No. _______

IN THE

Supreme Court of the United States

DON HIGGINSON,

Petitioner,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF CALIFORNIA; CITY OF POWAY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court held that a municipality's at-large voting system does not violate Section 2 of the Voting Rights Act merely because there is racially polarized voting. Dissatisfied with this interpretation of Section 2, California adopted the California Voting Rights Act ("CVRA"), which creates "a broader basis for relief from vote dilution than available under the federal Voting Rights Act." *Jauregui v. City of Palmdale*, 172 Cal. Rptr. 3d 333, 350 (Cal. Ct. App. 2014). To that end, the CVRA requires municipalities to dismantle at-large voting systems whenever there is racially polarized voting in the community—*i.e.*, when the race of voters tends to correlate with the selection of certain candidates. The CVRA, in other words, makes race not just the dominant factor but the *only* factor for determining whether municipalities may use at-large systems.

The question presented is:

Whether the California Voting Rights Act violates the Equal Protection Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

Petitioner is Don Higginson. Petitioner was the plaintiff in the district court and appellant in the court of appeals.

Respondents are Xavier Becerra, in his official capacity as Attorney General of California, and the City of Poway. Respondents were defendants in the district court and appellees in the court of appeals.

Respondent-Intervenors are California League of United Latin American Citizens, Hiram Soto, Judy Ki, and Xavier Flores. Respondent-Intervenors were intervenors in the district court and the court of appeals.

The following are directly related proceedings as defined in Rule 14.1(b)(iii).

United States District Court (S.D. Cal.)

Higginson v. Becerra, 17-cv-02032 (S.D. Cal.) (judgment entered March 5, 2019)

Higginson v. Becerra, 17-cv-02032 (S.D. Cal.) (order granting motion to dismiss filed March 5, 2019)

Higginson v. Becerra, 17-cv-02032 (S.D. Cal.) (order granting motion to dismiss filed February 4, 2019)

Higginson v. Becerra, 17-cv-02032 (S.D. Cal.) (order denying motion for preliminary injunction filed October 2, 2018)

Higginson v. Becerra, 17-cv-02032 (S.D. Cal.) (order denying motion for preliminary injunction and granting motion to dismiss filed February 23, 2018)

United States Court of Appeals (9th Cir.)

Higginson v. Becerra, No. 19-55275 (9th Cir.) (opinion filed December 4, 2019)

Higginson v. Becerra, No. 18-56062 (9th Cir.) (opinion filed August 9, 2018)

Higginson v. Becerra, No. 18-55455 (9th Cir.) (amended opinion filed July 31, 2018)

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INTRODUCTION

To avoid serious constitutional concerns, this Court has imposed stringent requirements that must be met before an at-large voting system will be held to violate Section 2 of the Voting Rights Act. Specifically, the minority group alleging vote dilution must be "sufficiently large and geographically compact to constitute a majority in a single-member district," the minority group must be "politically cohesive," and the majority group must vote "sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 56 (1986). These requirements are critical to ensuring that Section 2 does not contravene the Equal Protection Clause by entitling minority groups to the "maximum possible voting strength." *Bartlett v. Strickland*, 556 U.S. 1, 16 (2009) (plurality).

California adopted the California Voting Rights Act ("CVRA") for the express purpose of overriding this limiting interpretation. Under the CVRA, all that matters is whether racially polarized voting exists in the community. If it does, the locality will be liable for vote dilution and must abandon its at-large elections, full stop. No other showing—such as compactness or a history of intentional discrimination—is needed. Put simply, the California legislature—in order to maximize minority representation—ignored this Court's repeated warnings that making race the dominant focus of redistricting would be unconstitutional.

In 2017, the City of Poway was threatened with suit under the CVRA based on the purported presence of racially polarized voting. Like so many California municipalities, the City abandoned its decades-old, at-large electoral system and adopted a district-based system (Map 133) to elect city councilmembers. The day after the City adopted its new system, Petitioner Don Higginson, a Poway voter, filed a lawsuit seeking a declaration that the CVRA and Map 133 violate the Equal Protection Clause. Despite the CVRA's exclusive focus on racial considerations and the absence of any constitutional safeguards, the Ninth Circuit—in a cursory four-page opinion—upheld Map 133 on the theory that the CVRA is constitutional under rational-basis review.

This Court's intervention is plainly warranted. The Equal Protection Clause prohibits any state law—including one governing local districting—in which "racial considerations predominated over others" unless it can "withstand strict scrutiny." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). The CVRA makes race the *only* factor in determining whether a locality may use an at-large electoral system. And it does not come close to meeting strict scrutiny. The notion that a law this pervasively race-focused would be subject to rational-basis review is untenable.

This petition would be worthy of the Court's review even if the reach of the CVRA were limited to the City of Poway. But that is not remotely the case. The CVRA has forced *nearly 200* political subdivisions across California to abandon their at-large systems. And because the CVRA contains a broad fee-shifting

provision that leaves municipalities on the hook for millions of dollars in attorney's fees, there is no end in sight. Review is urgently needed.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit is unreported and is reproduced in the Appendix ("App.") at 1a-4a. The opinion of the U.S. District Court for the Southern District of California is unreported and is reproduced at App. 10a-31a.

JURISDICTION

The Ninth Circuit issued its opinion on December 4, 2019. This Court granted an extension to file a petition for certiorari to and including April 2, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "No State shall … deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, § 1. The relevant provisions of the CVRA, Cal. Elec. Code §§ 10010, 14026, 14027, 14028, 14029, 14030, are reproduced at App. 98a-110a.

STATEMENT OF THE CASE

A. Section 2 of the Voting Rights Act

The "central purpose" of the Equal Protection Clause of the Fourteenth Amendment "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993) ("*Shaw I*"). "Laws that explicitly distinguish between individuals on racial grounds fall within the core of that prohibition." *Id.* "Express racial classifications are immediately suspect because," as this Court has explained, "absent searching judicial inquiry, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 642-43 (cleaned up).

This Court has recognized that Section 2 of the Voting Rights Act of 1965 is in tension with these principles. *See Miller v. Johnson*, 515 U.S. 900, 927-28 (1995); *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring). Section 2 prohibits practices "imposed or applied … in a manner which results in a denial or abridgement" of the right to vote. 52 U.S.C. §10301(a) (formerly 42 U.S.C. §1973). When it is invoked to remove racially discriminatory voting restrictions, Section 2 enforces citizens' right under the Fourteenth Amendment to vote free from racial discrimination. The statute is uncontroversial when deployed in this fashion.

But Section 2 also has been interpreted to protect minority voters against "vote dilution." This Court has held that a municipality's use of at-large districts can "dilute[] minority voting strength by submerging [minority] voters into the white majority, denying them an opportunity to elect a candidate of their choice." *Bartlett*, 556 U.S. at 11 (plurality). Section 2 thus can require States and localities to draw majority-minority districts. *See Shaw v. Hunt*, 517 U.S. 899, 906-08 (1996) ("*Shaw II*"). This focus on ensuring minority groups can "elect representatives of their choice"—which significantly increases the role of race in the design of voting systems—raises serious constitutional concerns because it expressly classifies voters by their race. *Bartlett*, 556 U.S. at 20-21 (plurality). As a consequence, the Court has tried to interpret Section 2 in a way that prevents it from violating the Equal Protection Clause.

Specifically, the Court has identified three "necessary preconditions" for a Section 2 claim that use of multimember or at-large districts constitutes actionable vote dilution: "(1) The minority group must be 'sufficiently large and geographically compact to constitute a majority in a single-member district,' (2) the minority group must be 'politically cohesive,' and (3) the majority must vote 'sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate.'" *Id.* (quoting *Gingles*, 478 U.S. at 50-51, 56). The second and third *Gingles* factors are sometimes referred to collectively as "racially polarized voting." *See Abrams v. Johnson*, 521 U.S. 74, 92 (1997). Under Section 2, "only when a party has established the *Gingles* requirements does a court

proceed to analyze whether a violation has occurred based on the totality of the circumstances." *Bartlett*, 556 U.S. at 11-12 (plurality).

The Court has emphasized the importance of the first *Gingles* factor—*i.e.*, that the minority group be sufficiently large and geographically compact to constitute a majority in a single-member district—in ensuring that Section 2 enforces the right to vote instead of requiring racial gerrymandering. Without this showing, "there neither has been a wrong nor can be a remedy," since a finding of compactness establishes "that the minority has the potential to elect a representative of its own choice in some single-member district." *Growe v. Emison*, 507 U.S. 25, 40-41 (1993). Absent this requirement, that is, Section 2 would entitle "minority groups to the maximum possible voting strength," *Bartlett*, 556 U.S. at 16 (plurality), which "causes its own dangers, and they are not to be courted," *Johnson v. De Grandy*, 512 U.S. 997, 1016 (1994).

B. The California Voting Rights Act

The California Legislature was dissatisfied with this Court's interpretation of Section 2 and wanted to "provide a broader basis for relief from vote dilution than available under the federal Voting Rights Act." *Jauregui v. City of Palmdale*, 172 Cal. Rptr. 3d 333, 350 (Cal. Ct. App. 2014). The Legislature concluded that this Court's "[r]estrictive interpretations" of Section 2, which were adopted to avoid racial-gerrymandering concerns, were simply wrong. Assem. Comm. on Judiciary, Analysis of Sen.

Bill No. 976 (2001-2002 Reg. Sess.), as amended Apr. 9, 2002, p.2. Paying no heed to this Court's repeated warnings about the constitutional concerns with Section 2, the Legislature decided that "geographical compactness would not appear to be an important factor in assessing whether the voting rights of a minority group have been diluted or abridged by an at-large election system." *Id.* at 3.

The CVRA was enacted in 2001 to "avoid that problem" from this Court's jurisprudence. *Id.* at 2. The CVRA was expressly designed to "make it easier to successfully challenge at-large districts" by eliminating the *Gingles* precondition that "a minority community be sufficiently concentrated geographically to create a district in which the minority community could elect its own candidate." Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Jun. 11, 2002, p.4. The statute overrides the "[r]estrictive interpretations given to the [federal VRA]" by allowing a plaintiff to establish "[vote] dilution or abridgement of minority voting rights" merely "by showing the [other] two [*Gingles*] requirements." Assem. Comm. on Judiciary, *supra*, at 2-3.

To that end, the CVRA provides that "[a]n at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution." Cal. Elec. Code §14027. A "protected class" is defined as "a class of voters who

are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act of 1965." *Id.* §14026(d); *see* 52 U.S.C. §10301.

Importantly, "[a] violation … is established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision." Cal. Elec. Code §14028(a). "Racially polarized voting," in turn, means "voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act, in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate." *Id.* §14026(e).

The CVRA contains additional provisions that make clear that if racially polarized voting exists, no other showing is needed to establish a violation. "The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation …, but may be a factor in determining an appropriate remedy." *Id.* §14028(c). In addition, "[p]roof of an intent on the part of the voters or elected officials to discriminate against a protected class is not required." *Id.* §14028(d). Factors "such as the history of discrimination … are probative, but not

necessary factors to establish a violation of Section 14027 and this section." *Id.* §14028(e).

Once there is a finding of racially polarized voting, the political subdivision must discard its at-large system. "Upon a finding of a violation of Section 14027 and Section 14028, the court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation." *Id.* §14029. The CVRA also makes the political subdivision liable for attorneys' fees and costs. "In any action to enforce Section 14027 and Section 14028, the court shall allow the prevailing plaintiff party, other than the state or political subdivision thereof, a reasonable attorney's fee … and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs." *Id.* §14030. "Prevailing defendant parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation." *Id.*

Finally, the CVRA provides a "safe harbor" to political subdivisions in violation of the CVRA that allows them to limit the attorney's fees they must pay. Under the CVRA, a prospective plaintiff may not commence an action until 45 days after providing written notice to the political subdivision that its method of conducting elections may violate the CVRA. *Id.* §10010(e)(1)-(2). If the political subdivision passes a resolution "outlining its intention to transition from at-large to district-based elections, specific steps it will undertake to facilitate this transition, and an estimated timeframe for doing so," then the prospective plaintiff may not commence an action

within 90 days of the resolution's passage. *Id.* §10010(e)(3)(A)-(B). Therefore, a political subdivision can limit its exposure under the CVRA only by quickly agreeing to abandon its at-large system and transitioning to by-district elections. If the political subdivision capitulates, the prospective plaintiff will have his or her attorney's fees "capped at [$30,000]." *Id.* §10010(f)(3). This safe harbor gives municipalities a powerful incentive to abandon at-large voting systems immediately upon receiving a demand letter, to avoid the risk of incurring staggering fee awards.

C. The City of Poway's abandonment of at-large voting to comply with the CVRA

Like many California municipalities, the City of Poway for decades used an at-large voting system to elect its City Council. On June 7, 2017, the City received a certified letter from Kevin Shenkman, a private attorney, asserting that the City's at-large system violated the CVRA. App. 122a, ¶32. According to Shenkman, "voting within Poway is racially polarized, resulting in minority vote dilution, and therefore Poway's at-large elections violate the [CVRA]." *Id.* 122a-23a, ¶33. Shenkman noted that the CVRA is "different" from the federal Voting Rights Act "in several key respects, as the [California] Legislature sought to remedy what it considered restrictive interpretations given to the federal act." *Id.* 123a, ¶33. "The California Legislature dispensed with the requirement in *Gingles* that a minority group demonstrate that it is sufficiently large and geographically compact to constitute a 'majority-

minority district.' Rather, the CVRA requires only that a plaintiff show the existence of racially polarized voting to establish that an at-large method of election violates the CVRA, not the desirability of any particular remedy." *Id.*

According to Shenkman, "Poway's at-large system dilutes the ability of Latinos (a 'protected class') to elect candidates of their choice or otherwise influence the outcome of Poway's council elections." *Id.* ¶34. Unless the City "voluntarily change[d] its at-large system of electing council members," he would "be forced to seek judicial relief." *Id.* Shenkman reminded the City that he had sued "the City of Palmdale for violating the CVRA," and that "[a]fter spending millions of dollars, a district-based remedy was ultimately imposed upon the Palmdale city council, with districts that combine all incumbents into one of the four districts." *Id.* Shenkman gave the City until July 21, 2017 to notify him whether it would come into compliance with the CVRA. *Id.*

On June 20, 2017, in response to the Shenkman letter, the Poway City Council held a closed session to discuss the threatened CVRA litigation. *Id.* 123a-24a, ¶35. At the meeting, the City Council directed its staff to prepare a resolution of intention for establishing and implementing by-district elections for the City Council members for consideration at the July 18, 2017 City Council meeting. *Id.* In recommending that the City adopt the resolution, the City Attorney subsequently explained that "the risks and costs associated with protracted CVRA litigation—particularly in light of results in all other cities that

have fought to retain at-large voting—cannot be ignored. The public interest may ultimately be better served by a by-district electoral system if converting to that system avoids significant attorneys' fees and cost award." *Id.* 124a, ¶36.

At the July 18 City Council meeting, the City's attorney outlined the difficulty in defending CVRA lawsuits. *Id.* ¶37. He provided examples of prior attorney's fees awards under the CVRA, and he explained that the CVRA "effectively removed burdens of proof that exist under the federal Voting Rights Act," which meant that "it is virtually impossible for governmental agencies to defend against lawsuits brought under the CVRA." *Id.* That was why "cities throughout the State [were] converting … in the face of these demand letters." *Id.*

Each member of the City Council expressed strong disapproval of the changes that the CVRA was forcing the City to make. *Id.* 125a, ¶41. Councilmember Jim Cunningham explained that "the [safe-harbor provision] is truly the shield … we are using to avoid attorney's fees, and costs, and protracted litigation." *Id.* ¶42. Councilmember Dave Grosch explained that he had previously supported by-district elections, but his experience as an at-large councilmember where he serves and supports the entire community—and not just one district—convinced him that at-large elections were better. *Id.* 125a-26a, ¶43. In reference to Shenkman's letter, he added, "I really hate that the City is … being told to do this by someone who doesn't live in Poway," and he

made clear that the letter was the only reason the City was changing to by-district elections. *Id.*

Councilmember Mullin concluded: "We've gone through denial, and we've gone through anger, and now we're into acceptance. So, to those of you in the audience who think that we should be fighting this, we concur, we were there awhile back as well. I have no illusions that this will lead to better government for our city. I'm pretty proud of the job we do as we are now constituted … But having said all of that, again we have a gun to our heads and we have no choice." *Id.* 126a, ¶44.

Deputy Mayor Barry Leonard added, "I get it. I hate it but I get it." *Id.* ¶45. Under the existing at-large system, City Council members "respond to everybody in the City. We don't pick certain people in certain neighborhoods and say we'll treat them any differently. There is no evidence of that whatsoever. So, I feel like we're already being found guilty of something and we don't have a chance to prove our innocence. It's just the deck is stacked. So, rather than spend a million dollars of the taxpayers' money, we roll over to these bullies." *Id.* Mayor Steve Vaus concluded, "I'll just echo that this council does a remarkable job [with at-large elections]. … But we've got to do what we've got to do. And job one is to protect the treasure of our constituents. And it's their money we'd be putting at risk [with litigation] and none of us are willing to do that." *Id.* 127a, ¶46.

The City Council adopted a resolution that set forth its intention to transition from at-large to by-

district elections. *Id.* ¶47. According to the Resolution, "the City [had] received a letter threatening action under the California Voting Rights Act," and it had "determined that it is in the best interest of the City to move from its current at-large electoral system to a by-district election for members of the City Council, in furtherance of the purposes of California Voting Rights Act." *Id.*

On October 3, 2017, the Council adopted an ordinance enacting Map 133, an election plan that divided the City into four districts. *Id.* 127a-28a, ¶¶49, 51. In voting for the ordinance, councilmember Mullin reiterated, "I don't want my affirmative vote on this item to be construed in any way as my support for this notion for district elections.... I will support the motion because we have no choice not because I think district elections are what's best for the city." *Id.* 128a, ¶51.

D. Proceedings below

Petitioner Don Higginson is a resident of Poway and a registered voter. Under the longstanding at-large system, Higginson could vote for all four City Council seats, but under the new by-district plan he is able to vote only in District 2. *Id.* 113a-14a, ¶7.

In October 2017, Higginson filed a complaint against the California Attorney General and the City of Poway, seeking to have the CVRA and Map 133 declared unconstitutional and to enjoin their enforcement. Shortly thereafter, Higginson moved for a preliminary injunction seeking interim relief for the

2018 election cycle, and the Attorney General filed a motion to dismiss. Docs. 11, 33. For its part, the City of Poway took a "neutral position," stating that it would not "defend the constitutionality of the CVRA or otherwise actively support or oppose" Higginson's motion for a preliminary injunction. Doc. 16, at 1. Numerous California municipalities that had faced (or were facing) similar predicaments filed *amicus* briefs in support of the preliminary injunction. *See* Doc. 49 (Mission Viejo); Doc. 53 (San Gabriel Valley Council of Governments, Arcadia, Barstow, Fullerton, Glendora, Huntington Beach, Murrieta, South Pasadena, and West Covina).

On February 23, 2018, the district court denied Higginson's motion for a preliminary injunction and granted the Attorney General's motion to dismiss on the ground that Higginson lacked Article III standing to challenge the CVRA and Map 133. App. 63a-93a. Higginson immediately appealed. Given the need for a prompt decision before the upcoming election, the Ninth Circuit granted Higginson's motion to expedite and reversed the dismissal of Higginson's claims on June 14, 2018. *See* App. 59a-62a. The Ninth Circuit held that Higginson had standing to challenge the City's adoption of Map 133 and to press "his argument that the City violated his rights because the CVRA, with which the City sought to comply, is unconstitutional under the Equal Protection Clause." *Id.* 61a. The Ninth Circuit also reversed the dismissal of the claims against the Attorney General, concluding that he was a proper defendant in the case. *Id.* 61a-62a.

On remand, the district court again denied Higginson's motion for preliminary injunction, which caused the November 2018 election to go forward under Map 133. The district court then granted the Attorney General's motion to dismiss the complaint. App. 10a-31a. The court held that Map 133 and the CVRA do not violate the Equal Protection Clause because, in its view, the CVRA does not "classif[y] any voter according to that voter's membership in a particular racial group." *Id.* 28a. As a result, "Higginson's allegations do not support the inference that state actors—those who passed the CVRA, or those who implemented it through Map 133—classified Higginson into a district because of his membership in a particular racial group." *Id.*

The Ninth Circuit affirmed. In an unpublished, four-page opinion, the court held that Higginson's complaint failed to state a claim because he alleged "no facts concerning the City's motivations for placing him or any other Poway voter in any particular electoral district" and because the CVRA does not "mandate[] how electoral districts can or should be drawn." *Id.* 3a-4a. The Ninth Circuit acknowledged that "a finding of racially polarized voting triggers the application of the CVRA," but found this requirement permissible since "it is well settled that governments may adopt measures designed 'to eliminate racial disparities through race-neutral means.'" *Id.* 4a (quoting *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2524 (2015)). Because the court concluded that strict scrutiny did not apply, it held that Higginson's complaint was properly dismissed. *Id.*

REASONS FOR GRANTING THE PETITION

Review is warranted because the Ninth Circuit "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. Rule 10(c). This case presents an important question under the Equal Protection Clause: whether a State can use the mere existence of racially polarized voting to force localities to abandon at-large electoral systems. The Ninth Circuit disregarded longstanding equal-protection principles and this Court's decisions concerning the use of race in districting in upholding the CVRA under rational-basis review. The statute is flagrantly unconstitutional, and this Court's intervention is warranted to prevent California from evading the important limits on the use of race in government decisionmaking.

I. The constitutional issues presented in this case are critically important.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amdt. 14, §1. "The Framers of the Fourteenth Amendment desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations." *Shaw II*, 517 U.S. at 908 (cleaned up). "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial,

religious, sexual or national class." *Miller*, 515 U.S. at 911 (citation omitted).

The harms that occur from improper race-based decision-making are well documented. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people.'" *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). "Race-based assignments embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Miller*, 515 U.S. at 912 (citation omitted). That is why "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (citation omitted).

These same equal protection principles govern a State's decisions regarding elections. *Miller*, 515 U.S. at 905. The harms that flow from racial sorting "include being personally subjected to a racial classification, as well as being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015) (cleaned up). The Court thus has not hesitated to find electoral systems that violate these principles to be unconstitutional. *See, e.g.*, *Cooper*, 137 S. Ct. 1455 (North Carolina

congressional districts); *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788 (2017) (Virginia House of Delegates districts); *Alabama Legislative Black Caucus*, 575 U.S. 254 (Alabama House of Representatives and Senate districts).

The Court should be equally concerned about the use of race in districting at the local level. "[L]ocal assemblies of citizens constitute the strength of free nations." 1 Alexis de Tocqueville, *Democracy in America* 60 (Henry Reeve trans., Colonial Press 1899). Indeed, "without the spirit of municipal institutions, [a nation] cannot have the spirit of liberty." *Id.* Local governments are responsible for law enforcement, public education, libraries, sanitation, fire protection, streets, local transportation, sewage, building codes, zoning, parks and recreation, and countless other basic functions of government. Municipalities, in sum, tend to "all those personal interests and familiar concerns to which the sensibility of individuals is [the most] immediately awake." The Federalist No. 17, at 107 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

California's decision to make racially polarized voting the only factor in determining how municipalities may structure themselves politically is troubling. To begin, racially polarized voting—in which the race of voters tends to correlate with the selection of certain candidates—"is not evidence of unconstitutional discrimination, [and] is not state action." *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 228 (2009) (Thomas, J., concurring). It is instead the aggregated effect of individual political choices. Indeed, racially polarized

voting does not even prove that political preferences are being *driven* by race. There are many reasons besides race that might lead to racially polarized voting, such as voters' "education, economic status, or the community in which they live." *Shaw I*, 509 U.S. at 647. It is, by itself, simply not one of those rare and grave acts of discrimination that would permit the sorting of voters by race.

The CVRA also assumes that race is the only factor motivating a person's voting and thus reinforces pernicious stereotypes. As this Court has recognized, "a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract." *Id.* at 648. Forcing municipalities to abandon at-large elections because votes are being cast along racial lines "reinforces the perception that members of the same racial group … think alike, share the same political interests, and will prefer the same candidates at the polls." *Id.* at 647. "If our society is to continue to progress as a multiracial democracy," however, "it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 630-31 (1991). This is why strict scrutiny applies to all racially-motivated laws. *See, e.g.*, *Gratz*, 539 U.S. at 270; *Cooper*, 137 S. Ct. at 1464.

It is problematic enough that Section 2 of the Voting Rights Act is employed so that minority voters are guaranteed the ability "to elect a candidate of their choice." *Bartlett*, 556 U.S. at 11 (plurality); 52 U.S.C.

§10301(b). Because the Constitution prohibits only purposeful racial discrimination, *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980), there is a serious question whether Congress's enforcement powers extend to mere disparate impact, *Board of Trs. of University of Alabama v. Garrett*, 531 U.S. 356, 372-74 (2001). That is why the Court has gone to great lengths to construe Section 2 more narrowly. *See Bartlett*, 556 U.S. at 15, 21 (plurality); *Growe*, 507 U.S. at 40-41; *LULAC v. Perry*, 548 U.S. 399, 446 (2006) (Kennedy, concurring) (explaining that an interpretation of Section 2 that would "infuse race into virtually every redistricting" would raise "serious constitutional questions"); *Johnson*, 512 U.S. at 1028-29 (Kennedy, J., concurring in part and concurring in the judgment).

These serious constitutional concerns all have come to pass in California. Indeed, the City of Poway's abandonment of its at-large system in the face of allegations of racially polarized voting is not an isolated event. Nearly *200 political subdivisions* have changed to by-district elections as a result of the CVRA, including 131 school districts, 28 cities, 1 county, 27 community college districts, and 8 other special districts. *See Updated Counts of CVRA-Driven Changes*, National Demographics Corporation (last visited Mar. 31, 2020), https://bit.ly/2J2gaGc. And this number is continuing to grow. In March 2020 alone, numerous municipalities were in the process of transitioning from at-large districts to by-district elections because of the CVRA, including Santa

Clarita,[1] Malibu City,[2] the City of Napa,[3] the South Coast Water District,[4] the Cabrillo Unified School District,[5] the City of Malibu,[6] Palm Desert,[7] the Napa Valley Unified School District,[8] and the Chico Unified School District.[9]

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[1] Perry Smith, *Santa Clarita to Consider Move to District-Based Elections*, The Signal (Mar. 18, 2020), https://bit.ly/2UotEkz.

[2] *Public Hearings About Proposed Move to District Elections in Malibu*, The Patch (Mar. 14, 2020), https://bit.ly/2QwqzOu.

[3] Carly Graf, *First Draft Maps Suggest Boundaries for New Napa City Council Districts*, Nava Valley Register (Mar. 13, 2020), https://bit.ly/33u6w8G.

[4] Bradley Zint, *SCWD Mulls Switch to By-District Elections*, Laguna Beach Independent (Mar. 13, 2020), https://bit.ly/2WsLKEJ.

[5] Sarah Wright, *School Board to Finalize Redistricting*, Half Moon Bay Review (Mar. 11, 2020), https://bit.ly/3de9WAP.

[6] *Public Hearings Regarding District Elections*, Canyon News (Mar. 10, 2020), https://bit.ly/2QrzTTG.

[7] Sherry Barkas, *Coronavirus: Palm Desert Residents Can Telephone Comments to City Council During Today's Meeting*, Palm Springs Desert Sun (Mar. 9, 2020), https://bit.ly/2xfdVwj.

[8] Howard Yune, *Napa School District Tries to Garner Public Input on New Voting System as Coronavirus Keeps People Home*, Napa Valley Register (Mar. 30, 2020), https://bit.ly/2yivGLL.

[9] Natalie Hanson, *School Board Talks District Elections in Special Virtual Meeting*, Enterprise-Record (Mar. 30, 2020), https://bit.ly/343qBTp.

Indeed, not even the recent COVID-19 pandemic can slow the race-based changes forced by the CVRA. The City of Santa Clarita, for example, has been holding hearings to transition to by-district elections even though the city "is primarily focused on the response to [the coronavirus] and ensuring that all of our vital city services are still operating." Perry Smith, *Santa Clarita to Consider Move to District-Based Elections*, The Signal (Mar. 18, 2020), https://bit.ly/2UotEkz. The CVRA has forced the city to hold hearings and draw new maps to transition to a by-district system—even though the process is "taking away … our time from our current efforts" at protecting the city's residents. *Id.*

That so many municipalities are abandoning their at-large districts is not surprising. There is a "small cottage industry of lawyers and advocacy groups" dedicated to "suing jurisdictions under the [CVRA]." Thy Vo, *The Accidental Advocate*, Voice of OC (Sept. 12, 2016), https://bit.ly/33XsPnq. And it is "virtually impossible" for political subdivisions to prevail in a CVRA lawsuit. App. 36a-37a. Those that try have been forced to pay staggering attorney's fees, including, among others, Palmdale ($4.7 million), Modesto ($3 million), Anaheim ($1.2 million), Whittier (more than $1 million), and Santa Barbara ($600,000).[10] Countless municipalities will continue to

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[10] *See* Douglas Johnson, *The California Voting Rights Act and Districting: The Demographer's Perspective*, National Demographics Corporation at 5 (May 9, 2016), https://bit.ly/39awfnW; *City Council Staff Report*, City of Citrus Heights at 1-4 (Jan. 10, 2019), https://bit.ly/2UjaUDa.

be forced to abandon their at-large electoral systems because of the CVRA's race-based mandates absent the Court's intervention.

II. The decision below contravenes the Equal Protection Clause and this Court's precedents.

Not only is the question presented important, but the Ninth Circuit's decision is plainly wrong. The Equal Protection Clause bars "racial gerrymanders in legislative districting plans." *Cooper*, 137 S. Ct. at 1463. Thus, "if racial considerations predominated over others, the design of the district must withstand strict scrutiny." *Id.* at 1464; *see also Shaw II*, 517 U.S. at 907 ("[S]trict scrutiny applies when race is the 'predominant' consideration in drawing the district lines such that 'the legislature subordinates traditional race-neutral districting principles … to racial considerations.'" (quoting *Miller*, 515 U.S. at 916)). Once strict scrutiny is triggered, the burden "shifts to the State to prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper*, 137 S. Ct. at 1464.

Race unquestionably predominated over all other factors in the enactment of Map 133. Indeed, race was the *only* factor in the City's decision to abandon its at-large voting system in favor of by-district elections. The City was required, as a matter of state law, to comply with the CVRA. The CVRA, in turn, commands California localities (including the City) to abandon at-large systems upon a showing of racially-polarized voting—period. *See*

Cal. Elec. Code §14027 ("An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class … to influence the outcome of an election."); *id.* §14028(a) ("A violation of Section 14027 is established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision."); *id.* §14029 ("Upon a finding of a violation of Section 14027 and Section 14028, the court shall implement appropriate remedies, including the imposition of district-based elections."). In other words, the locality must change its electoral system *solely* because the race of voters tends to correlate with the selection of certain candidates. *Id.*; *see id.* §14026(e); *Gingles*, 478 U.S. at 74. It is difficult to imagine a law more pervasively dominated by racial considerations than the CVRA.

For Map 133 to withstand equal-protection review, then, the CVRA must pass strict scrutiny. It cannot do so. To start, the California Attorney General has never attempted to defend the CVRA on strict scrutiny grounds. For good reason. California does not have a compelling interest in forcing localities to adopt new electoral systems based on the mere existence of racially polarized voting. There is a serious constitutional question as to whether Section 2 of the Voting Rights Act can require that minority groups have "the potential to elect a representative of [their] own choice in some single-member district." *Growe*, 507 U.S. at 40; *supra* 4-6. But a statute that focuses only on racially polarized voting does not even pursue that anti-vote-dilution interest. The CVRA instead entitles "minority groups to the maximum possible

voting strength." *Bartlett*, 556 U.S. at 16 (plurality). And maximizing the voting power of minority groups is not a compelling interest. *See Miller*, 515 U.S. at 926; *Abrams*, 521 U.S. at 85-86 (1997) (explaining that *Miller* held that the Department of Justice's "max-black policy" violated the Equal Protection clause because of its "entirely race-focused approach to redistricting").

Nor is the CVRA narrowly tailored to remedy racial discrimination in voting. In particular, the CVRA does not include a limitation akin to the one in Section 2 of the Voting Rights Act, which requires that the minority group be sufficiently "compact" such that it would have "the potential to elect a representative of its own choice in some single-member district." *Growe*, 507 U.S. at 40. "Without such a showing, 'there neither has been a wrong nor can be a remedy.'" *Bartlett*, 556 U.S. at 15 (plurality) (quoting *Growe*, 507 U.S. at 41). Eliminating the compactness requirement, in other words, is not narrowly tailored to eliminate discrimination in voting because it would "unnecessarily infuse race into virtually every redistricting." *Id.* at 21 (citation omitted).

The Ninth Circuit ignored these core principles of the Equal Protection Clause, narrowly focusing on whether Higginson had alleged that race was the predominant "motivation[] for placing him or any other Poway voter in any particular electoral district." App. 3a. But that conflates the elements of an equal protection violation with the evidence needed to prove the violation. Challengers "may show predominance 'either through circumstantial evidence of a district's

shape and demographics or more direct evidence going to legislative purpose.'" *Bethune-Hill*, 137 S. Ct. at 798 (quoting *Miller*, 515 U.S. at 916). "Race may predominate," the Court has explained, "even when a reapportionment plan respects traditional principles," because "the Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications." *Id.* (quoting *Shaw*, 517 U.S. at 907). Challengers can "establish racial predominance in the absence of an actual conflict by presenting direct evidence of the legislative purpose and intent or other compelling circumstantial evidence." *Id.* at 799.

For these reasons, strict scrutiny applies "if '[r]ace was the criterion that, in the State's view, could not be compromised,' and race-neutral considerations 'came into play only after the race-based decision had been made.'" *Id.* at 798. That is exactly the way the CVRA works. The CVRA focuses exclusively on race—by putting voters into racial groups and imposing liability on cities when those groups tend to vote for different candidates. Under the statutory scheme, such "racially polarized voting" is the sole reason why a city like Poway may be forced to discard its at-large electoral map. Whether "race-neutral considerations" drive the way municipalities draw their district lines *after* they have been found to violate the CVRA is irrelevant; any such line-drawing comes "into play only after the race-based decision ha[s] been made." *See id.* at 798-99 (rejecting argument that "race does not have a prohibited effect on a district's lines if the legislature could have drawn the same lines in accordance with traditional criteria"). Because strict scrutiny applies "if race for its own sake is the

overriding reason for choosing one map over others," *id.* at 799, it applies to the decision to choose a by-district map over an at-large map solely for racial reasons.

Moreover, there is "direct evidence of legislative purpose and intent" that confirms what the CVRA's text makes explicit. *Id.* This Court's jurisprudence interpreting Section 2 of the Voting Rights Act is grounded in principles of constitutional avoidance, ensuring that any use of race remains within constitutional constraints. Yet the California State Legislature expressly sought to override those constraints in order to "provide a broader basis for relief from vote dilution than available under the federal Voting Rights Act." *Jauregui*, 172 Cal. Rptr. 3d at 350. The CVRA was intentionally designed to "make it easier to successfully challenge at-large districts" by eliminating the precondition that "a minority community be sufficiently concentrated geographically to create a district in which the minority community could elect its own candidate." Sen. Rules Comm., *supra*, at 4. The CVRA thus overrides the "[r]estrictive interpretations given to the federal [VRA]" by allowing a plaintiff to establish "[vote] dilution or abridgment of minority voting rights" merely by showing racially polarized voting. Assem. Com. on Judiciary, *supra*, at 2-3. The legislature made clear, then, that it wanted the CVRA to make race a *more* prominent factor than does the federal Voting Rights Act, notwithstanding the serious constitutional concerns that has informed the Court's interpretation of the Voting Rights Act.

The Ninth Circuit thus was wrong to suggest that the CVRA was "race-neutral" and merely operating "with consciousness of race." App. 4a. Race is the entire *raison d'etre* of the statutory scheme. Racial considerations are the sole trigger for the CVRA's draconian remedies, and the statute was expressly enacted to override federal jurisprudence that carefully limits the role of race in designing electoral systems. It blinks reality to brush all of this aside as a mere "consciousness of race." *Id.* Map 133 and the CVRA violate the Equal Protection Clause.

III. This case is an ideal vehicle for resolving the question presented.

This case presents an ideal vehicle for the Court to address the question presented. Most important, the legal issue is squarely presented. The sole basis for the Ninth Circuit's decision was that the California Voting Rights Act is constitutional. According to the court, Higginson's complaint failed to state a claim because the CVRA does not distribute "burdens or benefits" based on racial classifications, and racially polarized voting merely "triggers the application" of the CVRA's remedies. App. 4a. Granting the petition will allow the Court to cleanly address the constitutionality of the CVRA.

Moreover, there is no reason to wait for further developments in the lower courts. There obviously is no chance for a circuit split because this is a challenge to a California-specific law. Both the federal and state courts—which provided weak reasoning and never grappled with these difficult racial-gerrymandering

issues—have made clear that future challenges to the CVRA will fail. App. 3a-4a; *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821 (Cal. Ct. App. 2006). Meanwhile, the financial strain that challenging the law imposes creates a powerful incentive for municipalities to surrender. *Supra* 11-14, 21-24. There is thus an urgent need for the Court to decide this issue now.

Finally, that the decision below is unpublished should "carr[y] no weight in [the Court's] decision to review the case." *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987); *see, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 576 (2009). This is for good reason. "An unpublished opinion may have a lingering effect in the Circuit and surely is as important to the parties concerned as is a published opinion." *Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, O'Connor & Souter, JJ., dissenting). And a circuit court decision can be wrong, and worthy of reversal, "regardless of nonpublication and regardless of any assumed lack of precedential effect." *C.I.R.*, 484 U.S. at 7.

Further, a rule against reviewing unpublished decisions would create "a convenient means to prevent review." *Smith*, 507 U.S. at 1020 n.*; *see Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (Thomas & Scalia, JJ., dissenting) (that "the decision below is unpublished … is yet another disturbing aspect of the Fourth Circuit's decision, and yet another reason to grant review"). That concern exists here. The constitutionality of the CVRA is a weighty issue. Yet the Ninth Circuit disposed of the case with a four-page unpublished opinion. App. 1a-4a. The Ninth Circuit's decision to treat this case so dismissively

is unfortunate. *See* Rick Hasen, *Election Law Blog* (Dec. 4, 2019), https://bit.ly/2U3PnQ5 (expressing "surprise[] that [Higginson's] arguments did not get greater analysis" from the Ninth Circuit in this "major case" challenging the CVRA).

Higginson's claims deserved better from the lower courts. But because the Ninth Circuit "failed to grapple with the questions of exceptional importance raised in this [case]," if Higginson is "to obtain such an opinion from a reviewing court, [he] must now look to the Supreme Court." *Ricci v. DeStefano*, 530 F.3d 88, 101 (2d Cir. 2008) (Cabranes, J., dissenting from denial of rehearing en banc). His claims are worthy of that review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 4, 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-55275

D.C. No. 3:17-cv-02032-WQH-MSB

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.

MEMORANDUM[*]

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

Appendix A

Argued and Submitted November 5, 2019
Pasadena, California

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

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*, 145 Cal. App. 4th 660, 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.

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* 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.

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 Fed. Appx. 402, 403 (9th Cir. 2018).

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 "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, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (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, 201 L. Ed. 2d 714 (2018) (citing *Shaw v. Reno*, 509 U.S. 630, 641, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (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, 197 L. Ed. 2d 85 (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, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (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, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (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, 192 L. Ed. 2d 514 (2015); *see also Bush v. Vera*, 517 U.S. 952, 958, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (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, 197 L. Ed. 2d 837 (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, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (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.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, FILED MARCH 5, 2019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil Action No. 17-cv-02032-WQH-MSB

DON HIGGINSON,

Plaintiff,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; CITY OF POWAY; SEE ATTACHMENT,

Defendant.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED:

Pursuant to the request of Plaintiff Don Higginson, the Complaint is dismissed with prejudice. Final judgment in this matter is entered against Plaintiff and in favor of all defendants.

Date: 3/5/19

CLERK OF COURT
JOHN MORRILL, Clerk of Court
By: s/ A. Garcia
A. Garcia, Deputy

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, FILED MARCH 5, 2019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No.: 17cv2032-WQH-MSB

DON HIGGINSON,

Plaintiff,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; CITY OF POWAY,

Defendants,

v.

CALIFORNIA LULAC, HIRAM SOTO, JUDY KI, JACQUELINE CONTRERAS, XAVIER FLORES,

Intervenor-Defendants.

ORDER

HAYES, Judge:

The matter before the Court is the status of Plaintiff's claims against Defendant City of Poway and Intervenor-Defendants California LULAC, Hiram Soto, Judy Ki, Jacqueline Contreras, and Xavier Flores.

On February 4, 2019, the Court granted the Motion to Dismiss filed by Defendant Attorney General Xavier Becerra, stating that "Higginson's allegations do not support the inference that state actors—those who passed the CVRA, or those who implemented it through Map 133—classified Higginson into a district because of his membership in a particular racial group." (ECF No. 127 at 13). The Court ordered, "Plaintiff shall file any motions for leave to file an amended complaint, or show cause why the Complaint (ECF No. 1) should not be dismissed as to Defendant City of Poway and Intervenor-Defendants California LULAC, Hiram Soto, Judy Ki, Jacqueline Contreras, and Xavier Flores, within thirty days of the date of this Order." *Id.* at 15. On February 18, 2019, Plaintiff filed a response to the Court's Order. (ECF No. 128). Plaintiff states,

> Plaintiff does not intend to file a motion for leave to amend the complaint. . . . [A]lthough Plaintiff disagrees with the Court's ruling, Plaintiff acknowledges that the Court's holding forecloses his claims against the City and Intervenor-Defendants. . . . Th[e] reasoning would apply with equal force to Plaintiff's claims against the City and Intervenor-Defendants.

> Because any further litigation against the City or Intervenor-Defendants would be futile in light of the Court's ruling on the Attorney General's motion to dismiss, the Court should dismiss the claims against the remaining Defendants and enter final judgment, thereby allowing Plaintiff to seek review in the Ninth Circuit against all Defendants.

Id. at 2–3.

The Ninth Circuit Court of Appeals has held that a plaintiff who believes a complaint is adequately pled and chooses not to amend following dismissal may obtain an appealable final judgment by "filing in writing a notice of intent not to file an amended complaint." *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1064 (9th Cir. 2004) (citing *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1135 (9th Cir. 1997)). The request for entry of final judgment is granted.

IT IS HEREBY ORDERED that pursuant to the request of Plaintiff Don Higginson, the Complaint (ECF No. 1) is dismissed with prejudice and the Clerk of Court is directed to enter final judgment in this matter against Plaintiff and in favor of all defendants.

Dated: March 5, 2019

/s/________________________
Hon. William Q. Hayes
United States District Court

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, FILED FEBRUARY 4, 2019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No.: 17cv2032-WQH-MSB

DON HIGGINSON,

Plaintiff,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; CITY OF POWAY,

Defendants,

v.

CALIFORNIA LULAC, HIRAM SOTO, JUDY KI, JACQUELINE CONTRERAS, XAVIER FLORES,

Intervenor-Defendants.

Appendix D

ORDER

HAYES, Judge:

The matter before the Court is the Motion to Dismiss filed by Defendant Xavier Becerra. (ECF No. 103).

I. PROCEDURAL BACKGROUND

On October 4, 2017, Higginson initiated this action by filing the Complaint against Defendant Xavier Becerra, Attorney General of California (the Attorney General), and Defendant the City of Poway. (ECF No. 1). Higginson brings this action pursuant to 42 U.S.C. §§ 1983 and 1988 for violation of his Fourteenth Amendment equal protection rights. Higginson claims that the City of Poway adopted by-districtd elections in order to comply with the California Voting Rights Act (CVRA), and that such elections "are the product of racial gerrymandering." *Id.* ¶ 12.

On February 23, 2018, the Court dismissed the Attorney General and the City of Poway for lack of subject matter jurisdiction on standing grounds. (ECF No. 68). The Court of Appeals reversed and remanded for further proceedings. (ECF No. 115 at 5-6). The Court of Appeals found that Higginson "adequately alleged that he resides in a racially gerrymandered district and that the City's adoption of Map 133 reduced the number of candidates for whom he can vote." *Id.* at 5. The Court of Appeals found that Higginson has standing to challenge "the City's actions, including his argument that the City

violated his rights because the CVRA, with which the City sought to comply, is unconstitutional under the Equal Protection clause." *Id.* The Court of Appeals stated, "We, of course, express no view on the merits of any of Plaintiff's theories." *Id.*

On August 2, 2018, the Attorney General filed a Motion to Dismiss the Complaint "in its entirety" and "without leave to amend," on grounds that "Plaintiff has failed to allege sufficient facts to state a claim for which relief may be granted." (ECF No. 103 at 2). On August 27, 2018, Higginson filed an Opposition in response to the Motion to Dismiss. (ECF No. 111). On August 31, 2018, the Attorney General filed a Reply supporting the Motion to Dismiss. (ECF No. 118). The docket reflects that the City of Poway has made no filings with respect to the Motion to Dimiss.

II. ALLEGATIONS OF THE COMPLAINT

Higginson alleges that "[t]he Equal Protection Clause of the Fourteenth Amendment 'prevents a State, in the absence of sufficient justification, from separating its citizens into different voting districts on the basis of race.'" (ECF No. 1 ¶ 1) (quoting *Cooper v. Harris*, 137 S. Ct. 1455, 1463, 197 L. Ed. 2d 837 (2017) (internal quotations omitted)). Higginson alleges that Section 2 of the federal Voting Rights Act (FVRA) "has been interpreted to protect minorities against vote dilution." *Id.* ¶ 2. Higginson alleges that the Supreme Court has "emphasized" that the FVRA "is in obvious tension with the Fourteenth Amendment, because it, by definition, makes race the predominant factor in districting decisions." *Id.* Higginson

alleges that "[t]he Supreme Court issued a series of decisions, beginning with *Thornburg v. Gingles*" in order to "ensure [the FVRA] is an anti-discrimination provision, and not an unconstitutional mandate to maximize electoral power on the basis of race." *Id.* ¶ 3 (citing 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986)). Higginson alleges that the Supreme Court "held that an at-large voting system will violate [the FVRA] only if a minority group proves both that it can form a compact single-member district and that voting is racially polarized." *Id.*

Higginson alleges that the California legislature passed the CVRA "to override the constraints the Supreme Court has imposed in an attempt to save [the FVRA] from unconstitutionality." *Id.* ¶ 4. Higginson alleges that "[u]nder the CVRA, local governments must abandon at-large voting systems if racially polarized voting exists—regardless of whether the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* Higginson alleges, "Accordingly, the CVRA flagrantly violates the Fourteenth Amendment. Its 'race-based sorting of voters' does not serve a 'compelling interest' nor is it 'narrowly tailored.'" *Id.* ¶ 5 (quoting *Cooper*, 137 S. Ct. at 1464).

Higginson alleges that a 2016 CVRA amendment created a safe harbor provision, requiring potential plaintiffs to send advance notice that a political subdivision's election method may violate the CVRA. *Id.* ¶ 28. The political subdivision has 45 days to "pass a resolution outlining its intention to transition from at-large to district-based elections," in order to prevent the "prospective plaintiff from commencing an action to

enforce" the CVRA. *Id.* ¶ 29 (quoting Cal. Elec. Code § 10010(e)(3)(A)).

Higginson alleges that the City of Poway has used an at-large voting system to elect its City Council for decades. *Id.* ¶ 32. "On June 7, 2017, the City received a certified letter from an attorney, Kevin Shenkman, asserting that the City's at-large system violates the CVRA." *Id.* ¶ 33. The letter stated that "Poway's at-large system dilutes the ability of Latinos (a 'protected class') to elect candidates of their choice or otherwise influence the outcome of Poway's council elections." *Id.* ¶ 34. The letter urged Poway "to voluntarily change[] its at-large system of electing council members." *Id.* The letter "gave the City until July 21, 2017" to notify Shenkman of a voluntary change, after which Shenkman "w[ould] be forced to seek judicial relief." *Id.*

Higginson alleges that during "a closed session" on June 20, 2017, the Poway City Council discussed "the threatened CVRA litigation," and directed its "staff to prepare a resolution of intention for establishing and implementing by-district elections for . . . consideration at the July 18, 2017 City Council meeting." *Id.* ¶ 35. The City Attorney recommended "adoption of the resolution ahead of the July 18 meeting" to take advantage of the safe harbor provision because "the risks and costs associated with protracted CVRA litigation—particularly in light of results in all other cities that have fought to retain at large voting—cannot be ignored." *Id.* ¶ 36. The City Attorney stated that the "public interest may ultimately be better served by a by-district electoral system if converting to that system avoids significant attorneys' fees and cost award." *Id.*

Higginson alleges that at the July 18 meeting, an outside attorney advised the City Council that the CVRA "effectively removed burdens of proof that exist under the [FVRA]." *Id.* ¶ 37. The attorney "provided examples of prior attorney's fees awards under the CVRA." *Id.* The attorney stated that "it is virtually impossible for governmental agencies to defend against lawsuits brought under the CVRA" and "that's in fact why you see cities throughout the State converting" from at-large to by-district elections "in the face of these demand letters." *Id.*

Higginson alleges Councilmember Cunningham asked the attorney if the City of Poway's plan complied with the safe harbor provision, stating that the provision "is truly the shield . . . we are using to avoid attorney's fees, and costs, and protracted litigation." *Id.* ¶ 42. Councilmember Mullin stated,

> We've gone through denial, and we've gone through anger, and now we're into acceptance. So, to those of you in the audience who think we should be fighting this, we concur, we were there awhile back as well. I have no illusions that this will lead to better government for our city. . . . [W]e have a gun to our heads and we have no choice.

Id. ¶ 44. Deputy Mayor Leonard stated, "I get it. I hate it but I get it. . . . We don't pick certain people in certain neighborhoods and say we'll treat them any differently. There is no evidence of that whatsoever." *Id.* ¶ 45. Mayor Vaus concluded that "we've got to do what we've got to do. And job one is to protect the treasure of our constituents.

And it's their money we'd be putting at risk [with litigation] and none of us are willing to do that." *Id.* ¶ 46.

Higginson alleges that the councilmembers then "adopted Resolution No. 17-046, setting forth its intention to transition from at-large to by-district elections." *Id.* ¶ 47. The resolution stated that the City of Poway had "received a letter threatening action under the [CVRA]." *Id.* The resolution stated that the City Council had "determined that it is in the best interest of the City to move from its current at-large electoral system to a by-district election for members of the City Council, in furtherance of the purposes of the California Voting Rights Act." *Id.* ¶ 47. In August 2017, the councilmembers unanimously approved Map 133, a four-district plan. *Id.* ¶ 49. On October 3, 2017, "the Council adopted the ordinance enacting Map 133." *Id.* ¶ 51. Higginson alleges that the City of Poway "would not have switched from at-large elections to single-districts elections but for the prospect of liability under the CVRA." *Id.* ¶ 52. Higginson alleges that Attorney General, "in his official capacity," "is charged by Article V, Section 13 of the California Constitution with the duty to see that the laws of California are uniformly and adequately enforced." *Id.* ¶ 11.

Higginson requests that the Court "[d]eclare that the [CVRA] requires California political subdivisions, such as the City, to engage in racial gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment" and "[p]ermanently enjoin Defendant Becerra from enforcing or giving any effect to the [CVRA]." (ECF No. 1 ¶ 63).

III. CONTENTIONS OF THE PARTIES

The Attorney General contends that Higginson fails to state a claim under the Equal Protection Clause because Higginson "does not allege that he—or any other voter—has been placed in a district based on race." (ECF No. 103-1 at 6). The Attorney General contends that Higginson does not allege facts showing that race predominated in the drawing of Map 133. The Attorney General asserts that the CVRA is not subject to strict scrutiny because the statute makes no classification of voters based on their race, and does not require that political subdivisions make such classifications. (ECF No. 118 at 2). The Attorney General contends that this Court should reach the same conclusion as the court in *Sanchez v. City of Modesto*—that the CVRA complies with the Equal Protection Clause. *Id.* (citing 145 Cal. App. 4th 660, 51 Cal. Rptr. 3d 821, 837-41 (Ct. App. 2006)).

Higginson asserts that the lines of his voting district are "tainted" because the City of Poway's decision to change from the at-large election system to a districted system was "driven by race." (ECF No. 111 at 24). Higginson asserts that the CVRA causes race to be the predominant redistricting factor, and that the City of Poway's decision to adopt districts was driven by the CVRA. Higginson asserts that the CVRA causes race to be the predominant redistricting factor because CVRA liability "turns *solely* on the existence of racially polarized voting, to the exclusion of all other factors." *Id.* at 24-25. Higginson asserts that compliance with the CVRA caused race to be the "*only* factor in the City's

decision to abandon its at-large voting system in favor of by-district elections." *Id.* at 20. Higginson contends that the CVRA cannot survive strict scrutiny under the Equal Protection Clause because the CVRA provides a cause of action for vote dilution based on racially polarized voting alone, without regard to geographical compactness. *Id.* at 20-21. Higginson contends that districts drawn using predominantly racial considerations, in order to avoid FVRA vote dilution liability, fail to satisfy strict scrutiny without a showing of geographical compactness. *Id.* at 8, 25-27. Higginson contends that the ruling in *Sanchez* "is flawed and should not be followed," and that the reasoning in *Sanchez* "conflicts with binding precedent." *Id.* at 20.

IV. APPLICABLE STANDARD

Federal Rule of Civil Procedure 12(b)(6) permits dismissal for "failure to state a claim upon which relief can be granted." In order to state a claim for relief, a pleading "must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Dismissal under Rule 12(b)(6) "is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Shroyer v. New Cingular Wireless Servs.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (quotation omitted).

Stating a claim for relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). When considering a motion

to dismiss, a court must accept as true all "well-pleaded factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). "[A]ccepting all factual allegations in the complaint as true and drawing 'all reasonable inferences in favor of the nonmoving party,'" the plaintiff's "allegations must 'plausibly suggest an entitlement to relief.'" *Gregg v. Haw., Dep't of Pub. Safety*, 870 F.3d 883, 886-87 (9th Cir. 2017) (first quoting *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999); then quoting *Iqbal*, 556 U.S. at 681). "[E]stablishing only a 'possible' entitlement to relief . . . [does] not support further proceedings." *Eclectic Props. E. v. Marcus & Millichap Co.*, 751 F.3d 990, 996-97 (9th Cir. 2014).

V. SUBSTANTIVE LAW

A. Equal Protection and Racial Gerrymandering Claims

The Equal Protection Clause of the Fourteenth Amendment "forbids 'racial gerrymandering,' that is, intentionally assigning citizens to a district on the basis of race without sufficient justification." *Abbott v. Perez*, 138 S. Ct. 2305, 2341, 201 L. Ed. 2d 714 (2018) (quoting *Shaw v. Reno*, 509 U.S. 630, 641, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993)); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1463, 197 L. Ed. 2d 837 (2017) ("The Equal Protection Clause . . . prevents a State, in the absence of 'sufficient justification,' from 'separating its citizens into different voting districts on the basis of race.'") (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797, 197 L. Ed. 2d 85 (2017)); *see also Ala. Legislative Black Caucus*

v. Alabama, 135 S. Ct. 1257, 1265, 191 L. Ed. 2d 314 (2015) ("We have consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more specific electoral districts.").

A racial gerrymandering claim requires "a two-step analysis." *Cooper*, 137 S. Ct. at 1463. First, to trigger strict scrutiny, the plaintiff has the burden to "prove that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Id.* (quoting *Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995)); *see also Abbott*, 138 S. Ct. at 2315 (stating that cases have assumed "a State's consideration of race in making a districting decision is narrowly tailored and thus satisfies strict scrutiny" in certain circumstances). To carry that burden, the plaintiff must demonstrate "that the legislature 'subordinated' other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to 'racial considerations.'" *Cooper*, 137 S. Ct. at 1463-64. The inquiry to assess whether race "drove a district's lines"

> is satisfied when legislators have placed a significant number of voters within or without a district predominantly because of their race, regardless of their ultimate objective in taking this step. . . . [T]heir action still triggers strict scrutiny. . . . [T]he sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other . . . characteristics.

Id. at 1473 n.7 (quotation omitted). A federal court's review "of districting legislation represents a serious intrusion on the most vital of local functions," and the first step requires the plaintiff to overcome a "presumption of legislative good faith." *Abbott*, 138 S. Ct. at 2324 (quoting *Miller*, 515 U.S. at 915).

Second, for a redistricting plan with predominantly racial considerations to survive strict scrutiny, the state has the burden "to prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper*, 137 S. Ct. at 1464 (quoting *Bethune-Hill*, 137 S. Ct. at 800).

B. FVRA Liability

"At the same time that the Equal Protection Clause restricts the consideration of race in the districting process," certain circumstances "may justify the consideration of race in a way that would not otherwise be allowed." *Abbott*, 138 S. Ct. at 2314-15. For example, "consideration of race in making a districting decision is narrowly tailored and thus satisfies strict scrutiny if the State has 'good reasons' for believing that its decision is necessary in order to comply with the [F]VRA." *Id.* (quoting *Cooper*, 137 S. Ct. at 1464).

An electoral district may violate the FVRA if, "under the totality of the circumstances," the lines of the district "dilute the votes of the members of [a] minority group." *Id.* at 2331. FVRA liability, whether postured as an FVRA vote dilution claim or as a defense to a racial

gerrymandering claim, requires a threshold showing of the "three '*Gingles* factors': (1) a geographically compact minority population sufficient to constitute a majority in a single-member district, (2) political cohesion among the members of the minority group, and (3) bloc voting by the majority to defeat the minority's preferred candidate." *Id.* (quoting *Thornburg v. Gingles*, 478 U.S. 30, 48-51, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986)). In *Growe v. Emison*, a unanimous Supreme Court stated:

> The "geographically compact majority" and "minority political cohesion" showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district. And the "minority political cohesion" and "majority bloc voting" showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population. Unless these points are established, there neither has been a wrong nor can be a remedy.

507 U.S. 25, 40-41, 113 S. Ct. 1075, 122 L. Ed. 2d 388 (1993) (citations omitted); *see also Bartlett v. Strickland*, 556 U.S. 1, 10, 13-17, 21, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009) (plurality opinion) (declining to modify *Gingles* to permit FVRA vote dilution liability without geographical compactness; "avoiding serious constitutional concerns" by not "plac[ing] courts in the untenable position of predicting many political variables and tying them to race-based assumptions," or causing "a substantial increase in the

number of mandatory districts drawn with race as 'the predominant factor motivating the legislature's decision'" (quoting *Miller*, 515 U.S. at 916)).

C. CVRA Liability

The CVRA prohibits use of "[a]n at-large method of election" to "impair[] the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class."[1] Cal. Elec. Code § 14027. A CVRA violation can be "established if it is shown that racially polarized voting occurs in elections."[2] *Id.* § 14028(a). The CVRA provides that "[t]he fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section, but may be a factor in determining an appropriate remedy." *Id.* § 14028(c). The CVRA includes a private right of action for voters in protected classes. *Id.* § 14032.

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1. "'Protected class' means a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act of 1965." Cal. Elec. Code § 14026.

2. "Racially polarized voting" is defined as "voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate." Cal. Elec. Code § 14026(e).

In 2016, California amended the Elections Code to require a prospective CVRA plaintiff to notify a political subdivision before filing suit—commonly known as the safe harbor provision. Cal. Elec. Code § 10010. The amendment gives the political subdivision forty-five days to "pass a resolution outlining its intention to transition from at-large to district-based elections, specific steps it will undertake to facilitate this transition, and an estimated time frame for doing so," which prohibits the prospective plaintiff from suing "within 90 days of the resolution's passage." *Id.* The prospective plaintiff "is entitled . . . to reimbursement capped at $30,000." *Id.* § 10010(f)(3).

VI. DISCUSSION

In *Shaw v. Reno*, the Supreme Court defined racial gerrymandering claims, concluding "that a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." 509 U.S. at 649. In *Miller v. Johnson*, the Supreme Court stated that "the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts"; "that race for its own sake, and not other districting principles, was the controlling rationale in drawing its district lines," and "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." 515 U.S. at 911, 913, 916.

To state a racial gerrymandering claim subject to strict scrutiny under the Equal Protection Clause, a plaintiff must allege facts to support the inference that a districting decision was made "on the basis of race." *Abbott*, 138 S. Ct. at 2314. In *Shaw*, the Supreme Court characterized racial gerrymandering as a specific type of racial classification, applying the following Equal Protection principles:

> Classifications of citizens solely on the basis of race . . . threaten to stigmatize individuals by reason of *their* membership in a racial group . . . . [W]e have held that the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of *their* race to be narrowly tailored to further a compelling governmental interest.

509 U.S. at 643 (emphasis added) (citations omitted). The appellants in *Shaw* did not claim to be members of any particular racial group. The appellants instead claimed violation of "their constitutional right to participate in a 'color-blind' electoral process"—while "wise[ly]" conceding "that race-conscious redistricting is not always unconstitutional." *Id.* at 641-42 ("This Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances."); *see also Bartlett*, 556 U.S. at 23-24 (plurality opinion) (noting that "where no other prohibition exists," states using "proper factors" may "in the exercise of lawful discretion . . . draw crossover districts as they deemed appropriate"; recommending that states "defend against alleged [FVRA] violations by pointing to crossover

voting patterns and to effective crossover districts"). The Supreme Court held that appellants stated an Equal Protection claim, specifically framed as an objection to "a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of *their* race." *Shaw*, 509 U.S. at 642, 658 (emphasis added). The Supreme Court remanded, stating that "[i]f the allegation of racial gerrymandering remains uncontradicted, the District Court further must determine whether the North Carolina plan is narrowly tailored to further a compelling governmental interest." *Id.* at 658.

Racial gerrymandering claims trigger strict scrutiny under the same basic principles that trigger strict scrutiny under the Equal Protection Clause. *See id.* at 644 ("[R]edistricting legislation . . . that is unexplainable on grounds other than race . . . demands the same close scrutiny that we give other state laws that classify citizens by race.") (quotation omitted). Racial gerrymandering claims, like other Equal Protection claims, trigger strict scrutiny when a state actor has classified an individual based on that individual's membership in a racial group. In *Adarand Constructors v. Pena* the Supreme Court explained,

> [T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. . . . [A]ll governmental action based on race—a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited'—should be subjected to detailed

> judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.

515 U.S. 200, 227, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) (internal citation omitted). In *Parents Involved in Community Schools v. Seattle School District*, the Supreme Court stated that strict scrutiny applies pursuant to the Equal Protection Clause "when the government distributes burdens or benefits on the basis of *individual* racial classifications." 551 U.S. 701, 720, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007) (emphasis added).

In this case, Higginson alleges that California legislators passed the CVRA to maximize minority voting strength by making it easier to sue local governments for vote dilution, "based on the existence of racially polarized voting and nothing more." (ECF No. 1 ¶ 57). Higginson alleges that the City of Poway received a letter stating that "Poway's at-large system dilutes the ability of Latinos (a 'protected class') to elect candidates of their choice or otherwise influence the outcome of Poway's council elections," and that litigation would follow unless the City "voluntarily change[d]" to districted elections. *Id.* ¶ 34. Higginson alleges that the City of Poway found it was in the City's best interest to avoid CVRA litigation and adopted an ordinance enacting the voting districts of Map 133. Higginson alleges that he was sorted into a district through the application of the CVRA. Higginson alleges that other California municipalities are exposed to the same system of potential CVRA liability that caused the City of Poway to adopt by-district elections.

Higginson's allegations do not support the inference that state actors—those who passed the CVRA, or those who implemented it through Map 133—classified Higginson into a district because of his membership in a particular racial group. Higginson does not include any factual allegations in the Complaint related to the role of his, or any other voter's, race in the application of the CVRA. Higginson does not allege facts to support the inference that the CVRA causes state action that classifies any voter according to that voter's membership in a particular racial group. *See Shaw*, 509 U.S. at 642 (recognizing racial gerrymandering claim for "[a] reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin"); *Cooper*, 137 S. Ct. at 1473 n.7 (referencing "the sorting of voters on the grounds of their race" as action that "triggers strict scrutiny"); *see also Adarand*, 515 U.S. at 227 ("[A]ll governmental action based on race—a *group* classification . . .—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. . . . [A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny.").

Higginson's allegations that the California legislature passed the CVRA "to maximize minority voting strength," (ECF No. 1 ¶ 57), do not trigger strict scrutiny absent facts showing a state actor has classified individuals based on the racial group to which those individuals belong. "[T]he

good faith of the state legislature must be presumed." *See Abbott*, 138 S. Ct. at 2324 (quotation omitted). Higginson has not overcome the presumption of good faith, or demonstrated a legislative "effort to segregate the races for purposes of voting," by alleging "race-conscious state decisionmaking." *See Shaw*, 509 U.S. at 642 ("This Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances."). The Court of Appeals for the Third Circuit has stated,

> It is also error to treat "'racial motive' as a synonym for a constitutional violation" or "racial classification." This holds true even for a decisionmaker's racially discriminatory purpose. Racially discriminatory purpose, alone, is not a racial classification because racial classification is more than a mere thought. . . . [R]acial classification occurs when an action "distributes burdens or benefits on the basis of" race . . . . [R]acially discriminatory purpose refers to the purpose or intent in selecting an action and not to whether the selected action resulted in actual discrimination or classifications.

Doe ex rel. Doe v. Lower Merion Sch. Dist., 665 F.3d 524, 548 n.37 (3d Cir. 2011) (first quoting *Raso v. Lago*, 135 F.3d 11, 16 (1st Cir. 1998) ("[A] concern with race . . . does not make such enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause."); then quoting *Seattle*, 551 U.S. at 720 (separating discussion of racial classification and racially discriminatory purpose));

see also Chen v. City of Hous., 206 F.3d 502 (5th Cir. 2000) ("[T]his Court has interpreted the Supreme Court's current position to include a majority in favor of Justice O'Connor's statement in *Bush* that the intentional creation of minority-majority districts will not in and of itself trigger strict scrutiny." (citing *Bush v. Vera*, 517 U.S. 952, 958, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts.") (internal citations omitted))).

The Court finds that Higginson's allegations, accepted as true, with reasonable inferences drawn in his favor, do not state a racial gerrymandering claim subject to strict scrutiny analysis under the Equal Protection Clause. *See Gregg*, 870 F.3d at 886-87 ("[A]ccepting all factual allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party, the allegations must plausibly suggest an entitlement to relief.") (quotations omitted); *Eclectic Props.*, 751 F.3d at 996-97 ("[E]stablishing only a 'possible' entitlement to relief . . . [does] not support further proceedings."). Higginson fails to state a claim under the Equal Protection Clause of the Fourteenth Amendment, and the Complaint must be dismissed. *See Shroyer*, 622 F.3d at 1041 (noting propriety of dismissal "where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory").

VII. CONCLUSION

IT IS HEREBY ORDERED that the Motion to Dismiss filed by the Attorney General (ECF No. 103) is GRANTED. IT IS FURTHER ORDERED that Plaintiff shall file any motions for leave to file an amended complaint, or show cause why the Complaint (ECF No. 1) should not be dismissed as to Defendant City of Poway and Intervenor-Defendants California LULAC, Hiram Soto, Judy Ki, Jacqueline Contreras, and Xavier Flores, within thirty days of the date of this Order.

Dated: February 4, 2019

/s/ William Q. Hayes
Hon. William Q. Hayes
United States District Court

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, FILED OCTOBER 2, 2018

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No.: 17cv2032-WQH-JLB

DON HIGGINSON,

Plaintiff,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; AND CITY OF POWAY,

Defendants.

October 2, 2018, Decided
October 2, 2018, Filed

ORDER

HAYES, Judge:

The matter before the Court is the motion for a preliminary injunction filed by Plaintiff Don Higginson. (ECF No. 101).

Appendix E

I. PROCEDURAL BACKGROUND

On October 4, 2017, Higginson initiated this action by filing a complaint against Defendants Xavier Becerra, Attorney General of California (the Attorney General), and the City of Poway. (ECF No. 1). Higginson alleges a cause of action pursuant to 42 U.S.C. §§ 1983 and 1988 for violation of his Fourteenth Amendment rights. Higginson asserts that the City of Poway adopted by-distict elections in order to comply with the California Voting Rights Act (CVRA), and that such districting segregates voters on the basis of race without sufficient justification. *Id.* at 1-3.

On February 23, 2018, the Court dismissed the Attorney General and the City of Poway for lack of subject matter jurisdiction on standing grounds, denied a motion for a preliminary injunction filed by Higginson, and denied a motion to intervene (ECF No. 18) filed by Defendant-Intervenors California League of United Latin American Citizens, Jacqueline Contreras, Xavier Flores, Judy Ki, and Hiram Soto (LULAC) as moot. Higginson appealed. LULAC cross appealed.

The Court of Appeals reversed the dismissal of the City of Poway and the Attorney General, granted LULAC's motion to intervene on the merits, and remanded for further proceedings. (ECF No. 115 at 5-6). The Court of Appeals found that Higginson "adequately alleged that he resides in a racially gerrymandered district and that the City's adoption of Map 133 reduced the number of candidates for whom he can vote." *Id.* at 5. The Court of Appeals found that Higginson has standing to challenge "the City's actions, including his argument that the City

violated his rights because the CVRA, with which the City sought to comply, is unconstitutional under the Equal Protection clause." *Id.*

On August 2, 2018, Higginson moved for a preliminary injunction "temporarily enjoining Defendant Attorney General Xavier Becerra and his agents from enforcing the California Voting Rights Act and Defendant City of Poway from using Map 133 for elections during the pendency of this action." (ECF No. 101 at 2). On August 27, 2018, the City of Poway, the Attorney General, and LULAC filed responses opposing the preliminary injunction. (ECF Nos. 112-14). On August 31, Higginson filed a reply. (ECF No. 117).

II. BACKGROUND FACTS

The CVRA prohibits use of "[a]n at-large method of election" to "impair[] the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class."[1] Cal. Elec. Code § 14027. A CVRA violation can be "established if it is shown that racially polarized voting occurs in elections."[2] Whether "members

1. "'Protected class' means a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act of 1965." Cal. Elec. Code § 14026.

2. "Racially polarized voting" is defined as "voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.), in the choice of candidates or other electoral choices that

of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section, but may be a factor in determining an appropriate remedy." *Id.* § 14028. The CVRA includes a private right of action for voters in protected classes. *Id.* § 14032.

In 2016, California amended the Elections Code to require a prospective CVRA plaintiff to notify a political subdivision before filing suit—commonly known as the safe harbor provision. Cal. Elec. Code § 10010. The amendment gives the political subdivision forty-five days to "pass a resolution outlining its intention to transition from at-large to district-based elections, specific steps it will undertake to facilitate this transition, and an estimated time frame for doing so," which prohibits the prospective plaintiff from suing "within 90 days of the resolution's passage." *Id.* The prospective plaintiff "is entitled . . . to reimbursement capped at $30,000." *Id.* § 10010(f)(3).

The City of Poway has used an at-large voting system to elect its City Council for decades. (ECF No. 101-1 at 16). "On June 7, 2017, the City received a certified letter from an attorney, Kevin Shenkman, asserting that the City's at-large system violates the CVRA." *Id.* The letter stated that "Poway's at-large system dilutes the ability of Latinos (a 'protected class') to elect candidates of their choice or otherwise influence the outcome of Poway's council

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are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate." Cal. Elec. Code § 14026(e).

elections." (ECF No. 101-4 at 8). The letter "urge[d] Poway to voluntarily change its at-large system of electing council members," and to respond by July 21, 2017, "[o]therwise, on behalf of residents within the jurisdiction, we will be forced to seek judicial relief." *Id.* at 9.

During "a closed session on June 20, 2017," the City Council discussed "the threatened CVRA litigation," and directed the "staff to prepare a resolution of intention for establishing and implementing by-district elections for . . . consideration at the July 18, 2017 City Council meeting." *Id.* at 2. The City Attorney recommended "adoption of the resolution ahead of the July 18 meeting" to take advantage of the safe harbor provision—"not based on any admission or concession that the City would ultimately be found to have violated the CVRA," but because "the risks and costs associated with protracted CVRA litigation—particularly in light of results in all other cities that have fought to retain at large voting—cannot be ignored." *Id.* at 3. The City Attorney explained that the "public interest may ultimately be better served by a by-district electoral system if converting to that system avoids significant attorneys' fees and cost award." *Id.*

At the July 18 meeting, an outside attorney advised the City Council that "it is virtually impossible for governmental agencies to defend against lawsuits brought under the CVRA" because the statute "effectively removed burdens of proof that exist under the federal Voting Rights Act." (ECF No. 101-3 at 3). The meeting agenda included data showing that "every government defendant in the history of the CVRA that has challenged the conversion

to district elections has either lost in court or settled/agreed to implement district elections." (ECF No. 101-4 at 1). The agenda estimated that "voluntarily converting to district elections" would cost the city "approximately $82,500," whereas a lawsuit would probably cost the city over $1,000,000—and possibly "upwards of $4,500,000." *Id.* at 4.

Councilmember Cunningham asked the attorney if the City of Poway's plan complied with the safe harbor provision, stating that the provision "is truly the shield . . . we are using to avoid attorney's fees, and costs, and protracted litigation." *Id.* at 4. Councilmember Mullin stated,

> We've gone through denial, and we've gone through anger, and now we're into acceptance. So, to those of you in the audience who think we should be fighting this, we concur, we were there awhile back as well. I have no illusions that this will lead to better government for our city. . . . [W]e have a gun to our heads and we have no choice.

Id. Deputy Mayor Leonard stated "I get it. I hate it but I get it. . . . We don't pick certain people in certain neighborhoods and say we'll treat them any differently. There is no evidence of that whatsoever." *Id.* Mayor Vaus concluded, "we've got to do what we've got to do. And job one is to protect the treasure of our constituents. And it's their money we'd be putting at risk [with litigation] and none of us are willing to do that." *Id.* at 5.

The councilmembers then adopted Resolution No. 17-046, setting forth the intention to transition from at-large to by-district elections. (ECF No. 101-6 at 1). The resolution stated that "the City received a letter threatening action under the California Voting Rights Act." *Id.* The resolution stated that "the City Council has determined that it is in the best interest of the City to move from its current at-large electoral system to a by-district election for members of the City Council, in furtherance of the purposes of" the "California Voting Rights Act." *Id.* In August, the councilmembers unanimously approved Map 133, a four-district plan. (ECF No. 101-8 at 3). On October 3, 2017, Ordinance 809 enacted Map 133, to be used "beginning at the General Municipal Election in November 2018." (ECF No. 101-10 at 1, 3, 5-6).

The Poway City Council election is scheduled for November 6, 2018. (ECF No. 112-2 at 3). The candidate nomination period was July 16 to August 10, 2018, during which election officials "spent approximately 250 hours working with potential candidates, publication of notices, website election page updates, preparation of candidate materials, and processing nomination papers." *Id.* On August 16, 2018, the clerk's office filed candidate materials with the registrar, who began "the typesetting, layout, proofing, and printing of the ballots" on August 31, 2018. *Id.* "[T]he identity of the candidates" was "published in . . . the local newspaper," and "translated into Vietnamese, Spanish, Traditional Chinese, and Tagalog, as required by federal law," to "be published in the appropriate foreign language newspapers the first week of September." *Id.* "[S]ample ballot and voter information pamphlets" are

"mailed to the voters between September 27, 2018 and October 27, 2018," and "actual, final" ballots were "sent to military and overseas voters . . . September 22, 2018." *Id.*; ECF No. 112 at 9.

If election officials were enjoined from holding by-district elections for the November 2018 election, the City of Poway would be responsible for "printing and distributing its own ballots" because the registrar's deadlines have passed. *Id.* at 4-5. The cost "associated with doing so would exceed $650,000 . . . and potentially seven figures, if such a process is even possible." *Id.* at 5. Election officials would "likely spend[] at least 200 hours" processing new materials and "would be forced to spend a significant amount of time and resources on an extensive public outreach campaign to inform both existing and potential new candidates, as well as the public at large, about the momentous last minute change to the City's Election." *Id.* The additional time and resources required to comply with such an injunction "would greatly disrupt the normal operations of the City." *Id.*

III. CONTENTIONS OF THE PARTIES

Higginson seeks a preliminary injunction pursuant to Federal Rule of Civil Procedure 65(a) to temporarily enjoin "Defendant Attorney General Xavier Becerra and his agents from enforcing the California Voting Rights Act and Defendant City of Poway from using Map 133 for elections during the pendency of this action." (ECF No. 101 at 2). Higginson contends that he will succeed on the merits of his Fourteenth Amendment claim because the

CVRA, with which the City of Poway sought to comply, caused race to be the "*only* factor in the City's decisions to abandon its at-large voting in favor of by-district elections." (ECF 101-1 at 22) (emphasis in original). Higginson contends that districting decisions pursuant to the CVRA are race-based classifications lacking the compelling interest and narrow tailoring necessary to comply with the Equal Protection Clause.[3] *Id.* at 22-23. Higginson contends such a violation of his constitutional rights is "per se irreparable harm."[4] *Id.* at 23.

Higginson contends that enjoining the use of Map 133 is in the public interest because his constitutional voting rights have been violated. Higginson further contends that "35,000 other Poway voters . . . will suffer the same irreparable injury." Higginson asserts that "the rights millions of other California voters" are at risk of suffering his fate, because other cities are "future targets" for notice letters like the City of Poway received in this case. (ECF

3. Higginson contends that the CVRA cannot survive strict scrutiny because districts predominantly based on racial considerations—drawn to avoid federal Voting Rights Act liability—are not narrowly tailored enough to avoid Equal Protection violation absent proof "that the minority group is 'geographically compact.'" *Shaw v. Hunt*, 517 U.S. 899, 916, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996).

4. Higginson contends that his irreparable harm is abridgement of his fundamental right to vote because of race. (ECF No. 101 at 23-25). This contention merges "two separate strands of equal protection doctrine: suspect classifications and fundmental rights," *Short v. Brown*, 893 F.3d 671, 678 (9th Cir. 2018), as well as Fifteenth Amendment doctrine.

No. 101-1 at 26-27). Higginson contends that equitable considerations favor an injunction because he "filed his lawsuit the day after the ordinance passed," he "filed his motion for a preliminary injunction two weeks later, more than a year before the 2018 election," *id.* at 28, and he "has sought to expedite this case at every potential juncture," (ECF No. 117 at 11). Higginson contends that the injunction he requests would restore the status quo, because this is the first election cycle affected by the CVRA.

The City of Poway "intends to remain neutral with respect to the ultimate merits" of Higginson's constitutional claims. (ECF No. 112 at 5). The City of Poway contends, "without expressing any opinion as to whether or not an injury exists," that an "'injury' of voting for two candidates instead of four, in one election that is being conducted under a method of election that is expressly permitted by state law for all general law cities, is not 'irreparable' in nature." *Id.* at 15. The City of Poway contends any corresponding injury would be redressed in this action as "the City's method of election would, in theory, be impacted in November 2020 and beyond." *Id.*

The City of Poway opposes the motion "based on the significant harm that would result to both the City and the public if the Motion were to be granted on the eve of the November 2018 election." *Id.* at 5. The City of Poway states that "[s]imply put, granting the Motion would wreak havoc in the City." *Id.* at 12. The City of Poway asserts that its "election machinery is not only already in gear, it has completed the majority of its tasks, and is far past the

point of no return." *Id.* at 10. The City of Poway asserts that deadlines "dictated by the Registrar, state law, and federal law" have come and gone. *Id.* at 8-9. The City of Poway asserts it has spent "approximately 50 hours on outreach efforts, assuring candidates and the public that the Election is proceeding pursuant to the Ordinance unless and until the City is ordered otherwise," as a result of the "confusion caused by this Action." *Id.* at 8.

The City of Poway asserts that an order to change its voting plans for the "November 2018 Election—assuming *arguendo* that . . . the City [could] comply with such an order—would result in hundreds of hours of extra work by City staff, immense confusion among candidates and the public, and additional, unbudgeted expenditures of taxpayer money, ranging from $650,000 to the millions." *Id.* at 12. The City of Poway contends that the preliminary injunction Higginson seeks "would have the practical effect of enjoining the entire Election." *Id.* at 14. The City of Poway further contends that it "is particularly inequitable to foist the foregoing hardships on the City and its citizens in light of the fact that the City has . . . not been accused [of] any wrongdoing." *Id.*

The Attorney General contends that Higginson's claim fails on the merits. The Attorney General contends that Higginson must challenge "district maps or district lines themselves," rather than a decision to switch from at-large to by-district elections, in order to make out a Fourteenth Amendment racial gerrymandering claim. (ECF No. 113 at 11). The Attorney General asserts Higginson must challenge the maps or lines using evidence of "the

number of voters from protected classes included in the district, whether the districts are bizarrely shaped, [or] the legislative purpose behind the line drawing." *Id.* at 12-13. The Attorney General asserts that by failing to provide such evidence, Higginson fails to demonstrate that the City of Poway considered race when adopting Map 133. The Attorney General further contends the "CVRA does not sort voters by race" or "require political subdivisions to do so when crafting a remedy for a CVRA violation." *Id.* at 13.

The Attorney General contends that Higginson "has not demonstrated a likelihood of success on the merits" and "he has also failed to demonstrate that he will suffer irreparable harm absent an injunction." *Id.* at 18. The Attorney General asserts the balance of hardships weighs against injunctive relief because "[r]eturning to the at-large election system at this late date would only cause confusion for candidates, voters, and election officials." *Id.* at 19. The Attorney General asserts the public interest weighs against Higginson because "the minority voters the CVRA protects" may be harmed by a preliminary injunction requiring the City of Poway to return to at-large voting. *Id.* at 21.

LULAC contends that Higginson "lacks standing to enjoin statewide enforcement of the CVRA," and that Higginson has not satisfied any of the requisite preliminary injunction factors. (ECF No. 114 at 8). LULAC asserts that "the record in this action is devoid of allegations or evidence of the City placing Poway residents, including Plaintiff, in specific districts in Map 133 on the basis

of their race." *Id.* at 16. LULAC asserts that Map 133 created districts that are "similar in demographics" and "reasonably shapely," and that there are no "allegations or evidence of racially discriminatory comments or actions by City officials." *Id.* LULAC further asserts the CVRA did not compel the City of Poway to adopt Map 133. LULAC asserts the City of Poway's "adoption of by-district elections . . . reflected an overarching concern with preserving taxpayer dollars and avoiding costs associated with litigation." *Id.* at 17. LULAC contends that CVRA liability requires "a showing of racially polarized voting," and that, upon such a finding, "[t]he CVRA does not prescribe a particular remedy." *Id.* LULAC asserts that "the City adopted by-district elections voluntarily" and that "the factual question of whether voting in Poway was racially polarized has not been adjudicated." *Id.* LULAC contends Higginson's "right to vote will not be violated simply because he cannot vote for representatives for districts where he does not reside," because Higginson has no right to vote for a particular number of candidates. *Id.* at 19-20.

LULAC contends the balance of equities and public interest weigh against Higginson because an injunction would "outright disrupt the election process, upsetting the expectations and electoral activities of Poway residents, candidates for Poway's city council, and election administrators." *Id.* at 22. LULAC further asserts that voters would lose "numerous benefits" from voting by district pursuant to Map 133. *Id.* at 21.

IV. LEGAL STANDARD

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997) (emphasis in original) (quotation omitted). "[T]he the burden of proof at the preliminary injunction phase tracks the burden of proof at trial." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011). To obtain preliminary injunctive relief, a movant must "meet one of two variants of the same standard." *All. for the Wild Rockies v. Pena*, 865 F.3d 1211, 1217 (9th Cir. 2017). Under the first standard, the movant must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)).

Under the second standard, the movant must show "that there are serious questions going to the merits—a lesser showing than likelihood of success on the merits," that the "balance of hardships tips *sharply* in the plaintiff's favor," and that "the other two *Winter* factors are satisfied." *Id.* (quotation omitted). The balance of equities and public interest factors merge "[w]hen the government is a party." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (quoting *Nken v. Holder*, 556 U.S. 418, 435, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)). Under the second standard, when the government is a

party, the movant must show serious questions going to the merits; a balance of hardships, merged with public interest considerations, tipping sharply in the movant's favor; and a likelihood of irreparable harm absent preliminary relief.

V. DISCUSSION

A. Balance of Equities, Public Interest, and *Feldman* Factors

In *Southwest Voter Registration Education Project v. Shelley*, the Court of Appeals stated "[t]here is no doubt that the right to vote is fundamental, but a federal court cannot lightly interfere with or enjoin a state election." 344 F.3d 914, 918-19 (9th Cir. 2003). The court stated that "[i]nterference with impending elections is extraordinary," and that the "decision to enjoin an impending election is so serious that the Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation." *Id.* (citations omitted). In *Reynolds v. Sims*, the Supreme Court explained

> [O]nce a State's legislative apportionment scheme has been *found* to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court

> in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. . . . With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State . . . .

377 U.S. 533, 585, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) (emphasis added); *see also Abbott*, 138 S. Ct. 2324 ("If a plan is found to be unlawful long before the next scheduled election, a court may defer any injunctive relief until the case is completed. And if a plan is found to be unlawful very close to the election date, the only reasonable option may be to use the plan one last time.").

The Court of Appeals has identified "considerations specific to election cases" for courts to "weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction." *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 367-68 (9th Cir. 2016) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S. Ct. 5, 166 L. Ed. 2d 1 (2006)). In *Feldman*, the Court of Appeals enjoined enforcement of a recent Arizona election statute that "ma[d]e the collection of legitimate ballots by third parties a felony." *Id.* at 368. The court determined that enjoining enforcement of the statutue would not "affect the state's election processes or machinery" because "legitimate ballots collected by third parties [we]re accepted and counted, and there [we]re no criminal penalties to the voter"—meaning "[n]o

one else in the electoral process [wa]s affected," and "no electoral process [wa]s affected." *Id.* The court determined an injunction was particularly appropriate because the statute "newly criminalize[d] activity associated with voting." *Id.* The court found an injunction would not "disrupt long standing state procedures" because it would restore the status quo "prior to the recent legislative action," which was "affecting th[e] election cycle for the first time." *Id.* at 369. The court found it equitable to grant the injunction because the plaintiff had not delayed in bringing the action. *Id.* The court found it lacked "prima facie reason to believe that the challenged statute was not discriminatory" because there had been no other meaningful legal review to "alleviat[e] the concern that the law violated voting rights." *Id.* The court concluded it had given "careful and thorough consideration" to the election-specific issues, and granted injunctive relief. *Id.*

In this case, the November 2018 election is "impending," and the declaration and exhibit provided by the City of Poway show that the "election machinery is already in progress." *See Reynolds*, 377 U.S. at 585. Whether or not the "existing apportionment scheme" is ultimately "found invalid," enjoining the City of Poway from using Map 133 would be expensive, confusing, and disruptive—it would "requir[e] precipitate changes that [w]ould make unreasonable or embarrassing demands" on the election authorities.[5] *See id.*

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5. LULAC contends that Higginson's requested injunction is mooted because the County Registrar, a nonparty, has assumed responsibility for conducting the City of Poway's elections as of July 4, 2018. (ECF No. 114 at 13). LULAC contends that

Unlike in *Feldman*, the requested injunction would require a different voting plan and new election materials, which would "affect the . . . processes [and] machinery" of the election. *See* 843 F.3d at 368; ECF No. 112. Unlike in *Feldman*, enjoining the use of Map 133 would confuse, and affect the conduct of, voters and election officials. *Id.* Map 133 is "affecting this election cycle for the first time," and Higginson "did not delay in bringing this action." *See id.* at 369. However, the recent change is not due to conduct by the state legislature this year—the CVRA passed in 2002 and the safe harbor provision passed in 2016. *See* California Voting Rights Act of 2001, ch. 129, 2002 Cal. Legis. Serv. (West) (codified at Cal. Elec. Code §§ 14025-32); Act of Sept. 28, 2016, ch. 737, 2016 Cal. Legis. Serv. (West) (codified at Cal. Elec. Code. § 10010). Map 133 is the status quo in this case, and reversion to the previous method would be the far greater disruption. (ECF No. 112-1).

The CVRA has survived an equal protection challenge in California state court. *See Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 51 Cal. Rptr. 3d 821, 837-41 (Cal. Ct. App. 2006) (finding the CVRA constitutional). If the

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the County Registrar is not an agent of the City of Poway, and would not be "subject to an injunction against the City." *Id.* at 14. LULAC contends that the County Registrar could not "as a practical matter . . . restart the entire pre-election process and . . . comply with a City directive to use its former at-large system." *Id.* Higginson contends that "the county is merely acting as the City's agent" and would be bound by an injunction. (ECF No. 117 at 13). The Court does not reach contentions regarding the County Registrar.

CVRA is found to be constitutional, and the Court enjoins Map 133 at this stage, "the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott*, 138 S. Ct. 2324 & n.17.

After careful and thorough assessment of the election-specific *Feldman* considerations, the Court finds that the balance of equities does not tip in Higginson's favor, and that the public interest counsels against granting a preliminary injunction. An injunction at this stage in the proceedings would disrupt the status quo and harm the public interest.

B. Merits and Irreparable Injury

1. The City of Poway and Map 133

Whether a Fourteenth Amendment racial gerrymandering claim can prevail on the merits requires "a two-step analysis." *Cooper v. Harris*, 137 S. Ct. 1455, 1463, 197 L. Ed. 2d 837 (2017). First, the plaintiff has the burden to "prove that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Id.* (quoting *Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995)). To carry that burden, the plaintiff must demonstrate "that the legislature 'subordinated' other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to 'racial considerations.'" *Id.* at 1463-64. Because a federal court's review "of districting legislation represents a serious intrusion on the most vital of local functions," the

plaintiff must overcome a "presumption of legislative good faith." *Abbott*, 138 S. Ct. 2324 (quoting *Miller*, 515 U.S. at 915). The plaintiff may use "'direct evidence' of legislative intent, 'circumstantial evidence of a district's shape and demographics,' or a mix of both." *Id.* Second, if the challenger has shown racial considerations predominated the districting decision, the "design of the district must withstand strict scrutiny." *Id.* at 1464. The burden shifts to the state "to prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Id.*

Initially, the Court must address whether the adoption of district lines constitutes a "decision to place a significant number of voters within or without a particular district" for purposes of a Fourteenth Amendment racial gerrymandering claim, compared to typical racial gerrymandering claims challenging specific features of resulting districts. *Cooper v. Harris*, 137 S. Ct. at 1463. The Court must also address whether the CVRA constitutes a "racial consideration" for purposes of a Fourteenth Amendment racial gerrymandering claim. *See Cooper*, 137 S. Ct. at 1463; *see also Mazurek*, 520 U.S. at 972 (requiring the movant to make "*a clear showing*").

Higginson presents evidence showing that the City of Poway adopted by-district elections in response to a letter threatening a CVRA lawsuit. Higginson asserts that the CVRA is "dominated by racial considerations." (ECF No. 101-1 at 22). However, the Attorney General and LULAC maintain that "the CVRA does not, as Plaintiff contends, require political subdivisions to engage in racial

gerrymandering," or "prescribe a particular remedy where vote dilution occurs." (ECF No. 113 at 13; ECF No. 114 at 17).

At this stage in the proceedings, given the unresolved questions of law and fact, the Court finds that Higginson has not shown a likelihood of prevailing on the merits of his Fourteenth Amendment racial gerrymandering claim. Higginson is injured only if the CVRA caused the City of Poway to adopt Map 133 using predominantly racial considerations, and if Map 133 was not narrowly tailored to a compelling interest. *Pena*, 865 F.3d at 1217 ("[A] party must show . . . that he is likely to suffer irreparable harm in the absence of preliminary relief."); *see also Hale v. Dep't of Energy*, 806 F.2d 910, 918 (9th Cir. 1986) (finding that plaintiffs who failed to show a likelihood of success on the merits had "failed to establish that irreparable harm will flow from a failure to preliminarily enjoin defendants' actions"); *Lecky v. Va. State Bd. of Elections*, 285 F. Supp. 3d 908, 921 (E.D. Va. 2018) ("[E]ven if this single factor weighs in favor of plaintiffs, plaintiffs' failure to make a clear showing of likelihood of success on the merits nonetheless ends the matter.").

2. The Attorney General

Higginson moves the Court to enjoin the Attorney General "and his agents" from enforcing the CVRA "during the pendency of this action." (ECF No. 101 at 2). The Attorney General contends that he "has taken no action and made no threats to enforce the CVRA at this time," and that "there is no reason to assume he would

do so between now and the November election." (ECF No. 113 at 19-20). The Attorney General further contends that enjoining him from CVRA enforcement would not "forestall the injuries that Plaintiff contends would result from voting under Map 133." *Id.* at 6.

The Supreme Court has explained that "a plaintiff who alleges that he is the object of a racial gerrymander . . . has standing to assert only that his own district has been so gerrymandered." *Gill v. Whitford*, 138 S. Ct. 1916, 1930, 201 L. Ed. 2d 313 (2018). Such plaintiffs "cannot sue to invalidate the whole State's legislative districting map; such complaints must proceed 'district-by-district.'" *Id.* at 1930 (quoting *Ala. Legislative Black Caucus*, 135 S. Ct. 1257, 1265, 191 L. Ed. 2d 314 (2015)). The "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Id.* at 1931 (quotation omitted).

The claimed "irreparable harm must be causally connected to the activity to be enjoined" to support a preliminary injunction. *Nat. Wildlife v. Nat. Marine Fisheries*, 886 F.3d 803, 819 (9th Cir. 2018). In this case, Higginson has not come forward with facts to show a causal connection between the alleged irreparable harm—infringement of his constitutional rights under Map 133—and the Attorney General's enforcement of the CVRA. The Court finds that Higginson has failed to carry his burden to show he is entitled to a preliminary injunction against the Attorney General and his agents.

VI. CONCLUSION

The Court finds that Higginson has not demonstrated sufficient likelihood of success on the merits of his claim or irreparable injury absent injunctive relief, or that the balance of equities or public interest weigh in his favor.

IT IS HEREBY ORDERED that the motion for a preliminary injunction (ECF No. 101) is DENIED.

Dated: October 2, 2018

/s/ William Q. Hayes
Hon. William Q. Hayes
United States District Judge

APPENDIX F — AMENDED MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JULY 31, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-55455
D.C. No. 3:17-cv-02032-WQH-JLB

DON HIGGINSON,

Plaintiff-Appellant,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; CITY OF POWAY,

Defendants-Appellees.

No. 18-55506
D.C. No. 3:17-cv-02032-WQH-JLB

DON HIGGINSON,

Plaintiff-Appellee,

v.

Appendix F

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; CITY OF POWAY,

Defendants,

v.

CALIFORNIA LEAGUE OF UNITED LATIN AMERICAN CITIZENS; JACQUELINE CONTRERAS; XAVIER FLORES; JUDY KI; HIRAM SOTO, PROPOSED DEFENDANT-INTERVENORS,

Movants-Appellants.

June 7, 2018, Argued and Submitted, Portland, Oregon
July 31, 2018, Filed

Appeals from the United States District Court
for the Southern District of California.
D.C. No. 3:17-cv-02032-WQH-JLB
William Q. Hayes, District Judge, Presiding.

AMENDED MEMORANDUM*

Before: GRABER and M. SMITH, Circuit Judges, and HELLERSTEIN,** District Judge.

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

** The Honorable Alvin K. Hellerstein, United States District Judge for the Southern District of New York, sitting by designation.

Plaintiff Don Higginson timely appeals the district court's dismissal of this action for lack of subject matter jurisdiction. The district court ruled that Plaintiff does not have standing to sue either the Attorney General of California, Xavier Becerra, or the City of Poway ("the City") for allegedly violating his rights under the Equal Protection Clause when the City adopted the by-district election scheme of Map 133 to avoid litigation under the California Voting Rights Act ("CVRA"). Reviewing de novo, *Arakaki v. Lingle*, 477 F.3d 1048, 1056 (9th Cir. 2007), we reverse and remand.

1. We reverse the dismissal of the City. Plaintiff has standing to sue the City to challenge its adoption of Map 133. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (laying out the requirements of Article III standing). Plaintiff has adequately alleged that he resides in a racially gerrymandered district and that the City's adoption of Map 133 reduced the number of candidates for whom he can vote. This alleged injury is concrete and particularized, directly traceable to the City's adoption of Map 133, and potentially redressable by an injunction requiring the City to return to its former system of at-large elections. Accordingly, Plaintiff can bring this as-applied challenge to the City's actions, including his argument that the City violated his rights because the CVRA, with which the City sought to comply, is unconstitutional under the Equal Protection Clause. *See, e.g., Branch v. Smith*, 538 U.S. 254, 123 S. Ct. 1429, 155 L. Ed. 2d 407 (2003) (considering on the merits a challenge to a redistricting plan by individual voters in the

affected geographic area). We, of course, express no view on the merits of any of Plaintiff's theories. *See Ariz. State Legislature v. Ariz. Independent Redistricting Comm'n*, 135 S. Ct. 2652, 2663, 192 L. Ed. 2d 704 (2015) (holding that the state legislature had standing to challenge redistricting and cautioning that courts must not conflate the potential weakness of a claim on the merits with an absence of Article III standing).

2. We also reverse the dismissal of the Attorney General. On remand, the Attorney General will remain a defendant unless, at his request, the district court redesignates him as an intervenor.

3. Our holdings above render Proposed Intervenors' motion to participate in the litigation not moot. We now grant that motion on the merits. *See United States v. Sprint Commc'ns, Inc.*, 855 F.3d 985, 995 (9th Cir. 2017) (concluding, first, that the motion to intervene was not moot and then deciding the motion on the merits). We review de novo the district court's decision regarding intervention as a matter of right under Federal Rule of Civil Procedure 24(a)(2), and we construe that rule liberally. *Arakaki v. Cayetano*, 324 F.3d 1078, 1082-83 (9th Cir. 2003). We conclude that Proposed Intervenors meet all four requirements for intervention as of right.

REVERSED and REMANDED for further proceedings consistent with this disposition.

APPENDIX G — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JUNE 14, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-55455
D.C. No. 3:17-cv-02032-WQH-JLB

DON HIGGINSON,

Plaintiff-Appellant,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; CITY OF POWAY,

Defendants-Appellees.

No. 18-55506
D.C. No. 3:17-cv-02032-WQH-JLB

DON HIGGINSON,

Plaintiff-Appellee,

v.

Appendix G

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; CITY OF POWAY,

Defendants,

v.

CALIFORNIA LEAGUE OF UNITED LATIN AMERICAN CITIZENS; JACQUELINE CONTRERAS; XAVIER FLORES; JUDY KI; HIRAM SOTO, PROPOSED DEFENDANT-INTERVENORS,

Movants-Appellants.

Appeal from the United States District Court for the Southern District of California.
D.C. No. 3:17-cv-02032-WQH-JLB.
William Q. Hayes, District Judge, Presiding.

June 7, 2018, Argued and Submitted, Portland, Oregon
June 14, 2018, Filed

MEMORANDUM[*]

Before: GRABER and M. SMITH, Circuit Judges, and HELLERSTEIN,[**] District Judge.

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

** The Honorable Alvin K. Hellerstein, United States District Judge for the Southern District of New York, sitting by designation.

Plaintiff Don Higginson timely appeals the district court's dismissal of this action for lack of subject matter jurisdiction. The district court ruled that Plaintiff does not have standing to sue either the Attorney General of California, Xavier Becerra, or the City of Poway ("the City") for allegedly violating his rights under the Equal Protection Clause when the City adopted the by-district election scheme of Map 133 to avoid litigation under the California Voting Rights Act ("CVRA"). Reviewing de novo, *Arakaki v. Lingle,* 477 F.3d 1048, 1056 (9th Cir. 2007), we reverse and remand.

1. We reverse the dismissal of the City. Plaintiff has standing to sue the City to challenge its adoption of Map 133. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (laying out the requirements of Article III standing). Plaintiff has adequately alleged that he resides in a racially gerrymandered district and that the City's adoption of Map 133 reduced the number of candidates for whom he can vote. This alleged injury is concrete and particularized, directly traceable to the City's adoption of Map 133, and potentially redressable by an injunction requiring the City to return to its former system of at-large elections. Accordingly, Plaintiff can bring this asapplied challenge to the City's actions, including his argument that the City violated his rights because the CVRA, with which the City sought to comply, is unconstitutional under the Equal Protection Clause.

2. We also reverse the dismissal of the Attorney General. On remand, the Attorney General will remain

a defendant unless, at his request, the district court redesignates him as an intervenor.

3. Our holdings above render Proposed Intervenors' motion to participate in the litigation not moot. We now grant that motion on the merits. *See United States v. Sprint Commc'ns, Inc.*, 855 F.3d 985, 995 (9th Cir. 2017) (concluding, first, that the motion to intervene was not moot and then deciding the motion on the merits). We review de novo the district court's decision regarding intervention as a matter of right under Federal Rule of Civil Procedure 24(a)(2), and we construe that rule liberally. *Arakaki v. Cayetano*, 324 F.3d 1078, 1082-83 (9th Cir. 2003). We conclude that Proposed Intervenors meet all four requirements for intervention as of right.

REVERSED and REMANDED for further proceedings consistent with this disposition.

APPENDIX H — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, FILED FEBRUARY 23, 2018

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No.: 17cv2032-WQH-JLB

DON HIGGINSON,

Plaintiff,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; AND CITY OF POWAY, CALIFORNIA,

Defendants.

February 23, 2018, Decided
February 23, 2018, Filed

ORDER

HAYES, Judge:

The matters before the Court are the motion for a preliminary injunction filed by Plaintiff Don Higginson (ECF No. 11); the motion to intervene filed by California League of United Latin American Citizens, Jacqueline Contreras, Xavier Flores, Judy Ki, and Hiram Soto (ECF

No. 18); the motion to dismiss filed by Defendant Xavier Becerra (ECF No. 33); and the motion for leave to file amici curiae brief of the San Gabriel Valley Council of Governments, et al. (ECF No. 53).

I. BACKGROUND

On October 4, 2017, Plaintiff Don Higginson initiated this action by filing the Complaint against Defendants Attorney General Xavier Becerra (the "Attorney General") and the City of Poway (the "City"). (ECF No. 1). Higginson alleges a cause of action pursuant to 42 U.S.C. §§ 1983 and 1988 for a violation of his rights under the Fourteenth Amendment. Higginson asserts that the California Voting Rights Act ("CVRA") and the City's Map 133, allegedly enacted as a result of the CVRA, violate the equal protection clause. Higginson seeks an order declaring the CVRA and Map 133 unconstitutional and enjoining their enforcement and use.

On October 19, 2017, Higginson filed a motion for a preliminary injunction. (ECF No. 11). Higginson seeks a preliminary injunction pursuant to Federal Rule of Civil Procedure 65(a) which temporarily enjoins "Defendant Attorney General Xavier Becerra and his agents from enforcing the California Voting Rights Act and Defendant City of Poway from using Map 133 for elections during the pendency of this action." *Id.* at 2.

On November 6, 2017, the City filed a response to the motion for a preliminary injunction stating that it takes a neutral position in this litigation and "does not intend

to defend the constitutionality of the CVRA or otherwise actively support or oppose the Motion." (ECF No. 16 at 2). The City states that "unless and until this (or any) Court orders otherwise, the City will continue implementing by-district elections pursuant to the Ordinance, which means that the City will begin the transition to the election system adopted therein during the November 2018 election." *Id.* at 2. The City requests that the Court make its ruling prior to May 1, 2018 to "provide potential candidates with sufficient time to make decisions in advance of the formal July nominations filing period." *Id.* at 3.

On November 6, 2017, the California League of United Latin American Citizens ("LULAC"), Jacqueline Contreras, Xavier Flores, Judy Ki, and Hiram Soto ("the Proposed Intervenors") filed a motion to intervene and lodged an opposition to the motion for a preliminary injunction. (ECF Nos. 18, 19).

On November 7, 2017, the Attorney General filed a response in opposition to the motion for a preliminary injunction. The Attorney General asserts that Higginson lacks standing and "has not established a likelihood of success on the merits on his Fourteenth Amendment claim" or "any of the remaining factors . . . necessary to show he is entitled to a preliminary injunction." (ECF No. 22).

On November 22, 2017, the Attorney General filed a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). The Attorney General asserts that Higginson lacks Article III standing

to bring this action and that Higginson fails to state a claim upon which relief can be granted. (ECF No. 33). On December 12, 2017, Higginson filed a response in opposition. (ECF No. 48). On December 12, 2017, the City filed a response stating that the City intends to maintain a "neutral position in this action" and "will not support or oppose" the motion to dismiss. (ECF No. 47 at 2).

On December 14, 2017, the City of Mission Viejo filed a motion for leave to file an amicus curiae brief in support of the motion for a preliminary injunction. (ECF No. 49). On December 18, 2017, the Court granted the motion and deemed the Mission Viejo amicus curiae brief to be filed. (ECF No. 51).

On December 18, 2017, the San Gabriel Valley Council of Governments, the City of Arcadia, the City of Barstow, the City of Fullerton, the City of Glendora, the City of South Pasadena, and the City of West Covina filed an application for leave to file an amicus curiae brief in support of the motion for a preliminary injunction. (ECF No. 53).

On January 5, 2018, the Attorney General filed a motion for leave to file a response to the amicus curiae brief filed by the City of Mission Viejo. (ECF No. 59). On January 9, 2018, the Court granted the motion and allowed the City of Mission Viejo to file a response. (ECF No. 62). On January 10, 2018, the Attorney General filed a response to the amicus curiae brief filed by the City of Mission Viejo. (ECF No. 63).

On January 12, 2018, the Court heard oral argument on the motion for a preliminary injunction.

II. ALLEGATIONS OF THE COMPLAINT

The City is a "California general law city and a municipal corporation organized and existing under and by virtue of the laws of the State of California." (ECF No. 1 at ¶ 12). The City is subject to the CVRA. *Id.* "As a direct result of that statute, the City has abandoned its at-large voting system and switched to by-district elections that are the product of racial gerrymandering." *Id.*

The City has used an at-large voting system to elect its City Council for decades. *Id.* ¶ 31. "On June 7, 2017, the City received a certified letter from an attorney, Kevin Shenkman, asserting that the City's at-large system violates the CVRA." *Id.* ¶ 32. "According to Mr. Shenkman, 'Poway's at-large system dilutes the ability of Latinos (a 'protected class') to elect candidates of their choice or otherwise influence the outcome of Poway's council elections.' Therefore, unless the City 'voluntarily change[s] its at-large system of electing council members . . . [he] will be forced to seek judicial relief.'" *Id.* ¶ 34. "Mr. Shenkman gave the City until June 21, 2017 to notify him whether it would come into compliance with the CVRA." *Id.*

"On June 20, 2017, in response to the Shenkman letter, the City Council held a closed session to discuss the threatened CVRA litigation." *Id.* ¶ 35. "[T]he City Council provided direction to staff to prepare a resolution

of intention for establishing and implementing by-district elections for the City Council members to be presented for consideration at the July 18, 2017 City Council meeting." *Id.*

> In recommending the adoption of the resolution ahead of the July 18 meeting, the City Attorney explained that "the risks and costs associated with protracted CVRA litigation—particularly in light of results in all other cities that have fought to retain at large voting—cannot be ignored. The public interest may ultimately be better served by a by-district electoral system if converting to that system avoids significant attorneys' fees and cost award."

Id. ¶ 36. "At the City Council meeting on July 18, an outside attorney the City hired to advise it on the Shenkman letter outlined the difficulty in defending CVRA lawsuits." *Id.* ¶ 37. "Each member of the City Council . . . expressed his strong disapproval of the changes that the CVRA was forcing the City to make." *Id.* ¶ 41. "City councilmember Jim Cunningham explained that 'the [safe-harbor provision] is truly the shield ... we are using to avoid attorney's fees, and costs, and protracted litigation.' He then specifically sought advice from the outside attorney on whether they were utilizing that provision correctly to avoid those burdens." *Id.* ¶ 42.

> City councilmember John Mullin . . . concluded: "We've gone through denial, and we've gone through anger, and now we're into acceptance.

> So, to those of you in the audience who think we should be fighting this, we concur, we were there awhile back as well. I have no illusions that this will lead to better government for our city."

Id. ¶ 44. "Deputy Mayor Barry Leonard . . . explained his view that . . . 'We don't pick certain people in certain neighborhoods and say we'll treat them any differently. There is no evidence of that whatsoever.'" *Id.* ¶ 45.

> Mayor Steve Vaus concluded, "I'll just echo that this council does a remarkable job [with at-large elections] . . . But we've got to do what we've got to do. And job one is to protect the treasure of our constituents. And it's their money we'd be putting at risk [with litigation] and none of us are willing to do that."

Id. ¶ 46.

> The City Council adopted Resolution No. 17-046 setting forth its intention to transition from at-large to by-district elections, pursuant to Elections Code section 10010(e)(3)(A). The Resolution stated that after "the City [had] received a letter threatening action under the California Voting Rights Act," it had "determined that it is in the best interest of the City to move from its current at-large electoral system to a by-district election for members of the City Council, in furtherance of the purposes of [the] California Voting Rights Act."

Id. ¶ 47 (first alteration in original). "On August 31, 2017, the Council voted 5-0 to proceed with Map 133, an election plan that divides the City into four districts." *Id.* ¶ 49. "On October 3, 2017, the Council adopted the ordinance enacting Map 133." *Id.* ¶ 51. "The City would not have switched from at-large elections to single-district elections but for the prospect of liability under the CVRA." *Id.* ¶ 52. "City elections using these new districts will be held in 2018." *Id.* ¶ 6.

Higginson is a resident of Poway, California and a registered voter. *Id.* ¶ 10. "Because the California Voting Rights Act has forced the City to abandon at-large elections, he will now reside in and vote in District 2." *Id.* "District 2, like all of the City's districts, is racially gerrymandered as a result of the redistricting the California Voting Rights Act has imposed on the City." *Id.*

"The CVRA makes race the predominant factor in drawing electoral districts. Indeed, it makes race the only factor given that a political subdivision, such as the City, must abandon its at-large system based on the existence of racially polarized voting and nothing more." *Id.* ¶ 56. "California does not have a compelling interest in requiring any political subdivision, including the City, to abandon its at-large system based on the existence of racially polarized voting and nothing more." *Id.* ¶ 57. "The CVRA also is not narrowly tailored to ensure that minority voters do not have their votes diluted because, among other reasons, it overrides the compactness precondition of Section 2 of the [federal Voting Rights Act]." *Id.* ¶ 58. "[T]he CVRA violates the Equal Protection Clause of the Fourteenth Amendment." *Id.* ¶ 59.

Higginson requests the following relief from the Court:

> 62. Declare that the California Voting Rights Act requires California political subdivisions, such as the City, to engage in racial gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment.
> 63. Permanently enjoin Defendant Becerra from enforcing or giving any effect to the California Voting Act.
> 64. Declare Map 133 in violation of the Equal Protection Clause of the Fourteenth Amendment.
> 65. Permanently enjoin Defendant City of Poway from using Map 133 in any future election.

Id. ¶¶ 62-65.

III. THE CALIFORNIA VOTING RIGHTS ACT

The CVRA provides, in relevant part,

> An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class, as defined pursuant to Section 14026.[1]

1. "'Protected class' means a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act of 1965." Cal. Elec. Code § 14026.

Cal. Elec. Code § 14027. Pursuant to the CVRA,

> (a) A violation of Section 14027 is established if it is shown that racially polarized voting[2] occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision. Elections conducted prior to the filing of an action pursuant to Section 14027 and this section are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action.
>
> (b) The occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class. One circumstance that may be considered in determining a violation of Section 14027 and this section is the extent to which candidates who are members of a protected class and who are preferred by

2. "Racially polarized voting" is defined as "voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate." Cal. Elec. Code § 14026(e).

voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action based on Section 14027 and this section. . . .

(c) The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section, but may be a factor in determining an appropriate remedy.

(d) Proof of an intent on the part of the voters or elected officials to discriminate against a protected class is not required.

(e) Other factors such as the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns are probative, but not necessary factors to establish a violation of Section 14027 and this section.

Cal. Elec. Code § 14028. The CVRA includes a private right of action for voters. "Any voter who is a member of a protected class and who resides in a political subdivision where a violation of Sections 14027 and 14028 is alleged may file an action pursuant to those sections in the superior court of the county in which the political subdivision is located." Cal. Elec. Code § 14032.

In 2016, California amended the Elections Code to add language requiring that a prospective CVRA plaintiff provide written notice to a political subdivision before filing suit under the CVRA.

> (e)(1) Before commencing an action to enforce Sections 14027 and 14028, a prospective plaintiff shall send by certified mail a written notice to the clerk of the political subdivision against which the action would be brought asserting that the political subdivision's method of conducting elections may violate the California Voting Rights Act of 2001.
>
> (2) A prospective plaintiff shall not commence an action to enforce Sections 14027 and 14028 within 45 days of the political subdivision's receipt of the written notice described in paragraph (1).
>
> (3)(A) Before receiving a written notice described in paragraph (1), or within 45 days of receipt of a notice, a political subdivision may pass a resolution outlining its intention

> to transition from at-large to district-based elections, specific steps it will undertake to facilitate this transition, and an estimated time frame for doing so.
>
> (B) If a political subdivision passes a resolution pursuant to subparagraph (A), a prospective plaintiff shall not commence an action to enforce Sections 14027 and 14028 within 90 days of the resolution's passage.

Cal. Elec. Code § 10010. The Elections Code provides that a prospective plaintiff who sent a written notice pursuant to section 10010(e)(1) is entitled, upon written demand, to reimbursement capped at $30,000. Cal. Elec. Code § 10010(f)(3).

IV. MOTION TO DISMISS

The Attorney General brings a facial attack on the Court's subject matter jurisdiction asserting that Higginson lacks standing to bring this action. The Attorney General contends that Higginson has not sufficiently alleged injury to himself as a result of the CVRA because his claim that "all districts drawn in an effort to correct for vote dilution resulting from at-large district elections violate the Fourteenth Amendment" is a generalized grievance that cannot support standing. (ECF No. 33-1 at 9). The Attorney General contends that the Supreme Court redistricting cases addressing challenges to the way district lines are drawn are inapplicable to this case which challenges the decision to draw the district

lines in the first place. The Attorney General contends that Higginson cannot establish standing under these redistricting cases because he does not allege that he "has been personally subjected to a racial classification" and he does not allege sufficient facts to support the conclusory allegation that District 2 has been racially gerrymandered. *Id.* at 11. The Attorney General further contends that Higginson has not established that the City's decision to switch from at-large to by-district elections is traceable to any action by the Attorney General. The Attorney General contends that the Complaint does not contain any allegations that the ordinance enacting Map 133 was enacted to address a CVRA violation or racially-polarized voting in the City. The Attorney General contends that the CVRA does not require any political subdivision to abandon at-large voting unless racially-polarized voting exists. The Attorney General contends that a demand letter from a private party prompted the City's switch to by-district elections and that the allegations of the Complaint indicate that "the costs of litigation under the CVRA rather than the CVRA itself lead to the City's decision." *Id.* at 13. In addition, the Attorney General contends that the requested relief in the Complaint would not redress Higginson's alleged injury because enjoining the Attorney General from enforcing the statute would not preclude individuals from bringing private claims under the CVRA. The Attorney General contends that enjoining the enforcement of the CVRA would not ensure that the City abandons Map 133 because the City "voluntarily changed" to a by-district system and did not change due to any finding of a CVRA violation. *Id.* at 14.

Higginson contends that the Complaint alleges a cognizable harm to him because the City has segregated all City voters into separate voting districts on the basis of race and without sufficient justification. (ECF No. 48 at 20). Higginson contends that he does not assert a generalized grievance because he alleges that "there was no sufficient justification for making race the predominant factor in creating *his* district." *Id.* Higginson contends that the CVRA was a "substantial motivating factor" in the "decision to switch to by-district elections" because the Complaint "plausibly alleges that the City would have retained at-large elections absent the CVRA." *Id.* at 21. Higginson asserts that he properly brings this action against the Attorney General and that the Court can enjoin the Attorney General from enforcing the law under *Ex Parte Young*.[3] Higginson asserts that the City "had every reason to believe it was violating the CVRA" and that the allegations of the Complaint demonstrate that the City had a "real and reasonable apprehension" of liability under the CVRA. *Id.* at 22. Higginson contends that the Court can redress Higginson's injury by "enjoining Map 133 and restoring the preexisting at-large system." *Id.* Higginson contends a declaration that the CVRA is unconstitutional will preclude private parties from enforcing the CVRA. Higginson contends that the Attorney General's assertion that the City voluntarily changed to by-district elections is "speculation divorced from the Complaint's allegations." *Id.* at 23.

3. 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)

A. Applicable Law

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a defendant to move for dismissal on the grounds that the court lacks jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1). A jurisdictional attack pursuant to Rule 12(b)(1) may be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "In a facial attack, the challenger asserts that the allegations contained in the complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial attack on subject matter jurisdiction under Rule 12(b)(1), the court assumes the factual allegations of the complaint to be true and draws all reasonable inferences in favor of the plaintiff. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009). However, the court does not accept "the truth of legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003); *see also Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

The Article III standing doctrine limits federal court jurisdiction. *See La Asociacon de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). "[T]he 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). In order "to satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a)

concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (citing *Lujan*, 504 U.S. at 560-61). The party invoking federal jurisdiction bears the burden of establishing that the standing requirements of Article III are satisfied. *Spokeo*, 136 S. Ct. at 1547.

B. Discussion

In *United States v. Hays*, 515 U.S. 737, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995) and *Sinkfield v. Kelley*, 531 U.S. 28, 121 S. Ct. 446, 148 L. Ed. 2d 329 (2000), plaintiffs challenged the way district boundary lines were drawn as unconstitutional racial gerrymanders in violation of the equal protection clause. In *Hays*, the Supreme Court addressed the requirements of injury in fact, stating:

> Any citizen able to demonstrate that he or she, personally, has been injured by that kind of racial classification has standing to challenge the classification in federal court. Demonstrating the individualized harm our standing doctrine requires may not be as easy in the racial gerrymander context, as it will frequently be difficult to discern why a particular citizen was put in one district or another . . . . Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied

> equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action.

Hays, 515 U.S. at 744-45. The Court stated, "[W]e have repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *Id.* at 743. In *Sinkfield* and *Hays*, the Supreme Court determined that the challengers lacked standing to assert an equal protection claim because they did not allege or produce any evidence to establish that they "had been personally subjected to a racial classification." *Sinkfield*, 531 U.S. at 30; *see also Hays*, 515 U.S. at 746 ("The fact that Act 1 affects all Louisiana voters by classifying each of them as a member of a particular congressional district does not mean - even if Act 1 inflicts race-based injury on some Louisiana voters - that every Louisiana voter has standing to challenge Act 1 as a racial classification."); *Sinkfield*, 531 U.S. at 30 ("Appellees are challenging their own majority-white districts as the product of unconstitutional racial gerrymandering under a redistricting plan whose purpose was the creation of majority-minority districts, some of which border appellees' district. Like the appellees in *Hays*, they have neither alleged nor produced any evidence that any of them was assigned to his or her district as a direct result of having 'personally been subjected to a racial classification.'").

Higginson's equal protection claim is distinguishable from the claims in *Hays* and *Sinkfield*. Higginson does not challenge the boundaries of his particular district. Higginson asserts that he has been personally subjected

to a racial classification because he is now limited to voting in District 2 and that all of the City's districts are racially gerrymandered as a result of the districting imposed on the City by the facially-unconstitutional CVRA. *See* ECF No. 1 at ¶ 10. Higginson alleges, "District 2, like all of the City's districts is racially gerrymandered as a result of the redistricting the [CVRA] has imposed on the City." *Id.* Higginson contends that a political subdivision that changes its election system in an effort to comply with the CVRA denies each of its citizens equal treatment because of the CVRA's reliance on race-based criteria. Under Higginson's theory of liability, all citizens of Poway have suffered an injury in fact and have standing to bring an equal protection claim against the Attorney General challenging the constitutionality of the CVRA.

California law expressly permits the City to elect members of a legislative body through by-district elections. Section 34886 of the California Government Code provides:

> [T]he 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.

Cal. Gov't Code § 34886. Section 34886 expressly authorizes a political subdivision like the City to adopt by-district elections without voter approval and in furtherance of the CVRA. *See also* Cal. Gov't Code § 34871 (authorizing a legislative body to submit to voters an ordinance providing for by-district elections for members of the legislative body). Assuming that Higginson's inability to vote for councilmembers in three of the four districts after the enactment of Map 133 could constitute an "invasion of a legally protected interest" under Ninth Circuit precedent in an equal protection case, Higginson must plead facts to demonstrate that his injury is "fairly traceable" to requirements imposed on the City by the CVRA. *Lujan*, 504 U.S. at 560; *see League of United Latin American Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 430 (Fifth Cir. 2011) (determining that the deprivation of a "pre-existing right to vote for all the members of the city council which has jurisdiction over the city where he lives" constituted an injury sufficient to satisfy Article III). Higginson's claim that he suffered an injury because District 2 is a product of racial gerrymandering relies on his allegation that the requirements of the CVRA forced the City to create District 2 and his legal conclusion that the CVRA is a facially unconstitutional law requiring political subdivisions to violate the equal protection clause.[4] *Id.* ¶¶ 5, 10, 59.

4. In *Sanchez v. City of Modesto*, a California appellate court considered a facial challenge on equal protection grounds to the CVRA and determined that the CVRA was constitutional. 145 Cal. App. 4th 660, 51 Cal. Rptr. 3d 821, 837 (Ct. App. 2006) ("The CVRA is nondiscriminatory, not subject to strict scrutiny, and passed rational basis review").

To satisfy the causation element of Article III standing, "there must be a causal connection between the injury and the conduct complained of - the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560; *see also Bennett v. Spear*, 520 U.S. 154, 167, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). "To plausibly allege that the injury was 'not the result of the independent action of some third party' . . . the plaintiff must offer facts showing that the government's unlawful conduct 'is at least a substantial factor motivating the third parties' actions.'" *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014). "*Lujan* states that when 'causation and redressability . . . hinge on response of the regulated (or regulable) third party to the government action,' more particular facts are needed to show standing." *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir.), opinion amended on denial of reh'g, 312 F.3d 416 (9th Cir. 2002) (citing *Lujan*, 504 U.S. at 561-62). "That's so because the third parties may well have engaged in their injury-inflicting actions even in the absence of the government's challenged conduct." *Mendia*, 768 F.3d at 1013 (citing *Americans for Safe Access v. DEA*, 706 F.3d 438, 448, 403 U.S. App. D.C. 388 (D.C. Cir. 2013)); *see Novak v. United States*, 795 F.3d 1012, 1019 (9th Cir. 2015) (quoting *Mendia*, 768 F.3d at 1013) ("Plaintiffs themselves have alleged facts showing that the two companies 'may well have engaged in their injury-inflicting actions even in the absence of the government's challenged conduct.' . . . This is fatal to Plaintiffs' effort to allege causation.")

In this case, the Complaint does not allege any existing or threatened enforcement action under the CVRA against the City by the Attorney General or other state agency which motivated the City's switch to by-district elections. However, Higginson asserts that the Attorney General is the appropriate party to sue in this facial challenge to the CVRA because the Attorney General is the individual responsible for enforcing the CVRA, relying on *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

In *Ex Parte Young*, the Supreme Court established an exception to Eleventh Amendment sovereign immunity which otherwise protects states against suits by citizens in federal court. 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). The *Ex Parte Young* exception to Eleventh Amendment sovereign immunity provides that "private individuals may sue state officials for prospective relief against ongoing violations of federal law." *Nat'l Audubon Soc'y*, 307 F.3d at 847. For the exception to apply, the state official "must have some connection with enforcement of the act." *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013) (citing *Ex Parte Young*, 209 U.S. at 157). However, "a present threat of enforcement" is not required to satisfy *Ex Parte Young. Nat'l Audubon Soc'y*, 307 F.3d at 847. The Ninth Circuit Court of Appeals has determined any "imminence" requirement is addressed by "general Article III and prudential ripeness requirements." *Id.* ("We decline to read additional 'ripeness' or 'imminence' requirements into the *Ex Parte Young* exception to Eleventh Amendment immunity in actions for declaratory relief beyond those already imposed by a general Article

III and prudential ripeness analysis. The Article III and prudential ripeness requirements . . . are tailored to address problems occasioned by an unripe controversy."); *Association des Eleveurs*, 729 F.3d at 944 ("[A] plaintiff need not show that a 'present threat of enforcement' exists before invoking the *Ex Parte Young* exception . . . . Instead, a state official who contends that he or she will not enforce the law may challenge plaintiff's Article III standing based on an 'unripe controversy.'"). In this case, the Attorney General has not challenged Higginson's action on Eleventh Amendment grounds and *Ex Parte Young* does not provide support for Higginson's contention that the causation element of Article III standing is met simply because the Attorney General enforces the CVRA. In cases challenging the constitutionality of legislation, the Ninth Circuit Court of Appeals has consistently held that the "mere existence of a statute" or a "generalized threat of prosecution" are insufficient to satisfy Article III standing. *See San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (quoting *Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983)) ("We have repeatedly admonished, however, that '[t]he mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III.'"); *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) ("We have held that neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement. . . . Rather, there must be a 'genuine threat of imminent prosecution.'").

In this case, Higginson alleges,

> The City Council adopted Resolution No. 17-046 setting forth its intention to transition from at-large to by-district elections, pursuant to Elections Code section 10010(e)(3)(A). The Resolution stated that after "the City [had] received a letter threatening action under the California Voting Rights Act," it had "determined that it is in the best interest of the City to move from its current at-large electoral system to a by-district election for members of the City Council, in furtherance of the purposes of California Voting Rights Act."

(ECF No. 1 at ¶ 47). Higginson alleges, "The City would not have switched from at-large elections to single-district elections but for the prospect of liability under the CVRA." *Id.* ¶ 52. However, the conclusory allegation that the City would not have "switched from at-large elections to by-district elections but for the prospect of liability under the CVRA" is unsupported by the facts of the Complaint. *Id.*

The CVRA does not require political subdivisions to take action in the absence of racially-polarized voting. *See* Cal. Elec. Code. §§ 14027, 14028. Higginson does not allege facts supporting an inference that the decision to adopt by-district elections was motivated by an effort to address racially-polarized voting in the City's at-large elections or an effort to address a CVRA violation. The factual allegations of the Complaint demonstrate that the members of the City Council uniformly denied the existence of any CVRA violation under the at-large

elections. *See* ECF No. 1 at ¶¶ 44-46. The facts alleged in the Complaint support the conclusion that the decision to change to by-district elections was a voluntary business decision made in the "best interest" of the City and to avoid the costs of litigation. *See, e.g., id.* ¶ 47 ("The Resolution stated . . . 'it is in the best interest of the City to move from its current at-large electoral system to a by-district election for members of the City Council, in furtherance of the purposes of [the] California Voting Rights Act.'"); *id.* ¶ 42 ("City councilmember Jim Cunningham explained that 'the [safe-harbor] provision is truly the shield . . . we are using to avoid attorney's fees, and costs, and protracted litigation.'"); *id.* ¶ 45 ("We don't pick certain people in certain neighborhoods and say we'll treat them any differently. There is no evidence of that whatsoever."); *id.* ¶ 46 ("Mayor Steve Vaus concluded, 'I'll just echo that this council does a remarkable job [with at-large elections] . . . . But we've got to do what we've got to do. And job one is to protect the treasure of our constituents. And it's their money we'd be putting at risk [with litigation] and none of us are willing to do that.'"). Higginson does not allege sufficient facts to support an inference that the switch to by-district elections was motivated by an effort to comply with the requirements imposed on the City by the CVRA.

During oral argument, Higginson compared this case to *National Audubon Society* and argued that the CVRA was a but-for cause of the City's decision to switch to by-district elections. In *National Audubon Society*, the Ninth Circuit Court of Appeals determined that a nonprofit organization focused on bird life conservation had Article III standing to challenge a state proposition which banned the use of certain types of animal traps.

Nat'l Audubon Soc'y, 307 F.3d at 848-49. Following the enactment of the state statute, the federal government removed certain animal traps in California in order to comply with the requirements of the state statute. The nonprofit organization sought a declaration that the state statute was preempted and could not be enforced by state officials against federal trapping efforts. *Id.* at 848. The Court concluded that the organization alleged sufficient injury to "the aesthetic, recreational, and scientific interest of its members in the observation of birds and other wildlife" that occurred when the federal government removed its traps and exposed the bird population to "immediate risk of harm." *Id.* at 849. The Court of Appeals determined that the injury was "'fairly traceable' to Proposition 4 because the federal government removed traps in direct response to Proposition 4." *Id.* The Court stated that "there was no need to probe precisely why the federal government removed the traps . . . beyond the uncontested fact that the traps would not have been removed *but for* Proposition 4." *Id.*

In this case, the allegations of the Complaint do not support an inference that the requirements imposed on the City by the CVRA were a but-for cause of the City's decision to switch to by-district elections. Rather than adopting by-district elections in an effort to comply with the requirements imposed by the CVRA, the City allegedly adopted by-district elections after receiving the demand letter from a private party[5] in an effort to avoid

5. The CVRA provides for a private cause of action by "[a]ny voter who is a member of a protected class and who resides in a political subdivision where a violation of Sections 14027 and 14028 is alleged." Cal. Elec. Code § 14032.

the costs of litigation. The Court concludes that Higginson does not allege sufficient facts to support an inference that the decision to switch to by-district elections and any resulting injury to Higginson is "fairly traceable" to the requirements imposed on the City by the CVRA. *See Lujan*, 504 U.S. at 560.

To satisfy Article III standing requirements, Higginson must further establish that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth*, 528 U.S. at 180-81 (citing *Lujan*, 504 U.S. at 560-61). California law permits the City to use a by-district election system. *See* Cal. Gov't Code §§ 34886, 34871. The allegations of the Complaint support a conclusion that the City "determined that it [was] in the best interest of the City to move from its current at-large electoral system to a by-district election for members of the City Council, in furtherance of the purposes of [the] California Voting Rights Act." (ECF No. 1 at ¶ 47). Even accepting the legal conclusion that the CVRA is unconstitutional, a decision favorable to Higginson would not preclude the City from using Map 133[6] or require the City to ensure that Higginson could vote for all four councilmembers under the facts alleged in the Complaint. The allegations of the Complaint are insufficient to establish that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth*, 528 U.S. at 180-81 (citing *Lujan*, 504 U.S. at 560-61).

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6. At oral argument, counsel for the City opposed an injunction permanently enjoining use of Map 133.

Higginson fails to allege sufficient facts to establish Article III standing to bring this equal protection claim against the Attorney General. The Attorney General's motion to dismiss the complaint for lack of subject matter jurisdiction is granted.

V. THE CITY OF POWAY

The City has not filed a motion to dismiss and has repeatedly asserted that it intends to maintain a neutral position in this litigation. The Court has "the power and duty to raise the adequacy of . . . standing sua sponte." *Bernhardt v. County of L.A.*, 279 F.3d 862, 868 (9th Cir. 2002). The Court concludes that the Complaint must be dismissed as to the City because Higginson has failed to allege sufficient facts to establish that the City's decision to switch to by-district elections is fairly traceable to the requirements imposed by the CVRA on the City or that the City's decision to pass the ordinance changing to by-district elections was otherwise driven by race. In addition, Higginson fails to allege sufficient facts to establish that a favorable outcome is likely to redress any harm to Higginson. The Complaint is dismissed with respect to the City for lack of subject matter jurisdiction.

VI. MOTION FOR PRELIMINARY INJUNCTION

Higginson seeks a preliminary injunction pursuant to Federal Rule of Civil Procedure 65(a) which temporarily enjoins "Defendant Attorney General Xavier Becerra and his agents from enforcing the California Voting Rights Act and Defendant City of Poway from using Map 133

for elections during the pendency of this action." (ECF No. 11). In the opposition to the preliminary injunction, the Attorney General raises Article III standing as a "threshold matter" precluding this suit and the preliminary injunction. (ECF No. 22). The City maintains its neutral position in this litigation with respect to the preliminary injunction.

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997) (quotation omitted). To obtain preliminary injunctive relief, a movant must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008); *see also Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

The Court cannot conclude that Higginson has demonstrated a likelihood of success on the merits in light of the determination that the Complaint fails to allege sufficient facts to establish subject matter jurisdiction. The motion for a preliminary injunction is denied.

VII. AMICUS BRIEFS

The City of Mission Viejo and the San Gabriel Council of Governments have both filed applications to file amicus

briefs in this case. (ECF Nos. 49, 53). The Court has previously granted the City of Mission Viejo's application. (ECF No. 51). The Court grants the Application for Leave to File Amici Curiae Brief of the San Gabriel Council of Governments et al. in support of Plaintiff's Motion for Preliminary Injunction. (ECF No. 53). The Amicus Curiae Brief attached to the motion is deemed filed. The Court has considered both briefs in ruling on the motion for a preliminary injunction.

VIII. MOTION TO INTERVENE

Because the Court has determined that it lacks subject matter jurisdiction over this action, the motion to intervene as defendants filed by the Proposed Intervenors is denied without prejudice as moot. *See United States v. Ford*, 650 F.2d 1141, 1143 (9th Cir. 1981) ("Since there is no longer any action in which appellants can intervene, judicial consideration of the question would be fruitless.").

IX. CONCLUSION

IT IS HEREBY ORDERED that the motion to dismiss for lack of subject matter jurisdiction filed by Defendant Attorney General Xavier Becerra is GRANTED. (ECF No. 33). The Complaint is dismissed without prejudice as to Defendant City of Poway and Defendant Attorney General Xavier Becerra. Any motion for leave to file an amended complaint shall be filed within 30 days of the date of this Order and pursuant to Local Rule 7.1.

IT IS FURTHER ORDERED that the motion for a preliminary injunction filed by Plaintiff Don Higginson is DENIED. (ECF No. 11).

IT IS FURTHER ORDERED that the motion to intervene filed by California League of United Latin American Citizens, Jacqueline Contreras, Xavier Flores, Judy Ki, and Hiram Soto is DENIED. (ECF No. 18).

IT IS FURTHER ORDERED that the motion for leave to file an amicus brief in support of the motion for a preliminary injunction filed by the San Gabriel Valley Council of Governments et al. is GRANTED. (ECF No. 53). The amicus brief attached to the motion is deemed filed.

IT IS FURTHER ORDERED that the Request for Leave to File Supplemental Joinder Letters in Support of San Gabriel Governments' Amicus Brief is GRANTED. (ECF No. 64).

Dated: February 23, 2018

/s/ William Q. Hayes
Hon. William Q. Hayes
United States District Judge

APPENDIX I — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JULY 31, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-55455
D.C. No. 3:17-cv-02032-WQH-JLB
Southern District of California, San Diego

DON HIGGINSON,

Plaintiff-Appellant,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; CITY OF POWAY,

Defendants-Appellees.

No. 18-55506
D.C. No. 3:17-cv-02032-WQH-JLB

DON HIGGINSON,

Plaintiff-Appellee,

v.

Appendix I

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; CITY OF POWAY,

Defendants,

v.

CALIFORNIA LEAGUE OF UNITED LATIN AMERICAN CITIZENS; JACQUELINE CONTRERAS; XAVIER FLORES; JUDY KI; HIRAM SOTO, PROPOSED DEFENDANT-INTERVENORS,

Movants-Appellants.

July 31, 2018, Filed

Southern District of California, San Diego.
D.C. No. 3:17-cv-02032-WQH-JLB

Before: GRABER and M. SMITH, Circuit Judges, and HELLERSTEIN,* District Judge.

ORDER

Movants-Appellants' petition for panel rehearing filed in case No. 18-55506 is GRANTED in part. The memorandum disposition filed June 14, 2018, is amended

* The Honorable Alvin K. Hellerstein, United States District Judge for the Southern District of New York, sitting by designation.

by the memorandum disposition filed concurrently with this order, as follows:

On page 3, at the end of paragraph 1, insert the following:

> *See, e.g.*, *Branch v. Smith*, 538 U.S. 254, 123 S. Ct. 1429, 155 L. Ed. 2d 407 (2003) (considering on the merits a challenge to a redistricting plan by individual voters in the affected geographic area). We, of course, express no view on the merits of any of Plaintiff's theories. *See Ariz. State Legislature v. Ariz. Independent Redistricting Comm'n*, 135 S. Ct. 2652, 2663, 192 L. Ed. 2d 704 (2015) (holding that the state legislature had standing to challenge redistricting and cautioning that courts must not conflate the potential weakness of a claim on the merits with an absence of Article III standing).

With this amendment, Judges Graber and M. Smith have voted to deny Movants-Appellants' petition for rehearing *en banc*, and Judge Hellerstein has so recommended.

The full court has been advised of the petition for rehearing *en banc*, and no judge of the court has requested a vote on it.

Movants-Appellants' petition for rehearing *en banc* is DENIED.

Appendix I

Movants-Appellants' "Motion for Designation as Party-Respondents" in case No. 18-55455 is DENIED and "Motion to Recall the Mandate" in case No. 18-55455 is GRANTED only for the limited purpose of filing this order to amend the memorandum disposition filed June 14, 2018.

No further petitions for panel rehearing or for rehearing *en banc* may be filed. The mandates in these cases shall issue forthwith.

APPENDIX J — RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Amend. XIV, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix J

52 U.S.C.A. § 10301
Formerly cited as 42 USCA § 1973

§ 10301. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner 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 in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Appendix J

West's Ann.Cal.Elec.Code § 10010

§ 10010. Political subdivision changing from at-large method of election to district-based election or establishing district-based elections; public hearings; application; notice of action

(a) A political subdivision that changes from an at-large method of election to a district-based election, or that establishes districtbased elections, shall do all of the following before a public hearing at which the governing body of the political subdivision votes to approve or defeat an ordinance establishing district-based elections:

(1) Before drawing a draft map or maps of the proposed boundaries of the districts, the political subdivision shall hold at least two public hearings over a period of no more than 30 days, at which the public is invited to provide input regarding the composition of the districts. Before these hearings, the political subdivision may conduct outreach to the public, including to non-English-speaking communities, to explain the districting process and to encourage public participation.

(2) After all draft maps are drawn, the political subdivision shall publish and make available for release at least one draft map and, if members of the governing body of the political subdivision will be elected in their districts at different times to provide for staggered terms of office, the potential sequence of the elections. The political subdivision shall also hold at least two additional hearings over a period of no more than 45 days, at which the public

is invited to provide input regarding the content of the draft map or maps and the proposed sequence of elections, if applicable. The first version of a draft map shall be published at least seven days before consideration at a hearing. If a draft map is revised at or following a hearing, it shall be published and made available to the public for at least seven days before being adopted.

(b) In determining the final sequence of the district elections conducted in a political subdivision in which members of the governing body will be elected at different times to provide for staggered terms of office, the governing body shall give special consideration to the purposes of the California Voting Rights Act of 2001, and it shall take into account the preferences expressed by members of the districts.

(c) This section applies to, but is not limited to, a proposal that is required due to a court-imposed change from an at-large method of election to a district-based election.

(d) For purposes of this section, the following terms have the following meanings:

(1) "At-large method of election" has the same meaning as set forth in subdivision (a) of Section 14026.

(2) "District-based election" has the same meaning as set forth in subdivision (b) of Section 14026.

(3) "Political subdivision" has the same meaning as set forth in subdivision (c) of Section 14026.

(e)(1) Before commencing an action to enforce Sections 14027 and 14028, a prospective plaintiff shall send by certified mail a written notice to the clerk of the political subdivision against which the action would be brought asserting that the political subdivision's method of conducting elections may violate the California Voting Rights Act of 2001.

(2) A prospective plaintiff shall not commence an action to enforce Sections 14027 and 14028 within 45 days of the political subdivision's receipt of the written notice described in paragraph (1).

(3)(A) Before receiving a written notice described in paragraph (1), or within 45 days of receipt of a notice, a political subdivision may pass a resolution outlining its intention to transition from at-large to district-based elections, specific steps it will undertake to facilitate this transition, and an estimated timeframe for doing so.

(B) If a political subdivision passes a resolution pursuant to subparagraph (A), a prospective plaintiff shall not commence an action to enforce Sections 14027 and 14028 within 90 days of the resolution's passage.

(C)(i) A political subdivision and the prospective plaintiff who first sends a notice pursuant to paragraph (1) may enter into a written agreement to extend the time period described in subparagraph (B) for up to an additional 90 days in order to provide additional time to conduct public outreach, encourage public participation, and receive public input. The written agreement shall include a

requirement that the district boundaries be established no later than six months before the political subdivision's next regular election to select governing board members. However, in a political subdivision that holds a primary election as part of its process for selecting governing board members, the written agreement shall include a requirement that district boundaries be established no later than six months before the political subdivision's next regular primary election.

(ii) No later than 10 days after a political subdivision enters into a written agreement pursuant to clause (i), the political subdivision shall prepare and make available on its internet website a tentative schedule of the public outreach events and the public hearings held pursuant to this section. If a political subdivision does not maintain an internet website, the political subdivision shall make the tentative schedule available to the public upon request.

(f)(1) If a political subdivision adopts an ordinance establishing district-based elections pursuant to subdivision (a), a prospective plaintiff who sent a written notice pursuant to paragraph (1) of subdivision (e) before the political subdivision passed its resolution of intention may, within 30 days of the ordinance's adoption, demand reimbursement for the cost of the work product generated to support the notice. A prospective plaintiff shall make the demand in writing and shall substantiate the demand with financial documentation, such as a detailed invoice for demography services. A political subdivision may request additional documentation if the provided documentation is insufficient to corroborate the claimed costs. A political

subdivision shall reimburse a prospective plaintiff for reasonable costs claimed, or in an amount to which the parties mutually agree, within 45 days of receiving the written demand, except as provided in paragraph (2). In all cases, the amount of the reimbursement shall not exceed the cap described in paragraph (3).

(2) If more than one prospective plaintiff is entitled to reimbursement, the political subdivision shall reimburse the prospective plaintiffs in the order in which they sent a written notice pursuant to paragraph (1) of subdivision (e), and the 45-day time period described in paragraph (1) shall apply only to reimbursement of the first prospective plaintiff who sent a written notice. The cumulative amount of reimbursements to all prospective plaintiffs shall not exceed the cap described in paragraph (3).

(3) The amount of reimbursement required by this section is capped at thirty thousand dollars ($30,000), as adjusted annually to the Consumer Price Index for All Urban Consumers, United States city average, as published by the United States Department of Labor.

Appendix J

West's Ann.Cal.Elec.Code § 14026

§ 14026. Definitions

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(d) "Protected class" means a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.).

(e) "Racially polarized voting" means voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate. The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.) to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting.

Appendix J

West's Ann.Cal.Elec.Code § 14027

§ 14027. At-large method of election
affecting protected class voters

An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class, as defined pursuant to Section 14026.

Appendix J

West's Ann.Cal.Elec.Code § 14028

§ 14028. Violation of protected class voter rights; determination

(a) A violation of Section 14027 is established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision. Elections conducted prior to the filing of an action pursuant to Section 14027 and this section are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action.

(b) The occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class. One circumstance that may be considered in determining a violation of Section 14027 and this section is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action based on Section 14027 and this section. In multiseat at-large election districts, where the number of candidates who are members of a protected class is fewer than the number of seats available, the relative groupwide support received by candidates from members of a protected class shall be the basis for the racial polarization analysis.

(c) The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section, but may be a factor in determining an appropriate remedy.

(d) Proof of an intent on the part of the voters or elected officials to discriminate against a protected class is not required.

(e) Other factors such as the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns are probative, but not necessary factors to establish a violation of Section 14027 and this section.

Appendix J

West's Ann.Cal.Elec.Code § 14029

§ 14029. Remedies for violation of §§ 14027 and 14028

Upon a finding of a violation of Section 14027 and Section 14028, the court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation.

Appendix J

West's Ann.Cal.Elec.Code § 14030

§ 14030. Attorney's fees and costs

In any action to enforce Section 14027 and Section 14028, the court shall allow the prevailing plaintiff party, other than the state or political subdivision thereof, a reasonable attorney's fee consistent with the standards established in Serrano v. Priest (1977) 20 Cal.3d 25, 48-49, and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs. Prevailing defendant parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

APPENDIX K — COMPLAINT TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, FILED OCTOBER 4, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 17CV2032WQHJLB

DON HIGGINSON,

Plaintiff,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; AND CITY OF POWAY, CALIFORNIA,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Don Higginson brings this action against Defendants Attorney General Xavier Becerra and the City of Poway, California to have the California Voting Rights Act and Map 133 declared unconstitutional and to enjoin their enforcement. Plaintiff alleges as follows:

INTRODUCTION

The Equal Protection Clause of the Fourteenth Amendment "prevents a State, in the absence of 'sufficient justification,' from 'separating its citizens into different voting districts on the basis of race.'" *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (citation omitted). "[I]f racial considerations predominated over others, the design of the district must withstand strict scrutiny." *Id*. at 1464.

2. The Supreme Court has assumed—but not yet decided—that complying with Section 2 of the Voting Rights Act of 1965 ("VRA"), which has been interpreted to protect minorities against vote dilution, could be a compelling interest that upholds a districting plan. *Id.* But the Court also has emphasized that Section 2 is in obvious tension with the Fourteenth Amendment because it, by definition, makes race the predominant factor in districting decisions.

3. The Supreme Court issued a series of decisions, beginning with *Thornburg v. Gingles*, 478 U.S. 30 (1986), in an attempt to address this concern. Ultimately, the Court held that an at-large voting system will violate Section 2 only if a minority group proves both that it can form a compact single-member district and that voting is racially polarized. These requirements, the Court has warned, ensure that Section 2 is an anti-discrimination provision, and not an unconstitutional mandate to maximize electoral power on the basis of race.

4. The California Legislature did not heed the Supreme Court's warning. Instead, California passed its own voting rights act—the California Voting Rights Act of 2001 ("CVRA")—to override the constraints the Supreme Court has imposed in an attempt to save Section 2 from unconstitutionality. Under the CVRA, local governments must abandon at-large voting systems if racially polarized voting exists—regardless of whether the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district.

5. Accordingly, the CVRA flagrantly violates the Fourteenth Amendment. Its "race-based sorting of voters" does not serve a "compelling interest" nor is it "narrowly tailored." *Cooper*, 137 S. Ct. at 1464.

6. The City of Poway is one of many California localities that for decades used at-large voting to elect its City Council. Recently, however, the City received a demand letter alleging that racially polarized voting existed in the City, and that the City therefore would be sued under the CVRA—and exposed to legal liability and millions of dollars of fees—unless it switched to by-district elections. Given the prospect of liability, the City complied with the CVRA and abandoned at-large voting. On October 3, 2017, the City enacted four single-member districts solely as a consequence of the CVRA. City elections using these new districts will be held in 2018.

7. Don Higginson is a City resident and a registered voter. Because of the redistricting that the CVRA has imposed on the City, Mr. Higginson will now reside

in and vote in District 2. The creation of that district, like all of the City's new districts, is traceable to the CVRA's requirement that the City engage in racial gerrymandering. Mr. Higginson thus has brought this action to vindicate his constitutional rights under the Fourteenth Amendment.

JURISDICTION AND VENUE

8. This Court has jurisdiction to hear and decide Plaintiff's claim brought under the Fourteenth Amendment to the United States Constitution pursuant to 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 1331, 1343(a)(3), and 1357. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57.

9. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

PARTIES

10. Plaintiff Don Higginson is a City resident and a registered voter. Because the California Voting Rights Act has forced the City to abandon at-large elections, he will now reside in and vote in District 2. Mr. Higginson alleges that District 2, like all of the City's districts, is racially gerrymandered as a result of the redistricting the California Voting Rights Act has imposed on the City.

11. Defendant Xavier Becerra is the Attorney General of California. Defendant Becerra is charged by Article V, Section 13 of the California Constitution with the

duty to see that the laws of California are uniformly and adequately enforced. He is sued in his official capacity.

12. Defendant City of Poway is a California general law city and a municipal corporation organized and existing under and by virtue of the laws of the State of California. The City is subject to the California Voting Rights Act. As a direct result of that the City has abandoned its at-large voting system and switched to by-district elections that are the product of racial gerrymandering.

FACTUAL ALLEGATIONS

A. The Fourteenth Amendment

13. The Fourteenth Amendment prohibits "racial gerrymanders in legislative districting plans." *Cooper*, 137 S. Ct. at 1463. Absent a "sufficient justification," the Fourteenth Amendment forbids a State or political subdivision from "'separating its citizens into different voting districts on the basis of race.'" *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

14. Under controlling precedent, "strict scrutiny applies when race is the 'predominant' consideration in drawing the district lines such that 'the legislature subordinates traditional race-neutral districting principles ... to racial considerations.'" *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (quoting *Miller*, 515 U.S. at 916). Once strict scrutiny is triggered, the burden "shifts to the State to prove that its race-based sorting of voters serves

a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper*, 137 S. Ct. at 1464.

B. Section 2 of the Voting Rights Act

15. Congress passed the Voting Rights Act of 1965 ("VRA") to enforce the right to vote free from racial discrimination. Section 2 thus bars practices "imposed or applied ... in a manner which results in a denial or abridgment" of the right to vote. 52 U.S.C. § 10301(a) (formerly 42 U.S.C. § 1973). A violation of Section 2 "is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens … in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

16. Section 2 has been interpreted to protect minorities against vote dilution, and the Supreme Court has held that a municipality's use of multimember and at-large districts can, in some circumstances, "dilute[] minority voting strength by submerging [minority] voters into the white majority, denying them an opportunity to elect a candidate of their choice." *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009). At the same time, the Supreme Court has tried to interpret Section 2 in a way that might keep it from violating the Fourteenth Amendment's ban on racial gerrymandering.

17. To that end, there are "three 'necessary preconditions' for a claim that the use of multimember [or at-large] districts constitute[s] actionable vote dilution under § 2: (1) The minority group must be 'sufficiently large and geographically compact to constitute a majority in a single-member district,' (2) the minority group must be 'politically cohesive,' and (3) the majority must vote 'sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate.'" *Id.* (quoting *Gingles*, 478 U.S. at 50-51). "In a § 2 case," therefore, "only when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances." *Id.* at 11-12.

18. The Supreme Court has repeatedly emphasized the importance of the first *Gingles* factor—*i.e.*, that the minority group be sufficiently large and geographically compact to constitute a majority in a single-member district—in ensuring that Section 2 enforces the right to vote instead of requiring racial gerrymandering. The requirement is "needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district." *Growe v. Emison*, 507 U.S. 25, 40 (1993). "Without such a showing, 'there neither has been a wrong nor can be a remedy.'" *Bartlett*, 556 U.S. at 15 (quoting *Growe*, 507 U.S. at 41). Absent this requirement, in other words, Section 2 would entitle "minority groups to the maximum possible voting strength," *id.* at 16, which "causes its own dangers, and they are not to be courted," *Johnson v. De Grandy*, 512 U.S. 997, 1016 (1994).

19. The compactness requirement thus has been indispensable—at least to date—in saving Section 2 from constitutional doubt. Section 2 undeniably makes race the predominant factor—even with the compactness precondition in place—when it requires creation of majority-minority districts. *See Shaw*, 517 U.S. at 906-08. The Supreme Court has "assumed," but not held, "that one compelling interest is complying with operative provisions of the Voting Rights Act of 1965." *Cooper*, 137 S. Ct. at 1464. But compliance with Section 2 is assumed to be a compelling interest only because it is understood to remedy racial discrimination in voting. *Bartlett*, 556 U.S. at 10. There is no discrimination to remedy if the minority population is not sufficiently "compact" such that it would have "the potential to elect a representative of its own choice in some single-member district." *Growe*, 507 U.S. at 40.

20. Furthermore, the use of race in districting must be narrowly tailored even assuming the existence of a compelling interest. *Cooper*, 137 S. Ct. at 1464. Section 2 could never meet that requirement in the absence of the compactness precondition. "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw v. Reno,* 509 U.S. 630, 657 (1993). Eliminating the compactness requirement, in other words, would "unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Bartlett*, 556 U.S. at 21 (citation omitted).

C. The California Voting Rights Act

21. Over time, the California Legislature became dissatisfied with the Supreme Court's interpretation of Section 2 and wanted to "provide a broader basis for relief from vote dilution than available under the [VRA]." *Jauregui v. City of Palmdale*, 172 Cal. Rptr. 3d 333, 350 (Cal. Ct. App. 2014). The Legislature believed that the Court's "[r]estrictive interpretations" of Section 2, which were adopted to try to avoid racial-gerrymandering concerns, were simply wrong. Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9. 2002, p.2. Flouting the Supreme Court, the Legislature concluded that "geographical compactness would not appear to be an important factor in assessing whether the voting rights of a minority group have been diluted or abridged by an at-large election system." *Id.* at 3.

22. The California Voting Rights Act of 2001 ("CVRA") was enacted to "avoid that problem." *Id.* at 2. The CVRA thus was designed to "make it easier to successfully challenge at-large districts" by eliminating the *Gingles* precondition that "a minority community be sufficiently concentrated geographically to create a district in which the minority community could elect its own candidate." Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Jun. 11, 2002, p.4. The CVRA thus overrides the "[r]estrictive interpretations given to the [VRA]" by allowing a plaintiff to establish "[vote] dilution or abridgment of minority voting rights" merely "by showing the [other] two [*Gingles*] requirements." Assem. Com. on Judiciary, *supra*, at 2-3.

23. To that end, the CVRA provides that "[a]n at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election ... as a result of the dilution," Cal. Elec. Code § 14027, and 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 of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision," Cal. Elec. Code § 14028(a).

24. No other showing is needed to establish a CVRA violation. "The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section, but may be a factor in determining an appropriate remedy." Cal. Elec. Code § 14028(c).

25. Moreover, "[p]roof of an intent on the part of the voters or elected officials to discriminate against a protected class is not required." Cal. Elec. Code § 14028(d). Factors "such as the history of discrimination ... are probative, but not necessary factors to establish a violation of Section 14027 and this section." *Id.* § 14028(e).

26. Once there is a finding of racially polarized voting, the political subdivision must abandon its at-large system. "Upon a finding of a violation of Section 14027 and Section 14028, the court shall implement appropriate remedies, including the imposition of district-based elections, that

are tailored to remedy the violation." Cal. Elec. Code § 14029.

27. And, no matter the remedy, the political subdivision will be liable for attorneys' fees and costs because it will have been found liable under the CVRA. "In any action to enforce Section 14027 and Section 14028, the court shall allow the prevailing plaintiff party, other than the state or political subdivision thereof, a reasonable attorney's fee, ... and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs. Prevailing defendant parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation." Cal. Elec. Code § 14030.

28. In 2016, the election code was amended to afford a political subdivision in violation of the CVRA a safe harbor from the expense of litigation. "Before commencing an action to enforce Sections 14027 and 14028, a prospective plaintiff shall send by certified mail a written notice to the clerk of the political subdivision against which the action would be brought asserting that the political subdivision's method of conducting elections may violate the California Voting Rights Act." Cal. Elec. Code § 10010(e)(1). "A prospective plaintiff shall not commence an action to enforce Sections 14027 and 14028 within 45 days of the political subdivision's receipt of the written notice described in paragraph (1)." *Id*. § 10010(e)(2).

29. The political subdivision then must decide whether it will comply with the demand or be sued under the CVRA. "Before receiving a written notice described in

paragraph (1), or within 45 days of receipt of a notice, a political subdivision may pass a resolution outlining its intention to transition from at-large to district-based elections, specific steps it will undertake to facilitate this transition, and an estimated time frame for doing so." Cal. Elec. Code § 10010(e)(3)(A). "If a political subdivision passes a resolution pursuant to subparagraph (A), a prospective plaintiff shall not commence an action to enforce Sections 14027 and 14028 within 90 days of the resolution's passage." *Id.* § 10010(e)(3)(B).

30. In sum, the political subdivision can limit its legal exposure under the CVRA only by quickly agreeing to abandon its at-large system and begin the process of transitioning to by-district elections. Only if the political subdivision capitulates, in other words, will the complaining party have his or her fees "capped at $30,000." Cal. Elec. Code § 10010(f)(3).

D. The Shenkman Demand Letter

31. Like many California localities, the City of Poway for decades used an at-large voting system to elect its City Council.

32. On June 7, 2017, the City received a certified letter from an attorney, Kevin Shenkman, asserting that the City's at-large system violates the CVRA.

33. In particular, Mr. Shenkman asserted that "voting within Poway is racially polarized, resulting in minority vote dilution, and therefore Poway's at-large

elections violate the [CVRA].” He added that the CVRA is “different” from the VRA “in several key respects, as the [California] Legislature sought to remedy what it considered restrictive interpretations given to the federal act.” “The California Legislature dispensed with the requirement in *Gingles* that a minority group demonstrate that it is sufficiently large and geographically compact to constitute a ‘majority-minority district.’ Rather, the CVRA requires only that a plaintiff show the existence of racially polarized voting to establish that an at-large method of election violates the CVRA, not the desirability of any particular remedy.”

34. According to Mr. Shenkman, “Poway’s at-large system dilutes the ability of Latinos (a ‘protected class’) to elect candidates of their choice or otherwise influence the outcome of Poway’s council elections.” Therefore, unless the City “voluntarily change[s] its at-large system of electing council members ... [he] will be forced to seek judicial relief.” He reminded the City that he had sued “the City of Palmdale for violating the CVRA. After an eight-day trial, we prevailed. After spending millions of dollars, a district-based remedy was ultimately imposed upon the Palmdale city council, with districts that combine all incumbents into one of the four districts.” Mr. Shenkman gave the City until July 21, 2017 to notify him whether it would come into compliance with the CVRA.

E. The City’s Response

35. On June 20, 2017, in response to the Shenkman letter, the City Council held a closed session to discuss

the threatened CVRA litigation. As reported out by the City Attorney after the closed session, the City Council provided direction to staff to prepare a resolution of intention for establishing and implementing by-district elections for the City Council members to be presented for consideration at the July 18, 2017 City Council meeting.

36. In recommending the adoption of the resolution ahead of the July 18 meeting, the City Attorney explained that "the risks and costs associated with protracted CVRA litigation—particularly in light of results in all other cities that have fought to retain at-large voting—cannot be ignored. The public interest may ultimately be better served by a by-district electoral system if converting to that system avoids significant attorneys' fees and cost award."

37. At the City Council meeting on July 18, an outside attorney the City hired to advise it on the Shenkman letter outlined the difficulty in defending CVRA lawsuits. He provided examples of prior attorney's fees awards under the CVRA and explained that "[t]he state statutory scheme when it was adopted by the state legislature effectively removed burdens of proof that exist under the federal Voting Rights Act. And what that effectively means is that it is virtually impossible for governmental agencies to defend against lawsuits brought under the CVRA. And that's in fact why you see cities throughout the State converting … in the face of these demand letters."

38. Three citizens spoke during the public discussion portion of the meeting. The first speaker, a long-time

advocate for by-district elections, said “I thought we’d have to go through the initiative process to make it happen. It’s amazing what … one letter from a lawyer can do.”

39. The second speaker supported change to the electoral process in the City more generally but was not an advocate for by-district elections necessarily. He stated: “I think what you are doing as far as changing to districts is not [the] optimum but [] certainly will get rid of the problem of getting the lawsuit.”

40. The third speaker opposed a change to by-district elections but acknowledged to the City Council that, due to the threatened lawsuit, “I understand you don’t really have a choice here.”

41. Each member of the City Council then expressed his strong disapproval of the changes that the CVRA was forcing the City to make.

42. City councilmember Jim Cunningham explained that “the [safe-harbor provision] is truly the shield … we are using to avoid attorney’s fees, and costs, and protracted litigation.” He then specifically sought advice from the outside attorney on whether they were utilizing that provision correctly to avoid those burdens.

43. City councilmember Dave Grosch explained that he supported by-district elections eight years ago. But his experience as an at-large councilmember where he serves and supports the entire community—and not just one district—convinced him that at-large elections were

better. In reference to Mr. Schenkman's letter, he added, "I really hate that the City is … being told to do this by someone who doesn't live in Poway" and made clear that the letter was the only reason the City was changing to by-district elections.

44. City councilmember John Mullin asked the outside attorney, "If at some point in time, … somebody does succeed in challenging any or all of the portions of the act, would we … then have the option to revisit the decision to use district elections?" The attorney explained the City would be able to do so. Councilmember Mullin concluded: "We've gone through denial, and we've gone through anger, and now we're into acceptance. So, to those of you in the audience who think that we should be fighting this, we concur, we were there awhile back as well. I have no illusions that this will lead to better government for our city. I'm pretty proud of the job we do as we are now constituted… . But having said all of that, again we have a gun to our heads and we have no choice."

45. Deputy Mayor Barry Leonard said, "I get it. I hate it but I get it." He explained his view that "we respond to everybody in the City. We don't pick certain people in certain neighborhoods and say we'll treat them any differently. There is no evidence of that whatsoever. So, I feel like we're already being found guilty of something and we don't have a chance to prove our innocence. It's just the deck is stacked. So, rather than spend a million dollars of the taxpayers' money, we roll over to these bullies."

46. Mayor Steve Vaus concluded, "I'll just echo that this council does a remarkable job [with at-large elections]. … But we've got to do what we've got to do. And job one is to protect the treasure of our constituents. And it's their money we'd be putting at risk [with litigation] and none of us are willing to do that."

47. The City Council adopted Resolution No. 17-046 setting forth its intention to transition from at-large to by-district elections, pursuant to Elections Code section 10010(e)(3)(A). The Resolution stated that after "the City [had] received a letter threatening action under the California Voting Rights Act," it had "determined that it is in the best interest of the City to move from its current at-large electoral system to a by-district election for members of the City Council, in furtherance of the purposes of California Voting Rights Act."

48. On August 1, 2017, August 8, 2017, and August 18, 2017, the Council held meetings where it received public input on drawing new districts, consulted a demographer on how to draw new districts, and evaluated potential maps for the new districts.

49. On August 31, 2017, the Council voted 5-0 to proceed with Map 133, an election plan that divides the City into four districts.

50. On September 19, 2017, the Council introduced an ordinance for first reading and public comment that enacted Plan 133. For his part, councilmember Mullin reiterated his view that the City "went down this path

with the full recognition that this was our only reasonable option. Never did I, nor do I now, believe that this will lead to better governance for our city. … I support the [proposed ordinance] because of a lack of choice and not because I think it's best for the City. … I'm still begrudgingly doing this."

51. On October 3, 2017, the Council adopted the ordinance enacting Map 133. In voting for the ordinance, councilmember Mullin stated, "I don't want my affirmative vote on this item to be construed in any way as my support for this notion for district elections. … I will support the motion because we have no choice not because I think district elections are what's best for the city."

52. The City would not have switched from at-large elections to single-districts elections but for the prospect of liability under the CVRA.

CAUSE OF ACTION

42 U.S.C. §§ 1983, 1988

(Violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution)

53. Plaintiff realleges paragraphs 1 through 52 as if fully stated herein.

54. Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part: "No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

55. The Equal Protection Clause prohibits the use of race as the predominant factor in drawing electoral districts unless the State or political subdivision has a compelling interest in doing so and the use of race is narrowly tailored to that interest.

56. The CVRA makes race the predominant factor in drawing electoral districts. Indeed, it makes race the only factor given that a political subdivision, such as the City, must abandon its at-large system based on the existence of racially polarized voting and nothing more.

57. California does not have a compelling interest in requiring any political subdivision, including the City, to abandon its at-large system based on the existence of racially polarized voting and nothing more. The Supreme Court has assumed that there is a compelling interest in ensuring that minority voters are not denied the ability to form a compact district in which they will have the opportunity to elect a candidate of their choice. That is not the interest the CVRA advances. The CVRA seeks to maximize minority voting strength.

58. The CVRA also is not narrowly tailored to ensure that minority voters do not have their votes

diluted because, among other reasons, it overrides the compactness precondition of Section 2 of the VRA. The California Legislature, in enacting the VRA, thus lacked a strong basis in evidence to believe that it was necessary to override Section 2's compactness requirement in order to protect minorities from vote dilution.

59. As a consequence, the CVRA violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

60. Plaintiff has no adequate remedy at law other than the judicial relief sought here. The failure to enjoin the CVRA will irreparably harm Plaintiff by violating is constitutional rights.

COSTS AND ATTORNEYS' FEES

61. Pursuant to 42 U.S.C. § 1988, Plaintiff seeks an award of their costs, including reasonable attorneys' fees, incurred in the litigation of this case.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court:

62. Declare that the California Voting Rights Act requires California political subdivisions, such as the City, to engage in racial gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment.

63. Permanently enjoin Defendant Becerra from enforcing or giving any effect to the California Voting Rights Act.

64. Declare Map 133 in violation of the Equal Protection Clause of the Fourteenth Amendment.

65. Permanently enjoin Defendant City of Poway from using Map 133 in any future election.

Grant such other or further relief the Court deems to be appropriate, including but not limited to an award of Plaintiff's attorneys' fees and reasonable costs.

Respectfully submitted,

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