No. _____

IN THE
Supreme Court of the United States

DON HIGGINSON,

Applicant,

v.

XAVIER BECERRA, in his official capacity as Attorney General of California; CITY OF POWAY,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the U.S. Court of Appeals for the Ninth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court, Applicant Don Higginson respectfully moves for an extension of time of 30 days, up to and including April 2, 2020, within which to file a petition for a writ of certiorari.

1. Applicant will seek review of the Ninth Circuit's judgment in *Higginson v. Becerra*, No. 19-55275 (9th Cir. Dec. 4, 2019). A copy of the decision, dated December 4, 2019, is attached as Exhibit A. The current deadline for filing a petition for writ of certiorari is March 3, 2020. This application is being filed more than 10 days before the date the petition is due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court is based on 28 U.S.C. § 1254(a).

2. This case presents important questions concerning the constitutionality of the California Voting Rights Act (CVRA). The CVRA requires California localities to make racial considerations the only factor in determining what kind of electoral system the municipalities may use. Under the guise of prohibiting "vote dilution," the CVRA makes it illegal for a California locality to have at-large elections when there is "racially polarized voting" in that locality (*i.e.*, voters of one race tend to vote for one party while voters of another race tend to vote for another party). Cal. Elec. Code §§ 14027, 14028. The presence of racially polarized voting, *by itself*, can be used to force localities to dramatically upend their electoral systems.

3. In 2017, the City of Poway, California, was threatened with a lawsuit under the CVRA based on the purported presence of racially polarized voting. To

comply with the CVRA, Poway abandoned its decades-old, at-large system for electing city councilmembers and adopted a district-based system. Applicant Don Higginson, a Poway voter and former mayor, filed a lawsuit seeking a declaration that Poway's new by-district electoral map and the CVRA trigger strict scrutiny and violate the Equal Protection Clause.

4. The district court granted the California Attorney General's motion to dismiss. Despite the statute's exclusive focus on race and the fact that race predominated over all other considerations, the district court held that Poway's new electoral map and the CVRA were not subject to strict scrutiny because the CVRA does not "classi[fy] any voter according to that voter's membership in a particular racial group." As a result, the district court held, "Higginson's allegations do not support the inference that state actors . . . classified Higginson into a district because of his membership in a particular racial group."

5. The Ninth Circuit affirmed, holding that a showing that race was Poway's sole motivation for fundamentally changing its system from at-large to by-district elections was not enough to trigger strict scrutiny. Rather, Applicant would have to show that "the City's motivations for placing him or any other Poway voter in any particular electoral district" were race-based. Ex. A at 3. In other words, Applicant could not challenge the selection of an entire electoral system based on racial considerations unless he could point to the use of race in drawing specific district lines. Ex. A at 3-4.

6. Good cause exists for granting Applicant's request for an extension of time to file a petition for a writ of certiorari. *First*, an extension is warranted because this case presents substantial and important questions involving the constitutionality of using racial considerations to design electoral systems. The Ninth Circuit's holding flouts this Court's decision in *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788 (2017), and would significantly diminish litigants' ability to challenge race-based government policies. The CVRA's myopic focus on race to the exclusion of all other factors violates the Equal Protection Clause's "central purpose" of "prevent[ing] the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993). Simply put, the CVRA "must withstand strict scrutiny" because "racial considerations predominate over others" when a mere finding of racially polarized voting is used to force a locality to shift from at-large to by-district elections. *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). The Ninth Circuit's decision was clearly wrong and threatens to insulate race-based decisionmaking from meaningful constitutional scrutiny, thereby warranting this Court's review.

7. *Second*, Applicant's counsel have considerable briefing and argument obligations before this Court and other courts over the next several weeks. Counsel of record for Applicant, Jeffrey M. Harris, is co-counsel for the Respondent in *June Medical Services v. Gee*, No. 18-1323, which will be argued before this Court on March 4, 2020. Mr. Harris is also lead counsel for the defendants in *SisterSong v. Kemp*, No. 1:19-cv-2973-SCJ (N.D. Ga.), in which summary judgment briefs are currently

being prepared. And the other attorneys who will be assisting with this petition have considerable briefing and argument obligations over the next few weeks in *Speech First v. Killeen*, No. 19-2807 (7th Cir.) (oral argument Feb. 27); *Trump v. Vance*, No. 19-635 (merits reply brief due mid-March); *Trump v. Mazars USA, LLP*, No. 19-715 (merits reply brief due mid-March); and *S&R Development Estates, LLC v. Town of Greenburgh*, No. 7:16-cv-8043 (S.D.N.Y.) (ongoing summary judgment briefing). A modest extension of time will ensure that counsel's other matters do not hinder Applicant's ability to file a clear and comprehensive petition in this case.

8. For the foregoing reasons, Applicant hereby requests that an extension of time be granted, up to and including April 2, 2020, within which to file a petition for writ of certiorari.

Respectfully submitted,

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February 19, 2020

EXHIBIT A

NOT FOR PUBLICATION

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DON HIGGINSON, Plaintiff-Appellant, v. XAVIER BECERRA, in his official capacity as Attorney General of California; CITY OF POWAY, Defendants-Appellees, CALIFORNIA LEAGUE OF UNITED LATIN AMERICAN CITIZENS; et al., Intervenor-Defendants-Appellees.	No. 19-55275 D.C. No. 3:17-cv-02032-WQH-MSB MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Argued and Submitted November 5, 2019
Pasadena, California

Before: MURGUIA and HURWITZ, Circuit Judges, and GUIROLA,** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Louis Guirola, Jr., United States District Judge for the Southern District of Mississippi, sitting by designation.

Don Higginson appeals the district court's dismissal on remand of his complaint for failure to state a claim. *See Higginson v. Becerra*, 363 F. Supp. 3d 1118 (S.D. Cal. 2019).[1] We have jurisdiction under 28 U.S.C. § 1291. Agreeing with the decision of the California Court of Appeal in *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821 (Cal. Ct. App. 2006), we affirm.

In June 2017, the City of Poway, California received a letter from a private attorney threatening a lawsuit, claiming the City had violated the California Voting Rights Act ("CVRA"), Cal. Elec. Code §§ 14025–32. In response, the City Council determined that instead of defending the threatened litigation and incurring significant expenses in doing so, it would adopt a resolution that would transition the City from at-large to district-based elections.

Higginson's complaint alleges that he, a resident of the City, lives in a racially gerrymandered electoral district because: (1) "[t]he City would not have switched from at-large elections to single-district[] elections but for the prospect of liability under the CVRA;" and (2) "[t]he CVRA makes race the predominant factor in drawing electoral districts" by compelling a political subdivision to

[1] We previously held that Plaintiff has standing to assert an as-applied challenge to the City's adoption of Map 133, the district-based electoral map adopted by the City in October 2017. *Higginson v. Becerra*, 733 F. App'x 402, 403 (9th Cir. 2018).

"abandon its at-large system based on the existence of racially polarized voting and nothing more."

Reviewed de novo and viewed in the light most favorable to him, the allegations of the operative complaint fail to plausibly state that Higginson is a victim of racial gerrymandering. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1149 (9th Cir. 2019) (stating standard of review). Racial gerrymandering occurs when a political subdivision "intentionally assign[s] citizens to a district on the basis of race without sufficient justification." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (citing *Shaw v. Reno*, 509 U.S. 630, 641 (1993)). Plaintiff alleges no facts concerning the City's motivations for placing him or any other Poway voter in any particular electoral district. *See Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) ("[A] plaintiff alleging racial gerrymandering bears the burden 'to show . . . that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'") (quoting *Miller v. Johnson,* 515 U.S. 900, 916 (1995)). Similarly, he fails to cite any language in the CVRA that mandates how electoral districts can or should be drawn. *See* Cal. Elec. Code §§ 14025–32.

The operative complaint does not allege that the City or the CVRA "distribute[d] burdens or benefits on the basis of individual racial classifications."

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007). Although a finding of racially polarized voting triggers the application of the CVRA, it is well settled that governments may adopt measures designed "to eliminate racial disparities through race-neutral means." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2524 (2015); *see also Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race.").

Because Plaintiff's allegations do not trigger strict scrutiny, *see Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017), and he does not contend the City lacked a rational basis for its actions, *see FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314–15 (1993), he fails to state a claim for relief. He also therefore was not entitled to injunctive relief. *See Short v. Brown*, 893 F.3d 671, 675–76 (9th Cir. 2018).

AFFIRMED.