



The California Voting Rights Act: Recent Legislation & Litigation Outcomes

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You are sitting at your office on a Thursday afternoon, and the city manager sends you an email letting you know that the city received a demand letter about a voting rights issue. You review the demand letter and realize that it is a letter from a prospective plaintiff's attorney alleging that the city's election system is in violation of the California Voting Rights Act ("CVRA") and threatening litigation if the city does not voluntarily change its elections system. What do you do?

At least 88 cities have made the change to by-district elections and two more, the City of Goleta and the City of Carpinteria, agreed to make the change for 2022. Other cities, such as the City of San Clemente have decided to put the matter on the 2018 ballot for voters' approval. Approximately eighteen other cities are in some form of legal dispute but have not yet decided to make the change to by-district elections. For context, only 28 cities employed by-district elections prior to passage of the CVRA. Cities are not the only public entities susceptible to a CVRA challenge. Thirty two community college districts, over 165 school districts, and at least 12 other special districts have made the change to by-district elections.

This paper provides an overview of the CVRA and recent developments in both legislation and litigation surrounding the CVRA. It summarizes the options cities have in responding to CVRA demand letters, the process cities are required to go through in order to change their election system, and issues that have arisen in the process of jurisdictions transitioning from at-large to district-based elections. This paper focuses on the process for changing to district-based elections for general law at-large cities; the process may be slightly different for charter cities depending on whether they have to amend their charter to change their election system.

I. Introduction

The CVRA, Elections Code Sections 14025-14032, was enacted to implement the California constitutional guarantees of equal protection and the right to vote.¹ The CVRA provides a private right of action to members of a protected class where, because of "dilution or the abridgment of the rights of voters," an at-large election system "impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election."² The CVRA defines a "protected class" broadly as a class of voters who are members of a race, color, or language minority group.³

To establish a violation under the CVRA, a plaintiff must show that "racially polarized voting" occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters.⁴ Racially polarized voting means voting in which there is a difference in the choices of candidates or other electoral choices that

¹ Elec. Code § 14031.

² Elec. Code §§ 14027, 14032.

³ Elec. Code § 14026(d).

⁴ Elec. Code § 14028(a).

are preferred by voters in a protected class and the choices of the voters in the rest of the electorate.⁵ The occurrence of racially polarized voting is determined by examining (1) results of elections, with more weight given to elections in which at least one candidate is a member of a protected class, or (2) elections involving ballot measures or other electoral choices that affect the rights of the members of the protected class.⁶

While modeled after the federal Voting Rights Act of 1965 (“FVRA”), the CVRA lowers the threshold required to establish a voting rights violation. For example, unlike the FVRA, a protected class does not have to be geographically compact or concentrated to allege a violation of CVRA.⁷ Moreover, proof of intent on the part of the voters or elected officials to discriminate against a protected class is not required.⁸ The CVRA also eliminates the “totality of circumstances” test set forth in the FVRA, precluding introduction of other evidence as to why preferred candidates of the protected class lost elections. The deletion of the totality of circumstances factors makes CVRA litigation purely a statistical exercise.

Because of that lower threshold of proof, no jurisdiction has prevailed in a CVRA action as of the time this paper was written. Lacking an example of a successful defense, and because of the enormous financial cost involved in defending against – much less losing – such claims, and the majority of jurisdictions that receive a demand letter change to by-district elections without analyzing their election system to determine whether there is, in fact, racially polarized voting. The short time frame jurisdictions have in order to implement district-based elections under Elections Code Section 10010 also pushes jurisdictions toward by-district elections.

II. Recent Legislation

a. Ability to Transition to District-Based Elections by Ordinance

Before January 1, 2017, Government Code Section 34886 allowed cities with populations less than 100,000 to transition to district-based elections by ordinance. Cities with populations greater than 100,000 were required to place the issue on the ballot for voters to approve the transition. The population cutoff created an issue for larger cities that received demand letters to change their election system. For example, the City of Rancho Cucamonga received a letter on December 23, 2015 alleging that the city’s election system was in violation of the CVRA and urging the city to voluntarily change its at-large system of electing council members or face litigation. Because Rancho Cucamonga’s population was greater than 100,000, the city had to place the measure on the ballot for voters’ approval. After the city began analyzing its election system, but before it was able to place the issue on the November 2016 ballot, a CVRA action was filed against the city on March 10, 2016. After the voters approved the transition to district-based elections, the plaintiffs refused to dismiss the action alleging that the election system adopted by the city was flawed.

Recent legislative amendments to Government Code Section 34886 allow a city, regardless of population, to adopt an ordinance establishing district-based elections without

⁵ Elec. Code § 14026(e).

⁶ Elec. Code § 14028(b).

⁷ Elec. Code § 14028(c).

⁸ Elec. Code § 14028(d).

being required to submit the ordinance to the voters for approval. The elimination of the population cutoff in Section 34886 helps large cities avoid the scenario that occurred in Rancho Cucamonga by giving them the ability to adopt district-based elections by ordinance. Still some jurisdictions contemplate placing the issue on the ballot for voters' approval after they receive a letter alleging that the city's at-large election system violates the CVRA. If that is the case, the city should work with the potential plaintiff to reach a settlement to that effect. If a city decides to place the measure on the ballot, there is a risk that the voters will turn it down, leaving the city to choose between facing litigation or acting contrary to the voters' decision.

b. Amendments to Elections Code 10010 - "Safe-Harbor Provision"

Following efforts to provide some protection to jurisdictions from the costs involved in CVRA-related litigation, the California Legislature amended Section 10010 of the Elections Code to include a "Safe-Harbor" provision that would give jurisdictions the opportunity to change their election system once they receive a demand letter, while capping the amount of attorney's fees and costs that are recoverable by a prospective plaintiff(s).

Effective January 1, 2017, Elections Code Section 10010 requires a prospective plaintiff to send a written notice to the clerk of the city asserting that the city's method of conducting elections may violate the CVRA.⁹ Section 10010 puts a 45-day stay on a prospective plaintiff's ability to bring an action allowing the city to adopt a resolution outlining its intention to transition from at-large to district-based elections.¹⁰ If the city begins the process of switching to districts before receiving a notice letter or within 45 days of receipt of a notice and adopts a resolution to that effect, under Section 10010, a potential plaintiff cannot commence an action within 90 days of the resolution's passage.¹¹

After adopting the resolution of intention, the city is required to hold two public hearings over a period of no more than 30 days before drawing draft maps.¹² During those hearings, the public is invited to provide input regarding the composition of the districts.¹³ After the city's demographer draws the draft maps, the city must publish at least one draft map and, if members of the governing body of the city will be elected in their districts at different times to provide for staggered terms of office, the potential sequence of the elections.¹⁴ The city then holds at least two additional hearings over a period of no more than 45 days, at which the public is invited to provide input regarding the content of the draft maps and the proposed sequence of elections.¹⁵ The city has to publish the draft maps and sequencing at least seven days before those hearings.¹⁶

In short, a jurisdiction receiving a CVRA demand letter has 45 days to declare their intent to change their election system and then 90 days after that declaration to adopt the change.¹⁷ If

⁹ Elec. Code § 10010(e)(1).

¹⁰ Elec. Code § 10010(e)(2)-(3).

¹¹ Elec. Code § 10010(e)(3)(B).

¹² Elec. Code § 10010(a)(1).

¹³ *Id.*

¹⁴ Elec. Code § 10010(a)(2).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Elec. Code § 10010(e)(3)(A)-(B).

the city misses either of those deadlines, it could find itself in court and facing attorney fee demands well into the six or even seven figures.

Elections Code 10010 also offers some protection to jurisdictions in terms of exposure to a prospective plaintiff's attorneys' fees. If the jurisdiction meets the deadlines outlined above, the prospective plaintiff who sent the demand letter may only recover up to \$30,000 in attorneys' fees and costs from the city.¹⁸ The prospective plaintiff has to make the demand for reimbursement of costs with 30 days of the ordinance's adoption.¹⁹ If more than one prospective plaintiff requests a reimbursement of attorneys' fees and costs, the city shall reimburse the prospective plaintiffs in the order in which they sent the demand letter, but the cumulative amount of reimbursement to all prospective plaintiffs is capped at \$30,000.

c. Application of the Safe Harbor Provision

Back to your city: the first step after receiving the demand letter is to calculate 45 days from the date of the city's receipt. The date the letter is received is crucial because the city has 45 days of receipt of the letter to determine whether to change its elections system. If the city adopts a resolution by that date outlining its intention to transition from at-large to district-based elections, the prospective plaintiff is precluded from commencing an action under the CVRA for 90 days during which time the city goes through the process set forth above for transitioning to districts.

Second, you should place the matter on the next closed session agenda to inform the council of receipt of the demand letter and get direction regarding how they would like to proceed. Because of the 45-day deadline, you have limited opportunity to place the matter on closed session. Due to the complexity of the CVRA and related legislation, the city council may need more than one closed session to discuss the matter. You may also hold special closed sessions to discuss the matter, if necessary.

Third, because the council will most likely want to assess the accuracy of the allegations in the demand letter and the potential exposure, the jurisdiction's legal counsel should engage a demographer once you have received the demand letter. The demographer is instrumental in two aspects. First, if the city council decides to conduct a racially polarized voting analysis prior to determining whether to transition to district-based elections, the demographer conducts the analysis and presents it to the city council. Second, if the city council decides to initiate the process of transitioning to district-based elections, the demographer creates the district maps for the city council's consideration. In engaging the demographer, the city should consider retaining him or her through its city attorney in order to protect their work product to the extent possible.

Fourth, you should retrieve the election results for the city's most recent elections. Often times the demand letter contains allegations that are not entirely accurate because a prospective plaintiff's attorney is not familiar with the city's election history. For example, with some cities, prospective plaintiffs cited the absence of minorities on the city council as evidence of racially polarized voting. Because a prospective plaintiff relied on surnames to determine whether

¹⁸ Elec. Code § 10010(f)(3).

¹⁹ Elec. Code § 10010(f)(1).

minority candidates were elected to city council, plaintiff's allegations failed to account for minority candidates who do not necessarily have minority surnames, such as a minority candidate who changed his or her last name after marriage. Reviewing the city's election history to fact-check the allegations in the demand letter helps the city council make an informed decision.

d. District-Drawing Process

If the city council decides to proceed with the transition to district-based elections after analyzing the issue, the city council should adopt a resolution setting forth its intention to change its election system. Subsequently, the city must hold at least four public hearings before holding a hearing at which to vote on the ordinance establishing district-based elections. Two of the public hearings must be held before drawing the draft map(s). During those two public hearings, the city council would receive public input regarding the composition of the districts. Usually, these public hearings are held during regularly scheduled city council meetings; however, the city can also schedule them during special meetings. While Elections Code Section 10010 does not set forth the notice requirement for the first two public hearings, it is prudent for the city to apply the same notice requirement in Section 10010 for the second two public hearings which requires that any draft maps be published at least seven days before the hearing at which they would be considered. The city council cannot start the map drafting process without first holding those two public hearings. The first two hearings can be noticed in a single published hearing notice.

The focus of the first two hearings is on answering resident questions about the process and identifying the neighborhoods and communities of interest that should be used as the 'building blocks' to develop the draft district maps. Issues such as whether a community wants to be united in one district or included in multiple districts are often debated at this time. Most residential neighborhoods tend to lean toward being united in one district, while downtown business districts, port or industrial areas, and large active living senior communities typically lean toward having multiple representatives.

After the first two public hearings are held, the demographer drafts at least one draft map, but often times multiple maps are drawn. Interested residents may also submit maps, either using their own means or using tools provided by the demographer. Section 10010 requires that the first version of a draft map be published at least seven days before consideration at a hearing. If a draft map is revised at or following a hearing, it must be published and made available to the public for at least seven days before being adopted. After holding the four public hearings, the city council can then vote to approve or defeat the ordinance establishing district-based elections.

There are various ways residents can be encouraged and empowered to propose draft maps (in addition to the map(s) drafted by the City's official demographer). Depending on the level of public interest, the Council may have only the demographer's maps to consider, or as many as 20 or 40 resident-drawn proposals. Experienced demographers can provide tools to empower residents to draw maps as well as assistance guiding the city council through reviewing the pool of maps and arriving at a final selection.

The seven-day draft map publication provisions of Section 10010(a)(2) complicate the consideration of draft maps. The public is not barred from proposing new maps at each hearing, but the city council is barred from “considering” any new map that was not published at least seven days in advance. Section III. *a.*, *infra*, discusses the publication requirement set forth in Section 10010.

The timeline set forth in Elections Code 10010 does not leave much room for cities to conduct very robust community outreach programs regarding the city’s transition to district-based elections. While not required under Elections Code Section 10010, cities should still make the effort to hold community meetings and forums to get feedback from the public and answer questions regarding the process. Extensive outreach and notification about the transition to district-based elections will reduce the voters’ surprise and possible objections when the first by-district election is held.

e. Application of Process to Charter Cities

A charter city would need to review its charter to determine whether a charter amendment is necessary to change the city’s election system and whether the proposed charter amendment would be placed on the ballot. If the jurisdiction is a charter city, there is a preliminary question of whether the public hearing requirements of Elections Code 10010 would apply. On the one hand, Section 10010 specifically states that “[a] political subdivision that changes from an at-large method of election to a district-based election . . . shall do all of the following before a public hearing at which the governing body of the political subdivision votes to approve or defeat **an ordinance** establishing district based elections . . .” (Emphasis added). On its face, Section 10010 applies only when a city changes its election system by ordinance. At the same time, the CVRA explicitly provides that it applies to charter cities,²⁰ and Section 10010 specifically references the CVRA and incorporates some of the CVRA’s provisions.²¹

In placing a charter amendment on the ballot, a charter city needs to determine whether to apply the requirements set forth in Elections Code Section 10010. While there are no binding court decisions on the issue, it is prudent for a charter city to follow the process set forth in Elections Code Section 10010 to avoid potential challenges to its process. The city also needs to determine whether to hold the public hearings before or after it places the charter amendment on the ballot. On the one hand, there is an argument that the public hearings must be held before a charter amendment is placed on the ballot, because if the proposed amendment passes, that establishes district-based elections for the city council. On the other hand, because Section 10010 states specifically that it applies to an ordinance establishing district-based elections, there is an argument that a charter amendment is not an ordinance that is subject to the requirements set forth in that section.

A charter city should review its municipal laws to determine the process set forth therein for changing its election system and potential issues that may arise in attempting to comply with the requirements of Elections Code Section 10010.

²⁰ Elec. Code § 14026(c).

²¹ See Elec. Code § 10010(b), (d).

III. Notable Issues

There are a number of unresolved issues surrounding both the CVRA and the process of transitioning to district-based elections. While this paper does not attempt to discuss all the issues, it highlights a few topics that are important to keep in mind.

a. Notice and Publication

Section 10010(a)(2) requires that maps be “published at least seven days before consideration at a hearing,” but it does not define “publish” or specify how the maps are to be “published.” The Black’s Law Dictionary definition for “publish” is “to distribute copies (of a work) to the public.” Other provisions of the Elections Code requiring publication of materials specify that they be published in newspapers of general circulation with the alternative being posting the material conspicuously in three public places in the city.²²

While some cities have been able to publish their maps in newspapers of general circulation, smaller cities that have a local newspaper are often restricted by the newspaper’s timelines since they are published once a week. And cities that successfully encouraged public participation in the drafting of maps have ended up with more than twenty draft maps, making publishing all of them in a newspaper prohibitively expensive. Many cities have resorted to publishing notices of the public hearings in newspapers and listing a number of locations throughout the city where the maps will be available. If the City has a website that it maintains, it can also post the maps on its website and include that link in the notice.

Another issue to keep in mind is the federal Voting Rights Act requirement that election material be translated in various languages depending on the county where the election is held. For example, in Orange County, election material must be translated into at least four languages: Spanish, Chinese, Korean, and Vietnamese.²³ While the notices and other materials concerning a city’s transition to district-based elections does not relate to a specific election, the city should consider translating the materials concerning the public hearings in languages that are prevalent in that city.

b. At-Large Mayor Position Under California Law

There is a question of whether a by-district election system with an at-large mayor qualifies as an at-large election system that is vulnerable to a CVRA challenge. Only at-large election systems are susceptible to a CVRA challenge.²⁴ However, the CVRA’s definition of an at-large method of election is somewhat broad and misleading. Under the CVRA, an “at-large method of election” encompasses not only a system in which the voters of the entire jurisdiction elect the members of city council, but it also encompasses from-district election systems (election systems in which the candidates are required to reside in districts but are elected by the

²² See, e.g., Elec. Code §§ 9205, 12110-12111.

²³ <https://www.ocvote.com/voting/translatedelectionmaterials/>, last visited: April 11, 2018.

²⁴ Elec. Code § 14027.

voters of the entire city) and combination systems.²⁵ A combination system is an elections system that “combines at-large elections with district-based elections.”²⁶

The combination system can include a system in which a primary election may be conducted “by-district”, but the general election is conducted “from” those same districts, e.g., the top two vote winners in the primary in each district run for election “at-large” in the general election. A combination system may also be an election system in which some seats are elected at large and some are elected by-district. For example, a jurisdiction that has a seven-member city council with three members elected at-large and four members elected by-district is a combination system. Based on the plain language of the CVRA, however, a plaintiff can claim that a by-district election system with an at-large mayor qualifies as a “combination system.”

While the issue of whether a by-district election system with an at-large mayor qualifies as an at-large system has arisen in previous CVRA cases, there are no binding, appellate decisions on the issue. In previous CVRA cases, plaintiffs have made the argument that the election of even one member of a city council at-large, regardless of his or her title, makes the election system at-large and subject to challenge under the CVRA. For example, in the action involving the City of Rancho Cucamonga, the city placed the question of whether it should change its election system from at-large to a district-based system with an at-large mayor. Even after the ballot measure passed, plaintiffs refused to dismiss the case, arguing in part, that the city’s new election system remains an at-large system that violates the CVRA.²⁷ The parties in that case reached a settlement; therefore, the question was not decided by a court. Notably, the settlement agreement in the Rancho Cucamonga case kept the at-large mayor position intact.

In the case of *Jauregui v. City of Palmdale*, the trial court found that the mayor of Palmdale is a separately elected office and noted that Government Code Section 34900 expressly authorizes that form of government.²⁸ The court noted that while the mayor is a voting member of the council, he or she has additional duties, powers, and obligations. Therefore, the court found that the mayor in that case was a separately elected office, and the elimination of this office was not an appropriate remedy to address the CVRA violation.

Other provisions of California law provide support for the view that a by-district election system with an at-large mayor is a district-based election system, not an at-large system that is vulnerable to a CVRA challenge. The Government Code specifically allows for an at-large mayor position on the city council. Effective January 1, 2017, Government Code Section 34886 provides that the council “of a city may adopt an ordinance that requires the members of the legislative body to be elected by district or by district with an elective mayor, as described in subdivisions (a) and (c) of Section 34871, without being required to submit the ordinance to the voters for approval.”

²⁵ Elec. Code § 14026(a).

²⁶ Elec. Code § 14026(a)(3).

²⁷ *Southwest Voter Registration Education Project v. City of Rancho Cucamonga*, San Bernardino Superior Court Case No. CIVDS 1603632.

²⁸ *Jauregui v. City of Palmdale*, Los Angeles Superior Court Case No. BC483039, Final Statement of Decision dated December 23, 2013.

Subdivisions (a) and (c) of Government Code Section 34871 in turn provide:

[T]he legislative body may submit to the registered voters an ordinance providing for the election of members of the legislative body in any of the following ways:

(a) By districts in five, seven, or nine districts . . . [¶]

(c) By districts in four, six, or eight districts, with an elective mayor

Section 34886 states that “[a]n ordinance adopted pursuant to this section shall include a declaration that the change in the method of electing members of the legislative body is being made in furtherance of the purposes of the California Voting Rights Act of 2001.” (Emphasis Added). Section 34886 provides support for the position that a by-district system with an at-large mayor is not susceptible to CVRA violation because that Section specifically allows the adoption of that election system “in furtherance of the purposes” of the CVRA. Nonetheless, the broad definition of at-large election systems in the CVRA can provide the basis for a prospective plaintiff to challenge a jurisdiction’s adoption of an at-large mayor position.

The risk of such a challenge is higher if creating an at-large mayor seat would potentially dilute the voting power of a protected class.²⁹ A jurisdiction’s decision to establish an at-large mayor seat would involve it adding a district it otherwise wouldn’t have or eliminating a district that it would otherwise have. Depending on the jurisdiction’s demographics and concentration of members of protected classes, dividing the city into more or less districts can affect the voting power of the city’s protected class(es). If changing the number of districts decreases the voting power of a protected class in the city, that would bolster a prospective plaintiff’s argument that the city’s decision to create an at-large mayor position violates the CVRA.

c. District Elections Ordinance and the Power to Petition for Referendum

Article 2, Section 9(a) of the California Constitution provides that “[t]he referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the state.” Based on the plain language of that provision, districting or reapportionment ordinances do not fall under any of these exceptions because they are not a statute calling elections; rather, the ordinances set forth the system of election and the conduct of the elections in the future. In dicta, the court in *Assembly of State of Cal. v. Deukmejian*, 30 Cal.3d 638, 654 (1982) noted that “[w]hile it is obvious that a reapportionment statute relates to elections, it is equally clear that such statutes do not call elections.” That case concerned a writ of mandate challenging the placement on the ballot of referenda challenging the state’s reapportionment statutes, and the Assembly, State Senate, and Congressional redistricting maps were successfully referended in 1982. In *Vandermost v. Bowen*, 53 Cal.4th 421, 437 (2012), the court noted that “if a referendum that is directed at a newly adopted redistricting map qualifies

²⁹ The CVRA defines a “protected class” as “a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.)” Elec. Code § 14026(d).

for the ballot, triggering a stay of the new redistricting map pending the electorate’s vote on the referendum, this court has the responsibility of determining which voting district map should be used for the upcoming interim electoral cycle.” (Internal citations omitted). In *Ortiz v. Board of Supervisors*, 107 Cal.App.3d 866, 872 (1980), the court stated that “[c]hanges in supervisorial district boundaries is a legislative function and thus subject to the referendum.” (Internal citations omitted).

Even though these cases discuss reapportionment or redistricting plans, the same general principles would apply to ordinances establishing district elections because they do not fall under any of the exceptions set forth in Article 2, Section 9(a) of the Constitution, and districting ordinances are similar to reapportionment statutes in that while they relate to elections, they do not “call elections.” Therefore, an ordinance establishing district-based elections would ordinarily be effective 30 days after adoption.³⁰

In the past, perspective plaintiffs have made the argument that a local ballot measure cannot contravene state law (such as the CVRA) or policy, nor can a local ballot measure contravene the state's delegation of power to a local governing body. That argument also relies on the fact that California law was amended effective Jan. 1, 2017 to delegate the power to adopt district elections to city councils. However, there is nothing in the Elections Code that prevents a city from deciding to place the issue on the ballot for its voters, despite having the authority to change its election system by ordinance. Charter cities whose charters specify at-large elections must decide whether CVRA overrides the Charter or if a public vote on a charter amendment is necessary.

Making the ordinance effective thirty days after adoption creates an opportunity for referendum. If a petition for referendum is filed, however, and the matter has to be placed on the ballot, the city may face legal action by a prospective plaintiff claiming that the city’s election system violates the CVRA. There seems to be a gray area in the law and a need to balance between the power to petition for referendum and the need to apply state law.

IV. Litigation Update

a. Southwest Voter Registration Education Project v. City of Rancho Cucamonga

On December 23, 2015, the City of Rancho Cucamonga received a demand letter alleging violation of the CVRA. After receiving the letter, the city began analyzing the issue. On March 10, 2016, plaintiff Southwest Voter Registration Education Project³¹ filed an action against the city alleging that the city’s at-large election system violated the CVRA.³² On May 4, 2016, the City Council adopted a resolution submitting the question of district elections to the voters at the regular municipal election on November 8, 2016. The city’s electorate approved the measure at the November 2016 election.

³⁰ Gov. Code § 36937.

³¹ The plaintiff subsequently amended its complaint to add an individual plaintiff to the action.

³² *Southwest Voter Registration Education Project, et al. v. City of Rancho Cucamonga*, San Bernardino Superior Court Case No. CIVDS1603632.

Nonetheless, the plaintiffs pressed forward with the action on the ground that the adopted by-district election system with an at-large mayor was an at-large election system that was subject to the CVRA. The plaintiffs also challenged the map that the city's voters approved as part of the measure.

In November of 2017, the parties settled the action, and the only remaining issue to be decided in arbitration is plaintiffs' recovery of attorneys' fees from the city. The settlement agreement kept in place the election system approved by the voters during the November 2016 election. Pursuant to the settlement agreement, the parties shall work on adjusting the district map following the 2020 federal census.

b. Pico Neighborhood Association, et al. v. City of Santa Monica

On April 12, 2016, plaintiffs Pico Neighborhood Association, Maria Loya, and Advocates for Malibu Public Schools filed an action against the City of Santa Monica alleging, among other things that the city's election system violates the CVRA.³³ As of the date of drafting this paper, the case is set for trial on July 30, 2018.

On March 29, 2018, the City of Santa Monica filed a motion for summary judgment, or in the alternative, summary adjudication, on the ground that expert demographic analysis proves that no constitutionally or statutorily permissible remedy could enhance the Latino voting strength in the city. The city argues, therefore, that plaintiffs cannot meet their burden of demonstrating that an electoral scheme other than the city's current system would enhance Latino voting power. Based on the city's pleadings, the city's Latino population constitutes roughly 13 % of the city's citizen voting age population, and not a single voting precinct is majority-Latino. Therefore, the city argues, a district-based election system would dilute, not enhance, Latino voting strength. The city contends that a proof of racially polarized voting alone is not sufficient to establish a violation of the CVRA; rather, the plaintiff must show that the at-large election system has diluted the minority group's vote.

Alternatively, the city argues that the remedy plaintiff seeks—establishment of district-based elections—is not a constitutional remedy because any court order implementing district-based elections would separate voters on the basis of race. Such a remedy, the city argues, has to be narrowly tailored to accomplish a compelling state interest. The city argues that any district that attempts to group the city's Latino population in one district would be highly irregular in share that it would constitute racial gerrymandering.

The city is also seeking summary judgment on plaintiffs' claim for violation of the Equal Protection Clause on the ground that plaintiffs cannot draw a connection between the city's at-large system of election and any impact on Latino voting power in the city.

The city's motion is currently set for hearing on June 14, 2018.

³³ *Pico Neighborhood Association, et al. v. City of Santa Monica*, Los Angeles Superior Court Case No. BC616804.

c. Higginson v. Xavier Becerra, et al.

On October 4, 2017, plaintiff Don Higginson, a former mayor of the City of Poway, filed a federal action challenging the constitutionality of the CVRA.³⁴ The action was filed against Attorney General Xavier Becerra and the City of Poway after the City adopted district-based elections in response to a demand letter. The plaintiff alleged a cause of action under 42 U.S.C. §§ 1983 and 1988 for violation of his rights under the Fourteenth Amendment and alleged that the CVRA and the city's adopted map violated the equal protection clause. The plaintiff sought an order declaring that the CVRA and the district map adopted by the city were unconstitutional and enjoining their enforcement and use.

Subsequently, on October 19, 2017, the plaintiff filed a motion for a preliminary injunction to temporarily enjoin the Attorney General from enforcing the CVRA and the city from using the district-map for elections during pendency of the action. The city took a neutral position in the litigation. On November 22, 2017, the Attorney General filed a motion to dismiss the claim asserting that the plaintiff lacked standing to bring the action and that he failed to state a claim upon which relief can be granted.

The court granted the Attorney General's motion to dismiss on the ground that the plaintiff lacked standing to bring the action, and there was no subject matter jurisdiction. The court found that: (1) plaintiff has failed to plead facts to demonstrate that his injury is "fairly traceable" to requirements imposed on the City by the CVRA; (2) the complaint did not allege any existing or threatened enforcement action under the CVRA by the Attorney General or other state agency which motivated the city's switch to by-district elections; and (3) plaintiff did not allege facts supporting an inference that the decision to adopt by-district elections was motivated by an effort to address racially-polarized voting in the City's at-large elections or an effort to address a CVRA violation because the City stated during the process that this was a business decision to avoid litigation. The court also dismissed the case as to the City for the same reasons.

Based on the court's decision with respect to the motion to dismiss, the court denied the preliminary injunction motion, noting that it cannot conclude that plaintiff has demonstrated a likelihood of success on the merits in light of the determination that the complaint failed to allege sufficient facts to establish subject matter jurisdiction.

On April 6, 2018, the plaintiff filed a notice of appeal in the Ninth Circuit.³⁵

V. Conclusion

While the constitutionality of the CVRA is currently being challenged in both federal and state courts, cities and other jurisdictions with an at-large election system remain susceptible to

³⁴ *Higginson v. Xavier Becerra, et al.*, United States District Court for the Southern District of California, Case No. 3:17-CV-02032-WQH-JLB.

³⁵ *Higginson v. Becerra, et al.*, 9th Cir. Case No. 18-55455.

receiving a CVRA demand letter. Elections Code Section 10010 provides a safe harbor for cities and other jurisdictions that decide to abide by its timeline and transition to district-based elections once they receive a demand letter. The process for charter cities may vary depending on the charter provisions that govern elections and charter amendments as well as the application of Section 10010 in light of the cities' municipal laws.