts, Mary Roche got .37% greater margin for each added one percent Latino voters. Turnage's lead in non-minority precincts increased .67% for each additional percentage of voters who were white.



OTHER RISKS AND BENEFITS OF SINGLE-MEMBER DISTRICTS

Even if there is no racially polarized voting, the public interest may be served by moving from at-large election to districts. Single member districts reduce the cost of elections, both to candidates and to the city. Assuming that the election continues to be staggered, the printing required on ballots and pamphlets will be roughly halved, reducing the registrar's variable fees. Districting will substantially reduce the entry costs of running for office. Of the 45 cities in California with larger populations than Antioch, only twelve still elect their council at-large. If Antioch created five districts, each would still be larger than 47% of the cities in California.

Districting sometimes reduces the electoral strength of the very groups that it is designed to help. If Latinos do vote as a bloc, and comprise 15% of voters, they may exercise have decisive influence in the election of every member. Relatively few cities that have converted to single member districts have seen a significant increase in minority office holders. (Chula Vista and Anaheim are exceptions.) The greatest risk is that there will be no qualified candidate willing to stand for election in a new district. In such a case, the remaining members appoint, which completely disenfranchises voters in the new "minority" district.⁴

Districting can also force the community to choose among incumbents or other well-qualified candidates, when all could have been elected in the at-large system. The transition sequence may also have adverse effects. In a staggered system, the incumbents serve out their term. In the first election, the districts with the largest minority populations generally choose district members first. [Elections Code §10010\(b\)](#) (sequence must consider purposes of CVRA and preference by members (residents?) of the districts). Although the incumbents in Antioch are not closely clustered, none inhabits the high-minority area (assuming the registrar's precinct racial data is accurate).

PROCEDURES

Because Antioch is a general law city, any candidate for city council must live in the district they propose to represent. [Government Code §34882](#). Unless the city initiates a special reorganization, the incumbents are also entitled to serve the full terms to which they were elected. [Government Code §34873](#), [34878](#). However, an incumbent living in a new district that is having its election while he still has two years left on his term must either resign early to run, or face the prospect of running against a new incumbent. Constituents may also face unequal representation during the transition. If

⁴ Governor Brown vetoed [AB 182 \(2015\)](#), which would have added Section 14040 to prohibit imposing district-based elections in a manner that impairs the ability of protected classes to elect candidates of their choice. This could have created a defense if abandoning at-large elections is likely to lead to this undemocratic outcome.

multiple holdovers are placed in the same district, and desire to stay in office, they may all focus on gaining the allegiance of voters in their future district. Residents of any "empty" districts may not be effectively represented by any of the at-large members.

To preserve its safe harbor, the city council must declare an intention to move to district elections within 45 days, unless all who have filed demand letters agree to defer litigation. At this point, the city can have up to 75 more days to specify its plan.

[Government Code §34886 \(AB 278 \(2016\)\)](#) dispenses with the requirement of a ballot question to adopt district election for a city council. However, Antioch cannot have both district and at-large members, as Oakland and Downey do, and must use plurality voting without a runoff. The ordinance can provide for a mayor elected at large, but the council must then add or reduce a member. [Government Code §34871](#). [Elections Code §10010\(a\)](#) and [Government Code §34877.5](#) require four public hearings in order to adopt a district map.

CONCLUSION

It is extremely likely that a formal analysis will confirm that Antioch experiences racially polarized voting, which dilutes the electoral influence of the city's protected racial and language groups, particularly Latinos. My client is committed to a process that will adequate time for the council and people of Antioch to consider the evidence and develop a plan that, if well executed, will improve the equity and responsiveness of their city government.

Sincerely,

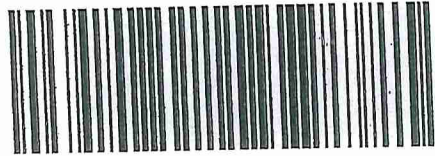
A handwritten signature in blue ink that reads "Scott J. Rafferty". The signature is written in a cursive, slightly stylized font.

Scott J. Rafferty

7015 1730 0001 2344 2741

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT
OF THE RETURN ADDRESS, FOLD AT DOTTED LINE

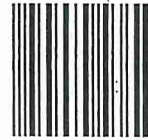
CERTIFIED MAIL®



7015 1730 0001 2344 2741



1000



94531

U.S. POSTAGE
PAID
ALAMO, CA
94507
NOV 14, 17
AMOUNT

\$4.75

R2304W121073-07

SCOTT J. RAFFERTY

ATTORNEY AT LAW

1913 WHITECLIFF COURT
WALNUT CREEK CA 94596

(202)-380-5525

RAFFERTY@GMAIL.COM

Mr. Arne Simonsen

Clerk

City of Antioch

200 H Street [94509-1285]

P.O. Box 5007

Antioch, CA 94531-5007

RECEIVED

NOV 17 2017

CITY OF ANTIOCH
CITY CLERK