California Special Districts Association
Districts Stronger Together

CONVERTING FROM AT-LARGE TO BY-DISTRICT ELECTIONS UNDER THE CALIFORNIA VOTING RIGHTS ACT: UNDERSTANDING THE "SAFE HARBOR" PROCESS FROM START TO FINISH

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Your district receives a letter from an out-of-town attorney claiming the at-large elections for its governing board violates the California Voting Rights Act ("CVRA"). The attorney claims "racially polarized voting" exists in your district's elections and alleges that a particular class of voters' power is diluted as a result. The attorney threatens to file a lawsuit if your district does not adopt a resolution expressing its intention to switch to a "by district" system of elections. The attorney notes that substantial attorney fees will be awarded against your district if the court finds its at-large election system does in fact violate the CVRA. The letter informs your district it has 45 days to act. *How do you respond*?

If your district receives such a letter, do not fear, as it is not alone. Many cities, school districts, and special districts have received such letters in recent years. The CVRA, which took effect in 2003, has a very loose standard for determining liability. Similar to claims of lawsuit abuse concerning the Americans with Disabilities Act or for failure to give Proposition 65 warnings, many believe the CVRA's broad criteria have resulted in similar lawsuit abuse. Fortunately, the Legislature has (somewhat) reined in the potential for such abuse with revisions to the Act that provide a "safe harbor" process through which local agencies can switch to by-district elections.

This paper is intended to help you understand your options and be prepared in the event that your district receives a demand letter. It describes the key features and standards of the CVRA as well as the (very tight) timelines that apply for considering whether to convert to a by-district election system and the process for doing so. This paper offers practical guidance regarding the safe-harbor process from start to finish.

How is the CVRA Violated?

The CVRA prohibits any *political subdivision* from using any *at-large method of election* that "impairs the ability of a *protected class* to elect candidates of its choice or influence the outcome of an election, as a result of the dilution or the abridgement of the rights of voters are members of the protected class…."[1]

If you read that last sentence and thought it was mouthful, don't feel bad. Statutes are often written in long, complex sentences loaded with precise terms and can be hard to digest. The CVRA is no exception. To break down the key text into simpler pieces, we'll start with terms the CVRA defines (italicized above).

"Political subdivisions" are units of government within the state and, at the local level, include cities, counties, and—of course—special districts.[2]

[1] Elec. Code, § 14027.
[2] Elec. Code, § 14026(c).

An “at-large method of election” is a system of voting in which voters within an entire jurisdiction elect the members of the governing body. If there are two positions open on a local board, for example, candidates would run as a group and the top two vote getters would be seated following the election.[3] In California, this is the most common way special district governing boards are elected.

A “protected class” means a class of voters who belong to *any* “race, color, or language minority group.”[4] It is possible for one minority group’s voting rights to be diluted even though other minority groups’ rights are not violated. In California, the most common CVRA claims involve African-American, Latino, and Asian-American populations.

Those are the defined terms. What about the rest of the text? That is, when does a political subdivision’s at-large election system *impair* a protected class’ *ability to elect candidates of its choice or influence the outcome of an election*? The answer: when there is “racially polarized voting” (“RPV”) within a jurisdiction.[5]

How and when RPV can exist will be explained in the next section. For now, it’s important to emphasize that the CVRA differs significantly from its federal counterpart, the Federal Voting Rights Act (“FVRA”). The standards FVRA establishes for demonstrating violations are much higher. In addition to demonstrating the existence of RPV, a plaintiff must demonstrate that a minority population is compact and large enough to form a majority in a single-member district.[6] The court in a FVRA case must also determine that under the “totality of the circumstances" the votes of minority voters are diluted.[7]

In contrast, CVRA plaintiffs need only prove that RPV *exists*.[8] In setting this relatively low standard, the Legislature intended to make voting-rights challenges much easier than under the FVRA. Not surprisingly, the legal community responded. A small group of attorneys began filing CVRA lawsuits on behalf of clients throughout the state.[9] And after some early successes in these lawsuits, followed by huge awards of attorney fees (sometimes in the seven-figure range), many agencies rightly began to fear the risk of having to pay similar awards. In fact, to date, very few CVRA lawsuits have gone to trial. The large majority of agencies that have received threats of CVRA lawsuits have quickly agreed to switch to by-district elections.

When Does “Racially Polarized Voting” Exist?

RPV exists when there is a difference in how members of a protected class vote versus members not within the protected class.[10] Sometimes this phenomenon is referred to as “bloc voting.”

Whether RPV exists is generally determined by statistical analyses. Typically, methods known as “regression analysis” and “ecological inference” are performed to assess relevant voter behavior in representative elections. Because these types of analyses are beyond most peoples’ expertise, demographers and other professionals are usually called upon to perform—and perhaps more importantly, explain—them.

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[3] *Id*., § 14026(a).
[4] *Id*., § 14026(d).
[5] *Id*., § 14028(a).
[6] *Thornburg v. Gingles* (1986) 478 U.S. 30, 50-51.
[7] 52 U.S.C., § 10301(b).
[8] *See* Elec. Code, § 14028(c) (noting that geographic compactness, as required under the CVRA, is not required to demonstrate RPV).
[9] Any voter who is a member of a protected class subject to RPV may bring a private civil action to enforce the CVRA. Elec. Code, § 14032. When his or her lawsuit is successful, the attorney who prosecuted the suit is entitled to an award of attorney fees and costs. *Id*., § 14030.
[10] Elec. Code, § 14026(e).

In determining whether RPV exists, the comparison is not just between a particular minority population and the white/Caucasian population. The comparison is made between the group whose voting power is asserted to be diluted and *all other voters* outside that group. Thus, if it were alleged that the votes of Latinos within a jurisdiction were being diluted, the comparison would be between their votes and the votes of whites, African-Americans, Asian-Americans, *and* all other groups.

Further, RPV is *not* determined solely by how the electorate voted in elections involving the agency's governing board. In a CVRA lawsuit, the court may look at the voting preferences of groups in not just agency board elections, but also in elections involving other agencies (such as cities, counties, and school districts), state elections (for the Assembly or Senate, for example), and ballot initiatives (state or local).[11]

An agency's intent or lack of intent to discriminate also is not relevant in determining whether RPV exists.[12] CVRA violations can occur—and often have been alleged to occur—in jurisdictions where elected bodies are perceived to be progressive on issues of race relations.

Finally, that candidates of a protected class have been elected to an agency's governing board does not negate a finding that RPV exists for that class. Under the CVRA, the history regarding class members' success as candidates is only a *factor* that may be considered in determining the existence of RPV.[13]

What is the Remedy for CVRA violations?

If a court finds that RPV exists, the CVRA requires it to implement an appropriate remedy. Usually, this involves the court ordering the agency to implement by-district elections.[14] In by-district elections, also referred to as "by-division" or "by-ward" elections, candidates reside within election districts that are divisible parts of the political subdivision and are elected only by voters that reside within those districts.[15] (Counties are a good example of local governments that utilize by-district elections.) The idea behind requiring such a remedy is that the protected class will have an easier chance of electing its members to office in smaller, discrete districts than it does when it must compete against the whole electoral population. In theory, the protected class is less likely to suffer from vote dilution when it votes in a districting system.

When by-district elections are ordered by a court, a judge supervises the agency's transition away from its at-large system as part of the remedial phase of the lawsuit. During this phase, although the agency has the right to be heard about what the resulting districts should look like, *the judge* makes the final decision as to where district lines are drawn.

Fortunately, the Legislature has provided a way for agencies to avoid having a judge decide such important—and fundamentally political—matters. In 2016, the Legislature enacted AB 350, which created a "safe harbor" by which agencies can voluntarily convert to by-district elections and avoid having to defend against CVRA lawsuits.[16] In this legislation, the Legislature included a key enticement: in exchange for moving away from at-large voting systems, agencies can ensure their exposure to a potential CVRA plaintiff's attorney fees is *capped at $30,000*. Given the seven-figure attorney-fee awards some agencies have paid after losing or settling CVRA lawsuits, many cities and agencies have found this a hard deal to turn down.

[11] *Id*., §14028(a)-(b).
[12] *Id*., § 14028(d).
[13] *Ibid*.
[14] Elec. Code., § 14029.
[15] *Id.*, § 14026(b).
[16] *See generally id.*, § 10010.

What Should My District Do After Getting a CVRA Demand Letter?

AB 350 changed the CVRA to require plaintiffs to first send a written notice, or demand letter, to an agency before filing suit. After serving such a notice by certified mail, the plaintiff must wait at least 45 days before filing an action.[17] This affords the agency a safe-harbor period in which to consider whether to convert from at-large to by-district elections. If the agency chooses to proceed with the conversion process, it must adopt a resolution within the 45 days expressing its intention to do so.[18]

If your agency receives a CVRA demand letter, the most important thing to recognize is that 45 days is not a lot of time. Many special districts meet once a month and sometimes even less frequently. Right away, it is important to identify a regular or special meeting date within the 45 days and to make sure at least a quorum of your elected body would be available to consider adoption of the required resolution.

In addition to meeting to consider the resolution, your agency should plan a separate—and earlier—meeting to discuss the potential CVRA litigation in closed session. Because the CVRA demand letter is a bona fide threat of litigation, the matter may appropriately be treated and discussed under the Brown Act as an anticipated litigation item.[19] In closed session, your board and key staff can discuss the threatened litigation with your general counsel and evaluate the potential action's strengths and weakness. Your general counsel should also consider immediately engaging a demographer as a litigation consultant to conduct a preliminary statistical analysis regarding the threatened claim. This analysis can appropriately be kept confidential under the attorney-client privilege and as attorney work product.

What Happens if Your District Sticks with its At-Large Voting System?

As noted, the vast majority of agencies that have received threats of CVRA litigation have chosen to switch to by-district elections. The reasons are easy to understand.

First, the standard for proving a CVRA case is quite low. A plaintiff need only show that RPV exists, not that it results in candidates from a protected class failing to gain office.

Second, a successful plaintiff is *guaranteed* an award of attorney fees when he or she prevails.[20] And when attorney fees are awarded, it is per the "lodestar" approach California courts use when plaintiff attorneys are found to have vindicated important public rights (as the right to vote would surely be considered). The lodestar is the product of an hourly rate the court establishes based on a number of factors, including the importance of the case and skill required of the attorneys, multiplied by the number of hours worked on the case. In one well publicized case, an attorney who settled a CVRA lawsuit received $950 per hour for his services. Although this amount is probably at the top of the range of—if not well above—what a court would award, it is not unrealistic to expect a court to award rates of $500 or more in successful CVRA litigation. For this reason, coupled with the number of hours plaintiff counsel would need to spend on the case, your agency can reasonably expect the possibility of a seven-figure attorney fee award if it chooses to litigate the CVRA lawsuit and is unsuccessful.

In contrast, if your district follows the AB 350 process, it is *guaranteed* not to pay more than $30,000 in attorney fees. AB 350 contains a process by which attorneys for CVRA plaintiffs must submit their bills to the agency for consideration and ensures that such fees cannot exceed the $30,000 cap—

[17] *Id.*, § 10010(e)(1)-(2).
[18] *Id.*, § 10010(d)(3)(A).
[19] *See* Gov. Code, § 54956.9(d)(2).
[20] Elec. Code, § 14030.

even if there were more than one demand letters served by more than one attorney representing different plaintiffs.[21]

Your agency has another risk if it chooses not to follow the AB 350 process. During any remedial phases of a CVRA lawsuit, the court makes the decision as to how and where district lines are drawn. This is not to say your agency will not have input before the judge makes that decision. But ultimately it will be *the judge* who has the final say. And he or she will have to consider any competing proposals the plaintiff in the case presents.

Under the AB 350 method, in contrast, *your agency* controls the districting process and *your governing board* makes the final decision about how district lines are drawn. Not surprisingly, for this reason many agencies have opted for an approach of "better the devil you know than the one you don't." Rather than put such a transformative political change in the hands of a judge, they have decided to make the important districting change themselves and preserve as much autonomy as they can over the conversion process.

Your District Agrees to Switch to By-District Elections. What Happens Next?

If your agency decides to convert to by-district elections, the first step is to adopt a resolution expressing its intention to do so within 45 days of receipt of the CVRA demand letter. The resolution must identify the steps that will be taken to facilitate the transition to by-district elections and the timeframe for the conversion process.[22] Adoption of this resolution extends the safe-harbor period for avoiding a CVRA lawsuit by 90 days.[23]

Plan for these 90 days to be a very busy time. In addition to all the other business items your agency must address during these three months, it will be required to hold at least *four* public hearings as part of the AB 350 process. Initially, your agency must hold at least two hearings to gather input regarding the composition of the proposed new districts and timing of district elections.[24] These meetings must occur over a period of no more than 30 days.[25]

After the initial two meetings (and any additional meeting your agency holds), your agency must then publish a draft map (or maps) of the proposed districts.[26] If your agency proposes to stagger the elections of the new districts (for instance, with four-year terms, a proposal could be that three board seats run initially in 2020 and the other two run in 2022), it must also publish the proposed election sequence.[27] Following such publication, and within 45 days, your agency must then hold two public hearings to consider and adopt a final district map and election sequence.[28] (The first of these hearings cannot occur until at least seven days after publication of the draft map or maps.[29]) The district system must be adopted by resolution.[30]

It is essential that your agency have a qualified demographer to assist in, and even facilitate, the creation of districts. It is also important your district retain this consultant right away. He or she will need to begin working almost immediately after being retained to gather relevant Census and elections data and information. The demographer will also be instrumental in facilitating input from

[21] Elec. Code, § 10010(f).
[22] *Id*., § 10010(e)(3)(A).
[23] *Id*., § 10010(e)(3)(B).
[24] *Id*., § 10010(a)(1).
[25] *Ibid.*
[26] *Id*., § 10010(a)(2).
[27] *Ibid.*
[28] Elec. Code, § 10010(a)(2).
[29] *Ibid.*
[30] *Id*., § 10650.

the public about communities of interest within your district (this concept is discussed below) and in drawing draft and final district maps.

Another important matter your district should consider is outreach during the AB 350 process. The conversion from at-large to by-district elections is a transformative process that significantly changes the relationship between your district's voters and elected officials. Although little time is provided to complete the process, your district should still consider public outreach a priority. A number of agencies that have converted to by-district elections have created special websites to describe the basics about the conversion process, outline the standards for creating districts, and provide notices and schedules of public hearings. Efforts to reach out to non-English speaking communities should also be encouraged.[31]

How Are Districts Drawn?

A number of factors go into the drawing of districts. As a starting point, to ensure the principle of "one person, one vote," districts should include about the same number of persons. Some variations in the populations of districts are permissible, but usually the variance should not exceed five percent above or below the average that should exist per district. The average is based on the total population of the jurisdiction determined by the last Census divided by the number of districts.

Generally, districts must also be *contiguous* and *compact*. These terms are technically distinct, but they combine to provide that districts must have some rational shape about them. Districts should follow visible features and boundaries when possible. Long, twisted, contorted, and oddly-shaped districts can suggest a desire to further ulterior motives. In theory—although not always in practice—the districting process should not take into account incumbency and partisan interests.

Importantly, districts should also attempt to preserve *communities of interest*. These are contiguous populations that share some common social or economic interests. Downtown corridors, historic districts, and subdivisions are examples—by no means exclusive—of areas that would be communities of interest. A rule of thumb might be to ask whether it would make sense to draw a district line through a particular area or neighborhood. If doing so would seem odd, because it would divide an area where there is a natural bond or connection, then that area would probably be a good candidate to treat as a community of interest.

When do By-District Elections Begin?

The subject of when and how to start district elections is a tricky—and unresolved—subject under the CVRA. Generally, incumbents should be allowed to serve out their terms.[32] However, under the CVRA, agencies must "give special consideration to the purposes of the [CVRA]" and "take into account the preferences expressed by members of the districts."[33]

Delaying the creation of districts for the convenience of the existing elected officials may not remedy a CVRA violation. For that reason, your district should implement district elections at the first election that follows the adoption of its resolution adopting by-district elections. One solution may be to start district elections for those seats that are up at that first election that follows and to assign the remaining districts to the seats that are up at the following election. If that approach is taken, district elections should begin immediately for the seat or seats that are likely to have the most members of the relevant protected class.

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[31] *Id.*, § 10010(a)(1).

[32] Elec. Code., § 10506. Note that elected officials in special districts may only serve for terms of up to four years. *Ibid*. Nothing about the safe-harbor process changes that limitation. *Id.*, § 10507.

[33] *Id.*, § 10010(b).

What if my District has yet to Receive a CVRA Demand Letter?

Your district need not receive a CVRA demand letter to begin the process to switch to by-district elections. A district can move away from at-large voting systems at any time.

Beyond avoiding the potential liabilities that come with CVRA lawsuits, there are practical reasons why districts might consider such a switch. One reason may be to reduce the costs districts must bear for board elections. Because only certain board seats would be open each election cycle, and these seats would not cover the entire district territories, districts may find that their counties charge less for the elections due to the smaller number of precincts that may be involved,

Some districts may also find it easier to entice a greater number of candidates to run in district elections. As candidates would only be required to campaign to about 20% of their populations in each election, they may be less inclined to perceive the economic costs of campaigning are too high to run for office.

However, in other districts—particularly smaller ones—switching to districts could reduce the pool of candidates who run for office. Especially in districts where populations are as low as 1,000 or 2,000 persons, and where vacancies and uncontested elections are more frequent, finding qualified candidates in five separate districts may be challenging.

Whatever your district's positions may be after considering these and other issues, one thing is clear: your district should not wait until it receives a CVRA demand letter before considering a switch to by-district elections. Your district should consider the advantages and disadvantages of such a switch while it still has the ability to carefully consider the issues free of the time constraints and burdens of threatened litigation.

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