

# THE RECORDER

## LOCAL GOVERNMENT

### Challenges to an at-large election system

*Municipalities facing state Voting Rights Act litigation should attempt to resolve disputes without costly, protracted litigation*



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#### Local Government

As a major Election Day approaches in November, we can appreciate the fundamental rights of all American citizens to vote in fair and nondiscriminatory elections. Unfortunately, some minority communities, even in California, still find themselves without a voice in their local government.

These groups have a powerful tool in the groundbreaking California Voting Rights Act, Cal. Elec. Code §14025 *et seq.*, enacted in 2002. Under the CVRA, minorities that historically have been underrepresented on a local governing body because of at-large elections can sue for implementation of district-based elections and other remedies that can enable them to elect officials more responsive to their needs. The CVRA survived a facial constitutional challenge

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in *Sanchez v. City of Modesto*, 145 Cal. App.4th 660 (2006).

The CVRA is a more plaintiff-friendly version of §2 of the federal Voting Rights Act, which is under assault; it had long provided an avenue for minority communities to challenge the use of at-large elections that dilute minority voting strength. Historically, this was especially important for African-Americans in the South, and Latinos in the Southwest.

The CVRA removed some of the hurdles required to prove a violation under the federal Voting Rights Act. Principally, unlike the federal law, members of a protected class need not demonstrate that they could constitute a majority in a hypothetical district in order to prove a violation under the CVRA. The protected class members need only show that they could influence the outcome of an election in a district system.

Over the past decade, voters have filed CVRA challenges to the at-large systems of Cerritos Community College District, Ceres Unified School District, Compton Community College District, Madera Unified School District, the city of Tulare, Tulare Local Healthcare District and Hanford Joint Union High School District. Changing demographics and the release of the 2010 census information appear to have accelerated the filing of CVRA lawsuits. This year, for example, the city of Compton settled a lawsuit brought under the CVRA, and there are cases pending against the city of Anaheim and San Mateo County.

#### KEY LEGAL ISSUES

Given the scope of the CVRA and the recent uptick in litigation under it, counsel for concerned citizens, community groups and local governments should understand how the statute works. There have only been two published decisions interpreting the CVRA, leaving a number of key legal issues unresolved.

What is required to prove a violation of the CVRA? The act defines protected class as "a class of voters who are members of a race, color or language minority group as this class is referenced and defined in the Federal Voting Rights Act" §14026(d). The statute provides that at-large elections may not be applied in a manner that impairs the ability of a "protected class" to elect officials responsive to the needs of the class. Impairment is demonstrated by a showing of racially polarized voting, i.e., white voters vote for white candidates in a manner that consistently defeats the ability of the protected class to elect candidates of its choice. No intent to discriminate is necessary. Experts estimate voting patterns based on statistical models analyzing precinct by precinct data, as voting decisions of individuals are private. The most common methods for making these estimates are ecological inference and ecological regression analysis, both of which have been employed extensively in federal cases. Under the CVRA, racially polarized voting is evaluated by examining 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 privi-

leges of members of a protected class.”

In determining whether racial polarization has illegally impaired the ability of protected class members to elect candidates they prefer or to influence election outcomes, the courts may consider historic election success or failure of particular candidates who are members of the protected class. But determining the race or ethnicity of a particular candidate or elected official is not always straightforward. In the *City of Compton* case, which settled without a resolution of the issue, the city claimed that two of its ostensibly African-American elected officials were, in fact, Latino, based on their family trees and genealogy. While that defense precluded summary judgment for the plaintiffs, no appellate decision has interpreted the term “protected class.” Nor is there any authority under the CVRA on whether a racial polarization challenge to an at-large system can succeed where a few protected class members have been elected or where the statistical estimates show only a marginal difference in voting patterns between the protected class and other members of the electorate.

How does the court weigh other evidence of discrimination? The CVRA provides that other evidence of discrimination in addition to voting patterns may be considered, but such consideration is not required to prove a violation of the act. This aspect of the CVRA has received less attention to date. If it exists, evidence of a history of discrimination in education, housing or employment, or evidence that members of the protected class are underrepresented in government employment, in appointments to local boards and commissions, or in receiving government grants or contracts, could be offered. Evidence of obstacles to voting by protected class members also can be offered, such as the comparative lack of polling places in minority neighborhoods, or failure to provide election guidance in languages other than English.

Does low voter turnout affect the analysis of whether there is a violation of the CVRA? Voter turnout in California in municipal

elections among all racial and ethnic groups is often low. Nothing in the language of the CVRA suggests that low minority-voter turnout is a defense to a suit challenging at-large elections. However, local governments may argue that minority groups could elect officials of their choice if they turned out in higher numbers. If that were to be presented as a defense, plaintiffs could respond with expert testimony explaining to the court how past discrimination and exclusion depress minority voter turnout because members of minority groups lose faith that the political system can work for them.

Are charter cities or counties exempt from

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CVRA liability? The California Constitution allows charter cities and counties to retain control over certain governmental functions without state interference. State laws on matters of statewide concern, however, can still bind local governments. In the CVRA case against the city of Compton, the superior court decided that the CVRA addresses statewide concerns and therefore can be applied to charter cities. There is no appellate case law on this issue, however.

What remedies can be imposed? The CVRA provides that the courts have discretion to impose “appropriate remedies” that are “tailored to remedy the violation.” The most likely remedy in a CVRA case challenging at-large elections would be to require the local jurisdiction to implement district-elections and draw district boundaries that remedy the CVRA violation. Other possible remedies include options such as ranked-choice or cumulative voting systems.

### **WAYS TO AVOID COSTLY LITIGATION**

Given the continuing uncertainty in the law and the need for expert testimony, CVRA litigation is expensive, both for plaintiffs and local governments. Proving or challenging racially polarized voting requires retaining the services of one or more experts who can sift through mounds of past election data and estimate the voting behavior of various groups in those elections. Discovery into other indicia of discrimination can also be far-reaching and expensive.

Defendants’ risks are increased by the CVRA’s attorney fees provisions. Prevailing plaintiffs are entitled to reasonable attorney fees, which can include a multiplier, and litigation expenses, including expert witness costs. Given the costs of bringing these cases and the CVRA’s fee-shifting provisions, at a time of ever strapped government budgets, local government agencies and community groups should work together to avoid costly litigation and ensure that voters from all communities have a voice in local government.

Local governments and their elected officials need to take any plaintiffs’ pre-litigation demand under the CVRA seriously and enter into good faith negotiations with these plaintiffs. One option for the negotiators to explore is to place a switch to district-based elections on the ballot at the next election. Such a ballot measure may be politically popular throughout the community and among the candidates and potential candidates. District elections likely reduce the costs of campaigns and make elected representatives more responsive to the constituents they represent. For example, the June ballot measure proposing a charter amendment adopting district elections in the city of Compton (which was part of the settlement of a CVRA case) passed with the support of 65 percent of Compton voters. This outcome was far preferable to protracted and uncertain litigation.

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