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10
 11 UNITED STATES DISTRICT COURT
 12 SOUTHERN DISTRICT OF CALIFORNIA

13 DON HIGGINSON,
 14
 15 Plaintiff,
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 17 v.
 18 XAVIER BECERRA, in his official
 19 capacity as ATTORNEY GENERAL OF
 20 CALIFORNIA; and CITY OF POWAY,
 21 CALIFORNIA,
 22
 23 Defendants.

Case No.: 3:17-cv-2032-WQH-JLB

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 PLAINTIFF’S EXPEDITED
 MOTION FOR AN INJUNCTION
 PENDING APPEAL**

Judge: Hon. William Q. Hayes

**No Oral Argument Unless Requested
 by the Court**

1 Pursuant to Federal Rule of Civil Procedure 62(c) and Federal Rule of Appellate
2 Procedure 8(a)(1), Plaintiff Don Higginson respectfully requests that the Court enjoin, for
3 the pendency of Plaintiff’s appeal, Defendant Attorney General Xavier Becerra and his
4 agents from enforcing the California Voting Rights Act and Defendant City of Poway from
5 using Map 133 for future elections.

6 Although the Court has already denied Higginson’s motion for a preliminary
7 injunction, the Court still “has the authority to issue an injunction pending appeal,
8 notwithstanding its denial of preliminary injunctive relief.” *Am. Beverage Ass’n v. City &*
9 *Cty. of San Francisco*, No. 15-cv-03415-EMC, 2016 WL 9184999, at *2 (N.D. Cal. June
10 7, 2016). Indeed, the Court may do so even if it continues to “believe[] it correctly decided
11 the issues presented” in the prior denial of injunctive relief. *Id.* An injunction pending
12 appeal is warranted here because there is a “plausible argument that there are serious
13 questions on the merits and irreparable injury.” *Id.* As explained below and in the prior
14 briefs, Higginson has standing, he is likely to succeed on the merits of his claims, and he
15 will be deprived of his constitutional rights without an injunction.

16 As soon as the Court rules on this motion, Higginson intends to file a notice of appeal
17 with this Court and a motion to expedite the appeal with the Ninth Circuit. Higginson will
18 also file a motion for an injunction pending appeal if this Court declines to grant such relief.
19 Higginson must move with this urgency because his constitutional rights will soon be lost
20 due to the upcoming election. *See* Memo in Support of Motion for a Preliminary Injunction
21 (“Mem.”) at 19-23. The City of Poway, too, recognizes the urgency to resolve this case.
22 The City has requested resolution of this action “on or before May 1 ... to allow potential
23 City Council candidates sufficient time to make decisions in advance of the nomination
24 period, and allow both the City and the Registrar sufficient time to perform their mandatory
25 duties under applicable law.” Neufeld Decl. ¶ 7 (Doc. 16-1).

26 To the extent the Court is disinclined to grant Higginson the relief he seeks,
27 Higginson respectfully requests that this Court promptly dispose of the instant motion
28 without waiting for the City and the Attorney General to file their responses, so that

1 Higginson may seek relief in the Ninth Circuit as soon as possible.¹ *See* Fed. R. App.
2 8(a)(1) (“A party must ordinarily move first in the district court for ... an order ... granting
3 an injunction while an appeal is pending.”). To the extent the Court deems additional
4 briefing necessary, Higginson respectfully requests the Court order the Attorney General
5 and the City of Poway to submit their responses as quickly as possible. *See, e.g., Annex*
6 *Medical, Inc. v. Sebelius*, 2013 WL 203526, at *1 (D. Minn. Jan. 17, 2013) (ordering
7 expedited briefing on a motion for injunction pending appeal).

8 STANDARD OF REVIEW

9 The Court has the power to grant a stay or injunction “[w]hile an appeal is pending
10 from an interlocutory order or final judgment that ... denies an injunction[.]” Fed. R. Civ.
11 P. 62(c). “The standard for granting an injunction pending appeal is generally the same as
12 the standard for granting a preliminary injunction.” *Allergan, Inc. v. Valeant Pharms. Int’l,*
13 *Inc.*, 2014 WL 11412670, at *1 (C.D. Cal. Nov. 5, 2014). However, “an injunction pending
14 appeal may be appropriate, even if the Court” has already denied a preliminary injunction
15 and “believe[s] its analysis in denying preliminary injunctive relief is correct.” *Am.*
16 *Beverage Ass’n*, 2016 WL 9184999, at *2. That is because “[a]n injunction is frequently
17 issued where the trial court is charting a new and unexplored ground and the court
18 determines that a novel interpretation of the law may succumb to appellate review.” *Id.*;
19 *see, e.g., id.* (granting an injunction pending appeal of a city ordinance, even though the
20 Court believed it had correctly denied preliminary-injunctive relief).

21 “In deciding whether to grant an injunction pending appeal, the court balances the
22 plaintiff’s likelihood of success against the relative hardship to the parties.” *Se. Alaska*
23 *Conservation Council v. U.S. Army Corps of Engineers*, 472 F.3d 1097, 1100 (9th Cir.
24 2006) (citation omitted). The Ninth Circuit “has recognized two different sets of criteria
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27 ¹ Higginson has conferred with the City and the Attorney General. The City takes no position on the
28 motion, but respectfully requests that the Court rule on the motion as quickly as possible. The Attorney
General opposes Higginson’s motion.

1 for preliminary injunctive relief.” *Id.* Under the “traditional test,” the moving party must
2 show: “(1) a strong likelihood of success on the merits, (2) the possibility of irreparable
3 injury to the plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring
4 the plaintiff, and (4) advancement of the public interest (in certain cases).” *Id.* (citation
5 omitted). The “alternative test” requires that the moving party demonstrate “either a
6 combination of probable success on the merits and the possibility of irreparable injury or
7 that serious questions are raised and the balance of hardships tips sharply in his favor.” *Id.*
8 (citation omitted). “[T]hese two formulations represent two points on a sliding scale in
9 which the required degree of irreparable harm increases as the probability of success
10 decreases. They are not separate tests but rather outer reaches of a single continuum.” *Id.*
11 at 1092-93 (citation omitted).

12 ARGUMENT

13 I. Higginson Is Likely to Succeed on the Merits of His Claim.

14 A. Higginson Has Standing to Bring this Lawsuit.

15 As explained in prior briefing,² Higginson has Article III standing. The undisputed
16 facts show that the City abandoned at-large elections and adopted Map 133 because of the
17 CVRA; the CVRA, in turn, violates the Equal Protection Clause. Accordingly, Higginson
18 has suffered an injury that has been caused by the CVRA and is redressable through
19 declaratory and injunctive relief that remedy the equal-protection violation and restore
20 Higginson’s ability to vote for all members of the city council. *See* Opposition to the
21 Motion to Dismiss (“Opp.”) 13-17; Reply in Support of the Motion for Preliminary
22 Injunction (“Reply”) 2-6.

23 In its Order, the Court found that Higginson alleged a sufficient injury-in-fact but
24 failed to show causation and redressability. The Court’s conclusions were error.

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26
27 ² Because “[t]he standard for granting an injunction pending appeal is generally the same as the standard
28 for granting a preliminary injunction,” *Allergan, Inc.*, 2014 WL 11412670, at *1, Higginson incorporates
by reference the arguments he made in his prior filings.

1 First, the Court found no causation because “the allegations of the Complaint do not
2 support an inference that the requirements imposed on the City by the CVRA were a but-
3 for cause of the City’s decision to switch to by-district elections.” Order 18. Instead, the
4 City “allegedly adopted by-district elections after receiving the demand letter from a
5 private party in an effort to avoid the costs of litigation.” *Id.* But there was “no need to
6 probe precisely why” the City adopted Map 133—“whether due to an imminent threat of
7 prosecution, general threat of prosecution, or its own desire to comply with state law—
8 beyond the uncontested fact that” Map 133 would not have been adopted “*but for* [the
9 CVRA].” *Nat’l Audubon Soc’y, Inc. v. Davis*, 307 F.3d 835, 848 (9th Cir. 2002). Indeed,
10 the City has *never* disputed that it would not have adopted Map 133 but for the existence
11 of the CVRA. Higginson thus established causation because “[t]he [City’s] decision caused
12 harm to [Higginson]; that decision was caused by [the CVRA]; and [Higginson] had no
13 ability to control that decision.” *Id.*

14 Second, the Court found that Higginson had failed to show redressability because “a
15 decision favorable to Higginson would not preclude the City from using Map 133 or require
16 the City to ensure that Higginson could vote for all four councilmembers under the facts
17 alleged in the Complaint.” Order 19. But the Court has the power to redress Higginson’s
18 injury by enjoining Map 133 and restoring the preexisting at-large system. *See, e.g., League*
19 *of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 431 (5th Cir. 2011)
20 (finding redressability prong satisfied because a ruling for the plaintiff “would have the
21 effect of restoring [the plaintiff’s] right to vote in the election of all five members of the
22 city council”). Whether the City might *in the future* try to reinstitute Map 133 or change its
23 election system is wholly irrelevant to redressability. *See, e.g., Larson v. Valente*, 456 U.S.
24 228, 242-43 & n.15 (1982) (rejecting the argument that “in order to establish redressability,
25 appellees must show that they are *certain*, ultimately, to receive a religious organization
26 exemption from the registration and reporting requirements of the Act—in other words,
27 that there is no other means by which the State can compel appellees to register and report
28 under the Act. We decline to impose that burden upon litigants.”). Higginson has standing.

1 without waiting for the City and the Attorney General to file their responses, so that
2 Higginson may seek relief in the Ninth Circuit as soon as possible. To the extent the Court
3 deems additional briefing necessary, Higginson respectfully requests the Court order the
4 Attorney General and the City of Poway to submit their responses as quickly as possible.
5

6 Dated: February 27, 2018

Respectfully submitted,

7 /s/ Bryan K. Weir

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this pleading with the Clerk of the Court using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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