

United States District Court
SOUTHERN DISTRICT OF CALIFORNIA

Received
City Clerk's Office

OCT 04 2017

CITY OF POWAY

Don Higginson

Plaintiff

Civil Action No. 17cv02032 WQH JLB

V.

Xavier Becerra, in his official capacity as Attorney
General of California; and City of Poway

Defendant

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

City of Poway
13325 Civic Center Drive
Poway, CA 92064

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) - or 60 days if you are the United States or a United States agency, or an office or employee of the United States described in Fed. R. Civ. P. 12(a)(2) or (3) - You must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Bryan K. Weir
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201
703-243-9423

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date: 10/4/17



John Morrill
CLERK OF COURT

S/ J. Mueller
Signature of Clerk or Deputy Clerk

Civil Action No. 17cv02032 WQH JLB

Date Issued: 10/4/17

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4(1))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of the individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's Signature

Printed name and title

Server's address

NOTICE OF RIGHT TO CONSENT TO TRIAL BY A UNITED STATES MAGISTRATE JUDGE

IN ACCORDANCE WITH THE PROVISION OF 28 USC 636(C) YOU ARE HEREBY NOTIFIED THAT A U.S. MAGISTRATE JUDGE OF THIS DISTRICT MAY, UPON CONSENT OF ALL PARTIES, CONDUCT ANY OR ALL PROCEEDINGS, INCLUDING A JURY OR NON-JURY TRIAL, AND ORDER THE ENTRY OF A FINAL JUDGMENT.

YOU SHOULD BE AWARE THAT YOUR DECISION TO CONSENT OR NOT CONSENT IS ENTIRELY VOLUNTARY AND SHOULD BE COMMUNICATED SOLELY TO THE CLERK OF COURT. ONLY IF ALL PARTIES CONSENT WILL THE JUDGE OR MAGISTRATE JUDGE WHOM THE CASE HAS BEEN ASSIGNED BE INFORMED OF YOUR DECISION.

JUDGMENTS OF THE U.S. MAGISTRATE JUDGES ARE APPEALABLE TO THE U.S. COURT OF APPEALS IN ACCORDANCE WITH THIS STATUTE AND THE FEDERAL RULES OF APPELLATE PROCEDURE.

1 Bryan K. Weir, CA Bar # 310964
2 William S. Consovoy, VA Bar # 47704 (*pro hac vice* to be filed)
3 Thomas R. McCarthy, VA Bar # 47154 (*pro hac vice* to be filed)
4 J. Michael Connolly, VA Bar # 77632 (*pro hac vice* to be filed)
5 CONSOVOY MCCARTHY PARK PLLC
6 3301 Wilson Boulevard
7 Suite 700
8 Arlington, VA 22201
9 (703) 243-9423

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CITY OF POWAY

10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA

12 DON HIGGINSON,
13 Plaintiff,
14 v.
15 XAVIER BECERRA, in his official
16 capacity as ATTORNEY GENERAL OF
17 CALIFORNIA; and CITY OF POWAY,
18 CALIFORNIA,
19 Defendants.

Case No.: '17CV2032 WQHJLB

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

20 Plaintiff Don Higginson brings this action against Defendants Attorney General
21 Xavier Becerra and the City of Poway, California to have the California Voting Rights Act
22 and Map 133 declared unconstitutional and to enjoin their enforcement. Plaintiff alleges as
23 follows:

INTRODUCTION

24 1. The Equal Protection Clause of the Fourteenth Amendment “prevents a State,
25 in the absence of ‘sufficient justification,’ from ‘separating its citizens into different voting
26 districts on the basis of race.’” *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (citation
27 omitted). “[I]f racial considerations predominated over others, the design of the district
28 must withstand strict scrutiny.” *Id.* at 1464.

1 2. The Supreme Court has assumed—but not yet decided—that complying with
2 Section 2 of the Voting Rights Act of 1965 (“VRA”), which has been interpreted to protect
3 minorities against vote dilution, could be a compelling interest that upholds a districting
4 plan. *Id.* But the Court also has emphasized that Section 2 is in obvious tension with the
5 Fourteenth Amendment because it, by definition, makes race the predominant factor in
6 districting decisions.

7 3. The Supreme Court issued a series of decisions, beginning with *Thornburg v.*
8 *Gingles*, 478 U.S. 30 (1986), in an attempt to address this concern. Ultimately, the Court
9 held that an at-large voting system will violate Section 2 only if a minority group proves
10 both that it can form a compact single-member district and that voting is racially polarized.
11 These requirements, the Court has warned, ensure that Section 2 is an anti-discrimination
12 provision, and not an unconstitutional mandate to maximize electoral power on the basis
13 of race.

14 4. The California Legislature did not heed the Supreme Court’s warning.
15 Instead, California passed its own voting rights act—the California Voting Rights Act of
16 2001 (“CVRA”)—to override the constraints the Supreme Court has imposed in an attempt
17 to save Section 2 from unconstitutionality. Under the CVRA, local governments must
18 abandon at-large voting systems if racially polarized voting exists—regardless of whether
19 the minority group is sufficiently large and geographically compact to constitute a majority
20 in a single-member district.

21 5. Accordingly, the CVRA flagrantly violates the Fourteenth Amendment. Its
22 “race-based sorting of voters” does not serve a “compelling interest” nor is it “narrowly
23 tailored.” *Cooper*, 137 S. Ct. at 1464.

24 6. The City of Poway is one of many California localities that for decades used
25 at-large voting to elect its City Council. Recently, however, the City received a demand
26 letter alleging that racially polarized voting existed in the City, and that the City therefore
27 would be sued under the CVRA—and exposed to legal liability and millions of dollars of
28 fees—unless it switched to by-district elections. Given the prospect of liability, the City

1 complied with the CVRA and abandoned at-large voting. On October 3, 2017, the City
2 enacted four single-member districts solely as a consequence of the CVRA. City elections
3 using these new districts will be held in 2018.

4 7. Don Higginson is a City resident and a registered voter. Because of the
5 redistricting that the CVRA has imposed on the City, Mr. Higginson will now reside in and
6 vote in District 2. The creation of that district, like all of the City's new districts, is traceable
7 to the CVRA's requirement that the City engage in racial gerrymandering. Mr. Higginson
8 thus has brought this action to vindicate his constitutional rights under the Fourteenth
9 Amendment.

10 **JURISDICTION AND VENUE**

11 8. This Court has jurisdiction to hear and decide Plaintiff's claim brought under
12 the Fourteenth Amendment to the United States Constitution pursuant to 42 U.S.C. §§ 1983
13 and 1988, and 28 U.S.C. §§ 1331, 1343(a)(3), and 1357. Declaratory relief is authorized
14 by 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57.

15 9. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

16 **PARTIES**

17 10. Plaintiff Don Higginson is a City resident and a registered voter. Because the
18 California Voting Rights Act has forced the City to abandon at-large elections, he will now
19 reside in and vote in District 2. Mr. Higginson alleges that District 2, like all of the City's
20 districts, is racially gerrymandered as a result of the redistricting the California Voting
21 Rights Act has imposed on the City.

22 11. Defendant Xavier Becerra is the Attorney General of California. Defendant
23 Becerra is charged by Article V, Section 13 of the California Constitution with the duty to
24 see that the laws of California are uniformly and adequately enforced. He is sued in his
25 official capacity.

26 12. Defendant City of Poway is a California general law city and a municipal
27 corporation organized and existing under and by virtue of the laws of the State of
28 California. The City is subject to the California Voting Rights Act. As a direct result of that

1 statute, the City has abandoned its at-large voting system and switched to by-district
2 elections that are the product of racial gerrymandering.

3 **FACTUAL ALLEGATIONS**

4 **A. The Fourteenth Amendment**

5 13. The Fourteenth Amendment prohibits “racial gerrymanders in legislative
6 districting plans.” *Cooper*, 137 S. Ct. at 1463. Absent a “sufficient justification,” the
7 Fourteenth Amendment forbids a State or political subdivision from “separating its
8 citizens into different voting districts on the basis of race.” *Bethune-Hill v. Virginia State*
9 *Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (quoting *Miller v. Johnson*, 515 U.S. 900, 911
10 (1995)).

11 14. Under controlling precedent, “strict scrutiny applies when race is the
12 ‘predominant’ consideration in drawing the district lines such that ‘the legislature
13 subordinates traditional race-neutral districting principles ... to racial considerations.’”
14 *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (quoting *Miller*, 515 U.S. at 916). Once strict
15 scrutiny is triggered, the burden “shifts to the State to prove that its race-based sorting of
16 voters serves a ‘compelling interest’ and is ‘narrowly tailored’ to that end.” *Cooper*, 137
17 S. Ct. at 1464.

18 **B. Section 2 of the Voting Rights Act**

19 15. Congress passed the Voting Rights Act of 1965 (“VRA”) to enforce the right
20 to vote free from racial discrimination. Section 2 thus bars practices “imposed or applied
21 ... in a manner which results in a denial or abridgment” of the right to vote. 52 U.S.C. §
22 10301(a) (formerly 42 U.S.C. § 1973). A violation of Section 2 “is established if, based on
23 the totality of circumstances, it is shown that the political processes leading to nomination
24 or election in the State or political subdivision are not equally open to participation by
25 members of a class of citizens ... in that its members have less opportunity than other
26 members of the electorate to participate in the political process and to elect representatives
27 of their choice.” *Id.* § 10301(b).

1 16. Section 2 has been interpreted to protect minorities against vote dilution, and
2 the Supreme Court has held that a municipality’s use of multimember and at-large districts
3 can, in some circumstances, “dilute[] minority voting strength by submerging [minority]
4 voters into the white majority, denying them an opportunity to elect a candidate of their
5 choice.” *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009). At the same time, the Supreme Court
6 has tried to interpret Section 2 in a way that might keep it from violating the Fourteenth
7 Amendment’s ban on racial gerrymandering.

8 17. To that end, there are “three ‘necessary preconditions’ for a claim that the use
9 of multimember [or at-large] districts constitute[s] actionable vote dilution under § 2:
10 (1) The minority group must be ‘sufficiently large and geographically compact to constitute
11 a majority in a single-member district,’ (2) the minority group must be ‘politically
12 cohesive,’ and (3) the majority must vote ‘sufficiently as a bloc to enable it ... usually to
13 defeat the minority’s preferred candidate.’” *Id.* (quoting *Gingles*, 478 U.S. at 50-51). “In a
14 § 2 case,” therefore, “only when a party has established the *Gingles* requirements does a
15 court proceed to analyze whether a violation has occurred based on the totality of the
16 circumstances.” *Id.* at 11-12.

17 18. The Supreme Court has repeatedly emphasized the importance of the first
18 *Gingles* factor—*i.e.*, that the minority group be sufficiently large and geographically
19 compact to constitute a majority in a single-member district—in ensuring that Section 2
20 enforces the right to vote instead of requiring racial gerrymandering. The requirement is
21 “needed to establish that the minority has the potential to elect a representative of its own
22 choice in some single-member district.” *Grove v. Emison*, 507 U.S. 25, 40 (1993).
23 “Without such a showing, ‘there neither has been a wrong nor can be a remedy.’” *Bartlett*,
24 556 U.S. at 15 (quoting *Grove*, 507 U.S. at 41). Absent this requirement, in other words,
25 Section 2 would entitle “minority groups to the maximum possible voting strength,” *id.* at
26 16, which “causes its own dangers, and they are not to be courted,” *Johnson v. De Grandy*,
27 512 U.S. 997, 1016 (1994).

1 19. The compactness requirement thus has been indispensable—at least to date—
2 in saving Section 2 from constitutional doubt. Section 2 undeniably makes race the
3 predominant factor—even with the compactness precondition in place—when it requires
4 creation of majority-minority districts. *See Shaw*, 517 U.S. at 906-08. The Supreme Court
5 has “assumed,” but not held, “that one compelling interest is complying with operative
6 provisions of the Voting Rights Act of 1965.” *Cooper*, 137 S. Ct. at 1464. But compliance
7 with Section 2 is assumed to be a compelling interest only because it is understood to
8 remedy racial discrimination in voting. *Bartlett*, 556 U.S. at 10. There is no discrimination
9 to remedy if the minority population is not sufficiently “compact” such that it would have
10 “the potential to elect a representative of its own choice in some single-member district.”
11 *Grove*, 507 U.S. at 40.

12 20. Furthermore, the use of race in districting must be narrowly tailored even
13 assuming the existence of a compelling interest. *Cooper*, 137 S. Ct. at 1464. Section 2
14 could never meet that requirement in the absence of the compactness precondition. “Racial
15 gerrymandering, even for remedial purposes, may balkanize us into competing racial
16 factions; it threatens to carry us further from the goal of a political system in which race no
17 longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to
18 which the Nation continues to aspire.” *Shaw v. Reno*, 509 U.S. 630, 657 (1993).
19 Eliminating the compactness requirement, in other words, would “unnecessarily infuse
20 race into virtually every redistricting, raising serious constitutional questions.” *Bartlett*,
21 556 U.S. at 21 (citation omitted).

22 **C. The California Voting Rights Act**

23 21. Over time, the California Legislature became dissatisfied with the Supreme
24 Court’s interpretation of Section 2 and wanted to “provide a broader basis for relief from
25 vote dilution than available under the [VRA].” *Jauregui v. City of Palmdale*, 172 Cal. Rptr.
26 3d 333, 350 (Cal. Ct. App. 2014). The Legislature believed that the Court’s “[r]estrictive
27 interpretations” of Section 2, which were adopted to try to avoid racial-gerrymandering
28 concerns, were simply wrong. Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976

1 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, p.2. Flouting the Supreme Court, the
2 Legislature concluded that “geographical compactness would not appear to be an important
3 factor in assessing whether the voting rights of a minority group have been diluted or
4 abridged by an at-large election system.” *Id.* at 3.

5 22. The California Voting Rights Act of 2001 (“CVRA”) was enacted to “avoid
6 that problem.” *Id.* at 2. The CVRA thus was designed to “make it easier to successfully
7 challenge at-large districts” by eliminating the *Gingles* precondition that “a minority
8 community be sufficiently concentrated geographically to create a district in which the
9 minority community could elect its own candidate.” Sen. Rules Com., Off. of Sen. Floor
10 Analyses, 3d reading analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended
11 Jun. 11, 2002, p.4. The CVRA thus overrides the “[r]estrictive interpretations given to the
12 [VRA]” by allowing a plaintiff to establish “[vote] dilution or abridgment of minority
13 voting rights” merely “by showing the [other] two [*Gingles*] requirements.” Assem. Com.
14 on Judiciary, *supra*, at 2-3.

15 23. To that end, the CVRA provides that “[a]n at-large method of election may
16 not be imposed or applied in a manner that impairs the ability of a protected class to elect
17 candidates of its choice or its ability to influence the outcome of an election ... as a result
18 of the dilution,” Cal. Elec. Code § 14027, and that “[a] violation of Section 14027 is
19 established if it is shown that racially polarized voting occurs in elections for members of
20 the governing body of the political subdivision or in elections incorporating other electoral
21 choices by the voters of the political subdivision,” Cal. Elec. Code § 14028(a).

22 24. No other showing is needed to establish a CVRA violation. “The fact that
23 members of a protected class are not geographically compact or concentrated may not
24 preclude a finding of racially polarized voting, or a violation of Section 14027 and this
25 section, but may be a factor in determining an appropriate remedy.” Cal. Elec. Code §
26 14028(c).

27 25. Moreover, “[p]roof of an intent on the part of the voters or elected officials to
28 discriminate against a protected class is not required.” Cal. Elec. Code § 14028(d). Factors

1 “such as the history of discrimination ... are probative, but not necessary factors to establish
2 a violation of Section 14027 and this section.” *Id.* § 14028(e).

3 26. Once there is a finding of racially polarized voting, the political subdivision
4 must abandon its at-large system. “Upon a finding of a violation of Section 14027 and
5 Section 14028, the court shall implement appropriate remedies, including the imposition
6 of district-based elections, that are tailored to remedy the violation.” Cal. Elec. Code §
7 14029.

8 27. And, no matter the remedy, the political subdivision will be liable for
9 attorneys’ fees and costs because it will have been found liable under the CVRA. “In any
10 action to enforce Section 14027 and Section 14028, the court shall allow the prevailing
11 plaintiff party, other than the state or political subdivision thereof, a reasonable attorney’s
12 fee, ... and litigation expenses including, but not limited to, expert witness fees and
13 expenses as part of the costs. Prevailing defendant parties shall not recover any costs,
14 unless the court finds the action to be frivolous, unreasonable, or without foundation.” Cal.
15 Elec. Code § 14030.

16 28. In 2016, the election code was amended to afford a political subdivision in
17 violation of the CVRA a safe harbor from the expense of litigation. “Before commencing
18 an action to enforce Sections 14027 and 14028, a prospective plaintiff shall send by
19 certified mail a written notice to the clerk of the political subdivision against which the
20 action would be brought asserting that the political subdivision’s method of conducting
21 elections may violate the California Voting Rights Act.” Cal. Elec. Code § 10010(e)(1).
22 “A prospective plaintiff shall not commence an action to enforce Sections 14027 and 14028
23 within 45 days of the political subdivision’s receipt of the written notice described in
24 paragraph (1).” *Id.* § 10010(e)(2).

25 29. The political subdivision then must decide whether it will comply with the
26 demand or be sued under the CVRA. “Before receiving a written notice described in
27 paragraph (1), or within 45 days of receipt of a notice, a political subdivision may pass a
28 resolution outlining its intention to transition from at-large to district-based elections,

1 specific steps it will undertake to facilitate this transition, and an estimated time frame for
2 doing so.” Cal. Elec. Code § 10010(e)(3)(A). “If a political subdivision passes a resolution
3 pursuant to subparagraph (A), a prospective plaintiff shall not commence an action to
4 enforce Sections 14027 and 14028 within 90 days of the resolution’s passage.” *Id.* §
5 10010(e)(3)(B).

6 30. In sum, the political subdivision can limit its legal exposure under the CVRA
7 only by quickly agreeing to abandon its at-large system and begin the process of
8 transitioning to by-district elections. Only if the political subdivision capitulates, in other
9 words, will the complaining party have his or her fees “capped at \$30,000.” Cal. Elec. Code
10 § 10010(f)(3).

11 **D. The Shenkman Demand Letter**

12 31. Like many California localities, the City of Poway for decades used an at-
13 large voting system to elect its City Council.

14 32. On June 7, 2017, the City received a certified letter from an attorney, Kevin
15 Shenkman, asserting that the City’s at-large system violates the CVRA.

16 33. In particular, Mr. Shenkman asserted that “voting within Poway is racially
17 polarized, resulting in minority vote dilution, and therefore Poway’s at-large elections
18 violate the [CVRA].” He added that the CVRA is “different” from the VRA “in several
19 key respects, as the [California] Legislature sought to remedy what it considered restrictive
20 interpretations given to the federal act.” “The California Legislature dispensed with the
21 requirement in *Gingles* that a minority group demonstrate that it is sufficiently large and
22 geographically compact to constitute a ‘majority-minority district.’ Rather, the CVRA
23 requires only that a plaintiff show the existence of racially polarized voting to establish that
24 an at-large method of election violates the CVRA, not the desirability of any particular
25 remedy.”

26 34. According to Mr. Shenkman, “Poway’s at-large system dilutes the ability of
27 Latinos (a ‘protected class’) to elect candidates of their choice or otherwise influence the
28 outcome of Poway’s council elections.” Therefore, unless the City “voluntarily change[s]

1 its at-large system of electing council members ... [he] will be forced to seek judicial relief.”
2 He reminded the City that he had sued “the City of Palmdale for violating the CVRA. After
3 an eight-day trial, we prevailed. After spending millions of dollars, a district-based remedy
4 was ultimately imposed upon the Palmdale city council, with districts that combine all
5 incumbents into one of the four districts.” Mr. Shenkman gave the City until July 21, 2017
6 to notify him whether it would come into compliance with the CVRA.

7 **E. The City’s Response**

8 35. On June 20, 2017, in response to the Shenkman letter, the City Council held
9 a closed session to discuss the threatened CVRA litigation. As reported out by the City
10 Attorney after the closed session, the City Council provided direction to staff to prepare a
11 resolution of intention for establishing and implementing by-district elections for the City
12 Council members to be presented for consideration at the July 18, 2017 City Council
13 meeting.

14 36. In recommending the adoption of the resolution ahead of the July 18 meeting,
15 the City Attorney explained that “the risks and costs associated with protracted CVRA
16 litigation—particularly in light of results in all other cities that have fought to retain at-
17 large voting—cannot be ignored. The public interest may ultimately be better served by a
18 by-district electoral system if converting to that system avoids significant attorneys’ fees
19 and cost award.”

20 37. At the City Council meeting on July 18, an outside attorney the City hired to
21 advise it on the Shenkman letter outlined the difficulty in defending CVRA lawsuits. He
22 provided examples of prior attorney’s fees awards under the CVRA and explained that
23 “[t]he state statutory scheme when it was adopted by the state legislature effectively
24 removed burdens of proof that exist under the federal Voting Rights Act. And what that
25 effectively means is that it is virtually impossible for governmental agencies to defend
26 against lawsuits brought under the CVRA. And that’s in fact why you see cities throughout
27 the State converting ... in the face of these demand letters.”
28

1 38. Three citizens spoke during the public discussion portion of the meeting. The
2 first speaker, a long-time advocate for by-district elections, said “I thought we’d have to
3 go through the initiative process to make it happen. It’s amazing what ... one letter from a
4 lawyer can do.”

5 39. The second speaker supported change to the electoral process in the City more
6 generally but was not an advocate for by-district elections necessarily. He stated: “I think
7 what you are doing as far as changing to districts is not [the] optimum but [] certainly will
8 get rid of the problem of getting the lawsuit.”

9 40. The third speaker opposed a change to by-district elections but acknowledged
10 to the City Council that, due to the threatened lawsuit, “I understand you don’t really have
11 a choice here.”

12 41. Each member of the City Council then expressed his strong disapproval of the
13 changes that the CVRA was forcing the City to make.

14 42. City councilmember Jim Cunningham explained that “the [safe-harbor
15 provision] is truly the shield ... we are using to avoid attorney’s fees, and costs, and
16 protracted litigation.” He then specifically sought advice from the outside attorney on
17 whether they were utilizing that provision correctly to avoid those burdens.

18 43. City councilmember Dave Grosch explained that he supported by-district
19 elections eight years ago. But his experience as an at-large councilmember where he serves
20 and supports the entire community—and not just one district—convinced him that at-large
21 elections were better. In reference to Mr. Schenkman’s letter, he added, “I really hate that
22 the City is ... being told to do this by someone who doesn’t live in Poway” and made clear
23 that the letter was the only reason the City was changing to by-district elections.

24 44. City councilmember John Mullin asked the outside attorney, “If at some point
25 in time, ... somebody does succeed in challenging any or all of the portions of the act,
26 would we ... then have the option to revisit the decision to use district elections?” The
27 attorney explained the City would be able to do so. Councilmember Mullin concluded:
28 “We’ve gone through denial, and we’ve gone through anger, and now we’re into

1 acceptance. So, to those of you in the audience who think that we should be fighting this,
2 we concur, we were there awhile back as well. I have no illusions that this will lead to
3 better government for our city. I'm pretty proud of the job we do as we are now
4 constituted... . But having said all of that, again we have a gun to our heads and we have
5 no choice."

6 45. Deputy Mayor Barry Leonard said, "I get it. I hate it but I get it." He explained
7 his view that "we respond to everybody in the City. We don't pick certain people in certain
8 neighborhoods and say we'll treat them any differently. There is no evidence of that
9 whatsoever. So, I feel like we're already being found guilty of something and we don't
10 have a chance to prove our innocence. It's just the deck is stacked. So, rather than spend a
11 million dollars of the taxpayers' money, we roll over to these bullies."

12 46. Mayor Steve Vaus concluded, "I'll just echo that this council does a
13 remarkable job [with at-large elections]. ... But we've got to do what we've got to do. And
14 job one is to protect the treasure of our constituents. And it's their money we'd be putting
15 at risk [with litigation] and none of us are willing to do that."

16 47. The City Council adopted Resolution No. 17-046 setting forth its intention to
17 transition from at-large to by-district elections, pursuant to Elections Code section
18 10010(e)(3)(A). The Resolution stated that after "the City [had] received a letter
19 threatening action under the California Voting Rights Act," it had "determined that it is in
20 the best interest of the City to move from its current at-large electoral system to a by-district
21 election for members of the City Council, in furtherance of the purposes of California
22 Voting Rights Act."

23 48. On August 1, 2017, August 8, 2017, and August 18, 2017, the Council held
24 meetings where it received public input on drawing new districts, consulted a demographer
25 on how to draw new districts, and evaluated potential maps for the new districts.

26 49. On August 31, 2017, the Council voted 5-0 to proceed with Map 133, an
27 election plan that divides the City into four districts.

1 must abandon its at-large system based on the existence of racially polarized voting and
2 nothing more.

3 57. California does not have a compelling interest in requiring any political
4 subdivision, including the City, to abandon its at-large system based on the existence of
5 racially polarized voting and nothing more. The Supreme Court has assumed that there is
6 a compelling interest in ensuring that minority voters are not denied the ability to form a
7 compact district in which they will have the opportunity to elect a candidate of their choice.
8 That is not the interest the CVRA advances. The CVRA seeks to maximize minority voting
9 strength.

10 58. The CVRA also is not narrowly tailored to ensure that minority voters do not
11 have their votes diluted because, among other reasons, it overrides the compactness
12 precondition of Section 2 of the VRA. The California Legislature, in enacting the CVRA,
13 thus lacked a strong basis in evidence to believe that it was necessary to override Section
14 2's compactness requirement in order to protect minorities from vote dilution.

15 59. As a consequence, the CVRA violates the Equal Protection Clause of the
16 Fourteenth Amendment to the United States Constitution.

17 60. Plaintiff has no adequate remedy at law other than the judicial relief sought
18 here. The failure to enjoin the CVRA will irreparably harm Plaintiff by violating his
19 constitutional rights.

20 **COSTS AND ATTORNEYS' FEES**

21 61. Pursuant to 42 U.S.C. § 1988, Plaintiff seeks an award of their costs, including
22 reasonable attorneys' fees, incurred in the litigation of this case.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiff requests that this Court:

25 62. Declare that the California Voting Rights Act requires California political
26 subdivisions, such as the City, to engage in racial gerrymandering in violation
27 of the Equal Protection Clause of the Fourteenth Amendment.
28

1 63. Permanently enjoin Defendant Becerra from enforcing or giving any effect to
2 the California Voting Rights Act.

3 64. Declare Map 133 in violation of the Equal Protection Clause of the Fourteenth
4 Amendment.

5 65. Permanently enjoin Defendant City of Poway from using Map 133 in any
6 future election.

7 Grant such other or further relief the Court deems to be appropriate, including but
8 not limited to an award of Plaintiff's attorneys' fees and reasonable costs.

9
10 Respectfully submitted,

11 /s/ Bryan K. Weir

12 Bryan K. Weir, CA Bar # 310964

13 William S. Consovoy, VA Bar # 47704 (*pro hac vice* to be filed)

14 Thomas R. McCarthy, VA Bar # 47154 (*pro hac vice* to be filed)

15 J. Michael Connolly, VA Bar # 77632 (*pro hac vice* to be filed)

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