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PERSPECTIVE

Court of Appeal decision may lead to increased California Voting Rights Act litigation

By Derek P. Cole

The California Voting Rights Act (Elections Code Section 14025 et seq.) is a consequential statute that, until recently, received little attention from California courts. That changed on July 9, when the 2nd District Court of Appeal decided *Pico Neighborhood Association et al. v. City of Santa Monica* (2020 DJDAR 7174).

In *Santa Monica*, the plaintiffs claimed an at-large system of electing city council members discriminated against Latino voters. The plaintiffs sought to compel the city to switch to a district-election system believed to better enable election of Latino-preferred candidates.

The Court of Appeal overturned the trial court's decision, issuing the first opinion to interpret the CVRA's substantive provisions. Whereas few local agencies had chosen to defend CVRA lawsuits before *Santa Monica*, more are likely to do so following the decision.

CVRA Overview

The CVRA was enacted in 2002. Although the CVRA borrows much from the Federal Voting Rights Act, it lessens the litigation burden on plaintiffs.

Generally, the CVRA is violated whenever a "political subdivision" — a city or special district — uses any "at-large method of election" that impairs the ability of a "protected class" to elect candidates or influence election outcomes. Elec. Code Section 14027.

An "at-large method of election" is a voting system in which all voters within a jurisdiction elect the members of the governing body. *Id.*, Section 14026(a)(1). For example, if there are three open seats on a city council, voters may vote for three candidates.

A "protected class" includes voters who belong to any "race, color, or

language minority group." *Id.*, Section 14026(d). Any member of the class who is a voter may enforce the CVRA by filing a citizen suit. *Id.*, Section 14032. When a court finds the CVRA has been violated, the usual remedy is to order that the agency implement "district" elections. *Id.*, Section 14029. These are elections in which voters vote for only one candidate from a district in which they reside.

District elections can enhance the voting power of protected classes. For example, if a protected class comprises 60% of the population of a district but only 10% of the electorate, the class is much likelier to elect a preferred candidate in a district-election system than an at-large one.

Must Vote Dilution Be Proven?

The key elements of proof of a CVRA claim derive from two terms used in the act, one defined and the other undefined.

The parties in *Santa Monica* did not dispute the defined term, "racially polarized voting" — bloc voting that occurs when the protected class prefers candidates other voters do not — was an element of proof. But they disputed whether the CVRA's reference to the undefined term, vote "dilution," is also a necessary element.

This dispute is the product of the drafting of two CVRA sections. The first, Elections Code Section 14027, states the CVRA's general prohibition. At-large voting violates the CVRA when it "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." Elec. Code, Section 14027 (emphasis added).

The second section, Elections Code Section 14028(a), provides that "[a] violation of Section 14027 is established if it is shown that racially polarized voting occurs in elections for members of

the governing body or in elections incorporating other electoral choices." Arguably, this section appears to link Section 14027's general prohibition with proof of racially polarized voting. On this basis, the *Santa Monica* plaintiffs argued they needed to prove only one element at trial: the existence of racially polarized voting.

The Court of Appeal rejected this position and held that vote dilution must be proven as well. The court addressed two rules of statutory construction. First, it focused on the CVRA's statutory text, noting that in three sections, the CVRA refers to a plaintiff's obligation to prove violation of "section 14027 and 14028." *Id.*, Sections 14029, 14030, 14032 (emphasis added). Because of the conjunctive construction, the court construed Section 14027's reference to "dilution" to be a separate element from Section 14028's reference to "racially polarized voting."

Second, the court declined the plaintiffs' request to treat Section 14027's reference to vote dilution as surplusage. It observed that "surplusage in legislation is unusual and disfavored."

Proving Vote Dilution

In what may be the more significant aspect of its opinion, the Court of Appeal also addressed the sufficiency of evidence necessary to prove vote dilution.

The *Santa Monica* plaintiffs argued the evidence at trial showed that under a district-election system, Latino voting power would increase to 30% from their share of the overall city voting population, 14%. In the plaintiffs' view, this sizable increase meant Latinos would have a greater influence in city elections even when their preferred candidates do not win.

The court disagreed. The court observed the plaintiffs' reasoning would sanction a "plaintiff always wins" standard in which even marginal increases would justify liability though yield no

change in election outcomes. What matters, the court held, is whether a change to district elections is "likely to make a difference in what counts in a democracy: electoral results."

How Will Agencies Respond?

Since 2017, local agencies have taken advantage of "safe harbor" legislation allowing them to convert to district elections to avoid threatened CVRA lawsuits. See Elec. Code, Section 10010. Because of a few well-publicized cases of seven-figure attorney-fee awards and settlements, agencies have often made this choice for fear of monetary exposure.

After *Santa Monica*, more agencies are likely to defend their at-large voting systems. As vote dilution is now a recognized element of proof, plaintiffs' litigation burden has measurably increased. Although many agencies are likely to continue taking advantage of the statutory safe harbor, some may see this increased burden as a ground for believing the risk of litigation is justified. ■

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