

The California Voting Rights Act

A Presentation by:

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for

The City of San Rafael

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The California Voting Rights Act (CVRA)

- The CVRA prohibits at-large electoral systems that impair the right to vote of a protected class. It applies to:
 - At-large elections
 - “From-District” Elections
 - Combination Systems
 - Multi-member Areas?
 - Alternative Systems?

Historical Background

- In the late 1990s and early 2000s, voting rights plaintiffs nationwide, but especially in California, were experiencing trouble bringing successful actions under Section 2 of the federal Voting Rights Act.
- Many of the most blatantly problematic voting structures had been remedied, and voting rights groups perceived the federal courts as less-than-entirely hospitable to their claims.

Section 2 of the FVRA

- Section 2 applies nation-wide. It forbids any “qualification or prerequisite to voting or standard, practice, or procedure ... which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color” or membership in a language minority group.

Background of Section 2:

Thornburg v. Gingles, 478 U.S. 30 (1986)

- A plaintiff must first establish the three *Gingles* threshold preconditions:
 - “First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . .
 - Second, the minority group must be able to show that it is politically cohesive. . . .
 - Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority’s preferred candidate.”

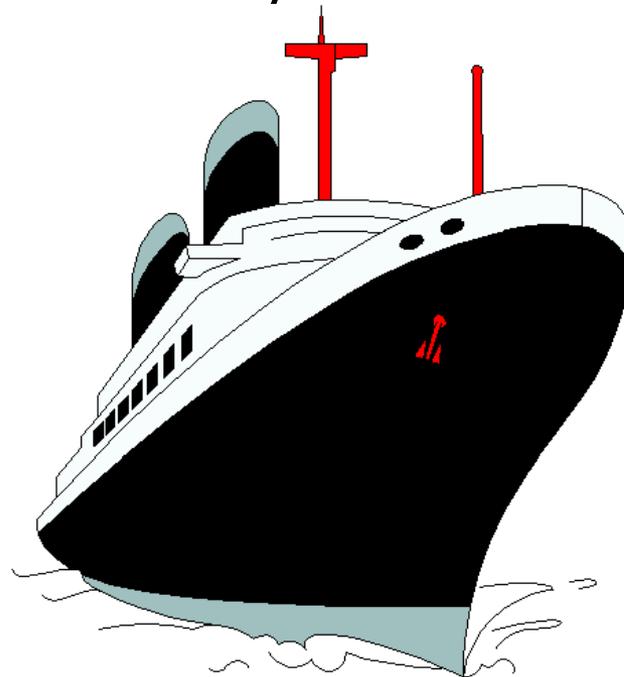
Id. at 50-51 (internal citations and footnote omitted).
- Many cases failed because plaintiffs could not establish the first precondition.

Solution? The CVRA

- Enacted in 2002 (S.B. 976)
- Took effect January 1, 2003
- Elections Code §§ 14025 to 14032
- Eliminates 1st Precondition
- Totality of Circumstances Remain?
- As MALDEF (Mexican-American Legal Defense and Education Fund) put it, the “[b]ill makes it easier for California minorities to challenge ‘at-large’ elections.”

The CVRA Safe Harbor “Single-member District” Elections

A City that elects by “single-member district”
has no liability under the CVRA.



What's Prohibited? Short Answer

- Good question. The language is very unclear. The Court of Appeal in *Sanchez v. City of Modesto* remanded the case to the superior court to determine the elements of a claim. The case settled before that happened.
- Interpretation has been hotly contested in subsequent cases.
- No Court of Appeal case law to clarify.

What's Prohibited? Longer Answer

Plaintiffs at least need to show:

1. At-large election system
2. Voting patterns correlated with the race of the voter
3. Impairment of the ability of voters in the protected class to elect the candidate of their choice
4. The minority-preferred minority candidate (sometimes) loses.

A New Theory for Plaintiffs: Influence Districts

- Not possible to draw a majority-Latino CVAP single-member district in San Rafael.
- In *Bartlett v. Strickland*, 556 U.S. 1 (2009), the U.S. Supreme Court rejected a claim that failure to create an “influence” district could give rise to federal liability.
- The CVRA, however, seems to anticipate it.
- What constitutes a failure to provide adequate “influence”? Good question!
- ““Influence” cannot be clearly defined or statistically proved’ and admits of no limiting principle.” *Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n*, 366 F. Supp. 2d 887, 906 (D. Ariz. 2005) (quoting *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 379 (S.D.N.Y.) (three-judge court), *summarily aff’d*, 543 U.S. 997 (2004)).

What Defenses Are Available?

- *Sanchez v. Modesto* seemed to indicate it's basically a federal action with compactness at the remedy stage. So possible defenses include:
 - No Racial Bloc Voting (Methodological Defects)
 - Numerosity Inadequate
 - Compactness
 - Minority-Preferred, Minority Candidates Elected
 - Minority-Preferred, Non-Minority Candidates Elected
 - Lack of Causation/ "Impairment"
 - Totality of the Circumstances
 - Lack of Remedy
 - As-Applied Constitutional Challenge

Effects of the CVRA

- After the CVRA passed in 2001, activity was slight while a challenge to the law’s constitutionality was decided.
- Even after it was upheld in *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660 (2006), *rev. denied*, 2007 Cal. LEXIS 2772 (Mar. 21, 2007), *cert. denied*, 128 S. Ct. 438 (U.S. Oct. 15, 2007), still limited activity because late in the decade. A handful of cases, all of which settled.
- Following the 2010 Census, activity ramped up. Since that time hundreds of school districts, cities, special districts, community college districts, and one county have abandoned at-large voting—most voluntarily, some after being sued.
- *Jauregui v. City of Palmdale*, 226 Cal. App. 4th 781 (2013).

Costs of CVRA Litigation

- Reasonable attorneys' fee awards to prevailing plaintiffs are *mandatory*, but if the jurisdiction fixes the problem and the case is dismissed as moot, under California Supreme Court case law, fees will only be awarded if plaintiffs gave a reasonable opportunity to "fix" the problem before filing suit.
- The City of Modesto is reported to have paid \$1.7 million to its attorneys and \$3.0 million to plaintiffs' attorneys. The case never even went to trial, though it did get litigated through the appeals courts up to the U.S. Supreme Court.
- City of Tulare reportedly paid \$250,000.
- Tulare Local Healthcare District paid \$500,000
- City of Escondido: reportedly \$585,000
- City of Palmdale: reportedly \$4.5 million through briefing on appeal, no argument
- City of Anaheim: \$1.2 million in settlement long before trial
- City of Whittier: ~ \$1 million, although City defeated motion for preliminary injunction, and case eventually dismissed as moot
- San Mateo County: \$650,000
- See "Voting Rights Cases in California & Settlement Costs," Antelope Valley Times (May 7, 2015), online at http://theavtimes.com/wp-content/uploads/2015/05/Voting_Rights_Cases_Costs.pdf.

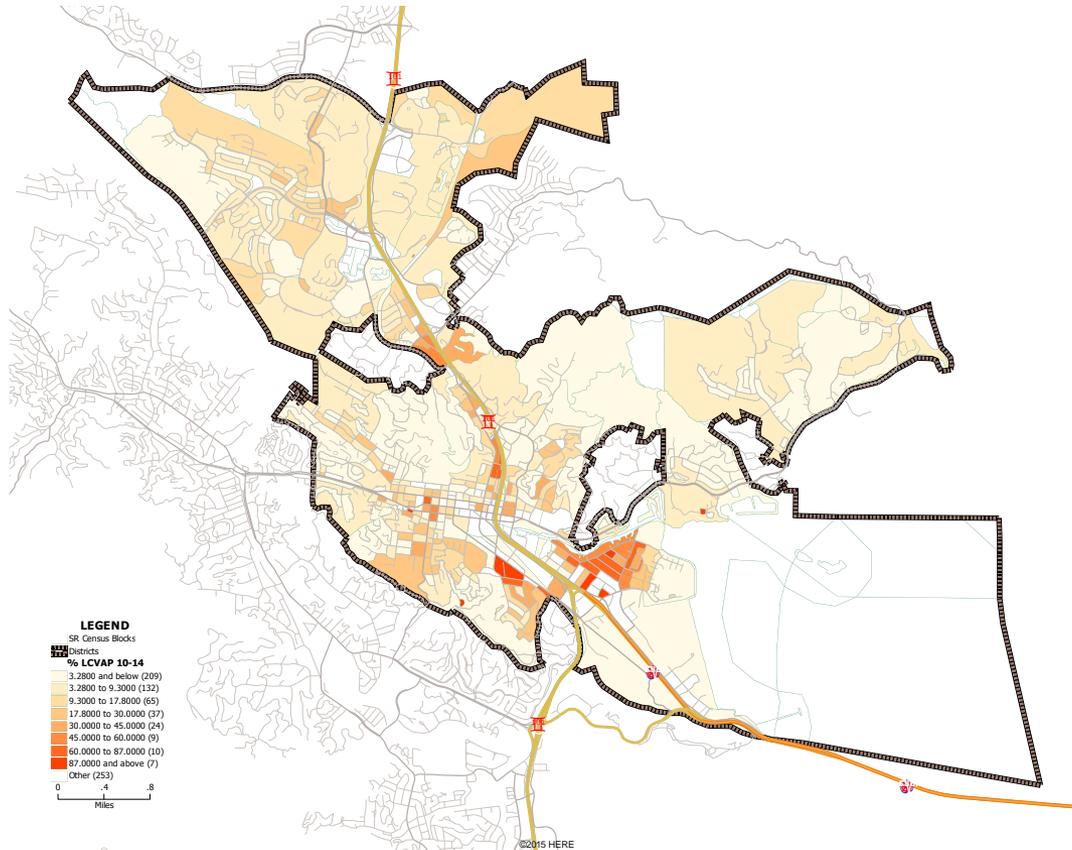
Legislative Reform: AB 350

- Certain jurisdictions (City of Whittier, Cerritos Community College District) were sued by would-be plaintiffs, even after indicating their intention to move forward with district-based elections, because had they done so without litigation pending, no attorneys' fees would have been due.
- In response to lobbying by the League of California Cities and others, AB 350 adopted a requirement that would-be plaintiffs send a demand letter to a jurisdiction before filing suit, and provides jurisdictions with a grace period (up to 135 days) within which to adopt districts/trustee areas. If it does so, the plaintiffs' attorneys can demand reimbursement of their costs without filing suit, but costs and fees are capped at \$30,000.
- If the jurisdiction does not comply within the grace period, the plaintiffs can file suit and seek reimbursement of costs and fees without the \$30,000 cap.
- If the jurisdiction commences the process before receiving a demand letter, it is not on the hook for any costs and fees to would-be plaintiffs.

Some Information About San Rafael

City of San Rafael - Summary Demographics	Count	Percent
Total Population (2010 Census)	57,713	
Ideal District Size (Four Districts)	14,429	
Ideal District Size (Five Districts)	11,543	
Citizen Voting Age Population (2010-2014 Special Tabulation)	36,702	
Hispanic/Latino CVAP (2010-2014 Special Tabulation)	4,132	11.26%
Non-Hispanic White CVAP (2010-2014 Special Tabulation)	28,709	78.22%
Non-Hispanic Black CVAP (2010-2014 Special Tabulation)	1,232	3.36%
Non-Hispanic Asian CVAP (2010-2014 Special Tabulation)	2,153	5.86%
Non-Hispanic Pacific Islander CVAP (2010-2014 Special Tabulation)	135	0.37%
Non-Hispanic Indian CVAP (2010-2014 Special Tabulation)	261	0.71%
Non-Hispanic "Other" & Multi-racial CVAP (2010-2014 Special Tabulation)	81	0.22%
Total Registered Voters (2014 General Election)	28,223	
Spanish-Surnamed Registered Voters (2014 General Election)	1,854	6.57%
Total Actual Voters (2014 General Election)	16,838	
Spanish-Surnamed Actual Voters (2014 General Election)	781	4.64%

Some Information About San Rafael



Options

- Do nothing and wait for litigation to be filed, and then aggressively defend.
- Initiate change of electoral system to be implemented in 2018 using AB 350 process
- Initiate change of electoral system to be implemented following next Census (in 2020).
 - Council districts must be readjusted following each Census.
 - No guarantee litigation will be avoided.

Elements of Process for Changing Electoral System

- Retain demographic consultant
- Update city demographics
- Adopt districting criteria
- Get community input at multiple public hearings
- Draw maps/determine election sequencing for electoral districts
 - Note: terms of incumbents are not cut short
- Additional public hearings prior to adoption of districting ordinance
- Pass ordinance adopting districts

Amendment to Charter Needed?

- **S.R. Charter, art. IV, sec. 2:** “Nominations and all elections to fill public offices and elections on measures shall be made, held and conducted in the manner provided for by general law.”
- **Cal. Govt. Code § 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).”

Process: Sample Timeline

Activity	Timing
Formally Resolve to Single-member Districts; Adopt Criteria and Tentative Calendar; Related Steps including Extensive Public Outreach and Development of Website	TBD but within 45 days of receipt of demand letter
Two Public Hearings Before any Maps Are Drawn	No more than 30 days apart
Draft Maps and Election Rotation Published	At least 7 days prior to next round of public hearings
Two Additional Public Hearings to Receive Input	No more than 45 days apart
Final Public Hearing to Adopt Districting Ordinance	At least 7 days after any changes to map proposed for adoption, and within 90 days of initial resolution
Receive Demand Letter for \$30K From Attorney Shenkman	Within 30 days of adoption of ordinance
Negotiate/ Pay Attorney Shenkman	Within 45 days of demand
Implement Adopted Single-member Districts	November 2018

Questions?

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