DANNIS WOLIVER KELLEY
Attorneys at Law

California Voting Rights Act Upheld By Ninth Circuit

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The Ninth Circuit Court of Appeals recently rejected a challenge to the constitutionality of the California Voting Rights Act (CVRA). (*Higginson v. Becerra* (9th Cir. 2019) 786 Fed.Appx. 705.) Enactment of the CVRA has required many local agencies, including approximately 300 California school districts, to alter how they elect governing boards – in many cases after school districts were required to pay a plaintiff's or potential plaintiff's/attorneys' fees. The rejection of this constitutional challenge means the CVRA will remain in force in California, and school districts that still use at-large elections should determine whether the CVRA necessitates a change in those elections.

The California Voting Rights Act

The CVRA was enacted to prevent the use of at-large elections by local governments to dilute the vote of protected classes. "At-large" elections – used by a majority of districts – are elections where the voters of the entire district elect the members of the board. With such a system, a group that constitutes a majority of voters in a district can elect the entire board, while a minority group may be unable to elect any candidates of their choice.

Thus, the CVRA prohibits the use of at-large elections where there is evidence of a difference in the preferences of minority group voters and voters in the rest of the electorate (also known as "racially polarized voting"), and the minority group is unable to elect candidates of their choice. However, where a district uses (or transitions to) "by-trustee area elections," where each board member is elected from a trustee area within the district, the district is immune from challenge under the CVRA. Thus, many districts concerned with liability under the CVRA transition to by-trustee area elections.

Ninth Circuit Rejects Challenge to CVRA

In 2017, former Mayor of Poway Don Higginson filed a lawsuit alleging that the CVRA illegally required local agencies to engage in racial gerrymandering and violated the equal protection guarantee under the 14th Amendment. The District Court ruled against Higginson, finding that the CVRA is not unconstitutional.

The Court of Appeal agreed. While the CVRA is related to race, it did not classify any residents,

including Plaintiff, by race, thus it did not trigger strict scrutiny. The appellate court held Higginson failed to meet his burden to demonstrate that the City was motivated by race in placing him or any other resident in a particular district for the purposes of voting. It added, "although a finding of racially polarized voting triggers the application of the CVRA, it is well settled that governments may adopt measures designed "to eliminate racial disparities through race-neutral means." On these grounds the Ninth Circuit upheld the constitutionality of the CVRA.

Continued Impact on Districts

The *Higginson* case acts as a further reminder that all districts should review the requirements of the CVRA. To date, no local agency has successfully defended a CVRA challenge. Moreover, under current law, waiting to make a transition until after a district receives notice of a potential challenge may require the district to reimburse the letter's author up to $30,000. Thus, it is prudent for all districts which use at-large elections to examine their compliance with the CVRA and evaluate whether they should transition to by-trustee area elections to avoid a CVRA challenge.

If you have any questions about the CVRA or other matters related to board elections, please do not hesitate to contact a DWK attorney in our Board Ethics Transparency and Accountable (BETA) group.

PRACTICE AREAS

- Board Ethics, Transparency and Accountability