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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DON HIGGINSON, Plaintiff, **v.** **XAVIER BECERRA, in his official capacity as ATTORNEY GENERAL OF CALIFORNIA; and CITY OF POWAY, CALIFORNIA,** Defendants.	3:17-CV-2032 WQHJLB **DEFENDANT XAVIER BECERRA'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** Date: November 20, 2017 Judge: Hon. William Q. Hayes Action Filed: October 4, 2017

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INTRODUCTION

Plaintiff Don Higginson seeks a preliminary injunction to enjoin Attorney General Xavier Becerra from enforcing the California Voting Rights Act (CVRA). The CVRA allows voters to challenge at-large elections when racially polarized voting has impaired their ability to elect their candidate of choice or to influence electoral outcomes. The most common remedy for a CVRA violation is a move from at-large elections to by-district elections. Plaintiff alleges that a change from at-large voting to by-district voting to remedy vote dilution necessarily forces political subdivisions to engage in racial gerrymandering in violation of the Fourteenth Amendment. Plaintiff's motion fails for several reasons.

As a threshold matter, Plaintiff lacks standing to bring this lawsuit. He has not sufficiently alleged any injury, either by alleging facts demonstrating that the district he now lives in has been racially gerrymandered or that he himself has been subjected to a racial classification. He also has not established causation because his alleged injury, even if there were one, could not possibly stem from the CVRA itself. The City of Poway voluntarily switched to a by-district election system, despite the lack of a finding that it has actually violated the CVRA, to avoid the cost of litigating that very issue. And Plaintiff has failed to establish redressability—an essential standing requirement—because the Attorney General has not threatened enforcement of the CVRA against the City of Poway and an injunction preventing him from doing so will not prevent private persons from seeking to enforce it.

But even if Plaintiff could establish standing, he is not entitled to a preliminary injunction. He has not established a likelihood of success on the merits on his Fourteenth Amendment claim. Plaintiff alleges that the CVRA forces a municipality to make race the predominant consideration when it draws election districts. As a California court recognized in 2006, for the CVRA to be facially invalid, it "would have to be not only that unconstitutional remedies are consistent

with the CVRA, but that they are *mandated* by it." *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 688 (2006); *cert. denied sub nom. City of Modesto, California v. Sanchez*, 552 U.S. 974 (2007) (emphasis added). That is emphatically not the case. *Id.* ("They are not.").

Plaintiff has also failed to establish any of the remaining factors—irreparable harm, the balance of the equities, the public interest—necessary to show he is entitled to a preliminary injunction. Plaintiff's motion for preliminary injunction should be denied.

BACKGROUND

I. THE CALIFORNIA VOTING RIGHTS ACT

The CVRA provides that "[a]n 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 . . . ." Cal. Elec. Code, § 14027. To establish a violation under the CVRA, a plaintiff must show 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." Cal. Elec. Code, § 14028(a). "Racially polarized voting" is defined as "voting in which there is a difference . . . 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." *Id.*, § 14026(e).

Under the CVRA "[a]ny voter who is a member of a protected class and who resides in a political subdivision where a violation of Section 14027 and 14028 is alleged may file an action pursuant to those sections . . . ." Cal. Elec. Code § 14032.

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II. THE FEDERAL VOTING RIGHTS ACT

The CVRA overlaps to some extent with § 2 of the Federal Voting Rights Act (FVRA). 52 U.S.C. § 10301(a). The FVRA prohibits all forms of voting discrimination, including vote dilution. On the other hand, the CVRA targets racially-polarized voting in at-large elections. . The CVRA explicitly addresses racially-polarized voting that impairs the ability of voters belonging to a protected class to influence election outcomes.

The United States Supreme Court has adopted a three-prong test for the application of § 2 of the FVRA in voting rights cases where minority voters' ability to elect candidates of choice is at issue. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). Under the *Gingles* test for establishing vote dilution under § 2, a plaintiff must establish (1) a minority group is sufficiently large and geographically compact to constitute a majority in a reasonably configured legislative district; (2) the minority group is politically cohesive; and (3) a district's majority votes sufficiently as a bloc to usually defeat the minority's preferred candidate. *Id*.

The usual remedy to a finding of vote dilution under § 2, particularly in cases challenging the use of at-large elections, is the imposition of a by-district election system. *Growe v. Emison*, 507 U.S. 25, 40 (1993) ("[W]e have strongly preferred single-member districts for federal-court-ordered reapportionment.") (citing *Connor v. Finch*, 431 U.S. 407, 415 (1977)). Legislative bodies have even more leeway than the federal courts in adopting by-district, or single-member districts to remedy § 2 violations. *Bush v. Vera*, 517 U.S. 952, 978 (1996) ("the States retain a flexibility that federal courts enforcing § 2 lack") (plurality opinion). "[T]he federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements." *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993).

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LEGAL STANDARDS

To succeed in his motion for a preliminary injunction, Plaintiff must establish that he is likely to succeed on the merits, he is likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips in his favor, and an injunction would be in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id*. at 22. Plaintiff points to the alternative test, which provides that "if a plaintiff can only show that there are 'serious questions going to the merits'—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the 'balance of hardships tips *sharply* in the plaintiff's favor,' and the other two *Winter* factors are satisfied."[1] *Alliance for the Wild Rockies v. Pena*, 865 F.3d 1211, 1217 (9th Cir. 2017) (quoting *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013)). Under either test, Plaintiff has failed to establish he is entitled to a preliminary injunction.

Plaintiff asserts that the CVRA is unconstitutional on its face and requests that Attorney General Becerra be enjoined from enforcing the CVRA statewide for the pendency of this litigation. Compl. at 1. Facial challenges to state statutes are disfavored for a variety of reasons. They "often rest on speculation" resulting in a risk of "premature interpretation of statutes on the basis of factually barebones records." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (citations omitted). Facial challenges also contradict the principle of judicial restraint that "courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law

[1] Several Ninth Circuit cases have assumed that this "serious questions" approach is still viable, despite the holding in *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) that "[t]o the extent our cases have suggested a lesser standard" than the approach outlined in *Winter*, "they are no longer controlling, or even viable." *See, e.g. Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-35 (9th Cir. 2011); *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012).

broader than is required by the precise facts to which it is to be applied.'" *Id.* Last but not least, "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* at 451. In light of all of the potential pitfalls posed by facial challenges, "a plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' i.e., that the law is unconstitutional in all of its applications."[2] *Id.* at 449 (citing *U.S. v. Salerno*, 481 U.S. 739, 745 (1987)); *Morrison v. Peterson*, 809 F.3d 1059, 1064 (9th Cir. 2015).

ARGUMENT

I. PLAINTIFF LACKS STANDING TO CHALLENGE THE CVRA

Plaintiff lacks standing to challenge not only the CVRA, but the City of Poway's newly-adopted district map (Map 133) as well. As the Supreme Court has explained:

> It is by now well settled that 'the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

U.S. v. Hays, 515 U.S. 737, 742-43 (1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The question of standing is not subject to waiver, and "it is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke

[2] An exception to the all-circumstances test applies when a statute is challenged on ground of vagueness in either the First Amendment context, *Hotel and Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 972 (9th Cir. 2003), or the criminal context, *Johnson v. United States*, 135 S.Ct. 2551, 2561 (2015). Neither exception applies here.

judicial resolution of the dispute." *Hays*, 515 U.S. at 743 (internal citations omitted). Plaintiff has not met this burden because he has failedto demonstrate the presence of any of the three essential elements of standing. He has not alleged an injury sufficient to support standing in this case, nor does any of the evidence submitted in connection with his preliminary injunction motion establish such an injury. He has also failed to establish that the CVRA is the cause of his purported injury, or that the requested relief would redress that injury. In light of his failure to establish standing in this case, Plaintiff cannot succeed on the merits of his claim.

1. Plaintiff Has Suffered No Injury to a Protected Interest from the City's Decision to Move to By-District Elections

Plaintiff claims that "the City's switch from at-large to by-district voting violates [his] Fourteenth Amendment rights because the decision was driven exclusively by race." Memo. at 18. Plaintiff's claim is unlike most redistricting claims, which typically challenge the way district lines are drawn (i.e., whether race predominated in drawing those lines as evidenced by the number of voters from protected classes included in the district, whether the districts are bizarrely shaped, and other factors) rather than the decision to draw them in the first place *See*, *e.g.*, *Cooper v. Harris*, 137 S.Ct. 1455 (2017) (challenge to North Carolina's congressional districts 1 and 12); *Alabama Legis. Black Caucus v. Alabama*, 135 S.Ct. 1257 (2015) (challenge to Alabama's senate district 26); *Miller v. Johnson*, 515 U.S. 900, 903 (1995) (challenge to Georgia's congressional district 11). Here, on the other hand, Plaintiff claims that the very decision to move from at-large elections to by-district elections was driven by race and, therefore, the resulting districts violate the Fourteenth Amendment.

Even if Plaintiff has alleged a cognizable redistricting claim, he still would not be able to establish standing. To establish standing, plaintiffs in redistricting cases must demonstrate that they live in a racially gerrymandered district or have personally been categorized by race. *Sinkfield v. Kelley*, 531 U.S. 28 (2000); *Shaw*

v. Reno, 509 U.S. 630, 646 (1996). For example, in *Sinkfield*, the Supreme Court found that the plaintiffs lacked standing under § 2 of the FVRA to challenge the election districts in which they lived as "the product of unconstitutional racial gerrymandering" because they "had neither alleged nor produced any evidence that any of them was assigned to his or her district as a direct result of having 'personally been subjected to a racial classification.'" 531 U.S. at 30 (citing *Hays*, 515 U.S. at 745).

Like the plaintiffs in *Sinkfield*, Plaintiff has not established and cannot establish either of these requirements. Plaintiff has not asserted that he personally has been subjected to a racial classification; he only alleges that his election district has been "racially gerrymandered." Memo. at 16. And Plaintiff does not allege any facts in his complaint or offer any evidence in support of his preliminary injunction motion that would support that conclusion. He does not argue that the City of Poway disregarded traditional districting principles when it created Map 133, or that those principles were subordinated to race, as required to establish that racial gerrymandering has occurred. *Miller*, 515 U.S. at 916. Instead, he argues that the City's decision to move from an at-large election system to a by-district election system was "driven by race" and that race was the predominant factor in the resulting district lines because they were tainted by that decision.

But conclusory allegations that a racial gerrymander has occurred are insufficient to establish standing. In *Sinkfield*, the Supreme Court rejected the argument that plaintiffs were "entitled to a presumption of injury-in-fact because the bizarre shapes of their districts reveal that the districts were the product of an unconstitutional racial gerrymander." *Sinkfield*, 531 U.S. at 30. Here, Plaintiff's argument is even more attenuated. It is not sufficient to establish injury-in-fact for standing purposes.

In support of his facial challenge, Plaintiff attempts to create an injury by asserting harm to all California voters on the theory that the CVRA "forces

[political subdivisions] to engage in racial gerrymandering." Memo. at 2. But the CVRA requires no such thing. The CVRA requires no change at all in the absence of racially polarized voting. Cal. Elec. Code, § 14028(a). And even if a particular political subdivision has been found to have violated the CVRA, the remedy required is not, as Plaintiff argues, a "racially gerrymandered" districting plan. If a political subdivision selects a by-district election system to address vote dilution in its elections, it must draw its districts according to the criteria enumerated in California Elections Code § 21601: "(a) topography, (b) geography, (c) cohesiveness, contiguity, integrity, and compactness of territory, and (d) community of interests of the council districts." These criteria are some of the same criteria outlined in § 2 vote dilution cases and are meant to ensure that districts drawn to remedy vote dilution do not verge into impermissible racial classifications. *See, e.g.*, *Miller*, 515 U.S. at 916. Because the CVRA does not require, or even permit, single-member districts drawn without regard to these criteria, Plaintiff cannot establish injury to all California voters.

In any event, asserting statewide injury to California voters without regard to their specific districts and how they were drawn, is not specific enough to create an injury in fact. "The rule against generalized grievances applies with as much force in the equal protection context as in any other." *Hays*, 515 U.S. at 743. "[E]ven if a governmental actor is discriminating on the basis of race the resulting injury accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." *Id*. at 743-44 (internal citations omitted). Plaintiff's claim that all districts drawn in an effort to correct for vote dilution resulting from at-large district elections violate the Fourteenth Amendment is precisely the type of generalized grievance that cannot support standing.

Plaintiff also asserts that he has suffered an injury because "before the switch, [he] could vote for all four councilmembers" and the City's ordinance moving to

by-district elections "takes away three of those votes." Memo. at 19. Plaintiff cites no cases indicating that this is the sort of cognizable injury that a court may address. *Raines v. Byrd*, 521 U.S. 811 (1997) ("the alleged injury must be legally and judicially cognizable"). This requires both a "concrete particularized injury" and "that the dispute is 'traditionally thought to be capable of resolution through the judicial process.'" *Id*. The question of how many city council seats individual voters are entitled to vote for is not such a question.[3] The extent to which Plaintiff has a right to vote for all four councilmembers, rather than a single councilmember to represent his district, is subject to the Legislature's ability to define how its political subdivision may structure—or restructure—elections. *Jauregui v. City of Palmdale*, 226 Cal. App. 4th 781, 799 (2014) ("Given the history of our nation and California, there is a convincing basis for the Legislature to act in what otherwise [would] be a local affair—city council elections."); Cal. Const. art. II, § 4 (Legislature is charged with "prohibit[ing] improper practices that affect elections.") Under California law, political subdivisions are unequivocally allowed to adopt a by-district election system. Cal. Elec. Code § 34886. Federal courts have also recognized that "States retain the power to regulate their own elections." *Burdick v. Takushi*, 504 U.S. 428, 432 (1992). Plaintiff cites no cases and provides no reason that this change should be treated as an injury-in-fact.

2. Plaintiff Has Not Established Causation

The second of the three elements required for standing is causation. "[T]here must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. 555, 560 (1992) (internal citations omitted). Even if Plaintiff's claimed injury-in-fact is sufficient to support standing in this case, it is not traceable

[3] California law provides that City Councils may be made up of anywhere from four to nine members, and that if it has an even number of members, it must have an elected mayor as well. Cal. Gov't Code § 34871.

to any action taken by the Attorney General. The letter that threatened litigation against the City of Poway came not from the Attorney General or any other state agency, but from a private attorney, as provided by the statute. Cal. Elec. Code § 14032. Plaintiff has not established causation sufficient to support standing that could support preliminary injunctive relief against the Attorney General.

3. The Requested Relief Cannot Redress Plaintiff's Alleged Injury

The third and final element of Article III standing is redressability. To invoke standing, a plaintiff must show that the alleged injury is "likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976). Plaintiff has not done so here. Enforcement of the CVRA falls mostly to private citizens who decide to challenge at-large election districts they believe impair the rights of voters in protected classes because of racially polarized voting. Cal. Elec. Code, § 10432 ("[a]ny 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.").

The Attorney General has not threatened to enforce the CVRA against the City of Poway. Enjoining him from enforcing the statute would not stop individuals from bringing claims under the CVRA. Furthermore, because the City of Poway voluntarily changed from an at-large election system to a by-district system with no finding of a CVRA violation, enjoining the enforcement of the statute would not ensure that the City abandons Map 133.

II. PLAINTIFF HAS NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS

For several reasons, Plaintiff has failed to show that he is likely to succeed on the merits of his claim that the CVRA is unconstitutional, or even that there are serious questions going to the merits. First, § 2 of the FVRA does not, as Plaintiff

contends, form the outer boundary of what the California Legislature may do to address vote dilution. Second, the CVRA does not violate the Fourteenth Amendment because it does not require cities to draw district boundaries based on racial categories. Third, Plaintiff's facial challenge fails because he cannot satisfy the all-circumstances test. Plaintiff's motion for preliminary injunction should be denied.

A. The CVRA Is Not Limited by the Scope of § 2 of the FVRA

Plaintiff argues that § 2 and its interpretation and application by the Supreme Court in vote-dilution and redistricting cases form the outer boundaries of the CVRA, and that to the extent the CVRA reaches beyond those boundaries, it violates the Fourteenth Amendment. Memo. at 16-17. There is no basis for this argument. Despite some overlap, the CVRA and the FVRA are separate and independent statutes. "States do not derive their reapportionment authority from the Voting Rights Act, but rather from independent provisions of state and federal law." *Voinovich*, 507 U.S. at 156.

The CVRA was "enacted to implement the guarantees of Section 7 of Article I and Section 2 of Article II of the California Constitution." Cal. Elec. Code § 14032. It departs from § 2 of the FVRA by making vote dilution actionable whether or not there is a sufficient number of voters belonging to a protected class to create a district that would enable them to elect a candidate of their choice. The Legislature also decided to empower cities to adopt single-member districts to further the CVRA's purposes without submitting plans to voters for approval, as is required for other ordinances. Cal. Gov't Code § 34886. All of these laws are within the Legislature's authority and do not contravene any federal requirements, including the Fourteenth Amendment. States have "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978).

The CVRA is also not constrained by the *Gingles* test, particularly the "compactness" prong, which was developed in the context of § 2 vote dilution cases concerned with minority voters' ability to *elect* candidates. *Gingles*, 478 U.S. at 50-51. *Gingles* and later cases that apply its test do not hold that the *Gingles* factors are necessary to *ensure compliance with the Fourteenth Amendment*; they simply hold that those three preconditions are necessary *to establish a violation of § 2*. *See Gingles*, 478 U.S. at 47-48; *Strickland*, 556 U.S. at 22-23. The Supreme Court recognized that "the first *Gingles* precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing [an] influence-dilution claim." *Voinovich*, 507 U.S. at 158. This is precisely what the CVRA has done—it has created a remedy for polarized voting (generally the adoption of a by-district election system) even where the compactness criterion is not met. The *Gingles* test does not constrain the Legislature's ability to enact the CVRA.

B. The CVRA Does Not Violate the Fourteenth Amendment

As a preliminary matter, the Supreme Court "never has held that race conscious state decisionmaking is impermissible in *all* circumstances." *Shaw v. Reno*, 509 U.S. 630, 642 (1993). Though *Shaw v. Reno* was decided more than 20 years ago, this is still the case today. In the Supreme Court's vote dilution cases, Fourteenth Amendment equal protection concerns come into play in connection with the remedy for vote dilution (i.e., the single member districts drawn), not in assessing whether vote dilution has occurred in the first place. *See*, *e.g.*, *Cooper*, 137 S.Ct. 1455 (challenge to North Carolina's congressional districts 1 and 12); *Ala. Legis. Black Caucus*, 135 S.Ct. 1257, (2015) (challenge to Alabama's senate district 26); *Miller*, 515 U.S. at 903 (challenge to Georgia's congressional district 11). The potential harms Plaintiff raises, to the extent they occur at all, would stem from a potential remedy for a CVRA violation—the way that single-member districts are drawn and the criteria used in drawing them—not from the

determination that vote dilution has occurred as a result of racially polarized voting in at-large districts. Plaintiff conflates these separate issues and attempts to apply the test for ensuring that the remedy for vote dilution does not pose Fourteenth Amendment issues to a statute that defines whether vote dilution has occurred.

Beyond that, contrary to Plaintiff's claims, the CVRA does not require political subdivisions to engage in racial gerrymandering in violation of the Fourteenth Amendment. Plaintiff has neither alleged nor offered evidence that the City of Poway, in drawing Map 133, departed from California's statutory criteria that enshrine traditional, non-racial districting principles. *See* Cal. Elec. Code § 21601. Unless such a showing is made, the City should be presumed to have followed the law. *See*, *Miller*, 515 U.S. at 900 ("[U]ntil a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed.") Because California law forbids the subordination of traditional districting principles to race, while still requiring compliance with § 2 of the FVRA, the CVRA does not pose a threat to equal protection under the Fourteenth Amendment. Cal. Elec. Code § 21601.

Indeed, the CVRA has previously withstood a facial Fourteenth Amendment challenge. *Sanchez*, 145 Cal. App. 4th at 666. In *Sanchez*, the Court declined to apply strict scrutiny because it found that the CVRA did "not confer benefits or impose burdens on any particular racial group and does not burden anyone's right to vote," *id*. at 683, and because "[a]ll persons have standing under the CVRA to sue for race-based vote dilution because all persons are members of a race." *Id*. at 685. The CVRA passed rational basis review: "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." *Id*. at 837-38. The plaintiffs raised a facial challenge to the CVRA, which the Court rejected because Plaintiffs could not show that it was unconstitutional in all its applications. *Id.* at 688. Both the California Supreme

Court and the United States Supreme Court declined to review the appellate court's decision. *Id.*, *cert. denied*, 128 S.Ct. 438 (2007).

Plaintiff urges this Court to apply strict scrutiny to the CVRA based on the standard developed in the Supreme Court's vote dilution cases. Those cases apply strict scrutiny when a specific district or a redistricting map was drawn with race as the predominant factor. *See*, *e.g.*, *Miller*, 515 U.S. at 921 (because race was "the predominant, overriding factor" in drawing a specific district, that district had to satisfy strict scrutiny). That framework does not apply here—again, the CVRA says nothing about how or where district lines should be drawn. As the California Court of Appeals explained in *Sanchez*:

> 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 through the combination of racially polarized voting and an at-large election system."

Sanchez, 145 Cal. App. 4th at 666. Furthermore, the Supreme Court has noted that under § 2 of the FVRA, "the States . . . may avoid strict scrutiny altogether by respecting their own traditional districting principles . . . . The constitutional problem arises only from the subordination of those principles to race." *Bush*, 517 U.S. at 978. Similarly, under the CVRA, a political subdivision's choice to move from at-large to by-district elections is not subject to strict scrutiny—strict scrutiny would only come into play, if ever, where a plaintiff could establish that race predominated over all other factors in crafting the resulting single-member districts. There is no basis to apply strict scrutiny to the CVRA, which more than satisfies the rational basis test.

C. Plaintiff Has Not Established That the CVRA Is Unconstitutional in All Its Applications

Plaintiff asks this Court for an injunction not just to prevent the implementation of the City of Poway's new by-district elections system but to halt the Attorney General's enforcement of the CVRA statewide. But to mount such a broad facial challenge, a plaintiff must "'establish that no set of circumstances exists under which the Act would be valid,' i.e., that the law is unconstitutional in all of its applications." *Wash. State Grange*, 552 U.S. at 449 (internal citations omitted). In this case, Plaintiff's argument centers on the idea that the CVRA requires political subdivisions to engage in racial gerrymandering in order to remedy vote dilution.

This is not the case. In the event that a court or political subdivision decides to switch to by-district elections to remedy vote dilution, they must still abide by traditional districting principles, as codified at California Elections Code § 21601. Even if some single-member district adopted by some political subdivision did, in fact, subordinate traditional districting principles to race in violation of California state law and the Fourteenth Amendment, that would be insufficient to establish that the CVRA is facially invalid. "[T]he possibility of some court imposing an unconstitutional remedy under the CVRA is not . . . a basis for *facial* invalidation." *Sanchez*, 145 Cal. App. 4th at 686. Thus, Plaintiff's facial challenge must fail.

III. PLAINTIFF HAS NOT SHOWN A LIKELIHOOD OF IRREPARABLE HARM

Plaintiff has not established that he will suffer any irreparable harm in the absence of a preliminary injunction. As described above, Plaintiff has not established an injury-in-fact for purposes of standing, i.e. that he lives in a racially gerrymandered district or that he has personally been subjected to a racial classification. *Supra* pp. 7-10. Establishing irreparable harm for purposes of a preliminary injunction motion is more difficult than establishing injury-in-fact for purposes of standing. *See Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 (9th

Cir. 2011) (plaintiff seeking preliminary injunction must be "under threat of suffering 'injury in fact' that is concrete and particularized" and "the threat must be actual and imminent, not conjectural or hypothetical"). Plaintiff has not established that any harm is imminent. "[A] plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Services Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (citing *L.A. Mem. Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980)).

The timeline for the next City Council election in Poway demonstrates that any harm Plaintiff might suffer is not imminent. Plaintiff explains in his memorandum in support of his preliminary injunction motion that the first election to take place under the City of Poway's new by-district election will not occur until November 6, 2018, and that candidates for the election will not be nominated until July 19, 2018. Memo. at 23. Plaintiff has not shown that a preliminary injunction is needed now, before other preliminary proceedings or trial. "An irreparable harm is one that cannot be redressed by a legal or equitable remedy following trial." *Premier Nutrition, Inc. v. Organic Food Bar, Inc*., 475 F. Supp. 2d 995, 1007 (C.D. Cal. 2007). Plaintiff's alleged harm, to the extent it exists, can be fully redressed following a trial in this matter.

Even less has Plaintiff shown a risk of irreparable harm in the absence of a statewide injunction against the Attorney General prohibiting enforcement of the CVRA. Not only is there an absence of any showing of current or expected actions by the Attorney General, but such a broad, unrestricted injunction would lack any nexus to the harms asserted by plaintiff. Plaintiff has failed to show a basis for any injunctive relief, but, given his focus on Map 133 and the actions of the Poway City Council, he has shown absolutely no basis for an injunction against the Attorney General.

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IV. PLAINTIFF HAS NOT SHOWN THAT THE BALANCE OF EQUITIES TIPS IN HIS FAVOR OR THAT AN INJUNCTION IS IN THE PUBLIC INTEREST

The last two preliminary injunction factors, the balance of equities and the public interest factors, also weigh in favor of denying Plaintiff's request for a preliminary injunction. "When the government is a party, these last two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418 (2009)). Plaintiff has not shown that the "balance of hardships tips *sharply* in his favor," *Alliance for the Wild Rockies*, 865 F.3d at 1217, or in his favor at all. Even if he had, the injunction he seeks would offer no relief from such hardships, since the Attorney General has not threatened to enforce the CVRA against Poway and suits by private plaintiffs would still be permitted.

A preliminary injunction preventing the Attorney General from enforcing the CVRA, even if effective, would not be in the public interest. The harms of vote dilution to minority voters and the effect of at-large districts in impairing minority voting power are well recognized in the case law. *Rogers*, 458 U.S. 616-17 ("At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect all representatives of the district."); *Whitcomb v. Chavis*, 403 U.S. at 158-59 (1971) (noting that multi-member district plans have been criticized due, in part, to "their winner-take-all aspects" and "their tendency to submerge minorities and to overrepresent the winning party as compared with the party's statewide electoral position"). The Legislature took these harms into account when it enacted the CVRA. Enjoining the enforcement of the CVRA statewide at this point could affect other litigation or other plans by political subdivisions to create single-member districts, creating uncertainty for them in running their next elections.

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CONCLUSION

For the foregoing reasons, Defendant respectfully requests that Plaintiff's motion for preliminary injunction be denied in its entirety.

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Respectfully Submitted,

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