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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 DON HIGGINSON,
12 Plaintiff,
13 v.

14 XAVIER BECERRA, in his official
capacity as ATTORNEY GENERAL OF
15 CALIFORNIA; and CITY OF POWAY,
CALIFORNIA,
16 Defendants.
17

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

**DEFENDANT CITY OF POWAY'S
RESPONSE TO PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

Honorable William Q. Hayes
Courtroom 14B

Date Action Filed: October 4, 2017
Trial Date: None Set

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1 **I. THE CITY IS TAKING A NEUTRAL POSITION IN THIS ACTION**

2 Plaintiff Don Higginson (“Plaintiff”) has filed a Motion for a Preliminary
3 Injunction (“Motion”), that if granted, would enjoin the enforcement of both the
4 California Voting Rights Act (“CVRA”) and Defendant City of Poway’s (“City”)
5 Ordinance No. 809, which amends Chapter 2.04 of the City’s Municipal Code
6 (“PMC”) to establish and implement by-district elections for City Councilmembers
7 (the “Ordinance”).¹ The Motion – like Plaintiff’s entire action, generally – relies on
8 Plaintiff’s argument that the CVRA violates the United States Constitution.

9 The City does not intend to defend the constitutionality of the CVRA or
10 otherwise actively support or oppose the Motion. While an “as-applied”
11 constitutional challenge to the CVRA appears potentially appropriate in a jurisdiction
12 with the City’s demographics (*see, Sanchez v. City of Modesto* (2006) 145
13 Cal.App.4th 660, 665), at this time, the City intends to take a neutral position in this
14 lawsuit and allow Plaintiff and Defendant State of California to litigate the issues
15 presented therein, including the issues presented in the Motion. While this litigation
16 is pending, the City intends to faithfully comply with applicable law, including its
17 own Municipal Code.

18 Accordingly, unless and until this (or any) Court orders otherwise, the City will
19 continue implementing by-district elections pursuant to the Ordinance, which means
20 that the City will begin the transition to the election system adopted therein during the
21 November 2018 election. (*See*, PMC § 2.04.080; Declaration of Nancy Neufeld
22 (“Neufeld Decl.”), ¶ 2.)

23 **II. THE CITY REQUESTS THAT THE COURT MAKE ITS DECISION ON**
24 **THE MOTION NO LATER THAN MAY 1, 2018**

25 In light of its neutral position, the City is not requesting that the Court grant or
26 deny the Motion. However, the City does respectfully request that the Court make its
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28 ¹ Specifically, the Ordinance amended PMC Chapter 2.04 to add sections 2.04.060 through 2.04.090.

1 decision on the Motion as soon as possible, and no later than May 1, 2018.

2 Based on the timelines established by the California Elections Code, and based
3 further on conversations with the San Diego Registrar of Voters, formal candidate
4 nomination papers are filed in July. (Neufeld Decl., ¶ 5.) However, the decision on
5 whether to run or not run for office is a thoughtful, deliberative process involving the
6 input of families, neighbors, and community groups. Therefore, the City believes
7 equity requires a decision on this motion and/or the merits as soon as possible, but in
8 no event later than May 1, 2018. (*Id.*, ¶ 7.) The City believes this May date will
9 provide potential candidates with sufficient time to make decisions in advance of the
10 formal July nomination filing period. (*Id.*, ¶¶ 4-7.)

11 In addition, it is obviously of critical importance that any order on the Motion
12 be issued by May 1, 2018 (or earlier) so that the City, potential candidates, and the
13 public are informed as to **whether the City Council seats on the November 2018**
14 **ballot will be two district seats (Districts 1 and 3, per PMC section 2.04.080), or**
15 **two at-large seats.** This materially affects who is eligible to run for City Council in
16 November 2018 because under the City’s currently adopted by-district elections,
17 candidates will be required to reside in either District 1 or 3, while if the Motion is
18 granted, presumably candidates will be permitted to reside anywhere in the City. (*See*,
19 PMC § 2.04.060 *et seq.*)

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1 If the Court issues its order any later than May 1, 2018, this will cause
2 significant hardship to the City, including unnecessary and increased costs associated
3 with the November 2018 election, and potentially create significant confusion among
4 its citizens. The timing of this Court's order is critical to ensure the continued good
5 and transparent governance of the City.

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Dated: November 6, 2017

Respectfully submitted,
RUTAN & TUCKER, LLP
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By: s/ Alan B. Fenstermacher
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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

Executed November 6, 2017.

s/ Alan B. Fenstermacher
ALAN B. FENSTERMACHER

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