# The Voting Rights Act: Where We've Been And Where We're Going

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**Notes:**

**"The Voting Rights Act – Where We've Been and Where We're Going"**

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## Introduction

We have witnessed an upward trend in challenges to at-large voting systems throughout California during the last several years. These challenges have been aimed at cities and other similarly situated public agencies with significant minority populations or with a history of minority candidates losing elections. The principle issue in each of the pertinent cases has been minority vote dilution, which describes those instances where minority voters as a group, although not restricted from voting, are nevertheless unable to elect their preferred candidates as a result of being outvoted by the majority.

## Historical Landscape

Challenges to at-large voting systems are generally premised on violation of the Federal Voting Rights Act of 1965 (FVRA) and/or the California Voting Rights Act (CVRA), explained in greater detail below. This paper will primarily address CVRA related issues, but some discussion of the FVRA is appropriate.

### The Federal Voting Rights Act (42 U.S.C. § 1973 et seq.)

The FVRA is widely considered to be the most successful civil rights legislation in American history. The FVRA prohibits state and local governments from imposing voting laws that result in discrimination against minority groups. Section 2 of the FVRA

addresses the problem of vote dilution by prohibiting public agencies from redistricting or using methods of elections that impair the ability of a protected minority group to elect candidates of their choice on an equal basis with other voters.

Over the years, the FVRA has been amended in response to various court rulings. As one example, the Supreme Court of the United States ruled in *Mobile v. Bolden*, 446 U.S. 55, 66 (1980), that in order to prevail on vote dilution claims, plaintiffs must present proof of the voting law's discriminatory intent – a very difficult task. Responding to the *Mobile* case, Congress amended the Act in 1982 to provide that plaintiffs are not required to prove discriminatory purpose in order to establish a violation of Section 2.

A few years later, the Supreme Court articulated the test for determining whether an at-large method of election dilutes minority voting strength in the landmark case *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). Under the *Gingles* test, agencies must initially answer the following questions:

1) Is the minority group sufficiently numerous and geographically compact to constitute a majority in a single-member district?

2) Do the members of the minority group tend to vote alike? In other words, are the members of the minority group politically cohesive?

3) Does the majority vote "sufficiently as a bloc to enable it" to usually defeat the minority's preferred candidate?

Under *Gingles*, if the answer to these three questions is yes, then the court must secondarily determine whether, under the totality of circumstances, the minority group has a diminished opportunity to elect candidates of its choice. Only when the plaintiff satisfies all three *Gingles* conditions and the totality of the circumstances test must a public agency abandon its at-large method of voting and switch to district-based voting.

California Voting Rights Act (Elections Code § 14025 et seq.)

Similar to the FVRA, the CVRA prohibits public agencies from imposing an at-large method of election "that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election." (Elections Code § 14027.) However, the CVRA *expands* the protections against vote dilution provided by the FVRA by eliminating the requirement that plaintiffs show a majority-minority ward or division is possible (i.e., the third prong of the *Gingles* analysis). Plaintiffs may prove a violation under the CVRA simply by proving the existence of "racially polarized voting" (see Election Code § 14028 (a)), which

is for all practical purposes, a combination of prongs 1 and 2 of the *Gingles* analysis described above. Plaintiffs are not required to demonstrate geographical compactness or concentration of the minority group to prevail under the CVRA. Presumably, the recent challenges to at-large voting have been brought under the CVRA because it does not require that the minority group be sufficiently numerous and geographically compact to constitute a majority in a single-member district in order to establish a violation. In short, it's easier for plaintiffs to make their case under the CVRA than the FVRA.

But just what does "racially polarized voting" mean? It means voting where there is a difference in the choice of candidates or other electoral choices that are preferred by voters in a protected class (minority group), and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate (majority). For public agencies that hold at-large elections (which are many), where all voters elect each member of the governing board, bloc voting by the majority can render the minority vote meaningless. Whether racially polarized voting is occurring is determined by "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."

(Elections Code § 14028(b).) The CVRA specifically identifies the success rate of minority candidates that are preferred by the minority voting bloc as a circumstance that should be carefully considered when determining whether racially polarized voting is occurring.

Where it is determined that "racially polarized voting" exists, the prescribed remedy is for local governments to switch to district-based voting. (See Elections Code § 14029.) In a district-based electoral system, local governments split the jurisdiction into multiple majority-minority districts and allow voters only to elect candidates in the division where the candidate resides.

It is important to note that both the FVRA and CVRA allow successful plaintiffs to recover attorney fees.

## Recent Developments

With this historical framework in mind, we turn to the reality that cities throughout California have been threatened or sued for alleged violations of the CVRA within the last several years. To emphasize the importance of this trend, I would note that of those cities that have had their at-large method of election challenged under the CVRA on the basis that racially polarized voting exists, I am unaware of any that have successfully defended the case. For the most part, these cases have resulted in changes to

the city's method of election and the city paying the plaintiff's attorney fees.

This rising tide of VRA claims against cities seemingly began in 2004, when the Lawyers Committee for Civil Rights (LCCR) filed suit against the City of Modesto in *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, on behalf of three Latino residents, claiming the city's racially polarized voting was limiting the ability of Latinos to be elected to office. At the time the City of Modesto was the fourth largest city in the state utilizing the at-large voting system. Although Latinos made up 25.6 percent of the city's population of 200,000 at the time of the suit, only one Latino had been elected to the city council since 1911. The case against Modesto ended in a settlement after citizens voted to switch from at-large to district-based voting on a ballot measure. Despite settling the case, the City of Modesto had to pay $3 million in fees to the plaintiff's lawyers and $1.7 million for its own lawyers.

Since the *Sanchez* case, cities have been on alert concerning compliance with the Voting Rights Act. Despite this alertness, many cities have been sued or threatened with suit for violation of the CVRA, including the Cities of Palmdale, Bellflower, Compton, Anaheim, Escondido, Whittier, Santa

Clarita, Merced, Ceres, Turlock, Los Banos, Fullerton, Highland, Riverbank, Santa Barbara, Tulare, and Visalia.

## Application to Charter Cities

When its at-large voting system was challenged in recent years, the City of Palmdale argued on appeal that it was not subject to the California Voting Rights Act because it is a charter city. (*Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781.) In evaluating the City's at-large voting charter provision, the Appeals Court held that while the provision addressed a municipal affair, it nevertheless stood in contradiction to state law because the evidence showed that in application the provision resulted in minority vote dilution. Thus, the court ruled that the CVRA applied to charter cities. The Appeals Court in *Jauregui* also affirmed the trial court's injunction that enjoined the certification of the city council election results pending implementation of the trial court's final plan. Therefore, *Jauregui* likely stands not only for the proposition that the CVRA's vote dilution provision applies to charter cities, but also that trial courts have wide discretion in fashioning appropriate remedies where minority vote dilution is found.

## The Legislative Landscape

For those cities who wish to voluntarily transition from at-large voting to district based voting, Government Code section 34871 authorizes cities to submit the matter to voters for approval. Similar provisions exist for similarly situated public agencies, like Community Service Districts (Government Code § 61025), Water Districts (Water Code § 30730), and School Districts (Education Code § 5019).

Additional legislative fixes have been proposed or are being proposed in relation to similarly situated public agencies. For example, in the 2009-2010 Legislative Session, AB 2330 was introduced that would have imposed a claim filing requirement and 30-day response period before a CVRA lawsuit could be filed against a school district. This bill ultimately failed. However, AB 684 passed during the 2011-2012 Legislative Session, which provides a streamlined process for community college districts to change from at large elections to district based elections. Under AB 684 (now codified at Education Code § 72036), community college districts may change from at large to district based elections with only the concurrence of the California Community College Board of Governors (i.e., no need to submit the matter to the voters).

With regard to charter cities, Elections Code section 21620 confirms that upon the establishment of district based elections and thereafter, charter cities must ensure that the separate districts are as nearly equal in population in accordance with federal census data.

During the current Legislative Session, several CVRA related bills have been introduced. AB 182 would prohibit the use of district based elections that lead to minority vote dilution. In other words, AB 182 would make clear that the CVRA applies to district based elections as well as at large voting elections. A similar bill was vetoed by Governor Brown last year.

AB 245 has been introduced to make technical, non-substantive changes to the CVRA.

AB 254 would amend the Elections Code (Sections 1000, 1301, and 13112) to eliminate currently available election dates in March and April, thereby consolidating local government elections with statewide election dates.

AB 277 has been introduced in response to the *Jauregui v. City of Palmdale* case and is an attempt to codify the court's decision, as it pertains to the CVRA's application to charter cities. This bill would amend Section 14026 of the Elections Code by expressly including a charter city, charter county, or charter city and county within the CVRA's definition of "political subdivision."

AB 278, reintroduced by Assembly Member Roger Hernandez is likely the most significant pending legislation because it would force numerous cities that now elect council member through an at large voting system to switch to district based voting. Specifically, AB 278 would require a city with a population of 100,000 or more to switch to district based voting by simply adopting an ordinance and not submitting the matter to the electorate for approval. AB 278 is unsettling to many because it would force cities to change their fundamental relationship with citizens without their input (i.e., no electorate approval) and force cities where racially polarized voting do not exist to switch to district based elections nonetheless.

Unlike AB 278, that would mandate that all cities with a populations of 100,000 or more to transition to district based elections via ordinance, SB 493 would give general law cities the ability to transition to district based elections by ordinance without submitting the matter to voters for approval.

SB 437 has been proposed by State Senator Block and would simply express that it is the intent of the Legislature that elections held in California comply with the CVRA.

Several factors are impacting the CVRA's legislative landscape. Obviously, those proposing many of the bills identified herein are growing frustrated with the seemingly slow transition to district based elections. Proponents of these measures are increasingly concerned that with the growing minority populations throughout the state (especially Latino), minority voters are being disenfranchised through the utilization of the at large voting system. On the other hand, many cities and other similarly situated public agencies are understandably reluctant to make such a fundamental change to the relationship they have with their electorate. Moreover, many cities are unaware as to whether racially polarized voting is even occurring in their jurisdiction and are often only made aware of this issue if it is brought to their attention by way of a demand letter or lawsuit. Only in very recent years have we seen cities and other similarly situated public agencies proactively addressing this issue.

Another matter worthy of consideration is the role that the CVRA's attorney fee provision is playing in all of this. Many elected officials and citizens are becoming increasingly frustrated with what they perceive as extortionist tactics employed by Plaintiff lawyers bringing CVRA claims against cities and other public agencies. The amount of attorney fees being paid to Plaintiff lawyers in recently settled CVRA cases is significant and should be of concern to public agency lawyers throughout the state.[1] To illustrate this point, a recent Open Letter to Assemblymember Das Williams and State Senator Hannah-Beth Jackson was published in the Santa Barbara Independent where the concerned citizen stated the following: "Surely, this is not what the law intended; if so, it should be renamed the 'Lawyer's Get Rich Quick' Act. . . . If you and your colleagues truly believe that at-large elections are inherently discriminatory, as the California Voting Rights Act has been interpreted by the courts, then simply mandate that all cities in California be carved up into little districts. Why create a process that is nothing but a cash cow for opportunistic lawyers, at the expense of the very people the law purports to benefit?"[2] This frustration with the amount of public dollars being expended to pay plaintiff's attorney fees in CVRA

[1] The City of Palmdale was ordered to pay approximately $3.5 million in Plaintiff's attorney fees (on appeal); the City of Anaheim settled its case, but paid approximately $1.2 million in Plaintiff's attorney fees; the City of Modesto paid approximately $3 million in Plaintiff's attorney fees.
[2] http://www.independent.com/news/2015/mar/11/california-voting-rights-act-should-not-be-gift-la/

cases is not isolated and is undoubtedly impacting CVRA's legislative landscape, as well as how cities and other public agencies throughout the state are responding to the risks of CVRA related claims.

## Defense Strategies

The most obvious defense strategy when your city's voting system has been challenged is to establish that there has been no occurrence of racially polarized voting, as defined in Elections Code Section 14026(e). In litigation, we refer to this as the affirmative defense of failure to state a cause of action. This can be difficult and costly as it will often require the retention of an expert to carefully comb through election data and identify statistical trends. However, if cities wait until they are threatened with suit or are actually sued to assess whether racially polarized voting is occurring, this procrastination may be costly in terms of both litigation strategy and budget. A pre-litigation evaluation of the city's voting system and voting practices of citizens will undoubtedly aid decision makers in assessing risk when or if the challenge comes, or be the impetus for making proactive changes to the city's voting system.

As alluded to herein, the devil is in the details when it comes to assessing whether racially polarized voting is occurring. To aid in the potential defense of these claims, city officials should be readily aware of not only the ethnic make-up of their city, but the voting trends of its constituency. It is recommended that cities gather and keep information relating to each election that occurs including, but not necessarily limited to, names of candidates, type of election, qualifications of each candidate, experience of each candidate, relevant newspaper or other articles, identities of supporters, and sources of financial support. This data can help identify minority electoral trends and may serve useful down the road when/if the city's electoral system is challenged.

Another consideration when a city's voting system has actually been challenged is the plaintiff's standing to bring the claim in the first place. It perhaps goes without saying, but Plaintiffs challenging the city's voting system should be from the minority group whose voting rights are allegedly being infringed upon by the existing voting system.

Additionally, some public agencies have mounted defenses based upon equal protection and substantive due process bases, but none have proved fruitful to date.

## What Should Cities Do?

With the rising tide of claims against cities for Voting Rights Act violations in the legislative landscape described above, it is imperative that cities proactively assess their vulnerability to such claims. The recent flurry of cases against cities for violations of the Voting Rights Acts have primarily been initiated by private plaintiffs and brought under the CVRA because of its lesser threshold of proof; however, cities should remember that both Federal and State Justice Departments are also potential plaintiffs in this regard, as they routinely investigate and file lawsuits alleging violations of the Voting Rights Acts.

Cities with no pending threats or suits for violation of the Voting Rights Acts face several different options, the appropriateness of which will necessarily depend on whether racially polarized voting indeed exists in your City. If your City has a significant minority population and uses the at-large method of election, there is the potential that racially polarized voting exists. If your City has a history of minority candidates losing elections, or has a significant minority population with little or no minority representation on the governing board, then the likelihood of racially polarized voting is even greater, and it is recommended that you analyze voting practices to determine whether it exists. This is typically accomplished by retaining a statistical expert who

carefully combs through census and election data to ascertain the presence and/or degree of racially polarized voting. In the event the statistical study confirms that racially polarized voting exists, then your city is likely vulnerable to claims for violation of the Voting Rights Acts and should evaluate its options to minimize or eliminate the risk associated therewith.

The first and perhaps most obvious option available to cities is the status quo – to stick with the at-large system and hope that activists do not bring an action against the city or wait until the Legislature potentially forces you to transition to district based elections. After all, many feel at-large voting offers citizens more power and holds candidates more accountable since voters have the ability to elect all, rather than just one, governing official. However, I would note that for those cities where racially polarized voting is occurring, continuing the status quo is probably comparable to playing Russian roulette, as it may only be a matter of time before a plaintiff's lawyer sends a demand letter.

Another option available to cities is to voluntarily convert from an at-large method of election to district-based elections using the process set forth in Government Code 34871. The switch to district-based voting will ordinarily involve carving out majority-minority districts, which can be a difficult logistical task to complete. Though the effort to transition from at-large voting to

district-based voting takes considerable time and money in the present, the transition (if done correctly) will immunize the city from the harm that could arise from a lawsuit. This option also ensures that the power to control the redistricting process will lie with the elected representatives and local voters, rather than the courts. Nonetheless, it should be remembered that with this approach you still run the risk that the electorate could reject the change to district-based elections and leave the city vulnerable to a CVRA lawsuit thereafter. This is likely one of the risks that lawmakers have sought to address with bills like AB 278 (Cities with 100,000+ population switch to district based elections with ordinance) and AB 493 (allow general law cities to switch to district based elections via city ordinance).

Alternatively, cities may consider blended elections (i.e., a combination of at-large and district-based voting). This option is likely to be more challenging administratively, and seats elected through the at-large method remain at risk of a lawsuit. However, this risk is lower than maintaining an all at-large board. Other voting systems, like cumulative voting, where each voter has as many votes as there are open seats and can distribute them among several candidates or give them all to one candidate, are experimental at this stage and are not proven remedies.

In summary, if your city has a significant minority population and/or there is concern that racially polarized voting may be occurring, your city should seriously consider the rising tide of Voting Rights Act claims against cities and other public agencies. Have an expert analyze your census and election data and confirm whether racially polarized voting exists in your city. The lawsuits briefly described herein are extremely costly and garner negative publicity. Because of the attorney fee provisions under both the CVRA and FVRA, plaintiffs have nothing to lose and much to win, regardless of whether the case goes to trial. This no-risk litigation environment for plaintiffs makes jurisdictions highly susceptible to Voting Rights Act claims, and cities should take steps now to evaluate and minimize their exposure to such claims.

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