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General Municipal Litigation Update

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GENERAL MUNICIPAL
LITIGATION UPDATE
FOR

LEAGUE OF CALIFORNIA CITIES
2025 ANNUAL CONFERENCE AND EXPO

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A. *Johnson v. Department of Transportation*, C099319, 109 Cal.App.5th 917 (Third District March 17, 2025), *review denied* (June 25, 2025).

Holding: The Court of Appeal affirmed the lower court's decision disqualifying plaintiff's attorney and three experts for violating a protective order barring the use of a privileged email. Of relevance to cities, the Court rejected the argument that attorney communications with low-level employees are not privileged because there is no attorney-client relationship.

Facts/Background: Plaintiff sued his employer Caltrans alleging employment claims for discrimination and harassment. An attorney for Caltrans sent an email about the litigation to plaintiff's supervisor, a lower-level employe. The supervisor sent an image of the email to plaintiff, who shared it with his attorney. Plaintiff and his attorney then shared the email with several retained experts and other individuals.

After extensive meet-and-confer efforts, Caltrans sought a protective order on attorney-client privilege grounds. Citing *Upjohn Co. v. United States* (1981) 449 U.S. 383, 391, the trial court found the email was covered by the attorney-client privilege because its dominant purpose was to obtain relevant information from the supervisor and prepare Caltrans's defense in the case and the email had a confidentiality warning at the end. The trial court found Caltrans did not waive the privilege through disclosure, delay in bringing the motion, or by other means.

Over the course of time, plaintiff's attorney disclosed the email and discussed the email with three retained experts and other individuals. Due to plaintiff attorney's noncompliance, Caltrans filed a motion to enforce the protective order and eventually to disqualify the attorney and the three experts. The trial court issued an order disqualifying the attorney and the three experts.

On appeal, the attorney challenged the trial court's disqualification order. Among other arguments, the attorney claimed the email was not protected by the attorney-client privilege, Caltrans waived any privilege through undue delay, and the court abused its discretion in ordering the drastic remedy of disqualification.

Analysis: The Court of Appeal rejected the attorney's arguments and affirmed the disqualification order. Public entities can claim attorney-client privilege, and attorney communications with agency employees are covered by the privilege if "the dominant purpose of the relationship between the parties to the communication" is to obtain relevant information from the employee to allow the attorney to prepare the case. (*Upjohn*, *supra*, 449 U.S. at pp. 391–393.)

The Court of Appeal found substantial evidence supported the trial court's conclusion the email was privileged because it was sent by an attorney representing Caltrans, the email involved legal advice or information, and the nature of the relationship between the attorney and the supervisor was that of a Caltrans attorney obtaining information relevant to litigation from a Caltrans employee. These facts satisfied Caltrans's prima facie burden of showing the communication was made in the course of an attorney-client relationship. (*Johnson, supra,* 109 Cal.App.5th at p. 936–937.)

The burden then shifted to plaintiff to show the email was not confidential or otherwise unprivileged. Plaintiff argued that communications with the attorney were not covered by the attorney-client privilege because the supervisor was only a low-level employee and Caltrans could not unilaterally create an attorney-client relationship with such an employee. Citing *Upjohn*, the Court of Appeal explained the email is privileged because it is important for entity lawyers to be able to exchange information with lower-level employees to adequately represent their clients. (*Id.* at p. 937.)

Finally, the Court of Appeal determined the supervisor's transmission of the email to plaintiff did not waive the privilege. (*Id*. at p. 940.) The privilege holder is Caltrans, as represented by its management. The supervisor is not Caltrans management. Nor is there any evidence Caltrans authorized the supervisor to disclose the email. Finally, contemporaneous communications from Caltrans's counsel indicated the supervisor did not have authority to waive attorney-client privilege on behalf of Caltrans. (*Id*.)

Impact: The decision confirms two key public agency attorney-client privilege issues. First, an agency attorney's communications with all employees, even lower-level employees, are privileged if the purpose of the communication is to prepare a case. Second, disclosure of a privileged communication by an employee does not waive the privilege unless the employee has authority to waive the privilege on behalf of the agency.

II. ELECTIONS

A. *San Diego Public Library Foundation v. Fuentes*, No. D084135, 111 Cal.App.5th 711 (Fourth District, Division 1, May 29, 2025).

Holding: The Court of Appeal found the San Diego County Registrar of Voters ("Registrar") acted arbitrarily in rejecting signatures due to address misspellings, illegibility, or nonstandard abbreviations when the voter registration record could be located and the identity of the signer could be verified. Court of Appeal rejected a strict application of Elections Code section 105 requiring the address be the "same" as what appears on the voter's registration affidavit. Partial dissent would have strictly applied section 150.

Facts/Background: In 2022, San Diego Public Library Foundation and the San Diego Parks Foundation began circulating a petition to collect signatures for the "Libraries and Parks Improvement Act" initiative to secure funding for libraries and parks in San Diego. They submitted over 111,000 signatures to the San Diego City Clerk for verification. The City Clerk forwarded the petition to the Registrar for signature verification.

The Registrar used a random sample to verify the signatures and determined the initiative did not have enough valid signatures to qualify for the ballot. The Registrar rejected a number of signatures because the signer misspelled their address, each individual letter of a street address was not legible, or letters in the street address were deleted or transposed. The Registrar also rejected several signatures because the voters abbreviated their street name or used an abbreviation for an address or address suffix which does not appear on the United States Postal Service's (USPS) list of standard abbreviations.

The proponents filed a petition for a writ of mandate seeking a finding the initiative was signed by enough validly registered City voters to qualify for the ballot. The trial court found proponents needed an additional 185 signatures to be deemed valid in order to trigger a full count. The court discussed some of the categories of signers the Registrar rejected, before concluding it was not required to address proponents' remaining contentions because proponents could not achieve the 185 signers which they needed.

Analysis: On the signature issue, the Court of Appeal found the Registrar of Voters should not have rejected the signatures based on misspellings and other issues with the addresses. Elections Code section 105 provides the residence address written on the petition must be "the same" as the address in the signer's voter registration record. The Court rejected the Registrar's strict interpretation of the section because it "fails to account for natural variations in a person's handwriting due to age, illness, or the hurried circumstances under which petitions are often signed." (*San Diego, supra,* 111 Cal.App.5th at p. 733.) The Court held the Registrar's approach would "disenfranchise less educated voters who might spell a street address phonetically … and voters with certain disabilities such as dyslexia, or individuals with poor handwriting." (*Id*.)

The Court of Appeal reasoned the purpose of comparing information on a petition with voter registration records is to determine if signers were registered voters on the date they signed the petition. (*Id*. at p. 734.) This can be accomplished "without letter-for-letter and word-for-word matches" with voter registration records. (*Id*.)

The Court of Appeal examined the question under *Wheelright v. County of Marin* (1970) 2 Cal.3d 448 and *Malick v. Athenour* (1995) 37 Cal.App.4th 1120. In *Wheelright*, the Supreme Court considered a clerk's rejection of signatures as not sufficiently similar to voter records. The Supreme Court held where the signature dissimilarities are so minor, rejection is an unreasonable or arbitrary act and the court may reject the clerk's determination. (*Wheelright, supra,* 2 Cal.3d at p. 456.) The *Wheelwright* Court acknowledged that while the clerk's duties are ministerial, they are not purely mechanical. (*Id.* at p. 455.)

In *Malick*, the Court of Appeal considered whether an elections official improperly disqualified signers who either illegibly printed their names or wrote them in cursive in the space designated for a printed name. (*Malik, supra,* 37 Cal.App.4th at p. 1124.) The Court rejected the claim that failing to print a name invalidated a signature. (*Id*. at p. 1126.) The court explained the purpose of requiring printed names is to assist verification. (*Id*.) But, insisting on perfectly separated printed letters does not further that goal and conflicted with the judicial policy of favoring the exercise of referendum rights. The Court ruled the automatic invalidation of such signatures, without any verification effort, was arbitrary as a matter of law. (*Id.* at p. 1127)

Based on *Wheelright* and *Malick*, the Court of Appeal found the Registrar used a mechanical approach to signature validation to improperly invalidate signatures. The Registrar's policy of looking at addresses "in isolation without even considering the key issue of whether the signature on the petition matches the voter registration form is arbitrary and contrary to law." (*San Diego*, 111 Cal.App.5th at p. 736.) The misspelled addresses, illegible handwriting, or nonstandard abbreviations does not automatically invalidate a signature when the registration record can be located and the identity of the signer can be verified. (*Id*. at p. 737.)

In a partial dissent, Presiding Justice O'Rourke disagreed to with the majority's ruling on the application of section 105. The dissent finds section 105's requirement the address be "the same" should be strictly applied. Unlike the signatures at issue in *Wheelright* and *Malick*, slight differences in the address requires the election official to make assumptions about whether the signer has moved to a slightly different street or address. This goes "beyond the official's ministerial duty and the law." (*Id*. at p. 740.)

Impact: City clerks and registrars must follow the ruling of the majority and not apply a hyper-technical reading of the requirements for initiative signatures. If the voter's registration information can be verified using the information on the petition, then the signature should be counted.

III. ADMINISTRATIVE EXHAUSTION

A. *Tesoro Refining & Marketing Co. LLC v. City of Carson*, B335686, 2025 WL 653916, (Second District, Division 4, Feb. 28, 2025) (unpublished); *review granted* S289952 (May 28, 2025).

Question for Review: Must a claimant for a local government tax refund comply with a local administrative review procedure prior to pursuing its remedies under the Government Claims Act (Gov. Code, § 810 et seq., "GCA")), or does the Act preempt such a requirement under the doctrine of field preemption? The trial court sustained Carson's demurrer and the Court of Appeal affirmed finding Tesoro failed to exhaust administrative remedies because it did not comply with the Carson Municipal Code requirements for tax refund claims.

Facts/Background: In November 2017, the Carson's voters approved Measure C which adopted the Oil Industry Business License Tax that taxed businesses refining and storing petroleum products in Carson. As part of the measure, Carson adopted Municipal Code provisions setting the procedures by which a taxpayer may obtain a tax refund. First, the Municipal Code required the taxpayer to seek relief from the City's Finance Director (Director). Second, if the taxpayer is dissatisfied with the Director's decision, the Municipal Code provides that any person may appeal any decision of the Director to the City Manager within 15 days of the decision. The Municipal Code states the City Manager's decision shall be final as to the City, but subject to judicial review pursuant to Code of Civil Procedure section 1094.5.

Tesoro paid the tax. When Carson audited Tesoro's returns, they issued a Notice of Deficiency assessing substantial additional amounts. Tesoro timely paid the balance. Tesoro mailed a claim for damages to Carson's City Clerk, seeking a tax refund. Carson denied the claim. Tesoro then sued Carson alleging a single cause of action for a tax refund. Tesoro alleged that by collecting the amount assessed, Carson improperly taxed business activity that Tesoro undertakes outside Carson's boundaries in violation of the United States and California Constitutions and several California statutes.

The City demurred on the ground the complaint fails to state facts sufficient to constitute a cause of action because Tesoro was required to exhaust the administrative remedies set forth in the Municipal Code. Carson argued the complaint was barred because Tesoro did not allege it availed itself of the Carson administrative procedures or seek relief by filing an action for administrative mandate under Code of Civil Procedure section 1094.5. In opposing the demurrer, Tesoro alleged it did not need to comply with the Municipal Code administrative remedy procedures because they are preempted by the GCA. Tesoro alleged local governments, including charter cities, cannot adopt claims requirements not imposed by the GCA. The trial court sustained the demurrer with leave to amend finding Tesoro's failed to exhaust administrative remedies and rejecting Tesoro's preemption argument.

Analysis: The Court of Appeal affirmed. The Court ruled the question need not be analyzed under the standard four-part preemption analysis because the Supreme Court "has held 'the home rule protections in the Constitution do not limit the Legislature's authority to prescribe procedures governing claims against chartered local government entities.'" (*Tesoro* at *4 [quoting *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 627].) Instead, the Court of Appeal determined the only question for the Court is whether the Municipal Code administrative procedures conflict with the GCA. (*Id*.) The Court ruled Tesoro had the burden to demonstrate preemption. (*Id*.)

The Court of Appeal analyzed the question as one of field preemption after finding Tesoro could not raise contradiction preemption for the first time on appeal. The Court of Appeal found the Legislature did not expressly or impliedly fully occupy the field. The Court analyzed the Municipal Code provisions under the framework established by *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068 which held that field preemption occurs when "(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality." (*Tesoro, supra,* at p. *4.) The Court of Appeal then found Tesoro failed to argue the circumstances of the case presented any of the three scenarios and failed to carry its burden to demonstrate preemption.

Tesoro relied on three cases to support its preemption argument: *Volkswagen Pacific, Inc. v. City of Los Angeles* (1972) 7 Cal.3d 48; *McWilliams, supra,* 56 Cal.4th 613; and *Sipple v. City of Hayward* (2014) 225 Cal.App.4th 349. The Court of Appeal rejected each of the cases. The Court rejected dicta in a footnote in *Volkswagen* regarding GCA deadlines preempting local ordinances as not controlling because the Supreme Court did not analyze preemption legal principles in the footnote. (*Tesoro, supra,* at p. *6.) The Court rejected *McWilliams* and *Sipple* because the Courts deciding those cases failed to apply "the legal principles governing when a local ordinance is preempted by state law." (*Id.*)

Impact: The Supreme Court granted Tesoro's petition for review to consider the question of whether the GCA bars local claims presentation requirements and procedures under the doctrine of field preemption? The case is of statewide importance because reversal will end local government claims requirements and administrative procedures for tax refunds. Further, reversal may more broadly imperil all local government claims requirements and end administrative exhaustion requirements at the local government level in favor of the GCA's claiming requirements.

IV. MUNICIPAL FINANCE

A. *Patz v. City of San Diego*, 113 Cal.App.5th 225 (Fourth District, Division Two, July 30, 2025, *modified* August 27, 2025), *petition for review filed* (August 28, 2025) S292698.

Holding: The Court of Appeal affirmed the trial court's statement of decision and upheld the $79.5 million judgement against the City of San Diego. The majority ruled San Diego's tiered water rates violate Proposition 218 because San Diego failed to demonstrate that its rates charged no more than the "proportional cost of service attributable to the parcel." The majority further held San Diego violated Proposition 218 by charging single-family residential (SFR) customers tiered rates and all other customer classes a uniform rate. The Court remanded to reconsider the remedy because newly enacted Government Code section 53758.5 precludes a direct refund and instead mandates prospective rate reductions. The dissent rejected the majority's opinion on liability as well as the decision in *Coziahr v. Otay Water District* (2024) 103 Cal.App.5th 785 because they impose a rigid interpretation of the proportionality requirement that requires impossible levels of precision in rate setting.

Facts/Background: In 2013 and 2015 San Diego adopted tiered water rates for the SFR customer class and uniform rates for the other customer classes. Tiered rates charge increasing rates for higher levels of water use. San Diego's consultant used the Base-Extra Capacity method to allocate costs and calculate the rates using peaking factors. Using that method, all customer classes were allocated a portion of peak costs based on historic consumption data. The method allocates more costs to higher-volume users on the theory that those users should pay more due to the increased costs required to build, operate, and maintain a system built to the size required to meet peak demand, which is unnecessary for lower-use customers.

Majority: The majority held San Deigo's rates violate Proposition 218's proportionality requirement. The majority applied the substantial evidence standard of review to the trial court's statement of decision (which was written by Plaintiff's counsel and signed by the trial court) because it found the determination of whether San Diego's rates meet the proportionality requirement is "essentially factual" and San Diego's arguments that the rates comply with Proposition 218's proportionality requirement ask the Court to reweigh conflicting evidence. (*Patz, supra,* at pp. *25–26, fn. 7.)

San Diego argued that it need only show that it used reasonably accurate data to calculate tiered rates that reasonably reflect the proportional cost to deliver water service to each parcel. Like *Coziahr*, the majority rejected a reasonableness standard of proof without explaining what standard of proof a water agency must meet to carry its burden of proof. (*Patz, supra,* at *18–21; *Coziahr, surpa,* 103 Cal.App.5th at pp. 800–802.)

San Diego has two primary sources of water: cheaper local water and more expensive purchased water. While San Diego did not claim it calculated the tiered rates based on the cost of its different sources of water supply, the majority upheld the statement of decision because San Diego failed to support its tiered rates by proving that only cheaper local water is delivered to a customer's pipe (as opposed to co-mingled supply) when that customer is charged the lower Tier 1 rate. (*Patz, supra,* at p. *28.) The majority also faulted San Diego because it failed to show that cheaper local supply was sufficient to meet all Tier 1 demand. (*Id*.)

The majority rejected San Diego's use of the Base-Extra Capacity method and peaking factors, holding San Diego failed to demonstrate that rates calculated using the method reflect the "proportional cost of service attributable to the parcel." The majority held San Diego cannot use peaking factors to allocate peak costs to the customer classes or to the tiers without employing time-of-use technology to determine which customers use water at peak times. The use of historical data was not sufficient for this process. (*Patz, supra,* at pp. *30–32.) The majority also rejected the tiered rates because San Diego could not give a cost-based justification for where it set the breakpoints between tiers (i.e., why Tier 1 was set at 1-4 hcf and Tier 2 was set at 5-12 hcf). (*Id*. at p. *31–32.)

Citing *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, the majority found San Diego discriminated against SFR customers when it charged SFR customers tiered rates and other customer classes a uniform rate. The majority found it is discriminatory and a violation of Proposition 218 for different customer classes to pay different rates for the same volume of water. (*Patz, supra,* at pp. *32–33.)

Government Code section 53758.5 provides that a trial court finding a violation of Proposition 218 does not award a refund but should instead "credit the amount of the fee or charge attributable to the violation against the amount of the revenues required to provide the property-related service." The majority held that by its terms, section 53758.5 apples to the refund awarded against San Diego. (*Id.* at pp. *49–51.) The majority remanded to allow the trial court to amend the judgment to "require City to credit an award in accordance" with section 53758.5 and "to not allow the Class to enforce the refund award as a money judgment." (*Id*. at p. *51.)

Dissent: In a noisy 62-page dissent, Justice Menetrez rejected the trial court's statement of decision, the majority opinion, and *Coziahr*. The dissent explained these holdings imposed an unduly rigid interpretation of the proportionality requirement requiring voluminous and precise data before an agency can allocate costs to tiered rates. The dissent found the statement of decision was "based on nothing but red herrings and misrepresentations of the facts and the law." (*Id*. at p. *64.)

The dissent found San Diego used an appropriate methodology to allocate incrementally higher costs of more expensive water service to incrementally higher users. It found San Diego applied the methodology to the appropriate data to set the tiered rates. (*Id*. at p. *63.) The dissent found San Diego's cost calculations and allocations based on data other than hourly time-of-use data were reasonable. (*Id*. at p. *72.)

Finally, the dissent concluded nothing in Palmdale "could be interpreted as implying that Proposition 218 prohibits discriminating between customer classes by subjecting them to different rate structures without a cost-based justification for the different treatment" because that Proposition 218 "on its face" imposes no such requirement. (*Id*. at p. *73.) Similarly, the dissent found no Proposition 218 requirement for cost-based justifications for the tier breakpoints. (*Id*. at pp. *73–74.)

In a signal the case may be appropriate for review, the dissent recognized a split in the law between the majority and *Coziahr* which reject a reasonableness standard and the line of cases starting with *Griffith II*[1] which recognize the standard of proof to show

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[1] *Griffith v. Pajaro Valley Water Mgmt. Agency* (2013) 220 Cal.App.4th 586 *(Griffith II); Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892; *Capistrano Taxpayers Ass'n, Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493; *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363; *KCSFV I, LLC v. Florin Cnty Water Dist.* (2021) 64 Cal.App.5th 1015.

proportionality is to show "that, under a reasonable calculation and allocation of costs, rates do not exceed proportional costs." (*Id*. at pp. *57–59.)

Impact: San Diego filed a petition for review on August 28, 2025. Patz, as well as Coziahr, show the continued judicial trend toward requiring heightened levels of proof to support tiered rates. If the majority opinion stands, water agencies should move away from tiered rates calculated using the Base-Extra Capacity method unless they have detailed time-of-use data to support peak cost allocations.

B. *Rogers v. City of Redlands*, G063580, 112 Cal.App.5th 667 (Forth District, Division 3, June 4, 2025, *modified* June 30, 2025); *City pet. for review denied* (August 20, 2025).

Holding: The Court of Appeal affirmed the trial court's ruling the City's inclusion of costs to repair street damage caused by trash trucks in the trash rates constituted a charge for the use of Redland's streets prohibited by Vehicle Code section 9400.8. The Court of Appeal also upheld the trial court's application of Health and Safety Code section 5472 as limiting refunds for the overpayment of trash charges to those who paid the charges under protest.

Facts/Background: Redlands learned it was sustaining $3.5 million in street damage every year caused by heavy trash trucks. Redlands passed an ordinance adopted trash rates based on costs of service which included the annual cost of street damage caused by the utility's trash trucks. Plaintiff sued alleging the inclusion of costs to repair road damage constituted a charge for the use of Redlands' streets in violation of Vehicle Code section 9400.8. Section 9400.8 provides that, other than a permit fee for extra-legal loads, local agencies may not impose charges "for the privilege of using its streets or highways."

In phase one, the trial court found the Redlands' inclusion of the street repair costs in the trash rates constituted a charge for the privilege of using the City's streets violating section 9400.8. In phase two, the trial court concluded Health and Safety Code section 5472 limited refunds to those who paid under protest, denying the plaintiff class monetary relief.

Analysis: The Court of Appeal affirmed. Relying on *County Sanitation District No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, the Court of Appeal determined the Redlands' inclusion of the costs in the trash rate calculation fell within section 9400.8's prohibition because, no matter how the charges were collected, they were a fee for using the City's streets.

County Sanitation concerned a county biosolids impact fee of $3.37 per ton applied to land in the county charged to landowners to mitigate the damage biosolids trucks caused to the county roads. (*County Sanitation, supra,* 127 Cal.App.4th at p. 1571.) The Court of Appeal concluded section 9400.8 must be construed to prohibit a local agency from imposing any fees or charges on legal loads hauled on its roads, even though hauling such loads may cause damage beyond minor wear and tear. (*Id*. at p. 1622.) Additionally, the Court of Appeal found the biosolids impact fee was the type of fee prohibited by section 9400.8 even though it was not, on its face, assessed based on miles driven on roads and instead was based primarily on tons of certain biosolids applied to land in the county. (*Id*. at 1622–1623.) The Court of Appeal concluded, "[b]ecause the primary purpose of the biosolids impact fee was to collect funds based on the use of streets or highways located in Kern County, it violated ... section 9400.8." (*Id.* at p. 1623.)

The Court of Appeal in *Rogers* found *County Sanitation* to be persuasive on the application of section 9400.8. (*Rogers, supra,* 112 Cal.App.4th at p. 157.) The Court rejected the City's argument that Rogers did not pay a fee to use the roads but instead paid a charge for trash service. The Court held that because the trash rate incorporates a charge for street repair calculated based on the weight of the trash trucks, the inclusion of the charge constitutes a charge for the privilege of using City streets barred by section 9400.8. (*Id*.)

The Court of Appeal also rejected the City's argument that Proposition 218 and section 9400.8 should be harmonized to allow the City to recover the charge because Proposition 218 allows the City to recover the full cost of service from trash customers through rates. (*Id*. at p. 157–158 [*citing Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637 and *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal.App.4th 914].) The Court of Appeal noted Proposition 218 states "[n]othing in this article or Article XIII C shall be construed to … [p]rovide any new authority to any agency to impose a tax, assessment, fee, or charge." When Proposition 218 passed in 1996, section 9400.8 had been in effect for six years. Therefore, Proposition 218 did not newly allow road use charges through rates that were barred by section 9400.8 before Proposition 218. (*Rogers, supra,* 112 Cal.App.4th at p. 158.)

As to the remedy, the Court of Appeal affirmed the trial court's ruling that Rogers and the class were not entitled to monetary relief for past trash charges paid because neither

Rogers nor any member of the class paid the trash charges under protest as required by Health and Safety Code section 5472. (Id. at p. 158–159.)

Impact: For City-owned water, sewer, and solid waste utilities, rates cannot recover the cost the City incurs to repair roads damaged by the utility's vehicles. If your rates recover these costs, they should be changed immediately. The plaintiff's attorney in *Rogers* is sewing utilities across the state for incorporating these costs in rates, and they are examining all city-utility rates searching for charges that violate section 9400.8.

C. *Gluck v. City and County of San Francisco*, A170087, 111 Cal.App.5th 769 (First District, Division Three, May 30, 2025).

Holding: The Court of Appeal affirmed the trial court's decision sustaining San Francisco's demurrer to the first three causes of action because San Francisco's combined wastewater and stormwater system is a "sewer," and therefore subject to the property-related fee exception to Proposition 218's voter approval requirement. The Court reversed the trial court's decision on the fourth cause of action finding the plaintiffs stated a claim the sewer rates violated Proposition 218's proportionality requirement by alleging the sewer rates were based solely on wastewater cost factors without consideration of stormwater cost factors.

Facts/Background: San Francisco operates a combined sewer system that collects and treats both wastewater and stormwater. Proposition 218 requires voter approval for property-related charges, except for "sewer, water, and refuse collection services." Prior to 2023, San Francisco charged sewer rates that recovered stormwater-related costs. The rates were set using wastewater cost factors (strength and flow) and not stormwater factors (permeable surface area).

In 2023, San Francisco conducted a new rate study that proposed a separate stormwater charge to recover stormwater-related costs split from the wastewater charge. The new stormwater charge would be based on parcel size and the parcel's permeable and impermeable area. Because the proposed rate structure changes were expected to have significant bill impacts on customers with parcels with large impermeable surface areas, San Francisco opted to phase in the new rates over seven years. New stormwater rates would fund one-seventh of all stormwater costs beginning in July 2023, with the proportion increasing each year until the new rates completely fund stormwater costs in the seventh year. During the ramp-up, the remainder of the combined wastewater and stormwater charges would be based on wastewater factors.

Plaintiffs filed a class action against San Francisco challenging the constitutionality of the sewer charges related to stormwater services. The first three causes of action argued stormwater services funded by the City's sewer charges were not "sewer" services covered by the exception to Proposition 218's voter approval requirement. The fourth cause of action argued the sewer rates violate the proportionality requirement of Proposition 218 to the extent San Francisco based the rates on wastewater factors in the past or during the ramp-up.

San Francisco demurred to all causes of action. The trial court sustained the demurrer without lave to amend. The trial court concluded the first, second, and third causes of action failed because San Francisco's combined sewer system provides "sewer" services which are not subject to voter approval under Proposition 218. The trial court then found the fourth cause of action failed because the crux of the claim was the incorrect assumption that the wastewater and stormwater systems are distinct.

Analysis: The Court of Appeal affirmed the trial court's judgment regarding the first three causes of action. The Court found that the term "sewer" as used in proposition 218 includes a combined wastewater and stormwater system. (*Gluck, supra,* 111Cal.App.5th at p. 783.) The Court relied on Public Utilities Code section 230.5 which defines "sewer system" expansively to include "all real estate, fixtures, and personal property … to facilitate sewage collection, treatment, or disposition for sanitary or ***drainage purposes***, including … ***outlets for surface or storm waters***, and any and all other works, property or structures necessary or convenient for the collection or disposal of sewage, industrial waste, ***or surface or storm waters***." (*Id*.) Therefore, the Court ruled the combined sewer system provides "sewer" services exempt from the voter approval requirement. (*Id*. at p. 790.)

The Court of Appeal reversed as to the fourth cause of action on proportionality. The Court held plaintiffs' allegation the sewer charges were not proportional did not fail as matter of law. The fact that San Francisco has a combined sewer system does not excuse it from adopting proportional rates that separately account for the different system costs as was done in the 2023 rate study. The Court emphasized the holdings in *Coziahr v. Otay Water* District (2024) 103 Cal.App.5th 785 and *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493 mandating an agency show its method of cost allocation produces rates that are proportional to costs. The Court found because San Francisco relied solely on wastewater cost factors to support charges for stormwater services without considering costs attributable to stormwater factors, plaintiffs fourth cause of action stated a claim San Francisco's sewer rates violate

Proposition 218's proportionality requirement. The case was remanded for further proceedings on the proportionality claim.

Impact: The case settled the question of whether a combined wastewater and stormwater system is a "sewer" system for purposes of Proposition 218. The case affirms and adds to the *Coziahr* and *Capistrano* line of cases finding a proportionality violation because the agency used "nonspecific data," assumptions, and industry standards, rather than "actual cost" to calculate rates. (*Gluck, supra,* 111Cal.App.5th at p. 792 [quoting *Coziahr*, 103 Cal.App.4th at p. 808].)

Dangerous Condition: Avoiding and Defending Public Property Liability Claims

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Dangerous Conditions: Avoiding and Defending Public Property Liability

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I. INTRODUCTION

Various public entities throughout California are constantly plagued with dangerous condition of public property claims. These claims include everything from raised sidewalks and "hidden" parking lot wheel stops, to "improper" road conditions. But dangerous condition claims can also include unique allegations such as a park swing that moves too fast, a window at a public building which is too clean, or allegations that a crosswalk should have been painted in the middle of a highway. Whatever the condition that may be alleged, Dangerous Condition of Public Property ("DCPP") claims have been on the rise throughout the state in recent years. Because of this, it is important that all public officials and employees understand the basic elements of and defenses to DCPP actions. This presentation will summarize the elements needed to establish a claim for a dangerous condition of public property, as well as the common immunities that can be asserted. Additionally, this presentation will provide practical advice on how to implement steps to prevent the tide of rising dangerous condition claims, as well as tactics and strategies for defending these claims once litigation has started. Lastly, this presentation will provide pointers to assist counsel in the preparation of a Motion for Summary Judgment should the opportunity present itself.

II. WHAT IS A DANGEROUS CONDITION OF PUBLIC PROPERTY AND WHAT MUST A PLAINTIFF PROVE?

A. What is the Definition of Public Property?

"Property of a public entity" or "public property" are defined as "real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity, but are not owned or controlled by the public entity."[2] Thus, for example, property outside city limits can be public property of a city, if the city owns or controls it. Similarly, property within the city's limits might not be considered property of an entity if it is not owned or controlled by the city (property owned by a school district for example).

To determine if a public entity has sufficient control over a particular property, the key issue to look at is whether or not the public entity had the "power to prevent, remedy or guard against the dangerous condition."[3] For example, a City may be subject to liability even if it does not own the property but maintains or repairs it.

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[2] *Government Code* §830(c)

[3] (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 990.)

B. What is a Dangerous Condition?

Government Code Section 830(a) defines a "Dangerous Condition" as "a condition of ***property*** that creates a ***substantial*** (as distinguished from a ***minor, trivial, or insignificant***) risk of injury when such property or adjacent property ***is used with due care*** in a manner in which it is ***reasonably foreseeable that it will be used***."[4]

A condition is not dangerous if a court "viewing the evidence, most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used."[5]

1. Trivial Defect Doctrine

While some conditions appear obviously dangerous (a giant sinkhole in the middle of a busy intersection, for example) others may be more difficult to determine (such as a two-inch lift in a section of a sidewalk). In dangerous condition cases involving potholes or uneven sidewalks, whether the alleged dangerous condition is substantial or trivial will often be a hotly litigated issue.

Though courts often refer to this principle as the "trivial defect defense," it is not actually an affirmative defense.[6] Rather, the plaintiff has the burden of proof of establishing that the defect actually caused his injury and was substantial rather than trivial.[7]

For example, as it pertains to sidewalks, the height of the differential is the first key question, and the *Huckey* case holds that "[s]idewalk elevations ranging from three-quarters of an inch to one and one-half inches have generally been held trivial as a matter of law."[8] The Court in *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 725–726, references three cases in which the size of the differential was not dangerous as a matter of law. In determining whether a particular defect is substantial or trivial, "the court should *not* rely solely upon the size of the defect."[9] "Instead, the court should [also] determine whether there existed any circumstances surrounding the accident which might have rendered the defect more dangerous than its mere abstract depth would indicate."[10]

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[4] *Government Code* §830(a) (emphasis added)

[5] Gov. Code §830.2.

[6] (*Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 927.)

[7] (*Ibid*.).

[8] (*Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092, 1107.)

[9] (*Id. at* 1105 [*emphasis in original*].)

[10] (*Fielder v. City of Glendale* (2023) 71 Cal.App.3d 719, 732.)

C. What are the elements a Plaintiff must prove to sustain a dangerous condition claim?

Government Code Section 835 lists the elements that a Plaintiff must prove in order to successfully establish a DCPP claim:

1. The public entity owned or controlled the property;
2. The property was in a "dangerous condition" at the time of the injury;
3. The dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred;
4. The negligent or wrongful conduct of the public entity's employees acting within the scope of employment created the dangerous condition or the public entity had (actual or constructive) notice of the dangerous condition for a long enough time to have protect against it and did not;
5. Plaintiff was harmed; and
6. The dangerous condition was a substantial factor in causing the Plaintiff's harm.[11]

Plaintiff must prove all of the above elements to meet their burden in proving a dangerous condition of public property cause of action. Common law negligence is not the applicable standard as Government Code Section 835 is the only means a Plaintiff may use to seek redress from a public entity for claims of damages resulting from its property.[12] Should a Plaintiff assert such a common law negligence claim, it is advisable to meet and confer with Plaintiff's counsel early and provide them an opportunity to dismiss any improper negligence claims prior to filing a demurrer.

D. "Protect Against"

Government Code section 830(b) provides that a public entity can "protect against" a dangerous condition by repairing it, remedying it, or providing safeguards or warnings.[13] Section 835(b) further specifies that a public entity cannot be held liable if it has taken such measures to protect against the condition prior to the incident giving rise to Plaintiff's claim.

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[11] Gov. Code §835; CACI No. 1100; (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 758.)

[12] Gov't Code 815: Except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person; *Hilts v. Solano County* (1968) 265 Cal.App.2d 161, 169-171 (negligence claims against public entities are improper because they are not founded on statute). "Section 835 [of the Government Code] is the sole statutory basis for a claim imposing liability on a public entity based on the condition of public property." (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 438, citing, *Brown v. Poway Unified School Dist*. (1993) 4 Cal.4th 820, 82)

[13] (*Foremost Dairies, Inc. v. State of California* (1986) 190 Cal.App.3d 361, 367.)

Case law establishes that a public entity is not liable for failing to warn of a condition that is already known to the plaintiff.[14] Courts have repeatedly held that adequacy of a warning may be resolved as a matter of law where reasonable minds can reach only one conclusion.[15]

E. Actual v. Constructive Notice

Unless Plaintiff establishes that the alleged dangerous condition was created by the negligent or wrongful conduct of the public entity's employees acting within the scope of employment, Plaintiff will need to establish that the public entity had actual or constructive notice of the alleged dangerous condition a sufficient time prior to the incident to have protected the public against the alleged condition.

1. Actual Notice

To prove a public entity had actual notice of a dangerous condition, Plaintiff must establish that the entity actually knew of the condition and knew or should have known of its dangerous character. This is typically demonstrated by the public entity receiving a prior claim relating to the same property and its condition or a complaint or repair request prior to the incident giving rise to the claim.[16]

2. Constructive Notice

To prove a public entity had constructive notice of a dangerous condition, Plaintiff must prove that the condition existed long enough for the public entity to know or should have known of the alleged dangerous condition and that the condition was so obvious that it should have discovered the condition and its dangerous character if it had used due care. An example of evidence of due care would be an inspection system that would have potentially discovered the dangerous condition.[17]

III. COMMON CAUSES OF DANGEROUS CONDITION LIABILITY CASES

Virtually any condition of public property that is causally connected to an injury-causing incident could be found to be a dangerous condition if the proper elements are asserted and proven. Thus, dangerous condition liability has been asserted for such varying conditions as landslides, backed up sewers, crowd control at a 4th of July celebration, the design of park swings, and even a library window that was allegedly too clean.

However, the most common dangerous condition situations relate to sidewalk lifts, street potholes or lifts, or issues relating to traffic intersections. Because of this, public entities should

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[14] (*Belcher v. City and County of San Francisco* (1945) 69 Cal.App.2d 457, 463; *Bunker v. City of Glendale* (1980) 111 Cal.App.3d 325, 333.)

[15] (*Foremost, supra*, 190 Cal.App.3d at p.367.)

[16] Govt. Code §835.2(a)

[17] *Id*. at §835.2(b)

keep alert to possible issues on their sidewalks, streets and intersections, lest they find themselves facing significant tort liability.

IV. IMMUNITIES

A. Trail Immunity

Under Government Code Section 831.4, “A public entity . . . is not liable for an injury caused by a condition of: (a) Any unpaved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational or scenic areas . . .;(b) Any Trail used for the above purpose; (c) Any paved trail walkway, path, or sidewalk on an easement of way which has been granted to a public entity, which easement provides access to any unimproved property.”

To effectively take advantage of this immunity, public entities should post clear labels and signage to denote the existence of a trail. Additionally, for the specific form of paved trail as outlined in Government Code Section 831.4(c), in order to take advantage of this immunity, a clear and distinct warning must be posted of any known hazards that are present.

B. Design Immunity

Per Government Code Section 830.6, “Neither a public entity nor a public employee is liable … for an injury caused by the plan or design or construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body … or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously approved ….”

A public entity claiming design immunity must establish three elements: (1) Causal relationship between the plan or design and the accident; (2) Discretionary approval of the plan or design prior to construction; and (3) Substantial evidence supporting the reasonableness of the plan or design.[18]

“The first two elements—causation and discretionary approval—involve factual questions to be resolved by a jury, unless the facts are undisputed. The third element—the existence of substantial evidence supporting the reasonableness of the plan or design—is a legal matter for the court to decide.”[19] On the third element, “ ‘[a] mere conflict in the testimony of expert witnesses provides no justification for the matter to go to a lay jury who will then second-guess the judgment of skilled public officials.’ ”[20]

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[18] (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 69.)

[19] (*Id.*)

[20] (*Menges v. Department of Transportation* (2020) 59 Cal.App.5th 13, 21.)

As to the first element of causal relationship, 'This element is ordinarily established by the allegations in the complaint that the injury occurred as a result of the plan or design."[21] Simply put, the public entity has only to show that the property design and Plaintiff's allegations relate as alleged to satisfy the first Design Immunity Element.

Regarding the second element of discretionary approval, Courts consistently hold the approval element requires a simple showing that engineers prepared the plans, and that they were signed by a person or legislative body with discretionary authority to do so.[22] If the design is approved by an employee, the employee must have discretionary authority delegated to them by law. The basis of the authority could be found in a statute, ordinance, or charter. However, the person with discretionary authority may delegate that authority to another person. For example, in *Thomson v. City of Glendale* (1976) 61 Cal.App.3d 378, the city charter, and city code conferred authority on the director of public works, and the director then delegated authority to the superintendent of maintenance. The Court of Appeal held an employee had discretionary authority to approve a plan.[23] Thus, the person exercising discretionary authority need not be the person who is granted authority by law.

The third element of design immunity requires that the public entity provide "any substantial evidence" of the reasonableness of the design. Under the third prong of design immunity, Government Code Section 830.6 design immunity applies:

"[i]f the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefore or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefore."

When a public entity moves for summary judgment based on design immunity, the trial court must only find that there is "any" substantial evidence that the plan is reasonable; it need not find that the plans are reasonable by a preponderance of the evidence. This is the same

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[21] (Van Alystyne, *Cal. Govt. Tort Liability Practice* (CEB 2019), §12.69; *Fuller v. Department of Transp.* (2001) 89 Cal.App.4th 1109, 1114 (public entity may rely on plaintiffs' pleadings to establish element of causation.)

[22] (*See, e.g. Alvarez v. State* (1999) 79 Cal.App.4th 720, 734 (disapproved on other grounds); *Cornette v. Department of Transportation* (2001) 26 Cal.4th 65 (approval satisfied by "detailed plan, drawn up by a registered professional engineer, and approved by district and State officials exercising their discretionary authority"); *Ramirez v. City of Redondo Beach* (1997) 192 Cal.App.3d 515 (plans signed by city engineers established approval); *Anderson v. City of Thousand Oaks* (1976) 65 Cal.App.3d 82, 89-90 ("a detailed plan, drawn up by a competent engineering firm, and approved by the city council in the exercise of its discretion, is certainly persuasive evidence of both prior approval and reasonableness for purposes of the design immunity defense.") "There is no requirement that the design be expressed in any particular form. The plan need only be sufficiently explicit to assure that it is understandable to the employee giving the approval." (*Thomson v. City of Glendale* (1976) 61 Cal.App.3d 378, 385.)

[23] (*Thomson v. City of Glendale* (1976) 61 Cal.App.3d 378.)

substantial evidence standard that a Court of Appeal would apply to a jury verdict.[24] Typically, "any substantial evidence" consists of an expert opinion as to the reasonableness of the design, or evidence of relevant design standards.[25]

"That a paid expert witness for plaintiff, in hindsight, found…the design was defective, does not mean, *ipso facto*, that the design was unreasonably approved."[26] The end result is that an opposing party cannot avoid the design immunity defense by presenting opposing affidavits alleging an unreasonable design.

Recognizing that design immunity is predicated upon the separation of powers doctrine, and that governmental entities need leeway designing public works, courts have developed liberal rules concerning what constitutes "substantial evidence." Ordinarily, a civil engineer's opinion that a design was reasonably approved constitutes "any substantial evidence" sufficient to support design immunity.[27] "The fact of approval by competent professionals can, in and of itself, establish the element of reasonableness."[28]

Given these factors, it is crucial for public entities to not only ensure that it has proper architectural plans for its structures and improvements that are approved by a duly appointed employee, but that a civil engineer (either from the public entity or a retained expert) has the qualifications and ability to opine on the reasonableness of the design in order to gain design immunity.

To ensure the best chances to obtain design immunity ensure that: (1) public entities delegate authority to approve plans to its engineer; (2) confirm that the plans are approved prior to construction; and (3) make sure that the plans are as detailed as possible so that they include the alleged dangerous condition.

However, it should be noted that the California Supreme Court recently held that design immunity does not categorically preclude failure to warn claims that involve a discretionarily approved element of a roadway and declined to overrule its prior precedent. In *Tansavatdi v. City of Rancho Pales Verdes* (2023) 14 Cal.5th 639, at issue was whether design immunity is limited to claims alleging that a public entity created a dangerous roadway condition through a defective design or whether design immunity also extended to claims alleging that a public entity failed to

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[24] (*King v. U.S. Bank National Association* (2020) 52 Cal.App.5th 711, 728.)

[25] (*See*, *Fuller, supra,* 89 Cal.App.4th at 1118; *Weinstein v. Department of Transportation* (2006) 139 Cal.App.4th 52, 59.)

[26] (*Sutton v. Golden Gate Bridge, Highway and Transportation Dist*. (1998) 68 Cal.App.4th 1149, 1158, quoting *Ramirez v. City of Redondo Beach* (1987) 192 Cal.App.3d 515, 525.)

[27] (*Sutton, supra*, 68 Cal.App.4th at 1162 (District Board's reliance on civil engineering opinions regarding median barrier was substantial evidence); *Fuller, supra,* 89 Cal.App.4th at 1118 (speed limits approved by traffic engineer constituted substantial evidence.))

[28] (*Higgins v. State* (1997) 54 Cal.App.4th 177, 187, disapproved on another point in *Cornette, supra*, 26 Cal.4th at pp.73-74.)

warn of a design element that resulted in a dangerous roadway condition. The Supreme Court held that while Cal. Gov. Code 830.6 shields public entities from liability for injuries stemming from the design of a roadway's physical features, they nonetheless have a duty to warn of known dangers the roadway presents to the public.

As a result of the *Tansavatdi* ruling, it is important for public entities to create evaluation systems of roadways and intersections. If it is revealed that these areas have a high propensity for accidents or damage due to its design, then a clear and distinct warning should be provided in order to mitigate against a potential failure to warn claim even if design immunity should apply.

Additionally, public entities should be aware of the factors that can negate the ability to claim design immunity such as: (1) a change of condition[29]; (2) the as-built plans differing from the previously approved design[30]; and (3) the authority to approve plans not delegated to person approving them[31].

For Plaintiff to negate design immunity by way of change of condition, Plaintiff must demonstrate that: (1) the location became dangerous due to a change in physical conditions; (2) the public entity had actual notice of the dangerous condition; (3) the public entity had the time and funds to correct the condition but failed to do so or the public entity was unable to fix the condition but did not provide adequate warnings.[32]

C. Dog Park Immunity

Government Code Section 831.7.5 states that: "(a) A public entity that owns or operates a dog park shall not be held liable for injury or death of a person or pet resulting solely from the actions of a dog in the dog park; (b) This section shall not be construed to affect the liability of a public entity that exists under the law; and (c) "Public entity" has the same meaning as Section 811.2, and includes, but is not limited to, cities, counties, cities and counties, and special districts.

In order to ensure that public entity can obtain the immunity provided by the Government Code for dog parks, it is advised to clearly and distinctly label all dog parks within your jurisdiction.

D. Sign Immunity

Government Code Section 830.4 states that, "A condition is not a dangerous condition within the meaning of this chapter merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described by

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[29] (*Cornette v. Dept of Transp.* (2001) 26 Cal. 4th 65)

[30] (*Castro v City of Thousand Oaks (2015)* 239 Cal.App. 4th 1451)

[31] (*Id.*)

[32] (*Cornette, supra.*)

the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code."

Further, Government Code Section 830.8 states that, "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care."

"Section 830.8 provides a limited immunity for public entities exercising their discretion in the placement of warning signs described in the Vehicle Code. 'The broad discretion allowed a public entity in the placement of road control signs is limited, however, by the requirement that there be adequate warning of dangerous conditions not reasonably apparent to motorists.' Thus where failing to post a warning sign results in a concealed trap for those exercising due care, section 830.8 immunity does not apply."[33]

Simply put, if the public entity has knowledge of a dangerous condition and/or a condition exists that could create a dangerous condition by way of a "concealed trap" at the specific site, then it has a duty to warn about it through the use of a clear and distinct warning. However, if a Plaintiff alleges that a sign was required and Plaintiff was injured as a result with no other dangerous condition being present, then the public entity is immune per the Government Code.[34]

E. Weather Immunity

Government Code Section 831 states that, "Neither a public entity nor a public employee is liable for an injury caused by the effect on the use of streets and highways of weather conditions as such. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such effect if it would not be reasonably apparent to, and would not be anticipated by, a person exercising due care. For the purpose of this section, the effect on the use of streets and highways of weather conditions includes the effect of fog, wind, rain, flood, ice or snow but does not include physical damage to or deterioration of streets and highways resulting from weather conditions."

Public entities should note that, even if Plaintiff's incident arises from a weather-related condition, should the public property be defective and/or if the incident in question was one that would not be anticipated by someone using due care, immunity could still not apply. Therefore, evaluate street conditions, and ensure that if there is knowledge of potential hazards developing in a particular area due to weather, that a clear and distinct warning be offered.

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[33] (*Kessler v. State of California* (1988) 206 Cal.App.3d 317, 321-322.)

[34] (*See, Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1196-1197.)

F. Natural Conditions Immunity

Government Code Section 831.2 codifies the natural condition immunity which states, "Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach."

Unlike weather immunity, the immunity provided by Section 831.2 is "absolute and applies regardless of whether the public entity had knowledge of the dangerous condition or failed to give warning. The legislative purpose in enacting Section 831.2 was to ensure that public entities will not prohibit public access to recreational areas due to the burden and expense of defending against personal injury suits and of placing such land in a safe condition."[35] "The natural condition immunity applies even 'where the public entity had knowledge of a dangerous condition which amounted to a hidden trap.' As a consequence, courts have held there is no liability for failure to warn of a known dangerous condition when the danger is a natural condition of unimproved public property."[36] "The statutory immunity extends to 'an injury caused by a natural condition of any unimproved public property.' The use of the term 'caused' is significant. One such example is in *Meddock v. County of Yolo* (2013) 220 Cal.App.4th 170, where the Court noted that "although the injury occurred on improved property, that is, the paved parking lot, it was caused by the trees, native flora located near - and perhaps super adjacent to - the improved parking lot, but themselves on unimproved property."[37] "[T]o qualify public property as improved so as to take it outside the immunity statute 'some form of physical change in the condition of the property at the location of the injury, which justifies the conclusion that the public entity is responsible for reasonable risk management in that area, [is] required to preclude application of the immunity.'"[38] "Immunity under section 831.2 exists even where the public entity's nearby improvements together with natural forces add to the buildup of sand on a public beach."[39]

Simply put, in order for Plaintiff to overcome this immunity, he or she would have to demonstrate that the incident location was not only improved property, but it was the actual improvement that caused the alleged injury. If it can be demonstrated that a natural element or force caused Plaintiff's injury, even if it occurred on improved property, the public entity can still obtain natural condition immunity.

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[35] (*Goddard v. Department of Fish & Wildlife* (2015) 243 Cal.App.4th 350, 360.)

[36] (*Alana M. v. State of California* (2016) 245 Cal.App.4th 1482, 1488.)

[37] (*Meddock v. County of Yolo* (2013) 220 Cal.App.4th 170, 177.)

[38] (*Id*. at 178.)

[39] (*Morin v. County of Los Angeles* (1989) 215 Cal.App.3d 184, 188.)

G. Hazardous Recreational Immunity

Government Code Section 831.7(a) states that, "Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave, for any damage or injury to property or persons arising out of that hazardous recreational activity." Additionally, Government Code Section 831.7(b) defines "hazardous recreational activity" as "a recreational activity conducted on property of a public entity that creates a substantial, as distinguished from a minor, trivial, or insignificant, risk of injury to a participant or a spectator."

Per the Government Code, hazardous recreational activity can be anything from, "water contact activities, except diving, in places where, or at a time when, lifeguards are not provided and reasonable warning thereof has been given, or the injured party should have reasonably known that there was no lifeguard provided at the time," to "diving into water from other than a diving board or diving platform, or at any place or from any structure where diving is prohibited and reasonable warning thereof has been given," to activities such as "animal riding," "equestrian competition," archery," bicycle racing or jumping," boating," "pistol and rifle shooting," and skydiving."[40]

However, a public entity can lose this immunity if it: (1) fails "to guard or warn of a known dangerous condition or of another hazardous recreational activity known to the public entity or employee that is not reasonably assumed by the participant as inherently a part of the hazardous recreational activity out of which the damage or injury arose"; (2) if a fee was taken by the public entity to engage in the hazardous recreational activity; (3) injury was caused due to a failure to properly construct or maintain in good repair any structure utilized in the activity; (4) gross negligence in promoting the participation or observance of the activity (promotional literature or a public advertisement or announcement that merely describes the facilities and services on the property does not constitute a grossly negligent promotion.); and (5) an act of gross negligence by the public entity or employee of same caused the injury.[41]

Thus, to maintain this immunity, public entities should post warnings on piers or near rock formations at beaches warning the public that diving is not allowed. Additionally, public pools should have signs posted that there are no lifeguards on duty if this is the case, and if there are lifeguards offered, when and where they will be located, and ensure they are maintained during those specific time periods. Additionally, any warning that applies to the location should be posted prominently to warn the public of engaging in hazardous recreational activities, especially if there is advance knowledge that two different types of activities could be engaged in one area (i.e. boating and waterskiing.)

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[40] Gov. Code Section 831.7(b)(1-3) (a full list of all defined hazardous recreational activities is listed in Gov. Code Section 831.7(b)(3).

[41] *Id*. at Section 831.7(c)(1)(A-E.)

It should be noted that while waivers were once an applicable tool for public entities in mitigating such claims, the recent holding by the California Supreme Court in *Whitehead v. City of Oakland* (2025) 17 Cal 5th 735 has significantly altered that available avenue of protection. In *Whitehead*, Plaintiff was preparing for a fundraising bike ride and signed a release absolving the City of claims related to negligence with relation to the offered facilities. Specifically, the waiver covered public street hazards such as broken pavement. Plaintiff's front tire struck a pothole and Plaintiff's bike flipped over resulting in a Traumatic Brain Injury ("TBI").

The California Supreme Court held that California Civil Code Section 1668 renders anyone seeking to exempt anyone from violation of law, whether intentional or negligent, is unlawful. The Court held that an agreement to exculpate a party for future violations of statutory duty designed to protect public safety is against public policy, and unenforceable. The holding further stated that because Government Code Section 835 imposes a statutory duty on public entities to maintain roadways in reasonable safe conditions, a release cannot be applied to exempt a public entity from liability to comply with its statutory duty.

As a result of the holding in *Whitehead*, while it is still worth using waivers to further enhance protection for claims involving hazardous recreational activities, remember that a general release of a public entity's duty under Government Code Section 835 cannot be waived and the waiver should focus specifically on the actions within the activity rather than on public conditions typically subject to Government Code Section 835.

V. PRACTICE TIPS TO AVOID AND MITIGATE DANGEROUS CONDITION CLAIMS

In order to effectively reduce the potential for liability, public entities should implement the following recommended mitigation measures:

- **Establish and Implement an Inspection Program**: All public entities should establish a system that can help a municipal entity identify and eliminate dangerous conditions before an accident occurs not only reducing exposure to dangerous condition liability but making public property safer and more enjoyable. Ideally, an inspection system should include both proactive elements (such as a dedicated inspection team) and reactive elements (such as a complaint call-in center). If the public entity "maintained and operated …an inspection system with due care and did not discover the condition, it will be difficult to establish that the public entity had the actual or constructive notice required to hold that public entity liable."[42]
- **Remediate any Dangerous Conditions Identified**: Once a public entity has an inspection system in place, it should also have a system in place to quickly remediate it, thus making the community a better and safer place while also protecting itself from liability. If a dangerous condition cannot be remediated immediately, remediate as much as possible and place adequate warnings near the condition to warn the public of its

[42] (Gov. Code § 835.2 (b)(2))

dangerous nature (including temporary warnings like spray painting sidewalk lifts), then assign funding and develop a plan to remediate the issue as soon as you are able.

- **Document, Document, Document**: Document all activities related to design, construction, maintenance, repair of any public property or project. This includes documenting with photographs any condition before and after repairs. This will help ensure consistent implementation of your projects, possibly protect you via design immunity and provide better evidence should the case go to trial.[43] It is also important to photograph and document the area of an incident as soon as the public entity receives a claim since property and conditions can change over time. Memories fade, witnesses retire or change jobs. So, if it might be important write it down!

The following are strategies and considerations for specific common causes of dangerous condition cases that should also be considered and implemented to minimize liability:

A. Sidewalks

1. Documented Inspection System

Implement an inspection system that optimally inspects for imperfections of public property on an ongoing basis. Upon completion of each inspection, ensure that staff create a detailed report and associated map demonstrating the area inspected and retain this information for at least five years.

a. Considerations for Documenting Sidewalk Deviations

Ensure that if your inspection team encounters a sidewalk deviation it is measured from the base of the actual lift to the top and a clear, up-close picture is taken to document the actual height of the lift. Under the trivial defect doctrine, the relevant measurement should be the size of the defect that creates a potential tripping hazard, not the aggregate elevation change from all surrounding slabs.[44] As previously discussed, courts tend to deem a sidewalk deviation of an inch or lower to be trivial as a matter of law. While there are cases that hold that a sidewalk deviation up to 1.5 inches falls within triviality, courts are less likely to do so, especially if other aggregate factors are present (i.e., poor lighting, obstructions, debris.) However, if a public entity can clearly demonstrate the height of the sidewalk deviation giving rise to the claim was an inch or less at the time of the incident , and there are no other aggravating factors, then there is a good chance it will be deemed trivial as a matter of law.

Additionally, should a public entity encounter a sidewalk deviation, it should provide a clear and distinct warning as soon as possible. The warning should make the condition open and obvious and command attention to alert pedestrians of the defect and satisfy the public entities

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[43] (Gov. Code §830.6)

[44] (*See Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092, 1107 [sidewalk elevations ranging from three-quarters of an inch to one and one-half inches have generally been held trivial as a matter of law]; *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 725–726 [defects of about three-fourths of an inch are not dangerous as a matter of law].)

requirement that it is "protecting against" the alleged dangerous condition[45]. For example, spray painting the rise with a bright spray paint until work crews can repair a sidewalk deviation can be an effective tool to offer a warning that meets the Government Code's definition of "protect against." Also, a public entity might want to consider some form of temporary barrier such as cones. Furthermore, public entities should make every effort to ensure that in addition to providing a warning prior to repair, it also makes every effort to keep the deviation free from debris or obstruction in case a pedestrian were to have an incident prior to the time the entity is able to repair in order to further enhance the argument that the deviation is trivial as a matter of law.

B. Roads

Government Code Section 830.8 states that "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care" To that end, if Plaintiff raises a claim that an intersection rose to the level of a dangerous condition due to a lack of traffic lights or signage for example, the public entity could likely not be held liable as a result.

VI. CLAIMS CONSIDERATIONS

Whenever a public entity receives a claim alleging a dangerous condition of public property, there are recommended first steps that should be taken at the initial receipt stage to determine if a viable claim has been presented, and to prepare in the making of immediate challenges that could dismiss the case early.

First, ensure that your public entity has a complete, accurate, and up to date claim receipt database that can be searched by location area and date of incident and receipt of claim. This can provide a host of benefits. For example, if a lawsuit is received, and no claim has been filed within six months of the incident giving rise to the claim directly to the public entity and prior to filing suit, the City can either file a Demurrer/Motion to Strike or a Motion for Summary Judgment on the basis that Plaintiff failed to comply with the Tort Claims Act and is therefore precluded from bringing the action to Court.

Second, if Plaintiff filed a claim with the public entity prior to initiating suit, but did not do so within six months of the date of the incident, the public entity may also claim Plaintiff's failure to adhere to the Tort Claims Act as a basis for the case to be dismissed.

However, it should be noted that should a public entity receive a claim after the six month period, Plaintiff can present a written application to the public entity for leave to present

[45] Government Code §§ 830 (b), 835 (b)

the claim, but the application must be presented along with the claim no more than one year after the date of the incident giving rise to the claim.[46] If an application is presented with the late filed claim, the public entity has 45 days to grant or deny the application, and the timing can be extended by written agreement. [47] If the public entity does not act in any manner on the application, then it is deemed denied on the 45th day.[48] A public entity "shall" grant the application if one or more of the following are applicable: "(1) The failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect and the public entity was not prejudiced in its defense of the claim by the failure to present the claim within the time specified in Section 911.2; (2) The person who sustained the alleged injury, damage, or loss was a minor during all of the time specified in Section 911.2 for the presentation of the claim; (3) The person who sustained the alleged injury, damage, or loss was a minor during any of the time specified in Section 911.2 for the presentation of the claim, provided the application is presented within six months of the person turning 18 years of age or a year after the claim accrues, whichever occurs first; (4) The person who sustained the alleged injury, damage, or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of that disability failed to present a claim during that time; (5) The person who sustained the alleged injury, damage, or loss was physically or mentally incapacitated during any of the time specified in Section 911.2 for the presentation of the claim and by reason of that disability failed to present a claim during that time, provided the application is presented within six months of the person no longer being physically or mentally incapacitated, or a year after the claim accrues, whichever occurs first; and/or (6) The person who sustained the alleged injury, damage, or loss died before the expiration of the time specified in Section 911.2 for the presentation of the claim."[49]

Conversely, if a Plaintiff files a late claim without the application mentioned previously, the public entity "any time within the 45 day period after the claim is presented, give written notice to the person presenting the claim that the claim was not filed timely and that it is being returned without further action."[50] In fact, the Government Code provides that the notice "shall be in substantially the following form:

'The claim you presented to the (insert title of board or officer) on (indicate date) is being returned because it was not presented within six months after the event or occurrence as required by law. See Sections 901 and 911.2 of the Government Code. Because the claim was not presented within the time allowed by law, no action was taken on the claim.

Your only recourse at this time is to apply without delay to (name of public entity) for leave to present a late claim. See Sections 911.4 to 912.2, inclusive, and Section 946.6 of the

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[46] Govt. Code Section 911.4(a-b).

[47] *Id*. at Section 911.6(a)

[48] *Id*. at Section 911.6(c).

[49] *Id*. at Section 911.6(b)(1-6).

[50] *Id*. at Section 911.3(a)

Government Code. Under some circumstances, leave to present a late claim will be granted. See Section 911.6 of the Government Code.

You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.'"[51]

It is critical that public entities have a draft response to late filed claims without an application such as the above as "Any defense as to the time limit for presenting a claim described in subdivision (a) is waived by failure to give the notice set forth in subdivision (a) within 45 days after the claim is presented, except that no notice need be given and no waiver shall result when the claim as presented fails to state either an address to which the person presenting the claim desires notices to be sent or an address of the claimant."[52] Therefore, to preserve what could be an outright defense to a late filed claim without an application for leave to file late, it is imperative that notices are provided in this format right away.

Third, this form of organization allows for public entities to provide counsel with confirmation if the public entity had prior actual notice of the alleged dangerous condition, which can also be a strong defense in a Motion for Summary Judgment to dispense of a dangerous condition claim.

Additionally, ensure that your public entity has clearly delineated borders and boundaries, and that this information is readily accessible to the public in both online and physical format. Should a Plaintiff sue a public entity and that particular entity does not own, operate, control, manage, or employ those working at that property, then it cannot be held liable for a dangerous condition claim. In these circumstances, if a clear and distinct boundary is identifiable, you can share this information with Plaintiff and/or their counsel and confirm to them that the alleged dangerous condition is not within the public entity's jurisdiction and is therefore not responsible. In these instances, you can work with opposing counsel and staff to create a declaration that attests to the lack of ownership and control of the property, which can be provided in exchange for a dismissal without prejudice, thereby creating a cost effective and expedient method to resolve claims that are of no moment.

VII. CONSIDERATIONS FOR EFFECTIVE MOTIONS FOR SUMMARY JUDGMENT

While not every dangerous condition of public property lawsuit is suitable for a Motion for Summary Judgment (or in the Alternative Summary Adjudication) ("MSJ/MSA"), it is imperative to analyze the case or claim as soon as it is received and as part of this initial review ask questions such as:

(1) Does the alleged dangerous condition meet the definition per the Government Code?

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[51] *Id.*

[52] *Id*. at Section 911.3(b).

(2) Is the alleged dangerous condition minor or trivial in nature?

(3) Even if a dangerous condition exists, did the public entity have actual or constructive notice? Did an employee of the public entity through negligence or omission create the dangerous condition?

(4) Did the public entity provide a warning prior to the incident giving rise to the claim?

(5) Do any immunities apply to the matter?

If the answer is yes to any of the above, then the strategy should focus on preparing to quickly dispose of the matter via an MSJ/MSA.

In order to strengthen the likelihood of success on such motions ensure that as a public entity, you have easy access to such documents as prior claims, contracts to construct the location to include construction plans and authorization by the public entity, repair and work orders, as well as photographs of any prior repairs or warnings applied, to include clear pictures of measurements of the height of any deviations.

In addition, in support of preparing for an MSJ/MSA, you should craft discovery requests and deposition questions that specifically target the elements Plaintiff must prove to substantiate their claim, as well as ask questions relating to defenses and immunities the public entity can raise in order to strengthen those positions and arguments. For example, questions to Plaintiff relating to the weather at the time of the incident, admitting to a lack of obstructions or debris at the incident location, their knowledge of the area or the alleged dangerous condition prior to the incident, whether they had prior knowledge and did not report it previously, or admitting to viewing a clear and distinct warning are all effective tools that can strengthen your ability to achieve summary judgment.

VIII. PLAINTIFF'S MEDICAL DAMAGES AND USE OF MEDICAL RECORDS AND BILLING IN MITIGATING THE AMOUNT OF CLAIMED DAMAGES

It is not uncommon for a personal injury Plaintiff to overstate or exaggerate their claimed medical claims in an attempt to gain payment for alleged damages sustained that is far greater than what is warranted. To effectively mitigate against Plaintiff's contentions, it is crucial to have knowledge of what the law allows, and strategies that can be used to evaluate the veracity of Plaintiff's alleged injuries.

One of the worst holdings from the California Court of Appeal came from *Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, which held that even if a Plaintiff has valid medical insurance, they can use a medical provider outside of their insurance plan and would be treated as uninsured in the eyes of the Court. As a result of *Pebley*, the Plaintiff personal injury bar has significantly increased the use of third-party lien-based medical providers in order to justify a grossly overinflated amount of damages for procedures that can cost between 30-70% less than what is actually billed. In reality, these providers essentially mark up their services, and once a settlement is on the horizon, counsel for Plaintiff will negotiate these rates with the provider knowing full well that the charged amount is nowhere near a fair market rate for the services provided.

However, the counter to *Pebley* comes in the form of the California Supreme Court decision in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, which held that a Plaintiff can only present the amount either they themselves or their insurance company actually paid to the provider at trial and aspects such as contractual adjustments are not allowable in damages calculations.[53] Thus, when a Plaintiff's medical damages are being evaluated, if they are not from a third party lien-based provider, but rather from a hospital or other medical facility where a Plaintiff's medical insurance was used, then the process of implementing a *Howell* reduction is used to determine what Plaintiff's actual damages are.

For example, if Plaintiff presents to Cedar Sinai and is provided medical care that totals $100,000, but there is a contractual adjustment in the amount of $50,000, and the insurance payment remaining is $50,000, then Plaintiff can only present damages from this provider in the amount of $50,000 per *Howell*.

Therefore, when calculating medical damages, it is imperative that a *Howell* reduction of all medical bills (if applicable) be conducted to provide a clear brightline as to the level of exposure a public entity has on any particular case. However, it should be noted that many Plaintiff side personal injury attorneys will ignore *Howell* and attempt to justify ludicrous settlement figures based on general damages/pain and suffering.

When calculating a reasonable payment figure for third party lien-based providers, it is helpful to contact your carrier to inquire if they have any benchmarks or average cost for certain procedures. For example, many third-party lien-based providers will charge anywhere between $1,800-$3,000 per MRI. Most carriers will indicate that such a procedure typically would cost between $800-$1,200. Therefore, when encountering these providers, especially during deposition, it is vital to ask questions such as "How much do you typically reduce your liens by with a patient" and "Do you accept medical insurance" can assist in demonstrating the providers propensity to markup their services for nothing more than an increased bottom line to themselves and Plaintiff.

Third party lien-based providers may also recommend various procedures that are without any medical efficacy or proven effectiveness. One such procedure is Plasma Rich Platelet ("PRP") injections. This is a procedure where a patient's blood is extracted, cycled through a centrifuge, and then reinjected into the affected area. Providers claim that this stimulates healing through the use of the patients stem cells. However, there are little to no reputable medical journals that substantiate the viability of such a treatment. Additionally, providers will charge anywhere between $15,000-$25,000 per injection. In cases where we have consulted with various medical providers, not only will none of them provide the treatment because they classify it as a modern day "snake oil", they have also informed us that even if they were to offer it, the cost would be somewhere between $600-$800 per injection given the

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[53] *Id*. at 551.

minimal resources and effort necessary to administer this treatment. Therefore, we would strongly encourage any public entity to reject any claim for PRP injections given the exorbitant cost and lack of proven medical efficacy.

Turning to medical records, while granted, few of us are physicians by trade, familiarity with typical medical conditions found in personal injury cases, medications prescribed, and certain terminology, can pay dividends in mitigating and sometimes defeating a Plaintiff's medical claims.

First, although the "Eggshell Plaintiff" rule is something to consider, a Plaintiff's pre-existing condition, especially the surrounding circumstances of it, can lead to invaluable information. For example, if Plaintiff tells you in deposition that in the three years prior to the incident, they fell in a similar manner on more than one occasion, then it is vital to obtain those records, and evaluate the notes from both doctors and nurses to determine the level of damages from each fall. While the incident you are defending could exacerbate a pre-existing condition, if you can find the right information, you can argue that the incident in your matter was neither the mechanism or a cause of Plaintiff's alleged injuries.

For example, if Plaintiff has sustained falls multiple times prior to the incident, and has had a prior surgery, look to records to see if a surgeon recommended a further surgery prior to your incident. If so, you can use that to demonstrate that the subject incident did not cause the need for the surgery, and the public entity is therefore not liable for the cost of said surgery. Additionally, given that back injuries are common in personal injury cases, it is also crucial to not let medical terminology or the presence of disc bulges cause undue panic. Most if not all of us have some form of natural degradation of our back muscles and discs as we get older. Further, most disc bulges or narrowing of the spinal canal (known as stenosis) are not trauma induced, but rather a natural effect of the aging process. Also, a Plaintiff's line of work, (i.e. if they work in construction, or any position that requires constant physical exertion) can also be the culprit of such ailments.

One method to determine if a bulge or stenosis is trauma induced is to subpoena MRI's for several years prior to the incident (typically 5 years prior will stave off any challenges from opposing counsel.) to have an expert review the images side by side to determine if there has been any marked change prior to or after the incident. Additionally, the MRI reports will provide an overview of the noticed conditions in the MRI film. If you are able to determine that there is little to no difference in what has been reported from before and after the incident, then Plaintiff's condition is likely caused by either natural degeneration or some other physical factor not associated with the incident.

With respect to soft tissue injuries such as neck and lower back pain, many Plaintiffs will receive numerous Epidural Steroid Injections ("ESI") or Radiofrequency Ablations ("RFA"). During an ESI, a provider will inject a steroid or corticosteroid into the epidural space around the spinal nerves to ease pain. ESIs and RFAs are rarely necessary unless the pain/injury is severe and long lasting. Furthermore, these treatments are supposed to last several months, and most reputable medical resources will tell you that you should not have more than 3 within a 12-month period in any one area of the body. However, Plaintiffs will often have back-to-back injections in the same area approximately 2-3 weeks apart claiming that they feel no lasting relief. While this practice is not necessarily one that would rise to the level of medical malpractice, most doctors would be hesitant to administer such treatment repeatedly in such a short time span. Therefore, questions should be asked of the Plaintiff such as, "what was your pain on a scale of 1-10 prior to the injection, a few days after, a week, etc.?" Then ask follow-up questions such as, "Do you remember the name of the provider who administered the treatment?" This is of interest because sometimes medical providers will claim they administered the treatment and charge an applicable rate per medical coding, when in actuality, an assistant or a Nurse Practitioner who would command less for administering the treatment, provides it instead. Also, ESIs typically cost between $1,500-$3,000 per injection from most reputable providers, whereas third-party-lien-based providers will charge anywhere between $10,000-$15,000 per injection.

As for RFAs, this procedure essentially burns off nerve endings in certain areas of the body to stop them from sending pain signals to the brain. This procedure is only conducted after several ESIs have been administered, and the pain continues to return. Similar to ESIs while this procedure has medical efficacy, the conditions and cost should be highly scrutinized. For example, if Plaintiff has an RFA without two ESIs prior, then it should be questioned for its need at such an early stage of treatment. Additionally, these procedures typically benchmark anywhere between $2,000-$4,000, and third-party lien based providers will charge upwards of $20,000-$25,000 per procedure.

Another consideration to analyze is the medications Plaintiff was prescribed prior to the incident, in conjunction with other conditions not associated with the incident. It is helpful to start learning side effects of commonly used medications and any potential interactions that could explain Plaintiff's claimed symptoms. For example, Plaintiff could claim that since the incident took place, they are suffering from dizziness and foggy memory and use this as a justification for a TBI diagnosis. However, if this patient was taking Xanax for anxiety and was also taking a opioid such as Oxycodone, these two medications combined could easily explain both symptoms, and not necessarily the incident itself. Therefore, when creating discovery or deposition questions, be sure to ask about Plaintiff's use of their medications, and have them admit the frequency and usage of each medication, and confirm they had taken them prior to the incident, in order to have an argument that medications explain their symptoms and not the incident in question.

Further, if a Plaintiff suffers from a condition such as Type 2 Diabetes, and it is not medicated, this can present significant issues with numbness in extremities such as the legs and arms, even to the point where there would be difficulty walking, which could be used as a basis to create comparative fault for the incident for not using due care.

Lastly, medical records can be a veritable treasure trove of information to defending personal injury claims. Doctors and nurses are apt to note a patient's recount of events in preparing treatment. There are many instances where facts alleged by Plaintiff do not coincide with what was presented to their physician. For example, Plaintiff might tell the doctor that they fell on their right hand, and received treatment for it, when they are alleging they injured their left hand in an incident. Sometimes, even accompanying relatives or spouses can provide information to a medical provider that makes its way to the notes that can provide useful information. For example, if a spouse tells the doctor that Plaintiff had been experiencing shuffling gait or balance issues prior to the incident, and they were prescribed a cane or walker and didn't use it at the time, this information can be used to forward a claim for comparative fault thereby reducing the overall amount the public entity would be liable for.

Therefore, taking additional time to understand the language and contents of medical and billing records with your matter can provide useful information that can be used to defend against the cost of Plaintiff's treatment for their injuries and lead to information that can help experts solidify their diagnosis that the incident didn't cause their alleged injuries at all.

IX. CONCLUSION

With dangerous condition of public property cases showing no signs of abating anytime soon, it is even more imperative that public entities fully examine their internal practices in not just claim handling, but in their preventive measures, repairs, warnings, and record keeping. Having a photograph of a sidewalk deviation clearly being one inch in height, or a photograph of a clear and distinct warning could be the difference between a successful MSJ/MSA, or a long litigation and trial process.

By implementing regular evaluations and cost-effective measures internally, in conjunction with recognizing the importance of discovery, depositions, MSJ/MSA's, and medical records and billing, a public entity can face any "dangerous" situation it faces head on with conviction and unwavering strength in pursuit of its defense.

Land Use and CEQA Litigation Update

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Cases Reported March 16, 2025, through August 31, 2025

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Thursday, October 9, 2025
8:30 a.m.

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Fall 2025

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I. CEQA Case Summaries

A. CEQA Compliance Issues -- Greenhouse Gas, VMT, and Related Issues

Cleveland National Forest Foundation v. County of San Diego
(2025) 110 Cal.App.5th 948

Nutshell

A county's study supporting new VMT thresholds of significance was not sufficient evidence to support adoption of such thresholds because the study specifically stated that additional evidence would be necessary to confirm that certain infill areas would have less than significant VMT impacts, and because it included evidence demonstrating that VMT impacts in some of the infill areas proposed to be screened out actually exceeded the countywide average.

Holding

The County's thresholds of significance for VMT analysis were invalid because the assumptions underlying such thresholds were not supported by substantial evidence.

Practice Tips

When establishing screening thresholds of significance, local agencies cannot rely on generally applicable statewide standards. Instead, thresholds must be based on evidence (e.g., local facts and conditions) supporting their applicability. Cities may use the OPR Technical Advisory for guidance but cannot rely on that document or other statewide or general analysis that does not refer to specific, local conditions.

Summary

In 2022, the County had adopted a revised Transportation Study Guide that included these thresholds (along with 5 unchallenged thresholds of significance). The Transportation Study Guide and updated thresholds were intended to implement SB 743 (Steinberg, 2013), which required cities to use the vehicle miles traveled ("VMT") metric rather than level of service ("LOS") metric, to evaluate transportation-related CEQA impacts. The State Office of Planning and Research ("OPR") also published a Technical Advisory for SB 743 which noted that cities could develop their own VMT thresholds based on certain types of project characteristics, including smaller projects generating fewer than 110 trips per day.

Petitioner challenged the County of San Diego's use of two thresholds of significance to screen out the need for a developer to perform a VMT analysis: the infill project threshold of significance (for projects proposed to be built within the County's unincorporated villages) and the small project threshold of significance (for projects that are expected to generate no more than 110 automobile trips per day).

The County based its infill threshold on the general assumption that development in more dense areas, including infill development, does not significantly impact VMT. The County noted that

SB 743 was purposefully targeting a switch from direct traffic impacts to VMT to promote infill development and concluded that "[d]evelopment in more dense areas with high job accessibility leads to more diversity in land use, demand for transit (bus and trolley) and multimodal infrastructure (walking and biking), and shorter vehicle trips, which reduce greenhouse gases and VMT." The County further characterized the method its infill consultant used to identify infill locations as substantial evidence supporting adoption of the threshold.

The court held that adoption of the threshold was not supported by substantial evidence because the Transportation Study Guide itself stated that the County "would require evidence to support the determination that projects in these locations would have a less than significant transportation impact and meet the intent of [Senate Bill] 743" and that associated maps showed that infill development in the westernmost unincorporated areas of the County will likely generate per capita VMT *in excess* of the County average. The court concluded: "The County has chosen to identify specific unincorporated areas as infill, where development can presumptively occur without performing a VMT analysis. But it has done so without providing any evidence that developing infill, as it has chosen to define it, would generally result in an insignificant transportation effect at the local county."

The County based its small project threshold on OPR's Technical Advisory, which advised that projects producing 110 trips or fewer per day could be considered not to lead to a significant impact. However, the court stated that the mere fact that OPR suggested or recommended a small project threshold cannot, by itself, excuse the County's failure to provide any evidentiary support for the assumption that small projects do not create significant transportation impacts under local conditions. The record thus lacked evidence of such local conditions or facts supporting the 110-trip threshold.

Center for Biological Diversity v. County of Los Angeles
(2025) 112 Cal.App.5th 317

Nutshell

An EIR for a massive (12,000-acre, 19,000+ residential units plus commercial and industrial) specific plan development project cannot rely upon state cap-and-trade regulations to offset the project's significant unmitigated greenhouse gas emissions.

Holding

Los Angeles County's certification of the Centennial Specific Plan's EIR violated CEQA, as it improperly relied on the state cap-and-trade program to offset the project's estimated greenhouse gas emissions, despite the project not being a "covered entity," and the EIR improperly double-counted certain carbon offsets as mitigation.

Practice/Litigation Tips

Local agencies may not rely on cap-and-trade compliance by upstream energy providers to offset its GHG emissions impacts. CEQA mandates that mitigation must be project-specific in addition to any reductions already required by law.

Summary

The Center for Biological Diversity and Climate Resolve challenged Los Angeles County's certification of an environmental impact report ("EIR") for the Centennial Specific Plan ("Plan"). The Plan proposed a massive mixed-use development in northern Los Angeles consisting of 12,323 acres that proposes approximately 20,000 residential units. Both groups allege that the EIR violated CEQA by improperly relying on California's cap-and-trade program to offset the Project's unmitigated greenhouse gas ("GHG") emissions and by failing to analyze wildfire impacts beyond the project site.

Under the cap-and-trade program, certain covered entities, including large industrial facilities and energy providers, must obtain allowances for their GHG emissions, which may be purchased, sold, banked or offset through reduction projects. The EIR acknowledged significant emissions estimated of the Project at 157,642 metric tons of CO_2 annually but proposed to mitigate 96% of this impact using cap-and-trade compliance by upstream energy providers. The trial court found this approach misleading because the Centennial Project was not a covered entity under the cap-and-trade regime and because the CEQA guidelines prohibit relying on emission reductions already mandated for other entities. Offsets must meet an "additionality" requirement which requires they occur in addition to reductions required by law or regulation and beyond what would otherwise occur. The court ruled the County failed to proceed in the manner required by law because the EIR's disclosure misrepresented the Project's environmental impact.

The Court of Appeal affirmed, holding that the EIR's mitigation of GHG through upstream compliance was "prejudicially misleading," that it violated the additionality requirement, and failed to proceed in the manner required by law. First, the Court of Appeal agreed with the trial court that the EIR's analysis regarding GHG mitigation was flawed, as the cap-and-trade program does not authorize the offset of carbon emissions by "downstream" users (i.e., retail users) of fossil fuels or electric power delivered by "upstream" covered entities (i.e., energy producers and suppliers). Further, the Court agreed that the Project does not fall within the cap-and-trade program because, as a mixed-use land use project, it is not a covered entity (like an oil refinery) and because the "additionality" requirement *disqualifies* mandatory carbon offset reductions from counting as permissible mitigation under the Project. The court thus affirmed the decertification of the EIR and the requirement that the County correct the deficiencies before recertifying the environmental review.

B. CEQA Litigation Procedural Issues -- Indispensable Parties

Citizens for a Better Eureka v. City of Eureka
(2025) 111 Cal.App.5th 1114

Nutshell

Another example of a CEQA challenge being dismissed because the petitioner failed to timely name the developer/applicant as a necessary and indispensable party, though this case has the added wrinkle that the developer was not even known until three months after the challenged action.

Holding

The court held that the Wiyot Tribe was a necessary and indispensable party with an interest in petitioner's CEQA challenge to a city's approval of an affordable housing project on a city-owned parking lot, given that the Tribe itself was to be the developer of the project, even though the Tribe's role had not even been known at the time the action was originally filed. The Tribe could not be joined due to the statute of limitations barring joinder; therefore, dismissal of the petition was appropriate.

Practice/Litigation Tip

It is less common these days for a petitioner to neglect to name a developer/applicant as a real party in interest, but it can still sometimes provide for an effective procedural defense.

Summary

Citizens for a Better Eureka ("CBE") challenged the City of Eureka's April 2023 resolution authorizing the modification of public parking from a City-owned lot for the development of affordable housing, to be developed by the Wiyot Tribe. The City determined the action was exempt from CEQA under Class 12 categorical exemption for sales of surplus government property. In its petition for a writ of mandate, CBE alleged the City improperly "piecemealed" the CEQA analysis by limiting review to the parking lot decision rather than considering the environmental effects of the anticipated redevelopment of the lot into housing.

Three months later, the City selected the Tribe as the developer, executing a memorandum of agreement granting it development rights and filed an NOE for the project. The Tribe had invested a significant amount of time and resources into planning, securing funding, and contracting for the project.

In February 2024, the Tribe (which had not been named in the lawsuit) specially appeared to move for dismissal of CBE's petition, arguing that it was a necessary party under Public Resources Code section 21167.6.5, subdivision (a) and Civil Procedure section 389. The Tribe asserted it could not be joined due to its sovereign immunity and that proceeding without it would prejudice its interests. The trial court agreed, finding that the Tribe was an indispensable party and that CBE failed to join it within the statute of limitations triggered by the NOE.

The Court of Appeal affirmed. It concluded that the project CBE sought to challenge encompassed the redevelopment of the parking lot into affordable housing, not merely the resolution authorizing the reduction of parking. CBE repeatedly argued in its petition that the basis for its CEQA challenge was respondents' failure to consider the environmental impact of the entire redevelopment project, not just the removal of parking. Therefore, the redevelopment resulting from the April resolution served as the crux of CBE's CEQA challenge. CBE's failure to join the tribe (which was selected as the developer in July) within its limitations period barred joinder, and the trial court did not abuse its discretion is dismissing the action.

C. CEQA Claims Asserted for Economic or Other "Non-Environmental" Reasons (Abusive CEQA Litigation?)

Camarillo Sanitary District v. State Water Resources Control Board (2025) 113 Cal.App.5th 407

Nutshell

In a highly technical opinion, the court held that the State Water Resources Control Board could not use certain toxicity requirements as enforceable standards in NPDES permits (a holding that is likely to be to the partial relief of a wide range of permittees, including our municipal clients). But the court otherwise rejected various state-law grounds for invalidating such requirements, including rejection of relatively weak arguments that the Board improperly determined that its requirements would not result in potentially significant CEQA impacts. The decision thus allows for some use of these standards outside the specific context of NPDES permits (including in the context of waste discharge requirements imposed under California, rather than federal, law).

Holding

The Board properly utilized a substitute CEQA document and properly determined that its use of more stringent NPDES permitting requirements would not result in potentially significant CEQA impacts.

Practice/Litigation Tip

Courts continue to cast a skeptical eye on industry-proffered CEQA challenges to regulatory actions that are, in fact, designed to better protect the environment.

Summary:

This case involves the Toxicity Provisions regulations adopted by the State Water Resources Control Board. The Toxicity Provisions comprise a combined state-wide water policy and state water quality control plan intended to apply to both waters of the United States and surface waters of the state. These Toxicity Provisions are designed to implement the test of significant toxicity for both acute (short term) and chronic (long term) toxicity water quality standards in California. The Toxicity Provisions were adopted in December 2020 and were readopted in conjunction with a subsequent court order in October 2021.

In very technical portions of the opinion unrelated to CEQA, the court held that the Board could not incorporate such Toxicity Provisions as enforceable standards in NPDES permits under the Federal Clean Water Act. Interestingly, in so holding, the court expressly found that the Board's statements in support of such requirements were not entitled to deference, as those findings were not adequately supported with evidence and analysis (and, indeed, were partly contradicted by the Board's own evidence).

However, the court otherwise rejected various challenges to the Board's adoption and enforcement of such standards outside the specific context of federal NPDES permits. With respect to CEQA, the Appellants argued that the State Board was not authorized to use a substitute environmental document to complete its environmental review and the State Board failed to adequately consider potentially significant environmental impacts.

The court concluded that the State Board did not violate CEQA or its internal regulations. First, the court held that the State Board was authorized to use a substitute environmental document (the basin plan) under its CEQA certified regulatory program because all water policy decisions fall within this program, as the program referred to the entire planning process related to water quality. Second, the State Board properly found there were no potentially significant environmental impacts coming from the Toxicity Provisions. An essential component of this analysis relied on the fact that substitute environmental documents must include an analysis of "reasonably foreseeable methods of compliance" by regulated entities and of "any reasonably foreseeable significant adverse environmental impacts associated with those methods of compliance[.]" Stated differently, future actions that are reasonably foreseeable warrant a discussion of its possible environmental effects, but not necessarily a detailed analysis of specific acts that are too speculative at the time the substitute environmental document is prepared.

While the State Board went further than required for transparency and disclosure purposes and also identified potentially significant environmental impacts that could arise should certain polluters seek to correct future toxicity issues, the court held that the State Board had no obligation to then mitigate those potential effects. The State Board's analysis, according to the Court, "provided a wealth of relevant information covering those activities it deemed too speculative to be reasonably foreseeable means of compliance … [and] [i]ts overall discussion constitutes substantial evidence supporting its conclusion that toxicity control efforts are not reasonably foreseeable means of compliance with the Toxicity Provisions."

II. <u>Land Use Case Summaries</u>

A. Mitigation Fee Act and *Nollan/Dolan* Regulatory Takings

Sheetz v. County of El Dorado
(2025) 113 Cal.App.5th 113

<u>Nutshell</u>

No, the sky is not falling after the U.S. Supreme Court's (unanimous) decision in *Sheetz v. County of El Dorado* (2024) 601 U.S. 267 applying the *Nollan*/*Dolan* nexus and rough proportionality requirements to legislatively adopted development fees. On remand, the Third District had no trouble finding that the County's $23,420 traffic impact fee imposed on development of a new prefabricated single-family home satisfied these requirements. The court relied on the nexus analysis that the County had previously conducted prior to legislatively adopting the fee, and rejected various (rather dubious) arguments Sheetz made in his attempt to challenge that analysis.

<u>Holding</u>

A traffic impact fee did not constitute an unlawful taking without just compensation in violation of the takings clause. The court upheld the analysis in the County's nexus study it had prepared before adopting the traffic impact fee, finding that it adequately demonstrated an essential nexus between the County's interest in reducing traffic congestion from new development and the permit condition requiring a property owner to pay a traffic impact fee to mitigate the traffic impacts, and that the amount of the fee was roughly proportionate to the traffic congestion caused by the new development under *Dolan*.

<u>Practice/Litigation Tips</u>

- It should go without saying that the preparation of adequate nexus studies to justify development impact fees requires a lot of careful work and analysis in order to satisfy the requirements of the Mitigation Fee Act. Once prepared, however, an adequate nexus study should have ample analysis to rebut any later *Nollan*/*Dolan* takings challenges brought against impact fees when they are actually imposed on individual projects.
- However, local governments cannot rest on their laurels after adopting fees. Perhaps the most frustrating result of the *Sheetz* holdings is that new arguments may be raised years after fees are initially adopted. Thus, agencies must continue to review and update nexus studies to ensure that sufficient evidence supports its conclusion that the impact fees are roughly proportional to the impacts of the development.
- Bear in mind that the petitioner in this case made very weak "after the fact" arguments that the County was able to readily rebut. A more sophisticated developer applicant could raise more difficult challenges. Agencies thus should work proactively to make sure the administrative record for each development project adequately documents the need for existing development fees. The CEQA analysis for each project may provide a useful mechanism for documenting development impacts warranting the imposition of existing impact fees.

<u>Summary</u>

This decision is on remand from the United States Supreme Court decision *Sheetz v. County of El Dorado, California* (2024) 601 U.S. 267. This dispute resulted from a challenge to El Dorado County's traffic impact fee, which was imposed as a condition for a (ministerial) building permit. Sheetz paid the $23,420 fee under protest and obtained the building permit, but later challenged the fee in state court, alleging that the conditioning of a building permit on the payment of a traffic impact fee constituted an unlawful exaction of money, and therefore an unconstitutional taking, under the Fifth Amendment. While the California court of appeal previously held that the *Nollan/Dolan* test applies only to permit conditions imposed administratively, not legislatively, the United States Supreme Court rejected this holding, finding that the *Nollan/Dolan* test applies to both legislative and administrative permit conditions. However, the Supreme Court did not address the parties' disputes over the validity of the traffic impact fee at issue and declined to rule as to whether a permit condition imposed on a class of properties must be tailored to the same degree of specificity as a permit condition imposed on a specific development.

On remand, the California Court of Appeal held that the challenged traffic impact fee did not constitute an unlawful monetary exaction under the *Nollan/Dolan* test. The Court first analyzed whether the fee has an essential nexus because of the County's interest and the permit condition. The Court found that an essential nexus exists because reducing traffic congestion is a legitimate government interest in the land use context where the landowner seeks a permit for new development that obviously will incrementally add traffic to the existing road network.

As to the rough proportionality standard, the Court first concluded that "the same constitutional rules apply whenever the government seeks to offset the public costs of new development through land-use exactions, regardless of whether the exaction (e.g., impact fee) is generally applicable to a class of permit applicants (as here) or is imposed on an individual basis in connection with a specific development project." Next, the Court found that the traffic impact fee satisfied the rough proportionality standard. In doing so, the Court reasoned that although *Dolan* did not explicitly endorse the reasonable relationship test used by California courts, the "rough proportionality" standard essentially adopted this reasonable relationship test. Under this test, the local government has the burden of producing evidence sufficient to demonstrate that it used a valid method for imposing the fee in question, one that established a reasonable relationship between the fee charged and the burden posed by the development." Applying the above test, the Court found that the administrative record included sufficient evidence establishing that the traffic impact fee satisfied the "rough proportionality" standard.

B. General Plan Consistency

Solano County Orderly Growth Committee v. City of Fairfield
(2025) __ Cal.App.5th __ (2025 WL 2476476)

Nutshell

A city's agreement to treat raw water to serve development approved by a county outside its borders was not the type of land use approval that needed to be consistent with the city's general plan. But, even if it was so required, the court upheld the city's (mostly implied) findings that it was so consistent, notwithstanding language in the City's general plan that frowned upon "urban" development outside of the city's urban limit line.

Holdings

1) Where a city is acting purely as a utility service provider, here to provide treated water, for the benefit of a development project approved by the county, and it's not exercising any land use/zoning discretion to actually approve development, it need not make any findings of general plan consistency.

2) Even if such general plan consistency findings were required, under the appropriate deferential standard of review, the court had no trouble upholding the city's determination that the limited provision of such water service was consistent with the City's general plan, notwithstanding policies that discouraged urban development outside the city.

Practice/Litigation Tips

Where a city is acting solely to provide some type of utility service (such as water) to development outside its boundaries, and is not itself exercising its land use discretion to actually approve such development, its actions are not subject to review for general plan consistency. The city may essentially defer to the county's discretion in approving such development.

Summary

At the request of the County of Solano, in 2022 the City of Fairfield and the Solano Irrigation District entered into an agreement by which the City would receive "raw water" from the District, treat the water at existing City facilities, and supply the District with an equivalent amount of potable water for use in a new mixed-use development that had been approved by the County in an unincorporated area known as Middle Green Valley, just outside the Fairfield city limits. The City would simply treat water provided by the District and make it potable; the District would do the rest, including distribution, operations, maintenance, and billing, and would bear all costs associated with serving the potable water. In written materials prepared before the Fairfield City Council voted on the resolution authorizing the City to enter into the agreement, the City stated that it had the right to serve water as a wholesaler for use outside the City's boundaries, that entering the agreement was consistent with the City's current practice, and that the agreement was modeled on an existing water treatment agreement between the City and the District.

After the resolution was passed and the potable water service agreement was signed, petitioner citizen group filed a petition for writ of mandate to invalidate it, alleging that the City's approval of the agreement conflicted with an express policy in the City's 2002 General Plan and therefore violated the Planning and Zoning Law (Gov. Code, § 65000 et seq). Petitioner specifically relied on a general plan policy that stated: "What is urban shall be municipal, and what is rural shall be within the County."

The trial court agreed with Petitioner, issuing mandamus relief to invalidate the agreement, but the court of appeal reversed on two alternative grounds.

First, as a threshold matter, the court held that nothing in the Planning and Zoning Law, or any other law, required that the City's agreement to provide such municipal services even needed to be consistent with the City's general plan in the first place. The City here was not even making a "local decision affecting land use," as that decision was made by the County, not the City.

Second, even assuming "for the sake of argument" that the water service agreement needed to be consistent with the City's general plan, the court held that the City did not abuse its discretion in so finding (even though the City's findings were mostly made by implication rather than explicitly). The court identified two separate rationales for the City's determination. First, it reasoned that "a reasonable person could conclude that in treating raw water supplied by the District for the District then to provide to its own customers, the City is not providing a 'basic municipal service.'" And second, it held that the City could reasonably determine that the development project was "rural" rather than "urban" in nature:

> "The description of the Project on which the Committee relies shows that the Project is part of a specific plan, approved by the County, that provides for 'clustered development on 257 acres' (that is, the mixed-use development at issue) while preserving the majority of the land in Middle Green Valley, 1,490 acres, for agriculture and open space. Although 123 acres of agricultural land would be converted to non-agricultural uses, more than '577 acres of prime farmland, 50 acres of unique farmland and over 1,200 acres of non-prime farmland and natural open space will be permanently protected.' Further, the preserved prime farmland is much greater than the amount of land currently used for agriculture, because only about 200 acres are currently under cultivation. Thus, a reasonable person could conclude that the Project is compatible with agriculture and open space, and therefore does not constitute urban development even under the Committee's own proposed definition."

Thus, the court concluded: "In sum, assuming that California law requires the City's approval of the Agreement to be consistent with the General Plan, we conclude that the City reasonably determined that the approval was consistent with its General Plan."

C. <u>Permit Streamlining Act</u>

Old Golden Oaks LLC v. County of Amador
(2025) 111 Cal.App.5th 794

<u>Nutshell</u>

The court invalidated a county's vague "catch-all" requirement that an application for an encroachment permit must include "other information as may be required by the director," as that requirement clearly lacked the specificity mandated under the Permit Streamlining Act. However, this deficiency really had no practical impact in this case, because the county's requirements for applications for grading permits were adequately specific.

<u>Holdings</u>

1) A "catch-all" provision on an encroachment permit submittal checklist violates the Permit Streamlining Act ("PSA") because it does not specify in detail the information required for a development project application.

2) The local agency may condition completeness of a grading permit application on a requirement that the project application include sufficient information to comply with CEQA.

Practice/Litigation Tip

- Make sure your local agency is complying with current requirements of the Permit Streamlining Act in specifying what information an applicant must include in order for any development application to be deemed complete. These requirements apply even to applications for encroachment permits.
  - But this particular case appears to be much ado about nothing. The county's requirements in this case for grading permits adequately detailed what information was needed for a complete application, and thus the court found that the county properly determined that the application was not complete. The county was just slightly tripped up because it also did not include such specificity in its requirements for encroachment permit applications.

Summary

This project involves a residential subdivision created by a map Amador County approved back in 1973. In 2023, Old Golden Oaks applied for a grading permit and an encroachment permit from the County to construct streets and water service facilities. The County's submittal checklist for the grading permit application required a proposed erosion control plan, a copy of any right-of-way agreements, a notice of intent, a stormwater pollution prevention plan, engineered plans, and an indemnification agreement if the project is subject to CEQA. The County's submittal checklist for the encroachment permit included the following catch-all provision for "[o]ther information as may be required by the director [of transportation and public works]." The County informed Old Golden Oaks that its applications were incomplete, and Old Golden Oaks then filed suit.

Regarding the encroachment permit, the court held that the application violated the Permit Streamlining Act because the "catch-all" provision contrasted with the PSA's mandate to "specify in detail" the requisite information for a permit. In fact, the "catch-all" provision frustrated the PSA's purpose to "ensure clear understanding of the specific requirements which must be met in connection with the approval of development projects." While the county may seek to condition an encroachment permit's application on supplying the correct environmental information, such information must be specifically apart of the submittal checklist under the PSA.

Regarding the grading permit, because all of the reasons the County declared the application incomplete were specified in the submittal checklist, the County's decision was correct. In fact, the submittal checklist explicitly asked the applicant whether the project was subject to CEQA, which is sufficient to comply with the PSA. Additionally, the fact that the County keeps the information on multiple checklists is not a violation of the PSA.

Meeting Housing Needs while Balancing CEQA and Fire Prevention Efforts

A Crossroads for Cities and Counties: Where the Housing Crisis and Fire Safety Collide

California is at the crossroads of a significant public policy conflict: how do we facilitate construction of much-needed housing without creating risks to public health and safety in the inevitable event of a wildfire?

Development in the wildland urban interface (WUI) leaves people and property more vulnerable to wildfire and can increase the risk of ignition by humans. One recent paper summarizes the issue and its relationship to meeting California's housing goals:

> A crucial issue for many of the major pathways for facilitating housing development in California--whether it is trying to develop CEQA exemptions for individual projects, supporting local government efforts to upzone across neighborhoods or cities to facilitate development more broadly, or having the state intervene to restrict local discretion in land-use regulation--is ensuring that the pathway actually produces housing where state officials want it, and not where they do not. . . . For example, as it stands, current state housing element law could require substantial housing production in jurisdictions that are located almost entirely in high fire hazard areas.[1]

Densifying housing in urban and suburban hills may help with affordability, but some fear it could create a problem if disaster strikes, while others argue this is simply the new pet issue of wealthy NIMBYs. This paper will discuss the development of this conflict, potential implications, and what cities and counties can do to balance these important priorities.

The Housing Crisis

California is, indisputably, in the midst of a housing affordability crisis. Historically, many obstacles have stood in the way of housing production, including high construction costs, local land use control, and opposition to development, with the California Environmental Quality Act (CEQA) being frequently utilized by NIMBYs.

The State of California has spent the last decade trying to facilitate development of housing by usurping local land use control and removing obstacles that increase costs and delay. Significant housing legislation over the last five years includes SB 330, which streamlined housing projects and purported to remove administrative hurdles; SB 35, which created a streamlined, ministerial approval process for qualifying housing projects; SB 9, which required ministerial approval of urban lot splits for residential projects and facilitated construction of ADUs; and SB 10, which

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[1] Eric Biber, Christopher Elmendorf, Nicholas Marantz, Moira O'Neill, *Just Look at the Map: Bounding Environmental Review of Housing Development in California*, 54 Envtl. L. 221, 263 (2024), citing as an example, *Wildland Urban Interface*, Fire Safe Marin, https://perma.cc/8UPZ-E76T. "Specifically, these communities will shortly receive regional housing needs allocation (RHNA) quotas that require significant production of housing under state law, with a range of potential consequences that might occur if those quotas are not met, including the ability for developers to construct housing inconsistent with components of the local jurisdiction's zoning regulations. *See* Ass'n of Bay Area Gov'ts, Final Regional Housing Needs Allocation (RHNA) Plan: San Francisco Bay Area, 2023-2031, at 24, 26 tbl.4 (2021), https://perma.cc/RLF7-P4X6 (requiring, in a draft proposal, the city of Mill Valley to produce 865 units between 2024 and 2031)." The study focused on three counties, finding that most of the proposed development that San Diego County in the study years was located in a very high- or high-risk fire hazard zone.

allowed, but did not require, a local jurisdiction to adopt an ordinance allowing for up to 10 units per parcel in transit-rich areas. However, some of this housing legislation authorizes a local government to establish objective criteria in evaluating housing projects, including criteria on fire protection.

The net effect of this effort has been increased zoning for and construction of dense housing in all parts of the state, including hilly and mountainous regions; streamlined review for housing where it meets certain criteria, potentially removing the requirement for review of wildfire impacts; and remedies against Cities and Counties who do not approve housing, even where there are potential concerns about wildfire.

Wildfire

Meanwhile, the State of California has faced an increase in the severity and frequency of extreme wildfires, culminating most recently in the Palisades fires, with caused immense destruction. A 2024 study by scientists from the University of California, Irvine, and the University of Utah found that the severity of California's wildfires has rapidly increased over the last several decades as a result of human-driven climate change. According to Jon Wang, a professor at the University of Utah, "[a]s California's climate has become warmer and drier, the severity of the average wildfire increased by 30 percent between the 1980s and 2010s." And fires that begin in or spread into WUI areas put communities at risk and can result in extreme financial consequences, as we saw in Pacific Palisades. As a result, homeowners insurance companies are exiting many markets and cancelling policies, even as to long-time policyholders.

Challenges for Cities – Wildfire Risk Management and Evacuation Concerns

Given the established need for housing and the ever-increasing risk faced by wildfires, local governments face two major policy issues: (1) how to effectively manage and reduce wildfire risk; and (2) how to address evacuation issues in areas where development is occurring despite limited ingress/egress. For both issues, we will look at cases recently filed against public agencies in the Bay Area.

Orinda and Moraga are wealthy communities nestled in the East Bay hills on the other side of the Caldecott Tunnel from Oakland. Orinda is located directly on Highway 24 and the regional transit line, with a BART station in the middle of town, but the bulk of the homes in Orinda are located on the steep hillsides that flank Highway 24. Moraga is located roughly 7 miles from the freeway, in an isolated hilly area with very limited routes of egress. The local fire authority, the Moraga-Orinda Fire District (MOFD), is a client of both presenters.

In January, the San Francisco Chronicle called these two communities "the Bay Area's Pacific Palisades," stating that they are most at risk for an urban firestorm.[2] The article featured MOFD Chief Jeff Isaacs, who, along with his predecessor, takes an aggressive and innovative approach to managing wildfire risk in the area.

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[2] https://www.sfchronicle.com/politics/article/orinda-moraga-fire-risk-20036253.php

Vegetation Management – *Sandia Pearson v. Moraga-Orinda Fire District*[3]

In 2023, MOFD's Board passed the Fuel Break Ordinance that required property owners within the District to manage vegetation to reduce wildfire intensity and spread potential. The Ordinance built on previous regulations related to parcels over one-acre, increasing the required perimeter fuel break. After some pushback from the project opponents, they revised the ordinance and eventually approved it pursuant to the statutory CEQA exemption for emergency projects and two categorical CEQA exemptions for regulatory actions to protect or enhance natural resources and the environment. The ordinance mirrored the State Fire Safe Regulations, requiring common-sense management of vegetation around homes and 100-foot buffers on the borders of large parcels.

Petitioners alleged that the ordinance should have required preparation of an EIR, arguing that the ordinance required "clear-cutting" of vegetation that could be harmful to the environment. Specifically, they alleged that:

- Measures to prevent fire ignition and spread were not actions taken to protect the environment
- The ordinance presented unusual circumstances due to habitat and topography
- The ordinance could have unintended significant impacts, particularly as to large areas required as fire breaks

The court ruled in favor of MOFD, finding the Ordinance was exempt from CEQA under categorical exemptions for regulatory actions protecting natural resources and the environment, as well as the statutory emergency exemption. The court found expert opinions and technical data on wildfire risks provided substantial evidence supporting the District's position that the Ordinance is necessary to reduce wildfire risks, protect public safety, and the environment. The court noted the Ordinance includes provisions to address environmental concerns, such as a modification process for properties with sensitive habitats. Petitioners did not appeal, but MOFD incurred litigation costs unnecessarily.

Wildfire Evacuation Analysis – *Orindans for Safe Emergency Evacuation (OSEE) v. City of Orinda*[4]

Residents challenged a Program Environmental Impact Report (EIR) for "Plan Orinda," a local land use plan intending to increase density near the town center and BART station. The City of Orinda flanks Highway 24 and the yellow BART line, with a town center adjacent to the freeway and the Town rising up slopes on both sides. Most homes are on narrow residential streets, many of which wind through the hills and provide limited access. The EIR found impacts to evacuation to be significant and unavoidable, and the City approved the plan and certified the EIR.

Petitioners challenged the plan on the basis that it did not effectively evaluate evacuation risk, and the court agreed. The court found that "Because the EIR provides ambiguous information on the impacts on evacuation in WFR-1 [Wildfire Risk-1] and does not provide the public and

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[3] *Pearson v. MOFD*, Case No. N23-2201, Superior Court of California, Contra Costa County.
[4] *OSEE v. Orinda*, Case No. N23-0579, Superior Court of California, Contra Costa County.

decision-makers with sufficient information to understand the magnitude of the impacts of the Project on evacuation in the face of wildfire hazards, the City did not have sufficient information to balance the benefits of the Project against its adverse impacts, after mitigation, and the City's Statement of Overriding Considerations is therefore not supported." The court also found flaw in a mitigation measure requiring "shelter in place" development standards and a Wildfire Hazard Assessment Plan.

The Town ultimately recirculated the EIR and re-approved the Project, including a new threshold of significance—whether the project would substantially increase emergency evacuation constraints—and imposing new mitigation measures for situations where sheltering in place was necessary, including vegetation management, fire sprinklers, and fire safe construction.

Wildfire Evacuation Analysis – *SAFE Moraga v. Town of Moraga*[5]

Petitioners challenged approval of a 66-unit housing project, including affordable units, alleging the Town violated CEQA by failing to adequately analyze wildfire risk, specifically, wildfire evacuation safety. The project was approved as consistent with the Comprehensive Advanced Planning Initiative (CAPI) Programmatic EIR previously prepared by the Town. The programmatic EIR considered addition of 1,118 units of housing to Moraga, where there are currently about 6,000 homes. This case is currently on hold because the developer has represented that it is considering an alternative project.

<u>2025 Legislation and Regulatory Updates</u>

The Legislature has begun to acknowledge this tension between the need to build housing and the imperative to avoid putting more people and property at risk of catastrophic wildfire. For example, several provisions of the CEQA reform bills do not allow certain exemptions to apply to very high fire hazard severity zones. Others allow exemptions to apply in these areas as long as the site has adopted fire hazard mitigation measures.

<u>AB 130 (Budget Trailer Bill) – Signed into Law 6/30/25, Effective Immediately</u>

This is a CEQA exemption for urban infill housing projects that meet the requirements in Government Code Section 65913.4(a), including 65913.4(a)(6). To qualify for the exemption, among other requirements, the project must meet the standards in siting criteria, <u>which generally prohibits projects in environmentally sensitive areas, including areas of high wildfire risk.</u>

The exemption cannot be used for projects within CAL FIRE designated very high fire hazard severity zones pursuant to Government Code Section 51178, or within the state responsibility area. However, this exclusion does not apply where sites have adopted fire hazard mitigation measures pursuant to existing building standards or state fire mitigation measures applicable to the development.

[5]*SAFE Moraga v. Town of Moraga*, Case No. N25-0416, Superior Court of California, Contra Costa County

It also implements a six- year freeze of California Building Standards Code, freezing local amendments applicable to housing projects until 2031, with limited exceptions. Exceptions for this provision include changes or modifications related to home hardening, building standards related to home hardening and proposed for adoption by a fire protection district, and where the Building Standards Commission deems changes or modifications necessary as emergency standards to protect health and safety.

This law also increases HCD enforcement authority over methodology for RHNA, adding factors for developing methodology that allocates regional housing, including "Emergency evacuation route capacity, wildfire risk, sea level rise, and other impacts caused by climate change."

It also includes Permit Streamlining Act amendments, including ministerial approval process for ADUs and one junior accessory dwelling units can only be used where certain criteria are met, including that the "side and rear setbacks are sufficient for fire and safety."

Finally, it amends Starter Home Revitalization Act of 2021 (SB 684/ SB 1123) to allow a ministerial approval process for subdividing a parcel can only be used where the lot to be subdivided is not within a very high fire hazard severity zone. For this provision (unlike the infill CEQA exemption), there is no exception to the fire hazard severity zone prohibition even if specified fire hazard mitigation measures have been adopted.

<u>SB 131 (Budget Trailer Bill) – Signed into Law 6/30/25, Effective Immediately</u>

This new law creates a narrower CEQA analysis for "near miss" housing projects with a single impact. Housing projects that would be exempt from CEQA but for a single unsatisfied condition only need to undertake environmental review of impacts related to that condition. While the narrower CEQA analysis does not apply to projects located on natural and protected lands, it *may* apply to a project located in a very high fire hazard severity zone.

It also creates a CEQA exemption for certain rezoning projects undertaken to implement an approved Housing Element that has already gone through CEQA are exempt from CEQA. This provision does not apply to rezoning sites designated as "natural and protected lands," which may include sites in very high fire severity zones.

SB 131 also requires the Governor's Office of Land Use & Climate Innovation (LCI, formerly OPR) to map eligible urban infill sites statewide by 2027. This assessment will help identify areas where development on the site will help accomplish state goals, including reducing the distance people need to travel and reducing conversion of open space for new development. It seems likely that this assessment would focus new development on areas not within the wildland urban interface. These are not the same "infill" sites that are used to qualify for the infill exemption.

The bill additionally creates a CEQA exemption for certain wildfire risk reduction projects and other community-serving infrastructure, including:

- Prescribed fire or fuel reduction projects to reduce wildfire risk. Projects must consult with the Department of Fish and Wildlife, may not exceed 50 contiguous acres, and must be located within one-half mile of a subdivision with at least 30 units.
- Defensible space fire clearance up to 100 feet for public roadways identified as egress or evacuation routes to remove flammable vegetation or trees under 12 inches in diameter. Applies to subdivisions or communities with 30 or more dwelling units.
- Establishment or enhancement of residential home hardening or defensible space for wildfire risk reduction within 200 feet of a legal structure in a high- or very high-fire severity zone; and
- Fuel breaks up to 200 feet from structures, including clearing flammable vegetation and trees under 12 inches in diameter.

AB 100 (Gabriel) – Signed into Law 4/14/2025

This law aims to expedite fire reduction projects and allocates over $10 million to support wildfire response and resiliency and $170 million in funding to conservancies for forest and vegetation management across California. It was signed into law along with an Executive Order to expedite implementation of these projects by authorizing state agencies to streamline or suspend State statutory and regulatory requirements for fuels reduction projects.

SB 79—Passed but Not Yet Signed
SB 79 would create a ministerial approval process for housing development projects located within a certain distance of transit-oriented development stops. According to Cal Cities, under the bill, transit agencies would have the power to determine nearly all aspects of the development, including height, density, and design, without any regard to local zoning or planning.

Practical Advice and Conclusion

While legislators may have begun to recognize the potential for development to exacerbate wildfire risk—both as to ignition and evacuation, the momentum in Sacramento to facilitate construction of housing has not slowed. Local government officials and planners will continue to face the dilemma of being required to zone for and approve housing projects, despite concerns about wildfire and evacuation—whether valid or just perceived by local residents.

In preparing a defensible CEQA evacuation analysis, it is advisable to rely on experts, including local fire officials, model evacuation scenarios (including potentially adopting significance thresholds for evacuation times), and, where possible, quantify the impact on evacuation times. In terms of addressing these policy issues more broadly, local governments should talk to state legislators about the need to balance housing and wildfire safety, look for ways to improve access, ingress, and egress, aggressively fund and undertake fuel management, and consider establishing related impact fees.

It will be critical that local agencies employ aggressive tactics to reduce the risk of wildfire, explore options for improving ingress and egress in the event of an emergency, and push Sacramento to allow local governments to deny projects that create unreasonable risk.

Affordable Housing: What City Attorneys (and Cities) Need to Know

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Affordable Housing: What City Attorneys (and Cities) Need to Know

Introduction

The landscape of affordable housing development is everchanging. Cities will be involved through their land use approval process, providing financing to affordable housing projects, supplying land for the project, and receipt of public input.

This paper will touch on considerations when the city is the lender, timelines to be aware of when permitting a housing development project, and how cities can be proactive with respect to affordable housing. In an environment where the State has enacted laws that remove local discretion in the approval of housing, particularly affordable housing, cities still have room to innovate and take charge of affordable housing in their communities.

Financing and Timelines

It is difficult to pay for affordable housing. The construction of affordable housing is certainly not cheaper than market-rate housing. In fact, with the need for several "layers" of financing and potential prevailing wage requirements, it may be *more expensive* to build affordable housing rather than market-rate housing. Yet affordable housing cannot rely on market-rate pricing or rents.

The end of redevelopment agencies in 2011 created a significant challenge to affordable housing in California. While the history of redevelopment agencies deserves criticism, no other State funding is set aside exclusively for affordable housing. Notably, since 2000, redevelopment agencies annually funded approximately 300 units of affordable housing in Los Angeles and 370 units in San José.[1] Despite these successes, no State-level set-aside for affordable housing is on the horizon.

Low-Income Housing Tax Credits (LIHTCs) are the most common source of financing for affordable housing. Created by Congress in 1986, LIHTCs are tradeable credits that offset potential income tax liability, once affordable housing projects are completed. Under federal law, each State receives a separate allotment of LIHTCs that they may distribute. Per this system, affordable housing developers apply for LIHTCs from the State (the California Tax Credit Allocation Committee, within the State Treasurer's Office). Because of the tax benefits that they offer, LIHTCs can be sold by affordable housing developers on the open market to investors, thus providing initial capital and funding for an affordable

[1] Redevelopment Agencies in California: History, Benefits, Excesses, and Closure

housing project. But note that there is competition for LIHTCs allocations from the state, with the number of applicants regularly exceeding supply.[2]

While LIHTCs are often employed for affordable housing projects, they are rarely the only source of funding for projects. Thus, it is often necessary to “layer” or “stack” financing for projects, using a combination of local, State, and federal funding. A 2021 study conducted by the Terner Center found that affordable housing developers layered an average of 3.5 permanent sources to finance developments built between 2000 and 2018. One in four layered at least five – and in some cases as many as eleven – sources of financing, and over time, the number of financing sources has only increased.[3]

The assembly of financing can be complex and time-consuming, taking up to 2-4 years. Potential financing from a variety of sources often has different application timelines and cycles. Funding sources often include: private financing in the form of conventional “hard” debt; public agency financing such as federal, state, and local funds often in the form of “soft” debt; equity tax credit investment; bonds; deferred developer fees; and property tax exemptions. “Hard” debt typically incurs interest and requires fixed payments. “Soft” debt may or may not include interest, payments are not required until maturity, and payments can be made from cash flow (allowing for fluctuation in debt payment amounts).

Developers will take a fee for the work they have put into creating and developing the affordable housing project. But payment of this fee will often be deferred or paid from cash flows over time. Many affordable housing projects also rely on public subsidies, such as project-based vouchers, for which there is also competition and dwindling resources.

Compiling financing for affordable housing takes time – and time results in higher costs. Delay in starting affordable housing projects can result in higher interest rates. It also often results in higher labor and material costs, as well as potential carrying costs for real property.

In short, the assembly of financing is time-consuming and once the financing is fully put together, affordable housing developers will want to move forward as quickly as possible – often placing demands on cities and city attorneys.

<u>Parties Involved and the City’s Role(s) and Responsibilities</u>

There may be many parties involved in an affordable housing project – the developer, tax credit investor, and lenders. The affordable housing developer will lead the

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[2] To the surprise of many, the recently enacted H.R. 1 – the One Big Beautiful Bill Act – will increase the amount of available tax credits in the coming years.

[3] The Complexity of Financing Low-Income Housing Tax Credit Housing in the United States (April 2021)

predevelopment, entitlement, and financing process. The developer's team will include architects, engineers, financial consultants, attorneys, etc. Additionally, in a tax credit project, a different legal entity formed by the developer will own and operate the project going forward. The type of legal entity and its structure will depend on the project investor and lender requirements.

If the city is providing a loan or other financing to an affordable housing project, it should also consider who will comprise its project team. This may include a staff planner overseeing the entitlement process, a housing specialist overseeing the loan process and documents, and city attorney or consulting attorney. Additionally, the city may consider having a financial consultant on board to help the city understand the financial nuances of the transaction and how the city's financial assistance will contribute to the overall project. There may also be requests from the developer team that would benefit from analysis by a financial consultant. Cities will also want to rely on their legal team to ensure the affordability and other commitments are secure and enforceable.

A city may expect that funding is the extent of its involvement. However, it is important for the city team to be involved in the entire transaction, not just the city's portion, to understand the finances of the project to ensure the city-contributed funds will be well-spent or to anticipate a request for additional funds down the road. Of course, the city should make sure the affordable housing "pencils" before committing funds. But it is also important that the city understand the project operating costs after it is developed and how those ongoing costs will be funded.

The city should also familiarize itself with the property title report and understand where in the recording order its documents may fall. It is common for the city's deed of trust to be recorded towards the bottom of the recording order. However, if there is a regulatory agreement associated with land use approvals, the city should ensure that is recorded in the most senior position. Most lenders are now accustomed to this approach, and it should not pose a significant challenge for the land use regulatory agreement, which often includes the long-term affordability commitments, to hold a senior recording position.

The city should also monitor closing calls and, in a tax credit project, the large number of parties involved and (consequently) the large volume of emails the city will soon receive. While the city may only have one loan in the transaction, it may receive comments on its document from the developer, other lenders, and investors. The city will need a system to collect and track all of the comments it receives and determine – ideally, ahead of time – which changes it is willing to make and who will be making the final decision regarding such changes.

Lastly, the city should make sure to identify any restrictions or requirements tied to the type of funding it will put towards the affordable housing project. For example, monies from the city's general fund will have significantly different restrictions than a fund that holds inclusionary housing in lieu fees.

Projects Change – the Need for Potential Flexibility

The parameters of affordable housing projects often change over time, primarily due to the involvement of additional parties to the transaction. While an affordable housing project may have begun with the selection of a developer, a tax credit investor and lender often later become a part of the project. And those investors and lenders may have different needs and priorities that were not addressed in the initial selection of a developer.

Because projects can change over time, cities should bear the need for flexibility in mind. For example, there may be changes to project milestones and timelines. The city may have negotiated agreements with the affordable housing developer, but once an investor or lender is identified and brought in, they may require changes to these documents. Similarly, if the city is providing a loan, the exact amount or structure of the loan, may need to change as the project gets closer to closing.

Given the fluid nature of projects, city councils should consider delegating future discretion over changes to city managers and other city staff. It will be a balancing act to ensure sufficient discretion is delegated to city staff and ensuring the city council is comfortable with what authority to change documents is provided to staff. It will also be important to help the developer team understand exactly what authority city staff have to modify documents, what will require city council approval, and the timelines involved.

Commonly Encountered Issues

Impact fees are one of the most common issues that cities may need to explore with affordable housing developers. Affordable housing projects are not presumptively exempt from development impact fees, such as fees charged to support school districts, parks, transportation or other types of infrastructure. In some projects, impact fees can be up to 10-20% of a project's total cost, which may present a challenge to affordable housing developers.

Cities may want to explore flexibility around impact fees for affordable housing projects, such as potential waivers or deferral of those fees. Further, as recent case law indicates, cities should also review whether all fees should apply to all projects.

Cities – and affordable housing developers – should seek to strike a balance on impact fees. While cities wish to encourage affordable housing, residents of those projects do place demands on public services and infrastructure. And developers may not necessarily wish to shirk those responsibilities, as they may want their future tenants to have public facilities available to them as well. There may also be questions on whether waivers or deferrals of impact fees could trigger prevailing wages requirements and how that may impact the project.

Other common issues that may require further discussion include:

- If the project is using city-owned land, any reverter or option to purchase clause for the property (that would potentially result in "reversion" of site control or ownership back to the city in the event the project is not completed or affordability covenants are violated).
- Similarly, if the project is using city-owned land, will the city be selling or leasing the land to the developer?
- The term (length) of any ground lease for the property. The length will need to be long enough to extend at least for the duration of financing, loan, and affordability covenant terms.
- If the city is ground leasing the property, the city will need to consider what it may permit to be recorded on the fee interest and what will be recorded on the leasehold interest.
- Structure and terms of a loan agreement from the City to help finance the affordable housing project.
- Potential flexibility on regulatory restrictions (affordability restrictions).
- Potential subordination to lender.
- Whether certain design or use requests should be incorporated into the project.
- Whether the community has certain needs regarding the population that will be housed by the project (e.g., low-income special needs individuals, supportive housing, etc.)

<u>City Attorney Punchlist</u>

The development of standardized checklists for different project types ensures consistency and more timely review. While such checklists and punchlists are not explicit "streamlining" policies, they can be just as instrumental in moving affordable housing projects forward.

Such checklists should be paired with internal tracking systems to monitor deadlines and flag potential delays as early as possible.

Recommended punchlist items are:

1. Assess Pre-Application or Application Type

- Project description?
- Affordability Levels and Unit Type
- Any requests for city financial assistance or other direct city support? E.g., free or reduced value land, infrastructure, financing?
- Applicant's proposed project type – e.g., SB 35, Density Bonus, Local/Special Housing Zoning, AB 2011/SB 6, or other?

2. Confirm and Calendar Deadlines Stemming from Application Type

- Under Permit Streamlining Act, the city must respond to any application submittal, or resubmittal, within 30 days as complete or incomplete.[4]
- Once a city deems a housing development application complete, the city has 30 or 60 days to determine if the application is consistent with applicable code requirements.[5] Note that the Housing Accountability Act applies to a code consistency determination.
- Under SB 330, the city is not required to issue a completeness determination for a pre-application. The applicant has 180 days to file a complete application, and after submission of the application, application completeness determination and code consistency determination requirements would apply.
- Project deadlines for action after the code consistency determination turn on whether the project is exempt from CEQA or requires further analysis. Typically, the city has 180 days to act if an EIR is prepared[6], 60 days if a Negative Declaration is prepared, or 60 days if the project is exempt from CEQA. Exceptions and shorter timelines exist for certain special project categories.

3. Assemble Project Team

Depending on the project's scope, the city will want to identify and put in place the project team, often including a designated planner, attorney, public works personnel, and consultants, such as CEQA, planning, financial, and resource specific consultants, if applicable.

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[4] Government Code Section 64943.
[5] Government Code Section 65589.5 (30 days if project has 150 or fewer units and 60 days if project has more than 150 units).
[6] Unless the housing project is at least 49% affordable to lower income households, in which case it is 60 days.

4. Consider Need for Initial Policy Direction

Depending on the project and realities on the ground, some cities will want to ensure early policy direction from the city council – mindful of the limits imposed by the Housing Accountability Act. Some projects are nearly certain to result in litigation, and identifying that possibility early, and discussing, as permitted by applicable law, potential resolutions and project adjustments toward resolution can facilitate a better outcome for the city and the applicant.

5. Evaluate Key Project Issues and Potential Pitfalls & Opportunities

- Every project is unique, and it is critical to identify key potential issues early, so they can be addressed. This includes identifying the issues, daylighting the issues to the city project team, and as appropriate, in conversation with the applicant team, and ensuring the right people and information are in place to resolve them.
- Recognize that affordable housing developers operate under different financial constraints than market-rate developers. Early engagement can identify potential deal-breakers before significant resources are invested.

6. Consider Establishing Regular Coordination Meetings with City and Developer Teams

- For larger or complex projects, it is important to establish regular contact, such as standing meetings, with the city and developer teams. This ensures regular, early information exchange, ensuring potential problems surface earlier, hopefully also resolving more successfully. This also helps in project planning and timeline management, as it allows the city to plan for what will be coming from the applicant.
- Structure these meetings to provide clear guidance on applicable housing laws, CEQA requirements, and local standards. Document key discussion points to avoid later disputes.

7. Map Out Project Path

Successful housing project processing begins before formal application submission. City attorneys should encourage planning staff to engage with developers early to identify potential issues and solutions. Once the city team has an initial handle on the project, it is helpful to map out the project's likely path, potential pitfalls or deviations, then plan out the processing timeline and plan. Typically, once this is determined, it is then shared with the applicant too, allowing the applicant to know the processing plan and timeline. For example, a project may require Planning Commission approval, but has a landmark on site, so it may also require review by the Historic Preservation Commission (creating multiple potential appeals to city council). Another, simpler project might only be subject to Community Development Director decision, with appeal to the Planning Commission. From the developer perspective, certainty in timeline and processing path is critical, so identifying the path early helps all.

<u>Potential Pitfalls</u>

Many projects can be fairly straightforward – a flat four-acre site, proposed for 80 units, all affordable, at 20 units/acre, with inconsistency with applicable zoning resolved by density bonus incentives and concessions. Other projects have pitfalls at every corner.

Potential pitfalls to look out for, and if present, evaluate are:

- **Affordability Compliance.** For projects claiming affordable housing benefits, it is critical to establish clear monitoring and enforcement mechanisms to ensure long-term compliance with affordability requirements. This can also create positive community support, as the public can see that the promised affordable units will truly be affordable 55+ years out.
- **General Plan and Zoning Consistency.** In addition to assessing the applicable base density, and any applicable special affordable or housing overlay zoning, most affordable housing projects will also qualify for a density bonus.
- **Landmark and Historic Properties.** Typically, a project that requires the demolition of a federal, state, or local registered historic site or landmark is not subject to streamlined state housing laws or exempt from CEQA. Projects that are consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties may be exempt from CEQA review.
- **Coastal Zone.** Most, but not all, newer state housing streamlining laws do not apply to the Coastal Zone, or portions thereof.
- **Wetlands.** Most, but not all, newer state housing streamlining laws exempt sites with mapped, jurisdictional wetlands.
- **Hazardous Waste Sites** that are not yet remediated and cleared by EPA and/or DTSC are typically not eligible for streamlining.
- **Earthquake Fault Zones** and **Floodways** are typically exempt from streamlining, unless certain safety requirements can be met.

- **Replacement Housing Requirements.** Three state laws require new housing developments to not reduce the total number of existing housing units, nor to displace, without replacement, existing lower income units: the Density Bonus Law, the Housing Element Law, and the Housing Crisis Act of 2019 for jurisdictions that are an "affected city" or "affected county" per HCD determinations under SB 330. Some cities also have stronger, local tenant protection and replacement housing laws. From a project processing perspective, this means the developer and the city need to determine if any protected units exist on site or existed but were demolished within the past five years, or ten years if the unit was withdrawn from the rental market under the Ellis Act; and if yes, the plan for ensuring their replacement as required. Some tenants may also qualify for relocation benefits. The city's application checklist may also include a requirement to provide information about existing tenant and their household income. This helps ensure the information is gathered at the start of the process to help inform the city on what requirements may be necessary with respect to existing units and tenants. The city should also consider bringing on a relocation consultant to help it navigate these requirements and ensure existing tenants receive the assistance required by law.
- **CEQA.** Most affordable housing projects are exempt from CEQA, either via housing streamlining laws, e.g. SB 35, SB 375, AB 2011/SB 6, or via CEQA Guidelines Sections 15194 or 15195, or the standard categorical exemptions, e.g. Class 32 Infill Projects, AB 130/SB 131, or because a ministerial approval process was followed. If not exempt, the city will need to assess CEQA compliance.
- **Learning the Changing Laws.** In the current context of annual changes and updates to state housing laws, it is important to stay up to date on these changes. Educating planning staff on state housing laws is crucial. Developers look very closely for tools to expedite entitlement processing and reduce CEQA review, and city staff should try to anticipate those questions as much as possible. Providing city staff with the resources to be knowledgeable and able to quickly respond and address project applicant proposals is important.
- **Managing Mixed-Use Complexity.** Mixed-use projects combining residential and commercial elements present unique challenges under both CEQA and housing laws. If a mixed-use project is proposed, the city will want to determine early whether the project qualifies for housing law protections when it includes substantial non-residential components. For example, density bonus projects can be mixed use in any proportion to qualify, but SB 35 projects must have at least two-thirds of the square footage designated for residential use to qualify. The Housing Accountability Act protections also require that at least two-thirds of the square footage be designated for housing for its protections to apply to the project.

- **Inadequate Public Participation.** Streamlined approval processes can reduce traditional public input opportunities, leading to community frustration and potential legal challenges. But cities can maintain meaningful public engagement within streamlined frameworks. Use early community meetings, design review processes, and clear communication about project benefits to maintain public support. Some of these meetings can be initiated and held by the developer team to share information and solicit community feedback.
- **Financial Feasibility.** Affordable housing projects operate on thin margins. Excessive conditions or fees can render projects financially infeasible, potentially triggering challenges under the Housing Accountability Act or leaving a project desired by the City and community unable to work. The solution can be to conduct feasibility analysis for significant conditions or fee requirements. Cities can even consider fee deferrals, reductions, or alternative compliance mechanisms for affordable housing projects – incentivizing desired projects.

Working collaboratively with the developer to identify, and resolve, these and other potential project pitfalls helps cities achieve affordable housing. In addition, cities can use this process to identify opportunities for the city, if desired, to support a project more directly, and to evaluate applicant requests, with city funding or land.

<u>Local Streamlining and Policy Innovations</u>

Over the past few years, cities have faced an onslaught of State legislation that seeks to facilitate or "streamline" affordable housing, through amendments to CEQA and other housing laws. These one-size-fits-all statues may have pros and cons. But cities are still free to innovate and develop their own policies to further affordable housing. Some cities have explored this policy areas, such as:

- Local streamlining processes for affordable housing, such as local density bonus programs.
- Local transit-oriented development.
- Objective development standards (e.g., avoiding subjective terms like "compatible with neighborhood character" in favor of specific height, setback, and design requirements)

In addition to such classic land use policies, cities can explore other ways in which to support affordable housing, such as:

- Implementing "gentle density" design standards, which provide multi-family housing but through a mix of different housing types.

- Inclusionary housing fees – don't be afraid to start small!
- Donation of land, or assistance with the consolidation of lots to create more potential sites.
- Programs that allow for cash flow flexibility, so that revenue from affordable housing projects with good cash flow can support other projects.

Smaller Steps

Apart from the type of larger policy decisions, there are more targeted – and potentially less demanding – ways that cities can support affordable housing projects.

- Seek HCD pro-housing designation. (This can help support a tax credit application and opens up the potential of other funding sources and state programs.)
- If your city is a utility provider, ensure that the local utility is on-time with utility hookups. (Developers may also need some help coordinating or establishing contact with PG&E, So Cal Edison, or SDG&E.)
- Be flexible with zoning changes that facilitate affordable housing projects. Small adjustments or changes may allow an entire project to move forward.
- Brainstorm with affordable housing project applicants on how best to process their applications so that the process is efficient and less costly and help present their project to gain community support (city staff will best know the political climate in the community).
- Support federal earmarks for affordable housing. Developers may want to partner with local elected officials, in seeking direct federal funding for projects.
- Collaborate with the local housing authority to determine what public subsidies may be available in your jurisdiction and when they may become available.
- Certain state funding applications require demonstration that the project has obtained land use entitlements or is eligible for a streamlined ministerial approval process. Cooperating with the developer on this aspect of the application can provide assistance and competitiveness to the developer in the funding application.
- Consider HCD requests for technical assistance.

Lastly, in speaking with persons in the affordable housing sector, cities – city managers and councilmembers – should be proactive in reaching out to their local affordable housing developers and asking about their concerns and challenges. Managing affordable housing properties is challenging work, and many tenants of such projects are facing financial challenges – such as the impending loss of Medicare and SNAP benefits. Keeping the "lights on" is more difficult than ever.

Such communication is also an opportunity for the city to express any concerns it may have with how a project is managed and work collaboratively to address issues. Public image and reputation are important and if the community sees poorly managed affordable housing projects, they may not be supportive of investing city funds into future projects.

<u>Conclusion</u>

Notwithstanding the plethora of State laws regarding affordable housing, cities (and other local agencies) still have room to be proactive regarding such projects in their communities. To be active participants, cities should prepare themselves – by learning about how affordable housing projects operate, considering local affordable housing policies, and preparing for the review and processing of such projects. As we all know, the need for affordable housing in California will be present for the foreseeable future.

LEAGUE OF CALIFORNIA CITIES

California Voting Rights Act: Conversations Around Achieving Election Equity

Thursday, October 9
(One of three options for the "Legal Issues" Session)

Introduction: J. Christine Dietrick, City Attorney, San Luis Obispo
California Voting Rights Act: Conversations Around Achieving Election Equity (2:45-3:45 p.m.)
The California Voting Rights Act (CVRA) continues to evolve, particularly following the California Supreme Court's decision in Pico Neighborhood Assoc. v. City of Santa Monica. This session will examine key legal questions surrounding standards of proof in CVRA litigation, the status of active cases, and the implications for cities navigating at-large and district-based election systems. Panelists will also discuss recent developments, including the 2024 FAIR MAPS Act, and explore what options remain for cities evaluating their obligations under the law. Attendees will gain insights into the legal landscape and strategies for addressing election-related challenges.
Facilitator/Moderator:

- Ryder Smith, President, Tripepi Smith

Speakers:

- Sheri Damon, City Attorney, Seaside
- Douglas Johnson, President, National Demographics Corporation
- Christopher Skinnell, Partner, Nielsen Merksamer, LLP

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The California Voting Rights Act (CVRA), enacted in 2002, stands as one of California's most impactful civil rights statutes, designed to address vote dilution and expand fair representation for minority communities across the state. This landmark law was prompted by allegations that at-large election systems in local jurisdictions often diminished the electoral strength of diverse populations, thereby failing to translate their political organizing into actual electoral victories. The CVRA builds on and goes further than its federal counterpart, lowering the barriers for successful legal challenges against at-large systems, including eliminating some of the geographic concentration requirements found in the federal Voting Rights Act.

Since its implementation, the CVRA has had a transformative effect on local governance in California. Hundreds of governmental agencies—including cities, school districts, and special districts—have shifted from at-large to district-based elections in response to litigation, demand letters, or the threat thereof. As of 2025, out of California's 483 incorporated cities, 233—nearly half—have adopted district-based council elections This wave of conversion has been particularly pronounced among the state's largest municipalities, but it has widely impacted smaller cities too: 85 cities under 50,000 in population have made the transition to by-district elections following passage of CVRA.

II. Patterns of Legal Challenge and Enforcement Since 2002

Since its enactment in 2002, the California Voting Rights Act (CVRA) has driven a sustained wave of litigation, threatened litigation, and voluntary transitions away from at-large city council election systems. The CVRA's strict liability framework (at least as previously understood), combined with lower evidentiary burdens than its federal counterpart, has made it extremely difficult for California cities to successfully defend at-large elections once challenged. To date, no city has prevailed in a CVRA lawsuit. So far, cities that have attempted litigation have uniformly lost or settled, often at substantial financial cost.

Many cities chose a preemptive switch to by-district elections after receiving demand letters that outlined potential CVRA violations. These letters explain the litigation risk, often allege patterns of racially polarized voting in the city, and offer a short statutory window (typically 45 days) for the city to adopt a resolution stating its intent to change its election system. High-profile, costly settlements have further motivated city councils to act quickly. The cities of Palmdale, Santa Clara, and Modesto engaged in prolonged court battles and eventually paid seven-figure plaintiff attorney fee awards. The specter of such outcomes now drives many jurisdictions to choose conversion over contest, fueling a "quiet tsunami" in California local government.

III. Current Status (2025): Adoption, Trends, and Map

By September 2025, 233 of California's 483 cities (48.2%) had adopted some form of district-based city council election system—compared to just 23 (4.8%) before the CVRA's passage. This pace sharply accelerated post-2016, as legal risks and attorney demand letters multiplied. Trends vary by city size:

- Very large cities (population >200,000): All 22 have adopted district-based elections.
- Large cities (75,001–200,000): 82% are now by-district.
- Medium cities (35,001–75,000): Over 60% use by-district systems.
- Small cities (≤35,000): Only 6% have converted, with the majority still using at-large systems.

Regionally, Southern California exemplifies this trend, with the vast majority of its most populous cities operating via district elections by 2024. Figures and maps from the Rose Institute illustrate both the historical at-large dominance and the contemporary rise of district-based systems, particularly in larger urban areas. Hybrid and "from-district" systems, where some seats remain elected citywide, persist but are increasingly rare.

The Fair Mapping Act: Enhanced Safeguards for Local Redistricting

The Fair Mapping Act (FMA), codified as Assembly Bill 849 (2019) and strengthened through subsequent amendments such as AB 764 (2024), establishes robust procedural and substantive requirements for districting and redistricting by California cities, counties, and (as of 2024) educational and special districts. The Act supplements the California Voting Rights Act by ensuring that any shift to by-district elections—whether prompted voluntarily or via CVRA demand—is conducted transparently and equitably, with meaningful public engagement throughout the process.

The FMA prescribes a hierarchy of line-drawing criteria, mandating that districts:

- Be of substantially equal population
- Comply with the Federal Voting Rights Act
- Be geographically contiguous
- Preserve neighborhoods and "communities of interest" (areas with shared policy, social or economic interests)

- Have easily identifiable boundaries and
- Be reasonably compact

To promote fairness and guard against abuse, the FMA prohibits drawing lines for the purpose of favoring or discriminating against incumbents and—in its most recent versions—emphasizes transparency, public outreach obligations (including workshops and translation services), and robust opportunities for public input on draft maps.

Recent legislation extends the FAIR MAPS Act requirements to educational and special districts, with some different timelines and procedures depending on jurisdiction size and type. Although not all local governments are yet required to use independent redistricting commissions, reformers continue to advocate that these be made mandatory.

Agencies that fail to follow the FMA's procedures expose themselves to additional legal challenges and public scrutiny – a critical consideration for cities transitioning under the pressure of a CVRA demand letter.

IV. Demand Letters Under the CVRA: Process and Volume

Elections Code § 10010 sets a clear process: upon receiving a written demand alleging a violation of the CVRA, a city has 45 days to declare its intent to switch to by-district elections, and then another 90 days to adopt a plan. This window enables cities to convert by ordinance, bypassing voter approval, and greatly limits potential legal exposure if the timeline is met. Cities may negotiate additional time with the attorney who sent the letter, but different attorneys have shown different levels of openness to such arrangements.

Outcomes are nearly uniform: cities overwhelmingly comply with demand letters, aware that contesting a CVRA suit is both expensive and, so far, lacking a clear path to success. Typical legal costs for cities fighting unsuccessfully can easily run into the millions, covering both their own defense and the plaintiff's attorney fees if the court finds a violation—even if a settlement is reached. In cases of settlement or preemptive action, fees are generally lower but still substantial compared to routine city litigation.

Thus, the statutory "demand letter" provision has become the principal lever driving change—yielding one of the most rapid and widespread municipal policy realignments in California history.

V. Growing Resistance: Recent Trends and Strategies

Between 2022 and 2025, California saw a surge in organized resistance to California Voting Rights Act (CVRA) demand letters. An increasing number of cities have begun pushing back by publicly challenging the validity of threat letters or otherwise rejecting the demand to change their election system.

For example, cities like Rancho Santa Margarita and Laguna Niguel refused full payment of fees to plaintiff attorneys following their mandated switch to district elections, arguing over the scope of reimbursement and the appropriateness of some claims. In other cities, elected officials have delayed compliance with the demand letter process or adopted resolutions contesting the assertion that racially polarized voting exists in their communities.

Legal resistance strategies include:

- Questioning the sufficiency of plaintiff evidence regarding racially polarized voting
- Asserting that certain cities lack sufficient minority populations to trigger CVRA protections
- Raising home rule or charter city protections—though these have thus far failed in court

Three cities have active litigation opposing plaintiff demands that they change to by-district elections:

- Huntington Beach, scheduled for November 24, 2025
- Burbank, scheduled for July 2026, and
- Santa Monica's second trial is scheduled for October 2026.

In the lengthy Santa Monica litigation, the original complaint was filed in April of 2016. Santa Monica's first trial concluded in February of 2019, with an Appeals Court ruling issued in July of 2020, overturning the trial court's judgment. That was followed quickly by a California State Supreme Court order de-publishing the Appeals Court ruling and agreeing to hear the case. The State Supreme Court then waited nearly three years to hear the case, as it finally held a hearing June 27, 2023, and issued its ruling (sending the case back down for reconsideration) September 20, 2023. A second Superior Court trial is now scheduled to begin October 26, 2026, but proceedings are temporarily stayed until February 2, 2026, to allow time for a possible decision from the U.S. Supreme Court in *Louisiana v. Callais*, a case under Section 2 of the federal Voting Rights Act that could have an impact on the application of the CVRA. The trial court has indicated that it intends a bifurcated trial: a first phase focused on determining whether elections continue to be racially-polarized in Santa Monica, recognizing that the focus of the CVRA is the present electoral system; and, if the plaintiffs prevail in the first phase, a second phase focused on whether the City's electoral system "dilutes" Latinos' voting power relative to alternative electoral systems.

The Huntington Beach case was filed in early May 2024. In December of last year the trial court denied the City's motion for summary judgment, finding there to be triable issues of fact concerning the existence of both racially-polarized voting and vote dilution. A jury trial was initially set for August 2025, but the plaintiffs successfully moved to strike the request for a jury, so the case will be tried to the court. The trial date has also been postponed a couple of times, first to mid-September and most recently to November 24.

Finally, the Burbank case was filed in October 2023, and the following January the court sustained a demurrer on the ground that the plaintiff had failed to identify the "protected class" on whose behalf the case was brought—an essential element of a CVRA claim—and because if failed to allege facts to show intentional discrimination, as an equal protection claim requires. A demurrer to the first amended complaint was also sustained in response to the City's arguments that the plaintiff failed to allege facts to support a finding of racially-polarized voting in Burbank or to support a showing of dilution. Again, the plaintiff was given leave to amend. In August of last year, the court again dismissed plaintiff's equal protection claim, this time without leave to amend, but allowed the CVRA cause of action to go forward. As noted, trial is scheduled for next July, and the parties are currently engaged in discovery.

Several bills have also been introduced in the 2025 legislative session, including SB 689 and AB 1079, which would alter appellate procedures, create new safe-harbor periods for small cities, and modify provisions related to attorney fees and court orders during appeal. One key provision in AB 1079, which has passed both houses of the Legislature and is currently pending before the Governor, would eliminate ’the normal rule in litigation that certain “prohibitory” judgments in the plaintiffs’ favor are automatically stayed pending appeal.

VI. Implications and Emerging Legal Issues

The rapid and widespread transition to by-district elections has had far-reaching effects on community representation. Some cities have seen an increase in minority representation on their councils, particularly in larger jurisdictions with well-defined minority communities. Many cities have seen a significant increase in the number of elections with only one candidate running. And the process of creating district boundaries has also introduced fresh legal and political controversies over potential gerrymandering, “safe seats,” and the fragmented representation of cohesive neighborhoods.

Charter cities continue to explore whether their charters can shield them from CVRA requirements, but so far courts have held that state law preempts conflicting charter provisions in this area. As more cities transition, concerns have grown about a “next wave” of litigation: challenges to the fairness of district lines, claims that new maps dilute new or emerging communities of interest, and even the possibility of federal lawsuits in cases where state law might clash with narrowing interpretations of federal voting rights from the Supreme Court.

Attention is also focused on potential CVRA reform. Several proposals—backed by both local government groups and some state lawmakers—would clarify definitions of key terms, provide new safe harbors or exemptions for very small cities, and introduce mediation or expert review for disputed demand letters. So far, however, most legislative reforms have favored expanding rather than restricting CVRA application.

VII. Practitioner Takeaways and Best Practices

Given the losses so far for cities in contested CVRA cases, and the significant costs of litigation, recommended best practices for practitioners include:

- Proactively reviewing local elections for CVRA vulnerabilities before receiving a demand letter
- Conducting a data-driven assessment of racially polarized voting and elections, consulting expert demographers and counsel early in the process
- Responding promptly to demand letters and leveraging safe harbor timelines to prevent runaway attorney fee awards
- Actively engaging the public and underrepresented communities in district map drawing to minimize further legal challenges
- Providing candid legal analyses and estimates of likely outcomes and costs to governing bodies before considering litigation
- Coordinating with peer jurisdictions and League of California Cities legal resources on draft policy, reform proposals, and court watch efforts

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Conclusion

California's CVRA landscape has experienced radical transformation over the past two decades and is now entering a period of heightened legal contest, strategic resistance, and possible reform. The next year could be pivotal, with appellate courts, the legislature, and potentially even the U.S. Supreme Court considering changes that will shape local election law for years to come. City attorneys must remain vigilant, prepare for evolving threats, and advise city leaders on both the risks of delay and the importance of fair and legally compliant representation structures.

Attachments

1. California Voting Rights Act text
2. 2023 FAIR MAPS Act text (AB764)
3. California Supreme Court ruling in *Pico Neighborhood Association v. Santa Monica*
4. California Fifth District ruling in *Sanchez v. City of Modesto*
5. U.S. Supreme Court 1985 ruling in *Thornburg v. Gingles*
6. Timeline of *Pico Neighborhood Association v. Santa Monica*
7. Rose Institute of State and Local Government 2016 paper on the impact of CVRA
8. Central Coast Democratic Socialist of America email to City of Seaside
9. Seaside City Attorney response to Central Coast DSA
10. Seaside demographer's summary report

BILL NUMBER: SB 976 CHAPTERED
BILL TEXT

CHAPTER 129
FILED WITH SECRETARY OF STATE JULY 9, 2002
APPROVED BY GOVERNOR JULY 9, 2002
PASSED THE SENATE JUNE 24, 2002
PASSED THE ASSEMBLY JUNE 20, 2002
AMENDED IN ASSEMBLY JUNE 11, 2002
AMENDED IN ASSEMBLY APRIL 9, 2002
AMENDED IN ASSEMBLY MARCH 18, 2002
AMENDED IN SENATE MAY 1, 2001

INTRODUCED BY Senator Polanco

FEBRUARY 23, 2001

An act to add Chapter 1.5 (commencing with Section 14025) to Division 14 of the Elections Code, relating to voting rights.

LEGISLATIVE COUNSEL'S DIGEST

SB 976, Polanco. Elections: rights of voters.

Existing law provides for political subdivisions that encompass areas of representation within the state. With respect to these areas, public officials are generally elected by all of the voters of the political subdivision (at-large) or from districts formed within the political subdivision (district-based).

Existing law generally allows the voters of the entire political subdivision to determine whether the elected public officials are elected by divisions or by the entire political subdivision.

This bill would provide that an at-large method of election, as defined, may not be imposed or applied in a manner that results in the dilution or abridgment of the right of registered voters who are members of a protected class, as defined, by impairing their ability to elect candidates of their choice or to influence the outcome of an election.

This bill would provide that a violation of its provisions shall be established if it is shown that racially polarized voting, as defined, occurs in elections for governing board members of a political subdivision, among other things. It would provide that an intent to discriminate against a protected class, as defined, is not required to establish a violation of this bill.

This bill would authorize a court to impose appropriate remedies, including district-based elections, and to award a prevailing nonstate or nonlocal government plaintiff party reasonable attorney's fees and expenses consistent with specified case law as part of the costs.

This bill would permit a member of a protected class to file an action pursuant to this bill under specified circumstances.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Chapter 1.5 (commencing with Section 14025) is added to Division 14 of the Elections Code, to read:

CHAPTER 1.5. RIGHTS OF VOTERS

14025. This act shall be known and may be cited as the California Voting Rights Act of 2001.

14026. As used in this chapter:

(a) "At-large method of election" means any of the following methods of electing members to the governing body of a political subdivision:

(1) One in which the voters of the entire jurisdiction elect the members to the governing body.

(2) One in which the candidates are required to reside within given areas of the jurisdiction and the voters of the entire jurisdiction elect the members to the governing body.

(3) One which combines at-large elections with district-based elections.

(b) "District-based elections" means a method of electing members to the governing body of a political subdivision in which the candidate must reside within an election district that is a divisible part of the political subdivision and is elected only by voters residing within that election district.

(c) "Political subdivision" means a geographic area of representation created for the provision of government services, including, but not limited to, a city, a school district, a community college district, or other district organized pursuant to state law.

(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 (42 U.S.C. Sec. 1973 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 (42 U.S.C. Sec. 1973 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 (42 U.S.C. Sec. 1973 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.

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 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.

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 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.

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, that are tailored to remedy the violation.

14030. 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.

14031. This chapter is enacted to implement the guarantees of Section 7 of Article I and of Section 2 of Article II of the California Constitution.

14032. 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.

Filed 12/6/06

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

ENRIQUE SANCHEZ et al., Plaintiffs and Appellants, v. CITY OF MODESTO et al., Defendants and Respondents.	F048277 (Super. Ct. No. 347903) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Heller Ehrman, George H. Brown, Warrington S. Parker, III, Peter E. Gratzinger, Nicholas S. Campins, Stephen A. Tuggy, and Ronald A. Valenzuela; Lawyers' Committee for Civil Rights, Robert Rubin and Nicholas Espiritu; Seattle University School of Law, Joaquin G. Avila, for Plaintiffs and Appellants.

Bill Lockyer, Attorney General, Louis R. Mauro, Assistant Attorney General, Christopher E. Krueger and Douglas J. Woods, Deputy Attorneys General, for State of California as Amici Curiae on behalf of Plaintiffs and Appellants.

Kathay Feng for California Common Cause and FairVote as Amici Curiae on behalf of Plaintiffs and Appellants.

Alan Smith, City Attorney; Hogan and Hartson, John W. Borkowski, Joseph G. Krauss, Nichelle Billips, Chhaya Malik, and Monica Sahaf, for City of Watsonville as Amici Curiae on behalf of Plaintiffs and Appellants.

Howrey, John E. McDermott; Richard Rudnansky, Interim City Attorney (Modesto), Roland R. Stevens, Assistant City Attorney, for Defendants and Respondents.

Gilbert Trujillo, City Attorney, for City of Santa Maria as Amici Curiae on behalf of Defendants and Respondents.

Patrick Whitnell for League of California Cities as Amici Curiae on behalf of Defendants and Respondents.

The trial court granted the defense's motion for judgment on the pleadings after ruling that the California Voting Rights Act of 2001 was facially invalid under the equal protection clauses of the state and federal Constitutions. It entered judgment against plaintiff Latino voters, who allege that, because of racially polarized voting in Modesto, they are precluded from electing any candidates in the city's at-large city council elections. No evidence has been presented in support of or in opposition to this claim. Rather, at a preliminary stage of the litigation, the trial court struck down the CVRA, ruling that any possible application would necessarily involve unconstitutional racial discrimination. As we will explain, Modesto's arguments do not support disposing of the Legislature's act in this summary manner.

Courts make two kinds of decisions about the constitutionality of laws: decisions about whether a law is invalid on its face and in all of its conceivable applications (called "facial" invalidity), and about whether a particular application of a law is invalid (called "as-applied" invalidity). In this case, the City of Modesto attempted to show that the CVRA is unconstitutional because it is facially invalid. Modesto's arguments cannot establish facial invalidity. The city may, however, use similar arguments to attempt to show *as-applied* invalidity later if liability is proven and a specific application or remedy is considered that warrants the attempt. For example, if the court entertains a remedy that uses race, such as a district-based election system in which race is a factor in establishing district boundaries, defendants may again assert the meaty constitutional issues they have raised here. In doing so, at that time they can ask the court to decide whether the particular application or remedy is discriminatory.

Why do Modesto's arguments fail to show that the CVRA is facially unconstitutional? Modesto takes the position that the CVRA is unconstitutional because it uses "race" to identify the polarized voting that causes vote dilution and prevents groups from electing candidates. Modesto claims that this use of race constitutes reverse racial discrimination and is a form of unconstitutional affirmative action benefiting only certain racial groups. However, this is not an accurate characterization of what the CVRA requires. The CVRA is race-neutral. It does not favor any race over others or allocate burdens or benefits to any groups on the basis of race. 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—like the election system used in Modesto. In this respect, it is similar to other long-standing statutes that create causes of action for racial discrimination, such as the federal Civil Rights Act or California's Fair Employment and Housing Act.

The reality in California is that no racial group forms a majority.[1] As a result, *any* racial group can experience the kind of vote dilution the CVRA was designed to combat, including Whites. Just as non-Whites in majority-White cities may have a cause of action under the CVRA, so may Whites in majority-non-White cities. Both demographic

[1]We take judicial notice of this fact, which was revealed by the 2000 census. (See <http://factfinder.census.gov/servlet/QTTable?_bm=y&-qr_name=DEC_2000_SF1_U_DP1&-geo_id=04000US06&-ds_name=DEC_2000_SF1_U&-_lang=en&-_sse=on> [census table reporting non-Hispanic Whites as 46.7 percent of state population].)

situations exist in California, even within our own San Joaquin Valley, and the CVRA applies to each in exactly the same way.

The trial court also found facially unconstitutional the portion of the CVRA that allows attorney fees to be awarded to prevailing plaintiffs. The trial court reached this issue even though it was moot—plaintiffs never had an opportunity to seek attorney fees, since they lost—and the city only briefed the issue after the trial court asked it to do so. Further, in reaching its decision, the court focused on an improbable set of hypothetical facts. The asserted invalidity of a single hypothetical application is not a proper basis for finding the fee clause invalid on its face.

The judgment is reversed and the case is remanded to the trial court.

FACTUAL AND PROCEDURAL HISTORIES

Plaintiffs are Latino voters who reside in Modesto. They filed a complaint in Superior Court on June 3, 2004, alleging that, because of racially polarized voting, the city's at-large method of electing city council members diluted their votes. The complaint named as defendants the City of Modesto, the city clerk, the mayor, and each member of the city council.

According to the complaint, in Modesto's at-large election system, candidates for city council run for individual seats to which numbers are arbitrarily assigned and for each of which all the city's voters may vote. To win, a candidate must receive a majority of the votes cast for the seat for which he or she has chosen to run. A runoff between the top two vote-getters for a seat occurs if no candidate receives a majority. The complaint alleges that this system, combined with a pattern of racially polarized voting, regularly prevented Latino voters from electing any candidates of their choice or influencing city government. Although Latinos were 25.6 percent of the city's population of 200,000, only one Latino had been elected to the city council since 1911.

The complaint alleged one cause of action, a violation of the CVRA (Elec. Code, §§ 14025-14032),[2] and prayed for the imposition of a district-based system as a remedy. The CVRA provides a private right of action to members of a protected class where, because of "dilution or the abridgement of the rights of voters," an at-large election system "impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election …." (§§ 14027, 14032.) To prove a violation, plaintiffs must show racially polarized voting. They do not need to show that members of a protected class live in a geographically compact area or demonstrate an intent to discriminate on the part of voters or officials. (§ 14028.)

Some background on federal voting rights law is helpful to provide context for the CVRA. Like the CVRA, section 2 of the Federal Voting Rights Act (FVRA) (42 U.S.C. § 1973) creates liability for vote dilution. A violation of the FVRA is established if "the political processes leading to nomination or election in [a] State or political subdivision [of a state] are not equally open to participation by members of a [protected] class … 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." (42 U.S.C. § 1973(b).) Amendments to the FVRA passed by Congress in 1982 made it clear that intentional discrimination by officials is not required to show a violation. (*Shaw v. Reno* (1993) 509 U.S. 630, 641 (*Shaw*); *Thornburg v. Gingles* (1986) 478 U.S. 30, 35 (*Gingles*).) Later, after noting that it has "long recognized" that at-large elections and multi-member districts can """minimize or cancel out the voting strength""" of minorities (*Gingles, supra,* at p. 47), the Supreme Court delineated the elements of a vote-dilution violation under the FVRA:

> "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.… Second, the minority group must be able to show that it

[2]Subsequent statutory references are to the Elections Code unless otherwise noted.

> is politically cohesive.… Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate." (*Gingles, supra*, 478 U.S. at pp. 50-51 (fn. omitted).)

Section 2 of the FVRA does not allow states to use race however they want to in remedying vote dilution. In fact, the Supreme Court has recognized constitutional limitations on race-based districting plans adopted by state and local governments attempting to avoid section 2 liability. For example, in *Shaw, supra,* 509 U.S. 630, the court considered a new district map for the State of North Carolina, created by the state legislature after the results of the 1990 census gave the state a right to an additional member of the House of Representatives. The new districting plan included two majority-Black districts. The plaintiffs claimed the plan constituted an unconstitutional racial gerrymander. (*Id.* at pp. 633-634, 641.) Among the justifications the state offered for the plan was that the two majority-Black districts were needed to avoid liability for vote dilution under section 2 of the FVRA. (*Shaw, supra,* at p. 655.) Reversing the trial court's order dismissing the case, the Supreme Court held that the plaintiffs had stated a valid claim for relief under the equal protection clause of the Fourteenth Amendment. (*Shaw, supra,* at pp. 637-639, 642.) It stated that, because the majority-Black districts' shapes were so bizarre, they could not "rationally … be understood as anything other than an effort to separate voters into different districts on the basis of race," and the redistricting plan should be subjected by the trial court to strict scrutiny, just like "other state laws that classify citizens by race." (*Id.* at pp. 644, 649.)

Later cases explained that a finding that race was the "predominant" factor in creating a district—to which other factors were "subordinated"—is what triggers strict scrutiny. (*Bush v. Vera* (1996) 517 U.S. 952, 958-959 (plur. opn. of O'Connor, J.) (*Vera*).) *Shaw* and its progeny therefore stand for the following proposition: While state and local governments are commanded not to permit racial vote dilution that violates section 2 of the FVRA, they are also forbidden to use race as the predominant factor in a redistricting scheme designed to avoid a violation unless that use of race passes strict scrutiny. The court has assumed without deciding that race-conscious measures undertaken to avoid section 2 liability pass strict scrutiny if those measures use race no more than is reasonably necessary to achieve section 2 compliance. (*Vera, supra*, 517 U.S. at pp. 976-979.)

The legislative history of the CVRA indicates that the California Legislature wanted to provide a broader cause of action for vote dilution than was provided for by federal law. Specifically, the Legislature wanted to eliminate the *Gingles* requirement that, to establish *liability* for dilution under section 2 of the FVRA, plaintiffs must show that a compact majority-minority district is possible. That said, the bill that ultimately became the CVRA did intend to allow geographical compactness to be a consideration at the *remedy* stage. A bill analysis prepared by staff for the Assembly Committee on Judiciary reflects this fact:

> "This bill would allow a showing of dilution or abridgement of minority voting rights by showing the first two *Thornburg* [*v. Gingles, supra*, 478 U.S. 30] requirements without an additional showing of geographical compactness.… This bill recognizes that geographical concentration is an appropriate question at the *remedy* stage. However, 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. Thus, this bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown)." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, p. 3 (italics added).)

Another point emphasized in the legislative history is California's lack of a racial majority group. The Assembly Judiciary Committee analysis says "[t]he author states that [the bill] 'addresses the problem of racial block voting, which is particularly harmful to a state like California due to its diversity.… In California, we face a unique situation where we are all minorities. We need statutes to ensure that our electoral system is fair and open. This measure gives us a tool to move us in that direction.…" (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, p. 2.)

The bill ultimately became sections 14025 to 14032 of the Elections Code. Here is a synopsis of those provisions:

- Section 14027 sets forth the prohibited government conduct:

  > "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 abridgement of the rights of voters who are members of a protected class, as defined pursuant to Section 14026."

- A protected class is 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 (42 U.S.C. Sec. 1973 et seq.)." (§ 14026, subd. (d).)
- Section 14032 gives a right of action to voters in protected classes.
- Section 14028 lists facts relevant to proving a violation: The dilution or abridgement described in section 14027 is established by showing racially polarized voting. (§ 14028, subd. (a).) Circumstances to be considered in determining whether there is racially polarized voting are described. (§ 14028, subd. (b).) Lack of geographical concentration of protected class members and lack of discriminatory intent by the government are not factors in determining liability. (§ 14028, subds. (c), (d).) Certain other probative factors are included. (§ 14028, subd. (e).)
- The court shall "implement appropriate remedies, including the imposition of district-based elections," if it finds liability. (§ 14029.)

- Prevailing plaintiffs shall be awarded attorney fees. Prevailing defendants can recover only costs, and then only if the action was frivolous. (§ 14030.)

According to plaintiffs, the CVRA enlarges the potential for relief beyond that available under the FVRA in a number of ways, of which the elimination of the geographically compact majority-minority district requirement as an element of liability is only the beginning. First, freed of that requirement, a court could craft a remedy involving a crossover or coalition district. A crossover district is one in which, although members of the plaintiffs' group do not constitute a majority, that group can elect candidates of its choice by joining forces with dissident members of the racial majority who also live in the district. A coalition district is similar, except that members of the plaintiffs' group join forces with members of another racial minority group.

Second, a court could impose a remedy not involving districts at all, relying instead on one of several alternative at-large voting systems. In one of these, called cumulative voting, each voter has as many votes as there are open seats and may distribute them among several candidates or give them all to one candidate. In a cumulative voting system, a politically cohesive but geographically dispersed minority group can elect a single candidate by giving all its votes to that candidate, although it would be unable to elect any candidates in a conventional winner-take-all at-large system and could not form a majority in any feasible district in a district system.

Defendants in this case filed a motion for judgment on the pleadings, arguing that the CVRA was facially invalid under the equal protection clause of the Fourteenth Amendment and article I, section 7 (i.e., the equal protection provision) of the California Constitution. In response to a request by the trial court, defendants filed a supplemental brief arguing that the CVRA's attorney-fee provision also violated article XVI, section 6, of the California Constitution, which prohibits gifts of public funds. The trial court agreed with defendants on both points. It granted the motion and entered a judgment of dismissal.

DISCUSSION

The standard of review for an order granting judgment on the pleadings is the same as that for an order sustaining a general demurrer: We treat as admitted all material facts properly pleaded, give the complaint's factual allegations a liberal construction, and determine de novo whether the complaint states a cause of action under any legal theory. (*DiPirro v. American Isuzu Motors, Inc.* (2004) 119 Cal.App.4th 966, 972.) We may rely on any applicable legal theory in affirming or reversing because we "'review the trial court's disposition of the matter, not its reasons for the disposition.'" (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1065.)

Where reasonably possible, we are obliged to adopt an interpretation of a statute that renders it constitutional in preference to an interpretation that renders it unconstitutional. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 60; *Martin v. Santa Clara Unified School Dist.* (2002) 102 Cal.App.4th 241, 254.) Even judicial reformation of a statute is preferable to invalidation where reformation would better serve the intent of the Legislature. (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660-661.) Principles of judicial self-restraint similarly require us to avoid deciding a case on constitutional grounds unless absolutely necessary; nonconstitutional grounds must be relied on if they are available. (*People v. Pantoja* (2004) 122 Cal.App.4th 1, 10.)

I. City's standing to challenge statute

As a threshold issue, plaintiffs contend that defendants are not entitled to bring their constitutional challenge to the CVRA. We disagree. Plaintiffs rely on a settled line of cases barring cities from mounting equal protection challenges to state statutes, but a second line of cases establishes an exception, into which this case falls. In light of our conclusion that defendants' equal protection challenge fails on its merits, we could decide this appeal without reaching the standing issue. We choose to address it, however, because the equal protection issue will likely arise on remand if the case reaches the remedy stage, and the standing question will surface again.

Defendants moved to strike the footnote in plaintiffs' reply brief in which standing was first raised and argued that we should not address it. We disagree because standing can be raised at any time. (*Payne v. Anaheim Memorial Medical Center, Inc.* (2005) 130 Cal.App.4th 729, 745; *Marshall v. Pasadena Unified School Dist.* (2004) 119 Cal.App.4th 1241, 1251; *People v. Leung* (1992) 5 Cal.App.4th 482, 490, fn. 2.) The issue of standing here does not come up in the traditional context, as we shall explain; however, it is sufficiently similar to warrant application of the rule that it may be raised at any time.

Further, defendants have had two opportunities to brief the issue. They did so first in their motion to strike the footnote, where they requested leave to submit additional briefing, and included a supplemental brief as a section of their motion. This request is granted and the supplemental discussion in the motion is deemed filed. Defendants also submitted a supplemental brief on the issue in response to our briefing letter dated June 30, 2006. For these reasons, defendants cannot legitimately claim to be prejudiced by any lack of opportunity to inform the court of their position. We hold that addressing the issue is appropriate and deny the motion to strike.[3] We now turn to the merits.

Plaintiffs invoke the "well-established rule that subordinate political entities, as 'creatures' of the state, may not challenge state action as violating the entities' rights under the due process or equal protection clauses of the Fourteenth Amendment or under the contract clause of the federal Constitution." (*Star-Kist Foods, Inc. v. County of Los*

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[3]In addition to the motion to strike and request for leave to submit supplemental briefing, a number of requests for judicial notice are pending. These requests, which we list in the Disposition, are granted.

Angeles (1986) 42 Cal.3d 1, 6 (*Star-Kist*).) The concept of standing at issue here is not the usual one limiting the rights of plaintiffs, but a special one pertaining to cities and counties attempting, as plaintiffs or defendants, to challenge state laws:

> "The term 'standing' in this context refers not to traditional notions of a plaintiff's entitlement to seek judicial resolution of a dispute, but to a narrower, more specific inquiry focused upon the internal political organization of the state: whether counties and municipalities may invoke the federal Constitution to challenge a state law which they are otherwise duty-bound to enforce." (*Star-Kist, supra*, 42 Cal.3d at pp. 5-6, fn. omitted.)

The rule against city and county standing in cases of this kind derives from the United States Supreme Court's holdings in *Williams v. Mayor* (1933) 289 U.S. 36, 40 (*Williams*) and a number of earlier cases. In *Williams*, the Maryland Legislature exempted a railroad from local taxes. (*Id.* at pp. 37-38.) The railroad was in the hands of a receiver appointed by a federal district court. Two cities filed claims in the receivership proceedings in the district court seeking taxes due. They challenged the tax-exemption statute under the equal protection clause of the Fourteenth Amendment. (*Williams, supra,* 289 U.S. at pp. 39-40.) The Supreme Court reversed a lower court decision invalidating the statute. Its explanation of this holding is simply: "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." (*Id*. at p. 40.) The court cited several of its own earlier cases, none of which explained the rule in any greater detail. (See, e.g., *Newark v. New Jersey* (1923) 262 U.S. 192, 196 [city not entitled to raise 14th Amend. equal protection challenge to state's imposition of water use fee]; *Trenton v. New Jersey* (1923) 262 U.S. 182, 185-188, 192 [city not entitled to challenge same fee under due process clause of 14th Amend. or under contract clause of art. I, § 10, of the U.S. Const.].)

California courts have applied the rule in a variety of contexts. (*Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 209 [city cannot rely on contract clause to obtain invalidation of a state statute allegedly impairing a preexisting contract between city and state]; *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (1999) 72 Cal.App.4th 366, 380 [airport authority, as political subdivision of state, had no standing to challenge under due process clause of 14th Amend. a state statute allowing a city to review authority's development plans]; *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 296-297 (*McMahon*) [county had no power to challenge under due process clause of 14th Amend. a state law requiring it to contribute county funds for welfare payments]; *City of Los Angeles v. City of Artesia* (1977) 73 Cal.App.3d 450, 457 [City and County of Los Angeles could not seek invalidation under due process clause of 14th Amend. or contract clause of retroactive application of state law limiting amount counties could charge Lakewood Plan cities for police protection].) The Ninth Circuit in California has applied the rule as well. (*City of South Lake Tahoe v. California Tahoe* (9th Cir. 1980) 625 F.2d 231, 233-234 [city lacked standing to challenge under 14th Amend. a planning agency's land use rules promulgated pursuant to state statute].)

The California Supreme Court has held that the no-standing rule does not apply to a political subdivision's claim that a state statute encroaches on the power of Congress to regulate interstate commerce under the commerce clause of the United States Constitution. (*Star-Kist, supra*, 42 Cal.3d at pp. 4, 8-9.) It relied in part on federal cases holding that the no-standing rule also does not apply to challenges based on the supremacy clause of the United States Constitution. (*Id.* at p. 8.) The court did not, however, disturb the doctrine with respect to the equal protection and due process clauses of the Fourteenth Amendment and the contract clause, the areas in which it traditionally has been applied. (*Id.* at pp. 5-6.)

A second line of cases establishes an exception to the no-standing rule for situations in which the claim of a city or county is best understood as a practical means of asserting the individual rights of its citizens. The first of these cases, *Drum v. Fresno County Dept. of Public Works* (1983) 144 Cal.App.3d 777 (*Drum*), involved a county's due-process challenge to its own inadequate notice to a building project's neighbors of a zoning-variance hearing. The county approved a request for a variance to enable a homeowner to build a garage. The notices of the variance hearing received by the neighbors described the garage. Later, the owner decided to add a second story with living quarters to the garage and requested a permit for the new design. The county issued the permit. When construction began, neighbors complained that they had not been informed about the second story. The county reversed its decision to issue the permit and issued a stop-work order. In the ensuing litigation between the owner and county, the county argued that the permit it issued for a two-story garage was invalid because it was not within the scope of the variance of which the neighbors had received notice; the neighbors' due process rights had therefore been violated. (*Id.* at pp. 779-781, 782.) We agreed with this position, rejecting the owner's argument that the county was not entitled to assert individual citizens' due process rights:

> "It would serve no legitimate interest to hold that appellant may not invoke lack of notice to its citizens in order to enjoin construction of respondents' building. Surely it should be able to invoke its own requirements of notice in order to preserve the public interest in preserving community patterns established by zoning laws." (*Drum, supra*, 144 Cal.App.3d at pp. 784-785.)

Admittedly, *Drum* did not involve a local government's challenge to a state law and dealt with statutory rather than constitutional due process rights. (*Drum, supra*, 144 Cal.App.3d at p. 783.) It did not discuss or cite any of the no-standing cases we mention above. But the next case in the line, *Selinger v. City Council* (1989) 216 Cal.App.3d 259 (*Selinger*), relied on *Drum*, among other authorities, in expressly asserting an exception to the no-standing rule.

In *Selinger*, a subdivision developer obtained a writ of mandate from the superior court requiring a city to acknowledge that his subdivision map was deemed approved by operation of law—because one year had elapsed without city action on his application—under the Permit Streamlining Act, a state statute. (*Selinger, supra*, 216 Cal.App.3d at

p. 263.) Among other things, the city argued that the Permit Streamlining Act violated adjacent landowners' right to due process of law by allowing a development plan to be automatically approved without notice and a hearing. (*Id.* at p. 270.) The Court of Appeal agreed, rejecting the developer's argument that the city lacked standing to contest the validity of the statute. The court noted the no-standing rule as stated in *Star-Kist, supra*, 42 Cal.3d at page 6, but it cited *Drum, supra*, 144 Cal.App.3d 777 in support of making an exception. (*Selinger, supra*, 216 Cal.App.3d at pp. 270, 271.)

More powerfully, the court relied on the Supreme Court's doctrine of third-party standing as set forth in *Singleton v. Wulff* (1976) 428 U.S. 106. In that case, the Supreme Court explained that constitutional rights usually must be asserted by the person to whom they belong, but that a litigant may assert them on behalf of a third party under exceptional circumstances. (*Id.* at p. 114.) In addition to the requirement that the litigant must sustain an injury of its own, two factual elements are relevant in determining whether the litigant should be allowed to assert a third party's rights. One tests whether the litigant and third party are related closely enough to ensure that the litigant's interest in asserting the right is genuine and its advocacy will be effective:

> "The first [element] is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." (*Singleton v. Wulff, supra*, 428 U.S. at pp. 114-115.)

The second element concerns the reasons why the third party is not asserting or cannot assert the right in question for itself:

> "The other factual element to which the Court has looked is the ability of the third party to assert his own right. Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency

> to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent." (*Singleton v. Wulff, supra*, 428 U.S. at pp. 115-116.)

In *Selinger*, the Court of Appeal thought the two elements supported the city's standing. Local citizens' right to notice and a hearing was "inextricably bound up" with the city's interest in reviewing and conditioning subdivision applications on its own timetable based on local needs. (*Selinger, supra*, 216 Cal.App.3d at p. 271.) Also, there was a high obstacle to local citizens' ability to litigate their rights: Without notice, adjacent landowners would be likely to miss the 90-day statutory deadline for legal challenges to the approval of subdivision maps. (*Ibid*.)

The Court of Appeal applied the exception to the no-standing rule again in *Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal.App.4th 621 (*Central Delta Water*). Two local water agencies sued the State Water Resources Control Board, mounting an equal-protection challenge to discharge fees imposed on them under a state statute and regulations. (*Id.* at pp. 627-629, 630.) The Court of Appeal rejected the defendant's claim that, as political subdivisions, the agencies lacked standing to challenge the statute and regulations. It stated that the equal protection rights of the agencies' constituent water users were inextricably bound up with the agencies' duty to supply water. (*Id.* at pp. 630-631.) The court did not explain what obstacles prevented the constituents from suing on their own behalf.

We believe these courts have reasoned correctly in establishing an exception to the no-standing rule for those situations in which the usual standards for third-party standing are satisfied. As previously mentioned, we acknowledge that there was no challenge to a state statute in *Drum*, and therefore the principle that a political subdivision cannot challenge the will of its creator was not implicated. Consequently, the citation of *Drum* by the *Selinger* court was a stretch. But the reasoning stated in *Selinger* and applied in *Central Delta Water* is sound. Although a local government has no equal protection rights of its own to assert against the state, there is no reason why it cannot act as a mouthpiece for its citizens, who unquestionably have those rights, where the third-party-standing doctrine would allow it.

We recognize that the third-party-standing doctrine is the key to the exception; that the doctrine is addressed to the standing of plaintiffs to sue in federal court; and that we deal here neither with the standing of plaintiffs nor with federal court. The doctrine is a sound basis for the exception in spite of these omissions. The point of the no-standing rule is to prevent local governments, whether as plaintiffs or defendants, from using certain provisions of the federal Constitution to obtain invalidation of laws passed by their creator, the state. This notion has no application where the truly interested parties—citizens or constituents of the local government entity—undisputedly do have standing and the entity merely asserts rights on their behalf.

This case falls into the exception to the no-standing rule established in these cases. As the Supreme Court explained in *Shaw*, *supra*, 509 U.S. 630, the constitutional interest at stake in an equal-protection challenge to race-related changes in a voting system arises from the fact that changes of that kind may "reinforce … racial stereotypes and threaten … to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." (*Id.* at p. 650.) Individual voters are entitled to assert this interest through litigation testing state laws, as they did in *Shaw*. The city's assertion of equal protection rights in this case is best understood as a means of asserting those rights on behalf of its citizens.

The requirements of third-party standing are satisfied here. First, the relationship between the city and individual citizens or voters is of the appropriate kind. The city's vigorous litigation up to this point has shown its zealousness in asserting the claimed right. Plaintiffs' complaint has informed us that city voters rejected district-based elections by a large margin in a referendum in 2001, so the city likely is acting with substantial constituent support for its position. A cross-complaint filed by the individual defendants, seeking a judgment declaring the CVRA unconstitutional, shows that at least those individuals want to have the city pursue the matter on their behalf. Finally, the claimed equal-protection interest of individual citizens is "inextricably bound up" (*Singleton v. Wulff, supra*, 428 U.S. at p. 114) with the city's interest in continuing its present election system.

Second, there are genuine obstacles to citizens asserting their own rights. It is not clear how a lawsuit could be structured to enable citizens to mount the facial challenge made by the city. Prior to any change in the city's voting system, whom would these citizens sue, and for what? Making citizens wait until after some remedy is ordered or adopted would involve other obstacles, including the possibility that elections could be held under the remedy before the litigation is concluded. Even after adoption of a change in the system, an individual voter's stake in the matter would be small in relation to the economic burdens of litigation, and this could be a substantial deterrent. (See *Powers v. Ohio* (1991) 499 U.S. 400, 415 [venire person dismissed in criminal case for racially discriminatory reason has little incentive to pursue costly litigation to vindicate his or her equal protection rights, so criminal defendant must be permitted to assert those rights].) While these obstacles would not make it impossible for individual voters to sue the city if some alteration in its voting system is adopted, a showing of impossibility is not required. (See *Singleton v. Wulff, supra,* 428 U.S. at p. 116, fn. 6 [dis. opn. argued that third parties must face insuperable obstacles; maj. replied that "our cases do not go that far"].)

For these reasons, we reject plaintiffs' contention that defendants are not entitled to assert an equal protection challenge to the CVRA. The city is entitled to do so on behalf of its citizens.

II. Equal protection

A. Principles

We begin our examination of defendants' equal-protection claim with a brief review of the basic constitutional principles at issue. Federal and California equal-protection standards are not the same for all purposes. (See *Warden v. State Bar* (1999) 21 Cal.4th 628, 652-653 (dis. opn. of Kennard, J.); *Butt v. State of California* (1992) 4 Cal.4th 668, 683, 685.) Here, however, the parties' briefs rely on federal case law and do not claim that any different standards apply to these facts under the state Constitution. We will, therefore, focus on principles developed in federal cases.

1. Suspect classifications, fundamental rights, strict scrutiny, and rational-basis review

A state's use of a classification is subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment if it is a suspect classification or if it burdens a fundamental right. (*Plyler v. Doe* (1982) 457 U.S. 202, 216-218 & fns. 14 & 15.) Otherwise, the classification is subject only to rational-basis review. (*Vacco v. Quill* (1997) 521 U.S. 793, 799.) Race is a suspect classification (*Johnson v. California* (2005) 543 U.S. 499, 505 (*Johnson*)), and the right to vote is a fundamental right (*Kramer v. Union School District* (1969) 395 U.S. 621, 626-628) for equal protection purposes.

A law subject to strict scrutiny is upheld only if it is *narrowly tailored* to promote a *compelling* governmental interest. (*Johnson, supra*, 543 U.S. at p. 505.) Under rational-basis review, by contrast, a law need only bear a *rational relationship* to a *legitimate* governmental interest. (*Vacco v. Quill, supra*, 521 U.S. at p. 799.) (The third level of review—intermediate scrutiny, which applies to sex discrimination—is not at issue in this case.)

2. Facial invalidity standard

Defendants' challenge claims that the statute is facially invalid. In *United States v. Salerno* (1987) 481 U.S. 739, 745 (*Salerno*), the Supreme Court stated that "[a] facial challenge to a legislative Act is, of course, 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." The court explained that the fact the federal Bail Reform Act, subject in that case to a substantive due-process challenge, "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." (*Ibid.*)

Defendants assert that the *Salerno* standard does not apply here because *Salerno* was not cited in certain cases involving affirmative action laws (see, e.g., *Richmond v. J. A. Croson Co.* (1989) 488 U.S. 469 [municipal ordinance establishing affirmative action program for city contracting]); laws creating specific election districts (see, e.g., *Shaw, supra,* 509 U.S. 630 [bizarrely shaped congressional district boundaries designed to create majority-Black districts]); and laws involving explicit use of racial segregation (see, e.g., *Johnson, supra*, 543 U.S. 499 [racial segregation of prisoners during initial evaluation]). Various justices of the Supreme Court, not amounting in any instance to a majority, have taken differing positions on the scope and applicability of the *Salerno* doctrine. (*Chicago v. Morales* (1999) 527 U.S. 41, 55, fn. 22 (conc. opn. of Stevens, J., joined by Souter, J. and Ginsburg, J.) [*Salerno* formulation is dictum and need not be followed, especially by state courts]; *id*. at pp. 77-80 & fns. 1-3 (dis. opn. of Scalia, J.) [*Salerno* states the correct standard for all cases but First Amendment overbreadth challenges].)

The only cases of which we are aware where it has been definitively stated that a facial challenge could succeed on a showing falling short of the *Salerno* standard, however, are those where the overbreadth of a law violated the First Amendment by chilling protected speech (*Salerno, supra,* 481 U.S. at p. 745) and where a law imposed an undue burden on the right to have an abortion (*Planned Parenthood of Southern Arizona v. Lawall* (9th Cir. 1999) 180 F.3d 1022, 1026 [asserting that in *Planned Parenthood of Southern PA v. Casey* (1992) 505 U.S. 833, U.S. Supreme Court overruled *Salerno* in context of facial challenges to abortion restrictions]). Outside these areas, California courts apply a *Salerno*-type approach to facial constitutional challenges in general. (See, e.g., *East Bay Asian Local Development Corp. v. State of California*

(2000) 24 Cal.4th 693, 709; *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 338; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) We agree there is no warrant for refusing to apply *Salerno* outside the First Amendment overbreadth and abortion areas until a majority of the Supreme Court gives clear direction to do so. (*Hotel & Motel Ass'n of Oakland v. City of Oakland* (9th Cir. 2003) 344 F.3d 959, 972.) Consequently, we hold that the *Salerno* standard for facial invalidation applies here, and defendants can succeed in their facial challenge only by showing that the CVRA can be validly applied under no circumstances.

B. Analysis

With this background, the two basic reasons for rejecting defendants' challenge to the CVRA are easy to state. First, because the statute is nondiscriminatory, it is subject only to rational-basis review, not strict scrutiny; and it passes rational-basis review. Second, although the *Shaw-Vera* line of cases reveals the potential for unconstitutional applications of the statute, that potential does not show there can be no valid applications and therefore cannot establish that the statute is facially invalid. We consider these two reasons in turn.

1. The CVRA is nondiscriminatory, not subject to strict scrutiny, and passes rational basis review

Like the FVRA, the CVRA involves race and voting, but, also like the FVRA, it does not allocate benefits or burdens on the basis of race or any other suspect classification and does not burden anyone's right to vote. Like the FVRA, the CVRA confers on voters of any race a right to sue for an appropriate alteration in voting conditions when racial vote dilution exists.

The CVRA vote-dilution cause of action differs from the FVRA version in important ways, specifically, that the need to prove the possibility of creating a geographically compact majority-minority district is eliminated. The differences do not introduce a racial classification or a burden on the right to vote, however. Therefore, the facial terms of the statute are not subject to strict scrutiny. Only rational-basis review applies, and the CVRA readily passes it. Curing vote dilution is a legitimate government interest and creation of a private right of action like that in the CVRA is rationally related to it. Major portions of defendants' briefs are devoted to showing that the CVRA fails strict scrutiny. We need not address these points because strict scrutiny does not apply.

a. *The CVRA is not a law that imposes a racial classification on individuals and then uses it to confer a burden or benefit on all*

Defendants argue that strict scrutiny applies here because it applies to any statute that refers to race or calls for any sort of race-conscious remedy or other action, even if it does not affect different races in different ways. They rely on cases like *Loving v. Virginia* (1967) 388 U.S. 1 (*Loving*) and *Johnson, supra*, 543 U.S. 499, which applied strict scrutiny to state laws that employed racial classifications but burdened persons of different races equally. In *Loving*, the Supreme Court invalidated a state law forbidding persons of different races to marry one another. The law was subject to strict scrutiny even though its burden was generally distributed. (*Loving, supra*, 388 U.S. at p. 8.) In *Johnson*, a policy of segregating state prison inmates by race during an initial evaluation period was held to be subject to strict scrutiny even though all prisoners were equally affected by it. (*Johnson, supra*, 543 U.S. at p. 506.)

What those cases hold is that a law classifying individuals by race and then imposing some kind of burden or benefit on the basis of the classification is subject to strict scrutiny even if persons of all races bear the burden or receive the benefit equally. In *Johnson*, for instance, the court rejected the state's argument that "strict scrutiny should not apply because all prisoners are 'equally' segregated." (*Johnson, supra*, 543 U.S. at p. 506.) It stated that this argument "ignores our repeated command that 'racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.'" (*Ibid.*)

What the cases do not hold is that a statute is automatically subject to strict scrutiny because it involves race consciousness even though it does not discriminate among individuals by race and does not impose any burden or confer any benefit on any particular racial group or groups. The CVRA confers on members of any racial group a cause of action to seek redress for a race-based harm, vote dilution. The creation of that kind of liability does not constitute the imposition of a burden or conferral of a benefit on the basis of a racial classification. If the CVRA were subject to strict scrutiny because of its reference to race, so would every law be that creates liability for race-based harm, including the FVRA, the federal Civil Rights Act, and California's Fair Employment and Housing Act.

Defendants argue that these antidiscrimination laws are, in fact, subject to strict scrutiny, but cite no cases subjecting them to it. Lacking that authority, they instead cite lower court cases subjecting federal antidiscrimination laws to analysis under the congruence and proportionality test of *City of Boerne v. Flores* (1997) 521 U.S. 507 (*Boerne*), which they describe as "obviously very similar to strict scrutiny." For example, the Court of Appeals subjected a provision of Title VII of the federal Civil Rights Act to a *Boerne* analysis in *In re Employment Discrimination Litigation* (11th Cir. 1999) 198 F.3d 1305, 1319-1324.

This argument does not work. The *Boerne* test has nothing to do with strict scrutiny. It has nothing in particular to do with the equal protection clause. It is about the source of constitutional power for Congress's enactment of certain types of statutes, not the constitutional right of individuals to be free from discrimination.

Briefly, the question presented in *Boerne* was whether Congress had authority under section 5 of the Fourteenth Amendment (the amendment's enforcement clause) to enact by statute a standard for protecting the free exercise of religion that was far more stringent than the standard the Supreme Court established under the free exercise clause of the First Amendment in an earlier case. Congress claimed the action was within its power under section 5 of the Fourteenth Amendment to enforce the due process clause of the Fourteenth Amendment, which in turn incorporated the First Amendment and its free exercise clause. (*Boerne*, *supra*, 521 U.S. at pp. 512-517.) The court held that Congress lacked this authority because the standard Congress adopted was not congruent and proportional to the scope of the First Amendment right as the court itself had earlier defined it. (*Id*. at pp. 519-520, 532.)

From this summary, it can be seen that the fact that an antidiscrimination law like Title VII has been subjected by some courts to a *Boerne* analysis does not even remotely imply that laws of that kind violate individuals' rights against discrimination unless they pass strict scrutiny. Defendants go so far as to imply that the only reason strict scrutiny has never been applied to federal antidiscrimination laws is that the *Boerne* test applies to those laws instead; strict scrutiny is the test appropriate for state legislation while *Boerne* applies in federal law. This cannot be true. Strict scrutiny applies to all racially discriminatory laws. It does not apply to antidiscrimination laws because, like CVRA, they are not racially discriminatory.

Defendants argue that the "sky will not fall" if strict scrutiny is applied to antidiscrimination laws. It will not fall because those laws, unlike the CVRA, generally impose liability only upon a showing of intentional discrimination, and for that reason the laws would likely be upheld under strict scrutiny. This argument collapses as soon as it is applied to the FVRA. As noted above, section 2 of the FVRA does not require a showing of intentional discrimination. No court has ever suggested, to our knowledge, that strict scrutiny applies to section 2 of the FVRA and that it would fail for this reason.

Also unhelpful to defendants is the argument that *Shaw* and *Vera* stand for the proposition that strict scrutiny can be triggered by an anti-vote-dilution law even though it does not burden the rights of the White plaintiffs. Responding to Justice Souter's dissenting view in *Shaw* that race-based districting should not trigger strict scrutiny unless another race's voting strength is harmed, the *Shaw* majority explained that "reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." (*Shaw, supra*, 509 U.S. at p. 650.) Similarly, in *Vera*, the plurality responded to a dissenting comment by Justice Souter—that race-based, dilution-combating districts do not harm any class of voters—by referring to "harmful and divisive stereotypes" that the use of race may foster even if it does not involve any voting-related harm to the plaintiffs. (*Vera, supra,* 517 U.S. at pp. 983-984.)

Contrary to defendants' view, these statements do not mean the CVRA is subject to strict scrutiny even though it does not confer benefits or impose burdens on any particular racial group and does not burden anyone's right to vote. They only mean that districting plans that use race as the predominant line-drawing factor—and therefore amount to segregation of voters by race—are subject to strict scrutiny. A court might wish to impose that kind of districting plan as a CVRA remedy. Even so, as we will explain, applications of the statute not involving that type of remedy are readily conceivable, so this potential problem is not a basis for a *facial* challenge.

b. The CVRA does not deny anyone standing on the basis of membership in any group

So far we have only addressed the main thrust of defendants' argument in support of applying strict scrutiny: that the statute's reference to race is itself a racial classification. We turn next to a series of related minor arguments. The first of these is based on the trial court's view that the statute is racially discriminatory on its face because its definition of "protected class" excludes some racial or ethnic groups. The CVRA defines a protected class as persons "who are members of a race, color or language minority group, as this class is referenced and defined in the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.)." (§ 14026, subd. (d).)

The trial court took issue with the inclusion of “language minority group” in this definition. Its objection is based on an error made in reviewing the federal standard that the CVRA incorporates. Its order quoted Title 42 United States Code section 1973b(f)(1), a provision stating congressional findings on the deleterious effects of English-only elections. The provision states that “voting discrimination against citizens of language minorities is pervasive” and that “[s]uch minority citizens are from environments in which the dominant language is other than English.” The trial court believed this was the federal statutory definition of “language minority group” to which the CVRA refers. On that basis, it concluded that the CVRA denies standing to English speakers. Then the trial court quoted 28 Code of Federal Regulations part 51.2 (2003), which states that “language minority group” means “persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage.” The court believed this further restricted the meaning of the term, so as to exclude, for example, speakers of Polish or Portuguese. These restrictions, the court ruled, denied standing to ethnic groups who speak the purportedly excluded languages. That, in turn, triggered strict scrutiny, which the statute failed.

In reality, the regulation the court referred to merely restated the *actual* federal statutory definition of “language minority group,” which is found at Title 42 United States Code section 1973l(c)(3): “The term ‘language minorities’ or ‘language minority group’ means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.” This provision uses and defines the precise phrase (“language minority group”) contained in the CVRA. The only logical conclusion is that this is the definition the Legislature intended to incorporate. There is no reason to think it also meant to include the language from Title 42 United States Code section 1973b(f)(1) about “environments in which the dominant language is other than English,” which does not use the phrase “language minority group” and which states a congressional finding, not a definition.

Consequently, despite its name, the classification "language minority group" does not define any group in terms of language, and the trial court relied on a mistaken understanding of the statute. The term simply identifies four specific racial or ethnic groups as belonging to a protected class. The definition refers to these as racial or ethnic groups ("persons who are American Indian," etc.), not in terms of their language. As plaintiffs explain, the category "language minority group" was added to the FVRA in 1975 for the purpose of ensuring that courts would not mistakenly exclude American Indians, Asian Americans, Alaskan Natives, and Hispanics from coverage under the statute, even though each group was already included in the category "race." (See Sen.Rep. No. 94-925, 1st Sess. (1975), reprinted in 1975 U.S. Code Cong. & Admin. News, pp. 774, 814 ["The Department of Justice and the United States Commission on Civil Rights have both expressed the position that all persons defined in this title as 'language minorities' are members of a 'race or color' group ...."].)

The four language minority groups are, therefore, on the same footing as Whites, persons of Polish or Portuguese ancestry, or any other racial or ethnic group. In a variety of contexts, the Supreme Court has held that the term "race" is expansive and covers all ethnic and racial groups. (*Rice v. Cayetano* (2000) 528 U.S. 495, 512 [15th Amendment's prohibition on abridgment of right to vote on account of race "grants protection to all persons, not just members of a particular race"]; *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 610, 613 [prohibition of racial discrimination in 42 U.S.C. § 1981 protects all persons from discrimination based on their "ancestry or ethnic characteristics"; court is "quite sure" White people are protected]; *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 280 [prohibition on discrimination because of race in Title VII applies to Whites and non-Whites alike].) The inclusion of "language minority groups," as defined by the statute, only reinforces the proposition that American Indians, Asian Americans, Alaskan Natives, and Hispanics are among the racial or ethnic groups that can constitute a protected class. It does not deny standing to anyone.

The trial court cited *Polish American Congress v. City of Chicago* (N.D.Ill. 2002) 211 F.Supp.2d 1098 for the proposition that "the federal courts have interpreted the definition of protected class under 42 U.S.C. [section] 1973 so as to exclude Polish speakers from those having standing to sue," but that is not what that case held. The court simply stated that Polish-Americans were not one of the four groups included in the statutory definition of "language minority group." (*Polish American Congress v. City of Chicago, supra,* at p. 1107.) The court did not consider whether Polish-Americans had standing under the FVRA as a "race" and the plaintiffs apparently did not argue that they did. A case is not authority for a proposition it did not consider. (*City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1318.)

The trial court's view would likely justify strict scrutiny and facial invalidation if it represented a correct reading of the statute, but it does not. Even if it were a *plausible* reading of the statute, it would be both possible and necessary under the constitutional avoidance doctrine to construe it as we have: All persons have standing under the CVRA to sue for race-based vote dilution because all persons are members of a race.

c. The CVRA is not an affirmative action law

Defendants characterize the CVRA as an affirmative action statute and rely on affirmative action cases to argue that it is subject to strict scrutiny. The CVRA is not an affirmative action statute because, unlike affirmative action laws the Supreme Court has struck down, it does not identify any races for conferral of preferences. In *Gratz v. Bollinger* (2003) 539 U.S. 244, for instance, the Supreme Court applied strict scrutiny and struck down a university's affirmative action admission program. The program conferred 20 points, on a scale of 1 to 150, on applicants belonging to a specified set of racial groups. This advantage could increase a low waitlist score to an automatic admit score. (*Id.* at pp. 251, 255). In *Richmond v. J. A. Croson Co., supra*, 488 U.S. 469, the court applied strict scrutiny and struck down a city's program of affirmative action in government contracting. The program commanded that 30 percent of the money spent on city building contracts be paid to subcontracting firms owned by members of a specified set of racial groups. (*Id.* at pp. 477-478, 511.) The CVRA does nothing similar. We cannot subject the CVRA to strict scrutiny on the ground that affirmative action programs are subject to strict scrutiny.

d. The CVRA does not burden the fundamental right to vote

As we have said, strict scrutiny under the equal protection clause can be triggered by a classification used to burden a fundamental right, and voting is treated as a fundamental right in this context. Separately from their racial discrimination argument, defendants contend that the CVRA is subject to strict scrutiny because it "impos[es] liability on the basis of voting …." This is not correct. It is true that the CVRA requires a showing of racially polarized voting as an element of liability, but that does not mean any person or group of people is held liable for voting or for how they voted. The liability is that of the government entity that maintains the voting system, and it is imposed because of dilution of the plaintiffs' votes.

A prime example of a violation of the equal protection clause through a burden on the right to vote is malapportioned districts, i.e., those that violate the one-person, one-vote rule by having unequal populations. (*Reynolds v. Sims* (1964) 377 U.S. 533, 568.) The CVRA involves nothing similar. Cases reviewing districts created predominantly on the basis of race presumably are another example, even though the opinions in those cases focus on the suspect racial classification rather than on the fundamental right to vote. However, the possibility of some court imposing an unconstitutional remedy under the CVRA in some cases is not, as we have said, a basis for *facial* invalidation.

e. The CVRA does not burden any First Amendment right

Defendants also argue that the CVRA is subject to strict scrutiny because it burdens fundamental rights protected by the First Amendment:

> "Voter preferences that underlie racially polarized voting, moreover, are political views protected against infringement by the First Amendment. The votes themselves are expressions of political preferences about

> candidates and ballot measures. Bloc voting, then, represents a coalition of political interests that lie close to the core of the freedom of political association."

Defendants may be correct in arguing that racially polarized voting constitutes political expression protected by the First Amendment. But the CVRA does not burden anyone's right to engage in racially polarized voting. It only makes racially polarized voting part of the predicate for a government entity's liability for racial vote dilution. In doing so, it is comparable to the FVRA. The *effect* of racially polarized voting—election of monoracial city councils and the like—may be and is intended to be reduced by the application of the CVRA. But no voter has a right to a voting system that chronically and systematically brings about that effect. We do not understand defendants to argue the contrary.

f. The fact that the CVRA addresses a racial issue does not show that the Legislature acted with an invidious purpose

A facially neutral law is subject to strict scrutiny if it was adopted for a racially discriminatory purpose. (*Miller v. Johnson* (1995) 515 U.S. 900, 913.) Defendants argue that, even if the CVRA is facially neutral, it is subject to strict scrutiny because it was "enacted <u>solely</u> for racial purposes, i.e., to remedy racial bloc voting in at-large" voting systems. Defendants contend that plaintiffs admit this by "assert[ing] that the [CVRA] is an antidiscrimination statute intended to remedy" racially polarized voting.

This is incorrect for essentially the same reason that defendants are mistaken in claiming that the statute is subject to strict scrutiny because it contains a facial reference to race. A legislature's intent to remedy a race-related harm constitutes a racially discriminatory purpose no more than its use of the word "race" in an antidiscrimination statute renders the statute racially discriminatory. An intent to remedy a race-related harm may well be combined with an improper use of race, as in an affirmative action program that uses race in an improper way. The CVRA does not, however, have the latter component. Upon a finding of liability, it calls only for "appropriate remedies" (§ 14029), not for any particular, let alone any improper, use of race.

g. Differences between the CVRA and the FVRA do not automatically render the CVRA unconstitutional

Defendants devote almost half of the argument portion of their brief to attempting to show that the CVRA contains "dramatic departures from the FVRA" which amount to an "extraordinary expansion of federal law." To the extent that this may be intended as an independent argument that the CVRA is unconstitutional, it is without merit. There is no rule that a state legislature can never extend civil rights beyond what Congress has provided. State law may, of course, be preempted by federal law if inconsistent with it, but defendants have not made a preemption argument. To the extent that this discussion may be intended to make the narrower point that the CVRA is not narrowly tailored to effectuate a compelling government interest—i.e., that it fails strict scrutiny—we will disregard it, since we hold that strict scrutiny does not apply.

2. Potential unconstitutional applications cannot show facial invalidity

Defendants' arguments are partially based on Supreme Court cases that struck down specific redistricting plans drawn up partly to avoid racial vote dilution that might violate section 2 of the FVRA. Because those cases only address specific actions taken by states to cure racial vote dilution (i.e., the creation of particular districts), their impact here relates only to the validity of specific applications of the CVRA—applications that at this point are hypothetical. Under the facial-invalidity standard set forth in *Salerno, supra*, 481 U.S. at page 745, therefore, the cases cannot establish that the CVRA is facially invalid. (To be sure, defendants contend that none of their arguments are addressed to mere remedies issues and that all are instead addressed to the criteria for liability under the CVRA and prove that those criteria are subject to strict scrutiny. As explained earlier, they are not subject to strict scrutiny.)

Shaw, supra, 509 U.S. 630 was the first in this line of cases. It held, as mentioned earlier, that a redistricting plan was subject to strict scrutiny because it could not rationally be understood as anything but an effort to separate voters on the basis of race. The plurality opinion in *Vera* made a similar point. There is no doubt that any district-based remedy the trial court might impose using race as a factor in drawing district lines would be subject to analysis under the *Shaw-Vera* line of cases. In reviewing a district-based remedy, it would be necessary to determine whether race was the predominant factor used in drawing the district lines. If it was, the plan would be subject to strict scrutiny.

It is equally apparent that this does not mean the CVRA must pass strict scrutiny in order to withstand a facial challenge. Whether one potential remedy under a statute would be subject to strict scrutiny if imposed is not the test for facial invalidity of the statute. Defendants' argument, to be successful, would have to be not only that unconstitutional remedies are consistent with the CVRA, but that they are mandated by it. They are not.

III. Gift of public funds

Although no fee motion was ever made, the trial court found the CVRA's attorney-fee provision to be invalid. That provision states as follows:

> "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." (§ 14030.)

Relying on *Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 450-451 (*Jordan*), the trial court ruled that this section violated article XVI, section 6, of the California Constitution, which forbids the Legislature to "make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation … ." The court interpreted *Jordan* to mean that "[a] lawsuit against a public entity which results in no change whatever in the status quo ante serves no public purpose, and does not constitute a valid claim against the public for attorney fee and cost purposes."

The court then applied this purported rule to a hypothetical:

> "If a California city has at large city council election plus one (1) voter of Alaskan native ancestry who repeatedly runs for the council and always gets just one vote (his own) and files suit under the California Voting Rights Act, he would be a prevailing party under the Act though no remedy is possible, and so be entitled to attorney fees and expenses. Defendants contend, and Plaintiffs do not dispute, that a local government cannot be required to carve an electoral district for an impossibly small number of voters (such as this hypothetical's one Alaskan native). [Citations.] While it is doubtful this hypothetical city could be sued every day under the Act in this situation, it could probably be sued every election cycle, and have to pay attorney fees over and over for a situation it cannot remedy or avoid."

The court violated two rules of constitutional decisionmaking in invalidating the section. First, a court should not decide constitutional questions unless required to do so. (*People v. Pantoja, supra*, 122 Cal.App.4th at p. 10.) Here, no party moved for attorney fees, so the validity of the fee statute was not at issue. The court should not have addressed or answered the question.

Second, the court's ability to think of a single hypothetical in which the application of a statute would violate a constitutional provision is not grounds for facial invalidation. Facial invalidation is justified only where the statute could be validly applied under *no* circumstances. (*East Bay Asian Local Development Corp. v. State of California*, *supra*, 24 Cal.4th at p. 709.) Circumstances in which the objection the court raises would not be present are easy to imagine. If, on remand, the court finds liability *in this case* but is unable to formulate a permissible remedy *in this case*, then the court will have an opportunity to decide whether the application of section 14030 would be unconstitutional *in this case*. It has not had that opportunity yet. We express no opinion here on whether a fee award would be barred under those circumstances since doing so is premature.

IV. Issues on remand

The parties have raised several issues in this appeal that the trial court never decided and that we need not decide now. We repeat them here for convenience:

- What elements must be proved to establish liability under the CVRA?
- Is the court precluded from employing crossover or coalition districts (i.e., districts in which the plaintiffs' protected class does not comprise a majority of voters) as a remedy?
- Is the court precluded from employing any alternative at-large voting system as a remedy?
- Does the particular remedy under contemplation by the court, if any, conform to the Supreme Court's vote-dilution-remedy cases?

The court's answers to these questions will determine the scope of relief, if any, available to plaintiffs. The logical limit in one direction would be a conclusion that plaintiffs can obtain under the CVRA only the same relief that they could have obtained under the FVRA. The logical limit in the other direction would be the conclusion that, upon proof of racially polarized voting, plaintiffs will be entitled to the most appropriate remedy, among the remedies we have discussed, that does not result in unconstitutionally drawn districts under the Supreme Court's rulings.

DISPOSTION

The judgment is reversed and the case remanded to the trial court for further proceedings. Plaintiffs shall recover their costs on appeal.

Defendants' motion to strike, filed February 10, 2006, is denied. The request for leave to submit supplemental briefing included in the motion to strike is granted and the supplemental brief incorporated in the motion is deemed filed.

The following requests are granted: Motion of Appellants Requesting Judicial Notice (filed September 15, 2005); Supplemental Motion of Appellants Requesting Judicial Notice (filed January 31, 2006); Second Motion of Respondents Requesting Judicial Notice (filed February 6, 2006); Request for Judicial Notice contained in defendants' Answer to Brief of Amici Curiae Common Cause and FairVote (filed March 22, 2006); Third Motion of Respondents Requesting Judicial Notice (filed July 20, 2006).

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Wiseman, J.

WE CONCUR:

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Harris, Acting P. J.

____
Cornell, J.

Rose Institute
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Quiet Revolution in California Local Government Gains Momentum

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A low-profile revolution in local government is happening this November as twenty-one California cities hold their first by-district city council elections. Prior to the 2002 passage of the California Voting Rights Act, only twenty-nine of California's nearly 500 cities held by-district elections: twenty-seven in purely by-district elections, and Downey and Oakland electing one councilmember "at large" (or citywide) and the rest of the council by-district (in Downey and Oakland the citywide councilmember is not the mayor). Between passage of the Act in 2002 and June of 2016, the CVRA prompted nine more cities to hold their first by-district elections. This November the total number of cities using by-district elections is jumping to fifty-nine.

From statehood in 1850 to passage of CVRA in 2002, all but the very largest cities in California tended to use at-large council election systems. In the fourteen short years since CVRA's passage, the number of cities using by-district elections has more than doubled.

This quiet tectonic shift in local government is accelerating. In eight more cities the voters are deciding in November 2016 whether to make the change; three other cities already made the change and their district elections will begin in 2018; in one city voters will decide in 2018 whether to make the change; and three cities currently are actively working toward changing to by-district elections for 2017 or 2018. If voters approve those changes or the councils follow through on their announced intentions to change, the number of cities electing by-district will increase from twenty-nine before CVRA to at least seventy-four by 2018 - an increase of 155 percent.

The California Voting Rights Act was written to promote the use of by-district elections to encourage the election of candidates preferred by previously "under-represented" voters such as Latinos and Asian-Americans. The law was slow to have effect. Signed by Governor Davis in 2002, it was almost immediately suspended by a superior court ruling that the law was unconstitutional. The law was then restored in a 2006 appeals court ruling. The shift to by-district city council elections began to gain momentum after Modesto agreed to a $3 million settlement in 2008, and accelerated after Palmdale agreed to a $4.5 million settlement in 2015.

This report presents the preliminary findings of a long-term Rose Institute research project considering the effects of the California Voting Rights Act. Future research plans include looking at the cities currently making the change to by-district elections; looking at the over 135 school districts that have made the change in election systems; reviewing the Community College and Special District jurisdictions that have made the change; expanding our review to include changes in the number of Asian-American and African-American candidates elected; comparing the changes in the newly by-district cities to those in cities staying at-large or already in districts; and studying what characteristics, demographics or dynamics cause some jurisdictions to see significant gains in Latino representation after the change, while others do not. For more information on the project, contact Douglas Johnson or Justin Levitt at the Rose Institute.

Overall, the move to by-district elections has increased the number of Latinos elected to city councils, but that change has been driven by significant gains in a few cities (such as Sanger and Chula Vista) that offset a lack of any increase in others (such as Escondido and Wildomar).

Any analysis of municipal elections in California is challenging due to the independence of the state's nearly 500 cities and the lack of a certified central repository of municipal election results. Our research is indebted to the Center for California Studies at Sacramento State University for its efforts to compile a comprehensive list of local election results. Rose Institute researchers have supplemented the Center's data with reviews of County Registrar and City Clerk online records, and have added data from National Demographics Corporation. The database remains a work in progress and we encourage anyone with additional information to contact the Rose Institute.

Identifying ethnicities of elected officials is a less than perfect art, in no small part because the definition of "Latino" or "Hispanic" is not universally agreed upon and, for that and other reasons, some individuals change their self-identification over time. To identify Latino officeholders, we relied the listing of Latino officeholders compiled each year by the National Association of

Latino Elected and Appointed Officials (NALEO), supplemented by news reports and online biographies of the officeholders. To identify Latino candidates, we relied on news reports and online biographies of those candidates.

This Rose Institute initial analysis reviews ten cities: nine that have held at least one election by district since CVRA prompted them to change their election system, and Wildomar, which is holding its first election in November, but it is included since both seats are uncontested and, thus, already known. This initial review identifies which cities have seen increases in Latino representation.

For each city, the numbers and the citywide Latino percentage of Citizens of Voting Age (CVAP) in the city is provided. We look at CVAP because the courts in Voting Rights Act litigation tend to use the CVAP counts from the Census Bureau as the best available measure of eligible voters. Follow up research will narrow that data to analyze the Latino (and other "protected class" population) percentages of CVAP in each district, but we have not yet compiled that data for all the cities.

Some of the advantages of by-district elections are that they make it easier for candidates to run and to get to know voters. Because there are fewer voters in a district than city at large, the cost of putting a candidate statement in the sample ballot decreases significantly and the pool of people who can run against a given candidate is restricted to the others who reside in the district. These advantages of shrinking the voter pool for a given election also come with a risk: with fewer people eligible to run, there is an increase in uncontested elections. In the nine cities that have held new district elections, this review has identified 58 district seats up for election over 22 election cycles (including those held this November in those nine cities). Of those 58 contests, 47 were contested and 11 (19 percent) were uncontested (meaning no more than one candidate ran for that district). It is notable, however, that 8 of the 11 uncontested elections were in the City of Madera. In the eight cities other than Madera, 48 seats have been up for election with 45 contested and 3 (6 percent) uncontested. Among those jurisdictions that changed to by-district elections and that are holding election this November, our review identified 57 district seats up for election, with 47 contested and 10 (18 percent) uncontested.

Another significant effect of the California Voting Rights Act is the financial cost it has imposed on cities--many challenges so far have resulted in settlements or legal awards over one million dollars. Arguably, these financial risks were a major reason some (and likely most) of the cities made the change to by-district elections, independent of actual or perceived violations of voting rights. The influence of the Act's penalty provisions on city governments will be part of the Rose Institute's ongoing research.

In summary, 2016 saw a significant expansion in the number of cities changing their elections from at-large to by-district elections, and we expect that rate of change to accelerate in coming years. It is likely, but far from guaranteed, that the change in election systems will increase the number of Latinos elected, as most, but not all, cities changing previously have seen such increases. While acknowledging that determining the ethnicity of elected officials is difficult, we estimate that number of Latinos elected to city councils in nine cities that have held by-district elections (and the one city where both 2016 districts are uncontested) increased the number of Latinos councilmembers in seven of the ten cities. The total number of Latinos on those ten city councils increased from seven after the last at-large election to eighteen elected by district so far.

The tables below display the CVAP data compiled from the 2010 to 2014 American Community Survey Special Tabulation data, which we have disaggregated to the Census Block level of geography and then aggregated by City.

Table 1: Changes in Latinos Elected in Ten Changed Cities With Election Results
(Listed by Latino % of Citizen Voting Age Population)

City	Population	LatinoCVAP	Latinos_Pre_Change	Latinos_Post_Change	Elections Held	Seats Up	Contested	uncontested
Sanger	24,270	74%	1	4	3 + 2016	9	8	1
Whittier	85,331	60%	0	1	1	2	1	1
Madera	61,416	60%	0	2	2 + 2016	10	2	8
Chula Vista	243,916	51%	1	3	1 + 2016	2	2	0
Compton	96,455	48%	1	2	2	7	7	0
Tulare	59,278	43%	0	1 (+2?)	2 + 2016	8	7	1
Escondido	143,911	30%	1	1	1 + 2016	4	4	0
Wildomar	32,176	29%	1	1	2016	2	0	1
Modesto	201,165	26%	1	1	4	13	13	0
Santa Barbara	88,410	24%	1	2	1	3	3	0

Table 2: Twenty-One Cities Holding Their First District Elections in 2016

Notes: In King City, one Latino is running unopposed, another district has two candidates but both are Latino, and a Latino is running against a non-Latino in the third district that is contested this year. In Turlock, only Latino candidates are running in one district, and a Latino is running against a non-Latino in another district that is up for election this year. Wildomar is in this table because its first election is in 2016, though it is also in Table 1 because both seats are uncontested so the results are already known.

City	Population	LatinoCVAP	Latinos_Pre_Change	Latinos_Post_Change	Seats Up	Contested	Uncontested
King City	12,874	79%	0	2 or 3	3	2	1
Los Banos	35,972	55%	0	Up to 2	2	2	0
Chino	77,983	48%	0	0	2	0	2
Palmdale	152,750	46%	2	Up to 3	4	4	0
Patterson	20,413	45%	1	Up to 1	2	1	1
Riverbank	22,678	44%	3	1	2	1	1
Visalia	124,442	37%	0	0	2	2	0
Merced	78,958	37%	3	Up to 2	3	3	0
Highland	53,104	36%	0	Up to 2	4	4	0
Eastvale	53,683	36%	0	Up to 1	3	3	0
Anaheim	336,265	35%	1	Up to 4	4	4	0
Woodland	55,468	35%	1	Up to 2	3	3	0
Buena Park	80,530	29%	0	Up to 1	2	1	1
Wildomar	32,176	29%	1	1	2	0	1
Turlock	68,549	27%	1	0	2	2	0
Hemet	78,657	27%	0	Up to 1	3	3	0
Dixon	18,351	27%	0	Up to 1	2	2	0
Banning	29,603	26%	0	1	3	1	2
Garden Grove	170,883	24%	0	Up to 2	4	4	0
Yucaipa	51,367	23%	0	0	3	3	0
San Juan Capistrano	34,593	19%	1	Up to 1	2	2	0

Table 3: Eight Cities Voting in 2016 on Whether to Change to By-District Elections

City	Population	LatinoCVAP	Wht.CVAP	Blk.CVAP	Asn.CVAP
Bellflower	76,616	44%	28%	16%	11%
Corona	152,374	33%	47%	6%	12%
Costa Mesa	109,960	21%	65%	2%	11%
El Cajon	99,478	22%	63%	7%	4%
Eureka	27,191	6%	80%	3%	4%
Fullerton	135,161	25%	48%	3%	22%
Placentia	50,533	26%	54%	2%	17%
Rancho Cucamonga	165,269	33%	47%	9%	10%

Table 4: Six Cities Already Working to Change to By-District Elections for 2017 or 2018

City	1stElection	Population	LatinoCVAP	Wht.CVAP	Blk.CVAP	Asn.CVAP
Ceres	2017	45,417	43%	45%	2%	7%
Hesperia	2018	90,173	39%	50%	7%	2%
La Mirada	2017	48,527	36%	42%	2%	18%
Upland	2018	73,732	31%	54%	6%	9%
Redlands	2018	68,747	24%	61%	6%	7%
San Marcos	2018	83,781	23%	63%	3%	10%

Table 5: Uncontested Elections So Far

City	Population	Latino_CVAP	Latinos_Pre_Change	Latinos_Post_Change	Elections Held	Seats Up	Contested	Uncontested
Madera	61,416	60%	0	2	2 + 2016	10	2	8
Sanger	24,270	74%	1	4	3 + 2016	9	8	1
Whittier	85,331	60%	0	1	1	2	1	1
Tulare	59,278	43%	0	1 (+2?)	2 + 2016	8	7	1
Chula Vista	243,916	51%	1	3	1 + 2016	2	2	0
Compton	96,455	48%	1	2	2	7	7	0
Escondido	143,911	30%	1	1	1 + 2016	4	4	0
Modesto	201,165	26%	1	1	4	13	13	0
Santa Barbara	88,410	24%	1	2	1	3	3	0

Table 6: Twenty-Seven Cities Holding By-District Elections Prior to Passage of CVRA

City	Population	Latino_CVAP	Wht_CVAP	Blk_CVAP	Asn_CVAP
Los Angeles	3,792,621	33%	41%	13%	13%
San Diego	1,307,402	21%	54%	7%	16%
San Jose	945,942	24%	37%	4%	33%
San Francisco	805,235	11%	48%	6%	32%
Fresno	494,665	37%	40%	9%	12%
Sacramento	466,488	20%	44%	15%	18%
Long Beach	462,257	29%	38%	16%	14%
Bakersfield	347,483	36%	47%	9%	6%
Riverside	303,871	39%	43%	8%	8%
San Bernardino	209,924	48%	27%	18%	5%
Moreno Valley	193,365	45%	26%	21%	7%
Salinas	150,441	56%	30%	3%	10%
Pomona	149,058	57%	20%	11%	11%
Pasadena	137,122	25%	47%	13%	15%
Berkeley	112,580	9%	61%	10%	19%
Inglewood	109,673	35%	5%	57%	2%
San Leandro	84,950	20%	32%	13%	32%
Menifee	77,519	25%	62%	7%	5%
Redondo Beach	66,748	14%	68%	3%	13%
Hanford	53,967	36%	53%	5%	5%
Colton	52,154	64%	20%	10%	5%
Watsonville	51,199	64%	29%	1%	5%
Hollister	34,928	58%	36%	2%	2%
Seal Beach	24,168	11%	78%	1%	10%
Dinuba	21,453	75%	21%	0%	3%
Parlier	14,494	93%	5%	1%	1%
Bradbury	1,048	16%	55%	3%	27%

THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. *v.* GINGLES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

No. 83-1968. Argued December 4, 1985—Decided June 30, 1986

In 1982, the North Carolina General Assembly enacted a legislative redistricting plan for the State's Senate and House of Representatives. Appellees, black citizens of North Carolina who are registered to vote, brought suit in Federal District Court, challenging one single-member district and six multimember districts on the ground, *inter alia*, that the redistricting plan impaired black citizens' ability to elect representatives of their choice in violation of § 2 of the Voting Rights Act of 1965. After appellees brought suit, but before trial, § 2 was amended, largely in response to *Mobile* v. *Bolden*, 446 U. S. 55, to make clear that a violation of § 2 could be proved by showing discriminatory effect alone, rather than having to show a discriminatory purpose, and to establish as the relevant legal standard the "results test." Section 2(a), as amended, prohibits a State or political subdivision from imposing any voting qualifications or prerequisites to voting, or any standards, practices, or procedures that result in the denial or abridgment of the right of any citizen to vote on account of race or color. Section 2(b), as amended, provides that § 2(a) is violated where the "totality of circumstances" reveals that "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . 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," and that the extent to which members of a protected class have been elected to office is one circumstance that may be considered. The District Court applied the "totality of circumstances" test set forth in § 2(b) and held that the redistricting plan violated § 2(a) because it resulted in the dilution of black citizens' votes in all of the disputed districts. Appellants, the Attorney General of North Carolina and others, took a direct appeal to this Court with respect to five of the multimember districts.

Held: The judgment is affirmed in part and reversed in part.

590 F. Supp. 345, affirmed in part and reversed in part.

JUSTICE BRENNAN delivered the opinion of the Court with respect to Parts I, II, III-A, III-B, IV-A, and V, concluding that:

1. Minority voters who contend that the multimember form of districting violates § 2 must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates. While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group. The relevance of the existence of racial bloc voting to a vote dilution claim is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidate. Thus, the question whether a given district experiences legally significant racial bloc voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and consequently establishes minority bloc voting within the meaning of § 2. And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting. Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences significant polarization than are the results of a single election. In a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one election or a few elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election. Here, the District Court's approach, which tested data derived from three election years in each district in question, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper standard for legally significant racial bloc voting. Pp. 52–61.

2. The language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim. Thus, the District Court did not err, as a matter of law, in refusing to treat the fact that some black candidates have

succeeded as dispositive of appellees' § 2 claims. Where multimember districting generally works to dilute the minority vote, it cannot be defended on the ground that it sporadically and serendipitously benefits minority voters. Pp. 74-76.

3. The clearly-erroneous test of Federal Rule of Civil Procedure 52(a) is the appropriate standard for appellate review of ultimate findings of vote dilution. As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of circumstances" and to determine, based upon a practical evaluation of the past and present realities, whether the political process is equally open to minority voters. In this case, the District Court carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. Pp. 77-79.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, concluded in Part III-C that for purposes of § 2, the legal concept of racially polarized voting, as it relates to claims of vote dilution—that is, when it is used to prove that the minority group is politically cohesive and that white voters will usually be able to defeat the minority's preferred candidates—refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting, and defendants may not rebut that case with evidence of causation or intent. Pp. 61-73.

JUSTICE BRENNAN, joined by JUSTICE WHITE, concluded in Part IV-B, that the District Court erred, as a matter of law, in ignoring the significance of the sustained success black voters have experienced in House District 23. The persistent proportional representation for black residents in that district in the last six elections is inconsistent with appellees' allegation that black voters' ability in that district to elect representatives of their choice is not equal to that enjoyed by the white majority. P. 77.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST, concluded that:

1. Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, such a showing cannot be rebutted by evidence that the divergent voting patterns may

be explained by causes other than race. However, evidence of the reasons for divergent voting patterns can in some circumstances be relevant to the overall vote dilution inquiry, and there is no rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. Pp. 100–101.

2. Consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation. The District Court erred in assessing the extent of black electoral success in House District 39 and Senate District 22, as well as in House District 23. Except in House District 23, despite these errors the District Court's ultimate conclusion of vote dilution is not clearly erroneous. But in House District 23 appellees failed to establish a violation of § 2. Pp. 101–105.

BRENNAN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, III–B, IV–A, and V, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined, an opinion with respect to Part III–C, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, and an opinion with respect to Part IV–B, in which WHITE, J., joined. WHITE, J., filed a concurring opinion, *post,* p. 82. O'CONNOR, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post,* p. 83. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and BLACKMUN, JJ., joined, *post,* p. 106.

Lacy H. Thornburg, Attorney General of North Carolina, *pro se,* argued the cause for appellants. With him on the briefs were *Jerris Leonard, Kathleen Heenan McGuan, James Wallace, Jr.,* Deputy Attorney General for Legal Affairs, and *Tiare B. Smiley* and *Norma S. Harrell,* Assistant Attorneys General.

Solicitor General Fried argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Reynolds* and *Deputy Assistant Attorney General Cooper.*

Julius LeVonne Chambers argued the cause for appellees. With him on the briefs for appellees Gingles et al. were *Eric Schnapper, C. Lani Guinier,* and *Leslie J. Winner. C. Allen Foster, Kenneth J. Gumbiner, Robert N.*

Hunter, Jr., and *Arthur J. Donaldson* filed briefs for appellees Eaglin et al.*

JUSTICE BRENNAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, III–B, IV–A, and V, an opinion with respect to Part III–C, in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, and an opinion with respect to Part IV–B, in which JUSTICE WHITE joins.

This case requires that we construe for the first time § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. 42 U. S. C. § 1973. The specific question to be decided is whether the three-judge District Court, convened in the Eastern District of North Carolina pursuant to 28 U. S. C. § 2284(a) and 42 U. S. C. § 1973c, correctly held that the use in a legislative redistricting plan of multimember districts in five North Carolina legislative districts violated § 2 by impairing the opportunity of black voters "to participate in the political process and to elect representatives of their choice." § 2(b), 96 Stat. 134.

I

BACKGROUND

In April 1982, the North Carolina General Assembly enacted a legislative redistricting plan for the State's Senate

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**Daniel J. Popeo* and *George C. Smith* filed a brief for the Washington Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union Foundation, Inc., et al. by *Cynthia Hill, Maureen T. Thornton, Laughlin McDonald,* and *Neil Bradley;* for Common Cause by *William T. Lake;* for the Lawyer's Committee for Civil Rights Under Law et al. by *James Robertson, Harold R. Tyler, Jr., Norman Redlich, William L. Robinson, Frank R. Parker, Samuel Rabinove,* and *Richard T. Foltin;* for James G. Martin, Governor of North Carolina, by *Victor S. Friedman;* for Legal Services of North Carolina by *David H. Harris, Jr., Susan M. Perry, Richard Taylor,* and *Julian Pierce;* for the Republican National Committee by *Roger Allan Moore* and *Michael A. Hess;* and for Senator Dennis DeConcini et al. by *Walter J. Rockler.*

and House of Representatives. Appellees, black citizens of North Carolina who are registered to vote, challenged seven districts, one single-member[1] and six multimember[2] districts, alleging that the redistricting scheme impaired black citizens' ability to elect representatives of their choice in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and of §2 of the Voting Rights Act.[3]

After appellees brought suit, but before trial, Congress amended §2. The amendment was largely a response to this Court's plurality opinion in *Mobile* v. *Bolden*, 446 U. S. 55 (1980), which had declared that, in order to establish a violation either of §2 or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose. Congress substantially revised §2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the "results test," applied by this Court in *White* v. *Regester*, 412 U. S. 755 (1973), and by other federal courts before *Bolden, supra*. S. Rep. No. 97–417, p. 28 (1982) (hereinafter S. Rep.).

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[1] Appellees challenged Senate District No. 2, which consisted of the whole of Northampton, Hertford, Gates, Bertie, and Chowan Counties, and parts of Washington, Martin, Halifax, and Edgecombe Counties.

[2] Appellees challenged the following multimember districts: Senate No. 22 (Mecklenburg and Cabarrus Counties—four members), House No. 36 (Mecklenburg County—eight members), House No. 39 (part of Forsyth County—five members), House No. 23 (Durham County—three members), House No. 21 (Wake County—six members), and House No. 8 (Wilson, Nash, and Edgecombe Counties—four members).

[3] Appellants initiated this action in September 1981, challenging the North Carolina General Assembly's July 1981 redistricting. The history of this action is recounted in greater detail in the District Court's opinion in this case, *Gingles* v. *Edmisten*, 590 F. Supp. 345, 350–358 (EDNC 1984). It suffices here to note that the General Assembly revised the 1981 plan in April 1982 and that the plan at issue in this case is the 1982 plan.

Section 2, as amended, 96 Stat. 134, reads as follows:

"(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 4(f)(2), 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." Codified at 42 U. S. C. § 1973.

The Senate Judiciary Committee majority Report accompanying the bill that amended § 2 elaborates on the circumstances that might be probative of a § 2 violation, noting the following "typical factors":[4]

"1. the extent of any history of official discrimination in the state or political subdivision that touched the right of

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[4] These factors were derived from the analytical framework of *White* v. *Regester*, 412 U. S. 755 (1973), as refined and developed by the lower courts, in particular by the Fifth Circuit in *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (1973) (en banc), aff'd *sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U. S. 636 (1976) *(per curiam).* S. Rep., at 28, n. 113.

> the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
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> "2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
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> "3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
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> "4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
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> "5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
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> "6. whether political campaigns have been characterized by overt or subtle racial appeals;
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> "7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
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> "Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:
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> "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
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> "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." S. Rep., at 28–29.

The District Court applied the "totality of the circumstances" test set forth in § 2(b) to appellees' statutory claim, and, relying principally on the factors outlined in the Senate

Report, held that the redistricting scheme violated § 2 because it resulted in the dilution of black citizens' votes in all seven disputed districts. In light of this conclusion, the court did not reach appellees' constitutional claims. *Gingles* v. *Edmisten*, 590 F. Supp. 345 (EDNC 1984).

Preliminarily, the court found that black citizens constituted a distinct population and registered-voter minority in each challenged district. The court noted that at the time the multimember districts were created, there were concentrations of black citizens within the boundaries of each that were sufficiently large and contiguous to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multimember districts. With respect to the challenged single-member district, Senate District No. 2, the court also found that there existed a concentration of black citizens within its boundaries and within those of adjoining Senate District No. 6 that was sufficient in numbers and in contiguity to constitute an effective voting majority in a single-member district. The District Court then proceeded to find that the following circumstances combined with the multimember districting scheme to result in the dilution of black citizens' votes.

First, the court found that North Carolina had officially discriminated against its black citizens with respect to their exercise of the voting franchise from approximately 1900 to 1970 by employing at different times a poll tax, a literacy test, a prohibition against bullet (single-shot) voting,[5]

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[5] Bullet (single-shot) voting has been described as follows:

"'Consider [a] town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting. Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if and designated seat plans[6] for multimember districts. The court observed that even after the removal of direct barriers to black voter registration, such as the poll tax and literacy test, black voter registration remained relatively depressed; in 1982 only 52.7% of age-qualified blacks statewide were registered to vote, whereas 66.7% of whites were registered. The District Court found these statewide depressed levels of black voter registration to be present in all of the disputed districts and to be traceable, at least in part, to the historical pattern of statewide official discrimination.

Second, the court found that historic discrimination in education, housing, employment, and health services had resulted in a lower socioeconomic status for North Carolina blacks as a group than for whites. The court concluded that this lower status both gives rise to special group interests and hinders blacks' ability to participate effectively in the political process and to elect representatives of their choice.

Third, the court considered other voting procedures that may operate to lessen the opportunity of black voters to elect candidates of their choice. It noted that North Carolina has a majority vote requirement for primary elections and, while acknowledging that no black candidate for election to the State General Assembly had failed to win solely because of this requirement, the court concluded that it nonetheless presents a continuing practical impediment to the opportunity of black voting minorities to elect candidates of their choice. The court also remarked on the fact that North Carolina does not have a subdistrict residency requirement for members of the General Assembly elected from multimember

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the vote of the majority is divided among a number of candidates.'" *City of Rome* v. *United States*, 446 U. S. 156, 184, n. 19 (1980), quoting United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 206–207 (1975).

[6] Designated (or numbered) seat schemes require a candidate for election in multimember districts to run for specific seats, and can, under certain circumstances, frustrate bullet voting. See, *e. g.*, *City of Rome, supra*, at 185, n. 21.

districts, a requirement which the court found could offset to some extent the disadvantages minority voters often experience in multimember districts.

Fourth, the court found that white candidates in North Carolina have encouraged voting along color lines by appealing to racial prejudice. It noted that the record is replete with specific examples of racial appeals, ranging in style from overt and blatant to subtle and furtive, and in date from the 1890's to the 1984 campaign for a seat in the United States Senate. The court determined that the use of racial appeals in political campaigns in North Carolina persists to the present day and that its current effect is to lessen to some degree the opportunity of black citizens to participate effectively in the political processes and to elect candidates of their choice.

Fifth, the court examined the extent to which blacks have been elected to office in North Carolina, both statewide and in the challenged districts. It found, among other things, that prior to World War II, only one black had been elected to public office in this century. While recognizing that "it has now become possible for black citizens to be elected to office at all levels of state government in North Carolina," 590 F. Supp., at 367, the court found that, in comparison to white candidates running for the same office, black candidates are at a disadvantage in terms of relative probability of success. It also found that the overall rate of black electoral success has been minimal in relation to the percentage of blacks in the total state population. For example, the court noted, from 1971 to 1982 there were at any given time only two-to-four blacks in the 120-member House of Representatives—that is, only 1.6% to 3.3% of House members were black. From 1975 to 1983 there were at any one time only one or two blacks in the 50-member State Senate—that is, only 2% to 4% of State Senators were black. By contrast, at the time of the District Court's opinion, blacks constituted about 22.4% of the total state population.

With respect to the success in this century of black candidates in the contested districts, see also Appendix B to opinion, *post*, p. 82, the court found that only one black had been elected to House District 36—after this lawsuit began. Similarly, only one black had served in the Senate from District 22, from 1975–1980. Before the 1982 election, a black was elected only twice to the House from District 39 (part of Forsyth County); in the 1982 contest two blacks were elected. Since 1973 a black citizen had been elected each 2-year term to the House from District 23 (Durham County), but no black had been elected to the Senate from Durham County. In House District 21 (Wake County), a black had been elected twice to the House, and another black served two terms in the State Senate. No black had ever been elected to the House or Senate from the area covered by House District No. 8, and no black person had ever been elected to the Senate from the area covered by Senate District No. 2.

The court did acknowledge the improved success of black candidates in the 1982 elections, in which 11 blacks were elected to the State House of Representatives, including 5 blacks from the multimember districts at issue here. However, the court pointed out that the 1982 election was conducted after the commencement of this litigation. The court found the circumstances of the 1982 election sufficiently aberrational and the success by black candidates too minimal and too recent in relation to the long history of complete denial of elective opportunities to support the conclusion that black voters' opportunities to elect representatives of their choice were not impaired.

Finally, the court considered the extent to which voting in the challenged districts was racially polarized. Based on statistical evidence presented by expert witnesses, supplemented to some degree by the testimony of lay witnesses, the court found that all of the challenged districts exhibit severe and persistent racially polarized voting.

Based on these findings, the court declared the contested portions of the 1982 redistricting plan violative of § 2 and enjoined appellants from conducting elections pursuant to those portions of the plan. Appellants, the Attorney General of North Carolina and others, took a direct appeal to this Court, pursuant to 28 U. S. C. § 1253, with respect to five of the multimember districts—House Districts 21, 23, 36, and 39, and Senate District 22. Appellants argue, first, that the District Court utilized a legally incorrect standard in determining whether the contested districts exhibit racial bloc voting to an extent that is cognizable under § 2. Second, they contend that the court used an incorrect definition of racially polarized voting and thus erroneously relied on statistical evidence that was not probative of polarized voting. Third, they maintain that the court assigned the wrong weight to evidence of some black candidates' electoral success. Finally, they argue that the trial court erred in concluding that these multimember districts result in black citizens having less opportunity than their white counterparts to participate in the political process and to elect representatives of their choice. We noted probable jurisdiction, 471 U. S. 1064 (1985), and now affirm with respect to all of the districts except House District 23. With regard to District 23, the judgment of the District Court is reversed.

II

SECTION 2 AND VOTE DILUTION THROUGH USE OF MULTIMEMBER DISTRICTS

An understanding both of § 2 and of the way in which multimember districts can operate to impair blacks' ability to elect representatives of their choice is prerequisite to an evaluation of appellants' contentions. First, then, we review amended § 2 and its legislative history in some detail. Second, we explain the theoretical basis for appellees' claim of vote dilution.

A

SECTION 2 AND ITS LEGISLATIVE HISTORY

Subsection 2(a) prohibits all States and political subdivisions from imposing *any* voting qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgment of the right to vote of any citizen who is a member of a protected class of racial and language minorities. Subsection 2(b) establishes that § 2 has been violated where the "totality of circumstances" reveal that "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . 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." While explaining that "[t]he 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" in evaluating an alleged violation, § 2(b) cautions that "nothing in [§ 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

The Senate Report which accompanied the 1982 amendments elaborates on the nature of § 2 violations and on the proof required to establish these violations.[7] First and foremost, the Report dispositively rejects the position of the plurality in *Mobile* v. *Bolden*, 446 U. S. 55 (1980), which

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[7] The United States urges this Court to give little weight to the Senate Report, arguing that it represents a compromise among conflicting "factions," and thus is somehow less authoritative than most Committee Reports. Brief for United States as *Amicus Curiae* 8, n. 12, 24, n. 49. We are not persuaded that the legislative history of amended § 2 contains anything to lead us to conclude that this Senate Report should be accorded little weight. We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill. See, *e. g.*, *Garcia* v. *United States*, 469 U. S. 70, 76, and n. 3 (1984); *Zuber* v. *Allen*, 396 U. S. 168, 186 (1969).

required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters.[8] See, *e. g.*, S. Rep., at 2, 15–16, 27. The intent test was repudiated for three principal reasons—it is "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities," it places an "inordinately difficult" burden of proof on plaintiffs, and it "asks the wrong question." *Id.*, at 36. The "right" question, as the Report emphasizes repeatedly, is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."[9] *Id.*, at 28. See also *id.*, at 2, 27, 29, n. 118, 36.

In order to answer this question, a court must assess the impact of the contested structure or practice on minority electoral opportunities "on the basis of objective factors." *Id.*, at 27. The Senate Report specifies factors which typically may be relevant to a § 2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political

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[8] The Senate Report states that amended § 2 was designed to restore the "results test"—the legal standard that governed voting discrimination cases prior to our decision in *Mobile* v. *Bolden*, 446 U. S. 55 (1980). S. Rep., at 15–16. The Report notes that in pre-*Bolden* cases such as *White* v. *Regester*, 412 U. S. 755 (1973), and *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (CA5 1973), plaintiffs could prevail by showing that, under the totality of the circumstances, a challenged election law or procedure had the effect of denying a protected minority an equal chance to participate in the electoral process. Under the "results test," plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose. S. Rep., at 16.

[9] The Senate Committee found that "voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination." *Id.*, at 40 (footnote omitted). As the Senate Report notes, the purpose of the Voting Rights Act was "'not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination.'" *Id.*, at 5 (quoting 111 Cong. Rec. 8295 (1965) (remarks of Sen. Javits)).

subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members 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; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. *Id.*, at 28–29; see also *supra*, at 36–37. The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value. *Id.*, at 29. The Report stresses, however, that this list of typical factors is neither comprehensive nor exclusive. While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims,[10] other factors may also be relevant and may be considered. *Id.*, at 29–30. Furthermore, the Senate Committee observed that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.*, at 29. Rather, the Committee determined that "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,'" *id.*, at 30 (footnote omitted), and on a "functional" view of the political process. *Id.*, at 30, n. 120.

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[10] Section 2 prohibits all forms of voting discrimination, not just vote dilution. S. Rep., at 30.

Although the Senate Report espouses a flexible, fact-intensive test for § 2 violations, it limits the circumstances under which § 2 violations may be proved in three ways. First, electoral devices, such as at-large elections, may not be considered *per se* violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. *Id.*, at 16. Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. *Ibid.* Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it. *Id.*, at 33.

B

VOTE DILUTION THROUGH THE USE OF MULTIMEMBER DISTRICTS

Appellees contend that the legislative decision to employ multimember, rather than single-member, districts in the contested jurisdictions dilutes their votes by submerging them in a white majority,[11] thus impairing their ability to elect representatives of their choice.[12]

[11] Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority. Engstrom & Wildgen, Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering, 2 Legis. Stud. Q. 465, 465–466 (1977) (hereinafter Engstrom & Wildgen). See also Derfner, Racial Discrimination and the Right to Vote, 26 Vand. L. Rev. 523, 553 (1973) (hereinafter Derfner); F. Parker, Racial Gerrymandering and Legislative Reapportionment (hereinafter Parker), in Minority Vote Dilution 86–100 (Davidson ed., 1984) (hereinafter Minority Vote Dilution).

[12] The claim we address in this opinion is one in which the plaintiffs alleged and attempted to prove that their ability *to elect* the representatives of their choice was impaired by the selection of a multimember electoral structure. We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in

The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. This Court has long recognized that multimember districts and at-large voting schemes may "'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'"[13] *Burns* v. *Richardson*, 384 U. S.

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a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections.

We note also that we have no occasion to consider whether the standards we apply to respondents' claim that multimember districts operate to dilute the vote of geographically cohesive minority groups that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.

[13] Commentators are in widespread agreement with this conclusion. See, *e. g.*, Berry & Dye, The Discriminatory Effects of At-Large Elections, 7 Fla. St. U. L. Rev. 85 (1979) (hereinafter Berry & Dye); Blacksher & Menefee, From *Reynolds* v. *Sims* to *City of Mobile* v. *Bolden*, 34 Hastings L. J. 1 (1982) (hereinafter Blacksher & Menefee); Bonapfel, Minority Challenges to At-Large Elections: The Dilution Problem, 10 Ga. L. Rev. 353 (1976) (hereinafter Bonapfel); Butler, Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote, 42 La. L. Rev. 851 (1982) (hereinafter Butler); Carpeneti, Legislative Apportionment: Multimember Districts and Fair Representation, 120 U. Pa. L. Rev. 666 (1972) (hereinafter Carpeneti); Davidson & Korbel, At-Large Elections and Minority Group Representation, in Minority Vote Dilution 65; Derfner; B. Grofman, Alternatives to Single-Member Plurality Districts: Legal and Empirical Issues (hereinafter Grofman, Alternatives), in Representation and Redistricting Issues 107 (B. Grofman, R. Lijphart, H. McKay, & H. Scarrow eds., 1982) (hereinafter Representation and Redistricting Issues); Hartman, Racial Vote Dilution and Separation of Powers, 50 Geo. Wash. L. Rev. 689 (1982); Jewell, The Consequences of Single- and Multimember Districting, in Representation and Redistricting Issues 129 (1982) (hereinafter Jewell); Jones, The Impact of Local Election Systems on Political Representation, 11 Urb. Aff. Q. 345 (1976); Karnig,

73, 88 (1966) (quoting *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965)). See also *Rogers* v. *Lodge*, 458 U. S. 613, 617 (1982); *White* v. *Regester*, 412 U. S., at 765; *Whitcomb* v. *Chavis*, 403 U. S. 124, 143 (1971). The theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.[14] See, *e. g.*, Grofman, Alternatives, in Representation and Redistricting Issues 113–114. Multimember districts and at-large election schemes, however, are not *per se* violative of minority voters' rights. S. Rep., at 16. Cf. *Rogers* v. *Lodge, supra,* at 617; *Regester, supra,* at 765; *Whitcomb, supra,* at 142. Minority voters who contend that the multimember form of districting violates §2 must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates. See, *e. g.*, S. Rep., at 16.

While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice.[15] Stated succinctly,

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Black Resources and City Council Representation, 41 J. Pol. 134 (1979); Karnig, Black Representation on City Councils, 12 Urb. Aff. Q. 223 (1976); Parker 87–88.

[14] Not only does "[v]oting along racial lines" deprive minority voters of their preferred representative in these circumstances, it also "allows those elected to ignore [minority] interests without fear of political consequences," *Rogers* v. *Lodge*, 458 U. S., at 623, leaving the minority effectively unrepresented. See, *e. g.*, Grofman, Should Representatives Be Typical of Their Constituents?, in Representation and Redistricting Issues 97; Parker 108.

[15] Under a "functional" view of the political process mandated by §2, S. Rep., at 30, n. 120, the most important Senate Report factors bearing on §2 challenges to multimember districts are the "extent to which minority group members have been elected to public office in the jurisdiction" and the "extent to which voting in the elections of the state or political sub-

a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group. Bonapfel 355; Blacksher & Menefee 34; Butler 903; Carpeneti 696–699; Davidson, Minority Vote Dilution: An Overview (hereinafter Davidson), in Minority Vote Dilution 4; Grofman, Alternatives 117. Cf. *Bolden*, 446 U. S., at 105, n. 3 (MARSHALL, J., dissenting) ("It is obvious

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division is racially polarized." *Id.*, 28–29. If present, the other factors, such as the lingering effects of past discrimination, the use of appeals to racial bias in election campaigns, and the use of electoral devices which enhance the dilutive effects of multimember districts when substantial white bloc voting exists—for example antibullet voting laws and majority vote requirements, are supportive of, but *not essential to*, a minority voter's claim.

In recognizing that some Senate Report factors are more important to multimember district vote dilution claims than others, the Court effectuates the intent of Congress. It is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability "to elect." § 2(b). And, where the contested electoral structure is a multimember district, commentators and courts agree that in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters. See, *e. g.*, *McMillan* v. *Escambia County, Fla.*, 748 F. 2d 1037, 1043 (CA5 1984); *United States* v. *Marengo County Comm'n*, 731 F. 2d 1546, 1566 (CA11), appeal dism'd and cert. denied, 469 U. S. 976 (1984); *Nevett* v. *Sides*, 571 F. 2d 209, 223 (CA5 1978), cert. denied, 446 U. S. 951 (1980); *Johnson* v. *Halifax County*, 594 F. Supp. 161, 170 (EDNC 1984); Blacksher & Menefee; Engstrom & Wildgen 469; Parker 107. Consequently, if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates. Minority voters may be able to prove that they still suffer social and economic effects of past discrimination, that appeals to racial bias are employed in election campaigns, and that a majority vote is required to win a seat, but they have not demonstrated a substantial inability to elect caused by the use of a multimember district. By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that § 2 plaintiffs prove their claim before they may be awarded relief.

that the greater the degree to which the electoral minority is homogeneous and insular and the greater the degree that bloc voting occurs along majority-minority lines, the greater will be the extent to which the minority's voting power is diluted by multimember districting"). These circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice for the following reasons. First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.[16] If it is not, as would be the case in a substantially integrated district, the *multimember form* of the district cannot be responsible for minority voters' inability to elect its candidates.[17] Cf. *Rogers*, 458

[16] In this case appellees allege that within each contested multimember district there exists a minority group that is sufficiently large and compact to constitute a single-member district. In a different kind of case, for example a gerrymander case, plaintiffs might allege that the minority group that is sufficiently large and compact to constitute a single-member district has been split between two or more multimember or single-member districts, with the effect of diluting the potential strength of the minority vote.

[17] The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure. As two commentators have explained:

"To demonstrate [that minority voters are injured by at-large elections], the minority voters must be sufficiently concentrated and politically cohe-

U. S., at 616. See also, Blacksher & Menefee 51–56, 58; Bonapfel 355; Carpeneti 696; Davidson 4; Jewell 130. Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Blacksher & Menefee 51–55, 58–60, and n. 344; Carpeneti 696–697; Davidson 4. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed, see, *infra*, at 57, and n. 26—usually to defeat the minority's preferred candidate. See, *e. g.*, Blacksher & Menefee 51, 53, 56–57, 60. Cf. *Rogers*, *supra*, at 616–617; *Whitcomb*, 403 U. S., at 158–159; *McMillan* v. *Escambia County, Fla.*, 748 F. 2d 1037, 1043 (CA5 1984). In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.

Finally, we observe that the usual predictability of the majority's success distinguishes structural dilution from the mere loss of an occasional election. Cf. *Davis* v. *Bandemer*, *post*, at 131–133, 139–140 (opinion of WHITE, J.); *Bolden*, *supra*, at 111, n. 7 (MARSHALL, J., dissenting); *Whitcomb*, *supra*, at 153. See also Blacksher & Menefee 57, n. 333; Note, Geometry and Geography: Racial Gerrymandering and the Voting Rights Act, 94 Yale L. J. 189, 200, n. 66 (1984) (hereinafter Note, Geometry and Geography).

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sive that a putative districting plan would result in districts in which members of a racial minority would constitute a majority of the voters, whose clear electoral choices are in fact defeated by at-large voting. If minority voters' residences are substantially integrated throughout the jurisdiction, the at-large district cannot be blamed for the defeat of minority-supported candidates . . . . [This standard] thus would only protect racial minority votes from diminution proximately caused by the districting plan; *it would not assure racial minorities proportional representation.*" Blacksher & Menefee 55–56 (footnotes omitted; emphasis added).

III

RACIALLY POLARIZED VOTING

Having stated the general legal principles relevant to claims that § 2 has been violated through the use of multimember districts, we turn to the arguments of appellants and of the United States as *amicus curiae* addressing racially polarized voting.[18] First, we describe the District Court's treatment of racially polarized voting. Next, we consider appellants' claim that the District Court used an incorrect legal standard to determine whether racial bloc voting in the contested districts was sufficiently severe to be cognizable as an element of a § 2 claim. Finally, we consider appellants' contention that the trial court employed an incorrect definition of racially polarized voting and thus erroneously relied on statistical evidence that was not probative of racial bloc voting.

A

THE DISTRICT COURT'S TREATMENT OF RACIALLY POLARIZED VOTING

The investigation conducted by the District Court into the question of racial bloc voting credited some testimony of lay witnesses, but relied principally on statistical evidence presented by appellees' expert witnesses, in particular that offered by Dr. Bernard Grofman. Dr. Grofman collected and evaluated data from 53 General Assembly primary and general elections involving black candidacies. These elections were held over a period of three different election years in the six originally challenged multimember districts.[19] Dr. Grofman subjected the data to two complementary methods of analysis—extreme case analysis and bivariate eco-

[18] The terms "racially polarized voting" and "racial bloc voting" are used interchangeably throughout this opinion.

[19] The 1982 reapportionment plan left essentially undisturbed the 1971 plan for five of the original six contested multimember districts. House District 39 alone was slightly modified. Brief for Appellees 8.

logical regression analysis[20]—in order to determine whether blacks and whites in these districts differed in their voting behavior. These analytic techniques yielded data concerning the voting patterns of the two races, including estimates of the percentages of members of each race who voted for black candidates.

The court's initial consideration of these data took the form of a three-part inquiry: did the data reveal any correlation between the race of the voter and the selection of certain candidates; was the revealed correlation statistically significant; and was the difference in black and white voting patterns "substantively significant"? The District Court found that blacks and whites generally preferred different candidates and, on that basis, found voting in the districts to be racially correlated.[21] The court accepted Dr. Grofman's expert opinion that the correlation between the race of the voter and the voter's choice of certain candidates was statistically significant.[22] Finally, adopting Dr. Grofman's terminology, see

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[20] The District Court found both methods standard in the literature for the analysis of racially polarized voting. 590 F. Supp., at 367, n. 28, 368, n. 32. See also Engstrom & McDonald, Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting, 17 Urb. Law. 369 (Summer 1985); Grofman, Migalski, & Noviello, The "Totality of Circumstances Test" in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective, 7 Law & Policy 199 (Apr. 1985) (hereinafter Grofman, Migalski, & Noviello).

[21] The court used the term "racial polarization" to describe this correlation. It adopted Dr. Grofman's definition—"racial polarization" exists where there is "a consistent relationship between [the] race of the voter and the way in which the voter votes," Tr. 160, or to put it differently, where "black voters and white voters vote differently." *Id.*, at 203. We, too, adopt this definition of "racial bloc" or "racially polarized" voting. See *infra*, at 55–58.

[22] The court found that the data reflected positive relationships and that the correlations did not happen by chance. 590 F. Supp., at 368, and n. 30. See also D. Barnes & J. Conley, Statistical Evidence in Litigation 32–34 (1986); Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702, 716–720 (1980); Grofman, Migalski, & Noviello 206.

Tr. 195, the court found that in all but 2 of the 53 elections[23] the degree of racial bloc voting was "so marked as to be substantively significant, in the sense that the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters." 590 F. Supp., at 368.

The court also reported its findings, both in tabulated numerical form and in written form, that a high percentage of black voters regularly supported black candidates and that most white voters were extremely reluctant to vote for black candidates. The court then considered the relevance to the existence of legally significant white bloc voting of the fact that black candidates have won some elections. It determined that in most instances, special circumstances, such as incumbency and lack of opposition, rather than a diminution in usually severe white bloc voting, accounted for these candidates' success. The court also suggested that black voters' reliance on bullet voting was a significant factor in their successful efforts to elect candidates of their choice. Based on all of the evidence before it, the trial court concluded that each of the districts experienced racially polarized voting "in a persistent and severe degree." *Id.*, at 367.

B

THE DEGREE OF BLOC VOTING THAT IS LEGALLY SIGNIFICANT UNDER § 2

1

Appellants' Arguments

North Carolina and the United States argue that the test used by the District Court to determine whether voting patterns in the disputed districts are racially polarized to an extent cognizable under § 2 will lead to results that are inconsistent with congressional intent. North Carolina main-

[23] The two exceptions were the 1982 State House elections in Districts 21 and 23. 590 F. Supp., at 368, n. 31.

tains that the court considered legally significant racially polarized voting to occur whenever "less than 50% of the white voters cast a ballot for the black candidate." Brief for Appellants 36. Appellants also argue that racially polarized voting is legally significant only when it always results in the defeat of black candidates. *Id.*, at 39–40.

The United States, on the other hand, isolates a single line in the court's opinion and identifies it as the court's complete test. According to the United States, the District Court adopted a standard under which legally significant racial bloc voting is deemed to exist whenever "'the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters in the election.'" Brief for United States as *Amicus Curiae* 29 (quoting 590 F. Supp., at 368). We read the District Court opinion differently.

2

The Standard for Legally Significant Racial Bloc Voting

The Senate Report states that the "extent to which voting in the elections of the state or political subdivision is racially polarized," S. Rep., at 29, is relevant to a vote dilution claim. Further, courts and commentators agree that racial bloc voting is a key element of a vote dilution claim. See, *e. g.*, *Escambia County, Fla.*, 748 F. 2d, at 1043; *United States* v. *Marengo County Comm'n*, 731 F. 2d 1546, 1566 (CA11), appeal dism'd and cert. denied, 469 U. S. 976 (1984); *Nevett* v. *Sides*, 571 F. 2d 209, 223 (CA5 1978), cert. denied, 446 U. S. 951 (1980); *Johnson* v. *Halifax County*, 594 F. Supp. 161, 170 (EDNC 1984); Blacksher & Menefee; Engstrom & Wildgen, 465, 469; Parker 107; Note, Geometry and Geography 199. Because, as we explain below, the extent of bloc voting necessary to demonstrate that a minority's ability to elect its preferred representatives is impaired varies according to several factual circumstances, the degree of bloc voting which constitutes the threshold of legal significance will vary from district to district. Nonetheless, it is possible to state some general principles and we proceed to do so.

The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates. See *supra*, at 48–51. Thus, the question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, Blacksher & Menefee 59–60, and n. 344, and, consequently, establishes minority bloc voting within the context of § 2. And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting. *Id.*, at 60. The amount of white bloc voting that can generally "minimize or cancel," S. Rep., at 28; *Regester*, 412 U. S., at 765, black voters' ability to elect representatives of their choice, however, will vary from district to district according to a number of factors, including the nature of the allegedly dilutive electoral mechanism; the presence or absence of other potentially dilutive electoral devices, such as majority vote requirements, designated posts, and prohibitions against bullet voting; the percentage of registered voters in the district who are members of the minority group; the size of the district; and, in multimember districts, the number of seats open and the number of candidates in the field.[24] See, *e. g.*, Butler 874–876; Davidson 5; Jones, The Impact of Local Election Systems on Black Political Representation, 11 Urb. Aff. Q. 345 (1976); United States Commis-

[24] This list of factors is illustrative, not comprehensive.

sion on Civil Rights, The Voting Rights Act: Unfulfilled Goals 38–41 (1981).

Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, *Whitcomb*, 403 U. S., at 153, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election.[25] Blacksher & Menefee 61; Note, Geometry and Geography 200, n. 66 ("Racial polarization should be seen as an attribute not of a single election, but rather of a polity viewed over time. The concern is necessarily temporal and the analysis historical because the evil to be avoided is the subordination of minority groups in American politics, not the defeat of individuals in particular electoral contests"). Also for this reason, in a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest.[26]

As must be apparent, the degree of racial bloc voting that is cognizable as an element of a § 2 vote dilution claim will

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[25] The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances. One important circumstance is the number of elections in which the minority group has sponsored candidates. Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process. Similarly, where a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim.

[26] This list of special circumstances is illustrative, not exclusive.

vary according to a variety of factual circumstances. Consequently, there is no simple doctrinal test for the existence of legally significant racial bloc voting. However, the foregoing general principles should provide courts with substantial guidance in determining whether evidence that black and white voters generally prefer different candidates rises to the level of legal significance under § 2.

3

Standard Utilized by the District Court

The District Court clearly did not employ the simplistic standard identified by North Carolina—legally significant bloc voting occurs whenever less than 50% of the white voters cast a ballot for the black candidate. Brief for Appellants 36. And, although the District Court did utilize the measure of "substantive significance" that the United States ascribes to it—"'the results of the individual election would have been different depending on whether it had been held among only the white voters or only the black voters,'" Brief for United States as *Amicus Curiae* 29 (quoting 590 F. Supp., at 368)—the court did not reach its ultimate conclusion that the degree of racial bloc voting present in each district is *legally* significant through mechanical reliance on this standard.[27] While the court did not phrase the standard for legally significant racial bloc voting exactly as we do, a fair reading of the court's opinion reveals that the court's analysis conforms to our view of the proper legal standard.

The District Court's findings concerning black support for black candidates in the five multimember districts at issue

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[27] The trial court did not actually employ the term "legally significant." At times it seems to have used "substantive significance" as Dr. Grofman did, to describe polarization severe enough to result in the selection of different candidates in racially separate electorates. At other times, however, the court used the term "substantively significant" to refer to its ultimate determination that racially polarized voting in these districts is sufficiently severe to be relevant to a § 2 claim.

here clearly establish the political cohesiveness of black voters. As is apparent from the District Court's tabulated findings, reproduced in Appendix A to opinion, *post*, p. 80, black voters' support for black candidates was overwhelming in almost every election. In all but 5 of 16 primary elections, black support for black candidates ranged between 71% and 92%; and in the general elections, black support for black Democratic candidates ranged between 87% and 96%.

In sharp contrast to its findings of strong black support for black candidates, the District Court found that a substantial majority of white voters would rarely, if ever, vote for a black candidate. In the primary elections, white support for black candidates ranged between 8% and 50%, and in the general elections it ranged between 28% and 49%. See *ibid.* The court also determined that, on average, 81.7% of white voters did not vote for any black candidate in the primary elections. In the general elections, white voters almost always ranked black candidates either last or next to last in the multicandidate field, except in heavily Democratic areas where white voters consistently ranked black candidates last among the Democrats, if not last or next to last among all candidates. The court further observed that approximately two-thirds of white voters did not vote for black candidates in general elections, even after the candidate had won the Democratic primary and the choice was to vote for a Republican or for no one.[28]

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[28] In stating that 81.7% of white voters did not vote for any black candidates in the primary election and that two-thirds of white voters did not vote for black candidates in general elections, the District Court aggregated data from all six challenged multimember districts, apparently for ease of reporting. The inquiry into the existence of vote dilution caused by submergence in a multimember district is district specific. When considering several separate vote dilution claims in a single case, courts must not *rely* on data aggregated from all the challenged districts in concluding that racially polarized voting exists in each district. In the instant case, however, it is clear from the trial court's tabulated findings and from the exhibits that were before it, 1 App., Exs. 2–10, that the court relied on

While the District Court did not state expressly that the percentage of whites who refused to vote for black candidates in the contested districts would, in the usual course of events, result in the defeat of the minority's candidates, that conclusion is apparent both from the court's factual findings and from the rest of its analysis. First, with the exception of House District 23, see *infra*, at 77, the trial court's findings clearly show that black voters have enjoyed only minimal and sporadic success in electing representatives of their choice. See Appendix B to opinion, *post*, p. 82. Second, where black candidates won elections, the court closely examined the circumstances of those elections before concluding that the success of these blacks did not negate other evidence, derived from all of the elections studied in each district, that legally significant racially polarized voting exists in each district. For example, the court took account of the benefits incumbency and running essentially unopposed conferred on some of the successful black candidates,[29] as well as of the

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data that were specific to each individual district in concluding that each district experienced legally significant racially polarized voting.

[29] For example, the court found that incumbency aided a successful black candidate in the 1978 primary in Senate District 22. The court also noted that in House District 23, a black candidate who gained election in 1978, 1980, and 1982, ran uncontested in the 1978 general election and in both the primary and general elections in 1980. In 1982 there was no Republican opposition, a fact the trial court interpreted to mean that the general election was for all practical purposes unopposed. Moreover, in the 1982 primary, there were only two white candidates for three seats, so that one black candidate had to succeed. Even under this condition, the court remarked, 63% of white voters still refused to vote for the black incumbent—who was the choice of 90% of the blacks. In House District 21, where a black won election to the six-member delegation in 1980 and 1982, the court found that in the relevant primaries approximately 60% to 70% of white voters did *not* vote for the black candidate, whereas approximately 80% of blacks did. The court additionally observed that although winning the Democratic primary in this district is historically tantamount to election, 55% of whites declined to vote for the Democratic black candidate in the general election.

very different order of preference blacks and whites assigned black candidates,[30] in reaching its conclusion that legally significant racial polarization exists in each district.

We conclude that the District Court's approach, which tested data derived from three election years in each district, and which revealed that blacks strongly supported black candidates, while, to the black candidates' usual detriment, whites rarely did, satisfactorily addresses each facet of the proper legal standard.

C

EVIDENCE OF RACIALLY POLARIZED VOTING

1

Appellants' Argument

North Carolina and the United States also contest the evidence upon which the District Court relied in finding that voting patterns in the challenged districts were racially polarized. They argue that the term "racially polarized voting" must, as a matter of law, refer to voting patterns for which the *principal cause* is race. They contend that the District Court utilized a legally incorrect definition of racially polarized voting by relying on bivariate statistical analyses which merely demonstrated a *correlation* between the race of the voter and the level of voter support for certain candidates, but which did not prove that race was the primary determinant of voters' choices. According to appellants and the United States, only multiple regression analysis, which can take account of other variables which might also explain voters' choices, such as "party affiliation, age, religion, income[,] incumbency, education, campaign expenditures," Brief for

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[30] The court noted that in the 1982 primary held in House District 36, out of a field of eight, the successful black candidate was ranked first by black voters, but seventh by whites. Similarly, the court found that the two blacks who won seats in the five-member delegation from House District 39 were ranked first and second by black voters, but seventh and eighth by white voters.

Appellants 42, "media use measured by cost, . . . name, identification, or distance that a candidate lived from a particular precinct," Brief for United States as *Amicus Curiae* 30, n. 57, can prove that race was the primary determinant of voter behavior.[31]

Whether appellants and the United States believe that it is the voter's race or the candidate's race that must be the primary determinant of the voter's choice is unclear; indeed, their catalogs of relevant variables suggest both.[32] Age, religion, income, and education seem most relevant to the voter; incumbency, campaign expenditures, name identification, and media use are pertinent to the candidate; and party affiliation could refer both to the voter and the candidate. In either case, we disagree: For purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to the situation where different races (or minority language groups) vote in blocs for different candidates. Grofman, Migalski, & Noviello 203. As we demonstrate *infra*, appellants' theory of racially polarized voting would thwart the goals Congress sought to achieve when it amended § 2 and would prevent courts from performing the "functional" analysis of the political process, S. Rep., at 30, n. 119, and the "searching practical evaluation of the 'past

[31] Appellants argue that plaintiffs must establish that race was the primary determinant of voter behavior as part of their prima facie showing of polarized voting; the United States suggests that plaintiffs make out a prima facie case merely by showing a correlation between race and the selection of certain candidates, but that defendants should be able to rebut by showing that factors other than race were the principal causes of voters' choices. We reject both arguments.

[32] The Fifth Circuit cases on which North Carolina and the United States rely for their position are equally ambiguous. See *Lee County Branch of NAACP* v. *Opelika*, 748 F. 2d 1473, 1482 (1984); *Jones* v. *Lubbock*, 730 F. 2d 233, 234 (1984) (Higginbotham, J., concurring).

and present reality,'" *id.*, at 30 (footnote omitted), mandated by the Senate Report.

2

Causation Irrelevant to Section 2 Inquiry

The first reason we reject appellants' argument that racially polarized voting refers to voting patterns that are in some way *caused by race*, rather than to voting patterns that are merely *correlated with the race of the voter*, is that the reasons black and white voters vote differently have no relevance to the central inquiry of § 2. By contrast, the correlation between race of voter and the selection of certain candidates is crucial to that inquiry.

Both § 2 itself and the Senate Report make clear that the critical question in a § 2 claim is whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. See, *e. g.*, S. Rep., at 2, 27, 28, 29, n. 118, 36. As we explained, *supra*, at 47–48, multimember districts may impair the ability of blacks to elect representatives of their choice where blacks vote sufficiently as a bloc as to be able to elect their preferred candidates in a black majority, single-member district and where a white majority votes sufficiently as a bloc usually to defeat the candidates chosen by blacks. It is the *difference* between the choices made by blacks and whites—not the reasons for that difference—that results in blacks having less opportunity than whites to elect their preferred representatives. Consequently, we conclude that under the "results test" of § 2, only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters.

The irrelevance to a § 2 inquiry of the reasons why black and white voters vote differently supports, by itself, our rejection of appellants' theory of racially polarized voting. However, their theory contains other equally serious flaws that merit further attention. As we demonstrate below, the addition of irrelevant variables distorts the equation and yields results that are indisputably incorrect under § 2 and the Senate Report.

3

Race of Voter as Primary Determinant of Voter Behavior

Appellants and the United States contend that the legal concept of "racially polarized voting" refers not to voting patterns that are merely *correlated with the voter's race,* but to voting patterns that are *determined primarily by the voter's race,* rather than by the voter's other socioeconomic characteristics.

The first problem with this argument is that it ignores the fact that members of geographically insular racial and ethnic groups frequently share socioeconomic characteristics, such as income level, employment status, amount of education, housing and other living conditions, religion, language, and so forth. See, *e. g.*, Butler 902 (Minority group "members' shared concerns, including political ones, are . . . a function of group status, and as such are largely involuntary. . . . As a group blacks are concerned, for example, with police brutality, substandard housing, unemployment, etc., because these problems fall disproportionately upon the group"); S. Verba & N. Nie, Participation in America 151–152 (1972) ("Socioeconomic status . . . is closely related to race. Blacks in American society are likely to be in lower-status jobs than whites, to have less education, and to have lower incomes"). Where such characteristics are shared, race or ethnic group not only denotes color or place of origin, it also functions as a shorthand notation for common social and economic characteristics. Appellants' definition of racially polarized voting is even more pernicious where shared characteristics are causally related to race or ethnicity. The opportunity to achieve high employment status and income, for example, is often influenced by the presence or absence of racial or ethnic discrimination. A definition of racially polarized voting which holds that black bloc voting does not exist when black voters' choice of certain candidates is most strongly influenced by the fact that the voters have low incomes and menial jobs—when the reason most of those voters have menial jobs and low incomes is attributable to past or present racial discrimination—runs counter to the Senate Report's instruction to conduct a searching and practical evaluation of past and present reality, S. Rep., at 30, and interferes with the purpose of the Voting Rights Act to eliminate the negative effects of past discrimination on the electoral opportunities of minorities. *Id.*, at 5, 40.

Furthermore, under appellants' theory of racially polarized voting, even uncontrovertible evidence that candidates strongly preferred by black voters are *always* defeated by a bloc voting white majority would be dismissed for failure to prove racial polarization whenever the black and white populations could be described in terms of other socioeconomic characteristics.

To illustrate, assume a racially mixed, urban multimember district in which blacks and whites possess the same socioeconomic characteristics that the record in this case attributes to blacks and whites in Halifax County, a part of Senate District 2. The annual mean income for blacks in this district is \$10,465, and 47.8% of the black community lives in poverty. More than half—51.5%—of black adults over the age of 25 have only an eighth-grade education or less. Just over half of black citizens reside in their own homes; 48.9% live in rental units. And, almost a third of all black households are without a car. In contrast, only 12.6% of the whites in the district live below the poverty line. Whites enjoy a mean income of \$19,042. White residents are better educated than blacks—only 25.6% of whites over the age of 25 have only an eighth-grade education or less. Furthermore, only 26.2% of whites live in rental units, and only 10.2% live in households with no vehicle available. 1 App., Ex-44. As is the case in Senate District 2, blacks in this hypothetical urban district have never been able to elect a representative of their choice.

According to appellants' theory of racially polarized voting, proof that black and white voters in this hypothetical district regularly choose different candidates and that the blacks' preferred candidates regularly lose could be rejected as not probative of racial bloc voting. The basis for the rejection would be that blacks chose a certain candidate, not principally because of their race, but principally because this candidate best represented the interests of residents who, because of their low incomes, are particularly interested in government-subsidized health and welfare services; who are generally poorly educated, and thus share an interest in job training programs; who are, to a greater extent than the white community, concerned with rent control issues; and who favor major public transportation expenditures. Similarly, whites would be found to have voted for a different candidate, not principally because of their race, but primarily because that candidate best represented the interests of residents who, due to their education and income levels, and to their property and vehicle ownership, favor gentrification, low residential property taxes, and extensive expenditures for street and highway improvements.

Congress could not have intended that courts employ this definition of racial bloc vcting. First, this definition leads to results that are inconsistent with the effects test adopted by Congress when it amended § 2 and with the Senate Report's admonition that courts take a "functional" view of the political process, S. Rep. 30, n. 119, and conduct a searching and practical evaluation of reality. *Id.*, at 30. A test for racially polarized voting that denies the fact that race and socioeconomic characteristics are often closely correlated permits neither a practical evaluation of reality nor a functional analysis of vote dilution. And, contrary to Congress' intent in adopting the "results test," appellants' proposed definition could result in the inability of minority voters to establish a critical element of a vote dilution claim, even though both races engage in "monolithic" bloc voting, *id.*, at 33, and generations of black voters have been unable to elect a representative of their choice.

Second, appellants' interpretation of "racially polarized voting" creates an irreconcilable tension between their proposed treatment of socioeconomic characteristics in the bloc voting context and the Senate Report's statement that "the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health" may be relevant to a § 2 claim. *Id.*, at 29. We can find no support in either logic or the legislative history for the anomalous conclusion to which appellants' position leads—that Congress intended, on the one hand, that proof that a minority group is predominately poor, uneducated, and unhealthy should be considered a factor tending to prove a § 2 violation; but that Congress intended, on the other hand, that proof that the same socioeconomic characteristics greatly influence black voters' choice of candidates should destroy these voters' ability to establish one of the most important elements of a vote dilution claim.

4

Race of Candidate as Primary Determinant of Voter Behavior

North Carolina's and the United States' suggestion that racially polarized voting means that voters select or reject candidates *principally* on the basis of the *candidate's race* is also misplaced.

First, both the language of § 2 and a functional understanding of the phenomenon of vote dilution mandate the conclusion that the race of the candidate *per se* is irrelevant to racial bloc voting analysis. Section 2(b) states that a violation is established if it can be shown that members of a protected minority group "have less opportunity than other members of the electorate to . . . elect representatives *of their choice*."

(Emphasis added.) Because both minority and majority voters often select members of their own race as their preferred representatives, it will frequently be the case that a black candidate is the choice of blacks, while a white candidate is the choice of whites. Cf. Letter to the Editor from Chandler Davidson, 17 New Perspectives 38 (Fall 1985). Indeed, the facts of this case illustrate that tendency—blacks preferred black candidates, whites preferred white candidates. Thus, as a matter of convenience, we and the District Court may refer to the preferred representative of black voters as the "black candidate" and to the preferred representative of white voters as the "white candidate." Nonetheless, the fact that race of voter and race of candidate is often correlated is not directly pertinent to a § 2 inquiry. Under § 2, it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important.

An understanding of how vote dilution through submergence in a white majority works leads to the same conclusion. The essence of a submergence claim is that minority group members prefer certain candidates whom they could elect were it not for the interaction of the challenged electoral law or structure with a white majority that votes as a significant bloc for different candidates. Thus, as we explained in Part III, *supra*, the existence of racial bloc voting is relevant to a vote dilution claim in two ways. Bloc voting by blacks tends to prove that the black community is politically cohesive, that is, it shows that blacks prefer certain candidates whom they could elect in a single-member, black majority district. Bloc voting by a white majority tends to prove that blacks will generally be unable to elect representatives of their choice. Clearly, only the race of the voter, not the race of the candidate, is relevant to vote dilution analysis. See, *e. g.*, Blacksher & Menefee 59–60; Grofman, Should Representatives be Typical?, in Representation and Redistricting Issues 98; Note, Geometry and Geography 207.

Second, appellants' suggestion that racially polarized voting refers to voting patterns where whites vote for white candidates because they prefer members of their own race or are hostile to blacks, as opposed to voting patterns where whites vote for white candidates because the white candidates spent more on their campaigns, utilized more media coverage, and thus enjoyed greater name recognition than the black candidates, fails for another, independent reason. This argument, like the argument that the race of the voter must be the primary determinant of the voter's ballot, is inconsistent with the purposes of § 2 and would render meaningless the Senate Report factor that addresses the impact of low socioeconomic status on a minority group's level of political participation.

Congress intended that the Voting Rights Act eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination. S. Rep., at 5, 40; H. R. Rep. No. 97–227, p. 31 (1981). Both this Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes. See, *e. g.*, *White* v. *Regester*, 412 U. S., at 768–769; *Kirksey* v. *Board of Supervisors of Hinds County, Miss.*, 554 F. 2d 139, 145–146 (CA5) (en banc), cert. denied, 434 U. S. 968 (1977). See also S. Verba & N. Nie, Participation in America 152 (1972). The Senate Report acknowledges this tendency and instructs that "the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process," S. Rep., at 29 (footnote omitted), is a factor which may be probative of unequal opportunity to participate in the political process and to elect representatives. Courts and commentators have recognized further that candidates generally must spend more money in order to win election in a multimember district than in a single-member district. See, *e. g.*, *Graves* v. *Barnes*, 343 F. Supp. 704, 720–721 (WD Tex. 1972), aff'd in part and rev'd in part *sub nom. White* v. *Regester*, *supra.* Berry & Dye 88; Davidson & Fraga, Nonpartisan Slating Groups in an At-Large Setting, in Minority Vote Dilution 122–123; Derfner 554, n. 126; Jewell 131; Karnig, Black Representation on City Councils, 12 Urb. Aff. Q. 223, 230 (1976). If, because of inferior education and poor employment opportunities, blacks earn less than whites, they will not be able to provide the candidates of their choice with the same level of financial support that whites can provide theirs. Thus, electoral losses by candidates preferred by the black community may well be attributable in part to the fact that their white opponents outspent them. But, the fact is that, in this instance, the economic effects of prior discrimination have combined with the multimember electoral structure to afford blacks less opportunity than whites to participate in the political process and to elect representatives of their choice. It would be both anomalous and inconsistent with congressional intent to hold that, on the one hand, the effects of past discrimination which hinder blacks' ability to participate in the political process tend to prove a § 2 violation, while holding on the other hand that, where these same effects of past discrimination deter whites from voting for blacks, blacks cannot make out a crucial element of a vote dilution claim. Accord, *Escambia County*, 748 F. 2d, at 1043 ("'[T]he failure of the blacks to solicit white votes may be caused by the effects of past discrimination'") (quoting *United States* v. *Dallas County Comm'n*, 739 F. 2d 1529, 1536 (CA11 1984)); *United States* v. *Marengo County Comm'n*, 731 F. 2d, at 1567.

5

Racial Animosity as Primary Determinant of Voter Behavior

Finally, we reject the suggestion that racially polarized voting refers only to white bloc voting which is caused by white voters' *racial hostility* toward black candidates.[33] To accept this theory would frustrate the goals Congress sought to achieve by repudiating the intent test of *Mobile* v. *Bolden*, 446 U. S. 55 (1980), and would prevent minority voters who have clearly been denied an opportunity to elect representatives of their choice from establishing a critical element of a vote dilution claim.

In amending § 2, Congress rejected the requirement announced by this Court in *Bolden, supra*, that § 2 plaintiffs must prove the discriminatory intent of state or local governments in adopting or maintaining the challenged electoral mechanism.[34] Appellants' suggestion that the discriminatory intent of individual white voters must be proved in order to make out a § 2 claim must fail for the very reasons Congress rejected the intent test with respect to governmental bodies. See Engstrom, The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases, 28 How. L. J. 495 (1985).

The Senate Report states that one reason the Senate Committee abandoned the intent test was that "the Committee . . . heard persuasive testimony that the intent test is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities." S. Rep., at 36. The Committee found the testimony of Dr. Arthur S.

[33] It is true, as we have recognized previously, that racial hostility may often fuel racial bloc voting. *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 166 (1977); *Rogers* v. *Lodge*, 458 U. S., at 623. But, as we explain in this decision, the actual motivation of the voter has no relevance to a vote dilution claim. This is not to suggest that racial bloc voting is race neutral; because voter behavior correlates with race, obviously it is not. It should be remembered, though, as one commentator has observed, that "[t]he absence of racial animus is but one element of race neutrality." Note, Geometry and Geography 208.

[34] The Senate Report rejected the argument that the words "on account of race," contained in § 2(a), create any requirement of purposeful discrimination. "[I]t is patently [clear] that Congress has used the words 'on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination." S. Rep., at 27–28, n. 109.

Flemming, Chairman of the United States Commission on Civil Rights, particularly persuasive. He testified:

> "'[Under an intent test] [l]itigators representing excluded minorities will have to explore the motivations of individual council members, mayors, and other citizens. The question would be whether their decisions were motivated by invidious racial considerations. Such inquiries can only be divisive, threatening to destroy any existing racial progress in a community. It is the intent test, not the results test, that would make it necessary to brand individuals as racist in order to obtain judicial relief.'" *Ibid.* (footnote omitted).

The grave threat to racial progress and harmony which Congress perceived from requiring proof that racism caused the adoption or maintenance of a challenged electoral mechanism is present to a much greater degree in the proposed requirement that plaintiffs demonstrate that racial animosity determined white voting patterns. Under the old intent test, plaintiffs might succeed by proving only that a limited number of elected officials were racist; under the new intent test plaintiffs would be required to prove that most of the white community is racist in order to obtain judicial relief. It is difficult to imagine a more racially divisive requirement.

A second reason Congress rejected the old intent test was that in most cases it placed an "inordinately difficult burden" on §2 plaintiffs. *Ibid.* The new intent test would be equally, if not more, burdensome. In order to prove that a *specific factor*—racial hostility—*determined* white voters' ballots, it would be necessary to demonstrate that other potentially relevant *causal factors*, such as socioeconomic characteristics and candidate expenditures, do not correlate better than racial animosity with white voting behavior. As one commentator has explained:

> "Many of the[se] independent variables . . . would be all but impossible for a social scientist to operationalize as interval-level independent variables for use in a multiple regression equation, whether on a step-wise basis or not. To conduct such an extensive statistical analysis as this implies, moreover, can become prohibitively expensive.
>
> "Compared to this sort of effort, proving discriminatory intent in the adoption of an at-large election system is both simple and inexpensive." McCrary, Discriminatory Intent: The Continuing Relevance of "Purpose" Evidence in Vote-Dilution Lawsuits, 28 How. L. J. 463, 492 (1985) (footnote omitted).

The final and most dispositive reason the Senate Report repudiated the old intent test was that it "asks the wrong question." S. Rep., at 36. Amended § 2 asks instead "whether minorities have equal access to the process of electing their representatives." *Ibid.*

Focusing on the discriminatory intent of the voters, rather than the behavior of the voters, also asks the wrong question. All that matters under § 2 and under a functional theory of vote dilution is voter behavior, not its explanations. Moreover, as we have explained in detail, *supra*, requiring proof that racial considerations actually *caused* voter behavior will result—contrary to congressional intent—in situations where a black minority that functionally has been totally excluded from the political process will be unable to establish a § 2 violation. The Senate Report's remark concerning the old intent test thus is pertinent to the new test: The requirement that a "court . . . make a separate . . . finding of intent, after accepting the proof of the factors involved in the *White* [v. *Regester*, 412 U. S. 755] analysis . . . [would] seriously clou[d] the prospects of eradicating the remaining instances of racial discrimination in American elections." *Id.*, at 37. We therefore decline to adopt such a requirement.

6

Summary

In sum, we would hold that the legal concept of racially polarized voting, as it relates to claims of vote dilution, refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent.

IV

THE LEGAL SIGNIFICANCE OF SOME BLACK CANDIDATES' SUCCESS

A

North Carolina and the United States maintain that the District Court failed to accord the proper weight to the success of some black candidates in the challenged districts. Black residents of these districts, they point out, achieved improved representation in the 1982 General Assembly election.[35] They also note that blacks in House District 23 have enjoyed proportional representation consistently since 1973 and that blacks in the other districts have occasionally enjoyed nearly proportional representation.[36] This electoral

[35] The relevant results of the 1982 General Assembly election are as follows. House District 21, in which blacks make up 21.8% of the population, elected one black to the six-person House delegation. House District 23, in which blacks constitute 36.3% of the population, elected one black to the three-person House delegation. In House District 36, where blacks constitute 26.5% of the population, one black was elected to the eight-member delegation. In House District 39, where 25.1% of the population is black, two blacks were elected to the five-member delegation. In Senate District 22, where blacks constitute 24.3% of the population, no black was elected to the Senate in 1982.

[36] The United States points out that, under a substantially identical predecessor to the challenged plan, see n. 15, *supra*, House District 21 elected a black to its six-member delegation in 1980, House District 39

success demonstrates conclusively, appellants and the United States argue, that blacks in those districts do not have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U. S. C. § 1973(b). Essentially, appellants and the United States contend that if a racial minority gains proportional or nearly proportional representation in a single election, that fact alone precludes, as a matter of law, finding a § 2 violation.

Section 2(b) provides that "[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered." 42 U. S. C. § 1973(b). The Senate Committee Report also identifies the extent to which minority candidates have succeeded as a pertinent factor. S. Rep., at 29. However, the Senate Report expressly states that "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote,'" noting that if it did, "the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a 'safe' minority candidate." *Id.*, at 29, n. 115, quoting *Zimmer* v. *McKeithen*, 485 F. 2d 1297, 1307 (CA5 1973) (en banc), aff'd *sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U. S. 636 (1976) *(per curiam)*. The Senate Committee decided, instead, to "'require an independent consideration of the record.'" S. Rep., at 29, n. 115. The Senate Report also emphasizes that the question whether "the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.'" *Id.*, at 30 (footnote omitted). Thus, the language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim.

Moreover, in conducting its "independent consideration of the record" and its "searching practical evaluation of the 'past

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elected a black to its five-member delegation in 1974 and 1976, and Senate District 22 had a black Senator between 1975 and 1980.

and present reality,'" the District Court could appropriately take account of the circumstances surrounding recent black electoral success in deciding its significance to appellees' claim. In particular, as the Senate Report makes clear, *id.*, at 29, n. 115, the court could properly notice the fact that black electoral success increased markedly in the 1982 election—an election that occurred after the instant lawsuit had been filed—and could properly consider to what extent "the pendency of this very litigation [might have] worked a one-time advantage for black candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting."[37] 590 F. Supp., at 367, n. 27.

Nothing in the statute or its legislative history prohibited the court from viewing with some caution black candidates' success in the 1982 election, and from deciding on the basis of all the relevant circumstances to accord greater weight to blacks' relative lack of success over the course of several recent elections. Consequently, we hold that the District Court did not err, as a matter of law, in refusing to treat the fact that some black candidates have succeeded as dispositive of appellees' § 2 claim. Where multimember districting generally works to dilute the minority vote, it cannot be defended on the ground that it sporadically and serendipitously benefits minority voters.

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[37] See also *Zimmer* v. *McKeithen*, 485 F. 2d, at 1307 ("[W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district").

B

The District Court did err, however, in ignoring the significance of the *sustained* success black voters have experienced in House District 23. In that district, the last six elections have resulted in proportional representation for black residents. This persistent proportional representation is inconsistent with appellees' allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority.

In some situations, it may be possible for §2 plaintiffs to demonstrate that such sustained success does not accurately reflect the minority group's ability to elect its preferred representatives,[38] but appellees have not done so here. Appellees presented evidence relating to black electoral success in the last three elections; they failed utterly, though, to offer any explanation for the success of black candidates in the previous three elections. Consequently, we believe that the District Court erred, as a matter of law, in ignoring the sustained success black voters have enjoyed in House District 23, and would reverse with respect to that District.

V

ULTIMATE DETERMINATION OF VOTE DILUTION

Finally, appellants and the United States dispute the District Court's ultimate conclusion that the multimember districting scheme at issue in this case deprived black voters of an equal opportunity to participate in the political process and to elect representatives of their choice.

A

As an initial matter, both North Carolina and the United States contend that the District Court's ultimate conclusion that the challenged multimember districts operate to dilute

[38] We have no occasion in this case to decide what types of special circumstances could satisfactorily demonstrate that sustained success does not accurately reflect the minority's ability to elect its preferred representatives.

black citizens' votes is a mixed question of law and fact subject to *de novo* review on appeal. In support of their proposed standard of review, they rely primarily on *Bose Corp.* v. *Consumers Union of U. S., Inc.*, 466 U. S. 485 (1984), a case in which we reconfirmed that, as a matter of constitutional law, there must be independent appellate review of evidence of "actual malice" in defamation cases. Appellants and the United States argue that because a finding of vote dilution under amended § 2 requires the application of a rule of law to a particular set of facts it constitutes a legal, rather than factual, determination. Reply Brief for Appellants 7; Brief for United States as *Amicus Curiae* 18–19. Neither appellants nor the United States cite our several precedents in which we have treated the ultimate finding of vote dilution as a question of fact subject to the clearly-erroneous standard of Rule 52(a). See, *e. g.*, *Rogers* v. *Lodge*, 458 U. S., at 622–627; *City of Rome* v. *United States*, 446 U. S. 156, 183 (1980); *White* v. *Regester*, 412 U. S., at 765–770. Cf. *Anderson* v. *Bessemer City*, 470 U. S. 564, 573 (1985).

In *Regester, supra*, we noted that the District Court had based its conclusion that minority voters in two multimember districts in Texas had less opportunity to participate in the political process than majority voters on the totality of the circumstances and stated that

> "we are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the . . . multimember district in the light of past and present reality, political and otherwise." *Id.*, at 769–770.

Quoting this passage from *Regester* with approval, we expressly held in *Rogers* v. *Lodge, supra*, that the question whether an at-large election system was maintained for discriminatory purposes and subsidiary issues, which include whether that system had the effect of diluting the minority vote, were questions of fact, reviewable under Rule 52(a)'s clearly-erroneous standard. 458 U. S., at 622–623. Similarly, in *City of Rome* v. *United States*, we declared that the question whether certain electoral structures had a "discriminatory effect," in the sense of diluting the minority vote, was a question of fact subject to clearly-erroneous review. 446 U. S., at 183.

We reaffirm our view that the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution. As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of the circumstances" and to determine, based "upon a searching practical evaluation of the 'past and present reality,'" S. Rep., at 30 (footnote omitted), whether the political process is equally open to minority voters. "'This determination is peculiarly dependent upon the facts of each case,'" *Rogers*, *supra*, at 621, quoting *Nevett* v. *Sides*, 571 F. 2d 209, 224 (CA5 1978), and requires "an intensely local appraisal of the design and impact" of the contested electoral mechanisms. 458 U. S., at 622. The fact that amended § 2 and its legislative history provide legal standards which a court must apply to the facts in order to determine whether § 2 has been violated does not alter the standard of review. As we explained in *Bose*, Rule 52(a) "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." 466 U. S., at 501, citing *Pullman-Standard* v. *Swint*, 456 U. S. 273, 287 (1982); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 855, n. 15 (1982). Thus, the application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law.

B

The District Court in this case carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. It found that the success a few black candidates have enjoyed in these districts is too recent, too limited, and, with regard to the 1982 elections, perhaps too aberrational, to disprove its conclusion. Excepting House District 23, with respect to which the District Court committed legal error, see *supra*, at 77, we affirm the District Court's judgment. We cannot say that the District Court, composed of local judges who are well acquainted with the political realities of the State, clearly erred in concluding that use of a multimember electoral structure has caused black voters in the districts other than House District 23 to have less opportunity than white voters to elect representatives of their choice.

The judgment of the District Court is

Affirmed in part and reversed in part.

APPENDIX A TO OPINION OF BRENNAN, J.

Percentages of Votes Cast by Black and White Voters for Black Candidates in the Five Contested Districts

Senate District 22

	Primary		*General*	
	White	*Black*	*White*	*Black*
1978 (Alexander)	47	87	41	94
1980 (Alexander)	23	78	n/a	n/a
1982 (Polk)	32	83	33	94

House District 21

	Primary		General	
	White	*Black*	*White*	*Black*
1978 (Blue)	21	76	n/a	n/a
1980 (Blue)	31	81	44	90
1982 (Blue)	39	82	45	91

House District 23

	Primary		General	
	White	*Black*	*White*	*Black*
1978 Senate				
Barns (Repub.)	n/a	n/a	17	5
1978 House				
Clement	10	89	n/a	n/a
Spaulding	16	92	37	89
1980 House				
Spaulding	n/a	n/a	49	90
1982 House				
Clement	26	32	n/a	n/a
Spaulding	37	90	43	89

House District 36

	Primary		General	
	White	*Black*	*White*	*Black*
1980 (Maxwell)	22	71	28	92
1982 (Berry)	50	79	42	92
1982 (Richardson)	39	71	29	88

House District 39

	Primary		General	
	White	*Black*	*White*	*Black*
1978 House				
Kennedy, H.	28	76	32	93
Norman	8	29	n/a	n/a
Ross	17	53	n/a	n/a
Sumter (Repub.)	n/a	n/a	33	25

House District 39

	Primary		*General*	
	White	*Black*	*White*	*Black*
1980 House				
Kennedy, A.	40	86	32	96
Norman	18	36	n/a	n/a
1980 Senate				
Small	12	61	n/a	n/a
1982 House				
Hauser	25	80	42	87
Kennedy, A.	36	87	46	94

590 F. Supp., at 369–371.

APPENDIX B TO OPINION OF BRENNAN, J.

Black Candidates Elected From 7 Originally Contested Districts

District (No. Seats)	Prior to 1972	1972	1974	1976	1978	1980	1982
House 8 (4)	0	0	0	0	0	0	0
House 21 (6)	0	0	0	0	0	1	1
House 23 (3)	0	1	1	1	1	1	1
House 36 (8)	0	0	0	0	0	0	1
House 39 (5)	0	0	1	1	0	0	2
Senate 2 (2)	0	0	0	0	0	0	0
Senate 22 (4)	0	0	1	1	1	0	0

See Brief for Appellees, table printed between pages 8 and 9; App. 93–94.

JUSTICE WHITE, concurring.

I join Parts I, II, III–A, III–B, IV–A, and V of the Court's opinion and agree with JUSTICE BRENNAN's opinion as to Part IV–B. I disagree with Part III–C of JUSTICE BRENNAN's opinion.

JUSTICE BRENNAN states in Part III–C that the crucial factor in identifying polarized voting is the race of the voter and that the race of the candidate is irrelevant. Under this test, there is polarized voting if the majority of white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates. I do not agree. Suppose an eight-member multimember district that is 60% white and 40% black, the blacks being geographically located so that two safe black single-member districts could be drawn. Suppose further that there are six white and two black Democrats running against six white and two black Republicans. Under JUSTICE BRENNAN's test, there would be polarized voting and a likely § 2 violation if all the Republicans, including the two blacks, are elected, and 80% of the blacks in the predominantly black areas vote Democratic. I take it that there would also be a violation in a single-member district that is 60% black, but enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters. This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 as it did, and it seems quite at odds with the discussion in *Whitcomb* v. *Chavis*, 403 U. S. 124, 149–160 (1971). Furthermore, on the facts of this case, there is no need to draw the voter/candidate distinction. The District Court did not and reached the correct result except, in my view, with respect to District 23.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, concurring in the judgment.

In this case, we are called upon to construe § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. Amended § 2 is intended to codify the "results" test employed in *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), and *White* v. *Regester*, 412 U. S. 755 (1973), and to reject the "intent" test propounded in the plurality opinion in *Mobile* v. *Bolden*, 446

U. S. 55 (1980). S. Rep. No. 97-417, pp. 27-28 (1982) (hereinafter S. Rep.). Whereas *Bolden* required members of a racial minority who alleged impairment of their voting strength to prove that the challenged electoral system was created or maintained with a discriminatory purpose and led to discriminatory results, under the results test, "plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose." S. Rep., at 28. At the same time, however, §2 unequivocally disclaims the creation of a right to proportional representation. This disclaimer was essential to the compromise that resulted in passage of the amendment. See *id.*, at 193-194 (additional views of Sen. Dole).

In construing this compromise legislation, we must make every effort to be faithful to the balance Congress struck. This is not an easy task. We know that Congress intended to allow vote dilution claims to be brought under §2, but we also know that Congress did not intend to create a right to proportional representation for minority voters. There is an inherent tension between what Congress wished to do and what it wished to avoid, because any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large. In addition, several important aspects of the "results" test had received little attention in this Court's cases or in the decisions of the Courts of Appeals employing that test on which Congress also relied. See *id.*, at 32. Specifically, the legal meaning to be given to the concepts of "racial bloc voting" and "minority voting strength" had been left largely unaddressed by the courts when §2 was amended.

The Court attempts to resolve all these difficulties today. First, the Court supplies definitions of racial bloc voting and minority voting strength that will apparently be applicable in all cases and that will dictate the structure of vote dilution litigation. Second, the Court adopts a test, based on the level of minority electoral success, for determining when an electoral scheme has sufficiently diminished minority voting strength to constitute vote dilution. Third, although the Court does not acknowledge it expressly, the combination of the Court's definition of minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts. In so doing, the Court has disregarded the balance struck by Congress in amending § 2 and has failed to apply the results test as described by this Court in *Whitcomb* and *White.*

I

In order to explain my disagreement with the Court's interpretation of § 2, it is useful to illustrate the impact that alternative districting plans or types of districts typically have on the likelihood that a minority group will be able to elect candidates it prefers, and then to set out the critical elements of a vote dilution claim as they emerge in the Court's opinion.

Consider a town of 1,000 voters that is governed by a council of four representatives, in which 30% of the voters are black, and in which the black voters are concentrated in one section of the city and tend to vote as a bloc. It would be possible to draw four single-member districts, in one of which blacks would constitute an overwhelming majority. The black voters in this district would be assured of electing a representative of their choice, while any remaining black voters in the other districts would be submerged in large white majorities. This option would give the minority group roughly proportional representation.

Alternatively, it would usually be possible to draw four single-member districts in *two* of which black voters constituted much narrower majorities of about 60%. The black voters in these districts would often be able to elect the representative of their choice in each of these two districts, but if even 20% of the black voters supported the candidate favored by the white minority in those districts the candidates preferred by the majority of black voters might lose. This option would, depending on the circumstances of a particular election, sometimes give the minority group more than proportional representation, but would increase the risk that the group would not achieve even roughly proportional representation.

It would also usually be possible to draw four single-member districts in each of which black voters constituted a minority. In the extreme case, black voters would constitute 30% of the voters in each district. Unless approximately 30% of the white voters in this extreme case backed the minority candidate, black voters in such a district would be unable to elect the candidate of their choice in an election between only two candidates even if they unanimously supported him. This option would make it difficult for black voters to elect candidates of their choice even with significant white support, and all but impossible without such support.

Finally, it would be possible to elect all four representatives in a single at-large election in which each voter could vote for four candidates. Under this scheme, white voters could elect all the representatives even if black voters turned out in large numbers and voted for one and only one candidate. To illustrate, if only four white candidates ran, and each received approximately equal support from white voters, each would receive about 700 votes, whereas black voters could cast no more than 300 votes for any one candidate. If, on the other hand, eight white candidates ran, and white votes were distributed less evenly, so that the five least favored white candidates received fewer than 300 votes while three others received 400 or more, it would be feasible for blacks to elect one representative with 300 votes even without substantial white support. If even 25% of the white voters backed a particular minority candidate, and black voters voted only for that candidate, the candidate would receive a total of 475 votes, which would ensure victory unless white voters also concentrated their votes on four of the eight remaining candidates, so that each received the support of almost 70% of white voters. As these variations show, the at-large or multimember district has an inherent tendency to submerge the votes of the minority. The minority group's prospects for electoral success under such a district heavily depend on a variety of factors such as voter turnout, how many candidates run, how evenly white support is spread, how much white support is given to a candidate or candidates preferred by the minority group, and the extent to which minority voters engage in "bullet voting" (which occurs when voters refrain from casting all their votes to avoid the risk that by voting for their lower ranked choices they may give those candidates enough votes to defeat their higher ranked choices, see *ante*, at 38–39, n. 5).

There is no difference in principle between the varying effects of the alternatives outlined above and the varying effects of alternative single-district plans and multimember districts. The type of districting selected and the way in which district lines are drawn can have a powerful effect on the likelihood that members of a geographically and politically cohesive minority group will be able to elect candidates of their choice.

Although § 2 does not speak in terms of "vote dilution," I agree with the Court that proof of vote dilution can establish a violation of § 2 as amended. The phrase "vote dilution," in the legal sense, simply refers to the impermissible discriminatory effect that a multimember or other districting plan has when it operates "to cancel out or minimize the voting strength of racial groups." *White*, 412 U. S., at 765. See also *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965). This definition, however, conceals some very formidable difficulties. Is the "voting strength" of a racial group to be assessed solely with reference to its prospects for electoral success, or should courts look at other avenues of political influence open to the racial group? Insofar as minority voting strength is assessed with reference to electoral success, how should undiluted minority voting strength be measured? How much of an impairment of minority voting strength is necessary to prove a violation of § 2? What constitutes racial bloc voting and how is it proved? What weight is to be given to evidence of actual electoral success by minority candidates in the face of evidence of racial bloc voting?

The Court resolves the first question summarily: minority voting strength *is* to be assessed solely in terms of the minority group's ability to elect candidates it prefers. *Ante*, at 48–49, n. 15. Under this approach, the essence of a vote dilution claim is that the State has created single-member or multimember districts that unacceptably impair the minority group's ability to elect the candidates its members prefer.

In order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2, however, it is also necessary to construct a measure of "undiluted" minority voting strength. "[T]he phrase [vote dilution] itself suggests a norm with respect to which the fact of dilution may be ascertained." *Mississippi Republican Executive Committee* v. *Brooks*, 469 U. S. 1002, 1012 (1984) (REHNQUIST, J., dissenting from summary affirmance). Put simply, in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it "should" be for minority voters to elect their preferred candidates under an acceptable system.

Several possible measures of "undiluted" minority voting strength suggest themselves. First, a court could simply use proportionality as its guide: if the minority group constituted 30% of the voters in a given area, the court would regard the minority group as having the potential to elect 30%

of the representatives in that area. Second, a court could posit some alternative districting plan as a "normal" or "fair" electoral scheme and attempt to calculate how many candidates preferred by the minority group would probably be elected under that scheme. There are, as we have seen, a variety of ways in which even single-member districts could be drawn, and each will present the minority group with its own array of electoral risks and benefits; the court might, therefore, consider a range of acceptable plans in attempting to estimate "undiluted" minority voting strength by this method. Third, the court could attempt to arrive at a plan that would maximize feasible minority electoral success, and use this degree of predicted success as its measure of "undiluted" minority voting strength. If a court were to employ this third alternative, it would often face hard choices about what would truly "maximize" minority electoral success. An example is the scenario described above, in which a minority group could be concentrated in one completely safe district or divided among two districts in each of which its members would constitute a somewhat precarious majority.

The Court today has adopted a variant of the third approach, to wit, undiluted minority voting strength means the maximum feasible minority voting strength. In explaining the elements of a vote dilution claim, the Court first states that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Ante*, at 50. If not, apparently the minority group has no cognizable claim that its ability to elect the representatives of its choice has been impaired.[1] Second, "the minority group must be able

[1] I express no view as to whether the ability of a minority group to constitute a majority in a single-member district should constitute a threshold requirement for a claim that the use of multimember districts impairs the ability of minority voters to participate in the political processes and to elect representatives of their choice. Because the plaintiffs in this case would meet that requirement, if indeed it exists, I need not decide whether

to show that it is politically cohesive," that is, that a significant proportion of the minority group supports the same candidates. *Ante*, at 51. Third, the Court requires the minority group to "demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances . . . —usually to defeat the minority's preferred candidate." *Ibid.* If these three requirements are met, "the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives." *Ibid.* That is to say, the minority group has proved vote dilution in violation of § 2.

The Court's definition of the elements of a vote dilution claim is simple and invariable: a court should calculate minority voting strength by assuming that the minority group is concentrated in a single-member district in which it constitutes a voting majority. Where the minority group is not large enough, geographically concentrated enough, or politically cohesive enough for this to be possible, the minority group's claim fails. Where the minority group meets these requirements, the representatives that it could elect in the hypothetical district or districts in which it constitutes a

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it is imposed by § 2. I note, however, the artificiality of the Court's distinction between claims that a minority group's "ability *to elect* the representatives of [its] choice" has been impaired and claims that "its ability to *influence* elections" has been impaired. *Ante*, at 46–47, n. 12. It is true that a minority group that could constitute a majority in a single-member district ordinarily has the potential ability to elect representatives without white support, and that a minority that could not constitute such a majority ordinarily does not. But the Court recognizes that when the candidates preferred by a minority group are elected in a multimember district, the minority group has *elected* those candidates, even if white support was indispensable to these victories. On the same reasoning, if a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.

majority will serve as the measure of its undiluted voting strength. Whatever plan the State actually adopts must be assessed in terms of the effect it has on this undiluted voting strength. If this is indeed the single, universal standard for evaluating undiluted minority voting strength for vote dilution purposes, the standard is applicable whether what is challenged is a multimember district or a particular single-member districting scheme.

The Court's statement of the elements of a vote dilution claim also supplies an answer to another question posed above: *how much* of an impairment of undiluted minority voting strength is necessary to prove vote dilution. The Court requires the minority group that satisfies the threshold requirements of size and cohesiveness to prove that it will *usually* be unable to elect as many representatives of its choice under the challenged districting scheme as its undiluted voting strength would permit. This requirement, then, constitutes the true test of vote dilution. Again, no reason appears why this test would not be applicable to a vote dilution claim challenging single-member as well as multimember districts.

This measure of vote dilution, taken in conjunction with the Court's standard for measuring undiluted minority voting strength, creates what amounts to a right to *usual, roughly* proportional representation on the part of sizable, compact, cohesive minority groups. If, under a particular multimember or single-member district plan, qualified minority groups usually cannot elect the representatives they would be likely to elect under the most favorable single-member districting plan, then § 2 is violated. Unless minority success under the challenged electoral system regularly approximates this rough version of proportional representation, that system dilutes minority voting strength and violates § 2.

To appreciate the implications of this approach, it is useful to return to the illustration of a town with four council representatives given above. Under the Court's approach, if the black voters who constitute 30% of the town's voting population do not usually succeed in electing one representative of their choice, then regardless of whether the town employs at-large elections or is divided into four single-member districts, its electoral system violates § 2. Moreover, if the town had a black voting population of 40%, on the Court's reasoning the black minority, so long as it was geographically and politically cohesive, would be entitled usually to elect two of the four representatives, since it would normally be possible to create two districts in which black voters constituted safe majorities of approximately 80%.

To be sure, the Court also requires that plaintiffs prove that racial bloc voting by the white majority interacts with the challenged districting plan so as usually to defeat the minority's preferred candidate. In fact, however, this requirement adds little that is not already contained in the Court's requirements that the minority group be politically cohesive and that its preferred candidates usually lose. As the Court acknowledges, under its approach, "in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Ante*, at 56. But this is to define legally significant bloc voting by the racial majority in terms of the extent of the racial minority's electoral success. If the minority can prove that it could constitute a majority in a single-member district, that it supported certain candidates, and that those candidates have not usually been elected, then a finding that there is "legally significant white bloc voting" will necessarily follow. Otherwise, by definition, those candidates would usually have won rather than lost.

As shaped by the Court today, then, the basic contours of a vote dilution claim require no reference to most of the "*Zimmer* factors" that were developed by the Fifth Circuit to implement *White*'s results test and which were highlighted in the Senate Report. S. Rep., at 28–29; see *Zimmer* v. *Mc*-

Keithen, 485 F. 2d 1297 (1973) (en banc), aff'd *sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U. S. 636 (1976) *(per curiam)*. If a minority group is politically and geographically cohesive and large enough to constitute a voting majority in one or more single-member districts, then unless white voters usually support the minority's preferred candidates in sufficient numbers to enable the minority group to elect as many of those candidates as it could elect in such hypothetical districts, it will routinely follow that a vote dilution claim can be made out, and the multimember district will be invalidated. There is simply no need for plaintiffs to establish "the history of voting-related discrimination in the State or political subdivision," *ante*, at 44, or "the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group," *ante*, at 45, or "the exclusion of members of the minority group from candidate slating processes," *ibid.*, or "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health," *ibid.*, or "the use of overt or subtle racial appeals in political campaigns," *ibid.*, or that "elected officials are unresponsive to the particularized needs of the members of the minority group." *Ibid.* Of course, these other factors may be supportive of such a claim, because they may strengthen a court's confidence that minority voters will be unable to overcome the relative disadvantage at which they are placed by a particular districting plan, or suggest a more general lack of opportunity to participate in the political process. But the fact remains that electoral success has now emerged, under the Court's standard, as the linchpin of vote dilution claims, and that the elements of a vote dilution claim create an entitlement to roughly proportional representation within the framework of single-member districts.

II

In my view, the Court's test for measuring minority voting strength and its test for vote dilution, operating in tandem, come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2. It is not necessary or appropriate to decide in this case whether § 2 requires a uniform measure of undiluted minority voting strength in every case, nor have appellants challenged the standard employed by the District Court for assessing undiluted minority voting strength.

In this case, the District Court seems to have taken an approach quite similar to the Court's in making its preliminary assessment of undiluted minority voting strength:

> "At the time of the creation of these multi-member districts, there were concentrations of black citizens within the boundaries of each that were sufficient in numbers and contiguity to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multi-member districts, which single-member districts would satisfy all constitutional requirements of population and geographical configuration." *Gingles* v. *Edmisten*, 590 F. Supp. 345, 358–359 (EDNC 1984).

The Court goes well beyond simply sustaining the District Court's decision to employ this measure of undiluted minority voting strength as a reasonable one that is consistent with § 2. In my view, we should refrain from deciding in this case whether a court must invariably posit as its measure of "undiluted" minority voting strength single-member districts in which minority group members constitute a majority. There is substantial doubt that Congress intended "undiluted minority voting strength" to mean "maximum feasible minority voting strength." Even if that is the appropriate definition in some circumstances, there is no indication that Congress intended to mandate a single, universally applicable standard for measuring undiluted minority voting strength, regardless of local conditions and regardless of the extent of past discrimination against minority voters in a particular State or political subdivision. Since appellants have not raised the issue, I would assume that what the District Court did here was permissible under § 2, and leave open the broader question whether § 2 *requires* this approach.

What appellants *do* contest is the propriety of the District Court's standard for vote dilution. Appellants claim that the District Court held that "[a]lthough blacks had achieved considerable success in winning state legislative seats in the challenged districts, their failure to consistently attain the number of seats *that numbers alone would presumptively give them* (*i. e.*, in proportion to their presence in the population)," standing alone, constituted a violation of § 2. Brief for Appellants 20 (emphasis in original). This holding, appellants argue, clearly contravenes § 2's proviso 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." 42 U. S. C. § 1973.

I believe appellants' characterization of the District Court's holding is incorrect. In my view, the District Court concluded that there was a severe diminution in the prospects for black electoral success in each of the challenged districts, as compared to single-member districts in which blacks could constitute a majority, and that this severe diminution was in large part attributable to the interaction of the multimember form of the district with persistent racial bloc voting on the part of the white majorities in those districts. See 590 F. Supp., at 372.[2] The District Court attached great weight

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[2]At times, the District Court seems to have looked to simple proportionality rather than to hypothetical single-member districts in which black voters would constitute a majority. See, *e. g.*, 590 F. Supp., at 367. Nowhere in its opinion, however, did the District Court state that § 2 requires that minority groups consistently attain the level of electoral success that would correspond with their proportion of the total or voting population.

to this circumstance as one part of its ultimate finding that "the creation of each of the multi-member districts challenged in this action results in the black registered voters of that district being submerged as a voting minority in the district and thereby having less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.*, at 374. But the District Court's extensive opinion clearly relies as well on a variety of the other *Zimmer* factors, as the Court's thorough summary of the District Court's findings indicates. See *ante*, at 38–41.

If the District Court had held that the challenged multimember districts violated § 2 solely because blacks had not consistently attained seats in proportion to their presence in the population, its holding would clearly have been inconsistent with § 2's disclaimer of a right to proportional representation. Surely Congress did not intend to say, on the one hand, that members of a protected class have no right to proportional representation, and on the other, that any consistent failure to achieve proportional representation, without more, violates § 2. A requirement that minority representation usually be proportional to the minority group's proportion in the population is not quite the same as a right to strict proportional representation, but it comes so close to such a right as to be inconsistent with § 2's disclaimer and with the results test that is codified in § 2. In the words of Senator Dole, the architect of the compromise that resulted in passage of the amendments to § 2:

> "The language of the subsection explicitly rejects, as did *White* and its progeny, the notion that members of a protected class have a right to be elected in numbers equal to their proportion of the population. The extent to which members of a protected class have been elected under the challenged practice or structure is just one factor, among the totality of circumstances to be consid-

ered, and is not dispositive." S. Rep., at 194 (additional views of Sen. Dole).

On the same reasoning, I would reject the Court's test for vote dilution. The Court measures undiluted minority voting strength by reference to the possibility of creating single-member districts in which the minority group would constitute a majority, rather than by looking to raw proportionality alone. The Court's standard for vote dilution, when combined with its test for undiluted minority voting strength, makes actionable every deviation from usual, rough proportionality in representation for any cohesive minority group as to which this degree of proportionality is feasible within the framework of single-member districts. Requiring that every minority group that could possibly constitute a majority in a single-member district be assigned to such a district would approach a requirement of proportional representation as nearly as is possible within the framework of single-member districts. Since the Court's analysis entitles every such minority group usually to elect as many representatives under a multimember district as it could elect under the most favorable single-member district scheme, it follows that the Court is requiring a form of proportional representation. This approach is inconsistent with the results test and with § 2's disclaimer of a right to proportional representation.

In enacting § 2, Congress codified the "results" test this Court had employed, as an interpretation of the Fourteenth Amendment, in *White* and *Whitcomb*. The factors developed by the Fifth Circuit and relied on by the Senate Report simply fill in the contours of the "results" test as described in those decisions, and do not purport to redefine or alter the ultimate showing of discriminatory effect required by *Whitcomb* and *White*. In my view, therefore, it is to *Whitcomb* and *White* that we should look in the first instance in determining how great an impairment of minority voting strength is required to establish vote dilution in violation of § 2.

The "results" test as reflected in *Whitcomb* and *White* requires an inquiry into the extent of the minority group's opportunities to participate in the political processes. See *White,* 412 U. S., at 766. While electoral success is a central part of the vote dilution inquiry, *White* held that to prove vote dilution, "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential," *id.*, at 765–766, and *Whitcomb* flatly rejected the proposition that "any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single member district." 403 U. S., at 156. To the contrary, the results test as described in *White* requires plaintiffs to establish "that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U. S., at 766. By showing both "a history of disproportionate results" and "strong indicia of lack of political power and the denial of fair representation," the plaintiffs in *White* met this standard, which, as emphasized just today, requires "a substantially greater showing of adverse effects than a mere lack of proportional representation to support a finding of unconstitutional vote dilution." *Davis* v. *Bandemer, post,* at 131 (plurality opinion).

When Congress amended § 2 it intended to adopt this "results" test, while abandoning the additional showing of discriminatory intent required by *Bolden.* The vote dilution analysis adopted by the Court today clearly bears little resemblance to the "results" test that emerged in *Whitcomb* and *White.* The Court's test for vote dilution, combined with its standard for evaluating "voting potential," *White, supra,* at 766, means that any racial minority with distinctive interests must *usually* "be represented in legislative halls if it is numerous enough to command at least one seat and represents a minority living in an area sufficiently compact to constitute" a voting majority in "a single member district." *Whitcomb*, 403 U. S., at 156. Nothing in *Whitcomb*, *White*, or the language and legislative history of § 2 supports the Court's creation of this right to usual, roughly proportional representation on the part of every geographically compact, politically cohesive minority group that is large enough to form a majority in one or more single-member districts.

I would adhere to the approach outlined in *Whitcomb* and *White* and followed, with some elaboration, in *Zimmer* and other cases in the Courts of Appeals prior to *Bolden*. Under that approach, a court should consider all relevant factors bearing on whether the minority group has "less opportunity than other members of the electorate to participate in the political process *and* to elect representatives of their choice." 42 U. S. C. § 1973 (emphasis added). The court should not focus solely on the minority group's ability to elect representatives of its choice. Whatever measure of undiluted minority voting strength the court employs in connection with evaluating the presence or absence of minority electoral success, it should also bear in mind that "the power to influence the political process is not limited to winning elections." *Davis* v. *Bandemer*, *post*, at 132. Of course, the relative lack of minority electoral success under a challenged plan, when compared with the success that would be predicted under the measure of undiluted minority voting strength the court is employing, can constitute powerful evidence of vote dilution. Moreover, the minority group may in fact lack access to or influence upon representatives it did not support as candidates. Cf. *Davis* v. *Bandemer*, *post*, at 169–170 (POWELL, J., concurring in part and dissenting in part). Nonetheless, a reviewing court should be required to find more than simply that the minority group does not usually attain an undiluted measure of electoral success. The court must find that even substantial minority success will be highly infrequent under the challenged plan before it may conclude, on this basis alone, that the plan operates "to cancel out or minimize the voting strength of [the] racial grou[p]." *White, supra,* at 765.

III

Only three Justices of the Court join Part III–C of JUSTICE BRENNAN's opinion, which addresses the validity of the statistical evidence on which the District Court relied in finding racially polarized voting in each of the challenged districts. Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, I agree that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters. I do not agree, however, that such evidence can never affect the overall vote dilution inquiry. Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates. Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections.

I believe Congress also intended that explanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account. In a community that is polarized along racial lines, racial hostility may bar these and other indirect avenues of political influence to a much greater extent than in a community where racial animosity is absent although the interests of racial groups diverge. Indeed, the

Senate Report clearly stated that one factor that could have probative value in § 2 cases was "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." S. Rep., at 29. The overall vote dilution inquiry neither requires nor permits an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. Such a rule would give no effect whatever to the Senate Report's repeated emphasis on "intensive racial politics," on "racial political considerations," and on whether "racial politics . . . dominate the electoral process" as one aspect of the "racial bloc voting" that Congress deemed relevant to showing a § 2 violation. *Id.*, at 33–34. Similarly, I agree with JUSTICE WHITE that JUSTICE BRENNAN's conclusion that the race of the candidate is always irrelevant in identifying racially polarized voting conflicts with *Whitcomb* and is not necessary to the disposition of this case. *Ante*, at 83 (concurring).

In this case, as the Court grudgingly acknowledges, the District Court clearly erred in *aggregating* data from all of the challenged districts, and then relying on the fact that on average, 81.7% of white voters did not vote for any black candidate in the primary elections selected for study. *Ante*, at 59–60, n. 28. Although Senate District 22 encompasses House District 36, with that exception the districts at issue in this case are distributed throughout the State of North Carolina. *White* calls for "an intensely local appraisal of the design and impact of the . . . multimember district," 412 U. S., at 769–770, and racial voting statistics from one district are ordinarily irrelevant in assessing the totality of the circumstances in another district. In view of the specific evidence from each district that the District Court also considered, however, I cannot say that its conclusion that there was severe racial bloc voting was clearly erroneous with regard to any of the challenged districts. Except in House District 23, where racial bloc voting did not prevent sustained and virtually proportional minority electoral success, I would accordingly leave undisturbed the District Court's decision to give great weight to racial bloc voting in each of the challenged districts.

IV

Having made usual, roughly proportional success the sole focus of its vote dilution analysis, the Court goes on to hold that proof that an occasional minority candidate has been elected does not foreclose a § 2 claim. But JUSTICE BRENNAN, joined by JUSTICE WHITE, concludes that "persistent proportional representation" will foreclose a § 2 claim unless the plaintiffs prove that this "sustained success does not accurately reflect the minority group's ability to elect its preferred representatives." *Ante*, at 77. I agree with JUSTICE BRENNAN that consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation. Moreover, I agree that this case presents no occasion for determining what would constitute proof that such success did not accurately reflect the minority group's actual voting strength in a challenged district or districts.

In my view, the District Court erred in assessing the extent of black electoral success in House District 39 and Senate District 22, as well as in House District 23, where the Court acknowledges error. As the evidence summarized by the Court in table form shows, *ante*, at 82, Appendix B, the degree of black electoral success differed widely in the seven originally contested districts. In House District 8 and Senate District 2, neither of which is contested in this Court, no black candidate had ever been elected to the offices in question. In House District 21 and House District 36, the only instances of black electoral success came in the two most recent elections, one of which took place during the pendency of this litigation. By contrast, in House District 39 and Senate District 22, black successes, although intermittent, dated back to 1974, and a black candidate had been elected in each of these districts in three of the last five elections. Finally, in House District 23 a black candidate had been elected in each of the last six elections.

The District Court, drawing no distinctions among these districts for purposes of its findings, concluded that "[t]he overall results achieved to date at all levels of elective office are minimal in relation to the percentage of blacks in the total population." 590 F. Supp., at 367. The District Court clearly erred to the extent that it considered electoral success in the aggregate, rather than in each of the challenged districts, since, as the Court states, "[t]he inquiry into the existence of vote dilution . . . is district-specific." *Ante*, at 59, n. 28. The Court asserts that the District Court was free to regard the results of the 1982 elections with suspicion and to decide "on the basis of all the relevant circumstances to accord greater weight to blacks' relative lack of success over the course of several recent elections," *ante*, at 76, but the Court does not explain how this technique would apply in Senate District 22, where a black candidate was elected in three consecutive elections from 1974 to 1978, but no black candidate was elected in 1982, or in House District 39, where black candidates were elected in 1974 and 1976 as well as in 1982. Contrary to what the District Court thought, see 590 F. Supp., at 367, these pre-1982 successes, which were proportional or nearly proportional to black population in these three multimember districts, certainly lend *some* support for a finding that black voters in these districts enjoy an equal opportunity to participate in the political process and to elect representatives of their choice.

Despite this error, I agree with the Court's conclusion that, except in House District 23, minority electoral success was not sufficiently frequent to compel a finding of equal opportunity to participate and elect. The District Court found that "in each of the challenged districts racial polarization in voting presently exists to a substantial or severe degree, and . . . in each district it presently operates to minimize the voting strength of black voters." *Id.*, at 372. I cannot say that this finding was clearly erroneous with respect to House District 39 or Senate District 22, particularly when taken together with the District Court's findings concerning the other *Zimmer* factors, and hence that court's ultimate conclusion of vote dilution in these districts is adequately supported.

This finding, however, is clearly erroneous with respect to House District 23. Blacks constitute 36.3% of the population in that district and 28.6% of the registered voters. In each of the six elections since 1970 one of the three representatives from this district has been a black. There is no finding, or any reason even to suspect, that the successful black candidates in District 23 did not in fact represent the interests of black voters, and the District Court did not find that black success in previous elections was aberrant.

Zimmer's caveat against *necessarily* foreclosing a vote dilution claim on the basis of isolated black successes, 485 F. 2d, at 1307; see S. Rep., at 29, n. 115, cannot be pressed this far. Indeed, the 23 Court of Appeals decisions on which the Senate Report relied, and which are the best evidence of the scope of this caveat, contain no example of minority electoral success that even remotely approximates the consistent, decade-long pattern in District 23. See, *e. g.*, *Turner* v. *McKeithen*, 490 F. 2d 191 (CA5 1973) (no black candidates elected); *Wallace* v. *House*, 515 F. 2d 619 (CA5 1975) (one black candidate elected), vacated on other grounds, 425 U. S. 947 (1976).

I do not propose that consistent and virtually proportional minority electoral success should always, as a matter of law, bar finding a § 2 violation. But, as a general rule, such success is entitled to great weight in evaluating whether a challenged electoral mechanism has, on the totality of the circumstances, operated to deny black voters an equal opportunity to participate in the political process and to elect representatives of their choice. With respect to House District 23, the District Court's failure to accord black electoral success such weight was clearly erroneous, and the District Court identified no reason for not giving this degree of success preclusive effect. Accordingly, I agree with JUSTICE BRENNAN that appellees failed to establish a violation of § 2 in District 23.

V

When members of a racial minority challenge a multimember district on the grounds that it dilutes their voting strength, I agree with the Court that they must show that they possess such strength and that the multimember district impairs it. A court must therefore appraise the minority group's undiluted voting strength in order to assess the effects of the multimember district. I would reserve the question of the proper method or methods for making this assessment. But once such an assessment is made, in my view the evaluation of an alleged impairment of voting strength requires consideration of the minority group's access to the political processes generally, not solely consideration of the chances that its preferred candidates will actually be elected. Proof that white voters withhold their support from minority-preferred candidates to an extent that consistently ensures their defeat is entitled to significant weight in plaintiffs' favor. However, if plaintiffs direct their proof solely towards the minority group's prospects for electoral success, they must show that substantial minority success will be highly infrequent under the challenged plan in order to establish that the plan operates to "cancel out or minimize" their voting strength. *White*, 412 U. S., at 765.

Compromise is essential to much if not most major federal legislation, and confidence that the federal courts will enforce such compromises is indispensable to their creation. I believe that the Court today strikes a different balance than Congress intended to when it codified the results test and disclaimed any right to proportional representation under § 2. For that reason, I join the Court's judgment but not its opinion.

JUSTICE STEVENS, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in part and dissenting in part.

In my opinion, the findings of the District Court, which the Court fairly summarizes, *ante*, at 37–41, 52–54, and n. 23, 59–61, and nn. 28 and 29, adequately support the District Court's judgment concerning House District 23 as well as the balance of that judgment.

I, of course, agree that the election of one black candidate in each election since 1972 provides significant support for the State's position. The notion that this evidence creates some sort of a conclusive, legal presumption, *ante*, at 75–76, is not, however, supported by the language of the statute or by its legislative history.[1] I therefore cannot agree with the Court's view that the District Court committed error by failing to apply a rule of law that emerges today without statutory support. The evidence of candidate success in District 23 is merely one part of an extremely large record which the District Court carefully considered before making its ultimate findings of fact, all of which should be upheld under a normal application of the "clearly erroneous" standard that the Court traditionally applies.[2]

The Court identifies the reason why the success of one black candidate in the elections in 1978, 1980, and 1982 is not

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[1] See *ante*, at 75 ("Section 2(b) provides that '[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered.' 42 U. S. C. § 1973(b). . . . However, the Senate Report expressly states that 'the election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote,"' noting that if it did, 'the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a "safe" minority candidate.' . . . The Senate Committee decided, instead, to '"require an independent consideration of the record"'") (internal citations omitted).

[2] See *ante*, at 79 ("[T]he application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law").

inconsistent with the District Court's ultimate finding concerning House District 23.[3] The fact that one black candidate was also elected in the 1972, 1974, and 1976 elections, *ante*, at 82, Appendix B, is not sufficient, in my opinion, to overcome the additional findings that apply to House District 23, as well as to other districts in the State for each of those years. The Court accurately summarizes those findings:

> "The District Court in this case carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice. It found that the success a few black candidates have enjoyed in these districts is too recent, too limited, and, with regard to the 1982 elections, perhaps too aberrational, to disprove its conclusion." *Ante*, at 80.

To paraphrase the Court's conclusion about the other districts, *ibid.*, I cannot say that the District Court, composed of local judges who are well acquainted with the political realities of the State, clearly erred in concluding that use of a multimember electoral structure has caused black voters in House District 23 to have less opportunity than white voters to elect representatives of their choice.[4] Accordingly, I con-

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[3] See *ante*, at 52–54, and n. 23, 60, n. 29, 75–76.

[4] Even under the Court's analysis, the decision simply to reverse—without a remand—is mystifying. It is also extremely unfair. First, the Court does not give appellees an opportunity to address the new legal standard that the Court finds decisive. Second, the Court does not even bother to explain the contours of that standard, and why it was not satisfied in this case. Cf. *ante*, at 77, n. 38 ("We have no occasion in this case

cur in the Court's opinion except Part IV–B and except insofar as it explains why it reverses the judgment respecting House District 23.

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to decide what types of special circumstances could satisfactorily demonstrate that sustained success does not accurately reflect the minority's ability to elect its preferred representatives"). Finally, though couched as a conclusion about a "matter of law," *ante*, at 77, the Court's abrupt entry of judgment for appellants on District 23 reflects an unwillingness to give the District Court the respect it is due, particularly when, as in this case, the District Court has a demonstrated knowledge and expertise of the entire context that Congress directed it to consider.

Santa Monica Election Litigation

Pico Neighborhood Association and Maria Loya v. City of Santa Monica in the matter of California Voting Rights. Case Number BC616804

Frequently Asked Questions

April 12, 2016

Complaint – Plaintiffs file their original complaint challenging the City's at-large election system.

February 23, 2017

First Amended Complaint – Plaintiffs' file their first amended complaint.

March 30, 2017

Demurrer to First Amended Complaint – City argues that the First Amended Complaint fails to state facts sufficient to constitute a cause of action under either the California Voting Rights Act (CVRA) or the Equal Protection Clause of the California Constitution.

Supporting Documents filed by the City:

Declaration of George Brown

Defendant's Request for Judicial Notice - Declaration of Daniel Adler – Attaches supporting exhibits cited in the demurrer.

May 9, 2017

Opposition to Demurrer – Plaintiffs oppose the City's demurrer.

Supporting Documents filed by Plaintiffs:

Objection to Request for Judicial Notice

Plaintiffs' Request for Judicial Notice – Attaches supporting exhibits cited in opposition.

May 22, 2017

City's Reply in Support of Demurrer – City filing responding to Plaintiffs' opposition.

Supporting Documents filed by City:

Supplemental Request for Judicial Notice in Support of Demurrer

June 7, 2017

Order Overruling City's Demurrer to the First Amended Complaint – Court denies demurrer and orders City to file answer to FAC.

June 27, 2017

City's Answer to the First Amended Complaint – City files its response to the allegations in the FAC and asserts affirmative defenses.

March 29, 2018

City's Motion for Summary Judgment – City contends that judgment should be issued in its favor because there are no triable issues of material fact on either Plaintiffs' CVRA claim or their Equal Protection claim.

Supporting Documents filed by City:

City's Separate Statement of Undisputed Material Facts

City's Request for Judicial Notice - Declaration of Daniel Adler – Attaches supporting exhibits for summary judgment motion.

Exhibit AA: Peter Morrison Declaration

Exhibit A: Elected Representative Roster

Exhibit B: Election Results

Exhibit C: Order Overruling City's Demurrer

Exhibit D: Order on Legal Issue Regarding Cumulative Voting in Soliz Case

Exhibit E: Demand Letter from Plaintiff

Exhibit F: Census Data

Exhibit G: 1948 and 1941 City Charters

Exhibit H: Exhibit 2 from Kevin Shenkman Declaration

May 31, 2018

Plaintiff's Opposition to Defendant's Motion for Summary Judgment – Plaintiffs oppose City's motion for summary judgment, and contend that service of the motion on Plaintiffs was untimely.

Supporting Documents filed by Plaintiffs:

Plaintiff's Separate Statement in Opposition – Plaintiffs contest that facts cited by City are undisputed and assert additional facts they contend are undisputed.

Declaration of David Ely

Declaration of J. Morgan Kousser

Declaration of Justin Levitt

Declaration of Sergio Farias

Declaration of Kevin Shenkman

Proof of Service

June 7, 2018

City's Reply in Support of its Summary Judgment Motion – City responds to Plaintiffs' opposition

Supporting Documents filed by the City:

City's Objections to Plaintiffs' Evidence – City states objections to certain evidence submitted by Plaintiffs

City's Reply in Support of Separate Statement – City responds to Plaintiffs' contentions regarding disputed and undisputed facts

Declaration of Daniel Adler

June 14, 2018

City's Motion for Order Rejecting Plaintiffs' Untimely Service Argument – City argues that Plaintiffs's untimely service argument should be rejected because they cannot show any prejudice from late service.

Supporting Documents filed by City:

Declaration of Daniel Adler

June 18, 2018

Plaintiffs' Opposition to City's Motion for Order Rejecting Plaintiffs' Untimely Service Argument – Plaintiffs respond to City's arguments regarding untimely service

Supporting Documents filed by Plaintiffs:

Declaration of Kevin Shenkman

June 19, 2018

Orders Denying City's Motion – Court issues two orders. One denies the City's motion for an order rejecting Plaintiffs' untimely service argument. The second denies the City's motion for summary judgment based on untimely service.

July 2, 2018

City's Writ Petition – In the Court of Appeal, City challenges the trial court's orders denying its summary judgment motion.

July 9, 2018

Letter Response to Writ Petition – Plaintiffs respond to the City's petition requesting that the Court of Appeal overturn the trial court's orders denying the City's summary judgment motion.

July 11, 2018

Reply in Support of Writ Petition – The City replies to Plaintiffs' response, further explaining why the Court of Appeal should overturn the trial court's orders denying the City's summary judgment motion.

July 12, 2018

Order Denying Writ Petition – Court of Appeal denies City's petition for a writ overturning the trial court's orders denying the City's summary judgment motion.

July 30, 2018

City's Trial Brief – Brief filed by City discussing legal and factual issues anticipated to arise at trial.

August 1, 2018

City's Opening Statement – City's Opening Statement Presentation presented at trial.

September 11, 2018

Tentative Ruling on City's Sanctions Motion – Court issues tentative order requiring plaintiffs and their counsel to pay monetary sanctions in the amount of $21,612.50 based on misuse of discovery process. (Order made final on November 8, 2018 – see entry below.)

September 25, 2018

Plaintiffs' Closing Brief– Plaintiffs' closing brief presented at the conclusion of trial.

October 15, 2018

City's Closing Brief – City's closing brief presented at the conclusion of trial.

October 25, 2018

Plaintiffs' Rebuttal Closing – Plaintiffs' rebuttal closing brief presented at the conclusion of trial.

November 8, 2018

Court's Tentative Ruling – Tentative ruling by the court.

Minute Order re Sanctions – Court issues final order requiring plaintiffs and their counsel to pay monetary sanctions in the amount of $21,612.50 based on misuse of discovery process.

November 15, 2018

Request for Statement of Decision – Filing by the City requesting that the Court provide an explanation of the legal and factual bases for its tentative decision.

November 19, 2018

Plaintiffs' Remedies Brief – Plaintiffs' arguments regarding the remedies they seek to have the court impose.

Supporting Documents filed by Plaintiffs

Declaration of Justin Levitt

Declaration of Kevin Shenkman

Plaintiffs' Proposed Seven-District Map – The district map proposed by plaintiffs, which was prepared by plaintiffs' expert and offered by plaintiffs as an exhibit at trial.

November 26, 2018

Response to Request for Statement of Decision – Plaintiffs' response to the City's request that the Court provide an explanation of the legal and factual bases for its tentative decision.

November 30, 2018

City's Answering Brief Regarding Remedies - City's arguments regarding remedies.

November 28, 2018

Order re Statement of Decision – Order directing Plaintiffs to file and serve a proposed statement of decision on or before January 2, 2019.

December 4, 2018

Plaintiffs' Reply Brief Regarding Remedies – Plaintiffs' response to City's arguments regarding remedies.

December 14, 2018

Court's First Amended Tentative Decision – Amended tentative ruling by the court.

December 21, 2018

Request for Statement of Decision re: First Amended Tentative Decision – Filing by the City requesting that the Court provide an explanation of the legal and factual bases for its first amended tentative decision.

December 31, 2018

Ex Parte Application for Clarification – Filing by plaintiffs seeking clarification from court regarding its amended tentative ruling re remedies.

January 2, 2019

Response to Ex Parte Application – Filing by City responding to plaintiffs' request for clarification.

January 3, 2019

Plaintiffs' Proposed Statement of Decision – Plaintiffs' proposed explanation of the factual and legal bases for the court's tentative decision.

Plaintiffs' Proposed Judgment – Plaintiffs' proposal for the judgment to be issued by the court.

January 18, 2019

City's Objections to Proposed Statement of Decision — City' filing of its factual and legal objections to the statement of decision proposed by plaintiffs.
City' Objections to Proposed Judgment — City's filing of its factual and legal objections to the order of judgment proposed by plaintiffs.
City's Request for Judicial Notice – City's request for the Court to take notice of Santa Monica's 2018 election results.

January 25, 2019

Plaintiffs file four documents in response to the City's Objections to their proposed statement of decision and judgment:

Plaintiffs' Response to Objections to Proposed Statement of Decision

Plaintiffs' Response to Objections to Proposed Judgment

Plaintiffs' Corrected Proposed Judgment

Plaintiffs' Objections to Request for Judicial Notice

February 15, 2019

Order re Objections to Plaintiffs' Proposed Judgment – Court denies City's objections to Plaintiffs' proposed judgment.

Order re Objections to Plaintiffs' Proposed Statement of Decision – Court denies the majority of the City's objections to Plaintiffs' proposed statement of decision.

Statement of Decision – With minor changes, Court adopts Plaintiffs' proposed statement of decision.

Judgment – Court adopts Plaintiffs' corrected proposed judgment.

February 22, 2019

City's Notice of Appeal

February 28, 2019

City's Ex Parte Application (a) to confirm that paragraph 9 of the February 13, 2019, judgment is a mandatory injunction and thus stayed pending appeal, or (b) in the alternative, to stay pending appeal the enforcement of paragraph 9.

Declaration of Denise Anderson-Warren

Declaration of Dr. Jeffrey B. Lewis

March 6, 2019

Order Denying City's Ex Parte Application to Confirm

March 8, 2019

City's Petition for Writ of Supersedeas Seeking Immediate Stay

March 18, 2019

Stay Order – Order from Court of Appeal temporarily staying paragraph 9 of the February 13, 2019 judgment.

March 21, 2019

Respondents' Opposition to Petition for Writ of Supersedeas – Plaintiffs' opposition to the City's petition for a stay pending appeal.

Motion to Strike – Plaintiffs' motion to strike portions of the City's petition referencing the Declaration of Jeffrey Lewis.

March 23, 2019

City's Reply in Support of Petition for Writ of Supersedeas Seeking Immediate Stay

City's Opposition to Motion to Strike

March 27, 2019

Order Granting City's Writ Petition – Court of Appeal order granting City's writ petition and staying judgment pending appeal.

March 28, 2019

Plaintiffs' Memorandum of Costs – Filing by plaintiffs setting out costs (other than attorneys' fees) they seek to recover from the City.

April 12, 2019

City's Motion to Strike or, in the Alternative, Tax Costs – Filing by City seeking to strike memorandum of costs due to late filing or, in the alternative, reduce allowable costs to exclude costs for which recovery is precluded by statute and unreasonable or unnecessary costs.

Supporting Declaration of Kahn Scolnick

April 29, 2019

City's Motion for Calendar Preference – Filing by City seeking expedited briefing and argument to facilitate a November 2020 Council election.

Supporting Declaration of Kahn Scolnick

May 2, 2019

Plaintiffs' Response to Motion for Calendar Preference

Supporting Declaration of Kevin Shenkman

May 3, 2019

City's Reply in Support of Motion for Calendar Preference

Supporting Declaration of Kahn Scolnick

May 6, 2019

Order granting City's Motion for Calendar Preference

June 3, 2019

Notice of Motion and Motion for an Award of Attorneys' Fees and Expenses

Proposed Order

Supporting Declaration of Milton Grimes

Supporting Declaration of Rex Parris

Supporting Declaration of Robert Rubin

Supporting Declaration of Kevin Shenkman

Supporting Declaration of Hon. Margaret M. Grignon (ret.)

Supporting Declaration of Barrett S. Litt

June 12, 2019

Plaintiff's Opposition to City's Motion to Tax Costs

Supporting Declaration of Milton Grimes

Supporting Declaration of Mary Ruth Hughes

Supporting Declaration of Rex Parris

Supporting Declaration of Robert Rubin

Supporting Declaration of Kevin Shenkman

June 18, 2019

City's Reply in Support of Motion to Strike Or, in the Alternative, to Tax Costs

Supporting Declaration of Kahn Scolnick

October 18, 2019

City's Opening Brief in the Court of Appeal

December 27, 2019

Plaintiffs' Answering Brief in the Court of Appeal

January 21, 2020

City's Reply Brief in the Court of Appeal

February 4, 2020

Amicus Brief – filed by California League of Cities and California Special Districts Association in support of City

Amicus Brief – filed by Santa Monica Transparency Project in support of City's position on remedies

Amicus Brief – filed by former State Senator Richard Polanco, three Palmdale council members, and one San Juan Capistrano council member in support of Plaintiffs

Amicus Brief – filed by FairVote, a non-profit headquartered in Maryland, in support of Plaintiffs

February 10, 2020

City's Response to Amicus Briefs – Response to amicus briefs filed by Fair Vote and current and former public officials

Plaintiffs' Response to Amicus Briefs – Response to amicus briefs filed by California League of Cities and Santa Monica Transparency Project

May 12, 2020

City's Letter re Oral Argument – Letter requesting that oral argument be scheduled to permit decision by July 10, 2020

June 9, 2020

Notice – Notice from court setting oral argument for June 30, 2020 at 1:00 pm (to be conducted remotely via teleconference)

City's Request for Oral Argument – Requesting 30 minutes of oral argument

June 15, 2020

Plaintiffs' Request for Oral Argument – Requesting 30 minutes of oral argument

July 9, 2020

Court of Appeal Opinion – The Court of Appeal issued its opinion ruling in favor of the City on both claims raised by Plaintiffs, reversing the trial court's judgment, and ordering the trial court to enter judgment in the City's favor.

July 24, 2020

Petition for Rehearing – Plaintiffs filed a petition requesting rehearing by the Court of Appeal.

August 5, 2020

Order Denying Petition for Rehearing.

August 18, 2020

Petition for Review – Plaintiffs filed a petition requesting review by the California Supreme Court.

August 31, 2020

Amicus Curiae Letter – Letter from the Dolores Huerta Foundation in support of Plaintiffs' petition for review.

Amicus Curiae Letter – Letter from Coalition of 2000-2001 California Legislators in support of Plaintiffs' petition for review.

September 4, 2020

Response to Petition for Review – City's response to Plaintiffs' request for review by the California Supreme Court.

September 8, 2020

Amicus Curiae Letter – Letter from California Secretary of State in support of Plaintiffs' petition for review.

September 10, 2020

Amicus Curiae Letter – Letter from FairVote in support of Plaintiffs' petition for review.

September 11, 2020

Amicus Curiae Letter – Letter from three California legislative caucuses (Latino Legislative Caucus, Legislative Black Caucus, and Asian Pacific Islander Legislative Caucus) in support of Plaintiffs' petition for review.

Amicus Curiae Letter – Letter from Asian Americans Advancing Justice—Asian Law Caucus, Asian Americans Advancing Justice—Los Angeles, the Asian Law Alliance, the Asian Pacific Environmental Network, and Khmer Girls in Action in support of Plaintiffs' petition for review.

Amicus Curiae Letter – Letter from the Southern Christian Leadership Conference of Southern California in support of Plaintiffs' petition for review.

Amicus Curiae Letter – Letter from the League of United Latin American Citizens and the Southwest Voter Registration Education Project in support of Plaintiffs' petition for review.

September 14, 2020

Reply in Support of Petition for Review – Plaintiffs' reply in support of their request for review by the California Supreme Court.

Amicus Curiae Letter – Letter from Lawyers' Committee for Civil Rights of the San Francisco Bay Area in support of Plaintiffs' Petition for Review.

September 15, 2020

Amicus Curiae Letter – Letter from California Latino School Boards Association and California Association of Black School educators in support of Plaintiffs' petition for review.

September 18, 2020

Amicus Curiae Letter – Letter from the Mexican American Legal Defense and Educational Fund and the NALEO Educational Fund in support of Plaintiffs' petition for review.

September 22, 2020

Amicus Curiae Letter – Letter from the California League of Cities and the California Special Districts Association in support of the City's response to Plaintiffs' petition for review.

October 21, 2020

Amicus Curiae Letter – Letter from the Latino Caucus of California Counties in support of Plaintiffs' petition for review.

Petition for Review Granted – The California Supreme Court granted the petition for review and ordered the parties to brief the following issue: "What must a plaintiff prove in order to establish vote dilution under the California Voting Rights Act?" The Supreme Court also ordered the Court of Appeal's opinion depublished.

December 21, 2020

Petitioners' Opening Brief – Plaintiffs' opening brief in the California Supreme Court.

March 22, 2021

City's Answering Brief – City's answering brief in the California Supreme Court.

City's Motion for Judicial Notice – City's motion requesting that the Supreme Court take judicial notice of the 2020 City Council election results, certain candidate statements from that election, and the transcript of the oral argument in the Court of Appeal.

April 6, 2021

Petitioners' Opposition to City's Motion for Judicial Notice

May 12, 2021

Petitioners' Reply Brief – Plaintiffs' reply brief in the California Supreme Court.

Petitioners' Motion for Judicial Notice – Plaintiffs' motion requesting that the Supreme Court take judicial notice of the legislative history of the CVRA.

April 12, 2021

City's Reply in Support of City's Motion for Judicial Notice

May 26, 2021

City's Response to Petitioner's Motion for Judicial Notice

May 27, 2021

Amicus Curiae Brief – Brief from FairVote in support of Plaintiffs

Amicus Curiae Brief – Brief from John K. Haggerty, Pro Per, in support of City

June 3, 2021

Plaintiffs' Reply in Support of Plaintiffs' Motion for Judicial Notice

June 7, 2021

Amicus Curiae Brief – Brief from League of Women Voters of Santa Monica, the Alliance of Santa Monica Latino and Black Voters, the Human Relations Council Santa Monica Bay Area, and the Community for Excellent Public Schools in support of City

Amicus Curiae Request for Judicial Notice – Request for judicial notice of City of Irvine correspondence

June 10, 2021

Amicus Curiae Brief -- Brief from Bruce A. Wessel in support of neither party

Amicus Curiae Brief -- Brief from Amici Scholars in support of Plaintiffs

June 11, 2021

Amicus Curiae Brief – Brief from Asian Americans Advancing Justice – Asian Law Caucus, Asian Americans Advancing Justice – Los Angeles, and Asian Law Alliance in support of Plaintiffs

Amicus Curiae Brief – Brief from Oscar de la Torre in support of Plaintiffs

Amicus Curiae Brief – Brief of League of California Cities and California Special Districts Association in support of City

Amicus Curiae Brief – Brief of UCLA Voting Rights Project in support of Plaintiffs

June 16, 2021

Plaintiffs' Response to Amicus Curiae Brief – Plaintiffs' response to the amicus curiae brief frilled by John K. Haggerty

June 18, 2021

Opposition to Motion for Judicial Notice – Plainitiffs' opposition to the motion for judicial notice filed by amicus curiae League of Women Voters of Santa Monica, et al.

June 24, 2021

Reply in Support of Motion for Judicial Notice – Amicus Curiae League of Women Voters of Santa Monica, et al., reply in support of motion for judicial notice

July 8, 2021

Motion to Strike Amicus Curiae Brief – Plaintiffs' motion to strike the amicus curiae brief of League of Women Voters of Santa Monica, et al.

July 12, 2021

Amicus Curiae Brief – Brief of California Attorney General Rob Bonta in support of neither party.

July 19, 2021

Opposition to Motion to Strike – League of Women Voters of Santa Monica, et al., opposition to Plaintiffs' motion to strike their amicus curiae brief

August 11, 2021

Response to Amicus Curiae Briefs – City's Consolidated Answer to Amicus Briefs

Response to Amicus Curiae Brief – Plaintiffs' Response to Amicus Brief of California Attorney General

Response to Amicus Curiae Brief – Plaintiffs' Response to Amicus Brief of League of California Cities, et al.

Response to Amicus Curiae Brief – Plaintiffs' Response to Amicus Brief of League of Women Voters, et al.

Response to Amicus Curiae Brief – Plaintiffs' Response to Amicus Brief of Bruce Wessel

April 13, 2022

Amicus Curiae Brief with Application to File Late Brief – Brief of Steven Bosworth and L. Stevan Leonard

May 13, 2022

Response to Amicus Curiae Brief – Plaintiffs' Response to Amicus Brief of Steven Bosworth and L. Stevan Leonard

November 16, 2022

Amicus curiae brief – Brief filed by Stephen Bosworth and L. Stevan Leonard

December 21, 2022

Request for Judicial Notice – RJN filed by Amici League of Women Voters of Santa Monica, Alliance of Santa Monica Latino and Black Voters, Human Relations Council Santa Monica Bay Area, and Community for Excellent Public Schools

January 5, 2023

Opposition to Request for Judicial Notice – Brief filed by Plaintiff and Respondent Pico Neighborhood Association

September 20, 2023

Opinion of the California Supreme Court

December 6, 2023

Supplemental Opening Brief after Remand – Brief filed by Appellant and Defendant City of Santa Monica

December 6, 2023

Supplemental Opening Brief after Remand – Brief filed by Plaintiff and Respondent Pico Neighborhood Association

June 25, 2024

Motion to Re-Issue Judgment- Motion filed by Pico Neighborhood Association

Supporting Declaration - Declaration of Kevin Shenkman in support of to Motion to Re-Issue filed by Pico Neighborhood Association

June 26, 2024

Ex Parte Application - Application to Advance Hearing on Motion to Re-Issue filed by Plaintiff Pico Neighborhood Association

Supporting Declaration - Declaration of Kevin Shenkman in support of Application to Advance Hearing on Motion to Re-Issue filed by Pico Neighborhood Association

June 26, 2024

Opposition- Opposition to Ex Parte Applicaiton to Advance Hearing filed by City of Santa Monica

Supporting Declaration - Declaration of Kahn A. Scolnick in Opposition to Ex Parte filed by City of Santa Monica

Motion Re Further Proceedings on Remand - Brief filed by City of Santa Monica

Supporting Declaration - Declaration of Kahn A. Scolnick in support of Motion re Further Proceedings filed by City of Santa Monica

Part 1, Part 2, Part 3, Part 4, Part 5, Part 6, Part 7, Part 8, Part 9, Part 10

June 27, 2024

Minute Order - Filed by Court

July 10, 2024

Motion- Motion to Reissue Judgment filed by Pico Neighborhood Association

August 1, 2024

Reply- Reply in support of Motion to Reissue Judgment filed by Pico Neighborhood Association

Declaration- Supplemental Declaration of Kevin Shenkman in support of Motion to Reissue Judgment filed by Pico Neighborhood Association

City of Santa Monica

Sheri Damon - Formal Request for the Creation of Districts for the City of Seaside

From: Central Coast DSA <centralcoastdsa@gmail.com>
To: <ioglesby@ci.seaside.ca.us>, <dpacheco@ci.seaside.ca.us>, <agarcia@ci.se...
Date: 10/14/2024 2:17 PM
Subject: Formal Request for the Creation of Districts for the City of Seaside

10/14/2024

Seaside City Council, City Manager, & City Attorney
City Hall
440 Harcourt Avenue
Seaside, CA 93955

Dear Mayor Oglesby, Members of the Seaside City Council, City Manager and City Attorney;

I am writing on behalf of concerned citizens of Seaside to formally request the creation of neighborhood-based districts for the representation of our city’s approximately 36,000 residents. This request is made with the understanding that the City of Seaside has a legal obligation to ensure equitable representation for all its citizens, especially in light of the California Voting Rights Act (CVRA) and relevant case law, which emphasize the importance of district-based elections to prevent disenfranchisement and ensure compliance with state laws.

The City must undertake a redistricting process to ensure that residents in different parts of Seaside receive fair and proportional representation in city governance. The current at-large election system may no longer reflect the diversity of our population, and the creation of districts is a crucial step toward ensuring that all communities, particularly those historically underrepresented, have an equal voice in city affairs.

Under the CVRA and California Elections Code, public agencies are legally required to avoid practices that dilute the voting power of minority communities. Creating districts, particularly for a city the size of Seaside, would ensure compliance with these laws by preventing potential violations of voters’ rights. Upon receipt of this formal letter, I respectfully urge the City of Seaside to begin the process of creating neighborhood districts without delay, as failure to do so could expose the city to legal challenges for violating residents’ rights to equal representation.

The City of Seaside is further obligated, upon receipt of this letter, to take immediate steps to assess the feasibility and necessity of this district creation through the initiation of a comprehensive redistricting process. I request that the City Council consider retaining expert demographers, legal counsel, and community representatives to begin the process of drafting district boundaries that reflect our city’s diverse population.

Supporting Framework from the MPUSD Redistricting Process provides a successful model, I encourage the City to review the redistricting process recently completed by the Monterey Peninsula Unified School District (MPUSD). MPUSD employed a data-driven approach that included demographic analysis, population distribution studies, and input from community stakeholders to create fair and representative boundaries for its district. The City of Seaside should similarly adopt the methodologies used by MPUSD, as this would provide a transparent and equitable framework for redistricting.

The community stands ready to assist the City by utilizing the MPUSD reports and findings, which are publicly available, as a foundation for city-wide districting. These documents provide key insights into how local demographics have shifted and how redistricting could benefit various neighborhoods. We believe this data will offer valuable support for drawing fair and representative boundaries in Seaside, ensuring that each district reflects the unique needs of its residents.

I hereby request that the City Council direct staff to begin the redistricting process, including public consultations, demographic studies, and the hiring or creation of an independent commission to review and draw potential district maps. I further request that a timeline for this process be established to ensure swift compliance with legal obligations. We are prepared to work with the City and offer any support necessary to expedite this process.

Failure to act in a timely manner on this request could not only perpetuate an outdated and potentially unlawful system but may also result in costly litigation for the City, as has been the case in other California municipalities that have delayed or ignored their legal obligations under the CVRA.

We look forward to the City's immediate response to this request and stand ready to work collaboratively to ensure that every resident of Seaside has fair representation in our local government.

Thank you for your attention to this critical matter. Please do not hesitate to contact me if additional information is needed, or to schedule a meeting to discuss this further.

Sincerely,

In Solidarity;
Karla Lobo
Co-Chair
Central Coast Democratic Socialist of America
P: 831.760.8026
M: 831.224.8005

Follow us on Instagram for breaking news & information @centralcoastdsa

NDC
National Demographics Corporation

November 14, 2024

Sheri Damon, City Attorney
City of Seaside
440 Harcourt Avenue
Seaside, CA 93955

Dear Ms. Damon,

NDC has worked on over 600 liability analysis and districting projects related to the California Voting Rights Act, and it has been our pleasure to work with Seaside to review the City's situation. Following the release of the 2020 Census data, NDC reviewed the City's demographic profile and election history. NDC's review included a look at election results back to 2006. Between 2006 and 2024, Latino candidates appeared on Council election ballots (or ran uncontested) seven times. All seven times the Latino candidate was elected. For Mayor, a Latino candidate appeared on the ballot six times in that time period, winning five of those six times.[1]

African-American candidates have a similarly long history of electoral success in Seaside, winning five of the seven times African-Americans ran for Council between 2006 and 2024, and winning the Mayoral election in 2018, 2020, 2022 and 2024. While NDC has not conducted the expensive and imprecise analysis of whether the data indicate whether Latino voters support those successful Latino candidates, or of whether African-American voters supported those successful African-American candidates, we are aware of no indications to the contrary. In short, a simple review of the City's electoral history indicates the City's at-large election system is not in violation of the Act's provisions. In fact, as detailed below, a shift to by-district elections is likely to impair, rather than enhance, the ability of Latino, African-American and Asian-American / Pacific Islander voters to elect their preferred candidates or otherwise influence the outcome of elections.

The 2020 Census and the most recent American Community Survey data at the time of our review indicated that Latinos are 43% of Seaside's total population and 28% of Seaside's Citizen Voting Age Population (often referred to as the 'eligible voter' population). At 75% of the City Council, (3 of 4) Latinos' share of the Council significantly exceeds the Latino share of eligible voters. African-Americans are similarly well-represented, with the Mayor representing 20 percent of the votes at City Council while African-Americans are only 11 percent of eligible voters.

No Asian-American is on the Council or Mayor, though Asian-Americans are 11 percent of the City's total population and 16 percent of eligible voters. But we have seen or read no indications of racially polarized voting against candidates preferred by Asian-American voters. Given the population patterns in the City, a move to by-district elections would likely impair, rather than enhance, Asian-American voting strength. Our review found that in a by-district system Asian-Americans would be, at most, 20 percent of eligible voters in a district. While 20 percent is a slight increase over their 16 percent citywide, those Asian-American voters would still be outnumbered four to one in a district that elects only one Councilmember. Outnumbered four-to-one in a single Councilmember election would be a significant reduction in Asian-Americans' ability to influence elections compared to representing 16 percent of the eligible voters in election contests for all four Councilmembers. Being concentrated in one district, with only one seat available, also removes the opportunity for an Asian-American to build a coalition of candidates and their supporters running together for multiple seats.

A move to a by-district election system would similarly reduce Latino voters' ability to elect their preferred candidates, because of the resulting concentration of many Latino voters in a single district.

[1] I am unaware of 2024 unsuccessful Mayoral candidate Karla Lobo's race/ethnicity, so she is not included in these counts.

Given the diverse demographics of the City, Latinos would likely not be a majority of eligible voters in any one district. But the concentration of Latino voters would reduce, or possibly even eliminate, Latino voters' current ability to electing multiple Latinos to the Council via the at-large election system.

Sincerely,

Douglas Johnson, President

OFFICE OF THE CITY ATTORNEY

440 Harcourt Avenue
Seaside, CA 93955
www.ci.seaside.ca.us

Telephone 831-899-6890
Facsimile 831-718-8602

November 15, 2024

Via Email: Central Coast DSA <centralcoastdsa@gmail.com>
Ms. Karla Lobo, Co-Chair
Mr. Henry Laney, Communication Chair
Central Coast Democratic Socialists of America

RE: Email of October 14, 2024

Dear Ms. Lobo and Mr. Laney,

Thank you for your email dated October 14, 2024. It appears from this email you are attempting to request the City to district in accordance with the California Voting Rights Act of 2001 (CVRA). While the City Clerk acknowledge the receipt of the email, the request is not in compliance with the Election Code that requires such requests to be transmitted via certified mail. (Cal. Elections 10010(e)(1)).

Additionally, the City Council after the 2020 census results authorized the commission of an evaluation of the City's election practices and potential districting based upon the 2020 Census results. Enclosed please find the executive summary of that report that indicates there have been no violations of the California Voting Rights Act of 2001 and that districting based upon those results could be detrimental to minority representation.

We provide this information, so your organization may be informed about the status and compliance of the City of Seaside with the CVRA. There will be a public presentation to the City Council on November 21, 2024 regarding the potential impacts of by-district voting in the City of Seaside. Please ensure that any future requests your organization might make for districting are in compliance with the CVRA.

Sincerely,

Sheri L. Damon
City Attorney

Enc.

Cc: City Clerk

Assembly Bill No. 764

Passed the Assembly September 13, 2023

Chief Clerk of the Assembly

Passed the Senate September 12, 2023

Secretary of the Senate

This bill was received by the Governor this _____ day of _______________, 2023, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER ________

An act to amend Section 35 of the Code of Civil Procedure, to amend Sections 1002, 5019, 5019.5, 5020, 5021, 5023, 5027, and 5028 of, to repeal Section 5019.7 of, and to repeal and add Section 1005 of, the Education Code, to amend Sections 21500, 21500.1, 21503, 21506, 21534, 21544, 21552, 21564, 21574, 21600, 21601, 21603, 21605, 21606, 21620, 21621, 21623, 21625, 21626, 21630, 22000, 23002, and 23003 of, to add Chapter 2 (commencing with Section 21100) to Division 21 of, to repeal Sections 21501, 21507, 21507.1, 21508, 21509, 21602, 21607, 21607.1, 21608, 21609, 21622, 21627, 21627.1, 21628, 21629, and 22002 of, and to repeal and add Section 22001 of, the Elections Code, and to amend Sections 34874, 34877.5, 34884, 34886, and 57301 of the Government Code, relating to elections.

LEGISLATIVE COUNSEL'S DIGEST

AB 764, Bryan. Local redistricting.

Existing law requires counties, general law and charter cities, and special districts that elect their governing boards using district-based elections to adopt, in a prescribed manner, new district boundaries following each federal decennial census. Existing law also requires county boards of education, and the governing boards of school districts and community college districts in which trustee areas have been established, to adopt new boundaries for their trustee areas following each federal decennial census.

This bill would revise and recast these provisions. The bill would require counties, county boards of education, cities, school districts, community college districts, and special districts, if the governing body of these local jurisdictions is elected by districts, to comply with uniform requirements related to redistricting. The bill would require local jurisdictions to adopt district boundaries, using specified criteria, following the decision to establish district-based elections and following each federal decennial census.

This bill would define the term "districting body," as specified, and clarify requirements applicable to advisory or hybrid redistricting commissions. This bill would require an advisory or hybrid redistricting commission to comply with specified requirements when recommending changes to the legislative body's district boundaries.

The bill would require a local jurisdiction, before adopting new district boundaries, to hold at least one public workshop and at least 5 public hearings, except as specified. This bill would require all public hearings held by an advisory or hybrid redistricting commission to comply with the same requirements applicable to hearings held by the districting body. This bill would impose requirements relating to workshops and public hearings upon local jurisdictions, districting bodies, and advisory and hybrid redistricting commissions, as specified. The bill would require the local jurisdiction to adopt a redistricting public education and outreach plan before holding a hearing or workshop, as specified. If a local jurisdiction establishes a hybrid redistricting commission to recommend changes to the legislative body's district boundaries, this bill would require the local jurisdiction, not the hybrid redistricting commission, to adopt the public education and outreach plan, as specified. The bill would also require the local jurisdiction to establish and maintain an accessible internet web page dedicated to redistricting to provide specified information to the public. The bill would require a local jurisdiction to make available on its redistricting web page, within specified time frames, both of the following: (1) recordings or written summaries of oral public comments made at workshops or public hearings, and (2) written comments and draft maps. The bill would require the Secretary of State to develop templates for such web pages and to provide a redistricting training for local jurisdictions. This bill would also require the Secretary of State to make available to the public a free electronic mapping tool, as specified.

For redistricting occurring in 2031 and thereafter, the bill would require district boundaries to be adopted no later than 204 days before the local jurisdiction's next regular election occurring after January 1 in each year ending in the number 2. If the responsible body misses that deadline, the bill would require the body to immediately petition a superior court in a county in which the local jurisdiction is located for an order adopting election district boundaries, and if the body does not petition a superior court, a resident of the local jurisdiction would be permitted to file that petition. If the court grants a petition, the bill would permit the court to appoint a special master to assist with adopting district boundaries.

Under existing law, county boards of supervisors and city councils that have adopted district-based elections are prohibited from adopting new district boundaries until after the next federal decennial census, except under certain circumstances.

This bill would authorize the adoption of new district boundaries before the next federal decennial census if the number of supervisors or city council members elected by districts changes or if an independent redistricting commission is established to adopt new districts before the next census.

The bill would provide that a member of the governing body of a local jurisdiction continues to represent the constituents residing in the district boundaries from which the member was elected for the duration of that term of office. The bill would specify that a local jurisdiction may assign a public official, as specified, to provide constituent services to residents of an area that is temporarily not represented by a member of the governing body of the local jurisdiction due to redistricting.

This bill would incorporate additional changes to Section 23003 of the Elections Code proposed by Assembly Bill 1248 to be operative only if this bill and Assembly Bill 1248 are enacted and this bill is enacted last.

By increasing the duties of local officials with respect to redistricting, the bill would create a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

The people of the State of California do enact as follows:

SECTION 1. Section 35 of the Code of Civil Procedure, as amended by Section 1 of Chapter 745 of the Statutes of 2022, is amended to read:

35. (a) Proceedings in cases involving the registration or denial of registration of voters, the certification or denial of certification of candidates, the certification or denial of certification of ballot measures, election contests, actions under Section 20010 of the Elections Code, and actions under Chapter 2 (commencing with Section 21100) of Division 21 of the Elections Code shall be placed on the calendar in the order of their date of filing and shall be given precedence.

(b) This section shall remain in effect only until January 1, 2027, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2027, deletes or extends that date.

SEC. 2. Section 35 of the Code of Civil Procedure, as amended by Section 2 of Chapter 745 of the Statutes of 2022, is amended to read:

35. (a) Proceedings in cases involving the registration or denial of registration of voters, the certification or denial of certification of candidates, the certification or denial of certification of ballot measures, election contests, and actions under Chapter 2 (commencing with Section 21100) of Division 21 of the Elections Code shall be placed on the calendar in the order of their date of filing and shall be given precedence.

(b) This section shall become operative January 1, 2027.

SEC. 3. Section 1002 of the Education Code is amended to read:

1002. (a) Upon being so requested by the county board of education, the county committee on school district organization, by a two-thirds vote of the members, may either change the boundaries of any or all of the trustee areas of the county pursuant to Chapter 2 (commencing with Section 21100) of Division 21 of the Elections Code, or propose to increase or decrease the number of members of the county board of education, or both.

(b) Following each decennial federal census, the county committee shall adopt trustee area boundaries pursuant to Chapter 2 (commencing with Section 21100) of Division 21 of the Elections Code.

(c) Except as to the redistricting deadline provided in Section 21140 of the Elections Code, changes in trustee area boundaries or a proposed reduction in the number of county board of education members shall be made in writing and filed with the county board of supervisors not later than the first day of March of any school year.

(d) Whenever the boundaries of trustee areas are changed so as to be coterminous with those of supervisorial districts of the county, excluding any part of a trustee area that is outside of the county pursuant to Section 1001, the election for members of the county board of education shall be consolidated with the countywide election.

SEC. 4. Section 1005 of the Education Code is repealed.

SEC. 5. Section 1005 is added to the Education Code, to read:

1005. (a) Notwithstanding subdivision (a) of Section 1000, the term of office of any member of a county board of education who has been elected and whose term of office has not expired shall not be affected by any change in the boundaries of the area from which the member was elected and that member shall continue to represent the constituents residing in the area boundaries from which the member was elected for the duration of that term of office. This section does not prevent a board from assigning a trustee or county office of education official to provide constituent services to residents of an area that is temporarily not represented by a trustee due to redistricting.

(b) At the first election for a member of the county board of education following adoption of the boundaries of trustee areas, excluding a special election to fill a vacancy or a recall election, a member shall be elected for each area under the new trustee area plan that has the same district number as a trustee area whose incumbent's term is due to expire.

(c) For a county board of education employing both a primary and a general election, a change in the boundaries of a trustee area shall not be made between the direct primary election and the general election.

SEC. 6. Section 5019 of the Education Code is amended to read:

5019. (a) (1) In any school district or community college district, the county committee on school district organization may establish trustee areas, rearrange the boundaries of trustee areas, abolish trustee areas, and increase to seven from five, or decrease from seven to five, the number of members of the governing board, or adopt one of the alternative methods of electing governing board members specified in Section 5030.

(2) For any school district whose average daily attendance during the preceding year was less than 300, the county committee on school district organization may decrease from five to three the number of members of the governing board, or adopt one of the alternative methods of electing governing board members specified in Section 5030.

(3) Notwithstanding paragraph (1), the county committee on school district organization shall not rearrange trustee area boundaries in a school district or community college district that has established a hybrid or independent redistricting commission for this purpose pursuant to Section 23003 of the Elections Code, the charter of a city or city and county, or a legal settlement.

(b) The county committee on school district organization may establish or abolish a common governing board for a high school district and an elementary school district within the boundaries of the high school district. The resolution of the county committee on school district organization approving the establishment or abolition of a common governing board shall be presented to the electors of the school districts as specified in Section 5020.

(c) (1) A proposal to make the changes described in subdivision (a) or (b) may be initiated by the county committee on school district organization or made to the county committee on school district organization either by a petition signed by 5 percent or 50, whichever is less, of the qualified registered voters residing in a district in which there are 2,500 or fewer qualified registered voters, by 3 percent or 100, whichever is less, of the qualified registered voters residing in a district in which there are 2,501 to 10,000 qualified registered voters, by 1 percent or 250, whichever is less, of the qualified registered voters residing in a district in which there are 10,001 to 50,000 qualified registered voters, by 500 or more of the qualified registered voters residing in a district in which there are 50,001 to 100,000 qualified registered voters, by 750 or more of the qualified registered voters residing in a district in which there are 100,001 to 250,000 qualified registered voters, or by 1,000 or more of the qualified registered voters residing in a district in which there are 250,001 or more qualified registered voters or by resolution of the governing board of the district. For this purpose, the necessary signatures for a petition shall be obtained within a period of 180 days before the submission of the petition to the county committee on school district organization, and the number of qualified registered voters in the district shall be determined pursuant to the most recent report submitted by the county elections official to the Secretary of State under Section 2187 of the Elections Code.

(2) When a proposal is made pursuant to paragraph (1), the county committee on school district organization shall call and conduct at least one hearing in the district on the matter. At the conclusion of the hearing, the county committee on school district organization shall approve or disapprove the proposal.

(d) If the county committee on school district organization approves pursuant to subdivision (a) the rearrangement of the boundaries of trustee areas for a particular district, then the rearrangement of the trustee areas shall be effectuated for the next district election occurring at least 125 days after its approval, unless at least 5 percent of the registered voters of the district sign a petition requesting an election on the proposed rearrangement of trustee area boundaries. The petition for an election shall be submitted to the county elections official within 60 days of the proposal's adoption by the county committee on school district organization. If the qualified registered voters approve pursuant to subdivision (b) or (c) the rearrangement of the boundaries to the trustee areas for a particular district, the rearrangement of the trustee areas shall be effective for the next district election occurring at least 125 days after its approval by the voters.

(e) Trustee areas shall comply with the requirements and criteria of Section 21130 of the Elections Code.

SEC. 7. Section 5019.5 of the Education Code is amended to read:

5019.5. (a) Following each decennial federal census, the governing board of each school district or community college district in which trustee areas have been established shall adopt trustee area boundaries pursuant to Chapter 2 (commencing with Section 21100) of Division 21 of the Elections Code.

(b) Notwithstanding subdivision (a) of Section 21130 of the Elections Code, if a school district or community college district has one or more multiple-member trustee areas, the governing board shall adopt the boundaries of the areas of the district so that the population of each area is substantially the same proportion of the total population of the district as the ratio that the number of governing board members elected from the area bears to the total number of members of the governing board, as required by the United States Constitution. Substantial proportionality of population shall be based on the total population of residents as provided in paragraphs (1) and (2) of subdivision (a) of Section 21130 of the Elections Code.

(c) Except as provided in subdivision (a), the authority to establish or abolish trustee areas, rearrange the boundaries of trustee areas, increase or decrease the number of members of the governing board, or adopt any method of electing governing board members may be exercised only as otherwise provided under this article and Division 21 (commencing with Section 21000) of the Elections Code, as applicable.

SEC. 8. Section 5019.7 of the Education Code is repealed.

SEC. 9. Section 5020 of the Education Code is amended to read:

5020. (a) (1) The resolution of the county committee approving a proposal to establish or abolish trustee areas, to adopt one of the alternative methods of electing governing board members specified in Section 5030, or to increase or decrease the number of members of the governing board shall constitute an order of election, and the proposal shall be presented to the electors of the district not later than the next succeeding election for members of the governing board.

(2) Notwithstanding paragraph (1), a county committee may, by resolution, approve a proposal to establish trustee areas and to elect governing board members using district-based elections, as defined in subdivision (b) of Section 14026 of the Elections Code, without being required to submit the resolution to the electors of the district for approval. A resolution adopted pursuant to this paragraph shall include a declaration that the change in the method of electing members of the governing body is being made in furtherance of the purposes of the California Voting Rights Act of 2001 (Chapter 1.5 (commencing with Section 14025) of Division 14 of the Elections Code). The resolution shall take effect upon adoption and shall govern all elections for governing board members occurring at least 125 days after the adoption of the resolution.

(b) If a petition requesting an election on a proposal to rearrange trustee area boundaries is filed, containing at least 5 percent of the signatures of the district's registered voters as determined by the elections official, the proposal shall be presented to the electors of the district, at the next succeeding election for the members of the governing board, at the next succeeding statewide primary or general election, or at the next succeeding regularly scheduled election at which the electors of the district are otherwise entitled to vote if there is sufficient time to place the issue on the ballot. The rearranged trustee areas shall comply with the criteria and requirements in Section 21130 of the Elections Code.

(c) If a petition requesting an election on a proposal to establish or abolish trustee areas, to increase or decrease the number of members of the board, or to adopt one of the alternative methods of electing governing board members specified in Section 5030 is filed, containing at least 10 percent of the signatures of the district's registered voters as determined by the elections official, the proposal shall be presented to the electors of the district, at the next succeeding election for the members of the governing board, at the next succeeding statewide primary or general election, or at the next succeeding regularly scheduled election at which the electors of the district are otherwise entitled to vote if there is sufficient time to place the issue on the ballot. Before the proposal is presented to the electors, the county committee on school district organization may call and conduct one or more public hearings on the proposal.

(d) The resolution of the county committee approving a proposal to establish or abolish a common governing board for a high school and an elementary school district within the boundaries of the high school district shall constitute an order of election. The proposal shall be presented to the electors of the district at the next succeeding statewide primary or general election, or at the next succeeding regularly scheduled election at which the electors of the district are otherwise entitled to vote if there is sufficient time to place the issue on the ballot.

(e) For each proposal there shall be a separate proposition on the ballot. The ballot shall contain the following words:

"For the establishment (or abolition or rearrangement) of trustee areas in ____ (insert name) School District—Yes" and "For the establishment (or abolition or rearrangement) of trustee areas in ____ (insert name) School District—No."

"For increasing the number of members of the governing board of ____ (insert name) School District from five to seven—Yes" and "For increasing the number of members of the governing board of ____ (insert name) School District from five to seven—No."

"For decreasing the number of members of the governing board of ____ (insert name) School District from seven to five—Yes" and "For decreasing the number of members of the governing board of ____ (insert name) School District from seven to five—No."

"For the election of each member of the governing board of the ____ (insert name) School District by the registered voters of the entire ____ (insert name) School District—Yes" and "For the election of each member of the governing board of the ____ (insert name) School District by the registered voters of the entire ____ (insert name) School District—No."

"For the election of one member of the governing board of the ____ (insert name) School District residing in each trustee area elected by the registered voters in that trustee area—Yes" and "For the election of one member of the governing board of the ____ (insert name) School District residing in each trustee area elected by the registered voters in that trustee area—No."

"For the election of one member, or more than one member for one or more trustee areas, of the governing board of the ____ (insert name) School District residing in each trustee area elected by the registered voters of the entire ____ (insert name) School District—Yes" and "For the election of one member, or more than one member for one or more trustee areas, of the governing board of the ____ (insert name) School District residing in each trustee area elected by the registered voters of the entire ____ (insert name) School District—No."

"For the establishment (or abolition) of a common governing board in the ____ (insert name) School District and the ____ (insert name) School District—Yes" and "For the establishment (or abolition) of a common governing board in the ____ (insert name) School District and the ____ (insert name) School District—No."

(f) If more than one proposal appears on the ballot, all must carry in order for any to become effective, except as follows:

(1) A proposal to adopt one of the methods of election of board members specified in Section 5030 that is approved by the voters shall become effective unless a proposal that is inconsistent with that proposal has been approved by a greater number of voters.

(2) An inconsistent proposal approved by a lesser number of voters than the number which have approved a proposal to adopt one of the methods of election of board members specified in Section 5030 shall not be effective.

SEC. 10. Section 5021 of the Education Code is amended to read:

5021. (a) If a proposal for the establishment of trustee areas formulated under Sections 5019 and 5020 is approved by a majority of the voters voting at the election, or by the county committee on school district organization when no election is required, any affected incumbent board member shall serve out the board member's term of office and succeeding board members shall be nominated and elected in accordance with Section 5030. If two or more trustee areas are established at an election that are not represented in the membership of the governing board of the school district or community college district, the county committee shall determine by lot the trustee area from which the nomination and election for the next vacancy on the governing board shall be made.

(b) If a proposal for rearrangement of boundaries is approved by a majority of the voters voting on the measure, or by the county committee when no election is required, or by the board, and if the boundary changes affect the board membership, any affected incumbent board member shall serve out the board member's term of office and that member shall continue to represent the constituents residing in the area boundaries from which the member was elected for the duration of that term of office. Succeeding board members shall be nominated and elected in accordance with Section 5030. This section does not prevent a board from assigning a trustee or school district or community college district official to provide constituent services to residents of an area that is temporarily not represented by a trustee due to redistricting.

(c) If a proposal for abolishing trustee areas is approved by a majority of the voters voting at the election, the incumbent board members shall serve out their terms of office and succeeding board members shall be nominated and elected at large from the district.

SEC. 11. Section 5023 of the Education Code is amended to read:

5023. (a) Whenever an elementary, high school, or unified school district, or a portion of any such district, is annexed to another school district in which trustee areas have been established, the county committee on school district organization of the county having jurisdiction over the annexing district shall study and make recommendations with respect to trustee areas of the annexing district as enlarged. If the recommendations include moving territory from an existing trustee area in the annexing district to another trustee area of the annexing district, the recommendations shall comply with the criteria and requirements in Section 21130 of the Elections Code. Procedures contained in Section 5019 shall be used for purposes of this section.

(b) Recommendations adopted under provisions of subdivision (a), if approved by the electors, shall become effective on the same date that the annexing district as enlarged becomes effective for all purposes.

SEC. 12. Section 5027 of the Education Code is amended to read:

5027. Notwithstanding Section 5019, Section 5019.5, or Chapter 2 (commencing with Section 21100) of Division 21 of the Elections Code, whenever the boundaries of a county high school district are coterminous with the boundaries of a county, the board shall consist of one member from each supervisorial district in the county elected at large from the district, and the high school district shall not go through a redistricting process separate from the process for redistricting the county board of supervisors.

SEC. 13. Section 5028 of the Education Code is amended to read:

5028. In every community college district that was divided into five trustee areas on or before September 7, 1955, one member of the board shall be elected from each trustee area by the registered voters of the trustee area. Following each federal decennial census, the governing board shall, by resolution, adopt boundaries for all of the trustee areas pursuant to Chapter 2 (commencing with Section 21100) of Division 21 of the Elections Code.

SEC. 14. Chapter 2 (commencing with Section 21100) is added to Division 21 of the Elections Code, to read:

Chapter 2. Fair And Inclusive Redistricting for Municipalities And Political Subdivisions (FAIR MAPS) Act of 2023

21100. (a) This chapter shall be known and may be cited as the Fair And Inclusive Redistricting for Municipalities And Political Subdivisions (FAIR MAPS) Act of 2023.

(b) In enacting this chapter, the Legislature finds and declares all of the following:

(1) The California Constitution guarantees to the people equal protection of the law and provides that the Legislature shall prohibit improper practices that affect elections.

(2) Ensuring the integrity, fairness, transparency, and accessibility of the local redistricting process is a matter of statewide interest and concern.

(3) Prohibiting discriminatory local redistricting practices, including racially discriminatory gerrymandering, partisan gerrymandering, and incumbency protection gerrymandering, is a matter of statewide interest and concern.

(4) Protecting the people from unrepresentative and dilutive local electoral systems is a matter of statewide interest and concern.

(5) As a result of changes to state law governing the city and county redistricting process that were included in the FAIR MAPS Act (Chapter 557 of the Statutes of 2019), the adjustment of district boundaries in cities and counties during the 2020 redistricting cycle was more transparent, participatory, and representative than in prior years.

(6) Notwithstanding these improvements to the redistricting process, research evaluating the 2020 redistricting cycle demonstrates that improvements to the FAIR MAPS Act are necessary to address ambiguities, loopholes, and deficiencies in the legislation that prevented the law's important goals from being fully realized.

(7) This chapter addresses a matter of statewide concern rather than a municipal affair as that term is used in Section 5 of Article XI of the California Constitution. Therefore, this chapter applies to all cities, including charter cities, except as specified.

(c) The purpose of this chapter is to do all of the following:

(1) Implement the guarantees of the California Constitution, including Sections 2, 3, and 7 of Article I and Sections 1, 2, 3, and 4 of Article II.

(2) Ensure the integrity, fairness, transparency, and accessibility of the local redistricting process, prohibit discriminatory local redistricting practices, and protect the people from unrepresentative and dilutive local electoral systems.

(3) Establish requirements to ensure minimum standards of transparency and accessibility in the local redistricting process so that the public is able to provide information to assist their local governments in adopting fair and equitable district maps.

(4) Establish mandatory districting and redistricting criteria to promote fair and effective representation for all people, neighborhoods, and communities, and particularly for disadvantaged, historically marginalized, under-resourced, low-income, and underrepresented neighborhoods and communities.

(5) Establish ranked criteria that prioritize keeping whole neighborhoods and communities of interest together, facilitate political organization and constituent representation, and prohibit gerrymandering, including incumbent-protection gerrymandering.

(6) Provide a means for residents to hold their local governments accountable for conducting a fair and transparent redistricting process and adopting district maps that comply with this chapter.

(d) This chapter shall be liberally construed to effectuate its purposes.

21110. For purposes of this chapter, the following terms have the following meanings:

(a) "Adopt" or "adoption" in regard to election district boundaries means the passage of an ordinance or resolution specifying those boundaries.

(b) "Applicable language" means the following:

(1) For a county or county office of education that is not a small education district, any language in which ballots are required to be provided in the county pursuant to Section 203 of the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10503).

(2) For a city, any language that is spoken by a group of city residents with limited English proficiency who constitute 3 percent or more of the city's total population over four years of age for whom language can be determined, as determined by the Secretary

of State in accordance with paragraph (2) of subdivision (c) of Section 21170.

(3) For a school district that is not a small education district, any language in which a school within the district is required to provide translated materials pursuant to Section 48985 of the Education Code.

(4) For a community college district that is not a small education district, any language that qualifies as an applicable language pursuant to paragraph (1) for a county in which the community college district is located.

(5) For a special district or a small education district, no applicable language shall be required under this chapter.

(c) "Election district" means an election district of the legislative body, including a county supervisorial district, county board of education trustee area, city council district, school district trustee area, community college district trustee area, or a special district governing board division.

(d) "Legislative body" means a county board of supervisors, a county board of education, a city council, a governing board of a school district, a governing board of a community college district, or a governing board of a special district.

(e) "Local jurisdiction" means a county, a county office of education, a general law city, a charter city, a school district, a community college district, or a special district.

(f) "Small education district" means any of the following:

(1) A county office of education in a county that has a total population of fewer than 250,000 residents, as of the most recent census.

(2) A school district serving an area that has a total population of fewer than 250,000 residents, as of the most recent census.

(3) A community college district serving an area that has a total population of fewer than 250,000 residents, as of the most recent census.

(g) "Member," unless otherwise specified, means a member of a legislative body elected by or from districts, including a county supervisor, county board of education member, city council member, school district trustee, community college district trustee, or special district governing board member.

(h) “Districting body” means the body that has the power to adopt a legislative body’s election districts, and which may include an independent redistricting commission.

(i) “Advisory redistricting commission,” “hybrid redistricting commission,” and “independent redistricting commission” have the same meanings as those terms are defined in Section 23000, and include any commission created by a charter city that meets those definitions.

21120. This chapter applies to a county, county office of education, general law city, charter city, school district, community college district, or special district whose legislative body is elected by districts or from districts.

21130. (a) Following or concurrent with the decision to establish district-based elections for a legislative body, or following each federal decennial census for a legislative body that is already elected using district-based elections, the districting body shall, by ordinance or resolution, adopt boundaries for all of the election districts of the legislative body so that the election districts shall be substantially equal in population as required by the United States Constitution.

(1) Population equality shall be based on the total population of residents of the local jurisdiction as determined by the most recent federal decennial census for which the redistricting data described in Public Law 94-171 are available.

(2) Notwithstanding paragraph (1), an incarcerated person, as that term is used in Section 21003, shall not be counted towards a local jurisdiction’s population, except for an incarcerated person whose last known place of residence may be assigned to a census block in the local jurisdiction, if information about the last known place of residence for incarcerated persons is included in the computerized database for redistricting that is developed in accordance with subdivision (b) of Section 8253 of the Government Code, and that database is made publicly available.

(b) The districting body shall adopt election district boundaries that comply with the United States Constitution, the California Constitution, and the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.).

(1) Consistent with the districting body’s existing obligations under the federal Voting Rights Act, the districting body shall determine whether it is possible to create an election district or

districts in which a minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, as set forth in Thornburg v. Gingles, 478 U.S. 30 (1986), and as interpreted in case law regarding enforcement of the federal Voting Rights Act with respect to redistricting. The districting body shall publish on its redistricting web page, at a minimum, the results of its analysis within seven days of completing the analysis or prior to adopting election district boundaries, whichever occurs first.

(2) If the districting body, consistent with its existing obligations under the federal Voting Rights Act, conducts an analysis to determine whether "racially polarized voting," as defined in case law regarding enforcement of the federal Voting Rights Act, exists in the local jurisdiction, the districting body shall publish on its redistricting web page, at a minimum, a summary of its analysis and findings within seven days of completing the analysis or prior to adopting election district boundaries, whichever occurs first.

(c) The districting body shall adopt election district boundaries using the following criteria as set forth in the following order of priority:

(1) To the maximum extent practicable, election districts shall be geographically contiguous. Areas that meet only at the points of adjoining corners are not contiguous. Areas that are separated by water and not connected by a bridge, tunnel, or regular ferry service are not contiguous.

(2) To the maximum extent practicable, and where it does not conflict with the preceding criterion in this subdivision, the geographic integrity of any local neighborhood or local community of interest shall be respected in a manner that minimizes its division. A "community of interest" is a population that shares common social or economic interests that should be included within a single election district for purposes of its effective and fair representation. Characteristics of communities of interest may include, but are not limited to, shared public policy concerns such as education, public safety, public health, environment, housing, transportation, and access to social services. Characteristics of communities of interest may also include, but are not limited to, cultural districts, shared socioeconomic characteristics, similar voter registration rates and participation rates, and shared histories.

Communities of interest do not include relationships with political parties, incumbents, or political candidates.

(3) To the maximum extent practicable, and where it does not conflict with the preceding criteria in this subdivision, the geographic integrity of a city or census designated place shall be respected in a manner that minimizes its division. This paragraph does not apply to a city.

(4) To the maximum extent practicable, and where it does not conflict with the preceding criteria in this subdivision, election districts shall be bounded by natural and artificial barriers, by streets, or by the boundaries of the local jurisdiction. Election district boundaries should be easily identifiable and understandable by residents.

(5) To the maximum extent practicable, and where it does not conflict with the preceding criteria in this subdivision, election districts shall be drawn to encourage geographical compactness in a manner that nearby areas of population are not bypassed in favor of more distant populations.

(d) The districting body shall not adopt election district boundaries for the purpose of favoring or discriminating against an incumbent, political candidate, or political party.

(e) The districting body shall not adopt election district boundaries using any criterion that is prioritized over the criteria in subdivision (c) or that, expressly or as applied, conflicts with one of the requirements in subdivisions (a) to (d), inclusive, except as provided in subdivision (g).

(f) Within 21 days of adopting final election district boundaries, the districting body shall issue a report that explains the basis on which the districting body made its decisions in achieving compliance with the requirements and criteria described in this section, including, as to each neighborhood, community of interest, city, or census designated place that was split into two or more districts, the reason for that split. This paragraph does not apply to a special district or small education district. Notwithstanding subdivision (i) of Section 23003, if a local jurisdiction establishes a hybrid redistricting commission to recommend changes to the legislative body's district boundaries, the report required by this subdivision shall be issued by the districting body, and not by the commission.

(g) Subdivision (c) does not apply to a charter city that has adopted comprehensive or exclusive redistricting criteria in its city charter that includes a requirement to keep whole either communities of interest or neighborhoods. In such a charter city, the report required by subdivision (f) shall explain the basis on which the districting body made its decisions in achieving compliance with the requirements described in this section and the criteria described in the city charter, including, as to each neighborhood or community of interest that was split into two or more districts, the reason for that split. For purposes of this subdivision, "comprehensive or exclusive" means either that the city's charter excludes consideration of redistricting criteria other than those that are identified in the city charter or that the city's charter provides two or more mandatory traditional redistricting criteria other than the requirement that districts be equal in population.

(h) If a local jurisdiction establishes an advisory or hybrid redistricting commission to recommend changes to the legislative body's district boundaries, any recommendation adopted by the commission shall comply with the requirements of subdivisions (a) through (e), inclusive, except as provided in subdivision (g).

(i) The criteria and requirements of this section apply to all election district boundaries adopted after January 1, 2024, including district boundaries adopted when a legislative body transitions from being elected at-large to elected by districts or from districts.

21140. (a) For redistricting occurring in 2031 and thereafter, the boundaries of the election districts shall be adopted by the districting body not later than 204 days before the local jurisdiction's next regular election occurring after January 1 in each year ending in the number two.

(b) This section does not apply when a legislative body transitions from being elected at-large to elected by districts or from districts.

(c) This section does not apply to a charter city that has adopted a different redistricting deadline by ordinance or in its city charter, provided that, if the county conducts the city's elections, the county is able to administratively accommodate this later deadline. If the county cannot accommodate that deadline, the county shall provide the charter city with the latest deadline the county can reasonably accommodate, which shall be used as the map-adoption deadline for purposes of Section 21180 and which the city shall post to the city's redistricting web page.

21150. (a) Before a districting body adopts new election district boundaries, including when a local jurisdiction redistricts following the federal decennial census or between federal decennial censuses, but not including when a legislative body transitions from being elected at-large to elected by districts or from districts, the local jurisdiction shall hold at least one workshop before the districting body draws a draft map or maps of the proposed election district boundaries and the districting body shall hold public hearings, as specified by this section, at which the public is invited to provide input regarding the composition of one or more neighborhoods, communities of interest, or election districts.

(b) For purposes of this chapter, a workshop is a standalone meeting which is conducted by either a local jurisdiction's staff, a consultant hired by the local jurisdiction, or by one or more members of the districting body but fewer than a majority of the members of the districting body. At each workshop, the local jurisdiction shall provide the public with information on the redistricting process, information on how the public may provide public comment, and instructions on how to use an online mapping tool to create draft maps or community of interest maps, if applicable. Local jurisdictions may, and are encouraged to, assist the public in drawing and submitting draft maps at the workshop. All submitted draft maps and an oral summary that characterizes the number and nature of the public comments received at the workshop concerning the proposed boundaries of a neighborhood, community of interest, or election district shall be presented to the districting body at the next public hearing.

(c) This subdivision applies to special districts and small education districts.

(1) After drawing a draft map or maps, the districting body shall hold at least two public hearings. This subdivision does not prevent a districting body from holding a public hearing before drawing a draft map or maps.

(d) This subdivision applies to counties, cities, school districts, community college districts, and county offices of education that are not a small education district.

(1) Before the districting body draws a draft map or maps of the proposed election district boundaries, the districting body shall hold at least two public hearings.

(2) After drawing a draft map or maps, a districting body shall hold at least three public hearings.

(e) (1) In lieu of the districting body, an advisory redistricting commission that complies with Section 23002 may hold the public hearings required by paragraph (1) of subdivision (d). An advisory redistricting commission may draw draft maps and hold public hearings to consider draft maps, but those public hearings shall not fulfill the districting body's responsibility to hold public hearings under paragraph (1) of subdivision (c) or paragraph (2) of subdivision (d).

(2) In lieu of the districting body, a hybrid redistricting commission, as defined in subdivision (c) of Section 23000, may hold the public hearings required by subdivisions (c) and (d) of this section.

(3) A public hearing held by an advisory or hybrid redistricting commission pursuant to this subdivision shall comply with the requirements of this section that would apply to the hearing if the hearing were held by the districting body.

(f) At least two workshops or public hearings shall be held on a Saturday, on a Sunday, or after 6 p.m. on a weekday.

(g) The building in which a workshop or public hearing is held shall be accessible to persons with disabilities.

(h) To promote the accessibility of the public hearings, the districting body shall permit the public to attend and provide live public comment at each public hearing both in-person and remotely, which should include providing an accessible and clearly audible call-in or internet-based service option. Notwithstanding any other law, the districting body shall not be required to provide a physical location from which the public may remotely provide public comment at a public hearing and the districting body shall not require that the public go to a physical location to remotely provide public comment.

(i) If a public hearing is consolidated with a regular or special meeting of the districting body that includes other substantive agenda items, the public hearing shall begin at a fixed time regardless of its order on the agenda, except that the districting body may first conclude any item being discussed or acted upon, including any associated public comment, when that time occurs. The time of the public hearing shall be noticed to the public.

(j) Consistent with the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code), the districting body may reasonably limit an individual's speaking time at a public hearing. The total amount of time available for all public comment at a public hearing shall not be limited to less than two hours; however, the public comment period may end before two hours if every person desiring to provide public comment has done so.

(k) Subdivisions (f) to (h), inclusive, do not apply to special districts or small education districts.

21160. (a) The local jurisdiction shall make a good faith effort to encourage residents, including those in underrepresented communities and non-English-speaking communities, to participate in the redistricting process.

(b) No later than four weeks before the first hearing or workshop held pursuant to Section 21150, the legislative body or districting body shall adopt a redistricting public education and outreach plan to inform residents about the local jurisdiction's redistricting process and how to participate. Notwithstanding subdivision (i) of Section 23003, if a local jurisdiction establishes a hybrid redistricting commission to recommend changes to the legislative body's district boundaries, the public education and outreach plan required by this subdivision shall be adopted by the local jurisdiction, and not by the commission.

(1) A draft version of the plan shall be posted online for a 14-day review and comment period prior to being adopted. In developing the draft plan, the local jurisdiction shall make a good faith effort to consult with organizations that are active in the local jurisdiction, including those active in language minority communities, and shall identify those consulted organizations in the draft report.

(2) The plan shall include a description of all of the following:

(A) How the local jurisdiction will devote the necessary resources on education and outreach to ensure that residents, including residents speaking an applicable language, are informed about the local jurisdiction's redistricting process.

(B) The specific methods the jurisdiction plans to use to inform residents about the redistricting process and how to participate. Examples may include media, including an identification of any media outlets that the jurisdiction plans to use, direct contact with residents, and community events or town halls.

(C) How the local jurisdiction will inform organizations that are active in the local jurisdiction, including organizations that requested to be notified of the jurisdiction's redistricting and organizations active in language minority communities, about the local jurisdiction redistricting process and which of these organizations, if any, that the jurisdiction will partner with to inform the public.

(D) Whether and how the local jurisdiction will coordinate its outreach and messaging with other local jurisdictions in the same county that are also redistricting.

(E) The number of workshops and public hearings the local jurisdiction intends to hold and their anticipated dates.

(3) A jurisdiction may use the redistricting public education and outreach template developed pursuant to paragraph (6) of subdivision (a) of Section 21170 when satisfying the requirements of this subdivision.

(c) Throughout the redistricting process, the local jurisdiction shall make a good faith effort to provide redistricting information to all of the following:

(1) Media organizations that provide local jurisdiction news coverage, including media organizations that serve language minority communities.

(2) Good government, civil rights, civic engagement, neighborhood, and community groups or organizations that are active in the local jurisdiction, including those active in language minority communities.

(3) Any person that has requested to be notified concerning the local jurisdiction's redistricting process. The local jurisdiction shall maintain a contact list for all such persons and provide them with regular updates throughout the redistricting process including, at minimum, notices of upcoming workshops or public hearings.

(d) The local jurisdiction shall arrange for the live translation in an applicable language of a workshop or public hearing held pursuant to this chapter if a request for translation is made at least 72 hours before the workshop or public hearing, unless less than five days' notice is provided for the workshop or public hearing, in which case the request shall be made at least 48 hours before the workshop or public hearing.

(e) Notwithstanding Section 54954.2 of the Government Code, the local jurisdiction shall publish the date, time, and location for any workshop or public hearing on the internet at least five days before the workshop or public hearing. However, if there are fewer than 28 days until the deadline to adopt boundaries, the local jurisdiction may publish the date, time, and location for the workshop or public hearing on the internet for at least 72 hours before the workshop or public hearing.

(f) (1) A draft map shall be published on the internet for at least 7 days before being adopted as a final map by the districting body provided that, if there are fewer than 28 days until the deadline to adopt boundaries, the draft map may instead be published on the internet for at least 72 hours.

(2) Each draft map prepared by a member of an advisory or hybrid redistricting commission, a member of the districting body, or by employees or contractors of the local jurisdiction, or any draft map submitted by the public that a member of the advisory or hybrid redistricting commission or districting body asks be discussed or considered at a future public hearing, shall be accompanied by information on the total population, citizen voting age population, and racial and ethnic characteristics of the citizen voting age population of each proposed election district, to the extent the local jurisdiction has that data.

(3) (A) An advisory or hybrid redistricting commission, the districting body, and employees or contractors of the local jurisdiction shall not release draft maps of election districts earlier than three weeks after the block-level redistricting database required by subdivision (b) of Section 8253 of the Government Code is first made publicly available. This subparagraph does not prohibit the commission or districting body from holding workshops or public hearings on the placement of election district boundaries before the earliest date that draft maps of election districts may be released.

(B) If the period of time between the date that the redistricting database is made publicly available and the map adoption deadline is fewer than 90 days and more than 59 days, the waiting period described in subparagraph (A) is reduced to 7 days.

(C) If the period of time between the date that the redistricting database is made publicly available and the map adoption deadline is fewer than 60 days, the waiting period described in subparagraph (A) does not apply.

(g) (1) The local jurisdiction shall either video or audio record or prepare a written summary of each oral public comment, and each deliberation by a districting body or an advisory or hybrid redistricting commission, made at every workshop or public hearing held pursuant to this chapter. The local jurisdiction shall make the recording or written summary of a workshop or public hearing available to the public on its redistricting web page no later than 14 days after the workshop or public hearing. Notwithstanding subdivision (i) of Section 23003, if a local jurisdiction establishes a hybrid redistricting commission, the local jurisdiction, not the hybrid redistricting commission, shall be responsible for meeting the requirements of this subdivision.

(2) Notwithstanding paragraph (1), the local jurisdiction shall do both of the following:

(A) At least 72 hours before holding the first of its final two workshops or public hearings, make all of the recordings or written summaries of the workshops and public hearings that the local jurisdiction has already held available to the public on its redistricting web page.

(B) Make all of the recordings or written summaries of the public hearings required by paragraph (1) of subdivision (d) of Section 21150 available to the public on its redistricting web page at least 72 hours before the first public hearing required by paragraph (2) of subdivision (d) of Section 21150.

(h) (1) The districting body, or an advisory or hybrid redistricting commission, shall allow the public to submit written public comment or draft neighborhood, community of interest, or district maps both in a paper format and electronically.

(2) The local jurisdiction shall make any written public comments or draft maps available to the public on its redistricting web page no later than 14 days after receiving the public comment or draft map.

(3) Notwithstanding paragraph (2), the local jurisdiction shall do both of the following:

(A) At least 72 hours before holding the first of its final two workshops or public hearings, make all of the written comments or draft maps available to the public on its redistricting web page, except for any public comment or draft map received less than four business days before that workshop or public hearing.

(B) Make all of the written comments or draft maps available to the public on its redistricting web page at least 72 hours before the first public hearing required by paragraph (2) of subdivision (d) of Section 21150, except for any public comment or draft map received less than four business days before that workshop or public hearing.

(i) Prior to holding its first workshop or public hearing, the local jurisdiction shall establish, and maintain for at least 10 years after the adoption of new election district boundaries, an accessible internet web page dedicated to redistricting. The web page may be hosted on the local jurisdiction's existing internet website or another internet website maintained by the local jurisdiction. Prior to the first workshop or public hearing and until new district boundaries are adopted, the homepage of the local jurisdiction's internet website shall include a prominent link to the redistricting web page. The web page shall include, or link to, all of the following information:

(1) A general explanation of the redistricting process for the local jurisdiction. This explanation shall be provided in English and applicable languages.

(2) An explanation of the procedures for a member of the public to provide in-person or remote oral public comment during a public hearing or to submit written public comment or a draft map to the districting body, or an advisory or hybrid redistricting commission, either in a paper or electronic format, for consideration at a future public hearing. The explanation shall be provided in English and applicable languages.

(3) A calendar of all workshop and public hearing dates. A calendar listing that includes the date, time, and location of the workshop or public hearing dates satisfies the notice required by subdivision (e).

(4) A notice of the applicable languages in which the local jurisdiction will provide live translation of a workshop or public hearing upon request and instructions for making such a request. This notice and these instructions shall be provided in English and applicable languages.

(5) Instructions and a method for a person to sign up to receive regular notices regarding redistricting, including notices of

upcoming workshops or public hearings. These instructions shall be provided in English and applicable languages.

(6) The notice and agenda for each workshop and public hearing.

(7) The recording or written summary of each workshop and public hearing.

(8) Each draft map considered by the districting body or an advisory or hybrid redistricting commission at a public hearing.

(9) Each written public comment submitted to the local jurisdiction.

(10) The results of the local jurisdiction's analysis under paragraphs (1) and (2) of subdivision (b) of Section 21130.

(11) The existing map of election district boundaries prior to redistricting.

(12) The adopted final map of election district boundaries after redistricting, and where applicable, the report required pursuant to subdivision (f) of Section 21130.

(j) This section does not apply when a legislative body transitions from being elected at-large to elected by districts or from districts.

(k) Subdivisions (b) to (g), inclusive, paragraphs (2) and (3) of subdivision (h), and paragraphs (4) to (10), inclusive, of subdivision (i) do not apply to special districts or small education districts. Subdivision (i) does not apply to special districts or small education districts that do not have a website for the jurisdiction and are not legally required to establish such a website.

21170. (a) No later than December 15, 2030, and no later than December 15 in each year ending in the number zero thereafter, the Secretary of State shall publish in a conspicuous location on the Secretary of State's internet website all of the following documents:

(1) A template explaining the local jurisdiction redistricting process that meets the requirements of paragraph (1) of subdivision (i) of Section 21160.

(2) A template explaining the procedures for providing public comment in the local jurisdiction redistricting process that meets the requirements of paragraph (2) of subdivision (i) of Section 21160.

(3) A template of a notice explaining the languages in which a local jurisdiction is required to provide live translation upon request

and how to make such a request that meets the requirements of paragraph (4) of subdivision (i) of Section 21160.

(4) A template of instructions for a member of the public to sign up for regular notices regarding redistricting that meets the requirements of paragraph (5) of subdivision (i) of Section 21160.

(5) A template form for a member of the public to describe and identify the boundaries of a neighborhood or community of interest.

(6) To assist local jurisdictions with complying with this chapter, a template of a redistricting public education and outreach plan that can be used to meet the requirements of subdivision (b) of Section 21160.

(7) To assist local jurisdictions with complying with this chapter, a brief summary and checklist of all the requirements imposed on a local jurisdiction by this chapter.

(b) No later than November 1, 2030, and no later than November 1 in each year ending in the number zero thereafter, the Secretary of State shall post online drafts of the documents described in subdivision (a) for at least a 30-day public comment period before finalizing any draft. Prior to posting these drafts, the Secretary of State shall solicit input from good government organizations, civil rights organizations, firms providing redistricting mapping services, and statewide associations representing affected local government agencies.

(c) (1) No later than January 1, 2031, and no later than January 1 in every year ending in the number one thereafter, the Secretary of State shall publish the applicable languages for each city and county in a conspicuous location on the Secretary of State's internet website.

(2) To determine the applicable languages for each city, in 2030 and in each year ending in the number zero thereafter, the Secretary of State, in consultation with the developer of the database developed in accordance with subdivision (b) of Section 8253 of the Government Code, shall request a special tabulation from the United States Census Bureau of the most recent data on limited English proficiency from the bureau's American Community Survey that satisfies paragraph (2) of subdivision (b) of Section 21110. If the bureau is unable to produce that data, the Secretary of State shall base the Secretary of State's determination on the table from the American Community Survey enumerating the number of residents with limited English proficiency that has the

largest number of languages included, that is publicly available, and that was produced within the previous 10 years.

(d) No later than February 28, 2031, and no later than February 28 in each year ending in the number one thereafter, the Secretary of State shall translate the documents described in paragraphs (1) to (5), inclusive, of subdivision (a) in any applicable language required for any city or county and shall publish these documents on a conspicuous location on the Secretary of State's internet website.

(e) Prior to finalizing any translated documents pursuant to subdivision (d), the Secretary of State shall post online drafts of these documents for at least a 15-day public comment period before finalizing any draft. Prior to posting these drafts, the Secretary of State shall solicit input from the Language Accessibility Advisory Committee and organizations representing communities that speak each applicable language.

(f) To assist local jurisdictions with complying with this chapter, the Secretary of State shall provide a training to local jurisdictions subject to this chapter and associations representing such local jurisdictions that summarizes the requirements imposed on a local jurisdiction by this chapter. This training shall be video recorded and posted in a conspicuous location on the Secretary of State's internet website.

(g) (1) Within 30 days of the computerized database described in subdivision (b) of Section 8253 of the Government Code being made available to the public, the Secretary of State shall make available to the public a free electronic mapping tool, loaded with relevant population and demographic data for each county and city whose legislative body is elected by district, which tool can be used by the public to create neighborhood maps, community of interest maps, or draft district maps that can be submitted to the local jurisdiction's districting body or to an advisory or hybrid redistricting commission. The Secretary of State is authorized and encouraged to create a mapping tool for other local jurisdictions whose legislative bodies are elected by district.

(2) Implementation of this subdivision shall be contingent on an appropriation being made for this purpose in the annual Budget Act or another statute.

21180. (a) If the districting body does not adopt election district boundaries by the deadlines set forth in subdivision (a) of

Section 21140 or adopted pursuant to subdivision (c) of Section 21140, as applicable, the districting body shall immediately petition a superior court in a county in which the local jurisdiction is located for an order adopting election district boundaries. If the districting body does not petition a superior court within five days after the deadline, any resident of the local jurisdiction may file that petition.

(b) (1) Upon granting a petition filed pursuant to subdivision (a), the superior court shall adopt election district boundaries in accordance with the requirements and criteria set forth in Section 21130, which shall be used in the local jurisdiction's next regular election.

(2) The superior court may appoint a special master to assist the court with adopting the district boundaries. The local jurisdiction shall pay the cost for the special master and associated costs.

(3) The superior court or a special master appointed by the superior court may hold one or more public hearings before the superior court adopts the election district boundaries.

(4) Subject to the approval of the court, the special master may employ redistricting experts or other consultants or counsel, independent experts in the field of redistricting and computer technology, and other necessary personnel to assist them in their work. The special master may also seek the full cooperation of the local jurisdiction in producing and using any data, computer models and programs, or technical assistance that was made available to the districting body or an advisory or hybrid redistricting commission and local jurisdiction personnel who are knowledgeable in the mechanics of drafting redistricting legislation. The court may assist the special master in securing the necessary personnel and the physical facilities required for their work and in preparing for the prompt submission to the local jurisdiction of a request for local jurisdiction funding for the necessary expenses of the special master and the special master's staff.

(c) The election district boundaries adopted by the superior court shall have the same force and effect as an enacted resolution or ordinance of the districting body, but shall not be subject to a referendum.

(d) The superior court may order the adjustment of electoral deadlines as necessary to implement the new election district boundaries in the next regular election.

(e) This section does not apply to a charter city that has adopted in its city charter a different method for adopting city council district boundaries when a redistricting deadline is missed.

(f) This chapter does not limit the discretionary remedial authority of any federal or state court, including any authority to award attorney's fees and costs under other provisions of law.

SEC. 15. Section 21500 of the Elections Code is amended to read:

21500. Following a county's decision to elect its board using district-based elections, or following each federal decennial census for a county whose board is already elected using district-based elections, the board shall, by ordinance or resolution, adopt boundaries for all of the supervisorial districts of the county pursuant to Chapter 2 (commencing with Section 21100).

SEC. 16. Section 21500.1 of the Elections Code is amended to read:

21500.1. This chapter applies to a county that elects members of the county's board of supervisors by districts or from districts.

SEC. 17. Section 21501 of the Elections Code is repealed.

SEC. 18. Section 21503 of the Elections Code is amended to read:

21503. (a) After redistricting or districting, a board shall not adopt new supervisorial district boundaries until after the next federal decennial census, except under the following circumstances:

(1) A court orders the board to redistrict.

(2) The board is settling a legal claim that its supervisorial district boundaries violate the United States Constitution, the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.), or this chapter.

(3) The boundaries of the county change by the addition or subtraction of territory.

(4) The number of supervisors elected by districts or from districts is increased or decreased.

(5) An independent redistricting commission is established pursuant to Section 23003 to adopt new supervisorial districts between federal decennial censuses and the districts being replaced were adopted by the board of supervisors.

(b) This section does not prohibit a board from adopting supervisorial districts between federal decennial censuses if the board is adopting supervisorial districts for the first time, including when a board adopts supervisorial districts for the purpose of transitioning from electing its supervisors in at-large elections to elections by districts or from districts.

SEC. 19. Section 21506 of the Elections Code is amended to read:

21506. (a) The term of office of any supervisor who has been elected and whose term of office has not expired shall not be affected by any change in the boundaries of the district from which the supervisor was elected and that supervisor shall continue to represent the constituents residing in the district boundaries from which the supervisor was elected for the duration of that term of office. This section does not prevent a board from assigning a county elected official or county official to provide constituent services for residents of an area that is temporarily not represented by a supervisor due to redistricting.

(b) At the first election for county supervisors in each county following adoption of the boundaries of supervisorial districts, excluding a special election to fill a vacancy or a recall election, a supervisor shall be elected for each district under the new district plan that has the same district number as a district whose incumbent's term is due to expire. This subdivision does not apply when a county transitions from at-large to district-based elections.

(c) For a county employing both a primary and a general election, a change in the boundaries of a supervisorial district shall not be made between the direct primary election and the general election.

(d) Except as provided in subdivision (a), a person is not eligible to hold office as a member of a board of supervisors unless that person meets the requirements of Section 201 of the Elections Code and Section 24001 of the Government Code.

SEC. 20. Section 21507 of the Elections Code is repealed.

SEC. 21. Section 21507.1 of the Elections Code is repealed.

SEC. 22. Section 21508 of the Elections Code is repealed.

SEC. 23. Section 21509 of the Elections Code is repealed.

SEC. 24. Section 21534 of the Elections Code is amended to read:

21534. (a) The commission shall establish single-member supervisorial districts for the board pursuant to a mapping process using the following criteria as set forth in the following order of priority:

(1) (A) Districts shall comply with the United States Constitution and each district shall have a reasonably equal population with other districts for the board, except where deviation is required to comply with the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10101 et seq.) or allowable by law.

(B) Population equality shall be based on the total population of residents of the county as determined by the most recent federal decennial census for which the redistricting data described in Public Law 94-171 are available.

(C) Notwithstanding subparagraph (B), an incarcerated person, as that term is used in Section 21003, shall not be counted towards the county's population, except for an incarcerated person whose last known place of residence may be assigned to a census block in the county, if information about the last known place of residence for incarcerated persons is included in the computerized database for redistricting that is developed in accordance with subdivision (b) of Section 8253 of the Government Code, and that database is made publicly available.

(2) Districts shall comply with the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10101 et seq.).

(3) Districts shall be geographically contiguous.

(4) The geographic integrity of any city, local neighborhood, or local community of interest shall be respected in a manner that minimizes its division to the extent possible without violating the requirements of paragraphs (1) to (3), inclusive. A community of interest is a contiguous population that shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation. Communities of interest shall not include relationships with political parties, incumbents, or political candidates.

(5) To the extent practicable, and where this does not conflict with paragraphs (1) to (4), inclusive, districts shall be drawn to encourage geographical compactness such that nearby areas of population are not bypassed for more distant areas of population.

(b) The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for purposes of favoring or discriminating against an incumbent, political candidate, or political party.

(c) (1) The commission shall comply with the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code).

(2) (A) Before the commission draws a map, the commission shall conduct at least seven public hearings, to take place over a period of no fewer than 30 days, with at least one public hearing held in each supervisorial district.

(B) In the event any state or local health order prohibits large gatherings, the commission may modify the location of the hearings, including use of virtual hearings that use technology to permit remote viewing and participation, to the extent required to comply with public health requirements. If the commission modifies the location of a hearing, it shall provide opportunities to view and listen to proceedings by video, to listen to proceedings by phone, and to provide public comment by phone and in writing with no limitation on the number of commenters. The commission shall, to the greatest extent practicable, provide an opportunity for in-person participation for at least one hearing in each supervisorial district. Methods for providing in-person participation may include, but are not limited to, setting up multiple rooms with audiovisual connections to the hearing, allowing community members to make appointments to make public comment, providing personal protective equipment, or holding hearings in outdoor spaces.

(3) After the commission draws a draft map, the commission shall do both of the following:

(A) Post the map for public comment on the internet website of the County of Los Angeles.

(B) Conduct at least two public hearings to take place over a period of no fewer than 30 days.

(4) (A) The commission shall establish and make available to the public a calendar of all public hearings described in paragraphs (2) and (3). Hearings shall be scheduled at various times and days of the week to accommodate a variety of work schedules and to reach as large an audience as possible.

(B) Notwithstanding Section 54954.2 of the Government Code, the commission shall post the agenda for the public hearings described in paragraphs (2) and (3) at least seven days before the hearings. The agenda for a meeting required by paragraph (3) shall include a copy of the draft map.

(5) (A) The commission shall arrange for the live translation of a hearing held pursuant to this chapter in an applicable language if a request for translation is made at least 24 hours before the hearing.

(B) For purposes of this paragraph, an “applicable language” means a language for which the number of residents of the County of Los Angeles who are members of a language minority is greater than or equal to 3 percent of the total voting age residents of the county.

(6) The commission shall take steps to encourage county residents to participate in the redistricting public review process. These steps may include:

(A) Providing information through media, social media, and public service announcements.

(B) Coordinating with community organizations.

(C) Posting information on the internet website of the County of Los Angeles that explains the redistricting process and includes a notice of each public hearing and the procedures for testifying during a hearing or submitting written testimony directly to the commission.

(7) The board shall take all steps necessary to ensure that a complete and accurate computerized database is available for redistricting, and that procedures are in place to provide to the public ready access to redistricting data and computer software equivalent to what is available to the commission members.

(8) The board shall provide reasonable funding and staffing for the commission.

(9) All records of the commission relating to redistricting, and all data considered by the commission in drawing a draft map or the final map, are public records.

(d) (1) The commission shall adopt a redistricting plan adjusting the boundaries of the supervisorial districts and shall file the plan with the county elections official by the map adoption deadline set forth in subdivision (a) of Section 21140. The commission shall not release a draft map before the date set forth in paragraph (3) of subdivision (f) of Section 21160.

(2) The plan shall be subject to referendum in the same manner as ordinances.

(3) The commission shall issue, with the final map, a report that explains the basis on which the commission made its decisions in

achieving compliance with the criteria described in subdivisions (a) and (b).

SEC. 25. Section 21544 of the Elections Code is amended to read:

21544. (a) The commission shall establish single-member supervisorial districts for the board pursuant to a mapping process using the following criteria as set forth in the following order of priority:

(1) (A) Districts shall comply with the United States Constitution and each district shall have a reasonably equal population with other districts for the board, except where deviation is required to comply with the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10101 et seq.) or allowable by law.

(B) Population equality shall be based on the total population of residents of the county as determined by the most recent federal decennial census for which the redistricting data described in Public Law 94-171 are available.

(C) Notwithstanding subparagraph (B), an incarcerated person, as that term is used in Section 21003, shall not be counted towards the county's population, except for an incarcerated person whose last known place of residence may be assigned to a census block in the county, if information about the last known place of residence for incarcerated persons is included in the computerized database for redistricting that is developed in accordance with subdivision (b) of Section 8253 of the Government Code, and that database is made publicly available.

(2) Districts shall comply with the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10101 et seq.).

(3) Districts shall be geographically contiguous.

(4) The geographic integrity of any city, local neighborhood, or local community of interest shall be respected in a manner that minimizes its division to the extent possible without violating the requirements of paragraphs (1) to (3), inclusive. A community of interest is a contiguous population that shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation. Communities of interest shall not include relationships with political parties, incumbents, or political candidates.

(5) To the extent practicable, and where this does not conflict with paragraphs (1) to (4), inclusive, districts shall be drawn to

encourage geographical compactness such that nearby areas of population are not bypassed for more distant areas of population.

(b) The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for purposes of favoring or discriminating against an incumbent, political candidate, or political party.

(c) (1) The commission shall comply with the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code).

(2) (A) Before the commission draws a map, the commission shall conduct at least seven public hearings, to take place over a period of no fewer than 30 days, with at least one public hearing held in each supervisorial district.

(B) In the event any state or local health order prohibits large gatherings, the commission may modify the location of the hearings, including through the use of virtual hearings that use technology to permit remote viewing and participation, to the extent required to comply with public health requirements. If the commission modifies the location of a hearing, it shall provide opportunities to view and listen to proceedings by video, to listen to proceedings by phone, and to provide public comment by phone and in writing with no limitation on the number of commenters. The commission shall, to the greatest extent practicable, provide an opportunity for in-person participation for at least one hearing in each supervisorial district. Methods for providing in-person participation may include setting up multiple rooms with audiovisual connections to the hearing, allowing community members to make appointments to make public comment, providing personal protective equipment, or holding hearings in outdoor spaces.

(3) After the commission draws a draft map, the commission shall do both of the following:

(A) Post the map for public comment on the website of the County of Riverside.

(B) Conduct at least two public hearings to take place over a period of no fewer than 30 days.

(4) (A) The commission shall establish and make available to the public a calendar of all public hearings described in paragraphs (2) and (3). Hearings shall be scheduled at various times and days

of the week to accommodate a variety of work schedules and to reach as large an audience as possible.

(B) Notwithstanding Section 54954.2 of the Government Code, the commission shall post the agenda for the public hearings described in paragraphs (2) and (3) at least seven days before the hearings. The agenda for a meeting required by paragraph (3) shall include a copy of the draft map.

(5) (A) The commission shall arrange for the live translation of a hearing held pursuant to this chapter in an applicable language if a request for translation is made at least 24 hours before the hearing.

(B) For purposes of this paragraph, an "applicable language" means a language for which the number of residents of the County of Riverside who are members of a language minority is greater than or equal to 3 percent of the total voting age residents of the county.

(6) The commission shall take steps to encourage county residents to participate in the redistricting public review process. These steps may include:

(A) Providing information through media, social media, and public service announcements.

(B) Coordinating with community organizations.

(C) Posting information on the website of the County of Riverside that explains the redistricting process and includes a notice of each public hearing and the procedures for testifying during a hearing or submitting written testimony directly to the commission.

(7) The board shall take all steps necessary to ensure that a complete and accurate computerized database is available for redistricting, and that procedures are in place to provide to the public ready access to redistricting data and computer software equivalent to what is available to the commission members.

(8) The board shall provide for reasonable funding and staffing for the commission.

(9) All records of the commission relating to redistricting, and all data considered by the commission in drawing a draft map or the final map, are public records.

(d) (1) The commission shall adopt a redistricting plan adjusting the boundaries of the supervisorial districts and shall file the plan with the county elections official by the map adoption deadline set forth in subdivision (a) of Section 21140. The commission shall not release a draft map before the date set forth in paragraph (3) of subdivision (f) of Section 21160.

(2) The plan shall be subject to referendum in the same manner as ordinances.

(3) The commission shall issue, with the final map, a report that explains the basis on which the commission made its decisions in achieving compliance with the criteria described in subdivisions (a) and (b).

SEC. 26. Section 21552 of the Elections Code is amended to read:

21552. (a) The commission shall establish single-member supervisorial districts for the board pursuant to a mapping process using the following criteria as set forth in the following order of priority:

(1) (A) Districts shall comply with the United States Constitution and each district shall have a reasonably equal population with other districts for the board, except where deviation is required to comply with the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10101 et seq.) or is allowable by law.

(B) Population equality shall be based on the total population of residents of the county as determined by the most recent federal decennial census for which the redistricting data described in Public Law 94-171 are available.

(C) Notwithstanding subparagraph (B), an incarcerated person, as that term is used in Section 21003, shall not be counted towards the county's population, except for an incarcerated person whose last known place of residence may be assigned to a census block in the county, if information about the last known place of residence for incarcerated persons is included in the computerized database for redistricting that is developed in accordance with subdivision (b) of Section 8253 of the Government Code, and that database is made publicly available.

(2) Districts shall comply with the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10101 et seq.).

(3) Districts shall be geographically contiguous.

(4) The geographic integrity of any city, local neighborhood, or local community of interest shall be respected in a manner that minimizes its division to the extent possible without violating the requirements of paragraphs (1) to (3), inclusive. A community of

interest is a contiguous population that shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation. Communities of interest shall not include relationships with political parties, incumbents, or political candidates.

(5) To the extent practicable, and where it does not conflict with paragraphs (1) to (4), inclusive, districts shall be drawn to encourage geographical compactness such that nearby areas of population are not bypassed for more distant areas of population.

(b) The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for purposes of favoring or discriminating against an incumbent, political candidate, or political party.

(c) (1) The commission shall comply with the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code).

(2) (A) Before the commission draws a map, the commission shall conduct at least seven public hearings, to take place over a period of no fewer than 30 days, with at least one public hearing held in each supervisorial district.

(B) In the event any state or local health order prohibits large gatherings, the commission may modify the location of the hearings, including use of virtual hearings that use technology to permit remote viewing and participation, to the extent required to comply with public health requirements. If the commission modifies the location of a hearing, it shall provide opportunities to view and listen to proceedings by video, to listen to proceedings by phone, and to provide public comment by phone and in writing with no limitation on the number of commenters. The commission shall, to the greatest extent practicable, provide an opportunity for in-person participation for at least one hearing in each supervisorial district. Methods for providing in-person participation may include, but are not limited to, setting up multiple rooms with audiovisual connections to the hearing, allowing community members to make appointments to make public comment, providing personal protective equipment, or holding hearings in outdoor spaces.

(3) After the commission draws a draft map, the commission shall do both of the following:

(A) Post the map for public comment on the internet website of the County of San Diego.

(B) Conduct at least two public hearings to take place over a period of no fewer than 30 days.

(4) (A) The commission shall establish and make available to the public a calendar of all public hearings described in paragraphs (2) and (3). Hearings shall be scheduled at various times and days of the week to accommodate a variety of work schedules and to reach as large an audience as possible.

(B) Notwithstanding Section 54954.2 of the Government Code, the commission shall post the agenda for the public hearings described in paragraphs (2) and (3) at least seven days before the hearings. The agenda for a meeting required by paragraph (3) shall include a copy of the draft map.

(5) (A) The commission shall arrange for the live translation of a hearing held pursuant to this chapter in an applicable language if a request for translation is made at least 24 hours before the hearing.

(B) For purposes of this paragraph, an "applicable language" means a language for which the number of residents of the County of San Diego who are members of a language minority is greater than or equal to 3 percent of the total voting age residents of the county.

(6) The commission shall take steps to encourage county residents to participate in the redistricting public review process. These steps may include:

(A) Providing information through media, social media, and public service announcements.

(B) Coordinating with community organizations.

(C) Posting information on the internet website of the County of San Diego that explains the redistricting process and includes a notice of each public hearing and the procedures for testifying during a hearing or submitting written testimony directly to the commission.

(7) The board shall take all steps necessary to ensure that a complete and accurate computerized database is available for redistricting, and that procedures are in place to provide to the public ready access to redistricting data and computer software equivalent to what is available to the commission members.

(8) The board shall provide for reasonable funding and staffing for the commission.

(9) All records of the commission relating to redistricting, and all data considered by the commission in drawing a draft map or the final map, are public records.

(d) (1) The commission shall adopt a redistricting plan adjusting the boundaries of the supervisorial districts and shall file the plan with the Clerk of the Board of Supervisors by the map adoption deadline set forth in subdivision (a) of Section 21140. The commission shall not release a draft map before the date set forth in paragraph (3) of subdivision (f) of Section 21160.

(2) The plan shall be subject to referendum in the same manner as ordinances.

(3) The commission shall issue, with the final map, a report that explains the basis on which the commission made its decisions in achieving compliance with the criteria described in subdivisions (a) and (b).

SEC. 27. Section 21564 of the Elections Code is amended to read:

21564. (a) The commission shall establish single-member supervisorial districts for the board pursuant to a mapping process using the following criteria as set forth in the following order of priority:

(1) (A) Districts shall comply with the United States Constitution and each district shall have a reasonably equal population with other districts for the board, except where deviation is required to comply with the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10101 et seq.) or allowable by law.

(B) Population equality shall be based on the total population of residents of the county as determined by the most recent federal decennial census for which the redistricting data described in Public Law 94-171 are available.

(C) Notwithstanding subparagraph (B), an incarcerated person, as that term is used in Section 21003, shall not be counted towards the county's population, except for an incarcerated person whose last known place of residence may be assigned to a census block in the county, if information about the last known place of residence for incarcerated persons is included in the computerized database for redistricting that is developed in accordance with subdivision (b) of Section 8253 of the Government Code, and that database is made publicly available.

(2) Districts shall comply with the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10101 et seq.).

(3) Districts shall be geographically contiguous.

(4) The geographic integrity of any city, local neighborhood, or local community of interest shall be respected in a manner that minimizes its division to the extent possible without violating the requirements of paragraphs (1) to (3), inclusive. A community of interest is a contiguous population that shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation. Communities of interest shall not include relationships with political parties, incumbents, or political candidates.

(5) To the extent practicable, and where this does not conflict with paragraphs (1) to (4), inclusive, districts shall be drawn to encourage geographical compactness such that nearby areas of population are not bypassed for more distant areas of population.

(b) The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for purposes of favoring or discriminating against an incumbent, political candidate, or political party.

(c) (1) The commission shall comply with the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code).

(2) (A) Before the commission draws a map, the commission shall conduct at least seven public hearings, to take place over a period of no fewer than 30 days, with at least one public hearing held in each supervisorial district.

(B) In the event a state or local health order prohibits large gatherings, the commission may modify the location of the hearings, including through the use of virtual hearings that use technology to permit remote viewing and participation, to the extent required to comply with public health requirements. If the commission modifies the location of a hearing, it shall provide opportunities to view and listen to proceedings by video, to listen to proceedings by phone, and to provide public comment by phone and in writing with no limitation on the number of commenters. The commission shall, to the greatest extent practicable, provide an opportunity for in-person participation for at least one hearing in each supervisorial district. Methods for providing in-person participation may include, but are not limited to, setting up multiple rooms with audiovisual connections to the hearing, allowing community members to make appointments to make public comment, providing personal protective equipment, or holding hearings in outdoor spaces.

(3) After the commission draws a draft map, the commission shall do both of the following:

(A) Post the map for public comment on the internet website of the County of Fresno.

(B) Conduct at least two public hearings to take place over a period of no fewer than 30 days.

(4) (A) The commission shall establish and make available to the public a calendar of all public hearings described in paragraphs (2) and (3). Hearings shall be scheduled at various times and days of the week to accommodate a variety of work schedules and to reach as large an audience as possible.

(B) Notwithstanding Section 54954.2 of the Government Code, the commission shall post the agenda for the public hearings described in paragraphs (2) and (3) at least seven days before the hearings. The agenda for a meeting required by paragraph (3) shall include a copy of the draft map.

(5) (A) The commission shall arrange for the live translation of a hearing held pursuant to this chapter in an applicable language if a request for translation is made at least 24 hours before the hearing.

(B) For purposes of this paragraph, an "applicable language" means a language for which the number of residents of the County of Fresno who are members of a language minority is greater than or equal to 3 percent of the total voting age residents of the county.

(6) The commission shall take steps to encourage county residents to participate in the redistricting public review process. These steps may include:

(A) Providing information through media, social media, and public service announcements.

(B) Coordinating with community organizations.

(C) Posting information on the internet website of the County of Fresno that explains the redistricting process and includes a notice of each public hearing and the procedures for testifying during a hearing or submitting written testimony directly to the commission.

(7) The board shall take all steps necessary to ensure that a complete and accurate computerized database is available for redistricting, and that procedures are in place to provide to the public ready access to redistricting data and computer software equivalent to what is available to the commission members.

(8) The board shall provide reasonable funding and staffing for the commission.

(9) All records of the commission relating to redistricting, and all data considered by the commission in drawing a draft map or the final map, are public records.

(d) (1) The commission shall adopt a redistricting plan adjusting the boundaries of the supervisorial districts and shall file the plan with the county elections official by the map adoption deadline set forth in subdivision (a) of Section 21140. The commission shall not release a draft map before the date set forth in paragraph (3) of subdivision (f) of Section 21160.

(2) The plan shall be subject to referendum in the same manner as ordinances.

(3) The commission shall issue, with the final map, a report that explains the basis on which the commission made its decisions in achieving compliance with the criteria described in subdivisions (a) and (b).

SEC. 28. Section 21574 of the Elections Code is amended to read:

21574. (a) The commission shall establish single-member supervisorial districts for the board pursuant to a mapping process using the following criteria as set forth in the following order of priority:

(1) (A) Districts shall comply with the United States Constitution and each district shall have a reasonably equal population with other districts for the board, except where deviation is required to comply with the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10101 et seq.) or allowable by law.

(B) Population equality shall be based on the total population of residents of the county as determined by the most recent federal decennial census for which the redistricting data described in Public Law 94-171 are available.

(C) Notwithstanding subparagraph (B), an incarcerated person, as that term is used in Section 21003, shall not be counted towards the county's population, except for an incarcerated person whose last known place of residence may be assigned to a census block in the county, if information about the last known place of residence for incarcerated persons is included in the computerized database for redistricting that is developed in accordance with subdivision (b) of Section 8253 of the Government Code, and that database is made publicly available.

(2) Districts shall comply with the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10101 et seq.).

(3) Districts shall be geographically contiguous.

(4) The geographic integrity of any city, local neighborhood, or local community of interest shall be respected in a manner that minimizes its division to the extent possible without violating the requirements of paragraphs (1) to (3), inclusive. A community of interest is a contiguous population that shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation. Communities of interest shall not include relationships with political parties, incumbents, or political candidates.

(5) To the extent practicable, and where this does not conflict with paragraphs (1) to (4), inclusive, districts shall be drawn to encourage geographical compactness such that nearby areas of population are not bypassed for more distant areas of population.

(b) The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for purposes of favoring or discriminating against an incumbent, political candidate, or political party.

(c) (1) The commission shall comply with the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code).

(2) (A) Before the commission draws a map, the commission shall conduct at least seven public hearings, to take place over a period of no fewer than 30 days, with at least one public hearing held in each supervisorial district.

(B) In the event a state or local health order prohibits large gatherings, the commission may modify the location of the hearings, including through the use of virtual hearings that use technology to permit remote viewing and participation, to the extent required to comply with public health requirements. If the commission modifies the location of a hearing, it shall provide opportunities to view and listen to proceedings by video, to listen to proceedings by phone, and to provide public comment by phone and in writing with no limitation on the number of commenters. The commission shall, to the greatest extent practicable, provide an opportunity for in-person participation for at least one hearing in each supervisorial district. Methods for providing in-person participation may include, but are not limited to, setting up multiple rooms with audiovisual connections to the hearing, allowing community members to make appointments to make public comment, providing personal protective equipment, or holding hearings in outdoor spaces.

(3) After the commission draws a draft map, the commission shall do both of the following:

(A) Post the map for public comment on the internet website of the County of Kern.

(B) Conduct at least two public hearings to take place over a period of no fewer than 30 days.

(4) (A) The commission shall establish and make available to the public a calendar of all public hearings described in paragraphs (2) and (3). Hearings shall be scheduled at various times and days of the week to accommodate a variety of work schedules and to reach as large an audience as possible.

(B) Notwithstanding Section 54954.2 of the Government Code, the commission shall post the agenda for the public hearings described in paragraphs (2) and (3) at least seven days before the hearings. The agenda for a meeting required by paragraph (3) shall include a copy of the draft map.

(5) (A) The commission shall arrange for the live translation of a hearing held pursuant to this chapter in an applicable language if a request for translation is made at least 24 hours before the hearing.

(B) For purposes of this paragraph, an “applicable language” means a language for which the number of residents of the County of Kern who are members of a language minority is greater than or equal to 3 percent of the total voting age residents of the county.

(6) The commission shall take steps to encourage county residents to participate in the redistricting public review process. These steps may include:

(A) Providing information through media, social media, and public service announcements.

(B) Coordinating with community organizations.

(C) Posting information on the internet website of the County of Kern that explains the redistricting process and includes a notice of each public hearing and the procedures for testifying during a hearing or submitting written testimony directly to the commission.

(7) The board shall take all steps necessary to ensure that a complete and accurate computerized database is available for redistricting, and that procedures are in place to provide to the public ready access to redistricting data and computer software equivalent to what is available to the commission members.

(8) The board shall provide reasonable funding and staffing for the commission.

(9) All records of the commission relating to redistricting, and all data considered by the commission in drawing a draft map or the final map, are public records.

(d) (1) The commission shall adopt a redistricting plan adjusting the boundaries of the supervisorial districts and shall file the plan with the county elections official by the map adoption deadline set forth in subdivision (a) of Section 21140. The commission shall not release a draft map before the date set forth in paragraph (3) of subdivision (f) of Section 21160.

(2) The plan shall be subject to referendum in the same manner as ordinances.

(3) The commission shall issue, with the final map, a report that explains the basis on which the commission made its decisions in achieving compliance with the criteria described in subdivisions (a) and (b).

SEC. 29. Section 21600 of the Elections Code is amended to read:

21600. This article applies to a general law city that elects members of the city's legislative body by districts or from districts, as those terms are defined in Section 34871 of the Government Code.

SEC. 30. Section 21601 of the Elections Code is amended to read:

21601. Following a city's decision to elect its council using district-based elections, or following each federal decennial census for a city whose council is already elected using district-based elections, the council shall, by ordinance or resolution, adopt boundaries for all of the council districts of the city pursuant to Chapter 2 (commencing with Section 21100).

SEC. 31. Section 21602 of the Elections Code is repealed.

SEC. 32. Section 21603 of the Elections Code is amended to read:

21603. (a) If the boundaries of a city expand by the addition of new territory, including through annexation of unincorporated territory or consolidation with another city, the council shall add that new territory to the nearest existing council district without changing the boundaries of other council district boundaries.

(b) Notwithstanding subdivision (a), the council may adopt new boundaries for each council district pursuant to Chapter 2 (commencing with Section 21100) if the boundaries of the city expand by the addition of new territory and if both of the following conditions are met:

(1) There are more than four years until the council is next required to redistrict pursuant to Section 21601.

(2) The population of the new territory being annexed or consolidated is greater than 25 percent of the city's population, as determined by the most recent federal decennial census.

SEC. 33. Section 21605 of the Elections Code is amended to read:

21605. (a) After redistricting or districting, a council shall not adopt new council district boundaries until after the next federal decennial census, except under the following circumstances:

(1) A court orders the council to redistrict.

(2) The council is settling a legal claim that its council district boundaries violate the United States Constitution, the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.), or this article.

(3) The boundaries of the city change by the addition of territory pursuant to Section 21603 or by the subtraction of territory.

(4) The number of council members elected by districts or from districts is increased or decreased.

(5) An independent redistricting commission is established pursuant to Section 23003 to adopt new council districts between federal decennial censuses and the districts being replaced were adopted by the city council.

(b) This section does not prohibit a council from adopting council districts between federal decennial censuses if the council is adopting council districts for the first time, including when a city adopts council districts for the purpose of transitioning from electing its council members in at-large elections to elections by districts or from districts.

SEC. 34. Section 21606 of the Elections Code is amended to read:

21606. (a) The term of office of any council member who has been elected and whose term of office has not expired shall not be affected by any change in the boundaries of the district from which the council member was elected and that member shall continue to represent the constituents residing in the district boundaries from which the member was elected for the duration of that term of office. This section does not prevent a city council from assigning a city elected official or city official to provide constituent services to residents of an area that is temporarily not represented by a council member due to redistricting.

(b) At the first election for council members in each city following adoption of the boundaries of council districts, excluding a special election to fill a vacancy or a recall election, a council member shall be elected for each district under the new district plan that has the same district number as a district whose incumbent's term is due to expire. This subdivision does not apply when a city transitions from at-large to district-based elections.

(c) Except as provided in subdivision (a), a person is not eligible to hold office as a member of a city council unless that person meets the requirements of Section 201 of the Elections Code and Section 34882 of the Government Code.

SEC. 35. Section 21607 of the Elections Code is repealed.

SEC. 36. Section 21607.1 of the Elections Code is repealed.

SEC. 37. Section 21608 of the Elections Code is repealed.

SEC. 38. Section 21609 of the Elections Code is repealed.

SEC. 39. Section 21620 of the Elections Code is amended to read:

21620. This article applies to a charter city that elects members of the city's legislative body by districts or from districts, as those terms are defined in Section 34871 of the Government Code.

SEC. 40. Section 21621 of the Elections Code is amended to read:

21621. Following a city's decision to elect its council using district-based elections, or following each federal decennial census for a city whose council is already elected using district-based elections, the council shall, by ordinance or resolution, adopt boundaries for all of the council districts of the city pursuant to Chapter 2 (commencing with Section 21100).

SEC. 41. Section 21622 of the Elections Code is repealed.

SEC. 42. Section 21623 of the Elections Code is amended to read:

21623. (a) If the boundaries of a city expand by the addition of new territory, including through annexation of unincorporated territory or consolidation with another city, the council shall add that new territory to the nearest existing council district without changing the boundaries of other council district boundaries.

(b) Notwithstanding subdivision (a), the council may adopt new boundaries for each council district pursuant to Chapter 2 (commencing with Section 21100) if the boundaries of the city expand by the addition of new territory and if both of the following conditions are met:

(1) There are more than four years until the council is next required to redistrict pursuant to Section 21621.

(2) The population of the new territory being annexed or consolidated is greater than 25 percent of the city's population as determined by the most recent federal decennial census.

(c) This section does not apply to a charter city that has adopted, by ordinance or in its city charter, a different standard for adding new territory to existing council districts.

SEC. 43. Section 21625 of the Elections Code is amended to read:

21625. (a) After redistricting or districting, a council shall not adopt new council district boundaries until after the next federal decennial census, except under the following circumstances:

(1) A court orders the council to redistrict.

(2) The council is settling a legal claim that its council district boundaries violate the United States Constitution, the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.), or this article.

(3) The boundaries of the city change by the addition of territory pursuant to Section 21623 or by the subtraction of territory.

(4) The number of council members elected by districts or from districts is increased or decreased.

(5) An independent redistricting commission, whose members are not directly appointed by the legislative body or an elected official of the local jurisdiction, is established to adopt new council

districts between federal decennial censuses and the districts being replaced were adopted by the city council.

(b) This section does not prohibit a council from adopting council districts between federal decennial censuses if the council is adopting council districts for the first time, including when a city adopts council districts for the purpose of transitioning from electing its council members in at-large elections to elections by districts or from districts.

(c) This section does not apply to a charter city that has adopted different rules for mid-cycle redistricting in its city charter.

SEC. 44. Section 21626 of the Elections Code is amended to read:

21626. (a) The term of office of any council member who has been elected and whose term of office has not expired shall not be affected by any change in the boundaries of the district from which the council member was elected and that member shall continue to represent the constituents residing in the district boundaries from which the member was elected for the duration of that term of office. This section does not prevent a city council from assigning a city elected official or city official to provide constituent services to residents of an area that is temporarily not represented by a council member due to redistricting.

(b) At the first election for council members in each city following adoption of the boundaries of council districts, excluding a special election to fill a vacancy or a recall election, a council member shall be elected for each district under the new district plan that has the same district number as a district whose incumbent's term is due to expire. This subdivision does not apply when a city transitions from at-large to district-based elections.

(c) For a city employing both a primary and a general election, a change in the boundaries of a council district shall not be made between the direct primary election and the general election.

(d) Except as provided in subdivision (a), a person is not eligible to hold office as a member of a city council unless that person meets the requirements of Section 201 of the Elections Code and Section 34882 of the Government Code.

SEC. 45. Section 21627 of the Elections Code is repealed.

SEC. 46. Section 21627.1 of the Elections Code is repealed.

SEC. 47. Section 21628 of the Elections Code is repealed.

SEC. 48. Section 21629 of the Elections Code is repealed.

SEC. 49. Section 21630 of the Elections Code is amended to read:

21630. If a council assigns the responsibility to recommend or to adopt new district boundaries to a hybrid or independent redistricting commission as defined in Section 23000, the charter city remains subject to the redistricting deadlines, requirements, and restrictions that apply to the council under this article and Chapter 2 (commencing with Section 21100), unless otherwise exempted by law. A redistricting commission described in this section may perform the duties required of a city council under this article.

SEC. 50. Section 22000 of the Elections Code is amended to read:

22000. (a) Following a special district's decision to elect its board of directors using district-based elections, or following each federal decennial census for a special district whose board of directors is already elected using district-based elections, the board of directors shall, by resolution, adopt boundaries for all of the divisions of the special district pursuant to Chapter 2 (commencing with Section 21100).

(b) The resolution specified in subdivision (a) shall be adopted by a vote of not less than a majority of the directors.

(c) At the time of, or after, any annexation of territory to the district, the board of directors shall designate, by resolution, the division of which the annexed territory shall be a part.

(d) Except as provided in Section 21140, no change in division boundaries may be made within 180 days preceding the election of any director.

(e) (1) A change in division boundaries shall not affect the term of office of any director.

(2) If division boundaries are adjusted, the director of the division whose boundaries have been adjusted shall continue to be the director of the division bearing the number of that division as formerly comprised until the office becomes vacant by means of term expiration or otherwise, whether or not the director is a resident within the boundaries of the division as adjusted. The director shall continue to represent the constituents residing in the district boundaries from which the director was elected for the duration of that term of office. This section does not prevent a board from assigning a director or special district official to provide

constituent services to residents of an area that is temporarily not represented by a director due to redistricting.

(f) The successor to the office in a division whose boundaries have been adjusted shall be a resident and voter of that division.

(g) A district is not required to adjust the boundaries of any divisions pursuant to this section until after the 2000 federal decennial census.

(h) This section shall not be construed to prohibit or restrict a district from adjusting the boundaries of any divisions pursuant to Chapter 2 (commencing with Section 21100) whenever the board of directors of the district determines by a two-thirds vote of the board that a sufficient change in population has occurred that makes it desirable in the opinion of the board to adjust the boundaries of any divisions, or whenever any territory is added by or excluded from the district.

SEC. 51. Section 22001 of the Elections Code is repealed.

SEC. 52. Section 22001 is added to the Elections Code, to read:

22001. This chapter and Chapter 2 (commencing with Section 21100) do not apply to special districts in which only landowners vote for directors or whose directors are all elected at large or appointed.

SEC. 53. Section 22002 of the Elections Code is repealed.

SEC. 54. Section 23002 of the Elections Code is amended to read:

23002. (a) This section applies to advisory redistricting commissions.

(b) Notwithstanding any other law, the local jurisdiction may prescribe the manner in which members are appointed to the commission, provided that the commissioners are not appointed by the legislative body or an elected official of the local jurisdiction.

(c) A person who is an elected official of the local jurisdiction, or a family member, staff member, or paid campaign staff of an elected official of the local jurisdiction, shall not be appointed to serve on the commission.

(d) A local jurisdiction may impose additional requirements or restrictions on the commission, members of the commission, or applicants to the commission in excess of those prescribed by this section.

(e) The commission is subject to the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code) and the California Public Records Act (Division 10 (commencing with Section 7920.000) of Title 1 of the Government Code).

SEC. 55. Section 23003 of the Elections Code is amended to read:

23003. (a) This section applies to hybrid redistricting commissions and independent redistricting commissions.

(b) Notwithstanding any other law, the local jurisdiction may prescribe the manner in which members are appointed to the commission, provided that the jurisdiction uses an application process open to all eligible residents and provided that the commissioners are not appointed by the legislative body or an elected official of the local jurisdiction.

(c) A person shall not be appointed to serve on the commission if the person or any family member of the person has been elected or appointed to, or been a candidate for, an elective office of the local jurisdiction in the eight years preceding the person's application.

(d) A person shall not be appointed to serve on the commission if either of the following applies:

(1) The person or the person's spouse has done any of the following in the eight years preceding the person's application:

(A) Served as an officer of, employee of, or paid consultant to, a campaign committee or a candidate for elective office of the local jurisdiction.

(B) Served as an officer of, employee of, or paid consultant to, a political party or as an elected or appointed member of a political party central committee.

(C) Served as a staff member or a consultant to, or who has contracted with, a currently serving elected officer of the local jurisdiction.

(D) Been registered to lobby the local jurisdiction.

(E) Contributed five hundred dollars ($500) or more in a year to any candidate for an elective office of the local jurisdiction. The local jurisdiction may adjust this amount by the cumulative change in the California Consumer Price Index, or its successor, in every year ending in zero.

(2) A family member of the person, other than the person's spouse, has done any of the following in the four years preceding the person's application:

(A) Served as an officer of, employee of, or paid consultant to, a campaign committee or a candidate for elective office of the local jurisdiction.

(B) Served as an officer of, employee of, or paid consultant to, a political party or as an elected or appointed member of a political party central committee.

(C) Served as a staff member of or consultant to, or has contracted with, a currently serving elected officer of the local jurisdiction.

(D) Been registered to lobby the local jurisdiction.

(E) Contributed five hundred dollars ($500) or more in a year to any candidate for an elective office of the local jurisdiction. The local jurisdiction may adjust this amount by the cumulative change in the California Consumer Price Index, or its successor, in every year ending in zero.

(e) A member of the commission shall not do any of the following:

(1) While serving on the commission, endorse, work for, volunteer for, or make a campaign contribution to, a candidate for an elective office of the local jurisdiction.

(2) Be a candidate for an elective office of the local jurisdiction if any of the following is true:

(A) Less than five years has elapsed since the date of the member's appointment to the commission.

(B) The election for that office will be conducted using district boundaries that were adopted by the commission on which the member served, and those district boundaries have not been subsequently readopted by a commission after the end of the member's term on the commission.

(C) The election for that office will be conducted using district boundaries that were adopted by a legislative body pursuant to a recommendation by the commission on which the member served, and those district boundaries have not been subsequently readopted by a legislative body pursuant to a recommendation by a commission after the end of the member's term on the commission.

(3) For four years commencing with the date of the person's appointment to the commission:

(A) Accept employment as a staff member of, or consultant to, an elected official or candidate for elective office of the local jurisdiction.

(B) Receive a noncompetitively bid contract with the local jurisdiction.

(C) Register as a lobbyist for the local jurisdiction.

(4) For two years commencing with the date of the person's appointment to the commission, accept an appointment to an office of the local jurisdiction.

(f) The commission shall not be comprised entirely of members who are registered to vote with the same political party preference.

(g) Each member of the commission shall be a designated employee in the conflict of interest code for the commission pursuant to Article 3 (commencing with Section 87300) of Chapter 7 of Title 9 of the Government Code.

(h) The commission is subject to the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code) and the California Public Records Act (Division 10 (commencing with Section 7920.000) of Title 1 of the Government Code).

(i) The commission shall be subject to the same redistricting deadlines, requirements, and restrictions that would otherwise apply to a legislative body. A local jurisdiction may also impose additional requirements and restrictions on the commission, on members of the commission, or on applicants to the commission in excess of those prescribed by this section.

(j) The commission shall publish a map of the proposed new district boundaries and make that map available to the public for at least seven days before that map may be adopted. The commission shall hold at least three public hearings preceding the hearing at which the new boundaries are adopted.

(k) The commission shall not draw districts for the purpose of favoring or discriminating against a political party or an incumbent or political candidate.

(*l*) District boundaries adopted by an independent redistricting commission or adopted by a legislative body from recommendations provided by a hybrid redistricting commission, shall not be altered by the legislative body or the commission until after the next federal decennial census occurs, unless those boundaries have been invalidated by a final judgment or order of a court of competent jurisdiction.

(m) For the purposes of subdivisions (c) and (d), "local jurisdiction" does not include a local jurisdiction that contracts with a county independent redistricting commission pursuant to Section 23004.

SEC. 55.5. Section 23003 of the Elections Code is amended to read:

23003. (a) This section applies to hybrid redistricting commissions, and to independent redistricting commissions, including independent redistricting commissions established by an ordinance, resolution, or charter amendment of the local jurisdiction, as described in Section 23001.5, and independent redistricting commissions established pursuant to Section 23005 or Section 23006.

(b) (1) Notwithstanding any other law, the local jurisdiction may prescribe the manner in which members are appointed to the commission, provided that the jurisdiction uses an application process open to all eligible residents and provided that the commissioners are not appointed by the legislative body or an elected official of the local jurisdiction.

(2) Paragraph (1) does not apply to a local jurisdiction required to establish an independent redistricting commission pursuant to Section 23005 or Section 23006.

(c) A person shall not be appointed to serve on the commission if the person or any family member of the person has been elected or appointed to, or been a candidate for, an elective office of the local jurisdiction in the eight years preceding the person's application.

(d) A person shall not be appointed to serve on the commission if either of the following applies:

(1) The person or the person's spouse has done any of the following in the eight years preceding the person's application:

(A) Served as an officer of, employee of, or paid consultant to, a campaign committee or a candidate for elective office of the local jurisdiction.

(B) Served as an officer of, employee of, or paid consultant to, a political party or as an elected or appointed member of a political party central committee.

(C) Served as a staff member or a consultant to, or who has contracted with, a currently serving elected officer of the local jurisdiction.

(D) Been registered to lobby the local jurisdiction.

(E) Contributed five hundred dollars ($500) or more in a year to any candidate for an elective office of the local jurisdiction. The local jurisdiction may adjust this amount by the cumulative change in the California Consumer Price Index, or its successor, in every year ending in zero.

(2) A family member of the person, other than the person's spouse, has done any of the following in the four years preceding the person's application:

(A) Served as an officer of, employee of, or paid consultant to, a campaign committee or a candidate for elective office of the local jurisdiction.

(B) Served as an officer of, employee of, or paid consultant to, a political party or as an elected or appointed member of a political party central committee.

(C) Served as a staff member of or consultant to, or has contracted with, a currently serving elected officer of the local jurisdiction.

(D) Been registered to lobby the local jurisdiction.

(E) Contributed five hundred dollars ($500) or more in a year to any candidate for an elective office of the local jurisdiction. The local jurisdiction may adjust this amount by the cumulative change in the California Consumer Price Index, or its successor, in every year ending in zero.

(e) A member of the commission shall not do any of the following:

(1) While serving on the commission, endorse, work for, volunteer for, or make a campaign contribution to, a candidate for an elective office of the local jurisdiction.

(2) Be a candidate for an elective office of the local jurisdiction if any of the following is true:

(A) Less than five years has elapsed since the date of the member's appointment to the commission.

(B) The election for that office will be conducted using district boundaries that were adopted by the commission on which the member served, and those district boundaries have not been subsequently readopted by a commission after the end of the member’s term on the commission.

(C) The election for that office will be conducted using district boundaries that were adopted by a legislative body pursuant to a recommendation by the commission on which the member served, and those district boundaries have not been subsequently readopted by a legislative body pursuant to a recommendation by a commission after the end of the member’s term on the commission.

(3) For four years commencing with the date of the person’s appointment to the commission:

(A) Accept employment as a staff member of, or consultant to, an elected official or candidate for elective office of the local jurisdiction.

(B) Receive a noncompetitively bid contract with the local jurisdiction.

(C) Register as a lobbyist for the local jurisdiction.

(4) For two years commencing with the date of the person’s appointment to the commission, accept an appointment to an office of the local jurisdiction.

(f) The commission shall not be comprised entirely of members who are registered to vote with the same political party preference.

(g) Each member of the commission shall be a designated employee in the conflict of interest code for the commission pursuant to Article 3 (commencing with Section 87300) of Chapter 7 of Title 9 of the Government Code.

(h) The commission is subject to the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code) and the California Public Records Act (Division 10 (commencing with Section 7920.000) of Title 1 of the Government Code).

(i) The commission shall be subject to the same redistricting deadlines, requirements, procedures, criteria, and restrictions that would otherwise apply to a legislative body. A local jurisdiction may also impose additional requirements and restrictions on the commission, on members of the commission, or on applicants to the commission in excess of those prescribed by this section.

(j) The commission shall publish a map of the proposed new district boundaries and make that map available to the public for at least seven days before that map may be adopted. The commission shall hold at least three public hearings preceding the hearing at which the new boundaries are adopted, or the number of public hearings that would otherwise apply to the legislative body for which district boundaries are being drawn, whichever is greater.

(k) The commission shall not draw districts for the purpose of favoring or discriminating against a political party or an incumbent or political candidate.

(*l*) District boundaries adopted by an independent redistricting commission or adopted by a legislative body from recommendations provided by a hybrid redistricting commission, shall not be altered by the legislative body or the commission until after the next federal decennial census occurs, unless those boundaries have been invalidated by a final judgment or order of a court of competent jurisdiction, or as may be necessary to account for changes to a jurisdiction's territory, including changes through annexation or consolidation.

(m) For the purposes of subdivisions (c) and (d), "local jurisdiction" does not include a local jurisdiction that contracts with a county independent redistricting commission pursuant to Section 23004.

SEC. 56. Section 34874 of the Government Code is amended to read:

34874. (a) An amendatory ordinance altering the boundaries of the legislative districts established pursuant to this article shall not be submitted to the registered voters until the ordinance has been submitted to the planning commission of the city or, in absence of a planning commission, to the legislative body of said city for an examination as to the definiteness and certainty of the boundaries of the legislative districts proposed.

(b) An amendatory ordinance altering the boundaries of legislative districts shall comply with the requirements and criteria of Section 21130 of the Elections Code.

SEC. 57. Section 34877.5 of the Government Code is amended to read:

34877.5. (a) After an ordinance is passed by the voters pursuant to Section 34876.5, or after an ordinance is enacted by the legislative body pursuant to Section 34886, the legislative body shall prepare a proposed map that describes the boundaries and numbers of the districts for the legislative body. In preparing the proposed map, the legislative body shall comply with the requirements and criteria of Section 21130 of the Elections Code and shall seek public input, including accepting proposed maps submitted by the public.

(b) If the legislative body is changing from an at-large method of election to a district-based election, as those terms are defined in Section 14026 of the Elections Code, the legislative body shall hold public hearings pursuant to Section 10010 of the Elections Code. If the legislative body is otherwise adjusting the district boundaries, the legislative body shall hold public hearings on the proposed district boundaries pursuant to Section 21150 of the Elections Code.

SEC. 58. Section 34884 of the Government Code is amended to read:

34884. (a) If, at the time a vote is held on the subject of incorporation of a new city, a majority of the votes cast is for incorporation and, if, in accordance with Section 57116, a majority of the votes cast on the question of whether members of the city council in future elections are to be elected by district or at large is in favor of election by district, all of the following procedures apply:

(1) Before the first day on which voters may nominate candidates for election at the next regular municipal election, the legislative body shall, by ordinance or resolution, establish the boundaries of the districts of the legislative body. The districts shall be substantially equal in population as required by the United States Constitution. The districts shall comply with the requirements and criteria of Section 21130 of the Elections Code.

(2) The terms of office of the two members elected with the lowest vote shall expire on the Tuesday succeeding the next regular municipal election. At that election, members shall be elected by district in the even-numbered districts and shall hold office for four years.

(3) The terms of office of the three members elected with the highest vote shall expire on the Tuesday succeeding the second regular municipal election following the incorporation. At that election, members shall be elected by district in the odd-numbered districts and shall hold office for four years.

(b) The result of the vote cast on the question of whether members of the city council in future elections are to be elected by district or at large shall not preclude the submission to the voters at any future election of a measure in accordance with Section 34871.

SEC. 59. Section 34886 of the Government Code is amended to read:

34886. Notwithstanding Section 34871 or any other law, the 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 comply with the requirements and criteria of Section 21130 of the Elections Code and 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 (Chapter 1.5 (commencing with Section 14025) of Division 14 of the Elections Code).

SEC. 60. Section 57301 of the Government Code is amended to read:

57301. If at any time between each decennial federal census, a city annexes or detaches territory or consolidates with another city, the city council of the city annexing or detaching the territory or the city council of the successor city, may reexamine the boundaries of its council districts pursuant to Section 21603 or 21623 of the Elections Code, as applicable.

SEC. 61. The district boundary criteria specified in this act apply to election district boundaries that are adopted or readopted on or after January 1, 2024. Election district boundaries adopted before January 1, 2024, shall comply with the applicable district boundary criteria in effect at the time of their adoption.

SEC. 62. The Legislature finds and declares that, as to cities and counties, many of the provisions of Chapter 2 (commencing with 21100) of Division 21 of the Elections Code, as added by this act, do not constitute a change in, but are declaratory of, existing law, and that a court should not draw a contrary inference based on the language of this act in resolving an action brought under the prior rules for city and county redistricting.

SEC. 63. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 64. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

SEC. 65. Section 55.5 of this bill incorporates amendments to Section 23003 of the Elections Code proposed by both this bill and Assembly Bill 1248. That section shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2024, (2) each bill amends Section 23003 of the Elections Code, and (3) this bill is enacted after Assembly Bill 1248, in which case Section 55 of this bill shall not become operative.

Approved ______________________________, 2023

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Governor

Labor and Employment Litigation Update

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Labor and Employment Litigation Update

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Labor and Employment Litigation Update Fall 2025

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I. INTRODUCTION

In the last several months, California and Federal courts have decided a number of new cases that will shape employment and labor practices for the public sector employers. Recent court decisions discussed in this paper cover a wide range of employment and labor issues that public sector employers commonly face. Amongst these decisions are a case brought by a police captain who was successful in an action in which she was harassed by second hand knowledge that her harassment, i.e., the sharing of a photograph, was taking place. Another decision clarified to some degree when elected official can sue under employment laws, and another discusses the risks associated with a public officials' social media activity. While we do not believe there is a significant pattern with these decisions, it is clear that employment and labor law litigation remains robust and is an area cities and other public agencies must be cognizant of from a risk management perspective.

II. CASES

Chapter 1: Whistleblower Retaliation

Lampkin v. County of Los Angeles (2025) 112 Cal.App.5th 920 – An employee's action is not successful if the defendant employer has established the same-decision defense and the plaintiff obtains no relief

On August 22, 2017, Plaintiff Lampkin ("Lampkin"), a deputy with the Los Angeles County Sheriff's Department (LASD), filed a complaint in California state court against the County of Los Angeles, alleging a single cause of action for whistleblower retaliation in violation of Labor Code section 1102.5. The complaint arose from a March 2016 investigatory stop by Lampkin involving Michael Reddy ("Reddy"), a retired LASD deputy, whom Lampkin suspected of soliciting a prostitute. According to Lampkin, Reddy attempted to leverage his former position and LASD connections to discourage any enforcement action against him. Reddy, in contrast, alleged misconduct by Lampkin, including an inappropriate comment made in the presence of Reddy's companion.

Following the incident, Lampkin reported the matter to his supervisor, while Reddy filed a formal complaint against Lampkin with LASD. Lampkin subsequently alleged that he suffered retaliation for his report, including suspension, a search of his residence, and termination of medical benefits. His original complaint sought only monetary damages, omitting requests for injunctive or declaratory relief.

The case proceeded to a jury trial in January 2023. On February 10, 2023, the jury returned a special verdict finding that Lampkin had engaged in protected activity under section 1102.5 and that such activity was a contributing factor in the adverse employment actions taken against him. However, the jury also found that LASD would have taken the same actions irrespective of the protected activity, in accordance with Labor Code section 1102.6. As a result, no damages were awarded.

Following trial, Lampkin moved to amend his complaint to include claims for injunctive and declaratory relief, which the trial court denied. He also sought a prevailing party determination and an award of costs, relying on *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, in which the California Supreme Court held that a same-decision defense under the Fair Employment and Housing Act (FEHA) does not preclude a prevailing plaintiff from recovering fees and costs. The trial court extended *Harris* to Labor Code section 1102.5 claims, declared Lampkin the prevailing party, and awarded him $52,043.65 in costs. On March 8, 2024, the court further awarded $400,000 in attorney's fees.

The County timely appealed from both the January 22, 2024 judgment and the March 8, 2024 fee award.

On appeal, the Court held that although Lampkin was able to prove the necessary elements of his/her required whistleblower retaliation claim, the County successfully established a "same decision" defense in accordance with Labor Code section 1102.6. The County was able to establish this defense by showing that they would have terminated Lampkin for a reason entirely separate from his whistleblower activity. As such, Lampkin was not entitled to recover any damages. Therefore, because Lampkin obtained no relief-no damages, no injunctive or declaratory remedy- the appellate court held his action was not successful, and therefore no fee award was authorized.

Chapter 2: Social Media Use By Public Official

Garnier v. O'Connor-Ratcliff (9th Cir. 2025) 136 F.4th 1181 – Public Official's Activity on Personal Social Media accounts like Twitter and Facebook can create liability as state action

Plaintiffs Christopher and Kimberly Garnier (collectively the "Garniers") are parents of children enrolled in the Poway Unified School District ("PUSD"). Defendants Michelle O'Connor-Ratcliff ("O'Connor-Ratcliff") and T.J. Zane ("Zane") (collectively the "Trustees") were, at the relevant times, members of the PUSD Board of Trustees. During and following their 2014 election campaigns, both Trustees operated public-facing social media accounts (on Facebook and Twitter), which they used to share updates regarding PUSD activities, announce Board meetings, and solicit community input.

Beginning in 2015, the Garniers frequently posted critical comments on the Trustees' social media pages, often duplicating messages across posts. In response, the Trustees initially deleted or hid the comments but eventually blocked the Garniers altogether from their accounts—O'Connor-Ratcliff blocked both Garniers on Facebook and Christopher Garnier on Twitter; Zane blocked both on Facebook.

The Garniers filed a civil rights action under 42 U.S.C. section 1983 against the Trustees and the District, alleging that the Trustees' social media pages constituted designated public fora and that blocking them constituted a violation of their First Amendment rights. They sought damages, declaratory relief, and injunctive relief.

At summary judgment, the district court held that the Trustees acted under color of state law, that their social media pages were designated public fora, and granted them qualified immunity as to damages. Following a two-day bench trial, the court concluded that although the Trustees' initial decision to block the Garniers was narrowly tailored to prevent repetitive postings, the indefinite nature of the blocking was not justified. The district court ruled in favor of the Garniers on their section 1983 claims and issued an injunction requiring the Trustees to unblock them.

On appeal, the Ninth Circuit affirmed the district court's findings, including the determinations on state action, forum designation, and the qualified immunity ruling. The Trustees petitioned for certiorari, which the Supreme Court granted.

Subsequently, in *Lindke v. Freed* (2024)601 U.S. 187 (2024), the Supreme Court clarified the standard for when public officials' social media conduct constitutes state action. In light of *Lindke*, the Court vacated the Ninth Circuit's prior decision in Garnier and remanded for further proceedings. On remand, the Ninth Circuit ordered supplemental briefing and held additional oral argument to reconsider the case under the new *Lindke* standard.

Per the *Lindke* Standard, "the Supreme Court held that a public official's social media activity constitutes state action for purposes of section 1983 "only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media." 601 U.S. at 198.[1] Under *Lindke*, the Ninth Circuit held that O'Connor Ratliff's actions on social media met the standard under *Lindke*.

California Law and PUSD bylaws, specifically Bylaw 9012 which conferred authority to communicate with the public about district matters, led to the holding that the first element of *Lindke* was met. O' Connor-Ratcliff's posting of official district content such as (e.g., Board meeting details, superintended announcements) showed the exercise of entrusted duties.

The Court held that the second element *Lindke* was also satisfied. On the social media account that O'Connor-Ratcliff used, she identified herself as Board president, and used this account separately from her personal account. Additionally, the content of posts were focused on PUSD business, with little to no posts regarding her personal or campaign-related content.

[1] *Garnier v. O'Connor-Ratcliff* (9th Cir. 2025) 136 F.4th 1181, 1185.

Chapter 3: Elected Officials' Ability to Sue Under Employment Law

Brown v. City of Inglewood (2025) 18 Cal.5th 33 – Elected official is not an employee who can sue for whistleblower retaliation under labor code section 1102.5

Wanda M. Brown ("Brown") served as the elected treasurer of the City of Inglewood ("City") since 1987. In late 2019 and early 2020, she raised concerns to City officials regarding alleged financial mismanagement, including an alleged overpayment of approximately $77,000 to a contractor, which she claimed violated Penal Code section 424. Following these allegations, Brown claimed she faced a series of retaliatory actions by the City and its officials, including diminished authority, loss of access to financial tools and documents, exclusion from committees and City Hall, demotion from auditing duties, and a significant salary reduction.

Brown filed suit under Labor Code section 1102.5, asserting whistleblower retaliation. The defendants moved to strike the claim under California's anti-SLAPP statute, arguing Brown was not an "employee" under the statute and thus not entitled to its protections.

The trial court denied the anti-SLAPP motion, holding the claim did not arise from protected activity under the statute. On appeal, the Court of Appeal reversed in part, holding the individual defendants' conduct was protected under the anti-SLAPP statute and that Brown, as an elected official, was not an employee for purposes of section 1102.5. The court relied on the statutory definition in Labor Code section 1106, which excludes elected officials, contrasting it with broader definitions in other contexts.

The California Supreme Court granted review, limiting the issue to whether elected officials qualify as employees under Labor Code section 1102.5(b).

The Supreme Court held that Labor Code section 1102.5 is limited to individuals who satisfy the statutory definition of "employee" under Labor Code section 1106. Under Labor Code section 1106, elected officials are expressly excluded. The legislative history of Labor Code section 1106 suggested a "particular purpose of protecting rank-and-file employees from supervisors and managers, not protecting elected officials." (See *Brown v. City of Inglewood* (2025) 18 Cal.5th 33, 44.) Therefore, elected officials cannot claim whistleblower protection under section 1102.5, regardless of the legitimacy of their claim or reporting.

Chapter 4: Public Agencies' Liability for Alleged Labor Code Violations

Krug v. Board of Trustees of California State University (2025) 110 Cal.App.5th234 – Unless specifically mentioned, the labor code does not apply to public sector employers

The California State University (CSU) system directed faculty to teach remotely in March 2020 due to the COVID-19 pandemic. Plaintiff Krug ("Krug") complied, but was denied access to his campus office and incurred personal expenses to replace work-related equipment. When CSU refused to reimburse these costs, Krug filed a class action alleging a violation of Labor Code section 2802, which requires employers to indemnify employees for necessary business expenses.

Krug later amended the complaint to add a Private Attorneys General Act (PAGA) claim based on the same facts, but later conceded that claim was not viable. CSU demurred, arguing that as a state agency, it was not subject to Labor Code section 2802 absent express legislative intent. The trial court sustained the demurrer without leave to amend, finding CSU exempt from the statute and holding that the lack of a statutory violation defeated the PAGA claim.

Krug appealed the judgment of dismissal. The California Supreme Court granted review pending its decision in *Stone v. Alameda Health System* (2024) 16 Cal.5th 1040.

Applying its holding in *Stone*, the Supreme Court held that Labor Code section 2802 does not apply to the CSU. The analytical framework of *Stone* requires an evaluation of a Labor Code by asking three questions:

- Does section 2802 reference its application to public employers?
- Does legislative history support Labor Code section 2802's application to public employers?
- Lastly, does applying Labor Code section to public employers infringe on sovereign governmental powers?

The Supreme Court found that Labor Code section 2802 makes no reference to a public entity, there was no legislative history suggesting the section was meant to apply to public entities, and that imposing Labor Code section 2802 on public entities would infringe on the CSUs authority to govern equipment policies and reimbursements. The Supreme Court referenced *Stone's* citing of *U. S. v. Hoar* in support of its conclusions, stating:

> [T]he general words of a statute should not include the government "unless that construction be clear and indisputable upon the text of the act." (*U.S. v. Hoar* (C.C.D. Mass. 1821) 26 F.Cas. 329, 330 (No. 15373) ["It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act"].) Our Supreme Court quoted *U.S. v. Hoar* for this rule in *Mayrhofer v. Board of Education* (1891) 89 Cal. 110, 112 [26 P. 646], which the court quoted in *Stone* to support its holding that it "is deeply embedded in our state's jurisprudence" that "absent express words to the contrary, governmental agencies are not included within the general words of a statute.'" (*Krug v. Board of Trustees of California State University* (2025) 110 Cal.App.5th 234, 250-251 [citing (*Stone*, *supra*, 16 Cal.5th at 1053].)

The Supreme Court concluded that although Labor Code section 2802 is silent on whether "employer" denotes both public and private entities, the statutory structure and legislative history indicate that the legislature intended to exclude public employers from Labor

Code section 2802's reimbursement obligations.[2] Therefore, Labor Code section2802 does not obligate public entities like CSU to reimburse employees for work-related expenses.

Chapter 5: Discrimination/Reverse Discrimination

Ames v. Ohio Department of Youth Services (2025) 145 S.Ct. 1540 – A plaintiff in "reverse discrimination" case has the same evidentiary burden as a minority plaintiff

In 2004, Marlean Ames ("Ames"), a heterosexual woman, was hired by the Ohio Department of Youth Services and later promoted to program administrator. In 2019, she applied for a newly created management position, but was not selected (the position went to a lesbian woman instead). Shortly after her interview, Ames was removed from her program administrator role and accepted a demotion back to her original secretarial position, resulting in a substantial pay cut. The agency later appointed a gay man to her former program administrator post.

Ames filed suit under Title VII, alleging that the agency discriminated against her based on her sexual orientation. The U.S. District Court for the Southern District of Ohio granted summary judgment to the agency, applying the *McDonnell Douglas* framework and concluding Ames failed to establish a prima facie case. The court required her, as a member of a majority group, to show "background circumstances" suggesting the agency was especially likely to discriminate against majority-group members than minorities—an evidentiary hurdle she did not meet.

The Sixth Circuit affirmed, reiterating that majority-group plaintiffs must meet this additional burden at the prima facie stage. The panel found Ames had not produced sufficient evidence of discriminatory background circumstances. Judge Kethledge concurred in the result, but criticized the "background circumstances" requirement as inconsistent with Title VII.

The U.S. Supreme Court granted certiorari to resolve a circuit split on whether majority-group plaintiffs must meet a different evidentiary standard under the *McDonnell Douglas* framework.

The Supreme Court held that the additional hurdle for majority plaintiffs is not consistent with Title VII's text or case law construing the statute. The Court specifically held that:

> "Our case law thus makes clear that the standard for proving disparate treatment under Title VII does not vary based on whether or not the plaintiff is a member of a majority group. Accord, *Bostock*, 590 U. S., at 659, 140 S. Ct. 1731, 207 L. Ed. 2d 218 ("This statute works to protect individuals of both sexes from discrimination, and does so equally"). The "background circumstances" rule flouts that basic

[2] *Krug v. Board of Trustees of California State University* (2025) 110 Cal.App.5th 234, 258 [331 Cal.Rptr.3d 358].)

principle.…"(See *Ames v. Ohio Dep't of Youth Servs.* (2025),U.S.,[145 S.Ct. 1540, 1546, 221 L.Ed.2d 929, 937].).

Therefore, it is inappropriate to require a Title VII plaintiff who is a member of a majority to meet the additional hurdle of the "background circumstances" rule.

Lui v. DeJoy (9th Cir. 2025) 129 F.4th 770 – A post office supervisor can proceed with title VII Claims for disparate treatment and harassment by her subordinates

Marlean Lui ("Lui"), a Chinese American woman in her late fifties, worked for the U.S. Postal Service (USPS) since 1992 and became Postmaster of the Shelton, Washington Post Office in 2014. Following her appointment, she allegedly faced racially and sexually charged harassment from employees, including slurs and unfounded complaints. She and her supervisor, Charles Roberts ("Roberts"), attributed this treatment to her race, sex, and national origin, citing that white male managers were not similarly targeted.

Roberts reported concerns to USPS Human Resources Manager Alexis Delgado ("Delgado"), alleging that certain employees, including a union representative, were targeting Lui. Instead of investigating, Delgado allegedly collaborated with those pursuing disciplinary action against Lui. Roberts also stated he was pressured by Delgado and another manager to support disciplinary measures against Lui, which he believed were racially motivated.

Ultimately, Lui received a notice of proposed downgrade based on three misconduct charges. Roberts refused to sign the notice, and was replaced by another manager who did. Lui filed an informal EEO complaint, then a formal complaint, alleging a hostile work environment, discrimination based on protected characteristics, and retaliation. She also appealed the downgrade through USPS and the Merit Systems Protection Board, both of which upheld the demotion. Lui was reassigned to a lower-paid Postmaster position in Roy, Washington, and replaced at Shelton by a less-experienced white man.

Lui then filed suit in federal district court. USPS moved for summary judgment. A magistrate recommended dismissal only of her retaliation claim, but the district court granted summary judgment on all claims. Lui appealed.

On appeal, the Ninth Circuit held that Lui met the fourth element of McDonnel Douglas by showing that she was demoted and replaced by a white man. This action sufficed to raise an inference of discrimination, and did not require that she show that she was treated less favorably than similarly situated employees. Additionally, the Ninth Circuit rejected USPS's rejected that the demotion stemmed from misconduct, ruling that the internal appeal, conducted solely through document review by the Tacoma Postmaster, was not independent. The reliance on potentially biased sources, without live interviews or credibility assessments, could lead a jury to reasonably infer subordinate bias influenced the decision.

The Ninth Circuit held that Lui had exhausted her administrative remedies by contacting an EEO counselor within 45 days of receiving the proposed downgrade. It further found that the demotion could reasonably be seen as part of a broader pattern of discriminatory mistreatment, contributing to a hostile work environment. Accordingly, the court vacated the summary judgment and remanded for further proceedings on this claim.

Lui also alleged that her demotion was retaliatory, tied to her involvement in investigating a sexual harassment complaint. However, the court affirmed summary judgment on this claim, finding no causal link between her investigative role and the demotion. The Tacoma Postmaster explicitly stated that the investigation was not considered in the decision, and there was no evidence of pretext.

The Ninth Circuit's decision underscores the importance of procedural fairness and evidentiary standards in employment discrimination cases. By recognizing Lui's replacement by a white male as sufficient to raise an inference of discrimination, and by finding flaws in the internal review process, the Court reinstated key claims for further proceedings.

Chapter 6: Retirement

Lowry v. Port San Luis Harbor Dist. (2025) 109 Cal.App.5th 56 – Denial of disability retirement benefits is not a legally cognizable adverse employment action for a disability discrimination claim

Lowry, a harbor patrol officer with the Port San Luis Harbor District ("District"), suffered physical and psychological injuries, including PTSD, after a work-related accident. His psychiatrist deemed him unfit to return to duty and recommended medical retirement. Based on this assessment, the District initially informed Lowry that he could not return to work and advised retirement as his only option.

Lowry applied for disability retirement, but the District later reversed its position and denied his application, stating it lacked sufficient information to determine disability. CalPERS also denied the application, citing the District's finding that Lowry was not incapacitated for duty. The District then terminated Lowry's employment, inaccurately stating that he had voluntarily resigned, a position it later conceded was incorrect.

After abandoning several claims, Lowry filed a first amended complaint asserting disability discrimination under California's Fair Employment and Housing Act (FEHA), alleging the denial of disability retirement constituted discrimination regarding a term or privilege of employment. The District moved for summary judgment, arguing Lowry could not perform his job's essential duties and that FEHA was not the proper vehicle for challenging denial of retirement benefits.

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[3] *Lowry v. Port San Luis Harbor Dist.* (2025) 109 Cal.App.5th 56, 66

The trial court granted summary judgment for the District, finding that disability retirement did not constitute a protected term or privilege of employment under FEHA. Lowry did not dispute that he was unable to return to work within 12 months of the injury, yet he appealed.

The Court held that postemployment retirement benefits—such as disability retirement benefits provided to individuals who are no longer qualified employees—do not fall within the scope of the "terms, conditions, or privileges of employment" as contemplated by FEHA (Government Code § 12940, subd. (a)). Because retirement benefits commence after employment ends, they are not "reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in [their] career" (Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1053-1054). Moreover, absent evidence that a disabled employee will be able to perform essential duties with or without reasonable accommodations in the future, disability retirement benefits do not assist such individuals in "hold[ing] employment." Therefore, Lowry was not entitled to retirement benefits required by FEHA.

Stanley v. City of Sanford (2025)606 U.S.___(145 S.Ct. 2058) – Retirees are not entitled to sue for disability discrimination under the ADA

Karyn Stanley ("Stanley") worked as a firefighter for the City of Sanford, Florida ("City"), beginning in 1999. At that time, the City provided health insurance until age 65 for retirees who either completed 25 years of service or retired earlier due to disability. In 2003, the City revised its policy, limiting health insurance for disability retirees to 24 months unless Medicare eligibility began sooner, while maintaining full coverage for 25-year retirees.

After developing an unspecified disability, Stanley was forced to retire in 2018, prior to completing 25 years of service. Under the revised policy, she received only limited post-retirement health insurance. She filed suit against the City, asserting, among other claims, that this differential treatment violated the Americans with Disabilities Act (ADA) as unlawful disparate treatment based on disability.

The district court dismissed her ADA claim, holding that Stanley was not a "qualified individual" under the ADA at the time of the alleged discrimination because she was no longer employed or seeking employment. The Eleventh Circuit affirmed, joining several other circuits in holding that ADA Title I protections do not extend to individuals who are not employed or seeking employment when the alleged discrimination occurs.

The U.S. Supreme Court granted certiorari to resolve the circuit split on whether 42 USCS section 12112(a) applies to disability-based discrimination against retirees who are no longer in the workforce or seeking employment.

The Supreme Court majority held that the ADA applies only to individuals who, at the time of the adverse action, "hold or desire" a job and can perform its essential functions with or without reasonable accommodation. Under 42 USCS section 2000e-5(e)(3)(A), the Supreme

Court considered three potential triggering events for filing a Title VII claim based on a discriminatory policy.

First, when the policy is adopted: Stanley failed here, as she suffered no injury in 2003 and was not disabled at that time. However, this avenue may remain open for plaintiffs who were both disabled and qualified when the policy was enacted.

Second, when an individual is affected by the policy's application: Stanley's benefits expired in 2020, but she was retired and no longer a "qualified" individual, precluding relief under this prong.

Third, when a person becomes subject to the policy: although the government argued Stanley became subject between her 2016 diagnosis and 2018 retirement, the complaint lacked necessary allegations regarding the timing of her disability and employment status. Moreover, Stanley expressly disclaimed this theory on appeal. The Eleventh Circuit found the claim forfeited, and the Supreme Court declined to disturb the lower court's waiver ruling or consider facts outside the complaint.[3]

Because retirees like Stanely do not meet that definition at the relevant time, the Court held that she is excluded from being able to bring a Title I ADA claim regarding post employment benefits. Additionally, the court in dicta stated that Stanely had other avenues to seek relief such as state law, Rehabilitation Act, or an equal protection claim under Rev. Stat. §1979, 42 U. S. C. §1983.[4]

In sum, Stanley's claims under Title I of the ADA failed because she was no longer a qualified individual with a disability at the relevant times.

Serrano v. Public Employees' Retirement System (2025) 109 Cal.App.5th 96 – A police sergeant on 'Association Leave' is not entitled to CalPERS Retirement benefits based on overtime or holiday pay

The City of Santa Ana ("City") and the Police Officers' Association ("Association") entered into a memorandum of understanding (MOU) governing officer compensation and benefits. The MOU included provisions for granting full-time release from duty to the Association president, who would continue to receive full salary and specific pay additives, including a "confidential premium," while on leave. The MOU also specified that the Association would fully reimburse the City for the president's compensation and that inclusion of the confidential premium as pensionable compensation was contingent upon CalPERS approval.

In April 2016, Detective Sergeant Gerry Serrano became Association President and went on leave from his City duties. While serving as the union's President, Serrano continued receiving his base salary and several pay additives tied to his former position. In 2020, CalPERS determined the confidential premium was not pensionable because Serrano was on leave. After reviewing his full compensation, CalPERS later concluded that other pay additives—such as detective premium,

[4] Id.
[5] Id.

bilingual premium, holiday pay, and uniform allowance—were also non-pensionable under the Public Employees' Retirement Law.

At an administrative hearing, the ALJ found that Serrano's Association duties did not qualify as active City service and therefore several of the pay additives were not pensionable. Only the educational incentive was deemed pensionable, as it was based solely on educational attainment. The CalPERS Board adopted the ALJ's findings in April 2022.

Serrano filed a petition for writ of administrative mandamus challenging the Board's decision. The trial court denied the petition in March 2023, and Serrano appealed.

The Court of Appeal found that while Government Code section 3558.8 of the Meyers-Milias-Brown Act ensures public employees on union leave retain base compensation and service credit, it does not guarantee retention of all pensionable earnings accrued in prior roles. Applying the Retirement Law and CalPERS regulations, the Court determined Serrano's confidentiality premium was non-pensionable because it replaced overtime compensation, which is excluded under Sections 20630 and 20636. The Court of Appeal also found his holiday pay non-pensionable as he did not meet the requirements of Regulation 571, subdivision (a)(5). The court emphasized that Section 3558.8 did not override the Retirement Law's definitions or CalPERS's authority in pension determinations.

<u>**Chapter 7: Hostile Work Environment Harassment**</u>

In November 2018, LAPD Captain III Karyn Carranza ("Carranza") learned while on vacation that a nude photo of a woman reported to be her was being circulated among LAPD personnel. Although the woman in the photo was not Carranza, she shared similar features, and the image was widely believed by officers to depict Carranza. She immediately filed a sexual harassment complaint with the City's MyVoiceLA agency and requested departmental action to stop the photo's dissemination.

LAPD launched an internal investigation, but Carranza became increasingly distressed as reports surfaced of officers viewing and discussing the photo at multiple LAPD locations. Despite her requests, LAPD leadership, including the Chief of Police, declined her request to issue a Department-wide communication clarifying the photo did not depict her. Carranza was later hospitalized for stress-related symptoms and diagnosed with multiple psychological disorders. Although the internal investigation ultimately sustained her complaint and deemed the circulation of the photo serious misconduct, no officers were disciplined because while the Department's investigation found that distributing the image was a violation of sexual harassment policies, it could not establish who first shared it.[5]

Carranza filed suit in January 2019 against the City of Los Angeles ("City"), alleging sexual harassment based on a hostile work environment. At trial in 2022, the jury found in her favor, concluding the harassment was severe or pervasive and that the City failed to take immediate corrective action. Carranza was awarded $4 million in noneconomic damages. The

[6] *Carranza v. City of Los Angeles* (2025) 111 Cal.App.5th 388, 398 [332 Cal.Rptr.3d 778].)

City's posttrial motions, including for a new trial and claims of jury misconduct, were denied. The trial court also awarded Carranza over $600,000 in attorney's fees and costs. The City appealed both the judgment and the fee award.

The Court of Appeal held that under the totality of circumstances test, the lower courts holding was affirmed. Factors of the totality of circumstances test include the frequency, severity, physical threat/humiliation, and interference with work the employee's performance. In evaluating the City's actions, the court noted that Carranza's stress was amplified by the fact that her Department repeatedly ignored Carranza's requests to make attempts to stop the dissemination of the photo. Additionally, the Court of Appeal rejected the City's argument that harassment must occur in the plaintiff's presence to be actionable under FEHA. Citing a broad array of precedents, the court reaffirmed that an employee can perceive and be harmed by harassing conduct even if it occurs outside their immediate presence, so long as they are aware of it. The court emphasized that FEHA does not excuse harassment merely because it is concealed or indirect; rather, it protects employees from hostile environments regardless of how the offensive behavior is communicated.

Chapter 8: California Public Records Act

Sacramento Television Stations Inc. v. Superior Court (2025) 111 Cal.App.5th 984 – Disclosure of critical incident video and audio under CPRA

In June 2023, following media inquiries about a officer involved shooting incident on April 6, 2023, Roseville Police Department ("RPD") released four 39-second body-worn camera clips and two radio audio clips to a Sacramento television station ("Sac TV"). RPD asserted these recordings covered the entirety of RPD officers' firearm discharges during the event and that no additional disclosure was required under the Assembly Bill No. 748, i.e., legislation that requires law enforcement agencies to disclose audio and video files of "critical incidents" under the California Public Records Act ("CPRA").

Between June and October 2023, Sac TV and RPD exchanged e-mails disputing the scope of disclosure required. Sac TV requested all body-worn and dashboard camera footage from officers' arrival to scene security, as well as drone footage. RPD refused, reiterating that only recordings depicting the "critical incident" of officer firearm discharge were subject to disclosure and noted that a criminal court order had sealed drone footage in connection with pending prosecution related to the incident.

In February 2024, Sac TV filed a petition for a writ of mandate in the superior court seeking an order compelling immediate disclosure of all requested materials. The City opposed, arguing: (1) the statutory disclosure obligation was limited to discrete "critical incidents," (2) release of additional recordings would substantially interfere with an active criminal investigation and pending trial, and (3) certain footage was sealed by court order in the criminal case.

At a July 2024 hearing, the City confirmed that the four released clips encompassed all shots fired by RPD officers and argued that unreleased drone footage did not depict any officer shootings and remained under seal. The parties also discussed whether in-camera review was mandatory.

In supplemental briefing, the City relied on the criminal court's July 2024 sealing order and the prosecutor's declaration to support its claim of substantial interference. Sac TV countered that the sealing order did not apply to the body-worn or dashboard camera footage at issue and that the City had forfeited its "ongoing investigation" argument.

In October 2024, the superior court denied Sac TV's petition, finding that the City had shown by clear and convincing evidence that further disclosure would substantially interfere with the active criminal investigation, rendering it unnecessary to decide the precise scope of Assembly Bill No. 748's requirements.

Later in October 2024, Sac TV filed a petition for writ of mandate in the Court of Appeal seeking reversal and an order for full disclosure of all footage from officers' arrival at approximately 12:30 p.m. until the scene was secured around 1:25 p.m. The appellate court issued an order to show cause, briefing concluded in February 2025, and oral argument occurred on May 20, 2025.

The Court of Appeal held that substantial evidence did not support applying the "active investigation" exemption under Assembly Bill No. 748 because the City's showing—a prosecutor's general concern about victim trauma and a fair trial—lacked meaningful detail and did not establish that disclosure would substantially interfere with an ongoing investigation.[6] The court agreed with Sac TV that a pending criminal prosecution alone is not necessarily an "active investigation," via distinguishing legislative treatment of "investigations" from "proceedings" in related statutes.[7]

On the scope of disclosure required under Government Code section 7923.625(e) for "an incident involving the discharge of a firearm," the court found the City's interpretation too narrow and Sac TV's interpretation too broad. The case was remanded for the superior court to, after an in-camera review of the unedited footage, determine the extent of additional disclosure needed to allow viewers to fully understand the events, including sufficient context before and after the shooting.

The City's reliance on good faith did not excuse insufficient disclosure, and its late-raised arguments under CPRA's catchall exemption were forfeited. The Court of Appeal also rejected the City's claim that Government Code section 7923.625(b)(1) allowed wholesale withholding to protect third-party privacy, holding that the statute requires redaction where possible rather than complete non-disclosure unless privacy cannot be protected through redaction.

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[7] *Sacramento Television Stations Inc. v. Superior Court* (2025) 111 Cal.App.5th 984, 994 [333 Cal.Rptr.3d 309].)

[8] *Id.* at 1001

The Court of Appeal granted Sac TV's petition, vacating the superior court's prior ruling on the "active investigation" exemption and ordering further proceedings, including an in-camera review. The decision narrowly construes the exemption, requiring concrete evidence of interference beyond the existence of a prosecution, and affirms that firearm-discharge incidents under the CPRA must include enough footage to provide meaningful context. It reinforces CPRA's pro-disclosure presumption, clarifies privacy–redaction principles, and requires fact-specific in camera determinations, limiting agencies' reliance on broad or conclusory withholding claims.

Policy Shifts and Legal Battles: The Trump Administration's Impact on Local Government

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<u>Policy Shifts and Legal Battles: The Trump Administration's Impact on Local Government</u>

League of California Cities
2025 Annual Conference

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Policy Shifts and Legal Battles: The Trump Administration's Impact on Local Government

I. EXECUTIVE SUMMARY

This white paper analyzes the legal and policy implications of executive actions taken during President Trump's second term, focusing on their impact on local governments. Key areas include immigration enforcement, federal funding freezes, Diversity Equity and Inclusion ("DEI") programs, and legal challenges surrounding sanctuary jurisdictions. The paper outlines the constitutional limits of executive orders and provides practical guidance for municipalities navigating these changes. Leveraging its nationally recognized government relations and legal practices, Brownstein Hyatt Farber Schreck, LLP ("Brownstein") has been at the forefront of monitoring and analyzing these developments, offering timely insights through resources such as its *Tracking President Trump's Executive Orders* and *Executive Action Tracker*.

A. Background

In his second term, President Trump rapidly enacted a series of executive orders aimed at reshaping multiple facets of federal policy. These directives span a broad spectrum, including immigration reform, environmental regulation, energy policy, federal funding structures, and even the nation's approach to trade agreements. The cumulative effect is a body of executive action that touches nearly every corner of government, from how local jurisdictions interact with federal agencies to how foreign governments negotiate trade with the United States.

Notably, Trump's directives reach beyond headline-grabbing topics like immigration and DEI. As highlighted in *Trump Executive Orders and Implications for Cities and Public Agencies*, many orders require immediate compliance from state and local governments, sometimes tying access to federal funding to new policy mandates. This can create uncertainty for public agencies tasked with delivering critical services. Similarly, trade policy has been reshaped through executive orders: *President Trump Establishes Process for Implementing Trade Agreements; Implements U.S.–Japan Deal* describes how new processes for negotiating and implementing trade agreements alter both the speed and predictability of U.S. commitments to its partners, with downstream consequences for industry and local economies.

Within this larger backdrop, several categories of executive action stand out for their direct impacts on cities, states, and federally funded programs:

> (1) Impacts to Designated Sanctuary Cities: President Trump signed several executive orders and presidential proclamations targeted at immigration enforcement and "sanctuary" jurisdictions. These orders assert a firm federal stance on immigration enforcement and seek to penalize "sanctuary" jurisdictions that refuse to cooperate with federal immigration enforcement efforts by potentially revoking their access to federal funds. On February 5, newly-confirmed U.S. Attorney General, Pam Bondi, issued a

memo[1] (the "Sanctuary City AG Memo") stating that the sanctuary jurisdictions should not receive access to federal grants administered by the Department of Justice ("DOJ"), and sued Illinois, the city of Chicago, and Cook County on February 6 for allegedly thwarting federal efforts to enforce immigration laws.[2] The lawsuit was dismissed on July 25 for lack of standing.[3]

Additionally, on February 12, the U.S. Attorney General filed a lawsuit against the New York Governor, Kathy Hochul, and state Attorney General Letitia James over immigration enforcement.[4]

The Trump administration also filed a lawsuit against the city of New York, Mayor Eric Adams, and top law enforcement officials on July 24 alleging the city's sanctuary city policies are preempted by federal law.[5]

A group of cities and counties also sued the Trump administration in February to block executive actions targeting "sanctuary" jurisdictions.[6] The federal district court granted a preliminary injunction and the Trump administration filed a motion to dismiss on August 26.[7] A hearing on the motion to dismissed is scheduled for November 5.[8] Similar lawsuits were also filed in Massachusetts and Rhode Island, which are still pending.[9]

(2) Federal Funding: Several of President Trump's early executive orders sought to pause or condition substantial amounts of federal funding. This includes funding to entities that promote DEI or use the funds to promote "gender ideology,"

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[1] *Sanctuary Jurisdiction Directives* (Feb. 05, 2025) available at https://www.justice.gov/ag/media/1388531/dl?inline#:~:text=So-called%20%22sanctuary%20jurisdictions%22,other%20applicable%20federal%20immigration%20laws.

[2] February 06, 2025 Complaint available at https://news.wttw.com/sites/default/files/article/file-attachments/gov.uscourts.ilnd_.473062.1.0.pdf.

[3] July 25, 2025 Order available at https://www.courthousenews.com/wp-content/uploads/2025/07/jenkins-dismissal-trump-sanctuary-lawsuit.pdf.

[4] See PBS News, WATCH: Bondi announces lawsuit against New York over immigration enforcement (Feb. 2, 2025) available at https://www.pbs.org/newshour/politics/watch-bondi-announces-lawsuit-against-new-york-over-immigration-enforcement.

[5] July 25, 2025 Complaint, available at https://www.courthousenews.com/wp-content/uploads/2025/07/us-v-nyc-sanctuary-city-eastern-district-new-york.pdf.

[6] San Francisco and Santa Clara counties in California, King County, Washington, and the cities of Portland, Oregon, and New Haven, Connecticut initially filed the federal lawsuit but amended their complaint to include additional jurisdictions.

[7] August 26, 2025 Motion to Dismiss, available at https://storage.courtlistener.com/recap/gov.uscourts.cand.444175/gov.uscourts.cand.444175.227.0.pdf.

[8] https://storage.courtlistener.com/recap/gov.uscourts.cand.444175/gov.uscourts.cand.444175.229.0.pdf.

[9] The Massachusetts cities of Chelsea and Somerville filed a motion for a preliminary injunction on June 3, 2025 and the suits in Rhode Island relate to federal funding for victims of crimes and cooperating with federal immigration enforcement, respectively. June 3, 2025 Motion, available at https://storage.courtlistener.com/recap/gov.uscourts.mad.281125/gov.uscourts.mad.281125.12.1.pdf; August 18, 2025 Complaint, available at https://storage.courtlistener.com/recap/gov.uscourts.rid.60243/gov.uscourts.rid.60243.1.0_1.pdf; June 19, 2025 Preliminary Injunction, available at https://storage.courtlistener.com/recap/gov.uscourts.rid.59601/gov.uscourts.rid.59601.57.0_1.pdf.

though there are other freezes mandated as well. Further, on January 27, the Office of Management and Budget ("OMB") issued a Memorandum temporarily pausing a substantial amount of federal spending (the "OMB Memo"). Judge Loren Alikhan issued an administrative stay on January 28 in the *National Council of Nonprofits v. Office of Management and Budget* case, ("January 28 Administrative Stay"), ordering the Trump administration[10] not to block the disbursement of federal funds under any open awards until at least 5 p.m. EST on February 3, and OMB then issued Memorandum M-25-14, which rescinded the OMB Memo. In a separate case, on January 31, a temporary restraining order (the "January 31 TRO") was issued instructing the Trump administration to not "pause, freeze, impede, block, cancel, or terminate Defendants' compliance with awards and obligations to provide federal assistance to the States."[11] The January 31 TRO also required the Trump administration to "provide written notice of this Order to all . . . agencies and their employees." The DOJ complied with this order and informed all federal agencies that they must not: "pause, freeze, impede, block, cancel, or terminate any awards of obligations on the basis of the OMB memo, or on the basis of the President's recently issued executive orders." Despite the January 28 Administrative Stay and January 31 TRO, 22 state attorney generals and Washington, D.C.'s attorney general accused the Trump administration of continuing to block access to federal funds.[12] On February 10, U.S. District Judge John McConnell ordered the Trump administration to "immediately restore frozen funding" while his order remains in effect, including to the National Institutes of Health and to fulfill the Biden-era Inflation Reduction Act and Infrastructure Improvement and Jobs Act ("February 10 Order").[13] Later that day, the Trump administration filed an appeal of the January 31 TRO, and insisted on an administrative stay of the court's orders pending the appeal. On February 11, the First Circuit denied the administration's request for an administrative stay but made clear that was the only issue it decided. An appeal of the January 31 TRO was not directly at issue. On March 6, a preliminary injunction was issued, extending the January 31 TRO. This preliminary injunction is still in place.

The parallel litigation in front of Judge Loren Alikhan in Washington, D.C. also resulted in a temporary restraining order, also enjoining the Trump administration from freezing federal funds (the "February 3 TRO").[14] A January 25 preliminary injunction extending the TRO remains in place in this case as well.

(3) DEI Programs: The DEI related orders halt federal DEI programs and restrict federal money from flowing to entities that promote DEI—even if the DEI programs in question are *not* funded with federal money. The restriction is recipient,

[10] Also referred to as the "Administration" throughout this white paper.
[11] *New York et al. v. Trump*, No. 25-cv-39-JJM-PAS (D.R.I.), ECF No. 50 (Jan. 31, 2025).
[12] February 07, 2025 Request for Emergency Relief to Enforce Temporary Restraining Order of January 31, 2025, Upon Evidence of Violation available at https://storage.courtlistener.com/recap/gov.uscourts.rid.58912/gov.uscourts.rid.58912.66.0.pdf.
[13] February 10, 2025 Order available at https://storage.courtlistener.com/recap/gov.uscourts.rid.58912/gov.uscourts.rid.58912.96.0_2.pdf.
[14] *National Council of Nonprofits v. Office of Management and Budget*, 1:25-cv-00239, (D.D.C. Feb 03, 2025) ECF No. 30.

not program-based, meaning that promotion of DEI would likely impact all federally-funded programs and projects, not just DEI programs. These orders, to the extent that they pause or restrict federal funding, are currently enjoined by preliminary injunctions.[15]

(4) <u>IRA and IIJA Grants and Incentives</u>: President Donald Trump issued the "Unleashing American Energy" executive order, directing federal agencies to pause disbursements from the Inflation Reduction Act ("IRA") and the Infrastructure Investment and Jobs Act, also known as the Bipartisan Infrastructure Law, ("IIJA"). This pause is intended to allow agencies to review their funding processes to ensure alignment with the Administration's energy policies. Some of the funding freezes are temporarily blocked by court orders, and litigation is ongoing with respect to other portions of the pause.

B. <u>Executive Orders: Legal Limits and Considerations</u>

Executive orders are powerful tools for setting executive policy and agency direction but are not a substitute for legislative or regulatory processes. Their legal effect is limited to what is permissible under the Constitution and federal law, and orders that exceed those limits may be subject to judicial review and invalidation.

Article II of the U.S. Constitution vests the President with executive power over the government, including the obligation to "take care that the laws be faithfully executed." U.S. Const. art. II, § 3 (the "Take Care" Clause); *see id*. at art. II, § 2, cl. 1. Executive orders are instruments through which a President can achieve that power, and may direct the policy priorities and internal operations of federal agencies under the Executive Branch. While executive orders can significantly influence the administration and enforcement of federal programs, they are not legislation and do not, by themselves, create binding legal obligations beyond the Executive Branch. Critically, executive orders generally cannot create new federal law, amend existing statutes, or override legislative requirements.

While an executive order may lawfully direct an agency to initiate a specific process, under current law it cannot itself establish new regulatory requirements or invalidate existing ones. Attempts to do so may violate the Administrative Procedure Act ("APA") and are likely subject to legal challenge. For example, directing agencies to initiate a rulemaking process would be a proper use of an executive order, whereas those declaring old rules void or purporting to create new regulatory definitions may be in violation of the APA. As such, executive orders generally cannot promulgate new regulatory definitions, repeal old regulatory definitions, or create new policy without undergoing the rulemaking process. Any substantive change to regulatory definitions or policy must typically proceed through the notice-and-comment rulemaking process under the APA.

However, there are exceptions to this general rule. For example, while most federal agency regulations require notice-and-comment rulemaking, the APA exempts certain regulations from

[15] On February 10, 2025, AG Bondi issued a memo exclusively aimed at prohibiting DEI policies in the private sector.

this process, including on "matter(s) relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. 553 (a)(2). The APA also allows agencies to forego notice requirements for "good cause" if the notice procedures are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B). Further, the United States President has the authority to declare national emergencies under the National Emergencies Act (50 U.S.C. §§ 1601–1651), which allows the President to take actions under certain laws. Regardless, the Supreme Court has recognized that under the APA, an agency must amend or repeal a rule using the same process that was used to pass the regulation initially. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015). As such, executive orders cannot unilaterally change federal regulations without notice-and-comment rulemaking, if such regulations were established under that process.

Moreover, executive orders must operate within constitutional and statutory bounds. They cannot override existing laws or infringe upon constitutional protections, such as those guaranteed by the First Amendment, the Equal Protection Clause, or statutory provisions such as Titles VI and VII of the Civil Rights Act of 1964. Similarly, while executive orders may shape agency priorities for future discretionary spending, they generally are not able to unilaterally reallocate or withhold funds that have already been appropriated or obligated by Congress. Actions of that nature may raise concerns under the Appropriations Clause, the Due Process Clause, or the Contracts Clause of the U.S. Constitution.

II. EXECUTIVE ORDERS: ANALYSIS AND IMPLICATIONS

A. Implications of and Requirements for Sanctuary City Designation

1. Review of Executive Orders and Actions

In his first term, President Trump issued Executive Order 13768, *Enhancing Public Safety in the Interior of the United States* (82 FR 8799), which purported to strip sanctuary jurisdictions of federal funding unless deemed necessary for law enforcement purposes.[16] The executive order defined sanctuary jurisdictions as any jurisdiction that "willfully refuses to comply with 8 U.S.C. § 1373," which provides that state and local government cannot prevent the Immigration and Naturalization Service from receiving information regarding the citizenship or immigration status of any individual. Importantly, 8 U.S.C. § 1373 governs only information sharing and does not extend to broader cooperation, such as honoring detainer requests or assisting U.S. Immigration and Customs Enforcement ("ICE") in arrests. The statute does not require states or localities to actively participate in immigration enforcement; rather, it simply prohibits policies that restrict communication with federal immigration agencies.

[16] 82 FR 8799.

That executive order was signed within the first week of President Trump's first term in office, and by the following week, several jurisdictions filed suit to prevent the U.S. government from enforcing the order.[17]

In the first case, the City of San Francisco sued on the grounds that the order violated the Tenth Amendment of the U.S. Constitution, arguing that the order unconstitutionally infringed on state sovereignty.[18] The city sought and won a nationwide preliminary injunction, effectively halting implementation of the order on April 25, 2017. The district court went on to issue a summary judgement in favor of the plaintiffs, permanently enjoining the Administration from withholding funds from sanctuary jurisdictions.[19]

Following the lawsuit, California lawmakers enacted SB 54, the "California Values Act," which restricts state and local law enforcement agencies from using their resources to assist federal immigration enforcement, except in limited circumstances. Specifically, the California Values Act prohibits the use of personnel, facilities, equipment, or funds for immigration enforcement activities. However, it provides exceptions for cooperation in serious criminal cases, including (1) individuals convicted of serious or violent felonies (e.g., murder, rape, robbery), and (2) participation in joint task forces with federal agencies for criminal investigations not primarily focused on immigration enforcement. Notably, the California Values Act does not prevent ICE from operating within the state or halting deportations.

The Trump administration sued California, arguing that SB 54 violated 8 U.S.C. § 1373[20] by restricting law enforcement from cooperating with ICE. However, in *United States v. California* (2019), the Ninth Circuit upheld SB 54, ruling that the federal government cannot force states to participate in federal immigration enforcement, reaffirming state sovereignty under the Tenth Amendment.[21] The Ninth Circuit reiterated that "California has the right, pursuant to the anticommandeering rule [derived from the Tenth Amendment], to refrain from assisting with federal efforts."[22] When the prior Trump administration asked the Supreme Court to review that decision, the Court denied the request, leaving the Ninth Circuit's decision and SB 54 in place. Similar cases have also provided localities with immunity when refusing to cooperate with federal immigration enforcement if their decision was a policy choice protected by discretionary immunity.[23]

In his second term, President Trump has issued several executive orders and proclamations aimed at immigration policies and citizenship, including: *Protecting the Meaning*

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[17] The guidelines under 82 FR 8799 were ultimately removed by former President Biden in January 2021. (See, Executive Order 13993, *Revision of Civil Immigration Enforcement Policies and Priorities*, 86 Federal Register 7051, January 20, 2021.)
[18] *City & County of San Francisco v. Trump* (N.D. Cal. 2017) 275 F.Supp.3d 1196.
[19] *Id*. at p. 1212 (granting summary judgement), available at https://www.cand.uscourts.gov/filelibrary/3225/Order-Granting-Motion-for-Summary-Judgment.pdf.
[20] 8 U.S.C. § 1373 is one of the original "anti-sanctuary" laws and was passed in 1996 before "sanctuary" was a common term, and states that no state or local official can prohibit any other state or local official from communicating immigration information to the federal government.
[21] *United States v. California* (9th Cir. 2019) 921 F.3d 865 available at https://oag.ca.gov/system/files/attachments/press-docs/9th_cir_ca_opinion%20SB%2054.pdf.
[22] *Id*. at p. 873.
[23] See *Steinle v. City of SF* (2019) 919 F.3d 1154.

and Value of American Citizenship (Executive Order 14160, 90 FR 8449); *National Emergency Concerning the Southern Border of the United States* (Proclamation 9844, 90 FR 8327); *Securing Our Borders* (Executive Order 14165, 90 FR 8467); *Protecting the United States from Foreign Terrorists and Other National Security and Public Safety Threats* (Executive Order 14161, 90 FR 8451); *Protecting the American People Against Invasion* (Executive Order 14159, 90 FR 8443); and *Protecting American Communities From Criminal Aliens* (Executive Order 14287, 90 FR 18761).

These orders and proclamations have led to an increase in immigration enforcement efforts across the country. Executive Order 14159 is of particular interest as it provides:

> "The Attorney General and Secretary of Homeland Security shall, to the maximum extent possible under law, evaluate and undertake any lawful actions to ensure that so-called **'sanctuary' jurisdictions**, **which seek to interfere with the lawful exercise of Federal law enforcement operations**, **do not receive access to Federal funds**."[24]

President Trump has said of sanctuary jurisdictions: "We're trying to end them, and a lot of the people in those communities don't want them."[25]

On February 5, U.S. Attorney General Bondi issued the Sanctuary City AG Memo stating that the sanctuary jurisdictions should not receive access to federal grants administered by the DOJ.[26] Similar to some of the executive orders, the Sanctuary City AG Memo references the Supremacy Clause, stating that the federal government trumps state and local law and enables it to invalidate any state and local law it deems as interfering with federal law.

Further, on February 6, the Trump administration sued Illinois, the city of Chicago, and Cook County for allegedly thwarting federal efforts to enforce immigration laws.[27] The lawsuit sought to invalidate state and local laws (the Way Forward Act, the TRUST Act, Chicago's Welcoming City Act, and Cook County Ordinance 11-0-73)[28], which DOJ alleged were preempted by federal immigration law and impeded the federal government's ability to carry out its immigration enforcement activities. A federal judge dismissed the lawsuit on July 25, citing a lack of standing.[29]

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[24] 90 FR 8443 (emphasis added).

[25] See discussion at https://www.nbcnews.com/politics/donald-trump/live-blog/trump-administration-executive-orders-presidential-agenda-live-updates-rcna188605.

[26] *Sanctuary Jurisdiction Directives* (Feb. 05, 2025) available at https://www.justice.gov/ag/media/1388531/dl?inline#:~:text=So-called%20%22sanctuary%20jurisdictions%22,other%20applicable%20federal%20immigration%20laws.

[27] February 06, 2025 Complaint available at https://news.wttw.com/sites/default/files/article/file-attachments/gov.uscourts.ilnd_.473062.1.0.pdf.

[28] We are currently analyzing these to determine whether there could be any overlap between these laws and any California state or local laws.

[29] July 25, 2025 Dismissal available at https://www.courthousenews.com/wp-content/uploads/2025/07/jenkins-dismissal-trump-sanctuary-lawsuit.pdf.

On July 24, the Trump administration filed a similar lawsuit against the city of New York, Mayor Eric Adams, and top law enforcement officials, arguing that the city's sanctuary laws violate the Supremacy Clause of the U.S. Constitution.[30] Reports suggest the Trump administration is targeting Illinois and New York in particular because they have some of the strongest protections for immigrants in the nation.

Additionally, San Francisco and Santa Clara counties, King County, Washington, and the cities of Portland, Oregon, and New Haven, Connecticut filed a federal lawsuit to stop the policy. On August 22, a federal district court judge issued a preliminary injunction blocking the Trump administration from withholding, freezing, or conditioning the use of federal funds from "sanctuary" jurisdictions.[31]

As of September 17, there has been no freeze in funding to sanctuary cities as a result of the Sanctuary City AG Memo that we are aware of, but this could change in the upcoming days, weeks and months.

2. Implications for Jurisdictions in California

a. Sanctuary City Designation

Although several executive orders have been issued with the stated goal of increasing enforcement actions against sanctuary cities, the criteria for identifying which jurisdictions qualify remains unclear. On August 5, the Trump administration did published a list of states, cities, and counties identified as having policies, laws, or regulations that impede enforcement of federal immigration laws.[32] However, it is uncertain whether additional jurisdictions will be added or what specific criteria trigger a jurisdiction to be designated as a "sanctuary" jurisdiction. Much of this determination appears to rest with the Attorney General and Secretary of Homeland Security.

Additionally, the lawsuit filed against Illinois, Chicago, and Cook County focuses on specific laws that limit ICE's ability to carry out immigration enforcement activities, but does not necessarily define what a "sanctuary" jurisdiction is. This suggests that, rather than adopting a uniform definition, the Trump administration may pursue a case-by-case approach aimed at invalidating particular state or local measures it views as obstructing federal immigration policy.

Further, local governments, as subdivisions of the states, retain rights that limit federal control. As made clear in *United States v. California* (9th Cir. 2019) 921 F.3d 865, the federal government cannot compel local jurisdictions to enforce federal law. This principle explains why immigration policy is set at the federal level and why Congress has never enacted immigration laws requiring localities to enforce them.

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[30] July 24, 2025 Complaint available at https://www.courthousenews.com/wp-content/uploads/2025/07/us-v-nyc-sanctuary-city-eastern-district-new-york.pdf.

[31] This order extended an April 24 preliminary injunction to include new plaintiffs that had since been added to the suit.

[32] See list at https://www.justice.gov/opa/pr/justice-department-publishes-list-sanctuary-jurisdictions.

California identifies itself as a "sanctuary state," with the California Values Act often cited as its sanctuary law. Therefore, even if a city or county in California does not formally identify as a "sanctuary" jurisdiction, it may still be affected by the state's sanctuary status. For example, a reduction in federal funding to California could result in reduced state funding available to local jurisdictions.

Further, now that the Administration is attempting to rescind federal funds from "sanctuary" jurisdictions, there will likely be several additional lawsuits challenging the move on grounds similar to the claims in *City of San Francisco v. Trump*. Those challenges, if California and/or other jurisdictions are successful, could lead to review by the Supreme Court, which would likely rule in favor of the administration given the current conservative majority. The Trump administration could try to make arguments based on 8 U.S.C. § 1373, as it did in *United States v. California*, but, as the precedent currently stands, this would likely only be successful to the extent that the state and local laws are specifically preventing the federal government from enforcing the immigration laws.

The Trump administration could also try to use 8 U.S.C. § 1324, which prohibits "any person" from affirmatively harboring or shielding aliens, or concealing an individual from immigration enforcement or detection. It also prohibits anyone from encouraging or inducing someone to illegally come to the U.S.[33] It is unclear, however, whether "any person" includes the state and local government. The statute also doesn't define "harboring" and "concealing," and therefore it is unclear whether a state or locality's actions would fall under these. Further, this is a criminal statute and courts may be unwilling to qualify the government as "any person" under a criminal statute.

b. Law Enforcement's Ability to Assist in Deportation Efforts

Under the California Values Act, local law enforcement is generally prohibited from assisting ICE in the current Administration's ICE raids, but there are limited exceptions where local law enforcement would be allowed to assist in such raids. Circumstances where local law enforcement could assist ICE include the following:

1. **Individuals with Serious or Violent Felonies**: Local law enforcement may notify ICE of an individual's release or transfer custody if the person has been convicted of a serious or violent felony (e.g., murder, rape, robbery).
2. **Joint Task Forces**: Localities may participate in federal task forces involving criminal investigations, as long as the primary focus is not immigration enforcement (e.g., drug trafficking or human trafficking cases that involve noncitizens).
3. **Judicial Warrants**: Jjails may comply with an ICE request only if ICE obtains a judicial warrant—but administrative detainers (ICE holds) alone are not enough.

Therefore, as the law currently stands, local law enforcement can only act in limited circumstances when it comes to ICE raids or other Trump administration deportation efforts. If

[33] 8 U.S.C. § 1324.

local law enforcement assists in activities prohibited by the California Values Act, the state could likely administer penalties.

B. Impacts on Federal Funding

1. Federal Spending Overview

Generally, federal money is first obligated (promised) to an individual, entity, or lower level of government, and then the money is disbursed (actually sent). This creates three buckets of funding: (1) non-obligated funds, (2) obligated funds, (3) disbursed funds (also known as outlays).

Prior to funds being obligated, there is no contractual obligation with the recipient to disburse the funds. That does not mean there is no *legal* obligation to disburse the funds—generally speaking, congressionally appropriated funds must be disbursed according to congressional intent. But this premise is likely to be the subject of a landmark constitutional challenge by the Trump administration and will be addressed in more detail below.

Once funds have been obligated, they must be disbursed according to the terms of the grant agreement and applicable federal regulations. For example, the Federal Fish and Wildlife Service may send a certificate of apportionment to a state wildlife agency promising a certain amount of federal funding. Once that certificate is sent, the funds are obligated and the federal government incurs a "legal liability to disburse funds immediately or at a later date."[34] Federal regulations, and often the grant agreements themselves, allow for termination of obligated funds in four instances: (1) failure to comply, (2) mutual agreement, (3) recipient request, or (4) if the award no longer meets the program goals or agency priorities.[35] In the past, these four options have been an exhaustive list. The fourth option, regarding agency priorities, has not, in the past, been interpreted to provide a universal or unilateral authority to cancel all funds. Rather, case-by-case analysis is required.

After the money is obligated and then disbursed, it becomes a federal "outlay," meaning the money has left the federal accounts and has been deposited with the recipient. Funds that are already disbursed and now considered outlays are unlikely to be rescinded—once funds have hit the accounts of their recipients, the federal government has historically been unlikely to claw back the funding.

The Congressional Budget and Impoundment Control Act of 1974 ("ICA") traditionally governs the process of a presidential freeze or termination (also called impoundment) of congressionally appropriated funds.[36] The ICA offers the president two options to halt appropriated funds: deferral or recission. Deferral allows the president to withhold funds temporarily; the funding cannot indefinitely be deferred, nor can it be allowed to expire. Recission allows the president to *propose* cancellation of funds, but Congress must act to

[34] 50 CFR 80.91.
[35] 2 CFR 200.340.
[36] Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344 (codified at 2 U.S.C. §§ 681-688).

approve this within 45 days of the request. Importantly, the ICA offers no statutory authority to defer or terminate federal funding indefinitely or unilaterally.

Senior Trump administration officials believe the ICA is an unconstitutional restriction on presidential power and contend that President Trump has the constitutional authority to freeze or terminate federal funding. Notably, this topic featured prominently during OMB nominee Russel Vought's confirmation hearing before the Senate Budget Committee. Vought and others argue that the president has the constitutional charge to "take Care that the Laws are faithfully executed," meaning that the president must have the discretionary authority to impound funds while executing the laws.[37] Conversely, others argue that the "take Care" clause means that the president has no discretionary authority in this area outside of what Congress delegates.

In the past, the Department of Justice and the U.S. Supreme Court have agreed with the latter argument: the president has no inherent authority to terminate or impound appropriated money. In *Train v. City of New York* (1975) 420 U.S. 35, the Court held that while Congress can confer upon the president the authority to withhold appropriated funds, he may not do so absent such a delegation of power.[38] Again, this topic is likely to be freshly litigated in the near future.

2. Review of Executive Actions

a. OMB's (Now Rescinded) Temporary Freeze on Federal Funds

During the 2024 presidential campaign, then-candidate Donald Trump promised to "use the president's long-recognized impoundment power to squeeze the bloated federal bureaucracy for massive savings." Both in a now-rescinded OMB Memo and in seven early executive orders, President Trump set out to do just that. On January 20, President Trump signed seven executive orders with direct impacts on the obligation and disbursement of federal funds. A week later, on January 27, OMB released the OMB Memo (later rescinded) purporting to "temporarily pause all . . . Federal financial assistance." OMB clarified that the OMB Memo did not intend to pause *all* federal funding—only funding directly implicated by the following orders:

- *Protecting the American People Against Invasion* (Executive Order 14159, 90 FR 8443);
- *Reevaluating and Realigning United States Foreign Aid* (Executive Order 14169, 90 FR 8619);
- *Putting America First in International Environmental Agreements* (Executive Order 14162, 90 FR 8455);
- *Unleashing American Energy* (Executive Order 14154, 90 FR 8353);
- *Ending Radical and Wasteful Government DEI Programs and Preferencing* (Executive Order 14151, 90 FR 8339)

[37] *See* Mark Paoletta, Daniel Shapiro, *The President's Constitutional Power of Impoundment*, Center for Renewing America (September 10, 2024), https://americarenewing.com/the-presidents-constitutional-power-of-impoundment/.
[38] *See Clinton v. City of New York* (1998) 524 U.S. 417, 468 (Scalia, J., concurring) ("President Nixon, the Mahatma Gandhi of all impounders, asserted at a press conference in 1973 that his 'constitutional right' to impound appropriated funds was 'absolutely clear' . . . Our decision two years later in *Train v. City of New York*, 420 U.S. 35 (10975), proved him wrong…").

- *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government* (Executive Order 14168, 90 FR 8615); and
- *Enforcing the Hyde Amendment* (Executive Order 14182, 90 FR 8751).

These seven executive orders include their own internal freezes on federal funding, as do several others. Therefore, rescission of the OMB Memo is unlikely to reduce the risk for recipients of federal funds. While many of these Executive Orders have been challenged in court, they remain in effect and federal funding remains at risk regardless of the OMB Memo. OMB later rescinded the original OMB Memo but insisted that the funding freeze required by each of the executive orders remains in effect. Two cases—one filed by a collection of non-profits, and another filed by 22 states and the District of Columbia—challenge the original OMB Memo and the underlying freezes embedded in each of the executive orders.

On January 31, Chief Judge of the District of Rhode Island John McConnell issued a temporary restraining order instructing the Trump administration to not "pause, freeze, impede, block, cancel, or terminate Defendants' compliance with awards and obligations to provide federal assistance to the States."[39] The order also required the Trump administration to "provide written notice of this Order to all . . . agencies and their employees." The Department of Justice complied with this order and informed all federal agencies that they must not:

> "pause, freeze, impede, block, cancel, or terminate any awards of obligations **on the basis of the OMB memo**, or on the **basis of the President's recently issued executive orders**."

Importantly, this instruction applies to all agencies (even those not listed as Defendants). The instruction also clarifies that each agency may exercise their own discretion and authority to pause awards and obligations—so long as those pauses are not the result of the OMB Memo or the President's executive orders.

The night of February 10, the Trump administration filed an appeal of the January 31 TRO, and insisted on an administrative stay of the court's orders pending the appeal. The First Circuit denied this request for an administrative stay, but made no decision on the merits. On March 6, Chief Judge of the District of Rhode Island John McConnell issued a preliminary injunction extending January 31 TRO, enjoining the Trump administration from "pausing, freezing, blocking, canceling, suspending, terminating, or otherwise impeding the disbursement of appropriated federal funds to the States . . . based on the OMB Directive, including funding freezes dictated, described, or implied by Executive Orders issued by the President before rescission of the OMB Directive or any other materially similar order, memorandum, directive, policy, or practice under which the federal government imposes or applies a categorical pause or freeze of funding appropriated by Congress."[40] This preliminary injunction remains in place.

[39] *New York et al. v. Trump*, No. 25-cv-39-JJM-PAS (D.R.I.), ECF No. 50 (Jan. 31, 2025).
[40] March 6, 2025 Preliminary Injunction, available at https://www.rid.uscourts.gov/sites/rid/files/16112325032NYT.pdf.

Parallel litigation in D.C. also resulted in a February 3 TRO.[41] Judge Loren Alikhan ordered that "Defendants are enjoined from implementing, giving effect to, or reinstating under a different name the directives in OMB Memorandum M-25-13 with respect to the disbursement of Federal funds under all open awards." On February 25 Judge Loren Alikhan granted the plaintiffs' motion for a preliminary injunction.[42]

Practically speaking, Judge McConnell and Judge Alikhan have enjoined any funding freezes as the result of OMB Memo and President Trump's executive orders. These preliminary injunctions will remain in place until the respective judges reach decisions on the merits.

As a result of the ongoing litigation and the Trump administration's unclear policies following the January 31 TRO or March 6 preliminary injunction, the full extent and effect of the funding freeze remains uncertain. OMB's rescission of the original OMB Memo does not necessarily answer many questions because the executive orders themselves include freezes on billions of dollars of federal funding. This remains an ongoing and complicated legal battle.

b. Executive Orders' Federal Fund Freezes

President Trump's early executive actions (and the now rescinded OMB Memo) include pauses on federal funding for projects related to DEI, "gender ideology," and green energy projects. The DEI orders, which will be addressed in the subsequent section, pause all federal funding for DEI programs, and also prohibit federal funds from flowing to recipients of federal money that "promote DEI." With regards to "gender ideology," the order, *Defending Women From Gender Ideology Extremism And Restoring Biological Truth To The Federal Government* (Executive Order 14168, 90 FR 8615), prohibits federal funds that "promote gender ideology." All agencies are instructed to "assess grant conditions and grantee preferences" to ensure that funds do not promote "gender ideology."[43]

President Trump's energy related order, *Unleashing American Energy* (Executive Order 14154, 90 FR 8353), includes a section "[t]erminating the Green New Deal" by "immediately paus[ing] the disbursement of funds appropriated through the Inflation Reduction Act of 2022 (Public Law 117-169) or the Infrastructure Investment and Jobs Act (Public Law 117-58)." The pause on disbursement appears to be comprehensive. Agencies were instructed to prepare a report within 90 days of the order with recommendations as to which programs should move

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[41] *National Council of Nonprofits v. Office of Management and Budget*, 1:25-cv-00239, (D.D.C. Feb 03, 2025) ECF No. 30.

[42] February 25, 2025 Preliminary Injunction, available at https://www.courtlistener.com/docket/69583571/51/national-council-of-nonprofits-v-office-of-management-and-budget/.

[43] The order defines "gender ideology" as an ideology that "replaces the biological category of sex with an ever-shifting concept of self-assessed gender identity, permitting the false claim that males can identify as and thus become women and vice versa, and requiring all institutions of society to regard this false claim as true. Gender ideology includes the idea that there is a vast spectrum of genders that are disconnected from one's sex. Gender ideology is internally inconsistent, in that it diminishes sex as an identifiable or useful category but nevertheless maintains that it is possible for a person to be born in the wrong sexed body."

forward depending on the programs' "alignment with the policy" set forth in the order. Critically, the order includes the instruction that:

> "**[n]o funds** identified in this subsection (a) **shall be disbursed** by a given agency until the Director of OMB and Assistant to the President for Economic Policy have determined that such disbursements are consistent with any review recommendations they have chosen to adopt."

As with each of the executive actions, the order speaks in broad, sweeping language that fails to specify what exactly, is targeted. Moreover, as was discussed earlier, these funding freezes are currently enjoined as the result of litigation challenging both the original OMB Memo and the funding freezes imbedded in each executive order. Other executive orders, such as the orders relating to immigration or sanctuary jurisdictions, also contain language pausing funding, and will also be the subjects of litigation.

3. Implications for Jurisdictions in California

The implications of the described orders are uncertain given (1) the recission of the funding freeze OMB Memo, (2) the lack of clarity in the executive orders themselves, (3) the impact of court ordered injunctions against the OMB Memo and the orders themselves, and (4) the Trump administration's potential failure/refusal to follow those injunctions.

To the extent that a jurisdiction engages with programs that promote "gender ideology," it should be aware that future grant awards may condition acceptance on the discontinuation of such programs. It is unclear whether a jurisdiction would need to certify that the federally funded program *itself* does not promote gender ideology, or if the jurisdiction as a *whole* would be disbarred from accepting any federal funds if it promoted gender ideology in any program.[44]

Although the OMB Memo directing a broad pause has been rescinded, some litigation is still active, and some courts have enjoined parts of the executive orders or related guidance. Agencies currently must tread cautiously: while many funds appear to be proceeding under past terms, delays or uncertainties persist. Retroactive claw backs of disbursed funds are not clearly authorized by these orders. As the litigation progresses, judgments on preliminary injunctions and related motions will more clearly define what agencies can or cannot do, and which grants may be legitimately conditioned or withheld.

C. Impacts on DEI Efforts

In his initial days in office, President Trump issued two orders related to diversity, equity, and inclusion ("DEI"). First, Executive Order 14170, *Reforming the Federal Hiring Process and Restoring Merit to Government Service* (90 FR 8621). Second, Executive Order 14151, *Ending*

[44] To put a fine point on this, if the order applies to recipients as a *whole*, that will likely mean any programs that promote "gender ideology" would prohibit a municipality from accepting any federal grants at all. Based on the drafting of the order, it appears the order is limited to programs that specifically promote "gender ideology": "Federal funds shall not be used to promote gender ideology." The order does *not* say recipients that otherwise promote gender ideology, with non-federal funds, are also barred from receiving unrelated federal money.

Radical and Wasteful Government DEI Programs and Preferencing (90 FR 8339). Together, these orders reshape federal policy and institute new requirements on recipients of federal money (federal grantees). Moving forward, entities with DEI programs will likely be ineligible for federal money.

1. Review of Executive Actions

President Trump's first DEI-related order, *Reforming the Federal Hiring Process and Restoring Merit to Government Service*, largely targets federal policies, offices, and positions designed to promote DEI, environmental justice, and other social justice related causes. While much of this order is inward facing, the order does direct agency heads to recommend steps to "align agency or department programs, activities, policies, regulations, guidance, . . . grants, consent orders, and litigating positions" with the Administration's view that DEI is both "illegal" and "immoral." This first order has no immediate impact on federal grantees (though, the eventual recommended changes likely will).

The second DEI-related order, *Ending Radical and Wasteful Government DEI Programs and Preferencing*, appears to have an immediate impact on federal grantees.[45] To start, the order relies on existing anti-discrimination and civil rights laws to classify at least some (or potentially all) DEI programs as unlawful under federal law. The order uses vague, broad language that fails to specifically describe the types of programs the Administration views as "unlawful" under existing law.

Notwithstanding the ambiguity, the order effectively states that (1) DEI programs violate existing federal antidiscrimination laws, and (2) that federal grantees (as a condition of accepting federal money) must not violate any such laws. Practically speaking, if the order is permitted to take effect, any recipient of federal funds will be banned from operating any programs promoting DEI.[46] Currently, there are 14 active cases challenging Executive Order 14151 that have temporarily blocked enforcement of parts of the executive order.[47]

The order calls for the "streamlin[ing] of the "[f]ederal contracting process," and requires "[f]ederal contractors and subcontractors to comply with our civil-rights laws." The order requires that every future contract or grant award issued by the federal government include the following:

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[45] The order also mandates that the attorney general produce a report, by May 21, 2025, that includes plans to identify private sector "key sectors of concern," "the most egregious and discriminatory DEI practitioners in each sector," and a plan to deter these programs. The order also directs "each agency . . . [to] identify up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars." The Department of Justice, and other regulatory agencies, should be expected to launch public investigations of various entities for alleged violation of federal anti-discrimination laws.

[46] The exact definition of DEI is elusive and will likely need to be defined by the Administration for federal fund recipients to comply.

[47] https://www.brookings.edu/articles/tracking-lawsuits-challenging-the-trump-administrations-k-12-education-agenda/.

(1) "A term requiring the contractual counterparty or grant recipient to **agree that its compliance in all respects with all applicable Federal anti-discrimination laws is material** to the government's payment decisions for purposes of [the False Claims Act];" and

(2) "A term requiring such counterparty or recipient to **certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws**."

For future government contracts and grant awards, this language will have immediate effects. *First*, the language requires applicants for federal money to ensure that their entities "do not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."[48] If an entity promotes DEI within their organization (through something like a strategic committee or mentorship program), that entity would likely not be able to certify that they comply with the terms of the contract or award and would thus be ineligible for the federal money.

Second, the required terms create a heightened risk of liability under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 – 3733. The FCA, which is explicitly referenced in the order, states that "any person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the federal government is liable for treble damages plus penalties. For a claim to be fraudulent under the FCA, the false certification in question must be "material" to the government's decision to pay the claim. The President's executive order requires grant and contract signors to agree that compliance with existing anti-discrimination laws is "material" is a direct attempt to satisfy an element of FCA liability.[49]

For current government contracts and already granted or obligated funds, the impact of the order is far less clear. Once spending becomes an outlay (or in other words, the money is already issued in a check, deposited into an account, or transferred electronically), it is very difficult to claw back. For money only budgeted or obligated (essentially, promised to a recipient), the administration has much more authority to pause, review, or, in some cases, terminate the funding.[50] As was discussed in Section II.B, the Administration attempted to freeze all federal spending on January 27. That freeze continues to be the subject of ongoing and evolving litigation. The freeze is currently enjoined by two federal judges in two different lawsuits.

An important caveat to the above analysis is that if DEI programs are *not* contrary to existing anti-discrimination and civil rights laws, the order lacks an enforcement hook. The order relies on the premise that DEI programs *do* violate such laws and thus upholding them can be a valid condition of federal money. The order specifically states that "unlawful" DEI programs are

[48] Again, the order does not state *which* DEI programs violate current anti-discrimination laws.
[49] It is unclear whether this preemptive designation of materiality will satisfy court review. In *Universal Health Services, Inc. v. United States ex rel. Escobar*, the Supreme Court held that simply "designating" any one legal requirement as an up-front condition of payment is not enough to establish materiality. 579 U.S. 176, 192 (2016).
[50] For more details regarding this authority, *see* Section II.B. Typically, these actions must be according to the terms of the contract or grant agreement, or otherwise in accordance with applicable regulations. A unilateral, overarching freeze on all federal obligations is not likely to be legal.

prohibited. If the programs are not unlawful on anti-discrimination grounds, they are not likely to be unlawful at all. But such a decision would require an unlikely sweeping Supreme Court or circuit court opinion, or an even more unlikely legislative change.

2. Implications for Jurisdictions in California

Generally speaking, if this order is permitted to take effect, entities that receive federal funds will need to certify, via their federal contract or grant award, that they do not "promote DEI." While the terms "promote" and "DEI" are not defined in the order, official actions like the establishment of a named committee or taskforce are likely to qualify. Other, unnamed actions (like the acceptance or recommendation of a project for DEI-related reasons) would also likely qualify as the "promot[ion] of "DEI."

Moreover, the order creates significant legal risk for individuals and entities who certify that that their respective entities do not "promote DEI." If the entities are found to have, in fact, promoted DEI, despite certifications to the contrary, the order insinuates that entities or individuals could incur liability under the FCA. The required term that DEI compliance is "material" confirms that the Administration plans to use the FCA to enforce the DEI prohibition.

As discussed previously, the funding freezes included in the DEI related executive orders, along with the rest of President Trump's early executive actions, are currently enjoined by the preliminary injunctions. The status of this depends on whether or not the federal administration complies with the injunctions.

III. CONCLUSIONS

More guidance and clarity from the White House and implementing agencies is expected. For now, entities can do the following:

First, **jurisdictions should be on the lookout for more guidance from implementing agencies**. Federal contractors should expect updates from the OFCCP regarding compliance with the executive orders as compliance deadlines approach.

Second, **jurisdictions should internally determine if any of its programs or policies "promote" "DEI".** This challenge is much broader and more significant. Even if the program in question is not federally funded, the fact that an entity itself funds or participates in the program may be enough to cut the entity off entirely from receiving federal grants or awards in the future. Despite this fact, many entities have refused to comply with DEI-related executive orders, including Executive Order 14151 and Executive Order 14173 for many of the reasons set forth in the legal challenges. Entities should be aware of this risk when continuing to implement and promote DEI programs.

Third, **jurisdictions should closely monitor the evolving status of the legal challenges to Executive Order 14151 and Executive Order 14173**. Many of these cases are proceeding on expedited briefing schedules, with ongoing motion practice and active court involvement. The outcomes of these cases will determine whether key provisions of the executive orders are upheld, narrowed, or invalidated.

Municipal Tort and Civil Rights Litigation Update

League of California Cities, Annual Conference, October 2025

Municipal Torts and Civil Rights Litigation Update

By

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Sacramento Television Stations, Inc. v. Superior Court of Placer County

111 Cal.App. 5th 984

Court of Appeal, Third District, California

Filed June 6, 2025

This is a CPRA writ of mandate case stemming from a request to the Roseville Police Department for police body camera footage of an officer involved shooting. The crux of the case is two-fold. First, whether the active investigation exemption applies; and second, how much footage are agencies required to produce to comply with Section 7923.625 of the CPRA as revised by AB 748.

As background, Roseville PD responded to a call of shots fired in a City park. When they arrived, they learned that CHP had attempted to serve a search warrant on a suspect and one of their officer had been shot by the suspect who was holding two civilians as hostage. Multiple Roseville officers fired shots, wounding the suspect, and the hostages, one of them, fatally. When asked for body camera and dashboard footage of the incident the Agency took a very narrow stance on what it was required to produce and provided only snippets of video showing the officers' discharging their firearms. Moreover, the agency argued that releasing additional footage would substantially interfere with an active criminal investigation and criminal court proceeding, namely, the suspect's criminal trial. The City proffered a declaration from the involved prosector stating concerns that release of the footage would create trauma for the victims and impinge upon the defendant's right to a fair trial.

Sac TV argued it was entitled to all recordings from the moment Roseville PD arrived on scene until the time that the suspect was apprehended and the scene was secured.

The superior court denied Sac TV's mandate petition finding the City had shown evidence that further disclosure would substantially interfere with the active investigation in the suspect's criminal case. While the Court acknowledged that AB 748's amendments to the CPRA required the disclosure of more footage than merely the seconds before and after the shooting, it did not rule on how broadly that disclosure would be because of the application of the active investigation exception. Sac TV appealed.

As an initial matter on appeal, the court determined that the mere showing of a pending criminal prosecution is insufficient for application of the active investigation exemption, and the prosecutor's declaration regarding concerns of victim trauma and a fair trial, without more were also insufficient. Because the court found that the active investigation exception did not apply, the court remanded the case to the trial court to review the footage in camera and determine how much additional footage needed to be released. The court provided guidance to the lower court which, essentially is dicta, but said that both Sac TV and the City were wrong in their interpretations because Sac TV's argument was for too much disclosure while the City's position would disclose too little. The Court said that the correct amount was whatever made the viewer able to fully, completely, and accurately comprehend the events captured. "Sufficient context preceding a peace officer's discharge of a firearm at a person is essential to understanding what occurred, just as sufficient context following the final shot is."

<u>**Significance**: The amount of footage that agencies must disclose of critical incidents under AB 748 is the amount needed to provide sufficient context before and after the officer involved shooting to make it make sense.</u>

RND Contractor's Inc. v. Superior Court of San Bernardino County

112 Cal.App.5th 697

Court of Appeal, Fourth District, California

Filed June 30, 2025

Issue presented is when a defendant moves for summary judgment, but the plaintiff does not oppose the motion, may another party oppose the motion?

Plaintiffs are the families of two men who were injured on a job site. They filed suit against various defendants including WRSE, and Balfour. Balfour filed a cross claim against RND. WRSE moved for summary judgment and plaintiffs filed a non-opposition, but RND and Balfour opposed arguing that WRSE was at least partially responsible and should not be out of the case. The trial court refused to consider RND and Balfour's oppositions finding they lacked standing because RND and Balfour had not filed cross-claims against WRSE. The trial court granted WRSE's unopposed motion. RND filed a writ petition asking the court to vacate its order granting WRSE's motion and revisit the motion after considering RND's and Balfour's oppositions.

Federal district courts are divided on whether a defendant may oppose a codefendant's motion for summary judgment when the plaintiff does not oppose it and there is no cross-claim between defendants. Here, the court determined that the Supreme Court decision in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826 was instructive. Aguilar, clarified California law regarding burden shifting on motions for summary judgment. In dicta, the Aguilar court broadly interpreted 437c(b)(2) to provide that any party may oppose a motion for summary judgment so long as that party is adverse to the moving party. While there is no definition of "adverse party" in the context of a summary judgment motion, there does exist a common thread in other contexts that parties are deemed adverse where their competing interests in the outcome of the litigation are at odds.

Here, defendants are all adverse to each other because they are all trying to escape liability by blaming someone else for Plaintiff's damages. Given the finger-pointing the defendants are all adverse to each other regardless of the presence or absence of cross-claims, and therefore, the oppositions should have been considered.

<u>**Significance**: Adverse parties may oppose dispositive motions regardless of the existence or non-existence of cross-complaints.</u>

Dessins LLC v. City of Sacramento

112 Cal.App.5th 996

Court of Appeal, Third District, California

Filed July 9, 2025

Issue presented is whether under Prop 218 a city may vote on a storm drainage fee it proposed on behalf of properties that it owns.

In 2022, the City of Sacramento proposed a new storm drainage fee to fund maintenance and improvements to its storm drainage system. The City's Department of Utilities conducted an election on the proposed fee and mailed ballots to each property owner who received storm drainage services and would be subject to the fee. The City owned 1% of the involved properties and authorized a vote in favor of the fee for it's 2,007 properties. Ultimately, 22,178 votes were cast in favor of the fee and 20,229 were cast against the fee. Based on the results of the vote, the City adopted the fee and authorized the creation of a new accounting fund. It is undisputed that had the City not voted, and it's 2,007 votes were taken out of the ballot count, the fee would not have passed.

Dessins, a property owner who voted against the fee, filed a petition for writ of mandate and complaint against the City seeking to invalidate the fee. Dessins argued that the City's votes should not be counted. The trial court determined that the City was entitled to vote and denied the petition. Dessins then appealed.

Challenges to the adoption of property-related fee increases subject to Prop 218 are properly brought through a writ of mandate with two key differences from a traditional writ of mandate. First, the agency has the burden of proving compliance and second, the trial court employs its independent judgment.

Before proposing or increasing any fees set forth in Prop 218 the agency is generally required to identify of the parcels upon which a fee or charge is imposed and provide notice to each record owner of each identified parcel. The voting provisions require a majority vote of the property owners of the property subject to the fee, or at the option of the agency, by two-thirds vote of the electorate residing in the affected area.

Dessins argues the City was not authorized to vote because doing so subverted the purpose of Prop 218. Court of Appeal determined that because the City is a property owner subject to the fee it was authorized to vote on the fee.

Significance: Public entities can vote on Prop 218 fee increases where it owns property that is subject to the fee.

Tindall v. County of Nevada

112 Cal.App.5th 78

Court of Appeal, Third District, California

Filed May 30, 2025

Appeal from summary judgment dealing with the weather immunity articulated in Government Code Section 831.

Appellant, Rhonna Tindall slipped on a layer of ice as she walked to her car in the parking lot of the County jail where she worked. The parking lot is owned and maintained by the County of Nevada. On the date of the incident Tindall arrived at work in the morning and there was fresh snow on the ground and in the parking lot. She went for a walk at lunch and noticed that the snow was starting to melt. Around 6 p.m., when Tindall left work, the sun had set and it was very cold. She ultimately slipped and fell on an ice patch injuring her knee which required surgery. Tindall sued the County alleging the ivy parking lot was a dangerous condition of public property. The County filed a motion for summary judgment on several grounds including that it was immune under Government Code section 831 – weather immunity. The trial court granted the County's motion and Tindall appealed.

Section 831 provides immunity to public entities and its employees for an injury caused by the effect on the use of streets and highways of weather conditions as such. This includes the effect on the use of streets and highways of fog, wind, ice or snow, but not physical damage to or deterioration of the streets and highways resulting from such conditions. The section also does not include liability for injuries proximately caused by such effect if it would not be reasonably apparent or anticipated by a person exercising due care. Appellant argued that section 831 does not apply to parking lots per se and does not apply where a combination of weather and other factors causes injury.

The appellate court agreed with the trial court that the parking lot where Tindall fell is a "street" for purposes of section 831 because Vehicle Code section 590 defines the word "street" as "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel." Moreover, at oral argument, Tindall did not dispute that the ice she slipped on was an effect of weather conditions. Therefore, the appellate court affirmed summary judgment.

Significance: Don't forget about the weather immunity! It applies to parking lots.

Maksimow v. City of South Lake Tahoe

106 Cal.App.5th 514

Court of Appeal, Third District, California

Filed November 4, 2024

This case involves the same set of facts as in Tindall but has a different analysis largely because the parties did not raise the weather immunity. Here, Plaintiff slipped and fell on a patch of ice in a public parking lot in the City of South Lake Tahoe. She sued alleging that the ice patch was a dangerous condition of public property. The City moved for summary judgment on the basis of lack of actual and constructive notice. The trial court granted the City's motion and the Plaintiff appealed, arguing that the motion should have been denied because there was a factual question for the jury as to actual and constructive notice.

As to actual notice, the court was not persuaded with appellant's argument that because the City knew that it was snowing, and that given the appropriate conditions snow can turn to ice, which may be hazardous to pedestrians, it had actual notice of the dangerous condition. Relying on the buried coals at the beach case, *State of California v.*

Superior Court (*Rodenhuis)* (1968) 263 Cal.App.2d 396, the court held that actual notice requires knowledge of the particular danger in question rather than mere general knowledge of a condition that has a potential for harm. In the same way that it was insufficient to show actual knowledge by showing that the state employees knew that beachgoers sometimes buried coal in the sand, so too is it insufficient to show that the South Lake Tahoe City employees knew it was snowing and that snow can turn to ice.

As to constructive notice, appellant argued that there was a triable issue of fact as to whether the ice patch existed for a sufficient length of time to permit the City to discover and remedy it. On appeal, the court considered that for constructive notice to be imputed the condition must have existed for a sufficient length of time in an obvious nature. The requirement of obviousness, coupled with the requirement of the particularization means that the particular condition needs to have existed in an obvious nature for the requisite period of time. With that framework, and the observation that ice patches are transitory in nature, the court looked to other cases with transitory conditions. In *Kotronakis v. City and County of San Francisco* (1961) 192 Cal.App.2d 624, plaintiff slipped and fell in a puddle of vomit on the sidewalk in an area known as “skid road.” The evidence showed that vomit was a frequent occurrence on the sidewalks in the area but there was a total lack of evidence that the vomit that plaintiff slipped in had existed for any length of time longer than overnight. The *Kotronakis* court refused to impute constructive notice on the City explaining that “it would carry the doctrine of constructive notice too far.” With respect to the ice patch, the court stated, “we are concerned with transitory conditions of public property” and like hot coals, and vomit, “the ice patch could have been present in the parking lot for 11 days or 11 hours.” Inviting a jury to simply guess as to how long the patch of ice existed is insufficient to establish a triable issue of fact.

Significance: The notice element in Gov. Code section 835 requires notice of the particularized condition. Constructive notice requires that the particularized condition was obvious for a sufficient length of time.

Estate of Hernandez, et al. v. City of Los Angeles

139 F.4th 790

U.S. Court of Appeals, Ninth Circuit

Filed June 2, 2025

Officers McBride and Fuchigami responded to the scene of a motor vehicle collision when the officers were advised by dispatch that a male suspect in one of the vehicles was armed with a knife. As the officers approached the collision, several bystanders informed the officer that the armed suspect was still located inside a vehicle and was threatening to kill himself. The officers responded by directing the bystanders to move back and McBride drew her firearm. McBride kept the weapon trained on the ground, and the officers called for additional units to respond. As the officers removed other victims of the collision from the scene, Officer McBride spotted the suspect rummaging in the middle console of his vehicle. McBride then requested that Fuchigami procure less lethal weapons, some of which were located within their patrol vehicle. As Fuchigami and McBride separated, McBride observed the suspect, later identified as Daniel Hernandez, exit the far side of his vehicle. McBride called out to Fuchigami, and subsequently, instructed Hernandez to show his hands.

Hernandez then rounded the corner of the vehicle and began approaching McBride, holding an unspecified object in his right hand. At the time of his approach, he was approximately 43 feet away from the officer, and as he continued his approach, McBride stepped back roughly 10 feet. McBride continued to instruct Hernandez to stop and disarm. Hernandez continued his approach regardless of the officer's warnings, and as he did, he raised his right hand making a box cutter visible to the officer. McBride continued to instruct Hernandez to disarm, but he did not relent. McBride then fired two rounds which took Hernandez to the ground. Hernandez then rolled to his side and began to push himself to his feet without yet advancing toward the officer, and McBride again fired a subsequent two rounds. Hernandez then fell into a supine position and subsequently rolled away from the officer onto his side when the officer fired a final volley of two rounds. Hernandez then ceased all movement and died shortly thereafter.

Following the incident, Hernandez's family brought suit against the City of Los Angeles, its police department, and Officer McBride on the grounds that Officer McBride's actions constituted a violation of Hernandez's constitutional and state law rights. Defendants moved for summary judgment which was granted by the District Court. In so doing, the District Court reasoned that McBride had not violated Hernandez's Fourth Amendment rights because her uses of force were reasonable under the circumstances. The district Court also opined that McBride was entitled to qualified immunity, and as no constitutional claims remained, dismissed Plaintiffs' claims under Monell as well. Plaintiff's appealed the decision, and the matter was heard in the Ninth Circuit by a three-judge panel. The Ninth Circuit reversed and remanded, in part, as to the reasonable nature of the third volley of rounds and their bearing on Plaintiffs' state law claims. However, following that decision, the Ninth Circuit elected to hear the matter en banc.

On rehearing, the Ninth Circuit examined whether Officer McBride's conduct was objectively reasonable. To assess the reasonableness of a particular use of force, the court balances the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing government interests at stake. Use of deadly force is the ultimate intrusion, and the court thus would examine whether the state interest was sufficient to justify the use of force.

The Supreme Court has provided three factors for determining the strength of the government's interest: "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Conner,* 490 U.S. at 386, 396 (1989). The "most important" of these factors is "whether the suspect posed an immediate threat to the safety of the officers or others." *Lal v. California*, 746 F.3d 1112, 1117 (9th Cir. 2014).

Here, the Court analyzed the reasonableness of each volley of lethal rounds and found that at the time McBride fired the first two volleys, Hernandez could have reasonably constituted an immediate threat. As for the initial volley of force, Hernandez continued to approach McBride while armed despite her commands to "drop the knife." While the Court indicated that McBride could have indeed continued to back away from Hernandez, it also highlighted that an officer is not required to avail themselves of the least intrusive means of responding to an exigent situation." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). Similarly, the Court also dismissed Plaintiff's argument that McBride should have waited for less lethal devices as an officer is not required to " 'endanger their own lives by allowing [a suspect] to continue in his dangerous course of conduct' merely because he 'was intent on suicide by cop.' " *Lal*, 746 F.3d at 1117 (internal citations omitted).

As to the second volley, the Court found that a reasonable officer could have determined that Hernandez continued to pose a threat. In so holding, the court recognized that an officer is not required to cease fire against "a severe threat to public safety" until the threat has ended. *Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014). Yet, an officer may not continue the use of lethal force where the initial round has clearly incapacitated the suspect. Id. Thus, where a suspect is on the ground, and appears wounded, a reasonable officer should reassess the situation prior to continuing to shoot. *Zion v. County of Orange*, 874 F.3d 1072, 1076 (9th Cir. 2017). As Hernandez continued to reorient himself in McBride's direction, attempted to get back to his feet, and remained armed despite McBride's commands, he was not yet incapacitated and continued to present an immediate threat. *Blanford v. Sacramento County*, 406 F.3d 1110, 1118 (9th Cir. 2005).

However, as to the third volley fired by McBride, the Court found that her actions could be unreasonable as he no longer posed an immediate threat. The Court highlighted the fact that at the time of the third volley, Hernandez had fallen to the ground remaining on his back and in the fetal position, only momentarily rolling to his side and away from

McBride. Accordingly, as Hernandez was armed solely with a "melee weapon" and it remained unclear whether he "would or even could get up from the ground to continue advancing," McBride was obligated to reassess the situation and abstain from further uses of force unless Hernandez continued to pose an immediate threat. The Ninth Circuit further highlighted that McBride should not be entitled to qualified immunity for her actions as it was clearly established that the continued use of force against an incapacitated suspect violated the Fourth Amendment. As the District Court's denial of Plaintiff's state law claims was based on their denial of the Fourth Amendment claims, the Ninth Circuit reversed that ruling as well.

In sum, the Ninth Circuit clarified and reaffirmed prior precedent holding that a use of lethal force against a fallen suspect, armed only with a bladed weapon, was de facto unreasonable absent some indication that the suspect continued to present an immediate threat.

Significance: Where an officer encounters an armed but injured suspect, particularly one armed only with a bladed weapon, continued use of lethal force cannot be predicated on the suspect's mere movement while on the ground. Instead, an officer must continually reassess the situation to determine if the suspect's movements are either non-threatening, or if the suspect's movements indicate an attempt to rise to their feet or otherwise continue their advance or flight.

Alves v. County of Riverside

135 F.4th 1161

U.S. Court of Appeals, Ninth Circuit

Filed April 29, 2025

Riverside County Deputies Keeney and Gomez responded to a call regarding an injured and unarmed man who appeared to be in the midst of a psychotic break and was causing self-injury. When the deputies encountered the suspect, later identified as Kevin Niedzialek, he was bleeding from a head wound and speaking incoherently. As they approached Niedzialek, he abruptly stood up and approached Deputy Keeney. At that time, Deputy Gomez deployed one cycle of her taser, taking Niedzialek down to the ground where Deputy Keeney attempted to restrain him. However, as Deputy Keeney re-approached, Niedzialek began to sit up. Deputy Keeney stepped back, and Deputy Gomez again deployed a taser cycle which took Niedzialek to the ground again. Once on the ground, the deputies struggled to restrain Niedzialek who was bucking, kicking, and flailing his legs. Deputies ultimately placed a knee on Niedzialek's back and Deputy Gomez applied handcuffs.

Niedzialek continued to struggle against the handcuffs, and he informed the deputies that he "need[ed] help" and to "get [him] up;" however, the deputies continued to keep Niedzialek in a prone position, handcuffed with Deputy Keeney's knee against his back. Momentarily, Niedzialek was able to roll to his left side, but he was ultimately re-positioned by the officers in the prone position, and Deputy Keeney again place a knee onto Niedzialek's back with Deputy Gomez placing a hand against his center back to prevent Niedzialek from further movement. As the officers waited for the arrival of paramedics, Niedzialek ceased movement and began to make grunting and moaning sounds. Niedzialek was unresponsive when asked his name, and remained unresponsive for approximately four minutes before Deputy Gomez checked for a pulse. Niedzialek was then rolled to his back and a weak pulse was located, but CPR was not given until paramedics arrived on-scene approximately two minutes later. Although CPR was then administered, Niedzialek died the following day.

Niedzialek's successor then brought suit against Riverside County, the Sheriff, Coroner, and Deputies Keeney and Gomez under both federal and state law. At trial, Plaintiff's claims for excessive force under federal law, and battery and negligence under state law, were tried before a jury. The jury ultimately concluded that the deputies had not used excessive force against Niedzialek under either federal or state law, but that the deputies did breach a duty owed to Niedzialek by failing to monitor and/or reposition Niedzialek once restrained. Defendants then sought judgment as a matter of law on the grounds that the mixed verdict was inconsistent and argued that reasonableness was assessed under an identical standard as it pertains to both excessive force and negligence. The District Court denied Defendnats motion and Defendants subsequently appealed.

Relying on California Supreme Court precedent *Hayes v. County of San Diego*, the Ninth Circuit affirmed that, under California law, the "reasonable standard or care" is separate, distinct, and broader than the "reasonableness" standard pertaining to excessive force under the Fourth Amendment. *Hayes v. County of San Diego*, 57 Cal.4th 622, 639 (2013). Accordingly, the Ninth Circuit reiterated that it had repeatedly acknowledged that California negligence law was far broader that Fourth Amendment jurisprudence. *C.V. ex rel. Villegas v. City of Anaheim*, 823 F.3d 1252, 1257 n.6 (9th Cir. 2016); accord *Vos v. City of Newport Beach*, 892 F.3d 1024, 1037–38 (9th Cir. 2018); see also *Tabares v. City of Huntington Beach*, 988 F.3d 1119, 1126-1128 (9th Cir. 2021). The Ninth Circuit also rejected Defendants argument that Hayes and its progeny should be narrowly read to apply solely to pre-shooting tactics and decisions. In support of their rejection of the argument, the Court stated that Hayes itself clarified the distinction between California law's broad consideration of the totality of the circumstances surrounding the incident as a whole, and

Fourth Amendment law which focuses more narrowly on the moments where force was used. *Hayes*, 57 Cal. 4th at 639.

While acknowledging that both bodies of law take into consideration a totality of the circumstances, the Court noted that, under California negligence law, a jury might consider whether officers acted in a manner consistent with their duty of due care during a use of force incident rather than focusing on the manner and context in which force or restraint was applied in that moment. *Grudt v. City of Los Angeles*, 2 Cal.3d 575, 585–88 (1970); *see also Tabares,* 988 F.3d at 1122. Accordingly, the Ninth Circuit found that the mixed jury verdict adequately reflected the nuances between California negligence law and Fourth Amendment jurisprudence, and was therefore reconcilable. In support of their contention, the Court noted that the jury had concluded that the uses of force were objectively reasonable under a Graham analysis regarding the totality of the circumstances officers faced at the moment force was applied.

Conversely, the jury had been able to conclude that the deputies' actions constituted negligence as they were instructed to contextualize the reasonableness of the officers restraint and forced used in light of all facts known to the deputies leading up to the use of force or restraint and following its application once Niedzialek had ceased movement and respiration. As the evidence presented at trial by Plaintiffs could have cause a reasonable inference that the deputies had breached their duty of care to Niedzialek by not placing him in a recovery position, failing to check whether he was breathing and had a pulse, or applying pressure on his back when it was no longer necessary, the jury's verdict in favor of Plaintiff's negligence claim was reconcilable. The Ninth Circuit accordingly affirmed the District Court's denial of Defendants post-trial motion.

Significance: Although the standards under both the Fourth Amendment and California's negligence law call for an analysis of reasonableness in the context of the totality of the circumstances, the standards are separate and distinct from one another. California's negligence standard assesses the issue of police conduct far more broadly, analyzing not only the application of force and those moments just prior, but also the incident as a whole, even extending beyond the application of force itself.

Murphy v. City of Petaluma

106 Cal.App.5th 1263

Court of Appeal, First District, California

Filed November 25, 2024

Marites Murphy was a victim of a head-on vehicle collision to which Paramedics Jude Prokop and Shay Burke responded. At the time the paramedics arrived on-scene, both Murphy and the other motorist were out of their cars and ambulatory. Prokop approached murphy and inquired as to her physical state, to which Murphy replied that she had been involved in the incident but was not hurt. Murphy further stated that she did not want medical treatment or assistance. Following Prokop's conversation with Murphy, Burke then approached her asking numerous questions about the incident, how it had occurred, and whether or not she required any medical assistance. Murphy informed Burke that she was not injured and reiterated that she did not want medical assistance. Burke then urged Murphy to continue speaking with him, asking her several additional questions about potential unseen injuries. Murphy stated in response that she had not suffered any impact to her head, did not lose consciousness, and was fine. Murphy had also not shown any signs or symptoms of any unseen injury at that time, neither did she show any signs of cognitive impairment. Per the Glasgow Coma Scale, Murphy was fully responsive and alert.

Despite Murphy's continued insistence that she did not require attention, Burke explained that Murphy may have injuries for which symptoms had not yet manifested; he also indicated that such injuries could prove life-threatening if left untreated. Burke then recommended medical transport and examination as a precautionary measure. Murphy stated she understood the risks, but declined. Burke then gave her signs and symptoms to keep watch for which could indicate such an injury was present. Following a completion of other duties at the scene, Prokop asked Burke to confirm that medical transport would not be completed for Murphy. Burke again approached Murphy and inquired if she had developed any additional symptoms or medical concerns. Murphy again indicated that she did not want medical assistance. Just before leaving the scene, Prokop requested final confirmation from Murphy that she did not want or need medical assistance, Murphy declined, and the paramedics left the scene.

Murphy subsequently suffered a stroke several hours following the incident, and she filed a claim alleging that the paramedics were negligent in their medical examination, evaluation, and treatment. Murphy further alleged that their failure to examine and record various biomarkers or transport her for evaluation were supportive of her claims. Defendants then moved for summary judgment which was granted on the grounds that neither Prokop nor Burke took any action which created a duty to perform a full assessment of Plaintiff's medical condition. Murphy appealed.

In analyzing the lower court's ruling, the appellate court noted that "It is well established there is no general duty to protect others from the conduct of third parties." (*Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 214.) The Court also noted that the "no-duty-to-aid rule applies equally to emergency rescue personnel, including paramedics." (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1185.) However, where a defendant's takes affirmative steps to render aid and thereby increases the risk of harm, a duty can arise giving way to negligence liability. (See *Golick v. State of California* (2022) 82 Cal.App.5th 1127, 1143–1146.) Similarly, once undertaken, liability can flow where harm is suffered in reliance upon the affirmative assistance given. (*Greyhound Lines, Inc. v. Department of California Highway Patrol* (2013) 213 Cal.App.4th 1129, 1136.) Yet, the scope of these duties necessarily depends on the nature of the undertaking. (*Golick, supra*, 82 Cal.App.5 at 1146.) The harm which arises from any undertaking must be of the type that would not have otherwise arisen but for the defendant's conduct. (Id. at 1147.)

The appellate court went on to affirm the lower court's ruling on the grounds that neither Prokop nor Burke had done any more than offer assistance to Murphy – that is neither paramedic took affirmative steps on which Murphy could have relied, nor did their offers of medical treatment increase any harm to her. Instead, the stroke suffered by Murphy was just the type of harm which was likely to arise from the third-party vehicle collision, a fact of which she was informed multiple times by the paramedics on-scene. The Court rejected Murphy's argument that the paramedics interacting with her in any capacity, even without providing medical care at all, gave rise to a duty. (Cf *Wright v. City of Los Angeles* (1990) 219 Cal.App.3d 318; *Zepeda v. City of Los Angeles* (1990) 223 Cal.App.3d 232; *Camp v. State of California* (2010) 184 Cal.App.4th 967.) As neither paramedic was permitted by Murphy to even begin to conduct a medical evaluation or examination, the Court held that Murphy's claims and the facts of the case were inconsistent with the parameters of the negligent undertaking doctrine. Accordingly, the appellate court determined that, based on the undisputed facts of the case, the lower court had correctly ruled in favor of Defendants.

Significance: Where an individual does not appear injured, refuses medical treatment, and appears to have the capacity for such a refusal, a theory of negligent undertaking against emergency responders is only viable if some medical examination of the individual, however minor, is conducted.

Hubbard v. City of San Diego

139 F.4th 843

U.S. Court of Appeals, Ninth Circuit

Filed June 4, 2025

The City of San Diego enacted an ordinance which prohibited yoga instruction at shoreline parks and beaches where the instruction was given to four or more persons. Two yoga instructors, Steven Hubbard and Amy Baack, challenged the City's ordinance on the grounds that it was a violation of the free speech provisions of the First Amendment both on its face, and as applied. The City's ordinance was enacted on the grounds that it attempted to limit commercial activity in the absence of City approval, or unless the activity was defined as "expressive" under the municipal code. Within the municipal code, teaching yoga was defined as a "non-expressive" activity. Both Hubbard and Baack were affected by the ordinance, with Hubbard receiving two citations for teaching and Baack being turned away from a park and informed that the City would not issue permits for yoga instruction.

The two teachers subsequently challenged the ordinance and sought a preliminary injunction which the District Court denied. In denying the injunction, the court reasoned that the teachers had failed to establish that teaching yoga was protected speech and thus had not demonstrated a likelihood of success on the merits. The District Court further determined that the ordinance was therefore content neutral, and did not specifically attempt to exclude yoga instruction, but was rather a valid time, place, and manner restriction. As the ordinance was not an outright ban on yoga instruction, but rather a restriction, the District Court deemed the ordinance constitutional. The teachers subsequently appealed to the Ninth Circuit which reversed the District Court's ruling.

In analyzing the relevant factors which pertained to the preliminary injunction, the Ninth Circuit focused heavily on the teachers' likelihood of success on the merits. *Meinecke v. City of Seattle*, 99 F.4th 514, 521 (9th Cir. 2024). The Court determined that, as a first step, teaching yoga was unequivocally protected speech under the First Amendment as it communicates a philosophy and information through expressive movements. *Bikram's Yoga Coll. of India, L.P. v. Evolation Yoga, LLC*, 803 F.3d 1032, 1034 (9th Cir. 2015). Likening yoga to vocational training, the Court quickly established that yoga instruction was protected under the First Amendment. *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1069 (9th Cir. 2020). Similarly, the Court had no issue determining that the parks and spaces affected by the ordinance were traditionally places of public speech and assembly. *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1099 (9th Cir. 2003). The Court then turned to the communicative content that the ordinance sought to restrict, finding it content-based, and thus presumptively unconstitutional. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

Finding the ordinance presumptively unconstitutional, the Court then focused its analysis on whether the ordinance "further[ed] a compelling interest and [was] narrowly tailored to achieve that interest." *Id*. at 171. In determining that the ordinance failed strict scrutiny, the Court highlighted the City's lack of explanation as to how the ordinance protected public safety or to the contrary how yoga instruction could pose a public harm or what consequences might result. Thus, even in the face of a compelling interest such as public safety, the City had failed to show that the ordinance was narrowly tailored to meet those interests. Further, the Court noted that the ordinance was "hopelessly underinclusive" in that it targeted yoga instruction for exclusion, but permitted similar activities such as Tai Chi or other types of physical instruction. *Id*. Finally, as the City failed to show how the ordinance and its prohibition on yoga instruction was the least restrictive means, the Court established that the ordinance failed under strict scrutiny, and that the teachers had made a showing of success on the merits of their as-applied challenge.

Having established a colorable claim under the First Amendment, the Court determined that Hubbard and Baack would suffer irreparable harm absent the preliminary injunction. The Court reasoned that "[i]t is axiomatic that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.' " *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ*., 82 F.4th 664, 694 (9th Cir. 2023). Thus, finding that the balance of hardships tipped strongly in favor of Hubbard and Baack's claim, the Ninth Circuit reversed the District Court's denial of the preliminary injunction, ordering it issued on remand. *Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019).

<u>**Significance**: City ordinances which attempt to restrict or single out particular activities, even those which are not traditionally thought of as forms of speech, may be subject to heightened levels of scrutiny and constitutional review. Accordingly, interpreting "expressive activity" broadly and avoiding activity-specific prohibitions may be advisable when contemplating new ordinances to avoid First Amendment challenges.</u>

AI's Seat at the Table: The Role of AI in Labor Relations

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AI's Seat at the Table: The Role of AI in Labor Relations

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AI's Seat at the Table: The Role of AI in Labor Relations

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I. INTRODUCTION

As artificial intelligence (AI) becomes increasingly integrated into city operations, public agencies must navigate its impact on labor relations. While AI can enhance efficiency both in the labor negotiations context and in personnel management generally, it also raises concerns about job displacement, changes in working conditions, and the potential for surveillance—all issues that implicate labor relations and bargaining obligations.

This white paper focuses on the intersection of AI and labor relations, equipping city leaders with a framework to implement AI responsibly while adhering to obligations under the Meyers-Milias-Brown Act ("MMBA") and other applicable labor laws. The paper also addresses emerging case law and legislative developments that underscore important considerations for public agencies seeking to integrate AI into the workplace.

II. OVERVIEW OF AI APPLICATIONS IN THE PUBLIC SECTOR

What is AI?

Before discussing the applications of AI by public agencies and the potential labor relations implications of its use, this section provides a foundational understanding of how AI operates.

AI systems draw data and information from myriad sources to make predictions, recommend actions, or automate repetitive tasks. Specifically, AI draws on data from large-language models ("LLM") that have collected and store massive amounts of data and information from various sources. The AI model's "intelligence" is really a sophisticated pattern recognition system that, at a basic level, detects patterns in language and uses statistical probabilities to predict the next word in a sequence. The more data these AI models access, the better they generally perform, including on myriad tasks not related to language recognition.

Each AI service, whether it's OpenAI's ChatGPT, Google's Gemini, Anthropic' s Claude, or a custom enterprise model, applies its own rules, instructions, and guidance (collectively an algorithm) to process the raw data and the user's inputs to generate a response or result. This includes varying approaches to speed and accuracy as well as issues like user security and privacy. Some products may be more focused on speed than accuracy or comprehensive responses and some services may prioritize user privacy and security than others.

Contradictions between developer-embedded assumptions and rules learned from data/machine learning may, and often does, lead to hallucinations, or incorrect, nonsensical, or misleading information presented as fact.

LLMs predict words based on probability, not accuracy, and lack the Artificial General Intelligence ("AGI") to actually "understand" the meaning of the words they use. Thus, AI sometimes "fills in the blanks" based on statistical likelihood, at the expense of factual accuracy. The fact that AI is trained and relies on data and information produced by humans is also the reason that AI may produce biased responses or results to questions. Humans generate the content on which AI operates, therefore human biases, stereotypes, and errors are inevitably embedded in that data and information. Biases and hallucinations are among the reasons why human oversight of AI applications in the public sector is imperative.

AI in the public sector encompasses a variety of technologies, including chatbots, scheduling software, and generative AI tools. Generative AI means that the tool uses data to produce, synthesize, or reorganize text, images, music, and even computer code. Traditional AI, on the other hand, combs through data to make decisions or predictions, but does not produce novel content.

How are cities in California using AI?

Public agencies in California are beginning to use AI in novel ways to address specific issues of concern. The following are some examples:

- The City of Corona uses an AI-enhanced camera to capture images from city-owned vehicles in order to detect and assess the severity of potholes on City streets. The system generates automated work orders for street and road repairs, which city staff use to prioritize the necessary repairs.
- The County of Los Angeles recently partnered with an AI company, Archistar, to streamline the building permit process in the wake of the Eaton and Palisades fires. A proprietary AI reviews building plans in the burn areas to assess the plan's compliance with the applicable building code. This allows homeowners, builders, and architects to pre-validate designs before submission to the County for review and approval, expediting the processing of permitting and the recovery of communities in the burn areas.
- CalFire uses AI to monitor fire-prone areas through a network of wildland cameras. The AI-enhanced cameras improves fire suppression by predicting the occurrence of fires based on environmental conditions, detecting fires early, and assessing the likely spread of such fires. The agency leverages AI to analyze satellite imagery, weather and environmental data, and provide real-time mapping and tracking of the fire's progress. AI-powered drones can also survey the area and offer information to firefighters on the ground.

In the employment context, cities are using AI to assist with the following types of work: (1) automating tasks (76% of respondents); (2) making better and more informed decisions (41%); and (3) engaging the community (23%).[1] Some common use cases of AI include the following:

- Notetaking during meetings and summarizing written material;
- Preparing first drafts of emails and other documents, like meeting agendas;
- Revising job descriptions and interview questions;
- Analyzing employee performance and attendance;
- Generating and revising disciplinary letters and evaluations;
- Optimizing scheduling based on staffing needs and employee preferences; and
- Handling California Public Records Act and union requests for information

Notably, however, a survey by the accounting firm Ernst & Young found that state and local government agencies lag behind the federal government in AI adoption.[2] Specifically, 48% of state and local agency respondents valued AI experience in job candidates, compared to 70% in federal agencies. Additionally, 39% of state and local agencies had never offered AI training, versus 28% for employers generally. The survey underscores the importance of investing in an AI strategy and governance plan (discussed in a later section) in order to harness the potential of AI at your agency.

III. AI-RELATED LEGAL CONSIDERATIONS UNDER THE MMBA

The implementation of AI tools in the workplace may change working conditions, impact privacy, and potentially may make obsolete certain tasks traditionally or historically performed by employees. These changes make the use of AI not just a technological issue, but a labor relations one as well.

The MMBA is the California labor law that applies to cities, counties, and special districts. Under the MMBA, public agency employers must meet and confer in good faith with recognized employee organizations over matters within the scope of representation, namely, wages, hours, and other terms and conditions of employment. Management decisions are typically exempt from mandatory bargaining, but the impacts and effects of management decisions on employees may also be subject to negotiation.

Management generally has the right to make operational decisions, including the adoption of new tools and technologies. Therefore, the decision to acquire and implement AI tools, whether it is geared at enhancing the provision of public services or management of personnel, is generally a management decision that is not subject to negotiation. However, such non-negotiable decisions may be subject to effects or impacts bargaining before the agency may lawfully implement the non-negotiable decision.

A notable exception to the above is surveillance technology, which triggers heightened scrutiny due to the technology's impact on employee privacy and working conditions.

[1] Source: https://hbr.org/2024/12/how-u-s-citis-are-using-ai-to-solve-common-problems?ab=at_art_art_1x4_s01.
[2] Source: https://statescoop.com/federal-government-state-local-ai-adoption-2024/.

Surveillance systems are typically considered within the "scope of representation," meaning their acquisition and implementation are *not* strictly management decisions. (*See Rio Hondo Community College District* (2013) PERB Decision No. 2313, pp. 14-16.) Thus, if a public agency intends to use AI technology to monitor employees' physical or virtual activity, the agency must provide employee organizations notice and an opportunity to bargain over the decision.

However, as provided above, even when decisions to implement AI are non-negotiable managerial prerogatives, employers are still obligated to provide employee organizations with notice and an opportunity to negotiate the effects or impacts of the decision. The effects and impacts of AI technology may include changes to daily workflows, the availability of evidence supporting employee discipline, and employee training requirements associated with new AI tools. (*See City of Sacramento* (2020) PERB Decision No 2745-M, pp. 17-20.) In such a scenario, the employee organization has the obligation to identify a matter within the scope of representation that is affected by management's decision to adopt and implement AI. (*County of Sacramento* (2013) PERB Dec. No. 2315-M.)

To the extent that an agency's use of AI performs duties that are currently performed by agency employees, the agency's decision to use AI in that manner may implicate the body of Public Employment Relations Board ("PERB") decisions regarding transfer of bargaining unit work. The decision to transfer work that was previously performed by bargaining unit employees is typically a mandatory subject of bargaining. (*See, e.g., City of Glendale* (2020) PERB Dec. No. 2694-M.) While we are not aware of an existing PERB decision that addresses transfer of bargaining unit work to be performed by an automated technology or tool, rather than people outside of the agency or in other bargaining units, it is possible that PERB will extend this reasoning to require agencies to bargain before utilizing any non-bargaining unit alternatives, including AI technology. Cities should be aware of this potential duty to bargain even where AI technology is poised to displace specific job duties, rather than entire positions at the city.

Agencies should also be mindful of avoiding direct dealing with represented employees when communicating about new AI policies and tools. Direct dealing occurs when a public agency communicates or negotiates directly with represented employees about matters within the scope of representation, thereby bypassing the union. This is an unfair labor practice because it undermines the union's exclusive right to represent its members in negotiations over wages, hours, and working conditions.

The bottom line is that even if AI adoption is a management right, the effects or impacts of the implementation of AI technologies tools may still be negotiable. Agencies should provide notice to all employee organizations when they are proposing to adopt a new AI-based tool or technology and provide employee organizations the opportunity to identify how the use of AI may affect or impact employee wages, hours, or the terms and conditions of their employment.

IV. UNION INTERESTS RELATED TO AI

Public employees, like employees in the private sector, may fear that the adoption and implementation of AI will result in mass layoffs and workforce reductions or job replacement, re-categorization, or re-assignment. Public employees may also be concerned about less fundamental, but nevertheless significant, changes to working conditions precipitated by the adoption of AI, such as mandatory training on and use of AI and AI-powered surveillance.

As witnessed in recent labor disputes with longshoreman on the East Coast and earlier strikes in Hollywood with screen actors and writers, demands by workers for protections against AI automation were key issues in bargaining. Recently, the California Nurses Association has organized protests across the state to highlight their concerns about using AI technology to perform nursing duties, which the nurses argue may threaten patient health and safety.[3]

While fears about widespread layoffs and workforce reductions in the public sector are likely overstated at present, it is inevitable that as the use of AI is increased it will qualitatively and quantitatively change the duties that employees perform. A recent study predicted that, while only 9% of jobs presently face a high risk of reduction or replacement due to automation or AI, approximately 60% of jobs involve duties, functions or tasks that could be automated or performed using AI tools or technology.[4]

Unions are increasingly aware of how AI may affect the terms and conditions of employment for the employees that the unions represent. Unions may assert objections to the adoption and implementation of AI tools and technologies and assert that the agency must negotiate both the decision to deploy AI as well as the effects or impacts associated with such deployment. Unions may preemptively make proposals at the bargaining table to limit agency use of AI or may make such proposals in response to notice from the agency about a forthcoming proposal to do so.

Common union proposals related to AI may include the following:

- Prohibiting the use of AI surveillance data in disciplinary decisions;
- Requiring disclosure of AI tools used in performance evaluations and other employment decisions; and
- Preserving bargaining unit work and limiting outsourcing via automation tools or technologies, like AI.

Proactive communication and transparency with employee organizations on AI-related issues may help them understand the potential for AI to be mutually beneficial. For example, AI can support safer staffing levels and reduce administrative burdens if deployed responsibly. Agencies should consider inviting unions to participate in pilot testing or technology advisory groups to foster buy-in (discussed further in Section VI, below).

[3] https://www.nationalnursesunited.org/press/cna-demand-patient-safeguards-against-artificial-intelligence.
[4] https://www.gao.gov/blog/which-workers-are-most-affected-automation-and-what-could-help-them-get-new-jobs.

V. AI AS A TOOL TO ENHANCE LABOR RELATIONS

AI is not only a potential disruptor—it can also support cities in the bargaining process and other labor relations settings.

One AI application with great potential to reduce administrative burden is using AI tools to streamline responses to union requests for information ("RFIs"). AI can comb large datasets, such as payroll and scheduling data, to respond to RFIs regarding overtime, staffing levels, or benefit usage. An HR Analyst could upload dozens of documents containing bargaining unit member information to an AI engine, such as ChatGPT, and ask it to populate a spreadsheet that can be easily conveyed to the union. For example, a union may request the number of overtime hours worked by maintenance staff in the last quarter. An AI tool can quickly analyze time logs, flag anomalies, and generate a formatted report with visual summaries.

Generative AI can also provide valuable assistance in preparing for negotiations. Applications include preparing draft memorandum of understanding ("MOU") provisions or bargaining proposals by synthesizing boilerplate language and relevant data. AI can thereby promote consistency both within and across MOUs at the agency, as well as flag ambiguous language that the agency might not have noticed otherwise. For example, an agency could upload the current MOUs for all of its bargaining units to an AI engine and ask it to flag variations in language for comparable provisions, such as sick and vacation leave policies. The agency could also upload grievances that it received during an MOU's term, along with the MOU, and ask an AI tool to flag the specific provisions and language that prompt grievances most often.

For agencies that prepare classification and compensation studies in-house, AI is a potentially powerful tool for performing market analysis. AI could help agencies select comparator cities across a number of criteria, benchmarking positions, aggregating publicly available market data, and synthesizing the data regarding compensation, benefits and other terms and conditions of employment.

One AI tool that has started to appear at bargaining tables, whether via Zoom or in-person, is notetaking software. While AI voice-to-text transcription can assist in creating an accurate record of bargaining sessions, agencies should proceed with caution. AI notetaking tools can introduce data privacy issues, i.e., if the software is inadvertently left on during a caucus, it may record the city's confidential bargaining positions, personnel information, or non-public financial data.

As with all AI applications, AI tools increase efficiency and accuracy, but should not replace human review and contextual judgment.

VI. DEVELOPING A GOVERNANCE AND IMPLEMENTATION STRATEGY

While it may be tempting to rush to catch up with the rapid pace of AI innovation, slow and steady wins the race. Successful AI integration in city operations begins with establishing a governance framework that incorporates labor relations considerations from the outset.

Developing an AI strategy starts with identifying uses of AI that are aligned with the mission and the needs of your city, whether the need pertains to service delivery or personnel management. Employees, and their representatives, will likely be more agreeable to the introduction of AI tools in the workplace if the city can point to a concrete need that AI will help fulfill. A failure to justify an investment of city time and resources on AI can reduce employee and community buy-in.

Next, a governance framework is a crucial ingredient in promoting consistent, comprehensive, and legally-compliant applications of AI at your agency. At its core, governance refers to the systems, processes, and structures used to make decisions, set policies, and ensure accountability within an organization. Therefore, a governance framework should address who has authority to make decisions regarding AI implementation (e.g., City Council, City Manager, Department Heads); the process that they must follow in acquiring and rolling out an AI tool, including the process for consulting with employee organizations and other groups; and a plan for monitoring both the effectiveness of the AI tool and legal compliance. A governance structure that incorporates union involvement at the outset can address unions' concerns about AI in the workplace. Likewise, involving unions in the process for testing and providing feedback on a pilot AI program can promote a sense of being heard and reduce resistance to AI implementation.

We recommend developing a written AI policy and governance structure, both in the interest of transparency and to promote consistent enforcement of the city's expectations. This policy is a valuable component of an overall effort to communicate clearly and regularly with unions to build the trust necessary to adopt AI at the city, especially for mission-critical applications. For example, a policy that explicitly states that confidential personnel information will not be used to train AI tools can facilitate employee organizations' buy-in. Note that an AI policy will likely be subject to the requirement to provide employee organizations with notice and an opportunity to identify negotiable effects and impacts.

VII. KEY TAKEAWAYS

Involving employee organizations in your agency's adoption of AI is not only legally required; it is also strategically wise. Even where the acquisition and implementation of an AI tool is arguably a management right under the MMBA, the technology likely will not be a worthwhile investment if the agency lacks employee and union buy-in. Proactively considering and addressing employee interests with respect to AI, including at the bargaining table and in the meet and confer process regarding the impacts of a specific AI tool, is instrumental to maximizing AI's potential to be a mutually-beneficial asset in the workplace.

Public Records Act: Compliance and Tips for Navigating Difficult Requests

HIGH STAKES OF THE CALIFORNIA PUBLIC RECORDS ACT PROTECTING YOUR AGENCY AND HANDLING DIFFICULT REQUESTS

Introduction and Background

The California Public Records Act ("CPRA"), codified at Government Code §7920.000 *et seq.*, was enacted in 1968. The CPRA is one of two "Sunshine Laws" in California aimed at promoting government transparency and accountability. In 2021, after decades of piecemeal amendments, which rendered the statute increasingly complex, the Legislature recodified the CPRA.[1] The recodification did not substantively alter the CPRA but rather reorganized a series of statutes that had become fragmented and difficult to navigate. The recodification resulted in an easier to use and understand statute.[2] The CPRA applies broadly to all state and local agencies[3] in California and broadly defines public records to include any writing[4] related to the public's business, regardless of physical form or characteristics. The CPRA further guarantees broad access rights to the public, while also providing exemptions to protect certain sensitive information and a mechanism to ensure compliance through judicial remedies.

Overarching Goals:

- Ensure government transparency and accountability through access to public records.
- Promote civic participation and government oversight.
- Balance public access rights with individual privacy concerns.

This *High Stakes of the California Public Records Act* training introduces the CPRA and examines its legal framework, common pitfalls, and compliance challenges, while offering strategies for public agencies to strengthen compliance, reduce risk, manage complex or burdensome requests, handle difficult requesters, and maintain public trust.

Legal Framework

Ratified in 1968, the CPRA grants the public broad access rights to information generated by public agencies. Founded on the principle that government activities must be conducted openly and transparently, the CPRA empowers the public to understand how public officials make decisions and hold them accountable for their actions. Over time, there have been changes to the CPRA, but the underlying intent has remained consistent. Passed in 2004, Proposition 59 amended Article I of the California Constitution, further strengthening the CPRA. With its passage, the public's right to access records was enshrined in Article I of the California Constitution:

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[1] Gov. Code, §7920.005 "CPRA Recodification Act of 2021"
[2] Gov. Code, §§7920.100-7920.120
[3] Gov. Code, §7920.540
[4] Gov. Code, §7920.545

"The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."[5]

In 2023, the CPRA was recodified to improve usability and clarity.

Purpose

The CPRA's sole function is to provide for the disclosure of identifiable public records. It is not a records retention, destruction, privacy, or usage statute. The CPRA does not dictate what information agencies may collect or how long they must maintain it; instead, it governs what must be disclosed once records exist.

In *Los Angeles Police Dept. v. Superior Court* (1977), the court stated the CPRA *"does not undertake to prescribe what type of information a public agency may gather, nor to designate the type of records such an agency may keep, nor to provide a method of correcting such records. Its sole function is to provide for disclosure."*[6]

Scope

The CPRA applies to all state and local agencies in California, including departments, boards, commissions, and city councils.[7]

A "public record" is defined broadly within the CPRA.

- Public Record: A "public record" is "*any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency, regardless of physical form or characteristics."*[8]

- Writing: A "writing" is defined as *"any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."*[9]

An agency may possess a record through "actual" possession (a record that is in an agency file, on an agency computer, or in the agency's computer system) or "constructive" possession (the agency has the right to control the record either directly or through another person).[10]

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[5] Cal. Const., art I, §3, sub (b)
[6] *Los Angeles Police Dept. v. Superior Court* (1977) 65 Cal.App.3d 661,668
[7] Gov. Code, §§ 7920.510, 7920.525, 7920.540
[8] Gov. Code, §7920.530
[9] Gov. Code, §7920.545, *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608,618-619
[10] *Board of Pilot Comrs. for the Bays of San Francisco, San Pablo and Suisun v. Superior Court* (2013) 218 Cal.App.4th 577,598; *Consolidated Irrigation Dist. v. Superior Court* (2012) 205 Cal.App.4th 697,710

Access Rights

Under the CPRA, every "person" (individuals, corporations, partnerships, LLCs, or associations)[11] has the right to inspect public records during a local agency's office hours (subject to certain exemptions[12]), and the right to promptly receive copies of public records[13].

- Person: A "person" is defined as any natural person, corporation, partnership, limited liability company, firm, or association. A "person" is not required to disclose their identity to access public records.[14]

The CPRA does not require a requester to disclose their purpose for making the request. If a requester shares their purpose for requesting a record, the CPRA does not allow limitations on access to a public record based on their stated purpose, if the record is otherwise subject to disclosure.[15]

Exemptions

Both the CPRA and the California Constitution require that public writings be open to public scrutiny. While disclosure is the general rule, the CPRA provides a list of specific statutory exemptions that allow agencies to withhold certain categories of records or information. In constructing the exemptions, the Legislature recognized that public access to information must sometimes yield to competing public interests, chief among them being the right to privacy. The following are some of the most common exemptions:

- Personnel and Medical Records: The CPRA does not require disclosure of personnel, medical, or similar files that would constitute an unwarranted invasion of personal privacy.[16]

- Criminal Investigatory Records: The CPRA shields records related to criminal investigations to protect law enforcement processes and individual privacy.[17]

- Utility Customer Data: The CPRA does not generally require the disclosure of private information, such as a utility customer's name, credit history, utility usage data, home address, or telephone number. [18]

- Pending Litigation: Records created for litigation purposes are generally exempt from disclosure; however, this exemption is not absolute and is subject to specific conditions. The exemption only applies until the subject litigation is adjudicated or otherwise settled.[19]

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[11] Gov. Code, §7920.520
[12] Gov. Code, §7922.525
[13] Gov. Code, §7922.530(a)
[14] Gov. Code, §7920.520
[15] Gov. Code, §7921.300
[16] Gov. Code, §7927.700
[17] Gov. Code, §§7923.600-7923.625
[18] Gov. Code, §7927.410
[19] Gov. Code, §7927.200

- Voter Information: The CPRA prohibits the disclosure of voter information, including home address, telephone number, email address, precinct number, or any other number specified by the Secretary of State for voter registration purposes.[20]

- Taxpayer Information: The CPRA does not require disclosure of taxpayer information.[21]

- Other Records Protected by Law from Disclosure: The CPRA incorporates provisions of federal and state law that regulate the disclosure of records or information,[22] including:
  - Attorney-Client Privilege
  - Attorney Work Product
  - Trade Secrets
  - Copyright

- Catch-all Exemption: The CPRA allows public agencies to justify withholding public records by independently balancing the public interests in disclosure and nondisclosure. In order the assert the catch-all exemption, a public agency must demonstrate that the public interest served by nondisclosure *clearly* outweighs the public interest served by disclosure based on the facts surrounding that particular record.[23] While the exemption is applied in good faith, an agency should be prepared to support its decision with a well-reasoned and documented justification. Consequently, agencies should exercise caution when using this exemption, as courts have consistently warned that it should not be employed as a matter of convenience or to shield records.

  Unlike the more specific exemptions enumerated in the CPRA, the catch-all exemption is intentionally broad and flexible, designed to address situations the Legislature could not have anticipated.[24]

Request Process

A CPRA request may take various forms. For example, the CPRA does not require requesters to submit their requests in writing. A request may be made in writing, verbally, or through another means of communication. While an agency may encourage written requests to promote accuracy, it cannot mandate them. Agencies may offer an online portal for submitting requests, but use of the portal must be optional. If a requester makes a verbal request, the agency may memorialize the request in writing or complete any agency-required forms on the requester's behalf.

Response Requirements: Within 10 days after a CPRA request is received, an agency must respond with one of the following[25]:

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[20] Gov. Code, §7924.000
[21] Gov. Code, §7925.000
[22] Gov. Code, §7927.705
[23] Gov. Code, §7922.000
[24] *Id*.
[25] Gov. Code, §7922.535

- *Production Letter*: accompanies any provided records.[26]
- *Denial Letter*: informs the requester that the records sought do not exist or are exempt from disclosure, and provides the basis for the exemption.[27] The denial letter must be in writing and include the name and title of the person responsible for the denial determination.[28]

- *Determination Letter*: alerts the requester that responsive records exist and specifies the date by which they will receive the record(s).[29]
- *Extension Letter*: provides the requester the update that the agency will extend its response deadline by up to 14 days, citing one of the statutory and factual bases below for the extension.[30]

    - Reasons that justify a 14-day extension:

        1. The need to search for and collect the requested records from locations or organizations that are separate from the office processing the request.
        2. The need to search for, collect, and review a large volume of records.
        3. The need to consult with another agency having substantial interest in the determination of the request.
        4. The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.
        5. The need to search for, collect, and appropriately examine records during a state of emergency proclaimed by the Governor in the jurisdiction where the agency is located when the state of emergency currently affects, due to the state of emergency, the agency's ability to timely respond to requests due to staffing shortages or closure of facilities where the requested records are located.

Production Requirements**:** While agencies have strict statutory timelines for *responding* to requests, there is no similarly strict timeline for *producing* records. Records shall be made available "promptly." For voluminous requests, agencies may release the records on a rolling basis, accompanied by a production letter that identifies any asserted exemptions and specifies the next date by which additional records are to be provided.[31]

In most cases, agencies have the option to provide the requested record in either electronic or paper form. However, a responding agency must provide an electronic copy when all of the following conditions are met:[32]

- an electronic copy is requested.
- the record is subject to disclosure.

[26] Gov. Code, §7922.535
[27] Gov. Code, §7922.535
[28] Gov. Code, §7922.540
[29] Gov. Code, §7922.535
[30] Gov. Code, §7922.535
[31] Gov. Code, §7922.530(a)
[32] Gov. Code, §7922.570

- the agency holds the record in an electronic format (e.g., can be extracted from a database).
- the release of an electronic format does not compromise the security or integrity of the original record or jeopardize the proprietary software in which it is maintained.

Clarifying Requests and Assisting the Requester: If a CPRA request is unclear, the responding agency should request clarification. When examining a request for clarity, a responding agency must determine whether it describes identifiable records. A requester may identify an exact record, but is not required to do so. A requester may seek a record based on a description of the record's general content or provide specific criteria for its retrieval.

The CPRA requires agencies to assist requesters in making focused and effective requests that reasonably describe identifiable records in the agency's possession.[33]

Judicial Remedies

The CPRA provides a legal remedy to requesters who believe they have been improperly denied access to records. This remedy is by way of a writ petition filed in superior court. A CPRA writ is a special kind of lawsuit used to enforce the mandate of access to public records.[34] Public agencies should be mindful that prevailing petitioners are entitled to recover attorney fees and costs.[35] Additionally, courts may order agencies to disclose records in compliance with the CPRA.

Evaluating Legal Risk and Exposure by Agencies

Common Pitfalls

Some common legal considerations and pitfalls arise under the CPRA whenever agencies seek to deny or delay responding to requests, as unjustified delays or blanket denials can expose them to litigation. Excessive redactions may also lead to legal disputes. Similarly, failure to respond within statutory deadlines is a frequent source of litigation and liability. Cost disputes can arise if an agency attempts to charge more than what is allowable for duplication or data extraction. Questions over the proper scope of disclosure often emerge when balancing privacy, security, and transparency obligations. Agencies must also weigh the public interest in evaluating whether to disclose records, as courts generally favor disclosure when public accountability is at stake.

Below are scenarios of common CPRA pitfalls:

Denial or Delay of Requests

Pitfall: Denying access to records or delaying responses without adequate justification can prompt a lawsuit to compel compliance.[36]

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[33] Gov. Code, §7922.600
[34] Gov. Code, §7923.100, *et seq.*
[35] Gov. Code, §7923.115
[36] *Rittiman v. Pub. Utilities Comm.* (2022) 80 Cal.App.5th 1018,1038

Scenario: A requester submits a written CPRA request seeking copies of any and all communications between agency staff and a vendor regarding the award of a contract. The agency is concerned that the release of the emails may generate public criticism, and delays responding to the request well beyond the statutory deadline. The agency eventually issues a denial letter, but does not cite any specific exemption or provide a legal justification for denying access. The requester, aware of their rights under the CPRA, files a CPRA writ to compel disclosure. The agency is now exposed to legal liability due to its failure to meet deadlines and its unsupported denial of access to public records.

<u>Excessive Redactions</u>

Pitfall: Excessively redacting documents that withhold information that requesters believe should be accessible under the CPRA can lead to disputes over transparency.[37]

Scenario: A requester calls an agency's main number and requests copies of an internal policy that is used to guide agency staff in handling public complaints. The agency provides the document, but heavily redacts large sections, including routine operational procedures and contact information for agency offices (information that is readily available on the agency's website). The requester argues that the redactions are being used to conceal dishonest practices when responding to complaints, rather than to protect confidential information. The requester challenges the response and files a CPRA writ to gain access to the unredacted records. The agency is now exposed to legal liability due to excessive redactions.

<u>Failure to Respond</u>

Pitfall: Failing to respond to CPRA requests within the statutorily required timeframe can prompt legal action to enforce the requester's rights. If an agency fails to respond to a request at all, it may be considered a constructive denial of the request. The requester can treat the lack of response as a denial and can pursue remedies available under the CPRA.[38]

Scenario: A requester submits a written CPRA request for records related to the agency's recent budget adoption. The request is properly directed to the agency's designated office. Still, due to an internal miscommunication, no acknowledgment or response is ever provided within the ten-day statutory period to the requester. From the requester's perspective, the silence constitutes a constructive denial under the CPRA. As a result, the requester files a lawsuit to compel disclosure. The agency is now exposed to legal liability due to its failure to respond to the requester.

<u>Cost Disputes</u>

Pitfall: Disputes can arise over fees charged for records retrieval, duplication, or mailing, especially if the requester believes the fees are excessive or not justified under CPRA guidelines.

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[37] *BondGraham v. Superior Ct.* (2023) 95 Cal.App.5th 1006,1017-1018; *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th59,67
[38] *County of San Benito v. Superior Court* (2023) 96 Cal.App.5th 243,264

The CPRA states that "*each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering* <u>*direct costs of duplication*</u>*, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so*."[39]

Scenario: A requester submits a CPRA request through the agency's CPRA portal on their website. The request seeks copies of environmental reports related to a recent development project that went to the planning commission for approval. The agency agrees to provide the records but informs the requester that the cost will be several hundred dollars, citing the time spent by staff searching for and reviewing the records. The requester, familiar with the CPRA's fee provisions, objects because agencies may charge only for the direct cost of duplication or, in limited cases, for programming or data extraction, and not for staff review time. Believing the charges to be excessive and inconsistent with the statute, the requester challenges the fees. In this case, the agency is now exposed to legal liability due to its unreasonable fee assessment.

Compliance Challenges and Agency Burdens

The CPRA presents several compliance challenges for public agencies, as the law imposes strict deadlines, broad disclosure obligations, and unpredictable legal risks. Agencies must strike a balance between transparency and legitimate confidentiality concerns, often navigating complex exemptions involving privacy, privilege, or ongoing investigations. The rise of advanced technology has further complicated compliance, as courts are less sympathetic to claims that requests are overly broad or voluminous, given the availability of modern tools such as metadata searches and automated redaction. Attorney fee awards have also become increasingly unpredictable, with courts allowing limited discovery in CPRA litigation. Together, these factors create a high-risk environment where even minor missteps, such as delayed responses, excessive redactions, or improper fee assessments, can expose agencies to costly litigation. These challenges also tend to compound one another, creating a ripple effect that increases the likelihood of additional pitfalls and escalates overall risk.

Below are common CPRA-related compliance challenges and burdens facing public agencies:

<u>Scope of Discovery</u>

CPRA litigation has a unique scope of discovery as compared to other writs.[40] Typically, discovery is not available in writs. It is, however, available to CPRA litigants. Because discovery is often the most expensive and time-consuming phase of litigation and because attorney fees awards are at risk in CPRA writs, it can be challenging for agencies to accurately evaluate or predict their scope of exposure. This reality places a heavy burden on agencies, as the potential for court-ordered discovery creates yet another avenue for costs to rise when compliance is questioned. The need to collect, review, and produce large volumes of records under strict legal standards can strain staff capacity, increase attorney involvement, and lead to higher overall expenses. In practice, any writ may open the door to a discovery process that magnifies both financial and operational impacts well beyond the original request. In effect, even a relatively small

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[39] Gov. Code, §7922.530

[40] *City of Los Angeles v. Superior Ct. (Anderson-Barker)* (2017) 9 Cal.App.5th 272,288

misstep in handling a CPRA request may trigger litigation costs that balloon far beyond expectations.

Attorneys' Fees

The monetary costs associated with CPRA litigation can be unpredictable. Even if a case is dismissed as "moot" after production of the requested records, a court can still award attorneys' fees to the prevailing party. A petitioning requester prevails in the litigation (and is entitled to recover fees) if the suit was the catalyst for disclosure of even a single record for which access was improperly denied.[41] Even settlement can expose an agency to a fee motion if the fees are not addressed in the settlement agreement.[42] This places a significant burden on agencies because it creates financial exposure even when access to the records is given. Agencies may find themselves paying attorneys' fees despite having ultimately produced the records, which means that even technical delays, incomplete searches, or inadvertent denials can lead to costly consequences. The unpredictability of fee awards makes it challenging to budget or plan, thereby increasing overall risk and underscoring the importance of strict compliance at every stage of the CPRA process.

Technological Advances

Technology has increased the heavy burden of disclosure.[43] Agencies may be required to search for and collect records from a wide array of virtual spaces, including the personal devices and accounts of staff and public officials.

This requirement creates a substantial burden because agencies must not only rely on staff and elected officials to search their personal devices and accounts to identify potentially responsive records, but agencies must also ensure that staff and elected officials consistently follow records retention policies. When employees use personal devices, emails, or messaging apps for agency-related communications, it complicates compliance, increases privacy concerns, and raises the risk of incomplete searches. Agencies then face the dual challenge of safeguarding individual privacy while still ensuring full disclosure, all while monitoring and enforcing records retention policies that govern public records on personal accounts and devices. This oversight role requires ongoing training, clear policies, and, in some cases, disciplinary measures, adding yet another layer of administrative and legal burden to CPRA compliance.

These burdens are further compounded by the fact that, with the advent of new technologies, courts are less inclined to be sympathetic to the argument that a request is overly broad or voluminous. As technology has evolved, advanced search capabilities, metadata filtering, email threading, deduplication, and automated redaction are standard tools available to most agencies. Courts are increasingly unwilling to accept volume alone as a reason for delay or denial,[44] which means that even the challenges of searching across personal and official platforms cannot be used as an excuse to narrow or slow a response.

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[41] *Sukumar v. City of San Diego* (2017) 14 Cal.App.5th 451,462
[42] *Galbiso v. Orosi Pub. Util. Dist.* (2008) 167 Cal.App.4th 1063,1089
[43] *City of San Jose v. Superior Court (Smith)* (2017) 2 Cal.5th 608, 618
[44] *Getz v. Superior Court* (2021) 72 Cal.App.5th 637,650

Managing Difficult Requesters

As discussed, public agencies are legally obligated to respond to requests made under the CPRA. While most requesters engage in good faith, agencies must also be prepared to handle difficult requesters. Some requesters may challenge staff's patience, strain agency resources, or attempt to use the law as a tool for intimidation. Understanding the types of difficult requesters, recognizing red flags, and applying professional management strategies are essential to maintaining compliance and protecting the integrity of the agency's operations.

Who Are Difficult Requesters?

Difficult requesters take several forms. Below are some common examples:

Frequent filers are requesters who submit repeated requests that often overlap or duplicate prior submissions, creating unnecessary workload.

Potential litigants are requesters that deliberately file requests with the aim of discovering technical violations that can form the basis of a lawsuit.

Intimidators are requesters who use the CPRA not as a transparency tool, but as a weapon to intimidate or punish agencies through burdensome requests.

Aggressive or hostile requesters are those who exhibit mean-spirited behavior in emails, public forums, or at government buildings or in public meetings.

Regardless of the type, agencies must remain mindful that each request, even if burdensome, is a legal obligation under the CPRA.

How to Manage Difficult Requesters?

The most effective strategy is to maintain professionalism and adhere to the law. Responses should be respectful, factual, and free from emotion, even in the face of hostility. When requests are vague, overly broad, or duplicative, agencies should seek clarification or formally note their intent to request clarification to narrow the scope of the request. This both preserves statutory compliance and protects the agency from accusations later.

Agencies should also communicate clearly with the requester, outlining the process, identifying who will follow up with the requester, and setting expectations. This reduces the likelihood of misunderstandings and ensures transparency in handling the request. Equally important is maintaining complete documentation of all correspondence and decisions made during the response process. Such documentation not only ensures continuity but also provides legal protection in the event that disputes escalate.

Finally, staff should coordinate internally to gather and produce responsive records as soon as possible. Meeting statutory deadlines is critical to avoiding legal exposure, and early coordination reduces the risk of last-minute delays.

How to Recognize Red Flags?

It would be beneficial for public agency staff to identify "red flags" or warning signs early on in the CPRA process. Red flags often signal a potentially problematic requester or a request that may pose an elevated risk of litigation.

Common "red flags" include:

- Requests marked "urgent" with demands for immediate action.
- Repetitive or boilerplate language, which may suggest mass filings.
- A legalistic tone, particularly when accompanied by citations to the CPRA or threats of legal action.
- Vague or overly broad requests, which may be strategically crafted to overwhelm staff or increase the likelihood of non-compliance.
- Requests from attorneys, law offices, or media organizations, which may warrant heightened attention due to the public or legal implications.
- Buried requests, in which the actual purpose is hidden within a lengthy or confusing submission, increase the risk that the agency may overlook an element.

Recognizing these patterns allows agencies to allocate resources appropriately, involve legal counsel early if necessary, and manage risks proactively.

Difficult requesters are unavoidable and a common element of CPRA compliance. However, with clear strategies, respectful and factual responses, clarification when needed, consistent documentation, internal coordination, and awareness of red flags, agencies can meet their legal obligations while reducing unnecessary risk. By striking a balance between transparency and professional management, public agencies not only comply with the CPRA but also safeguard public trust and protect themselves from litigation risks.

Strategies for Overall Compliance

Effective compliance requires agencies to adopt proactive strategies that strike a balance between legal rigor and operational efficiency. Agencies should establish clear internal procedures and designate trained personnel as responsible for managing requests, ensuring that statutory deadlines are consistently met. Regular staff training on CPRA requirements is essential to promote consistency, minimize errors, and reduce the risk of unlawful denials or excessive redactions.

Agencies should also leverage modern technology to streamline searches, manage large volumes of records, and facilitate rolling productions where appropriate. Legal counsel should be consulted on complex or sensitive requests to ensure that exemptions are properly asserted and defensible. Finally, agencies must reinforce the principle that records related to public business, even those on personal devices,[45] may fall within the scope of disclosure, including adopting

[45] *See generally City of San Jose v. Superior Court* (2017) 2 Cal.5th 608

policies that govern how such records are to be stored. Together, these strategies help agencies strengthen compliance, mitigate litigation risks, and maintain public trust.

Conclusion

The CPRA is both a statutory and constitutional mandate for transparency. Failure to comply with its provisions can expose agencies to costly litigation, attorneys' fees, and possibly cause reputational harm. By understanding the CPRA's framework, anticipating compliance challenges, and implementing strategic practices, agencies can navigate complex requests, mitigate risk, and maintain public confidence in their operations.