




DENNIS J. HERRERA
City Attorney

JOSHUA S. WHITE
Deputy City Attorney

Direct Dial: (415) 554-4661
Email: joshua.white@sfcityattty.org

MEMORANDUM

TO: Hon. Mark Farrell, Mayor
Hon. Members, Board of Supervisors
John Arntz, Director of Elections

FROM: Joshua S. White
Deputy City Attorney 

DATE: March 21, 2018

RE: Application of the California Voter Participation Rights Act to San Francisco

The California Voter Participation Rights Act (the "Act") requires "political subdivisions" whose elections have a "significant decrease in voter turnout" compared to statewide elections to hold local elections on the same day as statewide elections. Under the Act, which became effective on January 1, 2018, a "significant decrease in voter turnout" occurs when "the voter turnout for a regularly scheduled election in a political subdivision is at least 25 percent less than the average voter turnout within that political subdivision for the previous four statewide general elections." On July 11, 2017, the California Attorney General ("AG") issued an opinion concluding that the Act applies to charter cities. *See* 17 Cal. Daily Op. Serv. 6883 (Cal. A.G.), 2017 WL 3599288. In light of the AG's opinion, questions have been raised about whether the Act requires San Francisco, as a charter city, to hold its local elections on the same day as statewide elections. San Francisco's next local election that will not coincide with a statewide election is scheduled for November 5, 2019.

SUMMARY

A court would likely conclude that the Act does not require local elections in San Francisco to be held on the same day as statewide elections. Courts may consider AG opinions in reaching their decisions, but AG opinions are not binding on the courts or local jurisdictions.

The California Constitution grants charter cities sovereignty over "municipal affairs," including "plenary authority" over the dates of local elections. Local laws that regulate municipal affairs supersede state laws unless the state law involves a matter of "statewide concern." The California Supreme Court has articulated a four-part test to assess whether a state law implicates a statewide concern. Each prong of this test supports the conclusion that the Act does not implicate a matter of statewide concern, and as such, the Act does not apply to charter cities as a matter of law.

First, the Act plainly regulates a municipal affair—the dates of local elections. Second, the Act does not conflict with the City's Charter authority because the Legislature did not intend for the Act to apply to charter cities. The Act applies to "political subdivisions." The Act's definition of that term does not include charter cities. This omission was likely intentional. During the same time that the Legislature was considering the Act, it was also considering another law—an amendment to the California Voting Rights Act ("CVRA"). The exclusive purpose of that amendment was to expand the definition of "political subdivision" to include

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charter cities. The Legislature's explicit definition of "political subdivision" in the CVRA to include charter cities along with its simultaneous omission of charter cities from the Act's definition of "political subdivision" suggests that the Legislature did not intend the Act to apply to charter cities. When the Legislature has intended for a law to apply to charter cities, it has said so explicitly.

Third, a court would likely conclude that the Legislature lacks the authority to dictate the dates of City elections because the date of a municipal election is a quintessential municipal affair; that the Legislature may want to encourage higher voter turnout at municipal elections does not transform that municipal affair into a matter of statewide concern. Fourth, the Act is not narrowly tailored to avoid interference in local governance, as the Act requires cities to move all local elections with low voter turnout even if there is no evidence of impact on anyone's voting rights.

Even if a court were to dismiss these arguments and follow the AG's opinion that the Act applies to charter cities, the Act would not require San Francisco to change the date of its November 5, 2019 election. The Act does not clearly specify which local election a political subdivision must consider when conducting the voter turnout comparison contemplated by the Act. But given the Act's purpose—to prohibit local elections with low voter turnout—when determining whether San Francisco would have to reschedule its November 5, 2019 election, a court would likely conclude that the subdivision must look to the voter turnout at the most recent local election where the same City-wide offices were on the ballot. That election occurred on November 3, 2015. The voter turnout at that election was 45.45%, and the average voter turnout at the last four statewide elections was 66.44%. Because that difference is less than 25%, the Act's trigger of a "significant decrease in voter turnout" has not been met. As such, San Francisco would not have to change the date of its next local election.

BACKGROUND**I. THE CITY'S CHARTER SETS THE DATE OF ELECTIONS FOR CITY OFFICERS**

San Francisco is a chartered city and county. The City's Charter sets forth the election dates for City officers. *See* S.F. Charter §§ 13.101, 13.110. In November 2012, San Francisco voters adopted Proposition D, changing the City's election cycle for City Attorney and Treasurer so that these officers would be elected at the same time as the Mayor, Sheriff and District Attorney. Before Proposition D's adoption, the election for City Attorney and Treasurer occurred in different years than the election for Mayor, Sheriff and District Attorney. The November 3, 2015 election was the first at which, as a result of Proposition D, the election of these citywide offices occurred on the same date. Voter turnout at that election was 45.45%. *See* <http://sfgov.org/elections/historical-voter-turnout> (listing the voter turnout at elections in San Francisco). San Francisco's next municipal election is on November 5, 2019. At that election, voters will vote on same local offices as at the November 3, 2015 election—Mayor, City Attorney, Treasurer, Sheriff, and District Attorney.

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II. VOTER TURNOUT IN SAN FRANCISCO AT STATEWIDE ELECTIONS

The following chart illustrates the voter turnout in San Francisco at the last four statewide general elections.

Statewide General Election Date	Voter turnout
November 8, 2016 (Consolidated Presidential Election)	80.71%
June 7, 2016 (Consolidated Presidential Primary Election)	56.59%
November 4, 2014 (Consolidated General Election)	58.91%
June 3, 2014 (Consolidated Statewide Direct Primary Election)	69.55%

The average voter turnout in San Francisco at those elections was 66.44%.

III. THE CALIFORNIA VOTER PARTICIPATION RIGHTS ACT

Enacted in 2015 and effective on January 1, 2018, the Act prohibits a “political subdivision” from holding “an election other than on a statewide election date if holding an election on a nonconcurrent date has previously resulted in a significant decrease in voter turnout.” Cal. Elections Code § 14052, subd. (a).

The Act defines “political subdivision” to mean “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.” *Id.* § 14051, subd. (a). The Act does not state explicitly whether it applies to charter cities.

The Act defines “significant decrease in voter turnout” as “the voter turnout for a regularly scheduled election in a political subdivision is at least 25 percent less than the average voter turnout within that political subdivision for the previous four statewide general elections.” *Id.* § 14051(b). A “statewide election” is “an election held throughout the state,” *id.* § 357, and “‘general election’ means either of the following”:

- (1) The election held throughout the state on the first Tuesday after the first Monday of November in each even-numbered year.
- (2) Any statewide election held on a regular election date as specified in Section 1000.

Section 1000, in turn, provides that California’s “established election dates are as follows”:

- (a) The second Tuesday of April in each even-numbered year.
- (b) The first Tuesday after the first Monday in March of each odd-numbered year.

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(c) The first Tuesday after the first Monday in June in each year.

(d) The first Tuesday after the first Monday in November of each year.

Id. § 1000. Statewide elections typically occur in June and November of even-numbered years.

IV. THE ATTORNEY GENERAL'S OPINION

On July 11, 2017, the AG issued an opinion concluding that the Act applies to charter cities. As discussed in greater detail below, the AG concludes that the Legislature intended for the Act to apply to charter cities. He reasons that because low voter turnout implicates matters of statewide concern—specifically, the right to vote and the integrity of elections—the Legislature has the authority to intrude upon and supersede what would otherwise be a municipal affair of charter cities. In reaching this conclusion, the AG relies on the Court of Appeal's decision in *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, which held that the CVRA applies to charter cities because prohibiting local entities from diluting the voting rights of protected classes of voters by switching from district-wide to at-large elections is a matter of statewide concern.

Although courts can look to AG opinions as persuasive authority, those opinions are not binding on the judiciary. *See Kern County Water Agency v. Watershed Enforcers* (2010) 185 Cal. App. 4th 969, 984.

ANALYSIS

I. SAN FRANCISCO, AS A CHARTER CITY, HAS EXCLUSIVE AUTHORITY TO SET THE DATE OF LOCAL ELECTIONS

The California Constitution empowers charter cities to govern themselves as to matters of municipal affairs. “[I]nsofar as a charter city legislates with regard to municipal affairs, its charter prevails over general state law.” *Sonoma County Org. of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 315; *Johnson v. Bradley* (1992) 4 Cal. 4th 389, 396 [the California Constitution is “intended to give municipalities the sole right to regulate, control, and govern their internal conduct independent of general laws”]. California Constitution, Article XI, Section 5 addresses the “home rule” powers of charter cities:

(a) *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, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.*

(b) It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) *conduct of city elections* and (4)

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plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees.

(emphasis added.) Accordingly, as a charter city and county, San Francisco has plenary authority to adopt and enforce local laws that supersede the general laws of the State, provided that the subject of the regulation is a “municipal affair” rather than a “statewide concern.”

The California Supreme Court has set forth a four-part framework for resolving whether a state law falls within a charter city’s home rule authority. *See State Bldg. and Const. Trades Council of Cal., AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547, 552 (citation omitted). The first step is whether the state law regulates a municipal affair. *Ibid.* At the second step, the court asks whether there is an actual conflict between the state law and a charter provision. *Ibid.* Third, the court asks whether the state law addresses an issue of “statewide concern.” *Ibid.* Finally, the court must determine whether the law is “reasonably related to . . . resolution” of that concern and “narrowly tailored” to avoid unnecessary interference in local governance. *Ibid.* As explained below, a court likely would conclude that the Act, even if it applies to charter cities, usurps the City’s home rule authority.

A. The Act Regulates a Municipal Affair: the Date of Municipal Elections

The first question is whether the Act regulates a municipal affair. It does. As noted above, the California Constitution sets out a nonexclusive list of “core categories” that are, by definition, municipal affairs, one of which is the authority to regulate “the times at which . . . the several municipal officers and employees whose compensation is paid by the city shall be elected.” Cal. Const. Art. XI, § 5, subd. (b)(4). The AG’s opinion agrees that the Act regulates a municipal affair.

B. It Is Unlikely that a Court Would Find that the Act Conflicts with the City’s Charter Authority

When faced with a potential conflict between a state law and a charter city’s regulation of a municipal affair, the court must determine whether there is an actual conflict. If there is no conflict, then there is no need to decide whether the state law conflicts with the charter city regulation. *Johnson v. Bradley* (1992) 4 Cal. 4th 389, 398-401. As explained below, a court would probably find no actual conflict for two reasons. First, the Legislature did not intend for the Act to apply to charter cities. Second, regardless of the Legislature’s intention, a court would likely construe the Act as not applying to charter cities under the doctrine of constitutional avoidance, which instructs courts to interpret statutes in a way that avoids constitutional concerns. We discuss these reasons in turn below.

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1. The Legislature Did Not Intend for the Act to Apply to Charter Cities

As noted above, the Act applies to “political subdivisions,” which it defines as “geographic area[s] 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.” Cal. Elections Code § 14051, subd. (a). The AG asserts that “the Legislature intended the Act to apply to charter cities” because, “A Charter city is a city,” and charter cities are “geographic[s] area of representation created for the provision of government services.” As further support for its position, the AG cites the fact that in *Jauregui v. City of Palmdale*, *supra*, 226 Cal.App.4th at pp. 795-802, the Court of Appeal “applied the CVRA’s identical definition of ‘political subdivision’ to charter cities.”

A court’s primary objective when interpreting a statute “is to determine the lawmakers’ intent.” *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798. “When the language is reasonably susceptible of more than one meaning, it is proper to examine a variety of extrinsic aids in an effort to discern the intended meaning,” including the statute’s purposes and legislative history. *See Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 775–776; *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 507, 66 (noting that “unless the ‘statute’s text evinces an unmistakable plain meaning,’ courts look to ‘additional sources of information to determine the Legislature’s intent in drafting the statute’”). Here, the critical word in the Act’s definition of “political subdivision” is “city.” That word is susceptible to more than one meaning—it could be referring to charter cities or general cities or both. As such, a court would look to the Act’s legislative history to determine whether the Legislature intended for the Act to apply to charter cities.

Compelling evidence of the Legislature’s intent is the fact that, at roughly the same time and during the same session that the Legislature considered the Act, the Legislature was also considering the definition of a “political subdivision” in a different election-related bill—an amendment to the CVRA—and explicitly applied that term to charter cities. The California Court of Appeal decided *Jauregui v. City of Palmdale*, *supra*, 226 Cal.App.4th at pp. 795, on May 28, 2014, rejecting the City of Palmdale’s challenge to the applicability of the CVRA to charter cities. About nine months later, on February 11, 2015, AB 277 was introduced to amend the CVRA to explicitly apply it to charter cities. According to the legislative summary, AB 277 “[e]xpressly provides that general law cities, general law counties, charter cities, charter counties, and charter cities and counties are ‘political subdivisions’ that are subject to the CVRA.” *See* http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB277. The Legislature’s intent was explicit: “It is the intent of the Legislature that the CVRA shall apply to charter cities, charter counties, and charter cities and counties.” The Act was introduced on February 25, 2015—two weeks after AB 277. Both laws worked their way through the Legislature during the same timeframe, the same legislative committees considered both pieces of legislation, and the Legislature presented both laws to the Governor a month apart.

The AG asserts that, because *Jauregui* had already been decided when the Legislature was considering the Act, the Legislature must have shared the Court of Appeal’s interpretation of the term “political subdivision.” In support of this assertion, the AG cites *People v. Harrison*

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(1989) 48 Cal.3d 321, 329, for the proposition that, “Where a statute is framed in language of an earlier enactment on the same or an analogous subject, *and that enactment has been judicially construed*, the Legislature is presumed to have adopted that construction.” (emphasis added.) But the Court in *Jauregui* did not construe the term “political subdivision.” Indeed, the parties in that case did not raise the issue of whether the term “political subdivision” encompasses charter cities. Rather, the City of Palmdale’s argument, and the focus of the Court’s opinion, was whether the CVRA addresses a matter of statewide concern and whether the CVRA was narrowly tailored to serve that concern. Because *Jauregui* did not even mention, much less construe, the term “political subdivision,” *Jauregui* cannot serve as authority for the proposition that the term encompasses charter cities. See *Environmental Charter High School v. Centinela Valley Union High School Dist.* (2004) 122 Cal.App.4th 139, 150 (“It is axiomatic that cases are not authority for propositions not considered.”) (citation omitted).

Absent from the Act’s legislative history is any evidence that the Legislature intended for the Act to apply to charter cities. The legislative analyses for both the Senate and the Assembly acknowledge that the Act “does not explicitly address the question of whether it is intended to be applicable to charter cities. . . .” See https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB415. Indeed, the official analysis acknowledges that applying the Act to charter cities could pose constitutional concerns. *Ibid.*

The AG’s opinion cites statements of the author of the legislation during legislative hearings that he intended the Act to apply to charter cities. But an individual legislator’s subjective intent is immaterial. See *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.”].)

Further evidence of the Legislature’s intent is that, in other contexts, when the Legislature intended for the term “political subdivision” to encompass charter cities, the Legislature says so explicitly. See Cal. Pub. Util. Code, § 5810 [defining “political subdivision” as “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*, school district, community college district, or other district organized pursuant to state law”]; see also Cal. Rev. & Tax Code § 18670 [explicitly including “a city organized under a freeholders’ charter” in the definition of “political subdivision”]; Cal. Unemp. Ins. Code, § 13005, subd. (a) [same]; Pub. Contract Code, § 20671, subd. (b) [defining “public entity” as “*any city, charter city, city and county, county, district, public corporation, or political subdivision* of the state”]; Cal. Gov. Code § 53087.6, subd. (f)(1) [same]; Cal. Unemp. Ins. Code, § 1088.8 [same]; Cal. Pub. Resources Code, § 6324; Cal. Gov. Code, § 53270, subd. (b) [same].

Because the Legislature failed to make clear its intent that Act apply to charter cities, a court is likely to conclude that it does not apply. If so, then the Act does not conflict with the City’s Charter.

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2. A Court Is Likely to Construe the Act as Not Applying to Charter Cities to Avoid the Question of Whether the Act Unconstitutionally Usurps the City's Home Rule Authority

Even if the court concludes that the Act is ambiguous and the Legislature's intent is unclear, the court still would likely construe the Act as not applying to charter cities to avoid deciding whether the Act was an unconstitutional usurpation of the City's home rule authority. "To the extent difficult choices between competing claims of municipal and state governments can be forestalled in this sensitive area of constitutional law, they ought to be; courts can avoid making such unnecessary choices by carefully insuring that the purported conflict is in fact a genuine one, unresolvable short of choosing between one enactment and the other." *Johnson v. Bradley* (1992) 4 Cal.4th 389, 399 (quoting *Cal. Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 16-17.) Stated differently, a court would first inquire into "whether it is reasonably possible to construe the statute or the ordinance in a manner that reconciles the two and thereby avoids having to decide which takes precedence." *Id.* at p. 413 (Kennard, J., concurring.) This principle of interpretation derives from the broader principle that a court should decide a constitutional question only if it is absolutely necessary to do so. *Rosenberg v. Fleuti* (1963) 374 U.S. 449, 451.

Here, the court could—and probably would—avoid having to decide whether the Act unconstitutionally infringes on the City's home rule authority by construing the term "political subdivision" in the Act as referring only to general cities, and not charter cities.

C. Even If the Act Applies to Charter Cities, It Usurps the City's Plenary Authority to Regulate Municipal Affairs, as Voter Turnout at Purely Municipal Elections Is Not a Statewide Concern

Even if the Legislature intended for the Act to apply to charter cities, a court would likely conclude that voter turnout at local elections is not a matter of statewide concern.

Ultimately, the courts determine whether a matter is of statewide concern. *Sonoma County Org. of Pub. Employees v. County of Sonoma* (1979) 23 Cal. 3d 296, 316. As the California Supreme Court has stated:

What constitutes a strictly municipal affair is often a difficult question; ultimately it is an issue for the courts to determine. . . . while a court will accord great weight to the purpose of the Legislature in enacting general laws which disclose an attempt to preempt the field to the exclusion of local regulation, the fact that the Legislature has chosen to deal with a problem on a statewide basis is not determinative of whether the statute relates to a statewide concern.

Ibid., citation omitted; *see also Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63 ("the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern.").

Here, the date of local elections is a quintessentially local concern, as is the issue of voter turnout at local elections. In reaching a contrary conclusion, the AG asserts that low voter

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turnout at local elections serves two statewide concerns— protecting the constitutional right to vote and the integrity of the electoral process. According to the AG, by holding elections on dates when voter turnout is likely to be lower, charter cities may be impinging on the voting rights of the electorate. Similarly, in the AG’s view, elections have less integrity when fewer people vote in them. In support of his conclusion, the AG relies on *Jauregui v. City of Palmdale*, *supra*, 226 Cal.App.4th at p.793, which held that the CVRA applies to charter cities. In *Jauregui*, the Court reviewed the intent behind the CVRA, which was to prohibit political subdivisions from transitioning from district elections to at-large election to dilute or abridge minority voting rights. *See* Cal. Elections Code § 14026; *Sanchez v. State* (2009) 179 Cal.App.4th 467, 485. The Court also noted that the CVRA “was enacted to implement the equal protection and voting guarantees of article I, section 7, subdivision (a) and article II, section 2.” *Jauregui v. City of Palmdale*, *supra*, 226 Cal.App.4th at p. 793.

There are fundamental differences between the statewide concerns at issue in the CVRA and the concerns that animated the Legislature’s passage of the Act. The CVRA expands the federal Voting Rights Act (“FVRA”), a law enacted in 1965 to put a stop to almost 100 years of the suppression of minority voters. The FVRA creates liability for vote dilution. A jurisdiction violates the FVRA if “the political processes leading to nomination or election in [a] State or political subdivision [of a state] 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.” 42 U.S.C. § 1973, subd. (b). The United States Supreme Court has acknowledged that at-large elections can “minimize or cancel out the voting strength of minorities.” *Thornburg v. Gingles* (1986) 478 U.S. 30, 35 (internal quotations omitted). The California Legislature’s goal in enacting the CVRA was to “provide a broader cause of action for vote dilution than was provided for by federal law.” *Sanchez v. City of Modesto*, *supra*, 145 Cal.App.4th at p. 669. Against this backdrop, the Court of Appeal concluded that prohibiting local jurisdictions from diluting minority voting rights is an issue statewide concern.

A City’s decision to hold local elections on a particular date, even if doing so could result in low voter turnout, does not implicate the same concerns. The date of a local election has no impact on a person’s right to vote, nor does it have the effect of diluting the influence of protected classes of voters. There is nothing in the legislative record to support the conclusion that cities abridge or dilute the voting rights of minorities or other protected categories of voters simply by setting local elections on different days than statewide elections, nor are there cases suggesting that a jurisdiction infringes on minority voting rights, or degrades the integrity of the electoral process, simply by selecting a particular election date. Indeed, the constitutional guarantee that charter cities have “plenary authority” over the dates of local elections would be meaningless if the AG were right, as almost everything related to elections in some way affects the integrity of the electoral process.

In sum, a court likely would conclude that voter turnout in municipal elections is not a matter of statewide concern.

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D. The Act Is Not Reasonably Related to Voting Rights or Electoral Integrity, and in Any Event, Is Not Narrowly Tailored

At the final step in the analysis if the court concludes that the Act applies to charter cities and addresses a statewide concern, the court must determine whether the law is “reasonably related to . . . resolution” of that concern and “narrowly tailored” to avoid unnecessary interference in local governance. *See State Bldg. and Const. Trades Council of Cal., AFL-CIO v. City of Vista, supra*, 54 Cal.4th at p. 552. Again, a court would likely not conclude that a reasonable relationship exists between the Act and the statewide concerns articulated in the AG’s opinion. Indeed, as explained above, prohibiting municipalities from selecting the dates of municipal elections has no relationship to upholding minority voting rights or preserving electoral integrity. Even if there were such a connection, the Act is not narrowly tailored because it does not require an analysis of whether holding a local election on a particular date would actually impact minority voting rights. The CVRA’s structure helps illustrate why the Act is not narrowly tailored: the CVRA does not prohibit all at-large elections, but rather, only those that would impact minority voting rights. By contrast, the Act prohibits local elections with low voter turnout regardless of whether there is evidence of impact on anyone’s voting rights.

II. EVEN IF THE ACT APPLIES TO CHARTER CITIES, SAN FRANCISCO WOULD NOT HAVE TO CHANGE THE DATE OF THE NOVEMBER 2019 ELECTION BECAUSE THE VOTER PARTICIPATION DECREASE THRESHOLD HAS NOT BEEN MET

Even if the Act does not usurp the City’s constitutional authority to regulate its municipal affairs, a court would not likely order San Francisco to move its next local election—which is set for November 5, 2019—to the same day as a statewide election. This is because San Francisco has not met the Act’s trigger of a “significant decrease in voter turnout” at purely local elections.

To determine whether there is a “significant decrease in voter turnout,” the Act contemplates a comparison between the voter turnout at the average of “the previous four statewide general elections” and a local election. It is unclear from the statute’s plain language which local election should be considered for this comparison. There appear to be three potential options: (1) the most recent local election; (2) the most recent local election at which the same local offices were on the ballot as those that will be on the ballot at the next local election; or (3) any local election at any point in the political subdivision’s history.

The second option is the most reasonable reading of the statute. The Act’s purpose is to address low voter turnout at local elections by requiring them to occur on the same day as statewide elections. If the turnout at a particular local election is not likely to be impermissibly low, the purpose of the Act would not be served by moving that election. The best predictor of the voter turnout at an upcoming local election is the voter turnout at the last local election when the same local offices were at issue.

In San Francisco, the next scheduled purely municipal election is on November 5, 2019, where voters will vote on the offices of Mayor, City Attorney, Treasurer, Sheriff, and District Attorney. The last election where voters voted on the same offices was on November 3, 2015. Thus, when a court is determining whether there has been a “significant decrease in voter

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turnout,” the court would likely look to how voter turnout at the November 3, 2015 election compared to the average of the last four statewide general elections.

As explained above, the voter turnout at San Francisco’s November 3, 2015 election was 45.45%. The average voter turnout at the last four statewide general elections was 66.44%. Because the differential is less than 25%, the Act—even assuming it applies to charter cities—would not require San Francisco to hold its next municipal election on the same day as a statewide election.

CONCLUSION

Contrary to the AG opinion, a court would likely interpret the Act not to apply to charter cities as a matter of law. Even if the Legislature did intend the Act to apply to charter cities, the issue of voter turnout at local elections is not a matter of statewide concern and therefore does not preempt the authority of charter cities under the California Constitution over the date of local elections. As such, the City has plenary authority to set the date of elections for City-wide offices, and those elections need not occur on the same day as statewide elections. And even if a court were to find that the Act applies to charter cities, a court would likely find that the Act does not apply to San Francisco’s next election as a matter of fact because the Act’s trigger of a 25% decline in voter participation has not been met.