No. 19-55275

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DON HIGGINSON,
Plaintiff-Appellant,

v.

XAVIER BECERRA, in his official capacity as Attorney General of California, and CITY OF POWAY,
Defendants-Appellees,

CALIFORNIA LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.,
Intervenor-Defendants-Appellees

On Appeal from the United States District Court
for the Southern District of California
No. 3:17-cv-02032
Hon. William Q. Hayes, District Judge

BRIEF *AMICUS CURIAE* OF PROFESSOR J. MORGAN KOUSSER IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae is an individual, not a corporate entity, and therefore no corporate disclosure is made under Rule 26.1 of the Federal Rules of Appellate Procedure.

DATED: August 22, 2019

By: */s/ Justin Levitt*

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INTEREST OF AMICUS CURIAE[1]

In his opening brief to this Court, appellant Don Higginson asserts that "the text of the [California Voting Rights Act] and its legislative history provide . . . direct evidence of the predominance of racial considerations . . ."[2] But the short, selective quotations from only two of the many legislative documents and from statements hostile to the California Voting Rights Act (CVRA) taken from newspaper articles written long after the CVRA was initially passed are a flagrant example of "law office history." The purpose of this brief is to examine the legislative history and other documents in much greater depth than the plaintiff has, in order to answer two questions: What were the purposes of the legislature in adopting and later, amending, the CVRA? And did the legislators adequately tailor the law to remedy the problems that they believed existed?

Amicus J. Morgan Kousser is a professor of history and social science at the California Institute of Technology and the author of over a hundred journal articles, encyclopedia articles, book reviews, and books, including two books and

[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that Loyola Law School paid the expenses involved in filing any requested paper copies of this brief. All parties have consented to the filing of this brief.

[2] Appellant's Opening Br. at 24, *Higginson v. Becerra*, No. 19-55275 (9th Cir. June 17, 2019).

several law review articles on legislative intent or minority voting rights. He has testified or consulted in more than fifty federal and state voting rights cases, including sixteen CVRA cases. He is currently at work on a monograph on the CVRA.

SUMMARY OF ARGUMENT

Whatever the eventual standard of review in this case, a thorough understanding of the legislative history of the California Voting Rights Act (CVRA), and its origins, purposes, mechanics, and amendments, may assist the court in adjudicating the matter. None of the parties has provided such a history. This brief does.

The CVRA grew out of a voting rights lawyer's frustration with the difficulties and shortcomings of adjudicating cases under Section 2 of the federal Voting Rights Act (VRA) in a multiethnic state in which there was or soon would be no majority ethnic group. Joaquin Avila hoped to use his 1988 victory in overturning at-large elections in Watsonville to ensure equitable opportunities for members of different ethnic groups to gain representatives of their choice in local governments throughout California. Because most such governments were elected at-large, they were then overwhelmingly non-Hispanic white and responsive primarily to non-Hispanic white voters, even in communities that contained

substantial numbers of non-whites. Non-Hispanic white voters often held distinctive political preferences, which were diluted in at-large political systems. But the requirements for a Section 2 case made litigation expensive and uncertain. It was often difficult to determine statistically whether it was possible to draw a district that contained a majority of one ethnic group, and some federal judges required much more than a bare majority. Moreover, there were other "Senate factors" that had to be proven, the statistical methods of estimating racially polarized voting were contested, and sometimes the intent of adopting or maintaining the at-large structure became an issue.

So in 2001, Avila and State Sen. Richard Polanco authored a bill, SB 976, that simplified and clarified voting rights litigation in the state. It was very strictly limited and became more so during a 15-month legislative process. Unlike the VRA, it applied only to at-large elections – not, for example, redistricting. Its purpose, its proponents repeatedly announced, was to curb the dilutive effects of racially polarized voting in a state in which "we are all minorities." Its means were perfectly congruent with that end, focusing primarily upon statistical estimation of racially polarized voting in the at-large context, where it did the most harm. Other amendments in 2001-02 aligned its definitions, methods, and evidentiary bases with those of the VRA, with two principal differences that were based on Avila's experiences in litigation within the limitations of Section 2: the CVRA did not

require proof before a case could be filed that it was possible to draw a district containing a "compact" citizen voting-age population majority of a single ethnic group, and absent remarkably unusual circumstances, it did not allow a successful defendant jurisdiction to recover its costs and attorneys' fees.

After the constitutionality of the CVRA was affirmed in the State Court of Appeal, a decision that was left undisturbed by the California and United States Supreme Courts, the CVRA became very effective. From 2007 to 2016, at least 213 local jurisdictions abandoned at-large elections. But a few large settlements to plaintiffs' lawyers in prominent cases aroused opposition. So the legislature amended the CVRA to establish a simple, standardized process for a local elective body to determine whether or not to abolish at-large elections and to draw districts, even before the thick of litigation. If that "safe harbor" procedure was followed, attorneys' fees would be capped. By forcing discussion and compromise among the voters, the process also furthered the larger purpose of the CVRA – to decrease racial polarization in a multi-ethnic state.

ARGUMENT

I. Sources for this Legislative History

The legislative record about the initial passage of the California Voting Rights Act (hereinafter "CVRA") in 2001-02 is long and rich. LRI History LLC, a respected source for California legislative history,[3] has scanned 489 pages of files from a dozen file folders. They contain not only staff reports for the various committees, but drafts of statements by the principal legislative author of the bill, Sen. Richard Polanco, committee worksheets and other materials, committee and roll call votes, endorsement letters by outside organizations, and, perhaps most importantly, drafts of the bill and amendments to it. This brief refers to the materials by the name of the file folder in which they appear – for example, "Bill Versions (LRI History)."

[3] *See Pacific Gas & Electric Co. v. Hart High-Voltage Apparatus Repair & Testing Co., Inc.*, 18 Cal. App. 5th 415, 425-26 (Cal. Ct. App. 2017) (taking judicial notice of LRI History materials).

II. Background of the CVRA

To understand the aims of the CVRA (SB 976) and three of its most important provisions, one should start in Watsonville, as many of the bill analyses did. For example, a legislative bill analysis noted that

> One of the most frequently cited reasons for changing from at-large to district elections is the need to overcome a history or pattern of racial inequity. In some instances, election by districts may actually be required by the federal Voting Rights Act. In Gomez v. City of Watsonville (1988), the United States Supreme Court affirmed that the at-large elections of city council members in Watsonville, California had diluted the voting strength of the minority community, and ordered the city to switch to single-member district elections.[4]

But the Watsonville case, the first successful Section 2 case in California, was more significant than the staff analysis explained.[5] It had been brought by

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[4] Bill Analysis for Sen. Comm. on Elections & Reapportionment, S.B. 976, May 2, 2001, at 1, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200120020SB976. The same wording about Watsonville is repeated in other bill analyses throughout the files. *See, e.g.*, Bill Analysis for Sen. Floor Analysis, S.B. 976, June 1, 2001, at 2, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200120020SB976; Bill Analysis for Assemb. Comm. on Elections, Reapportionment & Const. Amds., S.B. 976, Apr. 2, 2002, at 3, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200120020SB976; Bill Analysis for Sen. Floor Analysis, S.B. 976, June 21, 2002, at 2, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200120020SB976.

[5] *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1534 (1989); *see also* Gov.'s Off. of Planning & Research, Enrolled Bill Report, S.B. 976, *in* Governor's Chaptered Bill File 9, 11 (LRI History).

Joaquin Avila, the voting rights lawyer and former president of the Mexican-American Legal Defense and Educational Fund (MALDEF) and the principal non-legislative author of the CVRA.[6] Watsonville had been carefully chosen after evaluating many jurisdictions,[7] and Avila hoped to use the Watsonville opinion as an entering wedge to encourage many other local jurisdictions to replace at-large with district elections. This, he believed, would spur Latino political mobilization, facilitating the integration of Latino voters and their choices into local political contests. Unless "the haves and the have-nots" were "educationally integrated, economically integrated, [and] politically integrated," Avila feared "a period of a very high level of social disorder."[8] In Avila's view, then, the VRA was to be employed for classically conservative ends.

Yet the Watsonville case had been very difficult to win at the trial level. Despite uncontested statistical evidence that elections had been racially polarized,

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[6] *See* Press Advisory, Sen. Richard G. Polanco, California's New Voting Rights Act, Senate Bill 976, Signed Into Law (July 10, 2002), *in* Author's File 134 (LRI History) ("Renowned civil rights attorney, Mr. Joaquin Avila, drafted the measure and assisted in its passage."); Background Information Request, *in* Sen. Comm. on Elections & Reapportionment 1 (LRI History) (noting that "Mr. Joaquin Avila, former President, MALDEF, a public interest attorney" "is the source of the bill").

[7] Joaquin G. Avila, *Panel 4: The Future of Voting Rights Litigation: Judicial and Community College Board Elections*, 6 Berkeley La Raza L.J. 115, 117 (1993), https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1175&context=blrlj.

[8] *Id*. at 121.

that Latino voters preferred Latino candidates, and that none of the nine Latino candidates who had run for the city council or mayor from 1971 through 1985 had been elected, the trial court ruled on the basis of other, non-statistical evidence that Latinos were not cohesive.[9] Even though it was easy to draw two population-majority-Latino districts (out of seven), the judge speculated that Latino registration and likely turnout were too low for the community to win those seats. Thus, although the evidence in the case seemed to satisfy the so-called "Gingles factors,"[10] which were considered prerequisites for a Section 2 case, the plaintiffs lost. Not only did the court deny Avila's petition, but it also ruled that Avila would have to pay the City's costs, which would have bankrupted the sole practitioner lawyer and inhibited any other lawyers and even civil rights organizations from bringing voting rights lawsuits in California. A unanimous Ninth Circuit decision reversed the trial court on all points.[11]

After the Ninth Circuit's decision, the San Francisco law firm of Rosen & Phillips identified 137 cities in California with a Latino population of at least 10%, at-large elections, and no elected Latino officials, which suggested places to

[9] *Gomez v. City of Watsonville*, No. C-85-20319 (N.D. Cal. Jan. 30, 1987).

[10] *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

[11] *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir 1988).

investigate further to see whether racial polarization existed.[12] Avila and other voting rights lawyers sued Salinas, Stockton, Pomona, San Diego, Chula Vista, and National City.[13] Although Salinas quickly settled Avila's lawsuit by shifting to districts, which immediately elected a Latino to the City Council,[14] and San Diego swiftly followed by moving to districts, the lawsuits in Pomona and Stockton went against the Latino plaintiffs at both the trial and appellate levels. Most importantly, in *Romero v. City of Pomona*, the federal courts ruled that the lawsuit could not go forward under Section 2 of the federal VRA because the trial court asserted that it was not possible to draw a district that had a citizen voting age population (CVAP) majority of a single minority population, which was deemed a statutory prerequisite for most Section 2 relief.[15] Ironically, after spending $1 million defending the *Romero* case, the Pomona City Council decided to authorize a referendum on switching to districts, and 56% of the city's 1990 voters supported

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[12] Mark A. Stein, *One Latino Wins, 3 Others Lose in Watsonville Vote*, L.A. Times (Dec. 6, 1989), http://articles.latimes.com/print/1989-12-06/news/mn-85_1_latino-voters.

[13] Joaquin G. Avila, *Latino Political Empowerment: A Perspective* 21 (1989). *See, e.g.*, *Armenta v. City of Salinas*, No. C-88-20567 (N.D. Cal. 1988); *Perez v. City of San Diego*, No. C-88-0103 (S.D. Cal. 1988).

[14] Stein, *supra* note 12.

[15] *Romero v. City of Pomona*, 665 F. Supp. 853 (C.D. Cal. 1987), *aff'd*, 883 F.2d 1418 (9th Cir. 1989). The only data available at the precinct level at the time of the case was for the total population by ethnicity, not CVAP.

the switch. In the first district elections, an African-American won a district that was only a third black in population, and a Latino won a seat with a Latino population of only 42.7%, and no doubt a Latino CVAP of much less.[16]

After the Pomona decisions, few local jurisdictions shifted from at-large to district elections, even when they faced federal lawsuits. In 1990-91, a hospital district, three school districts, and a city council in Tulare County moved from at-large to districts. In 1993, five school districts in Fresno County joined them.[17]

Two federal cases illustrate how difficult it was to meet the majority-CVAP hurdle or an even higher, vaguer Section 2 standard. In the 1990 case of *Garza v. County of Los Angeles*,[18] the trial court listened for more than two months to nine expert demographers dispute the most minute details of estimating the Latino CVAP in L.A. County by precinct.[19] The court finally ruled that because district lines for the County Board of Supervisors had been drawn with a racially discriminatory intent, the jurisdiction was liable under Section 2 even though the

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[16] *See* Florence Adams, *Latinos and Local Representation: Changing Realities, Emerging Theories* 49-61 (2000).

[17] *See id.* at 74-108.

[18] 756 F. Supp. 1298 (C.D. Cal. 1990).

[19] The arguments were over how to project national-level figures on the Latino CVAP down to the block level in Los Angeles and how to estimate the increase in all populations at the precinct level after 1980.

ability to draw a 50+% Latino CVAP district could not be demonstrated with certainty.[20] The Ninth Circuit upheld this decision and the remedial district that resulted, and Gloria Molina became the first person of Hispanic heritage elected to the Los Angeles County Board of Supervisors in 116 years.[21]

In *Garza*, one of the disputes in the Section 2 portion of the case concerned the possibility of drawing a Latino CVAP-majority district, as required by *Romero*. In 1995, a federal trial court in an El Centro case went further still, declaring that "[t]he legal standard is not total population, voting age population, voting age citizen population or registration, but the ability to elect."[22] *Romero*, the court said, merely stood "for the proposition that *at least* an eligible voter majority is required . . ." as a prerequisite to federal relief.[23]

When Joaquin Avila was drawing up and when the legislature was considering the CVRA, there were few minority-Latino cities in California that had elected <u>any</u> Latinos in at-large elections. Section 2 cases were extremely

[20] I was the only expert witness who testified on intent in the case.

[21] *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990); J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* 134 (1999).

[22] *Aldasoro v. Kennerson*, 922 F. Supp. 339, 371 (S.D. Cal. 1995).

[23] *Id.* at 373.

complicated and threatened to bankrupt any lawyer or organization that brought one. The majority-CVAP standard in the federal statute invited (and still invites) lengthy statistical quibbling that was, as the Pomona elections showed, unrelated to political reality. The CVRA was a reaction against this litigation history. It would seek to make it possible for voters of different ethnic groups to elect candidates of their choice, would make litigation less potentially career-ending for voting rights attorneys, would standardize the determination of racially polarized voting, and would push the problem of district composition from the liability to the remedy phase of a case.

III. The Purposes of the CVRA

We have already seen one purpose of the bill stated in the bill analysis of SB 976 for the Senate Committee on Elections and Reapportionment – "the need to overcome a history or pattern of racial inequity."[24] It was a phrase that was often repeated in analyses of the bill.[25] A bill analysis for a June 4, 2002 hearing in the

[24] Bill Analysis, May 2, 2001, *supra* note 4, at 1.

[25] *E.g.*, Bill Analysis, June 1, 2001, *supra* note 4, at 2; Bill Analysis for Sen. Floor Analysis, S.B. 976, Jan. 9, 2002, at 2, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200120020SB976; Bill Analysis, June 21, 2002, *supra* note 4, at 2.

Assembly Committee on Judiciary put the same point somewhat differently: ". . . this bill simply prohibits the abridgement or dilution of minority voting rights."[26]

The American Civil Liberties Union (ACLU) was a bit more specific in a letter of support for the bill: "Statewide, the underrepresentation of minority groups on [local governing] boards has been dismally and consistently low for decades. Where racially polarized voting has led to the exclusion of minority-preferred candidates, this law provides for changes in the electoral system so that it more fairly represents the constituencies within each jurisdiction."[27] In a letter urging Gov. Gray Davis to sign the bill, MALDEF cited statistics of underrepresentation:

> Although California has already become a majority-minority state, Latino political representation at the local level has not kept pace with the staggering growth of the Latino community over the past decade. In 2000, Latinos comprised 33% of California's population. Yet that same year, according to the 2000 National Association of Latino Elected Official's (NALEO) annual directory, Latinos represented only 2.8% of the total number of county elected officials in California (58/2,013), and only 10.5% of all municipal elected officials (308/2,913).

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[26] Bill Analysis for Assemb. Comm. on the Judiciary, S.B. 976, June 3, 2002, at 1, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200120020SB976.

[27] Letter from Francisco Lobaco, ACLU Leg. Dir., and Valerie Small Navarro, ACLU Leg. Advocate, to Sen. Richard Polanco, May 31, 2002, *in* Author's File 58 (LRI History).

> This stark disparity underscores the continued need for measures, legislative or otherwise, to help the governing bodies of local government better reflect the communities they serve.[28]

Far from a demand for maximization, as Appellant suggests,[29] the advocates' references to "exclusion," "more fairly represents," and "better reflect" were only appeals for representation that was not unjustifiably discriminatory.

But there was another purpose of the bill, one that legislators and bill analyses repeatedly stressed, and which at the same time captures the tailoring of SB 976, the close connection of its ends to its means. As Sen. Polanco pointed out in testimony before the Assembly Elections and Reapportionment Committee, there had been several bills in previous years that had attempted to substitute district for at-large elections statewide, one of which Gov. Davis had vetoed. "This measure is different: it does not say that district elections are the only means. This measure says that we need to attack block [sic] voting and, if block [sic] voting is established in a court of law, then it allows a court to impose

[28] Letter from Steven J. Reyes, MALDEF Staff Att'y, to Gov. Gray Davis, July 3, 2002, *in* Author's File 56, 56-57 (LRI History).

[29] Appellant's Opening Br. at 26-27, *Higginson v. Becerra*, No. 19-55275 (9th Cir. June 17, 2019).

remedies including district elections."[30] "Members," Sen. Polanco explained, "block [sic] voting, particularly when associated with racial or ethnic groups[,] is harmful to a state like California due to its diversity."[31]

The statement that the bill was aimed at the problem of bloc voting, which was particularly harmful to California because of its diversity, was repeated so many times that we should take it seriously as a motive separate from the goal of increasing minority representation. Bill analyses for several committees used the same language to describe the purpose of the bill:

> According to the author, SB 976 "addresses the problem of racial block [sic] voting, which is particularly harmful to a state like California due to its diversity. SB 976 provides a judicial process and criteria to determine if the problem of block [sic] voting can be established. Once the problem is judicially established, the bill provides courts with the authority to fashion appropriate legal remedies for the problem. In California, we face a unique situation where we are all minorities."[32]

As Sen. Polanco put it in a letter to Gov. Davis requesting that Davis sign the bill, "Senate Bill 976 addresses the problem of racial bloc voting in California

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[30] Sen. Richard G. Polanco, Statement Prepared for Hearing Before Assemb. Comm. on Elections & Reapportionment, *in* Author's File 5, 7 (LRI History) (emphasis in original).

[31] *Id.* at 5.

[32] Bill Analysis, Apr. 2, 2002, *supra* note 4, at 3; *see also* Bill Analysis, June 3, 2002, *supra* note 26, at 2; *cf.* Bill Analysis, May 2, 2001, *supra* note 4, at 3.

– a state without a majority racial or ethnic group. . . . Governor, after the 2000 Census, in California we are facing a unique situation where we are all minorities."[33] Letters to Gov. Davis from the League of United Latin American Citizens, the ACLU, the Mexican-American Political Association, the National Association of Latino Elected Officials, and MALDEF all focused on "racial bloc voting" as the problem addressed by the bill.[34] Governor Davis's statement to the State Senate upon signing the bill emphasized "the diverse make up of California voters."[35]

California's unique demography, proponents of SB 976 contended, not only made racial bloc voting a more serious problem. It also justified relaxing the *Gingles* requirement that plaintiffs in a Section 2 case had to prove that a "compact" majority-minority district could be drawn before a lawsuit could go forward.[36] As a bill analysis for SB 976 put it:

> This bill recognizes that geographical concentration is an appropriate question at the remedy stage. However, geographical compactness

[33] Letter from Sen. Richard G. Polanco to Gov. Gray Davis, July 2, 2002, *in* Author's File 54, 54 (LRI History).

[34] *See* Letters to Gov. Gray Davis, *in* Author's File 48-52, 56-57 (LRI History).

[35] Signing Statement of Gov. Gray Davis, July 9, 2002, *in* Governor's Chaptered Bill File 2 (LRI History).

[36] On Justice Brennan's addition of this factor to a subset of the 1982 "Senate factors" in his opinion in *Gingles*, see Kousser, *supra* note 21, at 58.

> would not appear to be an important factor in assessing whether the voting rights of a minority group have been diluted or abridged by an at-large election system. Thus, this bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown). . . . To clarify that there is more than one protected class, the author properly wishes to change references to "the protected class" to "a protected class."[37]

That is, because there were so many potential groups in California that might be discriminated against through racially polarized voting in an at-large election system, and because in a racially diverse community, any single group might not be quite large enough or concentrated enough to form a compact majority of a potential district, California needed a different standard. As Sen. Polanco put it in a press release after Gov. Davis signed the bill, "SB 976 is necessary because the federal Voting Rights Act's remedy fails to redress California's problem of racial bloc voting. . . . If a minority community were at 49 percent, then the federal courts cannot provide a remedy. Such a bright-line test establishes an artificial threshold which often serves to deny minority voting rights in California simply because the minority community is not sufficiently compact."[38]

And because California's problems were different than the black/white southern conflicts that had primarily motivated the federal VRA, California did not

[37] Bill Analysis, June 3, 2002, *supra* note 26, at 3.

[38] Press Advisory, *supra* note 6 (emphasis added).

have to limit itself to the precise choices of the federal statute and its jurisprudence. As Saeed Ali, the Principal Consultant to Senate Majority Leader Polanco, substituting for his boss in a hearing before the Senate Elections and Reapportionment Committee on May 2, 2001, put it,

> . . . this legislature can and does enact laws that provide Californians with better and more specific statutes than those in similar federal legislation. For example, we created the Unruh Civil Rights Act as we needed to provide better and more specific statutes suited to our needs than those in federal civil rights statutes. After the 2000 Census, in California, we are facing a unique situation where we are all minorities.[39]

IV. The Tailoring of SB 976

If the ends of SB 976 were to overcome a history of racial inequity and to protect against the representational consequences of racial polarization in a multi-racial state, the means that the law adopted were quite precisely aimed at achieving those ends.

[39] Saeed Ali, Statement Before Sen. Comm. on Elections & Reapportionment, May 2, 2001, *in* Author's File 8, 10 (LRI History). Passed in 1959 and amended since then, the Unruh Civil Rights Act may be found at https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CIV&sectionNum=51. Unruh Civil Rights Act, Cal. Civ. Code §§ 51 et seq.

First, unlike the VRA, which allowed lawsuits on redistricting, annexation, numbered place systems, residency requirements, majority vote requirements, staggered terms, and restrictions on the individual right to vote, including failing to make election materials available in languages other than English, the CVRA applied only to at-large elections.[40]

Second, as the bill analysis prepared for the Assembly Judiciary Committee stressed, "This Bill Does Not Mandate the Abolition of At-large Election Systems."[41] Pointing to sections of the state election code that required either district or at-large elections in locally-elected governmental bodies, the bill analysis implied that if the legislature could mandate both election structures, it could restrict the choice to one or could put conditions on either choice.[42] Two 1999 bills, AB 8 and AB 172, had sought, respectively, to eliminate the at-large election system within the Los Angeles Community College district and prohibit at-large elections for certain K-12 school districts. The first had been vetoed, and

[40] *Compare* 52 U.S.C. § 10301 (providing that "[n]o . . . standard, practice, or procedure shall be imposed or applied" in discriminatory fashion) *with* Cal. Elec. Code § 14027 (providing that "[a]n at-large method of election may not be imposed or applied" in discriminatory fashion).

[41] Bill Analysis, June 3, 2002, *supra* note 26, at 3 (emphasis in original).

[42] *Id*. at 2 (citing Cal. Elec. Code §§ 10505, 10508, and 10523, and Cal. Gov't Code §§ 58000-58200).

the second had failed in the Senate.[43] Unlike those bills, "this bill would not mandate that any political subdivision convert an at-large election system to a single-member district system."[44] So the legislature recognized that it had the power to ban at-large elections altogether, but it chose to take a much narrower path, banning them only if it could be proved in a court of law that voting within one of them was racially polarized and had a discriminatory effect.

Third, to simplify the proof required in CVRA cases and thus make them less expensive for either side to litigate than VRA cases were, the CVRA focused on racially polarized voting and specified that it would be proven by methodologies used to estimate racially polarized voting in VRA cases.[45] With three "*Gingles* prerequisites," seven "Senate factors," and sometimes intent cases based on 100-page expert witness reports and numerous depositions of lay witnesses, Section 2 cases had become, according to the American Bar

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[43] *Id*. at 5. Bills to prohibit at-large elections in school districts with certain ethnic composition had been proposed earlier, and at least one had been passed by both houses of the legislature and vetoed by the governor. They include AB 2 (1989-90), AB 1002 (1991-92), AB 2482 (1993-94), and AB 1328 (1999). Bill Analysis for Sen. Floor Analysis, A.B. 350, Aug. 18, 2016, at 5, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB350.

[44] Bill Analysis, June 3, 2002, *supra* note 26, at 1.

[45] Cal. Elec. Code § 14026(e).

Association, "extremely complex and costly" and "among the most difficult cases to prosecute," requiring almost four times the judicial workload of an average case.[46] The CVRA sought to reduce everyone's workload.

The bill's emphasis on statistical estimation of racially polarized voting also ensured that the evidence required in a CVRA case was directly related to the problem that the statute was designed to correct – racially polarized voting and its consequences. This provided an almost uniquely strong connection between the bill's end and its means.

Fourth, the extensive legislative files, which contain many amendments and versions of the bill, demonstrate a desire to mandate a simple, clear, restrained process of litigation. During the bill's fifteen months of careful consideration, when it had hearings in three different committees,[47] there were numerous amendments. These brought S.B. 976 into line with many federal standards,

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[46] Brief of Amicus Curiae The American Bar Association in Support of Respondents at 5, 15-16, 2013 WL 432970, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

[47] History, S.B. 976, http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=200120020SB976. The committees were the Assembly Judiciary and Elections, Reapportionment, and Constitutional Amendments committees and the Senate Elections and Reapportionment Committee.

definitions, and procedures. It also clarified issues that might arise under the law, thereby minimizing the time and expense of litigation under it.

The most important change, adopted in the May 1, 2001 Senate amendments, removed challenges to district lines from the causes of action authorized by Section 14027 of the CVRA.[48] Redistricting was the second most important topic of litigation under the 1957 and 1960 Civil Rights Acts and the VRA, from 1957 through 2014.[49] Eliminating such cases from the CVRA narrowed its scope significantly.

There were a series of other amendments that harmonized parts of the CVRA with the definitions and judicial standards of the VRA, as matters of legislative choice, rather than constitutional requirement. One adopted the VRA's definition of a "protected class."[50] Another echoed language in *Gingles* and the 1982 Senate Report on the VRA by specifying that findings about racially

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[48] *See* Compare Versions, Feb. 23, 2001, and May 1, 2001, S.B. 976, http://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=20010120020SB976&cversion=20010SB97699INT.

[49] J. Morgan Kousser, *Do the Facts of Voting Rights Support Chief Justice Roberts's Opinion in* Shelby County*?*, 2015 Transatlantica 1, 20 (2015), https://journals.openedition.org/transatlantica/7462.

[50] Cal. Elec. Code § 14026(d).

polarized voting in elections that took place before the filing of a CVRA lawsuit would be more probative than those in elections that took place afterwards.[51]

A third amendment, modeled on the seventh "Senate factor,"[52] declared that

> One circumstance that may be considered in determining a violation of Section 14027 and this section is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action based on Section 14027 and this section.[53]

A fourth added all of the "Senate factors" as probative, but not necessary, to establish a violation of the CVRA.[54] This made it possible for each side in a case to bring up other information, though it kept the focus on racially polarized voting.

Other amendments were just for clarity, settling possible disputes that might clog or extend court cases. The most important specified that the CVRA allowed cases to proceed even if no "compact or concentrated" district could be drawn that contained a CVAP-majority of one minority ethnic group.[55] We have seen above in the *Romero and Aldasoro* cases how dim the supposedly "bright line" was in

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[51] *Id.* § 14028(a). *See also Thornburg v. Gingles*, 478 U.S. 30, 76 (1986) (citing S. Rep. No. 97-417, at 29 (1982)).

[52] S. Rep. No. 97-417, at 28-29 (1982).

[53] Cal. Elec. Code § 14028(b).

[54] *Id.* § 14028(e).

[55] *See id.* §§ 14027, 14028(c).

practice. They showed, as well, how irrelevant a "majority-minority" standard was to the practical problem of electing a minority-preferred candidate.

A second clarified the definition of at-large elections, making it clear that, for example, city councils elected partly at large and partly by districts were considered at large for CVRA purposes.[56]

A third limited the racial polarization analysis to elections involving at least one minority candidate or ballot measures affecting "the rights and privileges of members of a protected class."[57] This sought to preclude the consideration of elections in which, for instance, Latino voters had a choice only between non-Hispanic white candidates, which might mask the amount of polarization that would take place in elections in elections with a more diverse set of choices.

A fourth tried to head off controversies about minority cohesion by declaring that if there were multiple candidates from one ethnic group in multi-seat at-large elections, the votes for all minority candidates should be added together in the racial polarization analysis.[58] A fifth specified that only voters who lived in the challenged jurisdictions could bring suit.[59] This paralleled the Supreme Court's

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[56] *Id.* § 14026(a).

[57] *Id.* § 14028(b).

[58] *Id.*

[59] *Id.* § 14032.

restriction in racial gerrymandering suits announced in *United States v. Hays*.[60] This precluded public interest organizations or the State of California from bringing lawsuits in their own names.

A sixth allowed defendants to recoup costs if a judge ruled the suit "frivolous, unreasonable, or without foundation."[61] This reined in completely irresponsible lawsuits.

Altogether, a detailed consideration of the text and legislative history of SB 976 shows that the CVRA was a clear and straightforward law, made simpler to litigate by careful amendments during the legislative process. It applied to only one of the many kinds of election rules that could be challenged under the VRA, at-large elections. Its goal was to alleviate the underrepresentation of members of any protected class in multi-racial California that resulted from racially polarized voting in at-large elections. Its means was connected to that goal as closely as possible -- determining whether at-large elections in the jurisdiction were marred by racial bloc voting.

[60] 515 U.S. 737 (1995).

[61] Cal. Elec. Code § 14030.

V. The CVRA in Action and the Further Narrowing of 2016

The CVRA took more than five years to become fully effective. Because the California State Attorney General was not authorized to file suit under the Act, lawsuits were left to individual attorneys. Because the first lawsuits were likely to be heavily contested and appealed, a private lawyer like Joaquin Avila would have to ally not only with a public interest group such as the Lawyers' Committee for Civil Rights (LCCR) or MALDEF, but also with a major law firm, to obtain the necessary resources to conduct the lawsuit properly.[62] In November, 2003, Avila and Robert Rubin of the LCCR convinced a large San Francisco law firm to work with them in suing the Hanford Joint Unified High School District, which settled the lawsuit in 2005.[63] In June, 2004, Avila and Rubin allied with another large San

[62] Less than six months after the law passed, Avila contacted the city manager of Chino, California, and convinced him to fund a racially polarized voting analysis of his small Southern California town in order to fend off a lawsuit. I did the statistical analysis, wrote a short report showing very clearly polarized elections, and presented the analysis to the city council, the city manager, and staff. Nothing whatsoever came of this. Until local jurisdictions faced financial consequences for inaction, they would disregard the law. Chino only converted from at-large to district elections after receiving a demand letter under the CVRA in 2016. *See* David Allen, *Under Threat of Lawsuit, Chino, Upland Also Eyeing Dividing Into Districts for Elections*, Inland Valley Daily Bulletin (Mar. 22, 2016), https://www.dailybulletin.com/2016/03/22/under-threat-of-lawsuit-chino-upland-also-eyeing-dividing-into-districts-for-elections/.

[63] Eiji Yamashita, *Victory Claimed in HJUHSD Lawsuit*, Hanford Sentinel (Mar. 22, 2005), http://www.hanfordsentinel.com/front/victory-claimed-in-hjuhsd-lawsuit/article_c96bd803-697b-5b89-b810-9ec17e505abe.html.

Francisco firm to file suit against the city of Modesto.[64] They lost *Sanchez v. Modesto* in the Stanislaus County Superior Court, but won in the 5th District State Court of Appeal, and both the California and United States Supreme Courts refused review.[65] In February, 2008, citizens of Modesto voted to replace the city's at-large system with one that elected the City Council by districts, and in June, 2008, the city settled the lawsuit.[66]

With the constitutionality of the CVRA seemingly settled and local governments anxious to avoid the legal costs of defending discrimination, jurisdictions finally began to agree to abolish at-large elections, most choosing district structures. By 2016, 43 cities, 141 school boards, 25 community college districts, and at least 6 healthcare or other special districts had begun or completed the process of shifting from at-large districts.[67] Many shifted voluntarily, before any lawyer had even contacted them, but with the knowledge that meritorious

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[64] Michael G. Mooney, *Proposed Suit Seeks District Elections*, Modesto Bee (June 3, 2004).

[65] *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660 (Cal. Ct. App. 2006), *appeal denied*, 2007 Cal. LEXIS 2772, *cert. denied*, 552 U.S. 974 (2007).

[66] Adam Ashton, *Settlement in Latino Voting Case Will Set Modesto Back $3 Million*, Modesto Bee (June 6, 2008), https://www.modbee.com/news/local/article3108787.html.

[67] The statistics are based on a large variety of sources that I have been compiling since 2008.

lawsuits might eventually be filed. As of 2016, only two cities, Palmdale and Highland, both in Southern California, had fought all the way to a full trial. The substantial costs that those cities had to pay when they lost and the lesser costs that other cities whose resistance stopped short of a full trial had to bear encouraged other local jurisdictions facing likely liability to settle.[68] But the costs also aroused cities, through the state League of Cities, to lobby the legislature to reform the law.

The legislature listened. In 2016, the legislature gutted an Assembly-passed bill that would have expanded the CVRA to allow claims that district lines had a discriminatory effect. It substituted a bill negotiated over several months between the League of Cities, the Governor's Office, MALDEF, ACLU, Common Cause and other organizations.[69] The bill instituted a "safe harbor" provision, shielding a local jurisdiction from litigation for 45 days if it received a "demand letter" from an attorney for a potential CVRA plaintiff.[70] If the local government indicated an intention to shift from an at-large system in those 45 days, it would enjoy another

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[68] *See generally* Justin Levitt & Douglas Johnson, *Quiet Revolution in California Local Government Gains Momentum* (2016), http://roseinstitute.org/wp-content/uploads/2016/11/CVRA-White-Paper.pdf.

[69] *See* Dane Hutchings, *California Voting Rights Act Reform Spurs Collaboration*, Western City (Feb. 1, 2017), https://www.westerncity.com/article/california-voting-rights-act-reform-spurs-collaboration; Cal. A.B. 350 (2016), http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB350, codified at Cal. Elec. Code § 10010.

[70] *See* Cal. Elec. Code § 10010(e).

90 days safe from litigation while it followed a standardized procedure.[71] It had to hold at least two public hearings before drawing draft maps, make the maps publicly available for at least 7 days, and then hold at least two additional public hearings before finally adopting the map.[72] In sequencing district elections, it had to give special consideration to the purposes of the CVRA.[73] If the jurisdiction initiated the process without receiving a demand letter, the safe harbor provision lasted only 90 days, but the other steps were the same.[74] The State would reimburse cities for the costs of the public hearings. This bill, AB 350, provided for reimbursement for a plaintiff's attorney who sent a demand letter that resulted in a pre-litigation shift away from at-large elections, but also capped that reimbursement at $30,000.[75] A companion measure, AB 2220, provided that all

[71] *See id.*

[72] *See id.* § 10010(a).

[73] *See id.* § 10010(b). After the settlement of a CVRA case in Anaheim, the election in the most heavily-Latino district was put off for three years, creating what an Aug. 26, 2016 bill analysis termed "outrage" among Latinos in the city. Bill Analysis for Assemb. Comm. on Elections & Redistricting, A.B. 350, at 3, Aug. 26, 2016, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB350. This section of the bill was a response to this event.

[74] *See* Cal. Elec. Code § 10010(e).

[75] *Id.* § 10010(f).

cities, regardless of population size, could switch from at-large elections by council ordinance, without scheduling a vote by all citizens.[76]

This was a significant compromise that simplified, standardized, and bureaucratized the process yet again and greatly reduced potential legal expenses. At the same time, AB 350 guaranteed more public involvement, involvement that, since it necessarily involved discussion and compromise, furthered the CVRA's overall aim of reducing racial polarization.

VI. Conclusion: A Law Carefully Limited to Reducing Racial Polarization

This detailed view of the origins, development, and provisions of the CVRA makes clear that its overall purposes were to reduce racial polarization and its dilutive electoral consequences in the nation's most multi-ethnic state. Its evidentiary focus on estimating the degree of racially polarized voting cohered exactly with those purposes. Through a painstaking process that eventually brought about a consensus between local governmental representatives and civil rights groups, it aligned state with federal law and reduced the complexity and

[76] SB 493 of 2015 had permitted cities of less than 100,000 population to switch from at-large to districts without a vote of the electorate. AB 2220 just took removed the population cap. Cal. A.B. 2220 (2016), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB2220, codified at Cal. Gov't Code § 34886.

potential cost of litigation. And it has resulted in the largest changes in California local government since the Progressive Era, changes that are increasingly bringing members of all ethnic groups together in the most basic of governmental settings. The judgment of the district court should be affirmed.

DATED: August 22, 2019

Respectfully submitted,

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