The Rising Tide of Voting Rights Act Claims: What Should My District Do?

Local governments throughout California have been sued or threatened with suit because of their at-large voting systems over the course of the last several years. For some time it seemed plaintiffs' lawyers were focusing their efforts against cities, but the evidence is mounting that special districts are now one of the chief targets. So what do you do if your district receives a demand letter from an attorney claiming that the at-large elections for your governing board violate the California Voting Rights Act ("CVRA")? This article is intended to help you answer that question and understand the legal issues surrounding CVRA claims. It reviews the key legal standards of the CVRA and recent revisions to the law that allow for districts to voluntarily transition to by-district elections without court involvement.

What is the CVRA and How is it Violated?

The CVRA was signed into law in 2003 and has a loose standard for determining liability. The CVRA forbids a district 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 who are members of the protected class…." [1] Hence, the pertinent question is, when does an at-large election system *impair* a protected class's *ability to elect candidates of its choice or influence the outcome of an election*? The answer is, when there is racially polarized voting within a jurisdiction. [2]

How is Racially Polarized Voting Proven?

Racially polarized voting exists when there is a difference in how members of a protected class vote versus members not within the protected class. Sometimes this phenomenon is referred to as "bloc voting."

Whether racially polarized voting 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.

In determining whether racially polarized voting 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, racially polarized voting is not determined solely by how the electorate voted in elections involving the district's governing board. In a CVRA lawsuit, the court may look at the voting preferences of groups in not just district 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).

A district's intent or lack of intent to discriminate is also not relevant in determining whether racially polarized voting exists. [3] 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 a district's governing board does not negate a finding that racially polarized voting 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 racially polarized voting. [4]

What is the Remedy for CVRA Violations?

If racially polarized voting exists in your district, the solution is to transition to by-district elections. How is this accomplished? Your district has essentially two options: it can either be forced to transition to by-district elections by a judge (lawsuit), or it can voluntarily transition by following the prescribed statutory framework.

If a court finds that racially polarized voting exists, the CVRA requires it to implement an appropriate remedy. Usually, this involves the court ordering the district to implement by-district elections.[5] 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.[6] (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.

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1 Elec. Code, § 14027. 2 *Id*., § 14028(a). 3 Elec. Code., § 14028(d). 4 *Ibid*. 5 *Id.*, § 14029. 6 *Id.*, § 14026(b).

When by-district elections are ordered by a court, a judge supervises the district's transition away from its at-large system as part of the remedial phase of the lawsuit. During this phase, although the district 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 districts 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 districts can voluntarily convert to by-district elections and avoid having to defend against CVRA lawsuits.[7]

In this legislation, the Legislature included a key enticement: in exchange for moving away from at-large voting systems, districts can ensure their exposure to a potential CVRA plaintiff's attorney's fees is capped at $30,000. Given the seven-figure attorney-fee awards some public agencies have paid after losing or settling CVRA lawsuits, many public agencies have found this a hard deal to turn down.

Under AB 350, plaintiffs are required to send written notice, or a demand letter, to a district before filing a lawsuit alleging that the district's election system violates the CVRA. Plaintiff must then wait at least 45 days before filing a lawsuit.[8] This 45-day window gives the district 45 days to consider its potential liability under the CVRA and decide whether or not to effectuate the transition to by-district elections. The district must adopt a resolution declaring the intent to transition to district-based elections within the 45-day period to stay within the confines of the "safe harbor" provision.[9] Once the resolution of intent to transition to by-district elections is adopted under AB 350, it extends the "safe harbor" period for avoiding a CVRA lawsuit another 90 days.[10] Over the course of the next 90 days, the district is tasked with hiring a demographer to analyze data and construct proposed district boundaries, holding a total of four public hearings to receive input concerning how districts should be drawn and the proposed election sequence.[11]

As AB 350 has been implemented over the course of the last two years, local governments have discovered that additional time can be helpful to ensure a successful transition to district-based elections. For example, one of the critical components of an effective transition from at-large to by-district elections is public outreach, including reaching out to minority communities. Some local governments were finding it difficult to do an effective outreach to, and receive feedback from, these communities within the deadlines prescribed by AB 350. In response to these concerns, the Legislature passed AB 2123, and it was signed by Governor Brown in September 2018.

AB 2123 authorizes prospective plaintiffs and districts to enter into agreements that extend the time period during which a prospective plaintiff is prohibited from filing a CVRA lawsuit for an additional 90 days.[12] However, under the law, the written agreement must include a provision directing that the districts be established no later than six months before the district's next regular election.[13] For any districts that hold primary elections, the written agreement needs to include the requirement that the districts be established no later than six months before the district's next regular primary election.[14] Additionally, districts that elect this approach are required to prepare and make electronically available within 10 days after the agreement is executed the schedule of public outreach events and the public hearings to be held.[15]

What Should My District Do?

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. Whatever your district's position may be after considering these issues, one thing is clear—your district should not wait until it receives a CVRA demand letter before considering whether a switch to by-district elections is in order. 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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7 *See* Elec. Code § 10010. 8 *Id*., § 10010(e)(1)-(2). 9 *Id*., § 10010(d)(3)(A). 10 *Id*., § 10010(e)(3)(B).

11 *Id*., § 10010(a)(1)-(a)(2). 12 *Id*., § 10010(e)(3)(C)(i). 13 *Ibid*. 14 *Ibid*. 15 *Id*., § 10010(e)(3)(C)(ii).