

No. 19-55275

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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DON HIGGINSON,  
*Plaintiff-Appellant,*

V.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF  
CALIFORNIA, and CITY OF POWAY,  
*Defendants-Appellees,*

and

CALIFORNIA LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.,  
*Intervenors-Defendants-Appellees.*

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**On Appeal from the United States District Court  
for the Southern District of California**

Case No. 3:17-CV-2032

Honorable William Q. Hayes, District Judge

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**Amicus Brief Of The UCLA Voting Rights Project  
In Support Of Appellees**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), undersigned counsel for amici make the following disclosures:

The University of California Los Angeles (“UCLA”) Voting Rights Project is an education, research and advocacy project of The University of California, Los Angeles, a not for profit educational institution chartered by the State of California. Neither The University of California, Los Angeles or the UCLA Voting Rights Project have any parent corporation or issue stock and consequently there exists no publicly held corporation which owns 10 percent or more of its stock.

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## INTEREST OF AMICUS

Amicus Curiae UCLA Voting Rights Project is a project of the Latino Politics & Policy Initiative, Luskin School of Public Affairs, University of California, Los Angeles. UCLA Voting Rights Project works to advance justice through research, advocacy, and education. The UCLA Voting Rights Project does not, in this brief or otherwise, represent the official views of University of California, Los Angeles.

The UCLA Voting Rights Project is made up of students, faculty and staff drawn from throughout the university who apply their research methods, expertise and legal abilities to address important issues affecting the right to vote. Participants in the project are principally drawn from the Schools of Public Affairs, Law and Division of Social Sciences but also other parts of the university, as the issues require.<sup>1</sup>

The UCLA Voting Rights Project has a special interest in establishing and preserving the undiluted right to vote for all eligible persons. Drawing from its experience and expertise, UCLA Voting Rights Project has a strong interest in ensuring that courts receive important legal and academic information pertaining to a dispute prior to deciding critical matters that will define the event horizon of our democracy. Supreme Court Rule 37.1 states that an amicus brief that calls the Court's attention to "relevant matter not already brought to its attention by the parties may

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<sup>1</sup> Principal participants in preparation of this brief along with the undersigned are: Matt Barreto, PhD, Professor of Political Science and Chicana/o Studies, Sonni Waknin, UCLA School of Law, Michael Rios, UCLA Luskin School of Public Affairs, Andrew Castillo and Vivian Alejandre, UCLA Division of Social Sciences.

be of considerable help to the Court ...” and it is for this purpose that the UCLA Voting Rights Project submits this brief.<sup>2</sup>

### **SUMMARY OF ARGUMENT**

Apparently unable to persuade the Legislature to rescind the CVRA, Higginson asks the Courts to do so by parading what amount to be essentially policy arguments dressed as constitutional claims. *See e.g.*, Higginson Br. at 9-14. The CVRA, passed in 2001 and affirmed by the California Supreme Court in 2006, creates standards to evaluate how at-large electoral systems impact political representation of minority groups within a given jurisdiction. To be clear, the CVRA does not single out any particular racial or ethnic group. Historically, Latinos, African-Americans and Asian Americans have had comparatively lower rates of representation in local politics, and have been able to use the CVRA to create remedies, that allow them to have a meaningful chance to elect candidates of choice. In some places those conditions have changed and white citizens are now in the minority and therefore are in danger of being harmed by at-large voting.

However, the CVRA does not establish a racial quota system, and does not call for racial classification in the analysis or evaluation of at-large electoral systems. Where

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<sup>2</sup> No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus made a monetary contribution to its preparation or submission. This brief is filed with the consent of all parties.

racially polarized voting in at-large elections harms white voters, the CVRA provides them the same remedy as any other group. Indeed, the CVRA benefits any and all racial or ethnic groups in California to ensure that their votes are not being diluted or diminished through at-large electoral systems.

The state's decision to permit at-large voting systems but only in circumstances where there is no evidence of racially polarized voting is well within its sovereign rights to form the policy making bodies of its political subdivisions. The fact that the prohibition of at-large systems is only triggered by a racially polarized voting analysis does not create a racial preference system that benefits or harms any racial or ethnic group. Finally, Map 133, the map Poway adopted to head-off a threatened lawsuit, does not sort voters based on their race but instead cracks the area of the city with the highest numbers of minority voters. The CVRA did not force Poway to engage in racial preference. The CVRA properly worked to exercise the state's sovereign judgment that at-large voting systems should be allowed but only in circumstances where they are not likely to dilute the vote of whatever group is the racial or ethnic minority in that political subdivision. The CVRA does not violate the federal constitution.

## **ARGUMENT**

### **I. ORDINARILY STATES DECIDE THE POLITICAL FORM OF THEIR SUBDIVISIONS.**

"In our federal system the states are sovereign but cities and counties are not; in California as elsewhere they are mere creatures of the state and exist only at the



state's sufferance.” *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 914, 13 Cal.Rptr.2d 245, 838 P.2d 1198. It follows from the fundamental nature of this relationship between a state and its political subdivisions that “states have extraordinarily wide latitude ... in creating various types of political subdivisions and conferring authority upon them.” *Id.* at 915–916 (internal citations omitted).

In adopting the CVRA, the Legislature weighed the political, legal and societal issues and, after careful deliberation, determined that its local subdivisions ought to have some freedom to select between at-large and single member districts except in the locales where racially polarized voting exists. This is a policy decision that does not offend the U.S. Constitution and should not be disturbed by federal courts. If the state had decided to require all of its political subdivisions to utilize single-member districts and had banned at-large voting completely, no one could successfully argue that the state’s decision violates the federal constitution.

California could have banned at-large voting all together as other jurisdictions have done. *See* N.M. Stat. Ann. §3-12-1.1 (“... members of governing bodies, excluding mayors, of municipalities having a population in excess of ten thousand shall reside in and be elected from single-member districts.”); N. Y. Const. art. III, § 5 (“[t]he members of the assembly shall be chosen by single districts. . .”); Wis. Const. Art. IV, § 4 (“[t]he members of the assembly shall be chosen biennially, by single districts. . .”).

California’s Legislature is not alone in worrying about the harms of at-large voting. Indeed it is the judgment of the U.S. Supreme Court that where voting occurs

along racial lines, at-large systems "allow[] those elected to ignore [minority] interests without fear of political consequences" *Thornburg v. Gingles*, 478 U.S. 30, 48 n. 14 (1986) (internal quotation marks omitted) (quoting *Rogers v. Lodge*, 458 U.S. 613, 623 (1982)). In fact, in the opinion of the Supreme Court, at-large voting schemes are problematic and "may operate to minimize or cancel out the voting strength" of racial minorities. *Id.* at 47.

Instead of throwing out the practice in all circumstances, the California Legislature designed a system that acknowledged the opinions like those expressed by Poway officials (Higginson Br. at 15-18) and permitted the use of at-large voting but only in locations where the harms of at-large voting were not likely to manifest. The Legislature concluded that the potential benefits of at-large systems are outweighed by the harms of vote dilution, a respectable judgment. Therefore, instead of banning the practice out right, California limited at-large voting in its political subdivisions to circumstances where dilution of the votes of minority citizens is unlikely to occur — these are the areas with the absence of racially polarized voting.

## **II. POLARIZED VOTING ANALYSIS IS NOT RACIAL CLASSIFICATION.**

Higginson's lawsuit rests on the incorrect premise that California's decision to trigger the requirement of single member districts when there is the presence of racial polarization in voting, is a racial classification. *See* Higginson Br. at 1 ("The California Voting Rights Act ("CVRA") makes racial considerations not just the dominant factor

but the only factor in determining whether municipalities may use at-large electoral systems rather than district-based systems.”) To support this claim, he regularly points to polarized voting analysis as a racial classification scheme but this argument misunderstands completely the social science behind racially polarized voting analysis.

Polarized voting analysis using ecological inference is a well-established statistical methodology that allows social scientists to examine aggregate units and sort out patterns within the data.<sup>3</sup> It is used in the fields of biology, ecology, zoology, anthropology, sociology, and political science. For political science purposes, when social scientists lack perfect information on how individuals behave, they can attempt to infer that behavior by examining patterns in larger aggregate units. Within the field of political science, ecological<sup>4</sup> inference is often used to study voting patterns among different racial or ethnic groups, in the United States or across any number of different countries. To do this, the political scientist takes precinct-by-precinct election results and correlate how precinct votes were cast and the racial or ethnic demographics of the voters within a given precinct.<sup>5</sup> The Supreme Court has accepted these types of analysis of voting patterns using ecological inference as a proper tool to adjudicate vote dilution claims. *See e.g., Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

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<sup>3</sup> Loren Collingwood, Kassra Oskooii, Sergio Garcia-Rios, & Matt Barreto, *eiCompare: Comparing Ecological Inference Estimates across EI and EI: Rx C*, 8 *The R J.* 92 (2016).

<sup>4</sup> The term ecological in this context means aggregate units such as voting precincts

<sup>5</sup> Bernard Grofman, *Multivariate Methods and the Analysis of Racially Polarized Voting: Pitfalls in the Use of Social Science by the Courts*, 72 *Soc. Sci. Q.* 826, 826–33 (1991).

An analysis of voting patterns, using ecological inference methodology can be used to detect polarized voting. Often called *racially polarized voting*, this analysis is simply a statistical measurement of how different precincts across a jurisdiction voted.<sup>6</sup>

The use of polarized voting analysis is itself not a method of racial classification, nor does it dictate an outcome of a racial quota system for political representation. Polarized voting analysis is merely a social science methodology that allows practitioners to assess whether or not elections for city council (or another office) can be characterized by opposing voting coalitions – hence polarized.<sup>7</sup> Using demographic data about the race or ethnicity of the voters within a precinct, the social scientist can use the ecological inference method to determine whether or not a certain candidate for political office was preferred by the racial group that is a numeric minority in the city. Beyond this, ecological inference analysis can reveal whether or not the same candidate was preferred or blocked by voters who make of the numeric majority in the city. These methods work well regardless of what racial or ethnic group makes up the majority or minority.

Social scientists worked for decades to develop the tools to employ voting analyses by relying on a combination of precinct voting data and voter demographic

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<sup>6</sup> M.V. Hood, Peter A. Morrison, & Thomas M. Bryan, *From Legal Theory to Practical Application: A How-To for Performing Vote Dilution Analyses*, 99 Soc. Sci. Q. 536, 536-552 (2018).

<sup>7</sup> Gary King, *A SOLUTION TO THE ECOLOGICAL INFERENCE PROBLEM: RECONSTRUCTING INDIVIDUAL BEHAVIOR FROM AGGREGATE DATA* (1997).

data<sup>8</sup>, often derived from Census, surname matching, or Bayesian improved surname geocoding (BISG) data<sup>9</sup> to assess whether a jurisdiction contains polarized voting. At the most basic level, an analysis of ecological voting data aids the courts in answering the following important question: Do majority voters exhibit different voting patterns than minority voters, or not?

The early efforts, using more simple methods,<sup>10</sup> supported what political scientists studying Southern politics had already found.<sup>11</sup> The early challenges surrounding ecological inference are well-documented in the social science literature. Robinson<sup>12</sup> pointed out that relying on aggregate data to infer the behavior of individuals can result in the ecological fallacy. Since then, scholars have applied different methods to discern more accurately microlevel relationships from aggregate data. Goodman<sup>13</sup> introduced ecological regression, where individual patterns can be drawn from ecological data under certain conditions. However, Goodman's statistical approach assumed that group patterns are consistent across each ecological unit and in

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<sup>8</sup> Bernard Grofman, *The Use of Ecological Regression to Estimate Racial Bloc Voting*, 27 *UsFL Rev.* 593 (1992).

<sup>9</sup> Kosuke Imai & Kabir Khanna, *Improving Ecological Inference by Predicting Individual Ethnicity from Voter Registration Records*, 24 *Political Analysis* 263, 263-72 (2016).

<sup>10</sup> Leo A. Goodman, *Ecological Regressions and Behavior of Individuals*, 18 *American Sociological Review* 663-664 (1953).

<sup>11</sup> Alfred A. Knopf, *New York* in *SOUTHERN POLITICS IN STATE AND NATION* (V.O. Key, Jr. 1949).

<sup>12</sup> William S. Robinson, *Ecological Correlations and the Behavior of Individuals*, 15 *Am. Soc. Rev.* 351, 351-57 (1950).

<sup>13</sup> Leo A. Goodman, *Some Alternatives to Ecological Correlation*, 64 *Am. J. of Soc.* 64 610, 610-25 (1959).

reality that may not be the case.

Over the decades, racial demographics and social science tools have evolved considerably. King<sup>14</sup> and Grofman<sup>15</sup>, for instance, advocated for a more precise measurement of racial voting patterns beyond homogeneous precinct analysis, simple correlation techniques, and Goodman's regression. Eventually, systematic analysis revealed that early methods could produce less reliable results (see, e.g., King 1997). Ecological Inference (EI) is Professor Gary King's solution to the ecological fallacy problem inherent in aggregate data. Since the late 1990s, EI has been the benchmark method that courts rely upon to evaluate polarized voting patterns in voting rights lawsuits. As it stands, social scientists—and the courts—most often rely on two specific statistical approaches to ecological data. The first, iterative ecological inference (EI), developed by King in 1997. The second and computationally intensive approach, EI row by column (RxC), developed by Rosen and colleagues<sup>16</sup>, was developed for instances when there are multiple racial or ethnic groups, or multiple candidates contesting office.

For social scientists and legal scholars interested in analyzing polarized voting behavior when only ecological data are present, both approaches can be relied upon as

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<sup>14</sup> Gary King, A SOLUTION TO THE ECOLOGICAL INFERENCE PROBLEM (1997).

<sup>15</sup> Bernard Grofman, *New Methods for Valid Ecological Inference*, in *Spatial and Contextual Models in Political Research* 127-149 (E. Monroe ed., 1995).

<sup>16</sup> Ori Rosen, Wenxin Jiang, Gary King, & Martin A. Tanner, *Bayesian and Frequentist Inference for Ecological Inference: The R x C Case*, 55 *Statistica Neerlandica* 134-56 (2001).

they lead to substantively similar conclusions about the presence or absence of polarized voting.<sup>17</sup> Additional systematic analysis with simulated data sets provides additional evidence that both statistical methods are accurate and reliable.

These peer reviewed, well established tools, will, for every single election examined, produce a unique and individualized result. In some instances, the results may show racially polarized voting patterns between two or more different racial groups. In some instances, the results will not show any evidence of racially polarized voting. The result is entirely dependent on how different precincts and parts of town cast their ballots and the nature of the analysis provides no benefit or harm to any particular racial group. Thus, when courts (and in this case the Legislature) have prescribed a polarized voting analysis, it is merely an endorsement of the proper methodology to use, it is not calling for the racial classification of voters.<sup>18</sup>

### **III. THE RACIAL POLARIZATION TRIGGER FOR SINGLE-MEMBER DISTRICTS NEITHER BENEFITS OR HARMS A PARTICULAR ETHNIC OR RACIAL GROUP.**

States are permitted to pursue race conscious practices assuming that those practices do not confer benefits or disadvantages to any particular race, nor do they use race as the sole factor in decision-making. *See Miller v. Johnson*, 515 U.S. 900, 947 (1995)

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<sup>17</sup> Matt Barreto, Loren Collingwood, Sergio Garcia-Rios and Kassra Oskooii. *Estimating Candidate Support: Comparing Iterative EI and EI-RxC Methods*, 48 Sociological Methods and Research. (2019).

<sup>18</sup> The record shows no evidence alleging that Poway performed any statistical racially polarized voting analysis prior to adopting Map 133.

“Race-conscious practices a State may elect to pursue, of course, are not as limited as those it may be required to pursue. *See Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) (‘[F]ederal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. But that does not mean that the State’s powers are similarly limited. Quite the opposite is true....’). Anyway, the “mere awareness of race” in policy making “does not doom that endeavor at the outset.” *Texas Dep’t of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

Setting this aside, even were the state’s powers extremely limited on race conscious practices, the CVRA falls well within even those claimed restrictions because the racially polarized voting trigger provides no benefit for any particular racial or ethnic group. Current demographic conditions in California and the operative provisions of the CVRA help exhibit this.

In California, no single racial or ethnic group constitutes a majority. Of the nearly 40 million residents of the state, about 40% are Hispanic or Latino, 37% White, non-Hispanic, and then smaller shares are Asian American (15%) and African American (7%) and Native American (2%).<sup>19</sup> However, the diversity of the population is not spread out equally. In some corners of the state, different racial groups constitute a minority of the population, and often their socioeconomic and political disadvantage,

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<sup>19</sup> Population data herein is selected from the U.S. Census Bureau decennial census 2000, 2010 as well as the American Community Survey 2018.



as well as at-large voting systems have created obstacles to obtaining even a single seat on city councils or school boards.

A violation of the CVRA is established if a plaintiff can show that polarized voting patterns occur in the election for members of the governing body at issue. Cal. Elec. Code. §14028. Polarized voting is determined by examining the results of past elections in which at least one candidate of the protected class ran and assessing whether the protected class voted cohesively to try and elect their preferred candidate, but the rest of the population came together to bloc-vote against the protected class preferred candidate. Cal. Elec. Code §14028(b). Proof of intent to discriminate against a protected class is not a requirement to show a CVRA violation, only that the protected class has a cohesive preferred candidate they want to see elected, but the at-large system creates obstacles to their ability to meaningfully influence election outcomes. *Id.*

If a violation of the CVRA is found, a court will impose appropriate remedies, including ordering a jurisdiction to switch from at-large to district-based elections. Cal. Elec. Code §14029. And, under the CVRA, all persons have standing to sue for race-based vote dilution because all persons are members of a race. *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 685 (51 Cal.Ct. App. 2006). The *Sanchez* court wrote:

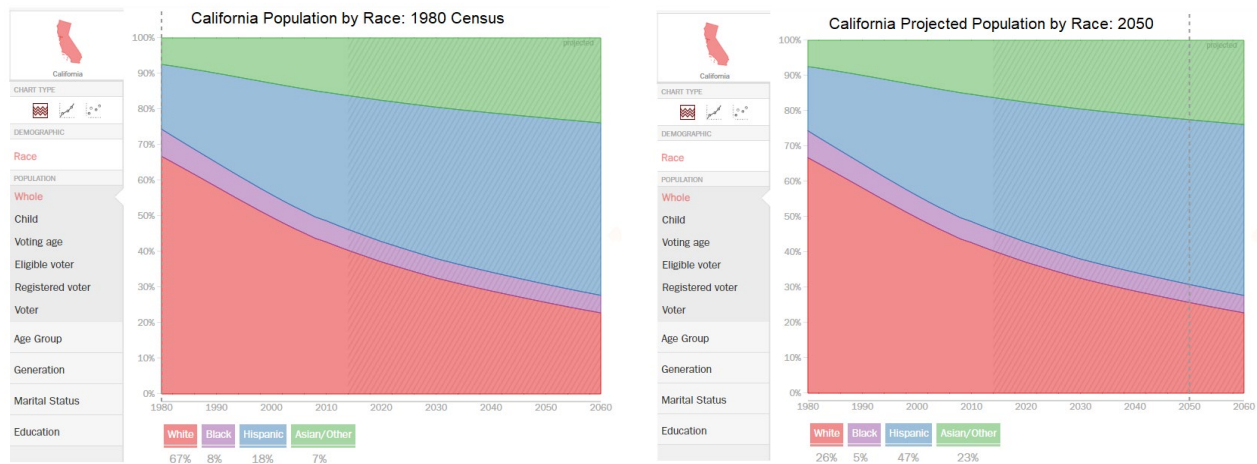
“[t]he CVRA is race neutral. It does not favor any race over others or allocate burdens or benefits to any groups on the basis of race. It simply gives a cause of action to members of *any* racial or ethnic group that can establish that its members' votes are diluted through the combination of racially polarized voting and an at-large election system . . .”

*Id.* at 666 (Cal. Ct. App. 2006). Thus, the CVRA provides a triggering mechanism to

prohibit the use of at-large election schemes when doing so is likely to allow the majority population to overcome the votes of *any* racial group that is in the minority of a jurisdiction's population and that is voting cohesively.

In California, non-Hispanic, Whites have historically had high levels of political representation on city councils and school boards. However, population shifts over the past two decades have seen the white population decline from 47% in 2000 to 40% in 2010 to 37% in 2018. Demographic projections suggest the non-Hispanic, White population will continue to decline as a percentage of the overall state, down to 26% by 2050, more than a 40-point drop from 1980 when California was 67% White (see Figure 1)<sup>20</sup>.

**Figure 1: Statewide Population by Race**



<sup>20</sup> Rob Griffin, William H. Frey and Ruy Teixeira, States of Change: The Demographic Evolution of the American Electorate 1980-2060, CENTER FOR AM. PROGRESS (February 24, 2015, 6:00 AM), <https://www.americanprogress.org/issues/democracy/news/2015/02/24/107166/in-teractive-the-demographic-evolution-of-the-american-electorate-1980-2060/>.

Thus, in many geographies across the state now and likely to grow in the future, Whites might constitute a racial minority group who may seek to use the CVRA to challenge at-large electoral systems. For example, in Southern California, Los Angeles County the city of Azusa is now 28% white among the citizen voting-age population (CVAP), however there are currently zero white candidates elected to the at-large city council. Further south in Orange County, the city of Westminster is 30% white among CVAP and has no white candidates elected to city council. In Northern California the city of Pittsburg is currently 26% white among CVAP, and like the two cities in Southern California, Pittsburg has no white candidates elected to the at-large city council. There are numerous other jurisdictions where Latinos hold a significant minority of the population yet have not representation. This is true for African-Americans in some locales and Asian American and Pacific Islanders in others.<sup>21</sup>

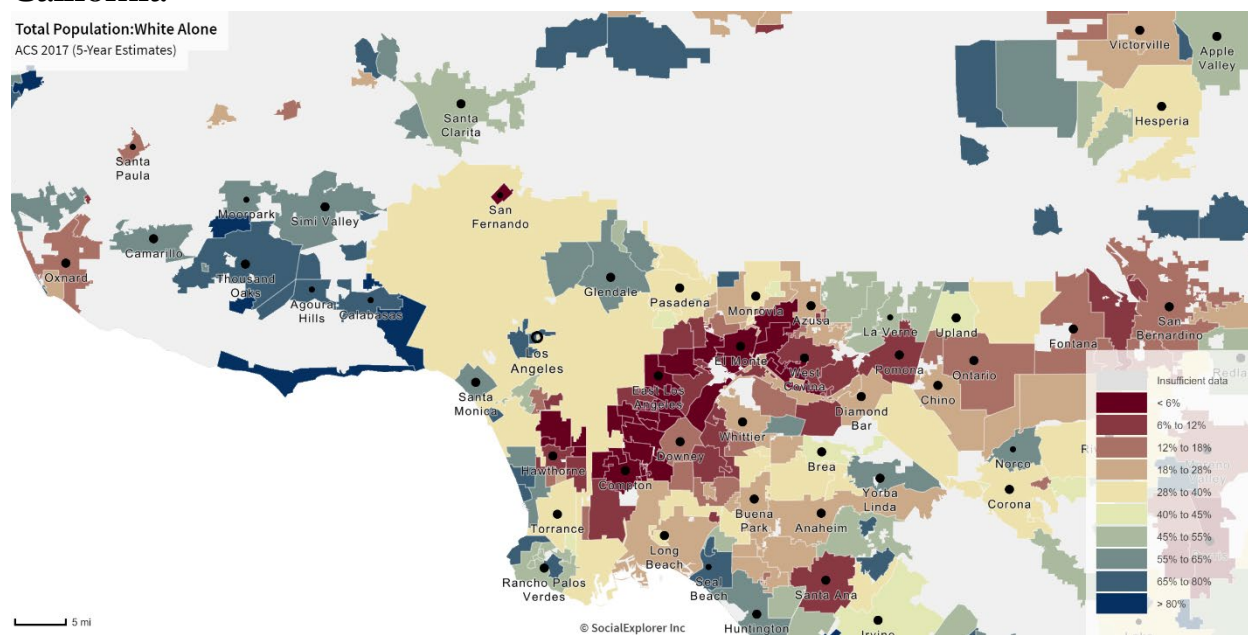
A demographic analysis of different regions in California show that there are multiple cities and local geographies where non-Hispanic, whites represent a minority of population, in particular between 18-40 percent (see peach and light-yellow colored

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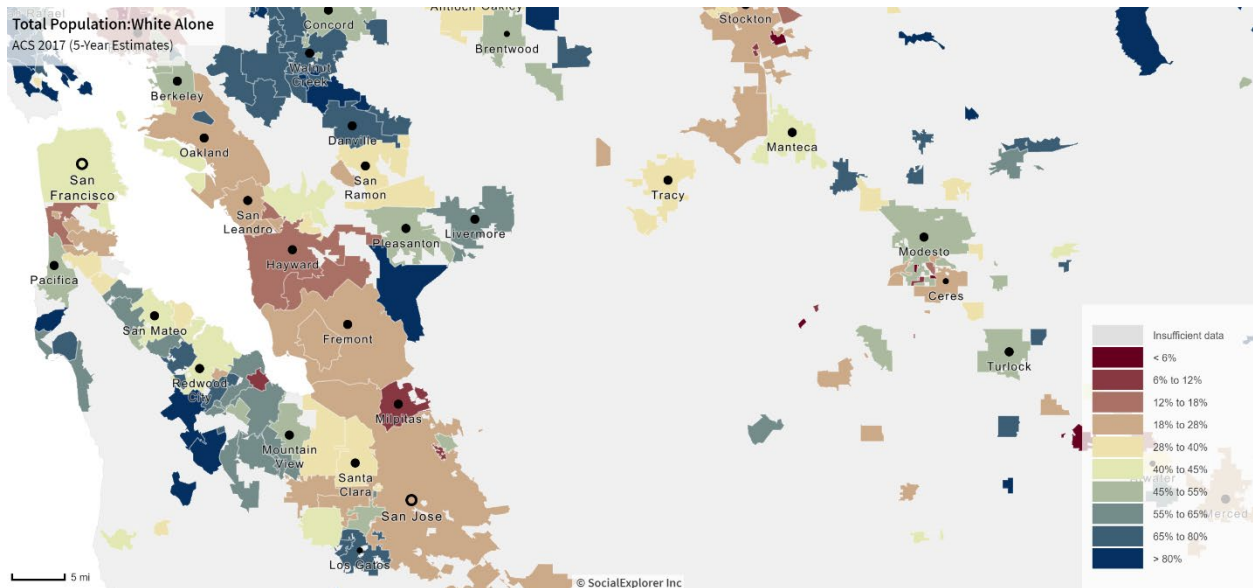
<sup>21</sup> For example the city of Compton faced a CVRA challenge by Latino plaintiffs in 2010 which resulted in the city placing a measure on the ballot in 2012 to move to districts, which was passed by voters, and now the city elects both Latino and African American elected officials, and local experts agree the districting plan implemented will allow both Latino and African American voters to continue electing candidates of choice for their communities for decades to come.

geographies in Figure 1, Figure 2 below). If these same jurisdictions also have at-large electoral systems in place that limit, block or dilute the white vote, then the CVRA could be a factor. As the White population continues to decline as a percentage of all Californians, additional jurisdictions may trigger the single member districts required by the CVRA.

**Figure 2: Percent White, non-Hispanic across different cities in Southern California**



**Figure 3: Percent White, non-Hispanic across different cities in Northern California**



Nevertheless, the lack of descriptive representation alone does not itself prohibit at-large elections in a local political subdivision under the CVRA. Historians, demographers and political scientists would need to analyze voting patterns and the history of discrimination in each jurisdiction to understand why there are currently no white, non-Hispanic elected officials in either city. These issues are built into the racial polarization analysis and that is why it is an excellent tool to trigger single-member districts.

Under the CVRA racially polarized voting trigger, a minority plaintiff would have to prove two critical points. First, analyzing voting patterns in local elections, an analysis would need to demonstrate, for example, that the white voting population is politically cohesive in so far as they tend to vote together for white-preferred candidates. Second, using the same voting data, an analysis would need to demonstrate that non-

whites – the rest of the voting population in the city – is bloc-voting against the white-preferred candidates, resulting in their perennial losses to city council elections. Absent these conditions, the CVRA allows political subdivisions to utilize at-large voting systems. Whether the plaintiff is suing on behalf of Latinos, Whites, African-Americans or Asian Americans/Pacific Islanders, the elements of proof needed under the racially polarized voting analysis are the same.

There is nothing in the CVRA that would limit or prevent white plaintiffs who find themselves in the numeric minority from challenging at-large electoral systems in the hopes of creating a remedy that would give them an opportunity to elect candidates of choice. The same standards of evaluation would apply to whites as they would to any other racial group in California. Higginson’s lawsuit, that the CVRA’s trigger from the racially polarized voting analysis creates a racial preference, completely ignores the diverse factual circumstances that could trigger the Legislature’s prohibition of at-large voting schemes.

#### **IV. THE CVRA DOES NOT REQUIRE RACIAL PREFERNCES IN MAPPING.**

Higginson claims, “Race predominated over any other considerations in the City’s decision to adopt Map 133.” Higginson Br. at 22. The particular lines Poway drew in Map 133 may have been laid out based on race but not because of the CVRA or the state government, but because of the choices made by Poway officials. While Map 133 may have been enacted to avoid the possibility of a lawsuit, it does not

concentrate voters based on their race or ethnicity.

The CVRA, unlike Section 2 of the federal Voting Rights Act, does not speak to vote dilution in the line drawing of single member district maps. Instead, the CVRA merely prohibits at-large voting in California political subdivisions where racially polarized voting exists and provides certain remedies depending upon the local conditions.

Despite this, Higginson argues that the Equal Protection Clause prohibits Map 133 because it, to use his quote, “separate[es] its citizens into different voting districts based on race.” Higginson Br. at 1 *quoting Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (internal citation omitted). Yet nowhere in his brief does Higginson describe how Map 133 actually meets the remedy provisions provided for in the Act. The CVRA “requires a court to implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy a violation of the act.” *See e.g.*, Cal. Elec. Code §14029. These provisions, however, had no effect on Poway’s construction of Map 133 because it chose to impose the map without court intervention.

Map 133 does not concentrate citizens into one or another district based on their race. Drawing district maps that respect the existing neighborhood boundaries, themselves often reflective by segregated housing pattern, is not government imposed racial sorting. But, Map 133 cracks the existing segregated populations in Poway in a way that dilutes the votes of the minority of citizens.

Map 133 creates four independent single-member districts and retains one at-

large election for mayor, which effectively serves as the fifth voting member of the city council. According to the demographic data accompanying Map 133, the city as a whole is 73 percent non-Hispanic, white among the citizen voting-age population, 12 percent Latino among CVAP and 12 percent Asian American and Pacific Islander. *See* Mot. for Prelim. Inj. Docket 11, Ex. 11. When Poway was at-large, its citizens elected 5 white-preferred candidates to their city council. After the implementation of districts, the districts continue to elect 5 white-preferred candidates.

Higginson claims that “race predominated over any other consideration in the City’s decision to adopt Map 133,” (Higginson Br. at 22) and this may be so but not because of the CVRA and not for the benefit of minority voters. Higginson claims that he was sorted into district 2 on the basis of his race, however Map 133 actually created four districts that are very closely align with the city’s overall racial demographics.

Map 133 could have been drawn to create a district where minority preferred candidates can win but by jumping the gun and avoiding the lawsuit, Poway has been able to adopt a map that preserves the majority’s election dominance even with single member districts. As shown in Table 1 below, all four of the districts created under Map 133 are over 65 percent white CVAP. None of these would likely elect a minority candidate of choice in Poway in a recent election.



**Table 1: Demographics of Poway District Map 133**

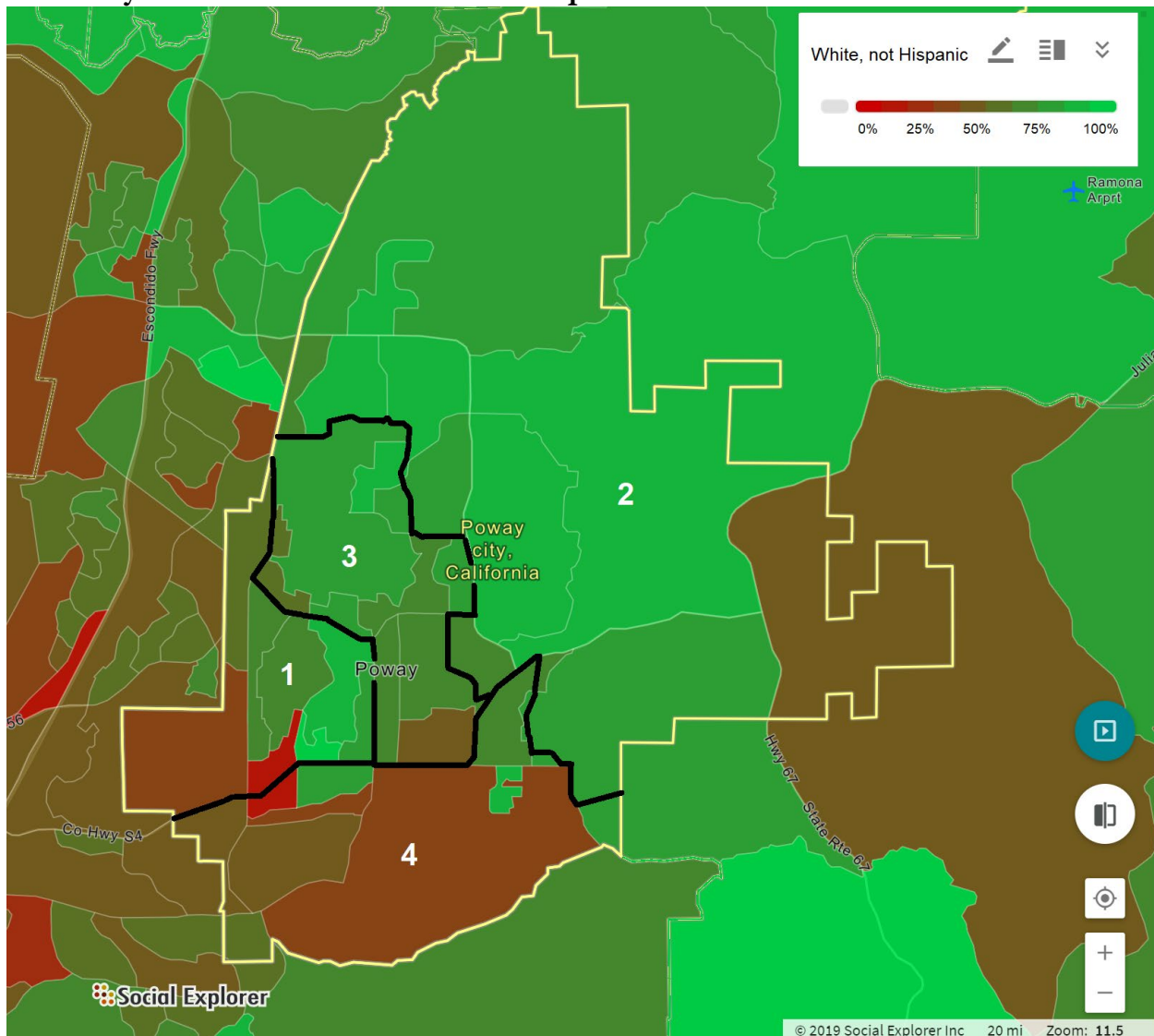
City of Poway - Plan 133						
District		1	2	3	4	Total
	Total Pop	12,100	11,521	12,264	11,926	47,811
	Deviation from ideal	147	-432	311	-27	743
	% Deviation	1.23%	-3.61%	2.60%	-0.23%	6.22%
Total Pop	% Hisp	20%	7%	14%	22%	16%
	% NH White	63%	83%	72%	59%	69%
	% NH Black	2%	1%	2%	2%	2%
	% Asian-American	13%	8%	11%	14%	12%
Voting Age Pop	Total	9,147	8,710	9,280	8,726	35,863
	% Hisp	17%	6%	12%	19%	13%
	% NH White	66%	85%	75%	63%	72%
	% NH Black	2%	1%	2%	2%	2%
	% Asian-American	14%	7%	10%	14%	11%
Citizen Voting Age Pop	Total	8,827	8,139	8,804	8,468	34,238
	% Hisp	15%	6%	12%	16%	12%
	% NH White	68%	85%	73%	65%	73%
	% NH Black	2%	2%	3%	1%	2%
	% Asian/Pac.Isl.	14%	7%	10%	16%	12%

Rather than attempt to create at least one district whereby minority voters have an opportunity to elect a candidate of choice, the map implemented by Poway in 2017 actually does the opposite. There is a sizable non-white minority population in Poway that is concentrated in the Southwest region of the city, both north and south of Poway Rd. In fact, the two most heavily minority census block groups in Poway are adjacent to one another, one just north, and one just south of Poway Rd, as depicted in Figure 3.

Map 133 approved by the city of Poway, absent another explanation, appears to have relied upon a technique called “cracking” to split the minority population, half into district 1, and half into district 4, rather than respecting the community of interest in

Southwest Poway that could have – theoretically – constituted a district in which minority voters may have had the opportunity to elect candidates of choice. Although one could claim that districts 1 & 4 were split this way along Poway Road, a major thoroughfare, this explanation does not survive scrutiny. To start, Poway Road continues throughout the entire city and was not used to divide district 2, rather it is allowed to run directly through district 2. Likewise, Twin Peaks Road in central Poway is allowed to run through the middle of district 3 and Espola Road, also a major thoroughfare, runs directly through district 3. So, the decision to split districts 1 and 4 along Poway Rd, and crack the non-white minority population into two separate districts suggests this map was not designed to concentrate the racial minority population, as Plaintiff suggests.

**Figure 4: Map of Poway, California with percent white by Census block group, with City Council boundaries from Map 133**



Because Poway successfully avoided any threatened CVRA lawsuit by adopting Map 133, it was still able to impose a map that is not likely to benefit the minority population in the short term. Therefore, this case does not present a set of facts where the Plaintiff was forced to resort to invidious racial sorting or concentration, because of the CVRA. Moreover, Higginson is incorrect when he states that Map 133 “was enacted solely to comply with the CVRA.”

The state of California's decision to prohibit at-large voting systems in political subdivisions when there is strong evidence of racially polarized voting is not a racial preference that is prohibited by the Equal Protection Clause. Furthermore, Poway's Map 133 does not prove that the CVRA is unconstitutional.

### **CONCLUSION**

For the foregoing reasons, this Court should affirm the opinion of the district court by leaving undisturbed the California Voting Rights Act.

Respectfully submitted,

Dated: August 22, 2019

### **UCLA VOTING RIGHTS PROJECT**

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## CERTIFICATE OF COMPLIANCE FOR BRIEFS

**9th Cir. Case Number(s) 19-55275**

I am the attorney for the UCLA Voting Rights Project.

**This brief contains 4,978 words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

complies with the word limit of Cir. R. 32-1.

is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

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it is a joint brief submitted by separately represented parties;

a party or parties are filing a single brief in response to multiple briefs; or

a party or parties are filing a single brief in response to a longer joint brief.

complies with the length limit designated by court order dated \_\_\_\_\_.

is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

**Signature** /s/Chad W. Dunn

**Date** August, 22, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 22, 2019.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: August 22, 2019

By           /s/ Chad W. Dunn            
          Chad W. Dunn