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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DON HIGGINSON,

Plaintiff,

v.

XAVIER BECERRA, in his official capacity as ATTORNEY GENERAL OF CALIFORNIA; and CITY OF POWAY, CALIFORNIA,

Defendants,

Case No. 3:17-CV-02032-WQH-JLB

**LODGED OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION BY PROPOSED DEFENDANT-INTERVENORS; OR, IN THE ALTERNATIVE, AMICUS CURIAE BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Judge: William Q. Hayes
Date: November 20, 2017

No oral argument unless requested by the Court.

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## INTRODUCTION

In *Rogers v. Lodge*, the United States Supreme Court identified a problem inherent in multimember districts in which officials are elected at-large: they "tend to minimize the voting strength of minority groups by permitting the political majority to elect all representatives of the district." 458 U.S. 613, 616 (1982). A numerical minority, whether racial, ethnic, economic, or political, "may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts." *Id.*

The California Voting Rights Act (CVRA) permits private persons to correct for this problem on a case-by-case basis throughout the state. In particular, the CVRA provides that at-large elections "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." Cal. Elec. Code § 14027. A "protected class" is "a class of voters who are members of [any] race, color, or language minority group." *Id.* § 14026. A violation of the CVRA "is established if it is shown that racially polarized voting occurs" among voters in the challenged political subdivision. *Id.* § 14028(a).[1] The CVRA may be enforced by a voter who is a member of a protected class and resides in the political subdivision to be challenged, *id.* § 14032, after which a court "shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation," *id.* § 14029.

Although Plaintiff in this action has the same rights under the CVRA as all other Californians, Plaintiff seeks to invalidate the CVRA as violative of the Fourteenth Amendment to the United States Constitution. Plaintiff also seeks to force the City of Poway to revert to at-large elections, after, he alleges, the City improperly adopted district-based elections for racially

[1] "'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." Cal. Elec. Code § 14026(e).

discriminatory reasons. However, the pleadings and the record in this action do not support, but even undermine, the merits of Plaintiff's claim. Moreover, Plaintiff has not met his burden of showing that the extraordinary remedy of injunction is warranted, especially not at this early stage. Accordingly, the Court should deny Plaintiff's Motion for Preliminary Injunction (Motion).[2]

## ARGUMENT

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008) The Ninth Circuit has recently held that "[a] party seeking a preliminary injunction must meet one of two variants of the same standard." *Alliance for the Wild Rockies v. Peña*, 865 F.3d 1211, 1217 (9th Cir. 2017). "[A] party 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*, 555 U.S. at 20). Alternatively, "'if a plaintiff can only show that there are serious questions going to the merits[,] . . . then a preliminary injunction may still issue if the balance of hardships tips sharply in the plaintiff's favor, and the other two *Winter* factors are satisfied.'" *Id.* (quoting *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (internal quotation marks omitted).

### I. PLAINTIFF CAN DEMONSTRATE NEITHER LIKELIHOOD OF SUCCESS ON THE MERITS NOR SERIOUS QUESTIONS GOING TO THE MERITS.

Under *Winter*, a plaintiff seeking preliminary injunctive relief "must establish that he is likely to succeed on the merits." *Winter*, 555 U.S. at 20. "Because it is a threshold inquiry, when a plaintiff has failed to show the likelihood of success on the merits, [a court] need not consider the remaining three [*Winter* elements]." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (internal quotation marks omitted) (citing *Ass'n des Eleveurs de Canards et d'Oies du Quebec v.*

[2] Defendant Attorney General Xavier Becerra does not object to Proposed Defendant-Intervenors' submission of this Opposition for the Court's consideration. Def.-Intervenors' Mot. to Intervene, Hulett Decl., Dkt. 18-3 at ¶ 3.

*Harris*, 729 F.3d 937, 944 (9th Cir. 2013) Under the variant, a plaintiff must demonstrate "serious questions going to the merits" alongside the balance of hardships "tip[ping] sharply in the plaintiff's favor." *Alliance for the Wild Rockies*, 865 F.3d at 1217.

Plaintiff cannot demonstrate likelihood of success on the merits or serious questions going to the merits of this action. Plaintiff lacks standing to challenge the CVRA in federal court. In addition, Plaintiff is unlikely to show—and even fails to state a claim—that the CVRA is unconstitutional on its face or as applied to the City of Poway.

**A. Claims Under the Fourteenth Amendment for Discrimination in Voting.**

The Fourteenth Amendment to the United States Constitution prohibits the denial of equal protection of the laws on the basis of race. *See Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."). A person may prove a violation of the Fourteenth Amendment for race discrimination in voting in three principal ways: a claim that a law employs an unconstitutional racial classification, *e.g.*, *Nixon v. Herndon*, 273 U.S. 536 (1927); a claim that a law results in unconstitutional racial vote dilution, *e.g.*, *Rogers*, 458 U.S. 613; or a *Shaw*-type claim for unconstitutional racial gerrymandering, *e.g.*, *Shaw v. Reno*, 509 U.S. 630 (1993).

In the first kind of claim—a claim against an unconstitutional classification—a plaintiff shows that a law singles out members of a protected class and subjects them to different treatment. *See Hirabayashi*, 320 U.S. at 100 (citations omitted) ("[L]egislative classification or discrimination based on race alone has often been held to be a denial of equal protection."). Consequently, a law's use of a racial classification subjects it to strict scrutiny; otherwise it is subject to rational basis review. *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982). To survive strict scrutiny, the law must be narrowly tailored to achieve a compelling state interest. *Id.* at 217. To survive rational basis review, however, a law must be rationally related to a legitimate state interest. *Romer v. Evans*, 517 U.S. 620, 635 (1996); *Plyler*, 457 U.S. at 216.

In the second kind of claim—a vote dilution claim—a plaintiff shows "that the State has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting

potential of racial or ethnic minorities.'" *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980)). In a Fourteenth Amendment vote dilution claim, a plaintiff demonstrates the law's unconstitutionality by evidencing "'invidious discriminatory purpose . . . [in] the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.'" *Rogers*, 458 U.S. at 618 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

In the third kind of claim—a *Shaw*-type claim—a plaintiff shows "that 'race was the predominant factor motivating [a] legislature's decision to place a significant number of voters within or without a particular district.'" *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (quoting *Miller*, 515 U.S. at 916). "That entails demonstrating that the legislature 'subordinated' other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to 'racial considerations.'" *Id.* at 1463–64 (quoting *Miller*, 515 U.S. at 916). If a plaintiff makes that showing, then the "the design of the district must withstand strict scrutiny." *Id.* (citing *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017)).

As discussed below, Plaintiff does not make out—and is not likely to succeed on the merits of—any of these claims for violation of the Fourteenth Amendment.

**B. Plaintiff Lacks Standing.**

Article III of the United States Constitution "limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Under the case-or-controversy requirement, "plaintiffs 'must establish that they have standing to sue.'" *Id.* (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). United States Supreme Court precedents "have established that the 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (quoting *Lujan*, 504 U.S. at 560–561). "The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these

elements" and must clearly allege facts demonstrating each element. *Id.* (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990); *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

Plaintiff lacks standing to challenge the CVRA and the City of Poway's adoption of district-based elections, because he cannot show injury traceable to the CVRA that could be redressed by the Court invalidating the law.

First, Plaintiff does not demonstrate injury in fact. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc.*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). The gravamen of Plaintiff's claim is that the CVRA's designation of racially polarized voting as a predicate for vote dilution liability under the law itself amounts to a "'race-based sorting of voters.'" *See* Complaint, Dkt. 1 at ¶ 5 (quoting *Cooper*, 137 S. Ct. at 1464). Plaintiff asserts that this has resulted in a denial of his right to vote on the basis of race. Pl.'s Mem. of Points & Auths. in Support of Mot. for Prelim. Inj. (Pl.'s Mem.), Dkt. 11-1 at 18. In doing so, Plaintiff conflates "racially polarized voting"—an evidentiary showing of the preexisting voting patterns of private persons—with "race," in particular the government's use of "race." *Id.* at 16. Moreover, Plaintiff does not allege that he is a member of a race that has been denied a right or privilege by the California Legislature, or that the CVRA burdens or benefits members of any one race. Indeed, the CVRA is race-neutral. *Sanchez v. City of Modesto*, 51 Cal.Rptr.3d 821, 826 (Cal. Ct. App. 2006). "It simply gives a cause of action to members of *any* racial or ethnic group that can establish that its members' votes are diluted though the combination of racially polarized voting and an at-large election system." *Id.* (emphasis in original). The statute's only mention of "race" is in defining "protected class" as "a class of voters who are members of a race, color, or language minority group," namely members of any race who are in the numerical minority in their jurisdiction. Cal. Elec. Code § 14026(d). Like the federal Voting Rights Act, "the CVRA confers on voters of any race a right to sue for an appropriate alteration in voting conditions when racial vote dilution exists." *Sanchez*, 51 Cal.Rptr.3d at 837.

Nor does Plaintiff allege that the City of Poway either was aware of his race and acted to deny his right to vote on that basis or used race at all in drawing the boundaries of the electoral

districts in Map 133. *See* Complaint, Dkt. 1 at ¶¶ 48–51. "[W]here a plaintiff does not live in [a racially gerrymandered] district, he or she does not suffer those special harms [arising from being classified by race], and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference." *United States v. Hays*, 515 U.S. 737, 745 (1995). "Unless such evidence is present, that plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve." *Id.* Plaintiff makes no showing whatsoever that the City Council was motivated by racial considerations in placing district boundaries where they did or that the CVRA required the City to enact the district lines in Map 133. If Plaintiff's allegation is that it was not only the actual line-drawing that was race-based but also the decision to convert to single-member districts, he still is no closer to success on the merits. Plaintiff makes no showing that the City Council was motivated by race when it decided to convert its electoral system. In fact, Plaintiff alleges that the City's decision to convert from at-large voting to by-district voting was motivated not by race but by the prospect of avoiding financial liability or the risk of protracted litigation. *See* Complaint, Dkt. 1 at ¶¶ 42–46. Without such allegations—as to which there is no evidence in the record before the Court as it considers Plaintiff's Motion—Plaintiff cannot credibly maintain that he was injured on the basis of his race.

Second, Plaintiff does not demonstrate traceability. To establish traceability, a plaintiff must show "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. However, plaintiff does not show sufficient causation between the CVRA's provisions and his asserted injury. Any adverse effect that the CVRA could have on Plaintiff's right to vote is indirect at most. The CVRA protects the voting rights of all California voters by requiring cities and other local governments to enact non-discriminatory voting systems. It neither compels voters nor burdens their rights to vote in any way; rather, under certain circumstances, it holds government entities liable for vote dilution. *See* Cal. Elec. Code §§ 14027–28. Plaintiff here has not shown that because of his race, the CVRA deprives him of any right protected by the Fourteenth Amendment, nor could he.

Moreover, Plaintiff's argument that the CVRA forces local governments—and forced the City of Poway in particular—to engage in racial gerrymandering overlooks the fact that local governments are only liable under the CVRA upon a showing of racially polarized voting. *Id.* § 14028(a). Plaintiff's argument also overlooks the fact that the CVRA does not prescribe a particular remedy, such as Map 133. Instead, the CVRA provides that courts "shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation." *Id.* § 14029. Here, there are no allegations in the Complaint—and the record does not show—that the CVRA compelled the implementation of Map 133. Therefore, Plaintiff has not met his burden to demonstrate traceability.

Third, Plaintiff does not demonstrate redressability. To establish redressability, a plaintiff must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (citation and internal quotation marks omitted). Plaintiff has not met his burden, however, to show that his asserted injury in having to vote by-district rather than at-large will be redressed by a favorable decision by this Court. Even if the Court were to find the CVRA unconstitutional, that decision would not prevent the City of Poway from maintaining its current district-based electoral system. Indeed, courts have recognized many benefits that inhere in district-based elections, and the City might well decide that good governance counsels in favor of voting by-district. For example, the City and other local governments might see in districts: greater access to elected officials, *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) ("Equal representation . . . is a principle designed to prevent debasement of voting power and diminution of access to elected representatives."); greater accountability of those elected officials, *Garza v. Cnty. of L.A.*, 918 F.2d 763, 781 (9th Cir. 1990) (Kozinski, J., concurring and dissenting) (recognizing that, in smaller districts, "no official has a disproportionately large number of constituents to satisfy"); and less expensive campaigns for public office, *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1570 (11th Cir. 1984) (recognizing that campaigning for an at-large position can be expensive and thus prohibitive for those with fewer economic means). Because the CVRA does not dictate the particular district lines that local governments may draw, moreover, invalidation of the CVRA also would not

redress Plaintiff's asserted injury in being placed in one district rather than another on the basis of his race. *See* Cal. Elec. Code § 14029. Therefore, Plaintiff has not shown that invalidation of the CVRA will redress his general grievance against by-district voting for the Poway City Council.

In sum, because Plaintiff has not met his burden to demonstrate each element of his standing to sue in federal court, he has not demonstrated likelihood of success on the merits or serious questions going to the merits of this action. Accordingly, Plaintiff has not met his burden in requesting preliminary injunctive relief, and this Court should deny his Motion.

**C. Plaintiff Cannot Show that the CVRA Is Unconstitutional on Its Face or as Applied to the City of Poway's Adoption of District-Based Elections.**

Plaintiff also cannot show likelihood of success on the merits or serious questions going to the merits, because Plaintiff cannot demonstrate that the CVRA is unconstitutional facially or as-applied. "A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). That a law "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *See id.* In contrast, a law "'may be invalid as applied to one state of facts and yet valid as applied to another.'" *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (quoting *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921)). Neither such challenge to the CVRA is likely to succeed. Plaintiff does not allege—and the record does not show—the elements necessary to make out a claim for violation of the Fourteenth Amendment to the United States Constitution—whether based on a racial classification, vote dilution, or racial gerrymandering.

**1. Plaintiff does not demonstrate that the CVRA employs an unconstitutional racial classification.**

As mentioned above, where a law employs a racial classification, it will be subject to strict scrutiny; otherwise it will be subject to rational basis review. *Plyler*, 457 U.S. at 216–17. Yet Plaintiff does not allege that the CVRA employs a racial classification triggering strict scrutiny. Indeed, the CVRA is race-neutral; it neither singles out members of any one race nor advantages

or disadvantages members of any one race. *See Sanchez*, 51 Cal.Rptr.3d at 826; *supra* at 5. Rather, the CVRA requires a person alleging a violation of the Act to demonstrate that racially polarized voting exists in the challenged jurisdiction. Cal. Elec. Code § 14028. This identification by the California Legislature of racially polarized voting as a predicate for establishing a CVRA violation confers no special benefit on members of any one race, and members of any race can claim the CVRA's protections upon a showing of racially polarized voting. *See id.* §§ 14026–28, 14032. Moreover, Plaintiff does not allege that he is not also protected by the CVRA. *See generally* Complaint, Dkt. 1. Therefore, Plaintiff does not demonstrate that the CVRA employs a racial classification, and rational basis review will apply.

**2. Plaintiff does not demonstrate that the CVRA results in unconstitutional vote dilution.**

Where a law is maintained for invidious discriminatory purpose and results in vote dilution, a plaintiff may have a claim for violation of the Fourteenth Amendment. *See Rogers*, 458 U.S. at 616–17. However, Plaintiff does not allege the necessary components of a vote dilution claim. Plaintiff alleges no invidious discriminatory purpose on the part of the California Legislature to deny him or others like him their right to vote. In particular, Plaintiff does not allege that the California Legislature or the CVRA contemplated or contemplates his race or that the CVRA was enacted in order "to minimize or cancel out the voting potential of racial or ethnic minorities." *See City of Mobile*, 446 U.S. at 66. Nor does Plaintiff allege—nor does the record show—dilution resulting from the CVRA. Plaintiff alleges nothing with respect to the strength of his vote, or that of members of a protected class to which he might belong, prior to the enactment of the CVRA compared to present. Plaintiff similarly alleges nothing with respect to the strength of his vote prior to the City of Poway's adoption of district-based elections compared to present. Therefore, Plaintiff does not demonstrate that the CVRA results in unconstitutional vote dilution.

**3. Plaintiff does not demonstrate that the CVRA is vulnerable to a *Shaw*-type claim for unconstitutional racial gerrymandering.**

As mentioned above, a plaintiff may bring a *Shaw*-type claim by alleging "that 'race was the predominant factor motivating [a] legislature's decision to place a significant number of

voters within or without a particular district.'" *Cooper*, 137 S. Ct. at 1463–64 (quoting *Miller*, 515 U.S. at 916). Although Plaintiff attempts to allege a *Shaw*-type claim for violation of the Fourteenth Amendment, Complaint, Dkt. 1 at ¶¶ 1, 13–14, 55, a *Shaw*-type claim involves "a voter su[ing] state officials for drawing . . . race-based lines" and a district court assessing the challenged districting plan. *Cooper*, 137 S. Ct. at 1463–64.

In this action, Plaintiff alleges that "[t]he creation of [the] district [in which he resides], like all of the City's new districts, is traceable to the CVRA's requirement that the City engage in racial gerrymandering." Complaint, Dkt. 1 at ¶ 7. However, Plaintiff does not allege—and there is nothing in the record to support—that the CVRA dictated the lines of the districts drawn by the City of Poway in the first place. Indeed, the CVRA is silent on how local governments found liable under the Act must draw district lines. *See* Cal. Elec. Code § 14029; *supra* at 7–8. "Upon a finding of liability, [the CVRA] calls only for appropriate remedies . . . not for any particular, let alone any improper, use of race." *Sanchez*, 51 Cal.Rptr.3d at 843 (internal quotation marks omitted) (citing Cal. Elec. Code § 14029). In addition, although a *Shaw*-type claim requires showing that a significant number of voters were moved into or out of a challenged district on the basis of race, Plaintiff makes no corresponding allegation. *Cooper*, 137 S. Ct. at 1463. Plaintiff's Complaint and the record in this action are devoid of allegations or evidence of Poway residents being placed in specific districts in Map 133 on the basis of their race. Plaintiff also does not allege, as is required in a *Shaw*-type claim, that the City Council "subordinated other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to racial considerations" in drawing the resulting districts' lines. *See id.* (internal quotation marks omitted) (citing *Miller*, 515 U.S. at 916). As a result, Plaintiff fails to state a *Shaw*-type claim for racial gerrymandering that would trigger strict scrutiny, and the CVRA is subject merely to rational basis review.

**4. Plaintiff does not demonstrate that the CVRA fails rational basis review.**

Under rational basis review, the CVRA is constitutional, as it is rationally related to a legitimate state interest. The State of California has a legitimate—indeed compelling—interest in

preventing race discrimination in voting and in particular curing vote dilution. This interest is consistent with and reflects the purposes of the California Constitution as well as the Fourteenth and Fifteenth Amendments to the United States Constitution. *See* Cal. Elec. Code § 14027 (identifying vote dilution as the end to be prohibited); *id.* § 14031 (indicating that the CVRA was "enacted to implement the guarantees of Section 7 of Article I and of Section 2 of Article II of the California Constitution"); *see also* Cal. Const., Art. I, § 7 (guaranteeing, among other rights, the right to equal protection of the laws); *id.* Art. II, § 2 (guaranteeing the right to vote); *Sanchez*, 51 Cal. Rptr. 3d at 837–38 (identifying "[c]uring vote dilution" as a purpose of the CVRA). The CVRA, which provides a private right of action by which individuals may seek remedies for vote dilution, is rationally related to the State's interest in curing vote dilution. *See* Cal. Elec. Code § 14032; *Sanchez*, 51 Cal. Rptr. 3d at 837–38. As a result, the CVRA is constitutional under rational basis review.

**5. Plaintiff does not demonstrate that the CVRA fails strict scrutiny.**

Even if strict scrutiny is found to apply to the CVRA, the CVRA is narrowly tailored to achieve a compelling state interest and is therefore constitutional. First, California has compelling state interests in protecting all of its citizens' rights to vote and to participate equally in the political process and in ensuring that its laws and those of its subdivisions do not result in vote dilution in violation of its robust commitment to equal protection of the laws. *See supra* at 10–11 (citing Cal. Const., Art. I, § 7, Art. II, § 2; Cal. Elec. Code §§ 14027, 14031; *Sanchez*, 51 Cal. Rptr. 3d at 837–38). Despite this, Plaintiff suggests that the CVRA's purpose is not to eliminate vote dilution. Pl.'s Mem., Dkt. 11-1 at 16. Plaintiff cites no authority for this position. Rather, Plaintiff attempts to mischaracterize the purpose of the CVRA by citing to *Bartlett v. Strickland* for the proposition that the CVRA "entitles 'minority groups to the maximum possible voting strength.'" Pl.'s Mem., Dkt. 11-1 at 16 (quoting *Bartlett v. Strickland*, 556 U.S. 1, 16 (2009)). However, *Bartlett* did not discuss, much less mention, the CVRA. Rather, *Bartlett* was a case regarding whether Section 2 of the federal Voting Rights Act requires states to create so-called "crossover" districts—in which voters in the majority help to elect minority voters' candidate of choice. *Bartlett*, 556 U.S. at 6. Moreover, although the Supreme Court held that Section 2 did not

require states to create "crossover" districts, the Court did not prohibit states from enacting laws, like the CVRA, that are even more protective of voters' rights than Section 2. *E.g., id.* at 23 ("Our holding that § 2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion. . . . [Section] 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts.").

Second, the CVRA is narrowly tailored to achieve its compelling interests in eliminating vote dilution. As discussed above, the CVRA requires a person to demonstrate the existence of racially polarized voting in order to prove a violation of the Act. Cal. Elec. Code § 14028; *see supra* at 1. Where racially polarized voting does not exist—in other words, where on the whole the voters in a jurisdiction do not vote along racial lines—the CVRA will not require a remedy. Moreover, although the CVRA does not require a finding of compactness among members of a protected class in order to establish a violation of the Act, compactness "may be a factor in determining an appropriate remedy." *Id.* § 14028(c). Accordingly, the CVRA cannot be understood to dispense with compactness entirely in order to "maximize minority voting strength." *Cf.* Complaint, Dkt. 1 at ¶ 57; Pl.'s Mem., Dkt. 11-1 at 16. As a result, the CVRA sweeps no wider than necessary in order to secure for Californians their rights to vote and to participate in the political process free from dilutive electoral systems.

In sum, Plaintiff cannot demonstrate likelihood of success on the merits or serious questions going to the merits of a claim that the CVRA is unconstitutional on its face or as applied to the City of Poway's adoption of district-based elections. The CVRA, the purpose of which is to eliminate vote dilution, does not employ a racial classification, itself result in unconstitutional vote dilution, or require political subdivisions in all circumstances to district in a particular manner, much less to engage in racial gerrymandering. Accordingly, the Court should deny his Motion.

**II. PLAINTIFF CANNOT DEMONSTRATE LIKELIHOOD OF IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY RELIEF.**

A person requesting a preliminary injunction must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in original). To do so, the party seeking preliminary relief must make a "clear showing" of irreparable harm, *id.* (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)), and establish a "sufficient causal connection" between the alleged injury and the law sought to be enjoined, *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 982 (9th Cir. 2011); *see also Garcia*, 786 F.3d at 745; *id.* at 748 (Watford, J., concurring) (citing *Perfect 10, Inc.*, 653 F.3d at 982). "A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (emphasis in original) (citing *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980)).

Plaintiff does not allege an immediate, irreparable injury or establish a sufficient causal connection between that injury and the CVRA such that preliminary relief would be warranted. First, Plaintiff argues that his injury lies in the violation of his right to vote, but he does not show how. Pl.'s Mem., Dkt. 11-1 at 17–19. Plaintiff argues that his right will be violated because, under Map 133, he will be able to vote for a representative from District 2, where he resides, but not for representatives from the districts in which he does not reside. *Id.* at 19. According to this argument, however, the apportionment and districting of United States Representatives provided in 2 U.S.C. § 2a would also violate Plaintiff's right to vote, as Plaintiff is not able to vote for candidates for United States Representative in other districts than his own. District-based elections have long been considered constitutional and not violative of the right to vote. *See, e.g.*, *Rogers*, 458 U.S. at 616–17, 627–28; *Reynolds v. Sims*, 377 U.S. 533, 578 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 8–9 (1964). Indeed, the City would be justified in preserving its new by-district electoral system for all of the benefits that inhere in by-district voting. *See, e.g.*, *supra* at 7 (citing improved access to representatives, greater accountability, and less expensive electoral campaigns). Moreover, Plaintiff does not allege—and the record does not show—that residents of

other districts in Poway will be able to vote in District 2 but District 2 residents will not be able to vote in other districts, a situation that might well pose equal protection concerns. Accordingly, Plaintiff's right to vote will not be violated simply because he cannot vote for representatives from districts where he does not reside.

Second, to the extent that Plaintiff argues that his right to vote will be violated for racial reasons, this argument presupposes that Plaintiff will succeed on the merits of his claim that the CVRA requires local governments to engage in racial gerrymandering. See Complaint, Dkt. 1 at ¶ 7. Although that outcome is unlikely, as discussed above, Plaintiff in any case fails to demonstrate a "sufficient causal connection" between his asserted race-based injury and the conduct that he seeks to enjoin. *See Perfect 10, Inc.*, 653 F.3d at 982. In particular, Plaintiff does not allege—and the record does not show—how the district boundaries in Map 133 are traceable to the CVRA. As mentioned above, Plaintiff does not allege that the City or State Defendants were aware of his race, that he and others were placed in or out of districts for racial purposes, or that the resulting lines or racial compositions of the districts in Map 133 were motivated predominantly by race. *See supra* at 6. Indeed, according to Plaintiff's Motion, each of the districts in Map 133 is contiguous and relatively compact, *see* Pl.'s Mem., Dkt. 11-1, Ex. G, at 6 (showing the adopted Map 133), and contains a substantial majority of White persons and similarly small minorities of Latino, Black and Asian and Pacific Islander persons, in terms of both total population and citizen voting age population, *id.*, Ex. H (showing demographics of districts in Map 133). Moreover, Plaintiff does not demonstrate how Map 133 was required by the CVRA in the first instance. The CVRA does not prescribe particular remedies for violations of the Act or dictate how local governments may draw district lines upon implementing district-based elections. *See* Cal. Elec. Code § 14029; *supra* at 7, 7–8. As a result, Plaintiff has not met his burden to show that the district lines of which he disapproves are traceable to the CVRA's provisions for eliminating vote dilution on a case-by-case basis.

Third, Plaintiff does not demonstrate that his asserted injury is immediate. Plaintiff argues that his right to vote will be violated during the November 2018 elections, in which he will not be able to vote for Poway City Council candidates running in districts other than his own. *See* Pl.'s

Mem., Dkt. 11-1 at 19. However, to the extent that this constitutes an injury at all, it is not immediate such that preliminary relief should issue. There is ample time before November 2018 for this Court to hold hearings and hear evidence in order to determine the merits of this action. Indeed, Plaintiff concedes that there is ample time between now and November 2018. *See id.* at 23. Thus Plaintiff has not demonstrated that his asserted injury is immediate.

In sum, Plaintiff has not met his burden to show that he is likely to suffer immediate, irreparable injury in the absence of preliminary injunctive relief, and the Court should deny his Motion.

**III. PLAINTIFF CAN DEMONSTRATE NEITHER THAT THE BALANCE OF EQUITIES TIPS IN HIS FAVOR, MUCH LESS SHARPLY, NOR THAT AN INJUNCTION IS IN THE PUBLIC INTEREST.**

In assessing whether the extraordinary relief of preliminary injunction should issue, courts "'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter*, 555 U.S. at 24 (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987)). "'In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.'" *Id.* (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

Plaintiff does not demonstrate that the balance of equities tips in his favor, much less sharply. As discussed above, Plaintiff's asserted injury is not immediate, leaving aside the threshold issue of whether Plaintiff's asserted injury is cognizable. *See supra* at 14–15. Therefore, the Court's decision to grant preliminary relief would cause no greater benefit to Plaintiff than would the Court's decision to deny preliminary relief. On the other hand, granting injunctive relief would immediately harm Defendant-Intervenors. Defendant-Intervenors have been and are engaged in advocating the Antelope Valley Community College District to convert from at-large voting to by-district voting in order to comply with the CVRA. *E.g.*, Def.-Intervenors' Mot. to Intervene, Dkt. 18, Ex. C, Flores Decl., at ¶ 9; *id.* Ex. F, Rodriguez Decl., at ¶ 4. Although the District has recently committed to implementing by-district voting, if the Court enjoins

enforcement of the CVRA, the District might refuse to follow through with its commitment. *See id.* Ex. B, Contreras Decl., at ¶¶ 9–11; *id.* Ex. C, Flores Decl., at ¶¶ 9–11; *id.* Ex. F, Rodriguez Decl., at ¶ 7. Defendant-Intervenors' capabilities in eliminating vote dilution will themselves be diminished by the Court's issuance of injunctive relief. They will suddenly lack an enforceable private right of action by which they have challenged and may challenge dilutive electoral systems. Moreover, enjoining the City of Poway's adoption of district-based elections will harm Defendant-Intervenors. Defendant-Intervenors will lose the smaller, regional districts enacted by Map 133, in which their representation and political access would be improved compared to the City's former at-large electoral system.

The issuance of preliminary injunctive relief will not serve the public interest. The basic function of a preliminary injunction is "'to preserve the status quo pending a determination of the action on the merits.'" *Dep't of Parks & Recreation v. Bazaar Del Mundo, Inc.*, 448 F.3d 1118, 1124 (9th Cir. 2006) (quoting *Chalk v. U.S. Dist. Court*, 840 F.2d 701, 704 (9th Cir. 1988)). The Ninth Circuit defines the status quo as "the last uncontested status that preceded the parties' controversy." *Id.* (citing *GoTo.Com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000)). Under the last uncontested status preceding Plaintiff's filing of this action, the CVRA was a viable statute that was enacted in 2001 and had been held constitutional in 2006. *See generally Sanchez*, 51 Cal.Rptr.3d 821. Since the CVRA's enactment nearly two decades ago, many individuals throughout California have availed and continue to avail themselves of the CVRA's private right of action in order to challenge at-large elections where racially polarized voting occurs. *See, e.g.*, Def.-Intervenors' Mot. to Intervene, Dkt. 18, Ex. C, Flores Decl., at ¶ 9; *id.*, Ex. F, Rodriguez Decl., at ¶ 4. To enjoin the CVRA now and without further hearings and a fuller record would disrupt not only the longstanding expectations of Californians and their lawmakers but also current efforts underway across the state to eliminate vote dilution.

Blocking the CVRA now—as opposed to after discovery and trial at the very least—would interrupt proceedings already underway throughout California to enforce its provisions. Blocking the CVRA would halt or at least impair the efforts of individuals bringing these proceedings or appealing to their local governments to adopt district-based elections either to

avoid vote dilution or simply for good governance. *See* Def.-Intervenors' Mot. to Intervene, Dkt. 18, Ex. B, Contreras Decl., at ¶¶ 10–11; *id.*, Ex. C, Flores Decl., at ¶¶ 8–11; *id.*, Ex. F, Rodriguez Decl., at ¶ 7; *see also id.*, Ex. D, Ki Decl., at ¶¶ 7–8; *id.*, Ex. E, Soto Decl., at ¶¶ 8–9. Elimination of the CVRA's private right of action via preliminary injunction will deny Californians a vehicle through which they may enforce their rights under the California and United States Constitutions. Plaintiff does not mention, much less attempt to justify, the disruption that enjoining the CVRA would have in jurisdictions across California that have already adopted district-based elections or are in the process of doing so.

In terms of the City of Poway, the status quo was that the City had already adopted district-based elections prior to Plaintiff's filing of this action. Plaintiff attempts to obscure the status quo with respect to the City's adoption of districts by arguing that the ordinance enacting Map 133 did not take effect prior to the filing of the lawsuit. However, according to Plaintiff's Motion, the ordinance was adopted on October 3, 2017 and its having taken effect thirty days later was pro forma. *See* Pl.'s Mem., Dkt. 11-1, Ex. G, at 4, 5. Accordingly, enjoining Poway's adoption of Map 133, now in effect, would disrupt Poway's implementation of district-based elections.

In particular, an injunction forcing the City to revert to at-large elections would eliminate the many benefits to all Poway residents—including Plaintiff and some Defendant-Intervenors—that inhere in district-based elections. It will block residents' improved access to representatives, fairer and more robust representation of the needs and interests of particular neighborhoods and regions in Poway, and lower financial threshold for entry into campaigns for city council. *See* Def.-Intervenors' Mot. to Intervene, Dkt. 18, Ex. D, Ki Decl., at ¶ 8; *id.*, Ex. E, Soto Decl., at ¶ 8–9; *see also supra* at 7. It will also curb the prospects of improved representation for voters and constituents in southern Poway just as these prospects have been realized in Map 133. *See* Def.-Intervenors' Mot. to Intervene, Dkt. 18, Ex. D, Ki Decl., at ¶¶ 6–8. To the extent that the population and demographics of Poway continue to change over the years, forcing the City of Poway to abandon its new electoral system might exacerbate the inadequate representation of which residents have regularly complained. *See id.*; *see also* J. Harry Jones, *Poway grudgingly*

*moving to district elections*, San Diego Union-Tribune (July 19, 2017), https://www.sandiegouniontribune.com/communities/north-county/sd-no-poway-elections-20170719-story.html ("Over the decades there has been a feeling in the city that southern Poway, which has more of a working class demographic, has been under-represented and some have expressed hope that will change with the new district requirements.").

In sum, Plaintiff does not demonstrate that the balance of hardships tips in his favor, much less sharply, or that preliminary injunctive relief serves rather than harms the public interest. Accordingly, the Court should refrain from enjoining the CVRA and Map 133 on the limited record now before it and instead deny Plaintiff's Motion.

## CONCLUSION

For the foregoing reasons, Movants respectfully request that this Court deny Plaintiff's Motion for Preliminary Injunction.

Dated: November 6, 2017

Respectfully submitted,

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

*/s/ Kip M. Hustace*
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