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Subject: Counter-Opinion to the AG's Opinion on charter city home rule election rights
Attachments: Counter-OpinionToAGOpinion.pdf

Mark Jomsky:

We understand from Mayor Tornek that the subject of changing from local-only elections to concurrent state-federal-local elections will come back to the City Council on Monday. Submitted herewith is a Counter-Opinion to the July Attorney General's Opinion asserting that charter cities are required to comply with the so-called California Voter Participation Rights Act. We have analyzed more than 30 California Supreme Court and Court of Appeal cases in the attached Counter-Opinion and submit that the Attorney General's opinion pervasively misanalyzes the issue and erroneously concludes that the CVPRA trumps Pasadena's and PUSD's constitutional home rule right to control the timing of the election. Since the previous discussion of this issue by the Council included as part of the agenda packet the Attorney-General's erroneous opinion. We urge that it would be appropriate to include the attached Counter-Opinion as an agenda attachment if this matter is being discussed Monday evening.

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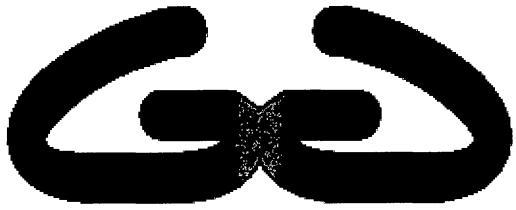

Counter-Opinion concerning the City of Pasadena's Constitutional "Plenary Authority" to set the timing of its and PUSD's Elections which overrides the California Voter Participation Rights Act

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Opinion Concerning to the City of Pasadena's Constitutional "Plenary Authority" to Set the timing of its and PUSD's Elections that overrides the California Voter Participation Rights Act

By Skip Hickambottom and Dale Gronemeier, Gronemeier & Associates, P.C.

Executive Summary

The City of Pasadena Charter establishes both Pasadena and the Pasadena Unified School District.[1] As a charter city, Pasadena has "plenary authority" under California Constitution, Art. XI, §5b(4), to determine "the time at which" its local elections are held. "Plenary" means ""full; entire; complete; absolute."[2] Pasadena's plenary power to determine the timing of its local election is restricted only by the Pasadena Charter provisions requiring that its exercise must be consistent with the Charter and with the California Constitution; its plenary authority over the timing of its local election is not restricted by inconsistent general State law.

Pasadena's Charter requires local elections to be held in odd-year election cycles; as a result, they are "local-only" rather than even-year elections that are "concurrent" with federal/state elections. The California Legislature passed a law – the 2015 California Voter Participation Right Act ("CVPRA")[3] – requiring that cities with low-turnout local elections shift to even-year concurrent elections. Pasadena's constitutional "plenary authority" to determine the timing of its local elections is threatened if Opinion #16-603[4] from the California Attorney General's Office correctly asserts that the City and PUSD must align their elections with federal/state elections in even years because of the CVPRA.

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[1]The City of Pasadena is hereinafter referred to as "Pasadena" and the Pasadena Unified School District is referred to as "PUSD."

[2]Simon and Schuster *Webster's New Twentieth Century Dictionary* (1979) p. 1379. A common usage of "plenary" is "plenary meetings," which means meetings for all members of an organization or all attendees at a conference.

[3]California Elections Code §§10450-10457.

[4]100 Ops. Cal. Atty. Gen. 4 (2017)

AG Opinion #16-603 opines that the CVPRA overrides Pasadena's "plenary authority" to determine the time at which it holds its local elections. It does so by systematically misanalyzing the issue at every level. A critical flaw in AG Opinion #16-603's is its failure to analyze the decisive role of other State constitutional guarantees where they come into play – which results in AG Opinion #16-603 failing to meaningfully address the difference between constitutional-based challenges and non-constitutional challenges to home rule rights and its making a false equivalency between the California Voter Rights ("CVRA") implementation of constitutional guarantees and the CVPRA's non-constitutional basis. A second critical flaw in AG Opinion #16-603 is that it fails to meaningfully address the meaning of "plenary authority" as "all authority" that was set out it its own precedent, 56 Ops. Cal. Atty. Gen. 289 (1973). But the misanalyses at the heart of AG Opinion #16-603's are not limited to those critical failures. AG Opinion #16-603's missteps begin with its failure to meaningfully address the specific constitutional guarantees that are the basis of charter city home rule rights over local elections. Its faulty analysis continues by failing to address the long-standing case law supporting charter city home rule rights over local elections and instead cherry-picking (and mischaracterizing) a few recent cases. AG Opinion #16-603 not only fails to meaningfully analyze the critical "plenary authority" language of Art. XI, §5b(4), but it also fails to analyze §5b(4)'s context within the structure of Article XI, which result in its not recognizing the differing degrees of authority and judicial scrutiny arising from the structure of Article XI. AG Opinion #16-603 fails to even acknowledge the holding concerning §b(4) in *Johnson*[5] – the most recent Supreme Court opinion on charter city home rule election rights; while citing *Johnson's* progeny *Cawdrey*,[6] AG Opinion #16-603 ignores that it followed Johnson with a judicial review that was deferential to home rule election rights. AG Opinion #16-603 fails to address *Trader Sports*[7] holding despite its being the recent case that is most inconsistent with AG Opinion #16-603's analysis.

From start to finish, AG Opinion #16-603 reflects a fatally-flawed analysis. Our opinion is that California courts will reject its conclusion that the CVPRA trumps Pasadena's charter provisions which set "the time at which" local elections are held and will instead recognize Pasadena's and PUSD's State Constitution "plenary authority" to determine local election timing.

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[5]*Johnson v. Bradley* (1992) 4 Cal. 4th 389.

[6]*Cawdrey v. City of Redondo Beach* (1993) 15 Cal App. 4th 1212.

[7]*Trader Sports v. City of San Leandro* (2001) 93 Cal. App. 4th 37.

§1. The City of Pasadena charter

The majority of California cities and school districts are "general law" entities, but a minority, including Pasadena and PUSD are "charter" entities. Pasadena's Charter is the local constitution for both the City of Pasadena and PUSD.[8] Pasadena's Charter gives the City broad powers:

> The City shall have the power to make and enforce all laws and regulations in respect to municipal affairs, subject only to the *restrictions and limitations provided in this Charter and in the Constitution of the State of California*. It shall have the power to exercise any and all rights, powers, and privileges heretofore or hereafter granted or prescribed by general laws of the State, or by other lawful authority, or which a municipal corporation might or could exercise under the Constitution of the State of California.[9]

The italicized language above restricts home rule charter city rights to the provisions of the Charter and the California State Constitution. Pasadena's charter is characteristic of practically all charter cities in giving the charter city broad home rule rights with restrictions only from the California Constitution and the charters themselves.[10]

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[8]Pasadena's Charter may be accessed by the following link: https://library.municode.com/ca/pasadena/codes/code_of_ordinances?nodeId=CH.

[9]Pasadena Charter §301 (emphasis added).

[10]We have gone online to search the charters of the charter cities which were involved in the cases cited in our Counter-Opinion. Identical or similar restrictions requiring conformance to the State Constitution to those in Pasadena's Charter that are italicized above are contained in the current charters of every California city that has figured in cases that are discussed in this Opinion concerning which we could locate the charter online. The only charter we could not locate online was the charter of the City of Salinas.

§2. Pasadena's constitutional home rule power concerning the timing of its elections

On the subject of local elections, the following are the relevant three rights granted by the California Constitution to charter cities:

1. **Plenary authority – including election times:** Charter cities have "plenary authority" pursuant to California Constitution Art. XI, §5b(4), to determine the manner in which, the method by which, *the times at which*, and the terms for which its officers are elected or appointed; this power is expressly designated as "plenary."[11]

2. **Non-plenary authority – "conduct of elections":** Charter cities have a power to regulate "the conduct of elections;" this power is not designated as plenary.[12]

3. **Non-plenary authority – municipal affairs:** Charter cities have the power to legislate "in respect to municipal affairs" over inconsistent state law; this power is not designated as plenary.[13]

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[11]"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) ***plenary authority*** *is hereby granted*, subject only to the restrictions of this article, *to provide* therein or by amendment thereto, the manner in which, the 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." California Constitution, Art. XI, §5b. (Emphases added)

[12]*See* fn. 10, *supra*.

[13]"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 the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to general laws." California Constitution, Art. XI, §5a (emphasis added).

The combination of the foregoing three California Constitution provisions give Pasadena home rule powers over local elections through it charter. AG Opinion #16-603 does not meaningfully differentiate between the foregoing three powers; rather, at p. 3 of the Opinion,[14] it collapses all three of them into an undifferentiated whole.

In addition to the foregoing three powers, the following is the California Constitution provision that brings PUSD's elections into the analysis:

4. **City charter regulating school board elections:** City charters may regulate school board elections,[15] as Pasadena's Charter does for PUSD.

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[14]While the Attorney General's website gives the official citation for AG Opinion #16-603, it has not posted by the time of this Opinion's writing the official opinion using pagination consistent with the official citation; this Opinion consequently cites to the pages of the slip opinion that is posted on the AG's electronic site.

[15]California Constitution, Art. IX, §16(a).

§3. The early years – the foundation of home rule powers through 1896

The California Constitution gives charter cities greater powers than general law cities, rights commonly referred to as their "home rule" rights. Weaker home rule rights were in the 1879, but charter cities preexisted that constitutional sanction.[16] As early as the 1880s, the California Supreme Court began to decide cases on cities' adoption of charters.[17] In 1896, the Constitution was amended to establish the two relevant home rule section; its Art.VI is the forerunner of current Art. XI, §5a and Art. XIII is the forerunner to Art. XI, §5b, creating home rule rights over "municipal affairs" and specified subjects respectively.[18]

In 1899, the California Supreme Court rejected an attack upon the 1897 State law authorizing elections for the adoption of charters by municipalities.[19]

AG Opinion #16-603 neither analyzes nor cites any of this history.

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[16]*Fragley v. Phelan* (1899) 126 Cal.383, 395-396 (Harrison, J., dissenting).

[17]*People v. Hogue* (1880) 55 Cal. 612, 617-618 (former California Constitution Art. XI, §8, allowing for cities to hold elections to choose persons to write charters, submit to the electorate in elections, and then submit to the legislature for approval without amendment of disapproval is self-executing, so long as the timing of the election is consistent with Art. XI, §8).

[18]*Johnson v. Bradley* (1992) 4 Cal. 4th 389, 395, *citing and quoting* Van Alstyne, *Background Study Relating to Article XI, Local Government*, Cal. Const. Revision Com., Proposed Revision (1966) pp. 278-279.1.

The reason for the addition of the language "municipal affairs" in the 1896 Constitution has been summarized by the California Supreme Court as follows: "As our opinion in *Braun* pointed out, the historical impetus for adoption of the municipal home rule provision in 1896 was in part a series of decisions by this court holding that the power to adopt charters (and thus to adopt self-government) given cities by former section 8 (repealed June 2, 1970) of article XI of the Constitution could in effect be overridden by the language of then section 6 (now section 5) of article XI of the Constitution. It was to ensure that city charters could no longer "at once be superseded by . . . general legislative enactment" that the "municipal affairs" clause was proposed to and adopted by the voters." *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal. 3d 1, 12, fn. 10 (citations omitted).

[19]*Fragley, supra,* 126 Cal. at 391.

§4. The 1899-1909 case law confirming charter cities' constitutional right to control over local elections

In the turn-of-the-century decade from 1899-1909, the California Supreme Court in five seminal decisions – *Hill,*[20] Carter,[21] *Martin,*[22] *Pfahler*[23] and *Socialist Party*[24] – recognized the California Constitution's provisions giving charter cities constitutional rights over local elections. These decisions established that express charter provisions concerning local election procedures prevail over conflicting general State election law. That rule was established under the 1896 Constitution *before* the California Constitution was amended in 1914 to strengthen charter cities' home rule rights by giving charter cities "plenary authority" over, *inter alia*, "the times at which" local elections are conducted.

In 1899, the Supreme Court in *Hill* – a case concerning the charter city Salinas – held that general State law concerning the *time* that polls can close does not apply where Salinas' Charter provided differently.[25] While the holding *de facto* prioritized the a city's charter provision over general State election, the opinion did not articulate a constitutional rule; rather, the *Hill* opinion focused on what is (at least presently) an obscure issue of the statutory construction of laws for special cases.[26]

In 1902, the Supreme Court in *Carter* – a case concerning the charter city Santa Rosa – expressly held that, as a matter of constitutional law, a city's charter provisions governing the *manner* of determining election contests prevailed over

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[20]*People v. Hill* (1899) 125 Cal. 16.

[21]*Carter v. Superior Court* (1902) 138 Cal. 150.

[22]*Martin v. Worswick* (1904) 142 Cal. 71.

[23]*In Re Pfahler* (1906) 150 Cal. 71 (referred to *supra*).

[24]*Socialist Party v. Uhl* (1909) 155 Cal. 776.

[25]*People v. Hill, supra*, 125 Cal. at 19-20.

[26]The Supreme Court's rationale for its decision in *Hill* was that "[t]he charter being a law for a special case is not in conflict with a general law which provides otherwise." *Id.*

conflicting State general law.[27] *Carter* expressly referred to the constitutional basis for its ruling,[28] announced the rule that "general laws inconsistent with special provisions of the charter are not applicable,"[29] and cited to *Hill* as authority for its holding.[30]

In 1904, the Supreme Court rejected an appeal on the *qualification of voters* from the losing mayoral candidate in the charter city San Jose; the losing candidate contended that his election loss was based on the wrong register of voter's list.[31] The Supreme Court concluded that the list used was the correct one required by San Jose's Charter.[32] *Martin* stated that local elections are "municipal affairs" and that "the general laws of the state touching the registration of voters prior to state and county elections have no bearing on an election of charter city officers, except insofar as they are adopted by the charter itself."

In 1906, the Supreme Court in *Pfahler* – a case involving the charter city Los Angeles – held that a charter city's provisions concerning the *manner* of local elections concerning initiatives were applicable irrespective of State general law provisions.[33] *Pfahler* stated the general rule that a charter provision governing a "municipal affair" is, as a constitutional matter, "paramount to general laws of the state."[34] *Pfahler* also rejected a constitutional challenge to Los Angeles' charter provision for initiatives and referenda as being inconsistent with the California Constitutional reference to establishing a "republican" form of government.[35]

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[27]*Carter v. Superior Court, supra,* 138 Cal at 152.

[28]*Id.*

[29]*Id.*

[30]*Id. Carter* also cited one of its non-election cases – *People v. Williamson* (1902) 135 Cal. 415 – for its holding.

[31]*Martin v. Worswick, supra.*

[32]*Id.* at 74.

[33]*In Re Pfahler, supra,* 150 Cal. at 82.

[34]*Id.*

[35]*In Re Pfahler* (1906) 150 Cal. 71, 77-78.

In 1909, the Supreme Court in *Socialist Party* – a case involving the charter city San Francisco – reaffirmed "[t]hat the election of municipal officers is strictly a municipal affair goes without question" and upheld the constitutionality of a State law governing primaries that was attacked because it exempted charter cities.[36]

Thus, by 1909 – five years before charter cities' home rule rights were further strengthened –, there were five Supreme Court cases recognizing that charter entities' constitutional home rule power over local elections in their charters preempted conflicting State general law. The last two of those five decisions were the last general challenges to the basic California Constitution concept of charter cities' home rule rights over local elections.

AG Opinion #16-603 does not cite nor analyze any of these seminal California Supreme Court decisions.

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[36] *Socialist Party, supra,* 155 Cal. At 788. In *Socialist Party*, the San Francisco Charter was consistent with State general law on primary elections because it had incorporated State law concerning the matter; the petitioner Socialist Party challenged the constitutionality of the general State law. But one of the grounds asserted in the petition attacked the constitutionality of the general State law because it did not apply to charter city elections. It was in that context that the Supreme Court in *Socialist Party* reaffirmed constitutional home rule rights for charter cities over election procedure.

§5. The 1914 amendment to the California Constitution establishing charter cities' "plenary authority"over "the time at which" local elections are held

In 1914, the constitutional home rule charter rights were significantly strengthened,[37] including adding the language that is presently contained in Art. XI, §5b(4) giving "plenary authority" to charter cities over the timing of local elections.[38] The 1914 amendment was prompted by the Supreme Court's 1910 *Nichol*[39] holding which limited home rule authority to subjects which were expressly reserved to cities in their charters.[40] The 1914 amendment *de facto* overruled *Nichol* by adding language indicating that the constitutional home rule provision were an affirmative grant of authority to charter cities irrespective of whether their charter contained express provisions concerning a subject.[41]

After the 1914 amendments, there was no California case law questioning that charter cities are legally-proper entities with constitutional home rule rights. After 1914, the constitutional home rule provisions remained essentially unaltered for over half a century. In 1968, as part of a systematic revision and renumbering of the state Constitution, the California Constitution Revision Commission recommended to the Legislature that the above sections be retained in substance but rewritten and renumbered as Art. I, §5. The voters approved renumbered Art. XI, §5, in a 1970 Special Election.[42]

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[37]*Johnson v. Bradley. supra,* 4 Cal. 4th at 396-397, *quoting and citing* Cal. Const. Revision Com. (Feb. 1968) *Proposed Revision of the Cal. Const.*, pp. 59-60.

[38]*People ex rel. Devine v. Elkus* (1922) 59 Cal. App. 396, 405-406.

[39]*Nichol v. Koster* (1910) 157 Cal. 416. *Nichol* involved the charter city San Francisco. It was an employee compensation case that would be governed by the present language of Art. XI, §5b(4). Because the city's charter did not have an express provision concerning employee compensation, the Supreme Court held in *Nichol* that home rule rights were not implicated.

[40]*Johnson v. Bradley. supra,* 4 Cal. 4th at 396.

[41]*Id.* at 396-397, *quoting and citing* Jones "Municipal Affairs in the California Constitution" (1913) 1 Cal. L. Rev. 132, 145.

[42]*Johnson v. Bradley, supra,* 4 Cal. 4th at 397, *quoting and citing* Cal. Const. Revision Com. (Feb. 1968) *Proposed Revision of the Cal. Const.*, pp. 59-60.)

AG Opinion #16-603 does not acknowledge the history of Art. XI that demonstrates an intention by the voters to strengthen home rule election rights over, among other things, the "time at which" local elections are held by the 1914 amendment that inserted into the California Constitution the language "plenary authority" for charter cities over the timing of local elections.

§6. Interpreting the language of Art. XI, §5

Before proceeding to analyze post-1914 cases, we interrupt the historical development of California law on charter cities' home rule rights over local elections because the current language of the relevant California Constitution was set by the 1914 amendments. Recognizing the relevant law governing interpretation of constitutional provisions is helpful in assessing the post-1914 case law as courts interpreted the meaning of the adjective "plenary" that was added in 1914 and the other language settled in 1914 which remains in the California Constitution to this date.

A. Basics of court interpretation of constitutional language.

In interpreting constitutional provisions, courts use essentially the same principles as they use to interpret statutes.[43] "If the language is clear and unambiguous, the plain meaning governs. But if the language is ambiguous, we consider extrinsic evidence..."[44] The purpose of constitutional interpretation is to effectuate the intent of the voters' enactments.[45] The starting point for constitutional interpretation is always the language of the constitution,[46] and it ends there unless there is ambiguity in the language.[47] But analysis of the language of a constitutional provision is not limited to a bare relevant word such as "plenary authority"; while constitutional interpretation begins with those words, courts analyze the "text in its relevant context, as text so read tends to be the clearest, most cogent indicator of a specific provision's purpose in the larger statutory scheme. We interpret relevant terms in light of their ordinary meaning,

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[43]*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 444.

[44]*Id.* at 444-445.

[45]*Richmond v. Shasta* (2004) 32 Cal. 4th 409, 418.

[46]*Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 39 Cal.5th 282, 293; *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 321.

[47]*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority, supra,* 44 Cal.4th at 444-445.

while also taking account of any related provisions and the overall structure..."[48]

Thus, the starting point for constitutional interpretation for the purpose of this opinion is analysis of California Constitution Art. XI, §5b(4)'s adjectival/nominal term "plenary authority" that gives Pasadena's charter the right to determine the "manner," "method," "time," "terms" and "election or appointment" of city officers. Semantic analysis of "plenary authority" leads to the conclusion that "plenary authority" means "all authority." Art. XI, §5b(4) grants *all authority* to charter cities to determine the time at which the cities hold their local elections.[49] However, assuming there were any ambiguity that required further analytical steps to disambiguate the meaning of "plenary," contextual analysis of the surrounding language structure in Art. XI, §5, supports that "plenary authority" means "all authority." Even assuming *arguendo* further analysis were required, the legislative history of the 1914 insertion into the constitutional home rule authority of "plenary authority" over "the time at which" local elections are held supports that the authority of charter cities is unrestricted by general State laws such as the CVPRA.

B. The absence of ambiguity that Art. XI, §5b(4)'s, adjective "plenary" modifying "authority" means "all."

Facially, the words "plenary authority" appear to assign all power to charter cities to determine the time at which they hold their local elections because the language does not exclude any part of such authority nor allow for such authority by another entity of the State such as the legislature. The California Attorney General previously determined that "[t]he word 'plenary' means 'full, entire, complete, absolute, perfect, unqualified'[50] – *i.e.*, a series of synonyms for "all."

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[48]*Los Angeles County Bd. of Supervisors v. Superior Court, supra,* 39 Cal.5th at 293.

[49]Hypothetically, there could be the following ambiguity: "times at which" could mean either (1) the broader meaning of "time" that includes the years and dates at which elections are held and the hours during which the polls are open or (2) the narrower meaning of time that it only means the time of day that the polls open and close. We're not aware of anyone who has even contended that the plenary authority of charter cities over the timing of elections means only the time of day that polls open and close.

[50]56 Ops. Cal. Atty. Gen. 289 (1973) p. 10, *citing* Black's Law Dictionary (4th ed. p. 1313).

The alternative synonyms identified by the Attorney General's earlier opinion do not lend themselves to qualification, so there are no plenary-er, plenary-est, or plenary-less words in the English language, let alone in Art. XI, §5b(4). Insofar as we can determine, the case law has never identified any ambiguity – neither patent nor latent – in the word "plenary", nor has any advocate in an election case even suggested there is such an ambiguity. Thus, because no ambiguity in the term "plenary" can be found, there would be no need to analyze further in order to arrive at the correct interpretation that Art. XI, §5b(4) gives *all authority* to charter cities to determine the time at which their local elections are held, subject only to the restrictions in their charters and to other constitutional provisions.

C. Contextual language analysis – the gradations of authority from (1) the apex of §5b(4)'s "plenary authority" to (2) the other "core categories" in §5b that do not have express restriction to (3) §5a's inherently dichotomous restriction of "municipal affairs" vs other matters.

Assuming *arguendo* that analysis beyond the plain meaning of "plenary authority" is warranted, contextual analysis – *i.e.*, analyzing the "text in its relevant context, as text so read tends to be the clearest, most cogent indicator of a specific provision's purpose in the larger statutory scheme ... taking account of any related provisions and the overall structure..."[51] – leads to the same conclusion that charter cities have *all* authority to determine the time of their local elections. Contextually, California Constitution Article XI contains a distribution of home rule powers to charter cities that puts sub-section 5b(4) at the apex of authority as reflected by three dimensions – (1) the degree of authority described, (2) the specificity of the subject matter, and (3) its grammatical independence.

(I) From "plenary authority" to dichotomized authority:

On the route backwards from the apex of authority in §b(4) to §a of Art. XI, (1) the matters specified in §5b(4) are expressly described as "plenary," (2) the authority to provide for the "core categories" in sub-sections 5b(1-3) are not modified by any adjective, and (3) the general authority given in §5a is mediated by the dichotomy between home rule "municipal affairs" vs. "other matters" that are subjects for State legislation.

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[51] *Los Angeles County Bd. of Supervisors v. Superior Court, supra*, 39 Cal.5th at 293.

"Plenary" is only used in California Constitution Art. XI in §5b(4) to modify charter cities' authority to determine the "manner," "method," "time," "terms" "election or appointment" or "removal" of city officers;[52] it is used nowhere else in Art. XI. The word "plenary" is not an adjective modifying the authority granted in subsections §5b(1-3) concerning the local police department, subgovernment, and "conduct of city elections." The word "plenary" does not appear in Art. XI, §5a, concerning "municipal affairs." The presence of the adjective "plenary" before "authority" and its absence from all other home rule authority in Art. XI is a fact that cannot be ignored in constitutional interpretation.[53] The presence in sub-section 5b(4) of the word "plenary" means that charter cities have *all* authority over the subject matter of §5b(4). The absence of the word "plenary" throughout the rest of Art. XI means that charter cities do not have *all* authority over the remaining subject matter.

The Supreme Court has referred to the four sub-sections set out in §b of Art. XI as "core categories" for local governments.[54] While not designated as "plenary," charter cities' authority over the §b(1-3) of Art. XI – local police departments, local subgovernment, and conduct of elections – do not contain any adjective modifying authority granted. In contrast, the more general authority over "municipal affairs" in Art. XI, §a, requires a determination of whether a matter is a solely "municipal affair" concerning which charter cities can legislate inconsistently with general State law or whether it is a matter of "statewide concern" for which conflicting charter provisions are preempted by inconsistent general State law. The "municipal affair"/"statewide concern" dichotomy is an interpretation method for "judicial mediation of jurisdictional disputes between charter cities and the Legislature, one that facially discloses a focus on extramunicipal concerns."[55] The Art. XI, §5a, "municipal affairs" powers thus inherently are not "plenary" powers like §5b powers because a "municipal affair" can also be a matter of "statewide concern," in which case the "municipal affair" is trumped by the "statewide concern." No such restrictions are suggest for Art. XI, §5B.

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[52]Art. XI, §5b(4) also grants plenary authority to charter cities over the hiring, firing, and compensating their employees.

[53]*Dyna-Med, Inc. v. Fair Employment & Housing Commission* (1987) 43 Cal 3d 1379, 1386-1387.

[54]*Johnson v. Bradley, supra,* 4 Cal 4th at 398.

[55]*Johnson v. Bradley. supra,* 4 Cal. 4th at 399.

(ii) Generality vs. specificity:

Along the same route backwards from §b(4) to §a, Art. XI goes from (1) the most specific designation of aspects of cities' officer elections and employee appointments in §5b(4) (including "the time in which" local election are held) to (2) the other relatively specific subjects in §5b(1-3) of local police, local subgovernment, and local conduct of city elections, (3) to the generality of §5a's "municipal affairs." In construing language, more specific language presumptively prevails over more general language.[56] The greatest specificity of the "plenary authority" in §5b(4) thus supports that it gives a greater grant of authority than other less specific topics within Art. XI.

(iii) Grammatical dependence vs. grammatical independence:

Sub-section §5b(4)'s apex of authority and most-specific position is also unusually distinct in the grammatical structure of Art. XI. Despite its complexity of complex and compound sentences and dependent and independent clauses, all of Art. XI syntactically flows from its beginning through §a and then through §b(1-3) with correct grammatical structure. But the correct grammatical structure jarringly ends at §b(4); §b(4) is a syntactic orphan that does not fit within the grammatical structure of Art. XI. Instead of adhering to the nouns describing municipal functions that are dependent on the prefatory language in §b to indicate what cities' can provide for in their charter, §5b(4) is a anomalous complete sentence that is inconsistent with the grammatical structure of §5b. Unlike all other descriptions of home rule authority in Art. XI, §5b(4) alone is blessed with an independent sentence which affirmatively states that charter cities are "are hereby granted plenary authority" over the subjects contained therein. §b(4)'s grammatical independence is a structural exclamation point on the uniqueness of its authorization of powers. Like its "plenary authority" substance, §b(4) grammatically stands alone.

While individual cases often select one or more of the foregoing interpretations, we have not found a case that systematically analyzes all of the language of California Constitution Article XI to articulate for local election matters a comprehensive interpretation. But the caselaw can be harmonized by recognizing that there are four degrees of scrutiny applied to challenges to the home rule rights of charter cities, three of which parallel the progression from low

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[56]"Particular expressions qualify those which are general." California Civil Code §3534.

authority to plenary authority in the text of Article XI's progression from §a to §b to §b(4) and the fourth of which arise from higher authority outside the text of Article XI:

(1) Art. XI, §5a: High scrutiny of home rule rights. Cases which analyze charter cities home rule rights strictly under Art. XI, §5a, balance home rule rights against statewide concerns, and thereby give low deference and high scrutiny to home rule rights if there are "statewide concerns." This level of judicial scrutiny in election cases is either applied to cases that do not fit squarely within the language of Article XI's §5b or to cases which may fit within Article XI's §5b(3)'s "conduct of elections" or §5b(4)'s plenary authority but in which the court uses this level of scrutiny as an act of judicial deference in arriving at a holding that supports the home rule rights because of the absence of a concrete "statewide concern."

(2) Art. XI, §5b(1-3): Intermediate scrutiny of home rule rights. This level of judicial scrutiny give more deference to home rule rights than the prior level because they are within a §5b "core category;" however, not as much deference is given to home rule rights as is given to the matters subject to §5b(4)'s plenary authority.

(3) Art. XI, §5b(4): No scrutiny of home rule rights except for constitutional challenges. The plenary authority matters set out in §5b(4), including the "time at which" local elections are held, are given the lowest level of judicial scrutiny and the highest deference; successful challenges are solely based on a level (4) constitutional challenge.

(4) Challenge based on a constitutional provision outside Art. XI: Highest scrutiny of home rule rights. Consistently with the specification in every city charter that charter authority must be consistent with the California Constitution and the general principal that constitutional provision prevail over any legislative enactment, whether State or local, the strictest judicial scrutiny – *i.e.*, no deference – is applied to charter city home rule provisions that conflict with other constitutional provisions such as equal protection or the right to vote.

AG Opinion #16-603 engages in no semantic analysis concerning the meaning of "plenary authority;" rather, it ignores the prior precedent of the attorney general by it Orwellian *de facto* equating "plenary authority" with "non-plenary authority." As noted *supra*, AG Opinion #16-603 does not even acknowledge the separate language throughout Article XI that qualifies the

different levels of home rule authority. AG Opinion #16-603 does not discuss the contextual structure of Article XI, and fails to acknowledge or discuss any varying degrees of home rule authority or the type of judicial review involved with each.

§7. Cases interpreting California Constitution Art. XI, §5b

A. Cases interpreting the "Plenary Authority" language of §5b(4).

The "plenary authority" language added by the 1914 Amendment and currently contained in California Constitution Art. XI, §5b(4) has been interpreted in a series of decisions relating to elections – *Elkus, Rand,*[57] *Rutledge,*[58] *Mackey,*[59] and *Rees.*[60] Several recent cases – *Johnson*[61] and *Cawdrey*[62] – have acknowledged the reference to "plenary authority" in §5b(4) but then made a deliberate decision to avoid interpreting its applicability to ambiguous election issues and instead have decided cases under §5a on the basis of whether they are solely "municipal affairs." We do not in this section analyze the 2014 *Jauregui*[63] case's flawed analysis of "plenary"; rather, it is separately analyzed in §9, *infra.*

I. Pre-Johnson §5b(4) cases.

The first appellate case referring to the "plenary" language added to the California Constitution in 1914 was the Court of Appeal decision in *Elkus* which struck down the charter city Sacramento's "Hare system" form of proportional representation[64] because it conflicted with the California Constitution's

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[57] *Rand v. Collins* (1931), 214 Cal. 168.

[58] *Rutledge v. Dominguez* (1932) 122 Cal. App. 680.

[59] *Mackey v. Thiel* (1968) 262 Cal. App. 2nd 362.

[60] *Rees v. Layton* (1970) 6 Cal. App. 3d 815.

[61] *Johnson v. Bradley* (1992) 4 Cal. 4th 389.

[62] *Cawdrey v. City of Redondo Beach* (1993) 15 Cal App. 4th 1212

[63] *Jauregui v. City of Palmdale* (2014) 226 Cal. App. 4th 781.

[64] In the Hare system as applied to Sacramento, nine at large candidates were on the ballot but each voter's ballot counted towards only one of the nine seats, so that voters were denied the right to vote for the other eight seats. *People ex rel. Devine v. Elkus, supra,* 59 Cal. App. at 397-398.

requirement that every qualified elector "shall be entitled to vote at all elections."[65] *Elkus* quoted the language concerning "plenary authority" and stated that the issue would be determined by its construction of the language "manner in which" and "method by which" city officer are elected. Citing out-of-state authority and the arguments concerning the 1914 Amendment which added the "plenary" authority to the Constitution, *Elkus* took a restrictive view of the language of current §5b(4) in holding that the language did not support that it authorized an interpretation that allowed taking away the right of voters to vote for all candidates.

Elkus' analytical approach to the language contained in current Art. XI, §5b(4), was *sub silentio* overruled in the 1931 *Rand* decision, the first case in which the Supreme Court interpreted the language. *Rand* involved a conflict between the provisions of other sections of the California Constitution and general State law that required election of certain officers – auditor, coroner, and clerk[66] – while the San Francisco charter provision provided that they be appointed. The Supreme Court held that the language gave San Francisco the right to appoint such officers who would otherwise have to be elected:

> ...[T]he language of section 8 ½,[67] which grants plenary power to provide in a charter "the manner in which, the method by which, the times at which, and the terms for which the several county and municipal officers shall be elected or appointed amounts to a grant of power to consolidated cities and counties to determine in their charters, as San Francisco has done, how their officers shall be chosen."[68]

Rand read the language that is now in Art. XI, §5b(4) expansively by treating it as granting to charter cities an option to appoint or elect municipal officers. *Rand* noted the more restrictive reading of the language in *Elkus*; while not expressly overruling *Elkus*, the Supreme Court indicated *Elkus* was neither controlling nor

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[65]California Constitution, Art. II, §1.

[66]*Rand v. Collins, supra* 214 Cal. at 169.

[67]California Constitution Art.XI, §8 ½, containing the same language as current California Constitution Art.XI, §5b(4).

[68]*Rand v. Collins, supra,* 214 Cal. at 172.

persuasive on the issue before it.[69]

The 1932 *Rutledge* Court of Appeal decision held that Los Angeles' charter provision allowing the incumbent subject to a recall petition to be on the ballot for reelection prevails over State general law that the incumbent cannot be on the ballot for reelection. The holding was primarily based on ground that the constitutional provisions concerning recalls only applied to the elections of State officials.[70] But a secondary ground was the "plenary authority" of the charter city to elect, appoint, remove, or recall officers, with the Court of Appeal stating that charters give cities "the authority to provide for the manner and method of electing as well as recalling and removing its officers."[71]

The 1968 Court of Appeal decision in *Mackey*[72] held that Los Angeles' detailed charter provisions for local initiatives or referenda were not preempted by conflicting State general law). The Supreme Court in *Johnson* cited *Mackey* with approval in rejecting a party's argument for a narrow interpretation of charter cities' "plenary authority" over the "manner in which" local elections are held that would limit "manner" to election procedures.[73].

In 1970, a Court of Appeal in *Rees*[74] cited the Art. XI, §5b(4) "plenary

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[69]*Id.* at 175.

[70]*Rutledge v. Dominguez, supra,* 122 Cal. App. 680 at 684.

[71]*Id.* at 687.

[72]*Mackey v. Thiel* (1968) 262 Cal. App. 2nd 362, 366.

[73]"This holding [*Mackey*'s] suggests that the constitutional provision granting charter cities "plenary authority" over the "manner" of electing municipal officers has a broader scope than envisioned by petitioners. We conclude petitioners offer no persuasive justification to question the reasoning or result in *Mackey*, and we are reluctant to endorse the narrow scope of the word "manner" advocated by petitioners." *Johnson v. Bradley. supra,* 4 Cal. 4th at 403.

[74]*Rees v. Layton* (1970) 6 Cal. App. 3d 815, 820-822. After holding that the charter provisions were not preempted by general State law, *Rees* invalidated the charter provision on the ground that it was unconstitutional under the U.S. Constitution equal protection clause and the California State Constitution prohibition

authority" of charter cities over the "manner in which" its municipal officers were elected in holding that the Los Angeles charter provision that no candidate except an incumbent could have any designation other than his name on the ballot prevailed over conflicting general State law on the subject.[75]

AG Opinion #16-603 ignores every one of the foregoing opinions interpreting "plenary authority."

ii. *Johnson* and *Cawdrey*.

In 1991, the California Supreme Court in *CalFed*[76] addressed the issue of what is a "matter of statewide concern" that trumps charter city provisions regulating "municipal affairs" under California Constitution, Art. XI, §5a. *CalFed* was not a local election case that implicated the "plenary" power of Art. XI, §5b(4), nor the "core category" of §5b(3) but rather a case concerning local taxation that was decided on the least rigorous constitutional standards of §5a. As noted *supra,* §6, the general term "municipal affairs" of Art. XI, §5a, is not stated in the Constitution as "plenary" home rule rights in §5b(4) nor "core categories" of municipal home rule rights in §5b generally. Rather, the text of Art. XI, §5a, contains the dichotomy between "municipal affairs" and "all other matters" concerning which general State law applies. The case law on Art. XI, §5a, is a long history of struggling over what is a solely "municipal affairs." *CalFed* determined that "the question of statewide concern is the bedrock inquiry through which the conflict between state and local interests is adjusted."[77] For matters that are not "municipal affairs" but rather matters of statewide concern, *CalFed* set out a standard that "the hinge of the decision is the identification of a *convincing basis* for legislative action originating in extramural concerns."[78]

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against special privileges or immunities. *Id.* at 822-823.

[75]Respectively, U.S. Constitution, Amend. 14, and California Constitution, Art. 21.

[76]*California Federal Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal. 3rd 1 (holding that State general law regulating financial institutions precluded charter cities from imposing local income taxes on savings banks).

[77]*Id.* at 16.

[78]*Id.* at 18.

In 1992, the Supreme Court in *Johnson* returned to a State vs. charter city conflict. *Johnson* involved the City of Los Angeles' charter's election procedures providing public funding of municipal elections[79] that conflicted with a California Constitution restriction against public funding enacted through a statewide initiative. The parties vigorously argued over the "plenary authority" language of §5b(4), with Los Angeles contending that its "plenary authority" over the "manner" of local elections embraced the power to provide for public funding while the opponents of public funding contended that the City's "plenary authority" was only over the procedures of local elections but not substantive regulation. While rejecting the petitioners' limiting interpretation of "plenary authority,"[80] *Johnson* punted rather than decide whether Los Angeles' liberal position on the scope of "plenary authority" over the "manner" of holding local elections was correct, stating that it would not decide whether the issue of public funding of local elections fell within charter cities' plenary powers to control the "manner" of local elections under California Constitution, Art. XI, §5b:

> We are hesitant, however, to embrace the expansive view of article XI, section 5, subdivision (b)(4), advanced by respondents and their amici curiae. They assert, with some force, that partial public financing of municipal election campaigns is "one way to elect municipal officials," although it is "certainly . . . not the only 'manner' in which to do so." They reason that under the plain words of article XI, section 5, subdivision (b)(4), partial public funding of local campaigns, being a "manner" of municipal elections, is a subject within the city's plenary regulatory authority that falls within the core definition of a "municipal affair" under that constitutional provision. Although we believe charter section 313 clearly "implicates" a municipal affair we need not, and do not, determine whether charter section 313 is by definition a "core" municipal affair under article XI, section 5, subdivision (b)(4), because we conclude that in any event, the charter section is enforceable as a municipal affair under article

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[79]Petitioners opposed to Los Angeles's charter-based public funding of elections argued that a successful statewide initiative prohibiting public funding concerning which they had been sponsors established a matter of statewide concern which preempted the Los Angeles Charter's provision for public funding of local elections. *Johnson v. Bradley, supra,* 4 Cal. 4th at 392-394.

[80]*Id.* at 403; this holding is quoted in fn. 78, *supra*, in the discussion of *Mackey v. Thiel* (1968) 262 Cal. App. 2nd 362, because *Johnson* expressly approves of *Mackey.*

XI, section 5, subdivision (a)...[81]

Johnson thus expressly stated that Los Angeles' more expansive contention was asserted "with some force" in contradistinction to rejecting the petitioners' narrow construction of "plenary authority." *Johnson* deliberately avoided deciding whether §5b(4)'s ambiguous term "manner" of conducting local elections included publicly financing them by instead deciding the case under the less rigorous §5a analysis that used *CalFed's* balancing of State vs. local interests.

Implicit in *Johnson's* election to avoid deciding the case under §5b(4) and to instead decide it under the less demanding scrutiny of §5a's balancing analysis was the Supreme Court's recognition that a ruling under §5b(4)'s "plenary authority" was an all-or-nothing decision could have broad ramifications for issues beyond public financing of elections. *Johnson* expressly rejected the petitioner's narrow construction of the term "manner" as procedural; it avoided the decision to further disambiguate "manner" with a liberal construction that would open the floodgates to much greater charter city control by turning instead to §5a's balancing local interests against statewide concerns. *Johnson* was thus an exercise in judicial restraint that limited the reach of its decision by holding that Los Angeles' public financing of elections was permissible because, under its §5a analysis, the integrity of local election processes against corrupting influences – meaning transparency through campaign financial disclosure – was a matter of statewide concern that trumped the "municipal affairs" interests under §5a but the prohibition against public financing did not serve that interest. *Johnson* did not have to proceed with the more rigorous scrutiny required for a §5b(4) "plenary authority" issue because the petitioners' case did not even survive the less rigorous scrutiny required under §5a.

Johnson thus is not authority that a conflict between a §5b(4) "plenary authority" issue such as the timing of local elections and a general State law can be resolved *against* a charter city by conducting the less rigorous balancing scrutiny applicable to a §5a "municipal affair" case. At most, it is a message to judges to resolve cases *in favor* of charter cities under the less rigorous §5a standards if that will avoid deciding the case *for* a charter city under the more demanding standards for "core functions" under §5b or the even more demanding standards for the "plenary authority of §5b(4). On the contrary,

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[81] *Johnson v. Bradley. supra,* 4 Cal. 4th at 403-404 (citations and footnotes omitted).

Johnson implies that a decision against a charter city on a §5b(4) on an unambiguous "plenary authority" matter must survive the most strict scrutiny standard required for §5b(4) matters.

In 1993, the post-*Johnson* Court of Appeal decision in *Cawdrey*[82] upheld the charter city Redondo Beach's charter term limits restrictions against an attack contending term limits were prohibited for all cities by general State law. *Cawdrey* expressly recognized that Art. XI, §5b, set out "core categories"[83] of municipal affairs, referred to the "plenary authority" language of §5b(4),[84] and quoted the text of §5b(4).[85] From start to finish, *Cawdrey* followed *Johnson* in upholding the charter city's §5b(4) "terms for which" local officials are elected by a strictly §5a mode of analysis. Citing *Johnson*, *Cawdrey* stated:

> ...[H]ere, as in *Johnson*, we need not determine the exact scope of the power granted charter cities by subdivision (b) of article XI, section 5, as we determine charter section 26 is enforceable as a municipal affair under subdivision (a) of article XI, section 5.[86]

Cawdrey determined that the petitioners attacking Redondo Beach's term limits did not meet the required *Johnson* standard that a *statewide concern* requires evidence of a "convincing" state interest rooted outside local interests rather than just an "abstract State interest"[87] Rather, *Cawdrey* determined there was no statewide concern because "term limits for City officials have to do solely with local concerns, and the electors of the City who are familiar with local conditions are best able to determine the desirability of such a charter provision."[88]

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[82]*Cawdrey v. City of Redondo Beach* (1993) 15 Cal App. 4th 1212

[83]*Id.* at 1221.

[84]*Id.*

[85]*Id.*, fn. 4.

[86]*Id.* at 1227.

[87]*Johnson v. Bradley. supra,* 4 Cal. 4th a 405.

[88]*Cawdrey v. City of Redondo Beach,* 15 Cal App. 4th at 1220.

Johnson is the most recent California Supreme Court case addressing charter cities' "plenary authority" under California Constitution Art. XI, §5b(4); *Johnson* is also the most extensive discussion of Article XI by the Supreme Court in all of its substantial number of home rule election cases. AG Opinion #16-603 thrice cites *Johnson* for other matters but does not address nor analyze *Johnson*'s detailed discussion avoiding deciding whether courts could restrict §b "core categories" of §b(4) "plenary authority." Rather, AG Opinion #16-603 relies upon a non-election Supreme Court case – *Vista* – [89] as the basis for its analysis.

B. *Trader Sports* – a post-*Johnson* Art. XI, §b, holding.

Johnson identified Art. XI, §b rights as "core categories" of home rule rights but, as discussed *supra*, upheld Los Angeles' public financing of local elections solely upon its §a higher-level scrutiny of the subject. *Trader Sports*[90] more directly dealt with the §5b(3) core category of the charter city's "conduct of elections." *Trader Sport's* held that a State statute purporting to regulate the number of votes required to put a local tax measure on the ballot was *per se* a violation of California Constitution, Art. XI, §b(3):

> When a charter city's enactment falls within one of these core areas, it supersedes any conflicting state statute. Our Constitution is most explicit. The "conduct of city elections" is one of the few specifically enumerated core areas of autonomy for home rule cities. A statute purporting to define the number of votes required for putting a local tax measure on the ballot contravenes this explicit constitution grant of authority to charter cities, such as San Leandro, over the conduct of its municipal elections.[91]

In what is either *dicta* or an alternative holding, *Trader Sports* proceeded to analyze the issue under §5a, determining that it is an issue of local rather than statewide concern, stating:

> After all, who else can best determine the proper balance between the

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[89] *State Bldg. And Const. Trades Council of Cal., AFL-CIO v. City of Vista* (2012) 54 Cal. 4th 547. *See* AG Opinion #16-603, p. 3, and fns. 12-15.

[90] *Trader Sports v. City of San Leandro* (2001) 93 Cal. App. 4th 37.

[91] *Id.* at 46-47 (citations and footnote omitted).

> powers delegated to the elected representatives of San Leandro to propose a local tax measure, and the powers reserved to the residents of San Leandro to enact such a tax measure? Certainly, it is the people of San Leandro, whore are familiar with local conditions, who are best able to regulate such matters by means of charter provisions and municipal codes.[92]

We do not conduct an Art. XI, §a analysis in this Opinion because we submit that, for a specifically-named §b(4) function such as the timing of local elections – or even an analysis under §b(3)'s "conduct of elections" –, a §a balancing analysis is not required. But, assuming *arguendo* that it were required, *Trader Sports*' foregoing statement can be paraphrased to explain why there is no statewide concern – *i.e.*, Who else can best determine the proper timing of local elections? Certainly, it is the people of Pasadena who are best able to regulate such matters by means of charter provisions and municipal codes.

Trader Sports is important because it is the only post-*Johnson* case to ever discuss the level of judicial review and deference required for the "core categories" of California Constitution Art. XI, §b, and its level of judicial review is inconsistent with the level implied in AG Opinion #16-603. AG Opinion #16-603 neither cites nor acknowledges *Trader Sports*.

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[92] *Id.* at 47. *Trader Sports* also anchored its *dicta* or alternative holding on the conflicting general State law not being narrowly tailored to any arguable statewide concern. *Id.* at 47-48.

§8. Limiting charter cities' constitutional right of plenary control over local elections by other constitutional restrictions.

It is an unremarkable proposition that a conflict between a charter city's home rule provisions concerning municipal elections and constitutional provisions is a different matter than mere conflicts general State law. It is basic constitutional law that constitutional provisions are superior to legislative enactments. Moreover, as noted *supra*, fn. 9, the charter of every California charter city appears to have a provision like Pasadena's that requires the charter to be consistent with the restrictions of the California Constitution.[93]

Beginning with the earliest California Supreme Court cases on home rule on election matters, California courts have recognized that, while charters could be inconsistent with general State legislation, it was a different matter if they were inconsistent with the Constitution. *Pfahler* noted that home rule for charter cities are permissible "so far as the same are consistent with the constitution of the state."[94] But no case came to the California Supreme Court that presented an arguable conflict between a charter provision on elections and a constitutional provisions until 1915 when the Supreme Court decided *Hopping*.[95] *Hopping* involved a charter city – Richmond – whose Council refused to place on the ballot an otherwise-properly-qualified referendum on a bond it had passed on the ground that it was a resolution which concerned an administrative act that was not subject to the electorate's referendum rights. The petitioners successfully contended that it was an ordinance concerning a legislative act that was subject to

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[93] *See also, Brown v. Boyd* (1939) 33 Cal. App. 2nd 416, 422 (California Constitution, Art.IV, referendum right became a part of San Francisco's charter by its Charter language that its powers are "consistent with and subject to" the Constitution).

While the authors have not investigated the matter further, they assume that the Legislature has required language acknowledging that charters have to be subordinate to the California Constitution to be included when it has approved city charters.

[94] *In Re Pfahler, supra*, 150 Cal. at 82 (non-election issue decided; reference is to language in current Art. I, §5a). The statement was *dicta* because there was no conflicting constitutional provision which was the basis of the challenge to the rule in the City of Los Angeles' Charter.

[95] *Hopping v. Council of City of Richmond* (1915) 170 Cal. 605.

the electorate's referendum rights. The charter provision on which Richmond's Council relied was described by the Supreme Court as "poorly drafted" because it referred at various points to ordinances, resolutions, and/or both. The Court held that even though the Council labeled its bond action a resolution, its label was irrelevant because it was in fact a legislative action that was subject to the electorate's referendum rights. Relying upon California Constitution provisions which (1) reserved to the electorate the right to exercise legislative power through referenda[96] and (2) prohibited legislative power being used improperly,[97] the Supreme Court deemed the Richmond Charter provisions referring to resolutions irrelevant and granted the petition to require the Richmond Council to submit its bond action to the voters by a referendum.

Six years after *Hopping, Elkus*[98] struck down the charter city Sacramento's "Hare system" manner of proportional representation because it conflicted with the California Constitution's requirement that every qualified elector "shall be entitled to vote at all elections."[99] In the Hare system as applied to Sacramento, nine candidates were elected at-large but each voter's ballot counted for only one seat.[100] The Court of Appeal found that the California Constitution's guarantee of the right to vote in all elections means a right to vote for "every office to be filled and on every proposition to be voted on." conflicted with the Sacramento proportional representation scheme and therefore trumped Sacramento's constitutional home rule powers[101] *Elkus'* discussion of the constitutional ground involved was succinct, as it simply said: "No one would contend that a law would be valid which deprived a qualified elector of the right to vote at an election."

Subsequent California cases recognize that charter provisions or their implementation may be "municipal matters" that ordinarily be a matter of home rule but hold that the impermissible when they conflict with other constitutional

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[96]California Constitution, Art. IV, §1.

[97]California Constitution, Art. III.

[98]*People ex rel. Devine v. Elkus* (1922) 59 Cal. App. 396.

[99]California Constitution, Art. II, §1.

[100]*People ex rel. Devine v. Elkus, supra,* 59 Cal. App. at 397-398.

[101]*People ex rel. Devine v. Elkus, supra,* 59 Cal. App. at 407.

provisions. In 1939, *Brown*[102] held that a Sacramento Charter provision that would defeat the Constitution's reservation of referendum powers to the people was constitutionally impermissible. The Supreme Court in *dicta* in its 1960 *Crestview Cemetary* acknowledged that Hayward's Charter's home rule procedures would unconstitutionally violate California Constitution, Art. IV, §1's referendum guarantee if they prevented an effective local referendum procedure.[103] In 1970, *Rees*[104] struck down a City of Los Angeles Charter provision that no candidate except an incumbent could have any designation other than his name on the ballot as a violation of the U.S. Constitution equal protections clause and the California State Constitution prohibition against special privileges or immunities.[105]

AG Opinion #16-603 fails to conduct any analysis recognizing the difference between cases which rely upon California Constitution provisions outside Article XI to restrict home rule charter rights, even those over which charter cities are given "plenary authority."

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[102]*Brown v. Boyd, supra*, 33 Cal. App. 2nd at 420-422.

[103]*Crestview Cemetery Ass'n v Dieden* (1960) 54 Cal. 2nd 744, 756.

[104]*Rees v. Layton* (1970) 6 Cal. App. 3d 815, 822-823. Prior to ruling on the constitutional ground, *Rees* held that a conflicting State general law provision did not preempt Los Angeles' Charter provision because of charter city's constitutional home rule rights. *Id.* at 820-823.

[105]Respectively, U.S. Constitution, Amend. 14, and California Constitution, Art. 21.

§9. *Jauregui* – the right decision with erroneous dicta

The 2014 *Jauregui*[106] decision is the most recent example of a local election "manner" or "method" for local elections within Art. XI, §5b(4)'s "plenary authority" that was properly struck down when its specific application collided with different and more important State Constitution mandates. *Jauregui* correctly found the charter city Palmdale's at-large election method invalid, but it reached its holding by a faulty analysis. Because the Attorney General's Opinion #16-603 relies so heavily on *Jauregui,*[107] an extended analysis of it is warranted.

Jauregui held that Palmdale could not exercise its plenary power over the local election *manner* of electing council members at-large rather than by district because the at-large manner in its charter as applied in Palmdale's council elections[108] resulted in the racially discriminatory dilution of minority voter[109] and thereby violated the California Voter Rights Act ("CVRA"). As *Jauregui* noted, the CVRA is a procedural statute which was enacted to implement two California Constitutional guarantees:[110] the equal protection clause in California Constitution Art. I, §7,[111] and the California Constitution Art. II, §2,voting guarantees.[112] clauses in the California Constitution.[113]

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[106]*Jauregui v. City of Palmdale* (2014) 226 Cal. App. 4th 781.

[107]Nineteen of AG Opinion #16-603' eighty-seven footnotes – 22% – cite to *Jauregui.*

[108]California Elections Code §§14050-14057.

[109]*Jauregui v. City of Palmdale, supra,* 226 Cal. App. 4th at 793-808.

[110]*Id.* at 793.

[111]"A person may not be deprived of life, liberty, or property without due process of law or *denied equal protection of the laws...*") (emphasis added). California Constitution Art. I, §7a

[112]"A United States citizen 18 years of age and resident in this state may vote." California Constitution Art. II, §2.

[113]*Jauregui v. City of Palmdale, supra,* 226 Cal. App. 4th at 793. California Constitution Art. 1, §7a and California Constitution Art. II, §2.

Jauregui's holding was that both the CVRA[114] and the State Constitution were violated by discriminatory dilution of the voting strength of minority voters. *Jauregui* is thus unremarkable in following the long line of cases, beginning with the Supreme Court's 1906 *Pfahler* decision which indicate that matters that are otherwise within home rule authority cannot be inconsistent with other guarantees in the California Constitution.

Where *Jauregui* went wrong was in its *dicta* in §VB3[115] – *dicta* relied upon by the Attorney General in Opinion 16-603. Palmdale asserted that its Art. XI, §6b(4), plenary authority trumped the CVRA. *Jauregui* could have simply referred to the *Pfahler*-to-*Rees* line of cases discussed in §8, *supra*, referred to its determination that the CVRA implemented two California Constitutions provision which prohibited election manners that diluted the votes of racial minorities, noted that Palmdale's Charter required consistency with the California Constitution,[116] and indicated that the plenary authority had to be exercised constitutionally – which it had not been exercised constitutionally in Palmdale because its at-large election system unconstitutionally diluted minority voting in violation of two guarantees in the California Constitution. Instead, *Jauregui* addressed Palmdale's plenary authority argument by misapplying Johnson's §5a analytical approach to a matter over which Palmdale was given plenary authority and *de facto* determined that plenary does not mean plenary.

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[114]As noted in the next section concerning the Supreme Court's decision in *Johnson v. Bradley* (1992) 4 Cal. 4th 389, while *Juaregui's* result is correct, the Court may have applied the wrong methodology and misinterpreted *Johnson's* reference to the plenary power in California Constitution, Article XI, §5b.

[115]*Jauregui v. City of Palmdale, supra*, 226 Cal. App. 4th at 802-804.

[116]*See* City of Palmdale Charter, Art. 1, §100, indicating that its City power and authority must be lawfully exercised pursuant to the California Constitution. The Charter can be reached by the following link: https://www.cityofpalmdale.org/Portals/0/Documents/City%20Hall/City%20Charter.pdf.

§10. The California Voter Participation Act ("CVPRA")

The California Voter Participation Right Act, SB415, was enacted 2015 and is currently Election Code §§ 10450-10457. Its title is misleading in referring to "voter participation rights," as the CVPRA neither grants any voter participation rights nor prevents any violation of voter participation right. What the CVPRA addresses is the differential level of voter participation which arising the voluntary decisions of voters to participate or not to participate in local elections; the CVPRA is not directed at one thing that restricts the right to vote in these elections.

What the CVPRA does is force some local governments (cities, school districts, counties, special districts) to shift their local elections from local-only odd-year elections to concurrent elections with federal and state elections if the turnout level for the local-only elections is lower by 25% or more than the average voter turnout in the last 4 presidential elections. If a local government's local election-only turnout falls below that level, the local government must adopt a plan to shift its local elections to concurrent even year elections in which the State and local candidates and issues would be on the same ballot with federal and state offices by November 8, 2022.

Unlike the CVRA, the CVPRA does not implement any California Constitution guarantee. There is no constitutional requirement that Californians have to vote. The manner of electing local official through at-large elections, when coupled with racially polarized voting, creates a structural election barrier that dilutes the influence of minority voters as compared to non-minority voters – much like racial gerrymandering is a structural barrier that can be used top dilute the influence of minority voters. But the timing of elections does not create a structural barrier to any constitutional guarantee. Lower turnout in local elections does not occur because the timing of local elections disadvantages the right of anyone to vote and have her vote count equally with others who vote; less interest in local elections resulting in more voters making the voluntary choice not to participate causes low voter turnout rather than structural barriers impinging on their votes and/or their vote's relative value as is the case with at-large elections and racial gerrymandering. Thus, while the CVPRA's objective of encouraging higher voter turnout through timing elections to get more voters voluntarily participation in local elections may be a legitimate goal for the legislature for general-law cities, the CVPRA does not implement constitutional equal protection or voter right guarantees that would trump plenary powers as the CVPRA does.

§11. Conclusion

AG Opinion #16-603 opines that the CVPRA overrides Pasadena's "plenary authority" to determine the time at which it holds its local elections. It does so by systematically misanalyzing the issue at every level. A critical flaw in AG Opinion #16-603's is its failure to analyze the decisive role of other State constitutional guarantees where they come into play – which results in AG Opinion #16-603 failing to meaningfully address the difference between constitutional-based challenges and non-constitutional challenges to home rule rights and its making a false equivalency between between the California Voter Rights ("CVRA") implementation of constitutional guarantees and the CVPRA's non-constitutional basis. A second critical flaw in AG Opinion #16-603 is that it fails to meaningfully address the meaning of "plenary authority" as "all authority" that was set out it its own precedent.

But the misanalyses at the heart of AG Opinion #16-603's are not limited to those critical failures. AG Opinion #16-603's missteps begin with its failure to meaningfully address the specific constitutional guarantees that are the basis of charter city home rule rights over local elections. Its faulty analysis continues by failing to address the long-standing case law supporting charter city home rule rights over local elections and instead cherry-picking (and mischaracterizing) a few recent cases. AG Opinion #16-603 not only fails to meaningfully analyze the critical "plenary authority" language of Art. XI, §5b(4), but it also fails to analyze §5b(4)'s context within the structure of Article XI, which result in its not recognizing the differing degrees of authority and judicial scrutiny arising from the structure of Article XI. AG Opinion #16-603 fails to even acknowledge the holding concerning §b(4) in *Johnson* – the most recent Supreme Court opinion on charter city home rule election rights; while citing *Johnson's* progeny *Cawdrey*, AG Opinion #16-603 ignores that it followed Johnson with a judicial review that was deferential to home rule election rights. AG Opinion #16-603 fails to address *Trader Sports'* holding despite its being the recent case that is most inconsistent with AG Opinion #16-603's analysis.

From start to finish, AG Opinion #16-603 reflects a fatally-flawed analysis. Our opinion is that California courts will reject its conclusion that the CVPRA trumps Pasadena's charter provisions which set "the time at which" local elections are held and will instead recognize Pasadena's and PUSD's State Constitution "plenary authority" to determine local election timing.