Agenda Item D.1
DISCUSSION/ACTION ITEM
Meeting Date: March 7, 2017

TO: Mayor and Councilmembers

FROM: Winnie Cai, Acting City Attorney

SUBJECT: California Voting Rights Act – District v. At-Large Elections

RECOMMENDATION:

Accept and consider input from the public on the demand made upon the City to shift from at-large elections to district elections, and provide direction to staff.

BACKGROUND

The Current Method of Voting for City Council in Goleta

When the ballot measure for City incorporation went to the electorate in 2001, the City's voters elected the first City Council by an at-large method of voting for City Council members. The at-large method allows all voters in the City to vote for candidates to fill the number of available positions regardless of where the candidates live in the City. In that election, the voters expressed a desire to consider a district-based voting system.

In 2004, Goleta voters considered whether to switch from an at-large voting method to a district-based voting scheme, in which the City would be divided into five districts and council candidates would be required to reside within the district that they sought to represent. Three measures were placed on the ballot. Two of the measures proposed two variations of district-based elections: one in which voters would be able to vote only for candidates from within the district in which they live (Measure R), and a second in which voters would be able to vote for candidates from all districts (Measure S). The third measure was to retain the at-large voting method (Measure T). Both district election measures failed and the electorate voted to retain the at-large method of voting by approval of Measure T.

In 2016, the voters passed a measure to create a directly elected mayor, commencing with the Council election in 2018. The directly-elected mayor will be voted for at-large.

The Notice of Violation Under the California Voting Rights Act ("CVRA")

On February 6, 2017, the City received a Notice of Violation of California Voting Rights Act (the "Notice") from residents Lindsey Rojas and Hector Mendez (Attachment 1). The Notice, sent pursuant to Elections Code § 10010 (e)(1)), asserts that Goleta elections are characterized by racially polarized voting and demands that the City commence the process to transition to district based elections. The Notice further states that if the City declines to do so, the authors and others may commence a lawsuit to compel district based elections.

The Notice was accompanied by a report prepared by the California Voting Rights Project dated February 2017 and entitled "Racially Polarized Voting and Abridgement of Latino Voting Rights in in the City of Goleta" (Attachment 2). The report asserts that the at-large voting method in Goleta disenfranchises Latino members of the community by impairing their ability to elect candidates of their choice or to influence the outcome of elections. The report contends that the reason for this disenfranchisement is the existence of a phenomenon known as "racially polarized voting," which is defined to mean that a larger ethnic group of voters in the community are statistically proven to prefer candidates who consistently defeat the preferred candidates of voters in a protected class. The report examines the history of elections in Goleta since 2001 and concludes that these elections are characterized by racial polarization to the detriment of the Latino community in Goleta.

If a plaintiff prevails in a California Voting Rights Act lawsuit, it is entitled to recovery of its attorney fees.

The City's Procedural Obligations under State Law

Before commencing an action alleging a violation of the CVRA, a prospective plaintiff must send by certified mail a written notice to the City Clerk asserting that the City's method of conducting an election violates the CVRA. (Elections Code § 10010 (e)(1).) The Notice attached as Attachment 1 satisfies that requirement.

Upon receipt of this Notice, the City has 45 days within which to pass a resolution outlining its intention to transition from at-large to district-based elections, the specific steps it will take to facilitate this transition, and an estimated time frame. (Elections Code § 10010 (e)(3)(A).) If the City passes this resolution within the 45-day timeframe, the prospective plaintiff is prohibited from commencing an action for violation of the CVRA within 90 days of the resolution's passage. (Elections Code § 10010 (e)(3)(B).) If the City Council fails or chooses not to enact the resolution within the 45-day period, then prospective plaintiffs may commence a CVRA enforcement action.

If the City Council passes a resolution evincing its intent to transition to district-based elections, before drafting a map or maps of the proposed boundaries of the districts, the City must hold at least two public hearings over a period of no more than 30 days to allow the public to provide input regarding the composition of the districts. (Elections Code § 10010 (a)(1).)

After draft maps are drawn, the City shall make available to the public the draft maps and hold at least two additional hearings over a period of no more than 45 days to receive input from the public. The first version of the draft map must be published at least 7 days before a public hearing. ((Elections Code § 10010 (e)(2))

If the City adopts an ordinance pursuant to the above procedures prior to the filing of a lawsuit, prospective plaintiffs can demand reimbursement from the City for the cost of the work product generated to support the notice of violation (City can request additional documentation to corroborate claimed costs). (Elections Code § 10010 (f)(1).) These costs are capped at $30,000. ((Elections Code § 10010 (f)(3).)

In total, should it choose to do so and in order to avoid a lawsuit, the City only has 135 days to effectuate the change from at-large to district-based elections (45 days to pass the resolution of intention, then 90 days from passage of the resolution to pass the ordinance). The City must additionally hold a minimum of 5 public hearings to discuss the district maps—two meetings to receive input on composing the district maps, two more to receive input on draft maps, and a final hearing prior to the vote on the ordinance.

DISCUSSION:

The Purpose of this Meeting

The City Council wants to solicit the views of its constituents before deciding how to proceed in this matter. The Council has made no decision whether to start the process of transitioning to a district-based election or whether to resist the demand made in the Notice. The purpose of this meeting is to provide Goleta residents an opportunity to comment on the two options available to the Council.

The Evidence of Racially Polarized Voting in Goleta

Goleta has a population of 29,888; 33% of the total population and 29% of eligible voters are Latino. The Latino population is concentrated in Old Town, but is also found in numbers in the central-western part of the City. Three Latino candidates have run as candidates between 2001 and 2016 in five separate elections; the Latino candidate was elected in three of those elections: Aceves (2006); Aceves (2010) and Aceves (2014, when all candidates were appointed due to cancellation of election for lack of candidates). One Latino, Tony Vallejo, was appointed to the Council in 2015 but lost reelection in 2016 by a small margin. At least one Latino has continuously served on the Council since 2006.

The test for determining racially polarized voting is as follows:

1. Do Latinos (or other “protected class” voters) vote cohesively for particular candidates?
2. Do non-Latinos vote as a bloc for different candidates?
3. Do the Latino-preferred candidates lose to candidates preferred by non-Latino voters?

4. Is an election system other than by-district (or division) elections used?

The existence of racially polarized voting is not an exact science. Evidence of racially polarized voting is derived by examining the results of elections, but statistical analysis of election results is not always entirely clear or easy to interpret. Additionally, every city's demographics and voting patterns are unique; any one city's experience is not necessarily of relevance to the experience of others.

The report accompanying the Notice entitled "Racially Polarized Voting and Abridgement of Latino Voting Rights in in the City of Goleta" included as Attachment 2 examines the results (within Goleta) of eleven citywide and countywide elections involving the election of both candidates and ballot measures The report observes that in these elections the voting pattern in Old Town varies from the voting preferences expressed in the other (non-Latino majority) voting precincts, and thus concludes that Latino voters in Goleta tend to vote as a bloc and tend to vote differently than non-Latino voters.

The evidence of Latino disenfranchisement is not strong. The conclusion reached in the report is not uniformly supported by the evidence presented. For example, the successful Latino candidate – Roger Aceves – received broad support from non-Latino voters in all precincts when he ran in 2006 and 2010 and received the highest number of votes in the 2010 election. Non-Latino candidates Wallis (2004) and Perotte (2010) received strong support from the precincts in Old Town. Hence, election results arguably demonstrate that Goleta voters, Latino or non-Latino, do not routinely vote as a bloc based on racial or ethnic preferences.

Because the community has voted to institute a directly elected mayor form of government, a district-based election system would involve dividing the City into four districts to account for the four remaining Council seats. Under the rulings of the United States Supreme Court, to be constitutional, districts must be comprised of essentially equal numbers of residents and may not be drawn with race as the "predominate" factor. Given those rules and the city's current demographics, it is not possible to draw a district where Latinos are a majority of eligible or registered voters. Consequently, instituting a district-based voting scheme could have the unintended result of diminishing the existing level of Latino participation in Goleta governance.

The Pros and Cons of District-Based Voting Versus At-Large Voting

Advocates of district-based voting argue that officials elected by districts are more responsive to the constituents in the district. Also, as is being asserted by the Notice at issue here, advocates argue that district-based voting makes it easier for members of protected classes to elect candidates of their choice. Additionally, some argue that non-incumbents fare better in district-based elections. District elections are more popular in large cities with very distinct neighborhoods that have different needs or concerns.

Advocates of at-large elections argue that governance is improved when elected officials answer to the entire community and not the narrower interests of their district. They further contend that officials elected by districts tend to have too much influence over

decisions affecting their district. Some argue that districts are unnecessary in small cities, where it is relatively easy and inexpensive to reach out to the entire electorate, such as by door-to-door campaigning.

Conclusion

The method by which City Councilmembers are elected in Goleta plays a significant role in the governance of the community. The enfranchisement and participation of all members of the community is an important value and legal requirement. An allegation has been made that Latino constituents of the community are disenfranchised; this is an allegation that must be taken seriously and given due consideration.

The evidence of Latino disenfranchisement is not strong. Further, if the City chose to proceed with district-based elections, it would not be possible to create a constitutionally supportable Latino majority district. Consequently, instituting a district-based voting scheme could have the unintended result of diminishing the existing level of Latino participation in Goleta governance. Other factors, unrelated to racial issues, may affect the desirability or not of district-based elections.

The pace of CVRA-based claims has accelerated in recent years. Numerous cities, school districts and other public agencies have voluntarily agreed to switch to district-based elections as a result of receipt of such claims. Some have paid monetary settlements to resolve such claims in order to avoid the expense of litigation and the risk of paying an even larger award of attorney fees. Only one city – Palmdale – has as of yet litigated a CVRA case, and it lost, resulting in a hefty attorney fee award. All of that said, a number of cities have resisted switching with no adverse consequences to date because the evidence of racially polarized voting in those cities was weak. As noted above, because every city's demographics and voting patterns are unique, the actions taken by other cities are not necessarily indicative of what is suitable and legally required for Goleta.

The City Council will be considering the advice of its attorneys and expert consultants in determining a course of action, but also wants to consider the views of the electorate. Consequently, the purpose of this meeting is to solicit public comment on the issues raised by the Notice, so that the Council may consider community opinion before choosing a course of action at a subsequent meeting.

FISCAL IMPACTS:

There are no fiscal impacts to the City in receiving public input.

ALTERNATIVES:

Since the purpose of this item is to receive public input, no alternatives are recommended.

Legal Review By:

Winnie Cai
Acting City Attorney

Approved By:

Michelle Gréene
City Manager

ATTACHMENTS:

1. Notice of Violation of California Voting Rights Act
2. Racially Polarized Voting and Abridgement of Latino Voting Rights in in the City of Goleta

Attachment 1

Notice of Violation of California Voting Rights Act

February 3, 2017

Ms. Deborah Lopez, City Clerk
City of Goleta
130 Cremona Drive, Ste. B
Goleta, CA 93117

By certified mail

Re: Notice of Violation of California Voting Rights Act

Dear Ms. Lopez:

We hereby assert that the City of Goleta's method of conducting elections may violate the California Voting Rights Act.

Please see the attached report prepared by the California Voting Rights Project, "Racially Polarized Voting and Abridgment of Latino Voting Rights in the City of Goleta".

Pursuant to California law, the Goleta City Council has 45 days from receipt of this letter to adopt a resolution outlining its intention to transition from at-large to district elections, specifying specific steps it will take to facilitate this transition, and estimating the time-frame for this transition. If the Goleta City Council does not adopt a resolution to this effect within 45 days, then we and other potential plaintiffs may commence a legal action in Santa Barbara Superior Court to require the City of Goleta to institute district elections pursuant to the California Voting Rights Act.

Thank you for your consideration.

Yours sincerely,

Lindsey Rojas
5683 Gato Ave.
Goleta, CA 93117

Hector Mendez
75 Touran Lane
Goleta, CA 93117

Attachment 2

Racially Polarized Voting and Abridgement of Latino Voting Rights in in the City of Goleta

Racially Polarized Voting and Abridgment of Latino Voting Rights in the City of Goleta

California Voting Rights Project
February 2017

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Racially Polarized Voting and Abridgment of Latino Voting Rights in the City of Goleta

1. Introduction

Racially polarized voting and abridgment of Latino voting rights characterize candidate elections and other electoral choices in the City of Goleta. Since Goleta incorporated as a city, racially polarized voting and abridgment of Latino voting rights have typified elections of candidates and other electoral choices in Goleta, both within the city and of jurisdictions including the City of Goleta.

The United States Voting Rights Act and, especially, the California Voting Rights Act provide strong protections for members of protected classes to challenge at-large forms of election to government bodies in court and to replace them with district elections. Pursuant to the California Voting Rights Act: "An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class" (Sec. 14027).

The current at-large method of city council elections in the City of Goleta impairs the ability of a protected class to elect candidates of its choice and its ability to influence the outcomes of elections. Therefore, district elections must be instituted in the City of Goleta.

2. United States Voting Rights Act

Passed in 1965, the United States Voting Rights Act is landmark legislation prohibiting racial discrimination in voting. According to the federal Voting Rights Act: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color ... A violation ... is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected] class of citizens ... in that its members have less opportunity than other members of the

electorate to participate in the political process and elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered" (52 U.S. Code Sec. 10301).

Although legal actions against political subdivisions in California to require district elections have usually been brought under the California Voting Rights Act rather than the federal Voting Rights Act, the United States Voting Rights Act also provides strong protections for the voting rights of members of protected classes.

3. California Voting Rights Act

Expanding on the United States Voting Rights Act, the California Voting Rights Act was passed in 2001 in order to allow legal challenges to government jurisdictions in California with at-large elections to require them to implement district elections. (A copy of the California Voting Rights Act is attached as Appendix B.)

As previously cited, the core section of the California Voting Rights Act (CVRA) is as follows:

> 14027. An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or abridgment of the rights of voters who are members of a protected class.

The CVRA could not be more clear: At-large methods of election are **illegal** in California when they impair the ability of a protected class to elect candidates of its choice or to influence the outcome of elections. Upon a showing of racially polarized voting or abridgment of a protected class' voting rights, **at-large methods of election must be discontinued**. According to Section 14028 of the CVRA: "A violation of Section 14027 is established if it is shown 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 of the political subdivision."

The CVRA is also clear with respect to what the remedy for illegal at-large elections is: "Upon a finding of a violation ..., the court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation" (Sec. 14029). Though the CVRA may here contemplate remedies for a

violation of voting rights other than district elections, in fact, no remedy except district elections has ever been imposed by any California court for a violation of the CVRA. When, as in the City of Goleta, a political subdivision utilizes an illegal at-large method of elections, district elections must be instituted.

To date, dozens of legal actions have been brought against cities and school districts in California for violation of the California Voting Rights Act, and all have led to district elections. The imposition of district elections in place of at-large elections is sweeping California as a result of the CVRA.

The California Voting Rights Act was ruled constitutional by a California Court of Appeal in *Sanchez v. City of Modesto* in 2007. In addition: "Proof of an intent on the part of the voters or elected officials to discriminate against a protected class is not required" (Section 14028(d)) to sustain a legal action brought under the CVRA.

4. Racially Polarized Voting and Abridgment of Latino Voting Rights in the City of Goleta

Since incorporation of Goleta as a city, racially polarized voting and abridgment of Latino voting rights have characterized elections in Goleta. Pursuant to the CVRA: "'Racially polarized voting' means voting in which there is a difference ... in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate" (Sec. 14026(e)).

Establishment of racially polarized voting is shown if "racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other choices by the voters of the political subdivision" (Sec. 14028(a)). It is not necessary that only elections of candidates or of the political subdivision determine racially polarized voting: "The occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class" (Sec. 14028(b)).[1] In addition: "One circumstance that may be considered in determining a violation ... is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision" (id.).

Furthermore: "Other factors such as the history of discrimination, ... denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, ... are probative, but not necessary factors to establish a violation" (Sec. 14028(e)).

Significant examples of racially polarized voting and abridgment of Latino voting rights in the City of Goleta include:

* **2001 defeat of Reynaldo Ybarra to the Goleta City Council.** This was the first election to the Goleta City Council, in which all five seats were open. Mr. Ybarra was one of the top five candidates in several precincts, including in heavily Latino old town Goleta, but he lost because he was not preferred by voters in other precincts.

* **2001 defeat of district elections in the City of Goleta.** At the same time that incorporation of Goleta as a city and election of its first city council were on the ballot, there was a measure to determine whether elections to the Goleta City Council in the future would be by district or at-large. District elections, a ballot measure affecting the rights and privileges of members of a protected class, were preferred by voters in old town Goleta but were opposed by voters in other precincts.

* **2004 reelection of Jonny Wallis to the Goleta City Council.** In the 2004 election to the Goleta City Council (the first election following the original 2001 election), Ms. Wallis was reelected to the City Council as the second place finisher, with 29.91 percent of the vote compared to 29.31 percent for challenger Roy Zbinden. Though not herself a member of a protected class, Ms. Wallis was preferred by voters of a protected class in old town Goleta, whose votes provided the margin of her victory.

* **2006 election of Roger Aceves to the Goleta City Council.** Mr. Aceves received 16.71% of the vote, barely finishing ahead of the fourth place finisher, Cynthia Brock, who received 16.50% of the vote. However, had it not been for the votes in old town Goleta, Mr. Aceves would have finished behind Ms. Brock and not been elected.

* **2012 defeat of a parcel tax in precincts of the Santa Barbara High School District in the City of Goleta.** This proposal, Measure W, was on the June ballot in the Santa Barbara High School District, the boundaries of which include the City of Goleta. The parcel tax was for educational programs in local schools, including Goleta Valley Junior High and Dos Pueblos High School, a ballot measure affecting the rights and privileges of members of a protected class. Measure W, which required a two-thirds vote to pass, received this level of support in old town Goleta but not elsewhere in the City of Goleta, and so the measure was defeated.

* **2014 defeat of Roger Aceves for County Supervisor.** Mr. Aceves was a candidate for Santa Barbara County Supervisor in the second supervisorial district, which includes much of the City of Goleta. Though Mr. Aceves, a sitting member of the Goleta City Council, received the majority of votes in old town Goleta, he was defeated elsewhere in second supervisorial district precincts in the City of Goleta.

* **2014 defeat of a school bond in precincts of the Santa Barbara Community College District in the City of Goleta.** This proposal, Measure S, was on the November ballot in the Santa Barbara Community College District, the boundaries of which include the City of Goleta. The bond was for educational facilities in the community college district, including continuing education facilities, a ballot measure affecting the rights and privileges of members of a protected class. Measure S, which required 55% of the vote to pass, received this level of support in old town Goleta but not in other precincts in the City of Goleta.

* **2016 defeat of Tony Vallejo to the Goleta City Council.** Though Mr. Vallejo was an appointed incumbent, he was defeated for election to the City Council, finishing in third place. However, Mr. Vallejo finished first in old town Goleta.

* **Number of Latino candidates for the Goleta City Council.** Since 2001, there have been three Latino candidates for the Goleta City Council (Mr. Ybarra, Mr. Aceves, and Mr. Vallejo). There have been a total of 26 candidates for the Goleta City Council since that time. Accordingly, Latino candidates have been 11.5 percent of all candidates for the Goleta City Council since 2001.

* **Number of successful Latino candidacies for the Goleta City Council.** Since 2001, there have been 22 successful candidacies for the Goleta City Council (counting the three candidates appointed in 2014 as successful candidacies). This means that successful Latino candidacies have been 13.6 percent of all successful candidacies for the Goleta City Council since 2001 (all by Mr. Aceves). Mr. Aceves is the only Latino ever elected to the Goleta City Council. It is important to emphasize that of the three Latino candidates who have run for the Goleta City Council, two (Mr. Ybarra and Mr. Vallejo) were defeated in the city at-large, though they received enough votes to be elected from Latino areas, and the third (Mr. Aceves) was initially elected only as a result of his support from Latino areas of the City of Goleta. Pursuant to the CVRA, establishment of racially polarized voting in the City of Goleta is conclusive and district elections must be instituted.

* **Number of votes received by Latino candidates for the Goleta City Council.** Since 2001, a total of 152,859 votes have been cast for candidates for the Goleta City Council. Of this, 17,053 have been cast for Latino candidates. This means that Latino candidates have received 11.2 percent of all votes cast for the Goleta City Council since 2001. According to the 2015 United States Census Bureau survey estimate of the City of Goleta's population, the city is currently 37.5 percent Hispanic or Latino.

To be clear, severe racially polarized voting characterizes elections in the City of Goleta. In addition to the above examples of racially polarized voting and abridgment of Latino voting rights, there is ample evidence of the extent to which Latinos in Goleta also bear the effects of past discrimination in areas such as education, employment, and health. These include poverty status, percentage of the population who speak English at home, home ownership, percentage of the population who have graduated from high school or college, health insurance coverage, and average income, among others.

In the event this matter becomes the subject of litigation through a lawsuit being filed, the California Voting Rights Project believes it would be possible to provide another ten to fifteen examples of racially polarized voting and abridgment of Latino voting rights in the City of Goleta, including greater development of the above examples. It is undeniable that a) racially polarized voting and abridgment of Latino voting rights characterize elections in the City of Goleta, b) the City of Goleta's current at-large method of elections to its city council is illegal, and c) if this matter goes to court, the City of Goleta would be ordered to institute district elections.

5. Attorney's Fees

Pursuant to the CVRA: "In any action to enforce [the California Voting Rights Act] the court shall allow the prevailing plaintiff party ... a reasonable attorney's fee ... and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs" (Sec. 14030). In addition: "Prevailing defendant parties shall not recover any costs" (id.).

In recent years, many jurisdictions have had to pay hundreds of thousands and even millions of dollars in attorney's fees to prevailing plaintiff parties. For example, in the City of Santa Barbara, Santa Barbara was required to pay $599,500 in attorney's fees and costs for a settlement reached in the pretrial phase of litigation. Other examples of attorney's fees settlements under the CVRA include the City of Modesto, which was required to pay $3 million; and the City of Palmdale, which was required to pay $4.5 million. It is estimated by the California League of Cities that attorney's fees settlements in recent years to enforce the CVRA exceed $20 million.

For this reason, the California Voting Rights Project strongly recommends that a settlement agreement be reached in the pre-litigation stage. In this case, pursuant to Assembly Bill 350 passed into legislation and signed by Governor Brown in 2016, costs are capped at $30,000. It should be emphasized that Assembly Bill 350 applies only to the pre-litigation phase of cases brought under the CVRA. If a CVRA complaint becomes the subject of litigation through a suit being filed, then there is no cap on attorney's fees and costs other than as stated in the CVRA--"a reasonable attorney's fee"--and can be hundreds of thousands of dollars or more.

In addition, because Assembly Bill 350 "would impose additional duties on local agencies, the bill would impose a state-mandated local program. The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state.... This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for these costs shall be made pursuant to ... statutory provisions" (Legislative Counsel's Digest of Assembly Bill 350). (A copy of Assembly Bill 350 is attached as Appendix C.)

6. Methods of Instituting District Elections in the City of Goleta

There are two methods by which district elections may be instituted in the City of Goleta: litigation or a negotiated, pre-litigation agreement between the City of Goleta and the prospective plaintiffs who have sent the City of Goleta a certified letter asserting that the City of Goleta's method of conducting elections may violate the CVRA.

If litigation is the path followed, plaintiffs may at any time after 45 days from the City's receipt of the certified letter bring an action in Santa Barbara Superior Court against the City of Goleta for violation of the California Voting Rights Act. (A draft complaint against the City of Goleta is attached as Appendix A.)

If the City of Goleta chooses a negotiated, pre-litigation settlement between the City and prospective plaintiffs, then, pursuant to Section 10010 of the California Elections Code, the process the City of Goleta must follow is:

1) Within 45 days of receipt of the certified letter notifying the City of Goleta that its method of conducting elections may violate the CVRA, the Goleta City Council must adopt a resolution outlining its intention to transition from at-large to district elections, specifying specific steps it will take to facilitate this transition, and estimating the time-frame for this transition.

2) If the Goleta City Council passes a resolution along these lines, a legal action may not be brought for another 90 days after the resolution's passage.

3) The Goleta City Council must then, within the 90 days, over a period of no more than 30 days hold two public hearings (before maps of districts are drawn) at which the public is invited to provide input concerning the composition of districts. Before these hearings, the City of Goleta should conduct outreach to the public, including to non-English-speaking communities, explaining the districting process and encouraging participation.

4) Following these two public hearings, the City of Goleta must publish and make available for release at least one draft map and the proposed sequence of elections to the new districts. The Goleta City Council must then, also within the 90 days, over a period of no more than 45 days hold two additional public hearings at which the public is invited to provide input on the draft map or maps and proposed sequence of elections. The first version of a draft map must 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 at least seven days before being adopted.

5) In determining the sequence of elections, the Goleta City Council must give special consideration to the purposes of the California Voting Rights Act. For this reason, it is very likely that among the first districts in which district elections will be held will be the district or districts including old town Goleta and other districts including high proportions of individuals from a protected class.

6) After adopting the resolution of intention to transition from at-large to district elections and then holding the four public hearings, the Goleta City Council adopts a map of districts and a sequence of elections.

If the City of Goleta establishes district elections pursuant to this process and schedule, no litigation is necessary.

7. Advantages of a Negotiated, Pre-Litigation Settlement

There are many advantages of a negotiated, pre-litigation settlement rather than a court action to enforce the California Voting Rights Act to institute district elections. Most importantly, the City of Goleta and the Goleta City Council retain greater control and a greater role in the outcome of the transition to district elections through a pre-litigation settlement than through going to court. This greater control and role could manifest itself in a number of ways, including:

1) Retention of four districts rather than five in the City of Goleta. As a result of a court settlement, the City of Goleta could be ordered to institute five districts rather than four districts.

2) Retention of at-large elected mayor. Similarly, a pre-litigation settlement could include retention of Goleta's just instituted mayor elected at-large.

3) Participation in timing of the first district elections, whether in 2018 or 2020. If this matter goes to court, a court would likely require the first district elections to be held in 2018; prospective plaintiffs could agree to 2020 in a pre-litigation settlement.

4) Retention of existing city council, no chance of a special election. Occasionally in actions brought under the CVRA, courts have ordered past at-large elections nullified and new, special elections called to elect councilmembers from districts.

5) Ability for the Goleta City Council to draw the lines of districts both now and in the future rather than by the court or through a court-imposed process.

6) Saving of plaintiffs' attorney fees and legal expenses by the City of Goleta, potentially saving hundreds of thousands or even more than a million dollars to the City of Goleta.

These are only some of the advantages of a negotiated, pre-litigation settlement. It should be noted that pursuant to Assembly Bill 2220 passed in 2016, all cities may convert to district elections from at-large elections through the ordinance process. No vote of the people is required to institute district elections in the City of Goleta. (A copy of Assembly Bill 2220 is attached as Appendix D.)

8. Other Benefits of District Elections

Even if the City of Goleta were not required to institute district elections pursuant to the California Voting Rights Act, there are many benefits to district elections which have been experienced in other communities. These include greater voter turn-out and participation. In some cities, turn-out in some precincts increased by one-quarter to one-third after district elections were instituted.

District elections bring government closer to the people. They result in representatives who are more knowledgable of local problems and issues. Local voters have a member of the city council to whom they can turn on neighborhood issues, and councilmembers are able to focus on neighborhood issues more. There is a wider spectrum of views on the council and more representation from all geographic parts of the city. District elections lead to greater neighborhood identity.

District elections also result in less expensive political campaigns. It is easier for lower socioeconomic and younger candidates to run for office if they do not have to raise as much money. This results in less influence by monied special interests. By sheer dint of shoe leather, candidates can be elected who would not be elected in at-large elections.

Goleta will be a better city with district elections, more representative of the people, and in compliance with the law. District elections will make elections to the city council fairer and increase participation and representation from the entire community.

9. Conclusion

Racially polarized voting and abridgment of Latino voting rights have no place in the City of Goleta or anywhere else. The evidence in support of racially polarized voting and abridgment of Latino voting rights in Goleta is clear and inescapable. The question is not whether district elections will be instituted in the City of Goleta, but when and how. A negotiated, pre-litigation agreement between the City of Goleta and prospective plaintiffs provides the best opportunity to institute district elections in Goleta in a manner that reflects the will of the people and is cost-effective.

Endnote

[1] Also see Marguerite Mary Leoni and Chrisopher E. Skinnell, legal specialists in districting, electoral issues, and voting rights, in "The California Voting Rights Act" (included here as Appendix E), which holds: "The fact that no members of the minority group have ever run for membership on the legislative body will not insulate a jurisdiction from CVRA challenge. The CVRA expressly provides that a violation can be shown if racially-polarized voting occurs in elections incorporating *other* electoral choices that affect the rights and privileges of members of a protected class, such as ballot measures. (Elec. Code Sec.s 14028(a) & (b).) Some particularly obvious examples from the last decade might include Proposition 187 (denying services to undocumented immigrants), Proposition 209 (preventing state agencies from adopting affirmative action programs), and Proposition 227 (barring the use of bilingual education in California public schools).... But other local measures may also serve the same purpose" (p. 42).

Appendices

DRAFT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

Complaint for Violation of the

California Voting Rights Act of 2001

Against the City of Goleta

Plaintiffs allege as follows:

1. All allegations made in this complaint are based upon information and belief, except those allegations which pertain to the named Plaintiffs, which are based on personal knowledge. The allegations of this complaint stated on information and belief are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

NATURE OF THE ACTION

2. This action is brought by Plaintiffs for injunctive relief against the City of Goleta, California, for its violation of the California Voting Rights Act of 2001 (hereinafter the "CVRA"), California Elections Code Sec.s 14025, *et seq*. The imposition of the City of Goleta's at-large method of election has resulted in vote dilution for Latino residents and has denied them effective political participation in elections to the Goleta City Council. The City of Goleta's at-large method of election for electing members to its city council prevents Latino residents from electing candidates of their choice in Goleta's city council elections.

3. The effects of the City of Goleta's at-large method of election are apparent and compelling. Despite a Latino population of approximately 37.5 percent (37.5%) in the City of Goleta, only one Latino has ever been elected to the Goleta City Council. This deficiency of successful Latino candidates reveals the lack of access to the political process.

4. The City of Goleta's at-large method of election violates the CVRA. Plaintiffs bring this action to enjoin the City of Goleta's continued abridgment of Latino voting rights. Plaintiffs seek a declaration from this Court that the at-large method of election currently used by the City of Goleta violates the CVRA. Plaintiffs seek injunctive relief enjoining the City of Goleta from further imposing or applying its current at-large method of election.

Further, Plaintiffs seek injunctive relief requiring the City of Goleta to design and implement district-based elections to remedy Goleta's violation of the CVRA.

PARTIES

5. At all times herein mentioned, Plaintiffs, and each of them, are and have been registered voters residing in the City of Goleta and are eligible to vote in the City of Goleta's elections.

6. At all times herein mentioned, Defendant City of Goleta, California ("Goleta"), is and has been a political subdivision of the State of California subject to the provisions of the CVRA.

7. Plaintiffs are unaware of the true names and capacities, whether individual, corporate, associate, or otherwise, of defendants sued herein as Does 1 through 100, inclusive, and therefore sue said defendants by fictitious names and will ask leave of court to amend this complaint to show their true names and capacities when the same have been ascertained. Plaintiffs are informed and believe and thereon allege that defendants Does 1 through 100, inclusive, are responsible on the facts and theories herein alleged.

8. Does 1 through 100, inclusive, are Defendants which have caused Goleta to violate the CVRA, failed to prevent Goleta's violation of the CVRA, or are otherwise responsible for the acts and omissions alleged herein.

9. Plaintiffs are informed and believe and thereon allege that Defendants and each of them are in some manner legally responsible for the acts and omissions alleged herein, and actually and proximately caused and contributed to the various injuries and damages referred to herein.

10. Plaintiffs are informed and believe and thereon allege that at all times herein mentioned each of the Defendants was the agent, partner, predecessor in interest, successor in interest, and/or employee of one or more of the other Defendants, and were at all times herein mentioned acting within the course and scope of such agency and/or employment.

JURISDICTION AND VENUE

11. All parties hereto are within the unlimited jurisdiction of this Court. The unlawful acts complained of occurred in Santa Barbara County. Venue in this Court is proper.

GENERAL ALLEGATIONS

12. Based on figures from the 2015 United States Census Bureau survey estimate, the City of Goleta contains approximately 30,541 persons, of which 37.5 percent (37.5%) are Hispanic or Latino.

13. The Latino population located within the City of Goleta is geographically concentrated.

14. The City of Goleta is governed by a city council. The Goleta City Council serves as the governmental body responsible for the operations of the City of Goleta. The city council is comprised of five members, i.e., one mayor and four council members.

15. The mayor for the City of Goleta and the Goleta City Council members are elected pursuant to an at-large method of election. Under this method of election, all of the eligible voters of the entire City of Goleta elect the mayor and members of the city council.

16. Vacancies to the city council are elected on a staggered basis. Every two years, the city electorate elects two city council members who each serve a four-year term. Pursuant to the November 2016 election, the mayor is elected to a term of two years.

17. Upon information and belief, since Goleta's incorporation as a city and the first election to its city council in November 2001, only one Latino has ever been elected to the Goleta City Council. Two Latino candidates have been defeated in candidacies for the Goleta City Council, despite one having been an appointed incumbent.

18. Elections conducted within the City of Goleta are characterized by racially polarized voting. Racially polarized voting occurs when members of a protected class as defined by the CVRA, Cal. Elec. Code Sec. 14025(d), vote for candidates or electoral choices that are different than the rest of the electorate. Racially polarized voting exists within the City of Goleta because there is a difference between the choice of candidates and other electoral choices that are preferred by Latino voters and the choice of candidates and other electoral choices that are preferred by voters in the rest of the electorate.

19. Racially polarized voting consists both of voter cohesion on the part of Latino voters and of bloc voting by the non-Latino electorate against the choices of Latino voters. Such polarized voting is legally significant in Goleta's city council elections because it dilutes the opportunity for Latino voters to elect candidates of their choice.

20. Patterns of racially polarized voting have the effect of impeding opportunities for Latino voters to elect candidates of their choice to the at-large city council positions in the City of Goleta, where the non-Latino populace dominates elections. Since establishment of Goleta as a city, Latino voters have been harmed by racially polarized voting.

21. For example, in 2001, Reynaldo Ybarra, a Latino, was defeated for election to the Goleta City Council, even though he would have been elected from Latino areas, because he was not preferred by voters in other precincts. Also in 2001, district elections, a ballot measure affecting the rights and privileges of a protected class, were preferred by Latino

voters but not by voters in other precincts. In 2004, Jonny Wallis was reelected to the Goleta City Council. Though not a member of a protected class herself, Ms. Wallis was preferred by Latino voters, whose votes provided the margin of her victory. In 2006, Roger Aceves became the only Latino elected to date to the Goleta City Council. However, had it not been for his support among Latino voters, he would have been defeated. In 2012, Measure W, a parcel tax in the Santa Barbara High School District and a ballot measure affecting the rights and privileges of members of a protected class, received the necessary two-thirds vote required to pass in Latino voting areas but was defeated elsewhere in the City of Goleta, resulting in defeat of the measure. In 2014, Roger Aceves, a sitting member of the Goleta City Council, was a candidate for Santa Barbara County Supervisor from the 2nd District, much of which is located in the City of Goleta. He received the majority of the vote in Latino areas in the City of Goleta, but was defeated elsewhere in the 2nd Supervisorial District in the City of Goleta. Also in 2014, Measure S, a bond in the Santa Barbara Community College District and a ballot measure affecting the rights and privileges of members of a protected class, received the necessary 55% vote required to pass in Latino voting areas but was defeated elsewhere in the City of Goleta. In 2016, Tony Vallejo, a Latino and an appointed incumbent of the Goleta City Council, was defeated for election to the Goleta City Council even though he finished first in Latino voting areas. Goleta elections thus demonstrate long-standing, consistent, substantial, and statistically significant racial polarization.

22. The at-large method of election and repeated racially polarized voting has caused Latino vote dilution within the City of Goleta. Latino voters and the rest of the

electorate often express different preferences on candidates and other electoral choices, to the detriment of Latino voters.

23. The obstacles posed by the City of Goleta's at-large method of election, together with racially polarized voting, impair the ability of Latino voters to elect candidates of their choice in elections conducted in the City of Goleta.

24. An alternative method of election exists, district-based elections, that will provide an opportunity for the members of a protected class as defined by the CVRA to elect candidates of their choice in Goleta City Council elections.

FIRST CAUSE OF ACTION

(Violation of California Voting Rights Act of 2001)

(Against All Defendants)

25. Plaintiffs incorporate by this reference paragraphs 1 through 24 as though fully set forth herein.

26. Plaintiffs, and each of them, are registered voters and reside within the City of Goleta, California. Plaintiffs are members of a protected class of voters under the CVRA. Plaintiffs are over the age of 18 and are eligible to vote in the City of Goleta's elections.

27. Defendant City of Goleta is a political subdivision within the State of California.

28. Defendant City of Goleta employs an at-large method of election, where voters of its entire jurisdiction elect members to its city council.

29. Racially polarized voting has occurred, and continues to occur, in elections for members to the City Council for the City of Goleta and in elections incorporating other electoral choices by voters of Goleta. As a result, the City of Goleta's at-large method of

election is imposed in a manner that impairs the ability of a protected class as defined by the CVRA to elect candidates of its choice in Goleta election.

30. An alternative method, district-based elections, exists that will provide an opportunity for the members of a protected class as defined by the CVRA to elect candidates of their choice in Goleta City Council elections.

31. An actual controversy has arisen and now exists between the parties relating to the legal rights and duties of Plaintiffs and Defendants, for which Plaintiffs desire a declaration of rights.

32. Defendants' wrongful conduct has caused and, unless enjoined by this Court, will continue to cause, immediate and irreparable injury to Plaintiffs, and those similarly situated.

33. Plaintiffs, and those similarly situated, have no adequate remedy at law for the injuries they currently suffer and will otherwise continue to suffer.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants, and each of them, as follows:

1. For a decree that the City of Goleta's current at-large method of election for the City Council violates the California Voting Rights Act of 2001;

2. For preliminary and permanent injunctive relief enjoining the City of Goleta from imposing or applying its current at-large method of election;

3. For injunctive relief mandating the City of Goleta to design and implement district-based elections, as defined by the California Voting Rights of 2001, to remedy the City of Goleta's violation of the California Voting Rights Act of 2001;

4. For an award of Plaintiffs' attorney fees, costs, and prejudgment interest pursuant to the CVRA, Cal. Elec. Code Sec. 14030, and other applicable law; and

5. For such further relief as the Court deems just and proper.

Dated: March 27, 2017

ELECTIONS CODE SECTION 14025-14032

14025. This act shall be known and may be cited as the California Voting Rights Act of 2001.

14026. As used in this chapter:

(a) "At-large method of election" means any of the following methods of electing members to the governing body of a political subdivision:

(1) One in which the voters of the entire jurisdiction elect the members to the governing body.
(2) One in which the candidates are required to reside within given areas of the jurisdiction and the voters of the entire jurisdiction elect the members to the governing body.
(3) One that combines at-large elections with district-based elections.

(b) "District-based elections" means a method of electing members to the governing body of a political subdivision in which the candidate must reside within an election district that is a divisible part of the political subdivision and is elected only by voters residing within that election district.

(c) "Political subdivision" means a geographic area of representation created for the provision of government services, including, but not limited to, a general law city, general law county, charter city, charter county, charter city and county, school district, community college district, or other district organized pursuant to state law.

(d) "Protected class" means 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.).

(e) "Racially polarized voting" means voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate. The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.) to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting.

14027. An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class, as defined pursuant to Section 14026.

14028. (a) A violation of Section 14027 is established if it is shown 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 of the political subdivision. Elections conducted prior to the filing of an action pursuant to Section 14027 and this section are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action.

(b) The occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class. One circumstance that may be considered

in determining a violation of Section 14027 and this section is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action based on Section 14027 and this section. In multiseat at-large election districts, where the number of candidates who are members of a protected class is fewer than the number of seats available, the relative groupwide support received by candidates from members of a protected class shall be the basis for the racial polarization analysis.

(c) The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section, but may be a factor in determining an appropriate remedy.

(d) Proof of an intent on the part of the voters or elected officials to discriminate against a protected class is not required.

(e) Other factors such as the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns are probative, but not necessary factors to establish a violation of Section 14027 and this section.

14029. Upon a finding of a violation of Section 14027 and Section 14028, the court shall implement appropriate

remedies, including the imposition of district-based elections, that are tailored to remedy the violation.

14030. In any action to enforce Section 14027 and Section 14028, the court shall allow the prevailing plaintiff party, other than the state or political subdivision thereof, a reasonable attorney's fee consistent with the standards established in Serrano v. Priest (1977) 20 Cal.3d 25, 48-49, and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs. Prevailing defendant parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

14031. This chapter is enacted to implement the guarantees of Section 7 of Article I and of Section 2 of Article II of the California Constitution.

14032. Any voter who is a member of a protected class and who resides in a political subdivision where a violation of Sections 14027 and 14028 is alleged may file an action pursuant to those sections in the superior court of the county in which the political subdivision is located.

Assembly Bill No. 350

CHAPTER 737

An act to amend Section 10010 of the Elections Code, relating to elections.

[Approved by Governor September 28, 2016. Filed with Secretary of State September 28, 2016.]

LEGISLATIVE COUNSEL'S DIGEST

AB 350, Alejo. District-based municipal elections: preapproval hearings.

Existing law provides for political subdivisions that encompass areas of representation within the state. With respect to these areas, public officials are generally elected by all of the voters of the political subdivision (at-large) or by districts formed within the political subdivision (district-based). Existing law requires a political subdivision, as defined, that changes from an at-large method of election to a district-based election to hold at least 2 public hearings on a proposal to establish the district boundaries of the political subdivision before a public hearing at which the governing body of the political subdivision votes to approve or defeat the proposal.

This bill would instead require a political subdivision that changes to, or establishes, district-based elections to hold public hearings before and after drawing a preliminary map or maps of the proposed district boundaries, as specified.

Existing law, the California Voting Rights Act of 2001 (CVRA), prohibits the use of an at-large method of election in a political subdivision if it would impair the ability of a protected class, as defined, to elect candidates of its choice or otherwise influence the outcome of an election. The CVRA provides that a voter who is a member of a protected class may bring an action in superior court to enforce its provisions.

This bill would require a prospective plaintiff under the CVRA to first send a written notice to the political subdivision against which the action would be brought indicating that the method of election used by the political subdivision may violate the CVRA. The bill would permit the political subdivision to take ameliorative steps to correct the alleged violation before the prospective plaintiff commences litigation, and it would stay the prospective plaintiff's ability to file suit for a prescribed amount of time. This bill would also permit a prospective plaintiff who sent a written notice, as described, to recover from the political subdivision reasonable costs incurred in supporting the written notice.

Because the bill would impose additional duties on local agencies, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 10010 of the Elections Code is amended to read:

10010. (a) A political subdivision that changes from an at-large method of election to a district-based election, or that establishes district-based elections, 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:

(1) Before drawing a draft map or maps of the proposed boundaries of the districts, the political subdivision shall hold at least two public hearings over a period of no more than thirty days, at which the public is invited to provide input regarding the composition of the districts. Before these hearings, the political subdivision may conduct outreach to the public, including to non-English-speaking communities, to explain the districting process and to encourage public participation.

(2) After all draft maps are drawn, the political subdivision shall publish and make available for release at least one draft map and, if members of the governing body of the political subdivision will be elected in their districts at different times to provide for staggered terms of office, the potential sequence of the elections. The political subdivision shall also hold 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 map or maps and the proposed sequence of elections, if applicable. The first version of a draft map shall be published at least seven days before consideration at a hearing. If a draft map is revised at or following a hearing, it shall be published and made available to the public for at least seven days before being adopted.

(b) In determining the final sequence of the district elections conducted in a political subdivision in which members of the governing body will be elected at different times to provide for staggered terms of office, the governing body shall give special consideration to the purposes of the California Voting Rights Act of 2001 (Chapter 1.5 (commencing with Section 14025) of Division 14 of this code), and it shall take into account the preferences expressed by members of the districts.

(c) This section applies to, but is not limited to, a proposal that is required due to a court-imposed change from an at-large method of election to a district-based election.

(d) For purposes of this section, the following terms have the following meanings:

(1) "At-large method of election" has the same meaning as set forth in subdivision (a) of Section 14026.

(2) "District-based election" has the same meaning as set forth in subdivision (b) of Section 14026.

(3) "Political subdivision" has the same meaning as set forth in subdivision (c) of Section 14026.

(e) (1) Before commencing an action to enforce Sections 14027 and 14028, a prospective plaintiff shall send by certified mail a written notice to the clerk of the political subdivision against which the action would be brought asserting that the political subdivision's method of conducting elections may violate the California Voting Rights Act.

(2) A prospective plaintiff shall not commence an action to enforce Sections 14027 and 14028 within 45 days of the political subdivision's receipt of the written notice described in paragraph (1).

(3) (A) Before receiving a written notice described in paragraph (1), or within 45 days of receipt of a notice, a

political subdivision may pass a resolution outlining its intention to transition from at-large to district-based elections, specific steps it will undertake to facilitate this transition, and an estimated time frame for doing so.

(B) If a political subdivision passes a resolution pursuant to subparagraph (A), a prospective plaintiff shall not commence an action to enforce Sections 14027 and 14028 within 90 days of the resolution's passage.

(f) (1) If a political subdivision adopts an ordinance establishing district-based elections pursuant to subdivision (a), a prospective plaintiff who sent a written notice pursuant to subdivision (e) before the political subdivision passed its resolution of intention may, within 30 days of the ordinance's adoption, demand reimbursement for the cost of the work product generated to support the notice. A prospective plaintiff shall make the demand in writing and shall substantiate the demand with financial documentation, such as a detailed invoice for demography services. A political subdivision may request additional documentation if the provided documentation is insufficient to corroborate the claimed costs. A political subdivision shall reimburse a prospective plaintiff for reasonable costs claimed, or in an amount to which the parties mutually agree, within 45 days of receiving the written demand, except as provided in paragraph (2). In all cases, the amount of the reimbursement shall not exceed the cap described in paragraph (3).

(2) If more than one prospective plaintiff is entitled to reimbursement, the political subdivision shall reimburse the prospective plaintiffs in the order in which they sent a written notice pursuant to paragraph (1) of subdivision (e), and the 45-day time period described in paragraph (1) shall apply only to reimbursement of the first prospective plaintiff who sent a written notice. The cumulative amount of reimbursements to all prospective plaintiffs shall not exceed the cap described in paragraph (3).

(3) The amount of reimbursement required by this section is capped at $30,000, as adjusted annually to the Consumer Price Index for All Urban Consumers, U.S. city average, as published by the United States Department of Labor.

SEC. 2. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

Assembly Bill No. 2220

CHAPTER 751

An act to amend Section 34886 of the Government Code, relating to elections.

[Approved by Governor September 28, 2016. Filed with Secretary of State September 28, 2016.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2220, Cooper. Elections in cities: by or from district.

Existing law generally requires all elective city offices, including the members of a city council, to be filled at large by the city electorate at a general municipal election. Existing law, at any municipal election or special election held for this purpose, authorizes the legislative body of a city to submit to the registered voters an ordinance providing for the election of members of the legislative body by district or from district, as defined, and with or without an elective mayor. Existing law also authorizes the legislative body of a city with a population of fewer than 100,000 people to adopt an ordinance that requires the members of the legislative body to be elected by district or by district with an elective mayor without being required to submit the ordinance to the voters for approval.

This bill would delete the population limitation in that provision, thereby authorizing the legislative body of a city to adopt an ordinance that requires the members of the legislative body to be elected by district or by district with an elective mayor without being required to submit the ordinance to the voters for approval.

The bill also would make a conforming change to these provisions.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 34886 of the Government Code is amended to read:

34886. Notwithstanding Section 34871 or any other law, the legislative body 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. An 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 (Chapter 1.5 (commencing with Section 14025) of Division 14 of the Elections Code).

THE CALIFORNIA VOTING RIGHTS ACT

Marguerite Mary Leoni[*]
Christopher E. Skinnell[**]

In 2002, the California Voting Rights Act, S.B. 976, was signed into law. (Elec. Code §§ 14027-14032.) The Act makes fundamental changes to minority voting rights law in California. As of January 1, 2003, the California Voting Rights Act ("CVRA") alters established paradigms of proof and defenses under the federal Voting Rights Act, thus making it easier for plaintiffs in California to challenge allegedly discriminatory voting practices.[1] The potential consequences of this legislation are significant: it could force a city or special district to abandon an electoral system that may be perfectly legal under

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[*] Ms. Leoni is a partner at Nielsen, Merksamer, Parrinello Mueller & Naylor, LLP (Mill Valley, California), Phone: (415) 389-6800, E-mail: mleoni@nmgovlaw.com. She specializes in legal counseling and civil litigation relating to redistricting and voting rights questions, school district reorganizations, campaign, government and initiative/referendum law. Her practice includes both trial and appellate practice.

Ms. Leoni has represented and currently represents numerous state agencies, municipalities, counties, school districts and other special districts on districting, redistricting and electoral matters. She has assisted in all phases of such cases including design of plans, the public hearing process, analysis of proposed alternatives, enactment procedures, referenda, districting and redistricting, preparing and advocating preclearance submissions to the U. S. Department of Justice, and defending federal court litigation concerning the legality of electoral systems under the federal constitution and Voting Rights Act. She represented the Administrative Office of the Courts on federal Voting Rights Act issues and electoral questions pertaining to trial court unification in California. She also represented the Florida Senate in designing that state's Senate and Congressional districts, Voting Rights Act preclearance, and in defending against ensuing state and federal court challenges. She also represented the consultant to Arizona's Independent Redistricting Commission in designing redistricting plans for Arizona's state legislative and congressional districts.

[**] Mr. Skinnell is an associate (bar results pending) at Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP (Mill Valley, California), Phone: (415) 389-6800, E-mail: cskinnell@nmgovlaw.com. He received his Bachelor's degree in 1999 from Claremont McKenna College, *magna cum laude*, and is a 2003 graduate of the University of Chicago Law School, where he served as Editor-in-Chief of *The University of Chicago Legal Forum*.

Prior to attending law school, he was a political consultant to several California legislative and initiative campaigns, a research associate at the Rose Institute of State and Local Government, and chairman of a successful initiative campaign in Southern California.

Mr. Skinnell has extensive experience with voting rights matters, both from the legal and technical perspectives. In addition to working on various voting rights lawsuits, he has published numerous articles and studies on voting rights and redistricting, has served as the technical/GIS consultant on several municipal redistrictings, and has prepared a successful preclearance submission to the U.S. Department of Justice under Section 5 of the Voting Rights Act.

[1] As noted in a celebratory press statement by the Mexican American Legal Defense and Education Fund (MALDEF) following the passage of S.B. 976, which along with the ACLU and voting rights attorney Joaquin Avila, was a primary supporter of the CVRA, the "[b]ill makes it easier for California minorities to challenge 'at-large' elections."

federal law, in the process exposing the jurisdiction to the possibility of paying very high awards of attorneys fees to plaintiffs.[2]

California's cities, counties, and special districts have had almost four decades of experience in complying with the federal Voting Rights Act ("federal VRA"), especially Section 2, the landmark legislation outlawing both intentional discrimination in voting practices and those practices that have unintentional but discriminatory effects when viewed in the totality of the circumstances. (Voting Rights Act of 1965, Pub. L. No. 89-110, Stat. 437 (1965), codified as amended at 42 U.S.C. §§ 1971, 1973-1973ff-6 (1994).) Indeed, California has adopted compliance with Section 2 as one of its statutory redistricting criteria for cities, counties, and special districts. (*See, e.g.*, Elec. Code §§ 21601 [general law cities], 21620 [charter cities], & 22000 [special districts].) After decades of litigation under the federal VRA, the courts have provided a wealth of guidance for cities and special districts in identifying practices that may have discriminatory effects. Most notable in California is the prevalence of the "at-large" electoral system (see description below). Jurisdictions have learned to consider changing to a district-based electoral system when they have minority group residents who are sufficiently numerous and geographically concentrated to form a majority in a single-member district, especially when that minority group, despite running candidates for election, consistently fails to elect.

But now the voting rights legal environment with which cities and special districts have grown familiar has changed significantly. Here are some of the highlights.

CVRA Highlights.

- **Focus of the CVRA: "At-large" and "From-district" Elections.**

If your city or special district elects its governing board members "by-district," (*i.e.*, only by the voters of the district, sometimes called "division" or "area," in which the candidate resides), you can stop reading now. The CVRA does not apply to a by-district electoral system. However, if you have an "at-large" or "from-district" system, read on!

The CVRA applies only to at-large and from-district electoral systems, or combination systems. (Elec. Code §§ 14026(a), 14027.) At-large systems are those in which each member of the governing board is elected by all the voters in the jurisdiction. Most

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[2] In federal voting rights cases, the litigation bill can run to hundreds of thousands of dollars even for a small jurisdiction of a few thousand people. *See* Florence Adams, *Latinos and Local Representation: Changing Realities, Emerging Theories* 73 (Garland 2000) (noting that in the City of Dinuba, California, the costs of federal voting rights litigation added up to nearly $60 per person, more than the annual cost of Dinuba's Fire Department). In a voting rights case filed against the City of Santa Paula in 2000 and recently settled, the City reportedly spent $700,000 for attorneys fees. *See* T.J. Sullivan, "Santa Paula Quiet on Measure D," *Ventura County Star* B-01 (Oct. 20, 2002).

jurisdictions in California, especially smaller jurisdictions, have at-large electoral systems. "From-district" elections differ from at-large systems only in that they require each member of the governing board to live within a particular district. Election, however, is still by all the voters in the jurisdiction, rather than being limited to the voters within a district. There are also combination systems in which, for example, 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.

Each of these variations is equally vulnerable to challenge if the minority plaintiffs can show that racially-polarized voting undercuts their ability to elect or influence the election of minority-preferred candidates. Features that might cause plaintiffs to scrutinize a city or special district as a potential target for a CVRA challenge include a history of electoral losses by minority candidates or a history of unresolved issues disproportionately affecting the minority community (*e.g.*, affordable housing, street and sidewalk maintenance, juvenile crime, etc.), coupled with a significant proportion of the population that are ethnic or racial minorities.

- **Protection For Minority Electoral "Influence."**

The federal VRA prohibits the use of electoral systems that abridge the ability of minority voters to *elect* candidates of their choice. Thus, if the minority plaintiffs would have still been unable to elect their chosen candidates in the absence of the challenged at-large system, the plaintiff would have very little chance of stating a federal claim (see below). Not so under the CVRA. The CVRA invalidates not only at-large elections that prevent minority voters from electing their chosen candidates, but also those that impair the ability of minority voters to *influence* elections.

To date, such influence claims have enjoyed *very* limited recognition or success in federal litigation, and California jurisdictions have no real experience with them. The U.S. Supreme Court has repeatedly declined to address influence claims in recent years. *See Johnson v. De Grandy*, 512 U.S. 997, 1008-09 (1994); *Holder v. Hall*, 512 U.S. 874, 900 n.8 (1994) (Thomas, J., concurring in judgment); *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993); *Growe v. Emison*, 507 U.S. 25, 41 n.5 (1993). The federal courts in California have refused to sanction such influence suits as well. *See Aldasoro v. Kennerson*, 922 F.Supp. 339, 376 (S.D. Cal. 1995); *DeBaca v. County of San Diego*, 794 F.Supp. 990, 996-97 (S.D. Cal. 1992); *Skorepa v. City of Chula Vista*, 723 F. Supp. 1384, 1391-92 (S.D. Cal. 1989); *Romero v. City of Pomona*, 665 F. Supp. 853, 864 (C.D. Cal. 1987), *aff'd* 883 F.2d 1418, 1424 (9th Cir. 1989).

Indeed, only two federal courts have ever held[3] that the federal VRA requires, rather than merely permits, the creation of influence districts in the absence of a showing of intentional discrimination, and both are of questionable precedential value. *See Armour v. Ohio*, 895 F.2d 1078 (6th Cir. 1990); *East Jefferson Coalition for Leadership & Dev. v. Parish of Jefferson*, 691 F.Supp. 991 (E.D. La. 1988). One of the opinions, *Armour v. Ohio*, was subsequently vacated when rehearing en banc was granted, 925 F.2d 987 (6th Cir. 1991). On remand the district court implicitly sanctioned such claims again, 775 F.Supp. 1044, 1059 n.19 (N.D. Ohio 1991),[4] but later opinions from the Sixth Circuit have not treated *Armour* as binding on this issue, and have, in fact, expressly rejected influence suits. *See Cousin v. Sundquist*, 145 F.3d 818, 828 (6th Cir. 1998) ("We do not feel that an 'influence' claim is permitted under the Voting Rights Act."); *Parker v. Ohio*, 2003 U.S. Dist. LEXIS 8745, *11 (S.D. Ohio). The holding of the second case, *East Jefferson Coalition for Leadership*, was effectively undermined when the court subsequently amended the finding that necessitated the influence claim: that the minority community was too widely dispersed in the jurisdiction to constitute a majority in a single-member district. *See East Jefferson Coalition for Leadership & Dev. v. Parish of Jefferson*, 926 F.2d 487, 491 (5th Cir. 1991) (noting the amended finding that the minority group could indeed constitute a majority in a single-member district).

Given the reluctance of federal courts to enter the political thicket of influence suits, by opening the door to such claims the CVRA greatly expands protection for minority voting rights and, consequently, the potential for liability of cities and special districts.

The next question, of course, is obvious: what constitutes "influence"? The answer, unfortunately, is not so obvious. The CVRA does not define "influence" and there is very little federal precedent on which to rely for guidance. As the federal district court for Rhode Island put it in *Metts v. Almond*:

> "Ability to influence" itself, is a nebulous term that defies precise definition. If it means only the potential to alter the outcome of an election, it provides no standard at all because a single voter can be said to have that ability. On the other hand, if it means something more, there does not appear to be any workable definition of how much more is required and/or any meaningful way to determine whether the requirement has been satisfied.

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[3] Several other courts have assumed as much, without so deciding, instead ruling on other grounds. *See, e.g., Voinovich*, 507 U.S. at 154; *West v. Clinton*, 786 F.Supp. 803, 806 (W.D. Ark. 1992).

[4] The district court in *Armour* purported to avoid the question of influence claims. *See* 775 F.Supp. at 1059 n.19 ("We need not reach the question of whether [an influence claim] may be viable under the Voting Rights Act because we find that the plaintiffs have met their burden of demonstrating an ability to elect a candidate of their choice."). But as Judge Batchelder noted in dissent, the Court only avoided the issue by first holding that the plaintiffs need not constitute a majority in the reconfigured district. 775 F.Supp. at 1079 (Batchelder, J., dissenting). In so ruling, "the majority opinion effectively h[eld] that there is a cause of action under Section 2 when political boundaries are drawn so that they fail to maximize a minority group's ability to influence the outcome of elections." *Id.*

217 F.Supp.2d 252, 258 (D.R.I. 2002).

Nevertheless, defining "influence" is the task that a California court may soon face. The definition may well be case-specific to the demographic and political circumstances in each defendant jurisdiction, leaving local jurisdictions without clear guidelines.

- **Streamlined Proof for Plaintiffs.**

Federal voting rights cases under Section 2 require that a successful plaintiff show that (1) the minority group be sufficiently large and geographically compact to form a majority of the eligible voters in a single-member district, (2) there is racially-polarized voting, and (3) there is white bloc voting sufficient usually to prevent minority voters from electing candidates of their choice. *Thornburg v. Gingles,* 478 U.S. 30, 50-51 (1986). If (and only if) all three of these "preconditions" are proven, the court then proceeds to consider whether, under the "totality of circumstances" the votes of minority voters are diluted. (42 U.S.C. § 1973(b) [prescribing the totality of the circumstances standard].)

The CVRA, by contrast, purports to prescribe an extremely light burden on the plaintiff to establish a violation. Under the CVRA, plaintiffs apparently can prove a violation based *solely* on evidence of racially-polarized voting. (Elec. Code §§ 14027 & 14028(e).) Racially-polarized voting is defined as "voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and the electoral choices that are preferred by voters in the rest of the electorate." (Elec. Code § 14026(e).) *See Ruiz v. City of Santa Maria,* 160 F.3d 543, 552 (9th Cir. 1998) (adopting relatively lenient "separate electorates" test for determining whether a candidate was a minority-preferred candidate who was defeated by white bloc voting), *cert. denied,* 527 U.S. 1022 (1999).

The CVRA appears to eliminate the first precondition that plaintiffs must prove at the liability stage in federal litigation, that is, that the minority group is sufficiently large and geographically compact to form a majority in a single member district. (Elec. Code § 14028(c).) Assuming that racially-polarized voting can be proven, the CVRA defers inquiry into the size and geographical compactness of the minority group and the impact of those factors on the minority voters' ability to elect or ability to influence elections, to the remedial phase of the litigation. (See discussion below.)

The CVRA also eliminates the requirement that plaintiffs prove discrimination under the totality of the circumstances test. (Elec. Code § 14028(e).) This departure from the federal standards may prove to be the most significant. Some federal courts have been very lenient in finding racially-polarized voting. They could afford to be so lenient,

because, under federal law, establishing racially-polarized voting is not sufficient to prove a violation. The other *Thornburg v. Gingles* preconditions must be established and a violation must be proven in the "totality of the circumstances" phase of the lawsuit. The totality analysis then permits a federal judge to take into account such matters as the *degree* of the racially-polarized voting and perhaps find that it was not severe enough to warrant judicial intervention into the electoral processes of a city.

The CVRA does not require any comparable "totality of the circumstances" analyses as part of the plaintiff's proof. Under what would seem to be a draconian application of the CVRA, plaintiffs could argue that a jurisdiction is subject to liability if 51% of minority voters vote one way, 51% of non-minority voters vote the other way, and the minority-preferred candidate loses. Whether a court would sanction such an extreme application of the CVRA, without the subsequent safety valve of the totality analysis, cannot be known at this time. Another plausible reading of the CVRA is that the Legislature meant to ease the burden on plaintiffs but still permit the totality analysis to come in by way of defense. (Elec. Code § 14028(e) [stating that many of the traditional totality factors are "probative," but not necessary to establish a violation].)

Despite the fact that Section 14028(a) provides that a violation is established if racially-polarized voting is shown, the legislation does identify at least one other factor that bears on the question of liability. Specifically the CVRA provides that the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class have been elected to the governing body of a jurisdiction is "one circumstance that may be considered *in determining a violation.*" (Elec. Code § 14028(b) [emphasis added].) Thus phrased, the relevance of such evidence would not appear to be limited to the remedial stage, but would affect the question of liability as well. Moreover, the phraseology suggests that other, unspecified circumstances may be considered on the question of liability as well. Under the federal scheme, minority plaintiffs whose preferred candidates have a winning record would find it difficult, if not impossible, to establish a violation of the federal VRA. Presumably this would be the result under the CVRA, but the new law is not explicit on that point. Also, the CVRA specifies that the successful candidate must also be a member of the minority group in order to be taken into consideration as "one circumstance" that may be considered at the liability phase of the litigation. The CVRA is silent on whether the election of non-minority persons who are proven to be the preferred candidates of minority voters can also be considered. Plaintiffs may well argue that such successful minority-preferred candidates do not count.

- **New Remedies.**

The most likely remedy in a successful CVRA action would be to order cities and special districts with at-large, from-district, or mixed electoral systems to change to by-district systems in which a minority group will be empowered either to elect its preferred candidates, or influence the election outcome. But judicial remedies under the Act may

not be limited to the imposition of a by-district system. In cases where the minority group may be too small to form a majority in a single member district (*i.e.*, a district from which one member of the governing board is elected), the CVRA mandates that a court impose remedies "appropriate" to the violation. Indeed, the advocates of limited or cumulative voting systems may see the CVRA as an opportunity to attempt to impose such experimental remedies in California.

In a limited voting system, voters either cast fewer votes than the number of seats, or political parties nominate fewer candidates than there are seats. Theoretically, the greater the difference between the number of seats and the number of votes, the greater the opportunities for minorities to elect their chosen candidates. Versions of limited voting are used in Washington, D.C., Philadelphia (PA), Hartford (CT) and many smaller jurisdictions.

In a cumulative voting system, voters cast as many votes as there are seats. But unlike winner-take-all systems, voters are not limited to giving only one vote to a candidate. Instead voters can cast some or all of their votes for one or more candidates. Chilton County (AL), Alamogordo (NM), and Peoria (IL) all use a version of cumulative voting, as do a number of smaller jurisdictions. The State of Illinois used cumulative voting for state legislative elections from 1870 to 1980.

- **No-Risk Litigation For Plaintiffs.**

The CVRA mandates the award of costs, attorneys fees, and expert expenses to prevailing plaintiffs. (Elec. Code § 14030.) Prevailing defendants, however, are not treated so kindly. The CVRA denies not only attorneys fees but also the costs of litigation to prevailing defendants, unless the court finds a suit to be "frivolous, unreasonable, or without foundation," an extremely high standard. (*Id.*)

Furthermore, California law interprets "prevailing party" more broadly than does the analogous federal law governing attorneys fees awards for actions brought under Section 2 of the Voting Rights Act. The United States Supreme Court has, as a matter of statutory interpretation, recently rejected the "catalyst" theory of prevailing parties. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Servs.*, 532 U.S. 598, 603-05 (2001). The catalyst theory, which the California Supreme Court has previously approved, permits recovery of attorneys fees if there is any "causal connection" between the plaintiffs' lawsuit and a change in behavior by the defendant. *Maria P. v. Riles*, 43 Cal.3d 1281, 1291 (1987). The *Maria P.* court continued:

> "'The appropriate benchmarks in determining which party prevailed are (a) the situation immediately prior to the commencement of suit, and (b) the situation today, and the role, if any, played by the litigation in effecting any changes between the two.'" . . . An award of attorney fees under section 1021.5 is

> appropriate when a plaintiff's lawsuit "'was a *catalyst* motivating defendants to provide the primary relief sought,'" or when plaintiff vindicates an important right "'by activating defendants to modify their behavior.'"

Id. at 1291-92 (quoting *Folsom v. Butte County Assn. of Governments,* 32 Cal.3d 668, 685 n.31 (1982); *Westside Community for Independent Living, Inc. v. Obledo,* 33 Cal.3d 348, 353 (1983)) (internal citations omitted).

Federal law, by contrast, requires some "change [in] the legal relationship between [the plaintiff] and the defendant." *Buckhannon,* 532 U.S. at 604 (quoting *Texas State Teachers Assn. v. Garland Independent School Dist.,* 489 U.S. 782, 792 (1987)). In other words, it is not enough under federal law that the defendant changed its conduct voluntarily—there must be some legally compelled impediment to the defendant falling back into the old ways, like a judgment or a settlement.

The California Supreme Court has traditionally treated federal precedent interpreting 42 U.S.C. § 1988 as persuasive authority, but it has also held that such federal precedent is not binding with regards to interpretation of state attorneys fee law. *See Serrano v. Unruh,* 32 Cal.3d 621, 639 n.29 (1982). Thus, the *Buckhannon* holding will not inevitably lead California to reject the catalyst theory in CVRA litigation as well.

Charter Cities.

Charter cities should not be complacent in a belief that they are immune from successful challenge under the new CVRA. The CVRA, after all, purports to apply to "cities" without making any explicit distinction between general law or charter cities. (Elec. Code § 14026(c).) It is true that a charter can provide for a form of government or electoral process for a city that is different from the general law. A charter city, however, remains subject to the California Constitution and would be prohibited from adopting or maintaining a discriminatory electoral system or electoral practices that violate the equal protection clause or the right to vote. *See Canaan v. Abdelnour,* 40 Cal.3d 703 (1985), *overruled on other grounds by Edelstein v. City & County of San Francisco*, 29 Cal.4th 164, 183 (2002); *Rees v. Layton,* 6 Cal.App.3d 815 (1970). Furthermore, California courts have recognized that state statutes can override city charters if they are narrowly-tailored to address an issue of statewide concern, even in the core areas of charter city control like election administration. *Edelstein*, 29 Cal.4th at 172-174; *Johnson v. Bradley,* 4 Cal.4th 389, 398-400 (1992). The CVRA expressly provides that it is intended to implement the guarantees of Section 7 of Article I (Equal Protection) and Section 2 of Article II (Right to Vote) of the California Constitution, which are themselves regarded as matters of statewide concern. *See Cawdrey v. City of Redondo Beach*, 15 Cal.App.4th 1212, 1226 (1993).

It is always possible that the California Supreme Court would decide that, even if preserving the right to vote is a matter of statewide concern, the CVRA sweeps too broadly and cuts too deeply into municipal affairs in violation of the principle of home rule. As the Supreme Court has noted, "[T]he sweep of the state's protective measures may be no broader than its interest." *Johnson,* 4 Cal.4th at 400. *Cf. Bd. of Trustees. of the Univ. of Ala. v. Garrett,* 531 U.S. 356, 365 (2000) (when Congress seeks to enforce constitutional protections with legislation, the statutory scheme must be congruent and proportional to the injury to be prevented or remedied); *City of Boerne v. Flores*, 521 U.S. 507 (1997). For example, charter cities could argue that, assuming eradicating the adverse effects of racially-polarized voting in at-large electoral systems is a matter of statewide concern, the CVRA is not narrowly-tailored because the federal VRA presents a scheme more carefully-crafted to weed out those at-large systems in which, under the totality of circumstances, minority voting rights are abridged, and leave in place those at-large systems in which a minority candidate may have simply lost an election.

Vote of the People.

The sole fact that the voters of a city or special district have enacted an at-large electoral system by ballot measure, or rejected a by-district electoral system by ballot measure, will not protect a jurisdiction. Indeed, the latter may increase the risk to the jurisdiction by serving as persuasive proof of a violation of the CVRA if the by-district system was rejected in an election characterized by a racially-polarized vote.

No Minority Candidates.

The fact that no members of the minority group have ever run for membership on the legislative body will not insulate a jurisdiction from CVRA challenge. The CVRA expressly provides that a violation can be shown if racially-polarized voting occurs in elections incorporating *other* electoral choices that affect the rights and privileges of members of a protected class, such as ballot measures. (Elec. Code §§ 14028(a) & (b).) Some particularly obvious examples from the last decade might include Proposition 187 (denying state services to undocumented immigrants), Proposition 209 (preventing state agencies from adopting affirmative action programs), and Proposition 227 (barring the use of bilingual education in California public schools). *See Cano v. Davis*, 211 F.Supp.2d 1208, 1241 n.37 (C.D. Cal. 2002) (assuming these initiatives may be used to demonstrate racially-polarized voting). But other local measures may also serve the same purpose.

CONCLUSION

California's cities and special districts are entering a new and uncertain era in voting rights law. Much about the CVRA is unclear and federal precedent on key issues appears to have been legislatively overruled. It may require years of litigation to sort it all out. It

is impossible to know now whether California courts will uphold the constitutionality of the CVRA, how they will interpret the new law, or what defenses will be available. Perhaps the "totality of the circumstances" test will be reinvigorated by way of defense. In the meantime, there is a safe harbor under the CVRA (though still not necessarily under the federal Voting Rights Act): a by-district electoral system.

Jurisdictions with a history of electoral losses by candidates who are members of a minority group should consider analyzing those elections for racially-polarized voting. If polarized voting is detected, these jurisdictions may want to consider whether a change to a by-district electoral system is warranted. Demands by minority group representatives for a change to by-district elections must be taken seriously, even if the minority group is not numerous enough to form a majority in a new single member district. Changing voluntarily permits the elected representatives and the voters, rather than adverse plaintiffs or a court, to control the districting process and the considerations that will guide the districting. Once the single member districts are in place, the city or special district is in the CVRA safe harbor, even if the districts are not exactly those that plaintiffs would have preferred.