

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 4 2019

FOR THE NINTH CIRCUIT

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

DON HIGGINSON,

Plaintiff-Appellant,

v.

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

Defendants-Appellees,

CALIFORNIA LEAGUE OF UNITED
LATIN AMERICAN CITIZENS; et al.,

Intervenor-Defendants-
Appellees.

No. 19-55275

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

MEMORANDUM*

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

Argued and Submitted November 5, 2019
Pasadena, California

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

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

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

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

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

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

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

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

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

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

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

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

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

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The Clerk is requested to award costs to (*party name(s)*):

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