



# The California Voting Rights Act

*What To Do When Your Agency Gets a Letter*

Thomas Rice & Doug Johnson

Municipal Law Webinar Series

November 2, 2017



**BEST BEST & KRIEGER**  
ATTORNEYS AT LAW

• [@bbklaw](#)

# Presentation Outline



[www.BBKlaw.com](http://www.BBKlaw.com)

© 2017 BEST BEST & KRIEGER LLP

# Presentation Outline

- The Good, the Bad, and the Ugly
  - Good Intentions?
  - Bad Law?
  - Ugly Case History
- A Glimmer of Hope
  - Recent Legislation
- What to Do When Your Agency Gets a Letter



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

# Good Intentions, Bad Law?

## *An Introduction to the CVRA*



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

# Key Terms

- “At Large”
  - Candidates may reside anywhere in the jurisdiction
  - All voters vote for all offices
- “By District”
  - Jurisdiction divided into districts
  - Candidate must reside in district
  - Only voters in district vote for district office
- “From District”
  - Jurisdiction divided into districts
  - Candidate must reside in district
  - All voters vote for all offices



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

# The Federal Voting Rights Act

- Originally adopted the FVRA in 1965 as an effort to codify and effectuate the 15th Amendment's guarantee that no person shall be denied the right to vote on account of race or color
- Amended in 1982 in order to prohibit the occurrence of "vote dilution," and effectively eliminated any requirement that a plaintiff prove intent to dilute votes
- Gingles v. Thornberg Standards
  - Can the protected class constitute the majority of a district?
  - Does the protected class vote as a bloc?
  - Do voters outside the protected class vote as a bloc to defeat preferred candidates of the protected class?
  - Do the "totality of the circumstances" indicate race is a factor in elections?



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

# Adoption of the California Voting Rights Act

- The California Voting Rights Act (CVRA) became law on January 1, 2003
- Why did California want its own law?
  - Intended to prevent disenfranchisement of protected classes (race, color, language)
  - “. . . this bill would presumably make it easier to successfully challenge at-large districts.” (Bill Analysis with Senate Vote – June 11, 2002)
- Creates private right of action



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

## CVRA Legal Standard #1

*An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class, as defined pursuant to Section 14026.*

Elections Code, § 14027

Note: Dispute over how much 'impairment' is required.



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

## CVRA Legal Standard #2

- Successful plaintiff entitled to attorneys' fees.
  - Note: successful defendant unlikely to get attorneys' fees
- **Has “racially polarized voting” has occurred?**
  - “Racially polarized voting” occurs when there is a difference between the choice of candidates preferred by voters in a protected class and the choice of candidates preferred by voters in the rest of the electorate.



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

## Key Differences from FVRA

- Gingles Standards:
  - ~~Can the protected class constitute the majority of a district?~~
  - Does the protected class vote as a bloc?
  - Do voters outside the protected class vote as a bloc to defeat preferred candidates of the protected class?
  - ~~Do the “totality of the circumstances” indicate race is a factor in elections?~~



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

## A Low Bar?



**BBK**

[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

# The Ugly

## *The Key Cases*



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

## Sanchez v. City of Modesto (2006)

- City was sued by Latino voters living in Modesto alleging a violation of CVRA
- City challenged CVRA as unconstitutional (facial Equal Protection challenges)
- Trial Court – Agreed with City, declared CVRA unconstitutional
- Court of Appeal – CVRA is race neutral and subject to rational basis review. CVRA “readily passes” such review. Sent case back to Trial Court to assess whether there was a violation of the CVRA
- Supreme Court – Declines to review
- Settlement – \$3 million paid in attorneys’ fees to plaintiff, City spent c. \$1.7 million on its own attorneys



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

## Jauregui v. Palmdale (2014)

- City was sued by 3 residents alleging a violation of the CVRA
- Trial Court – Preliminary injunction issued against City certifying the results of its Nov. '13 election. Court orders City to hold another election.
  - City appeals; order stayed – no new election.
- Court of Appeal – City argues that, as a charter city, it is not subject to CVRA. Court holds charter cities subject to CVRA. Certification of Nov. '13 results enjoined.
- Settlement – City gets to certify Nov. '13 results. City agreed to hold district elections for all 4 council members in 2016 (with two members taking two-year terms only).
  - City paid \$4.5 million in attorneys' fees to plaintiff.



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

## Other Interesting Cases and Settlements

- Highland – Rather than transition to by district elections, City opted to take matter to voters. Voters rejected transition. Court ordered transition and chose plaintiff's map.
- Rancho Cucamonga – City has proposed 4 districts with an at-large mayor. After multiple skirmishes, City now fighting 4<sup>th</sup> Amended Complaint! Note: Still subject to jurisdiction because plaintiff argues it has an 'at large' component.
- Other Notable Settlement Amounts:
  - Anaheim - \$1.1 million
  - Whittier - \$1 million
  - Santa Barbara - \$600,000



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

# A Glimmer of Hope

## *Recent Legislation*



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

## AB 493 – Adopted October 2015

- Authorizes the legislative body of a city with a population of fewer than 100,000 people to adopt an ordinance that requires the members of the legislative body to be elected by district or by district with an elective mayor without being required to submit the ordinance to the voters for approval.
- Requires the ordinance to include a specified declaration and would require the population of the city to be determined by the most recent federal decennial census.



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

## SB 2220 – Adopted September 2016

- Deletes the population limitation from AB 493.
- Authorizes the legislative body of a city to adopt an ordinance that requires the members of the legislative body to be elected by district or by district with an elective mayor without being required to submit the ordinance to the voters for approval.



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

## AB 350 – Adopted September 2016

- Sets forth clear process to transition:
  - Plaintiff must send letter and wait 45 days before suit can be filed
  - Public agency may pass Resolution of Intention, indicating its intent to transition to district based elections.
  - If agency adopts Resolution, it has 90 days to adopt an ordinance transitioning:
    - 2 public hearings before maps are drawn;
    - 2 public hearings after maps are drawn; and
    - Ordinance requires two readings
- If agency follows the process for transition, recovery is capped at \$30,000.



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

# What to Do When Your Agency Gets the Letter



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

# General Rules

- RULE #1 – Act Fast
- RULE #2 – Get Your Attorney Involved Day One
- RULE #3 – Hire a Demographer
- RULE #4 – Build Flexibility Into the Schedule
- RULE #5 – Monitor the Politics – Avoid Assumptions
- RULE #6 – Know Your Local Agency's Territory;  
Understand the Maps and the Demographics



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

## Get Into Closed Session A.S.A.P.

- Receipt of a letter alleging a CVRA violation is certainly “significant exposure to litigation” and warrants a closed session
- Brief Legislative Body
- Obtain approval to retain demographer under work product privilege
  - Get a sense of direction
    - Will they want to fight?
    - Do they want you to start the transition process?



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

# The First 45 Days

- Work with demographer
  - Assess likely risk under CVRA
    - Are you one of the special cases?
  - Become familiar with CVRA principles and mapping
- Develop a schedule
  - When do you need to adopt the Resolution of Intention?
    - Triggers 90 day public hearing and adoption period
    - How does adoption impact public hearing schedule?



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

# Demographics – Level I Analysis

- Demographic Summary
  - Look at the demographics in the jurisdiction
    - “Citizen Voting Age Population”
- Election History
  - Look at who has been elected (and, importantly, who hasn’t)
    - Note: This is a proxy – the law focuses on preferred candidates not on candidates of the same protected class. Also, elections with candidates of a protected class candidate tend to be a focus of courts
- Test Maps
  - Get a sense of what might be done



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

## Demographics – Level II Analysis

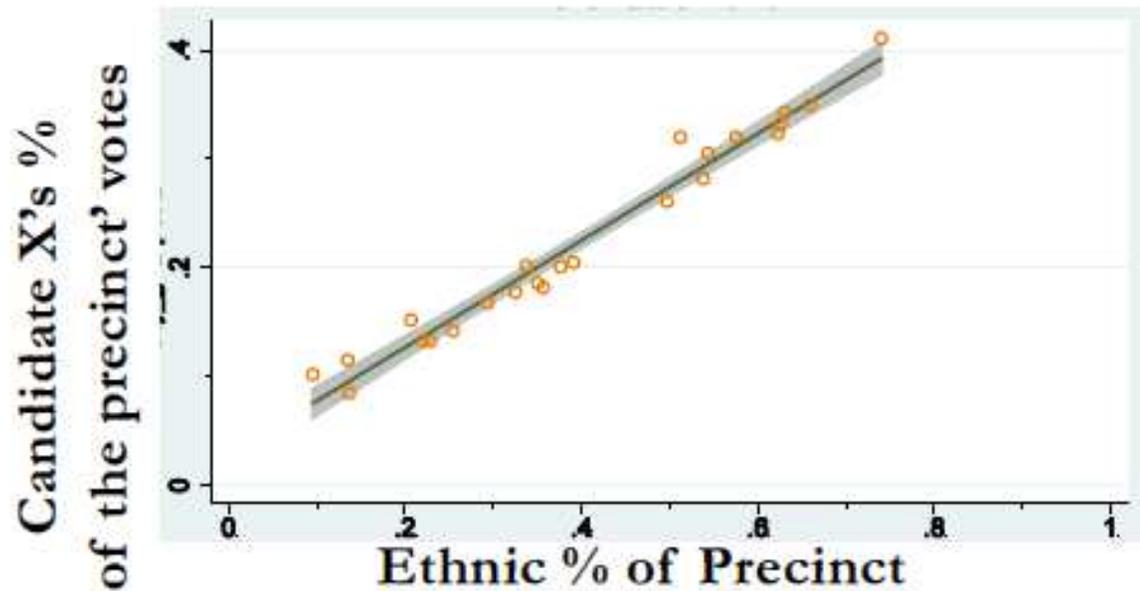
- Focus on Statistics - Regression Analysis
- Process
  - Look at results for recent elections on a precinct by precinct basis.
  - Review how various candidates did in precincts with a low protected class CVAP compared to how they did in precincts with a high protected class CVAP.



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

## Level II Analysis – Example #1



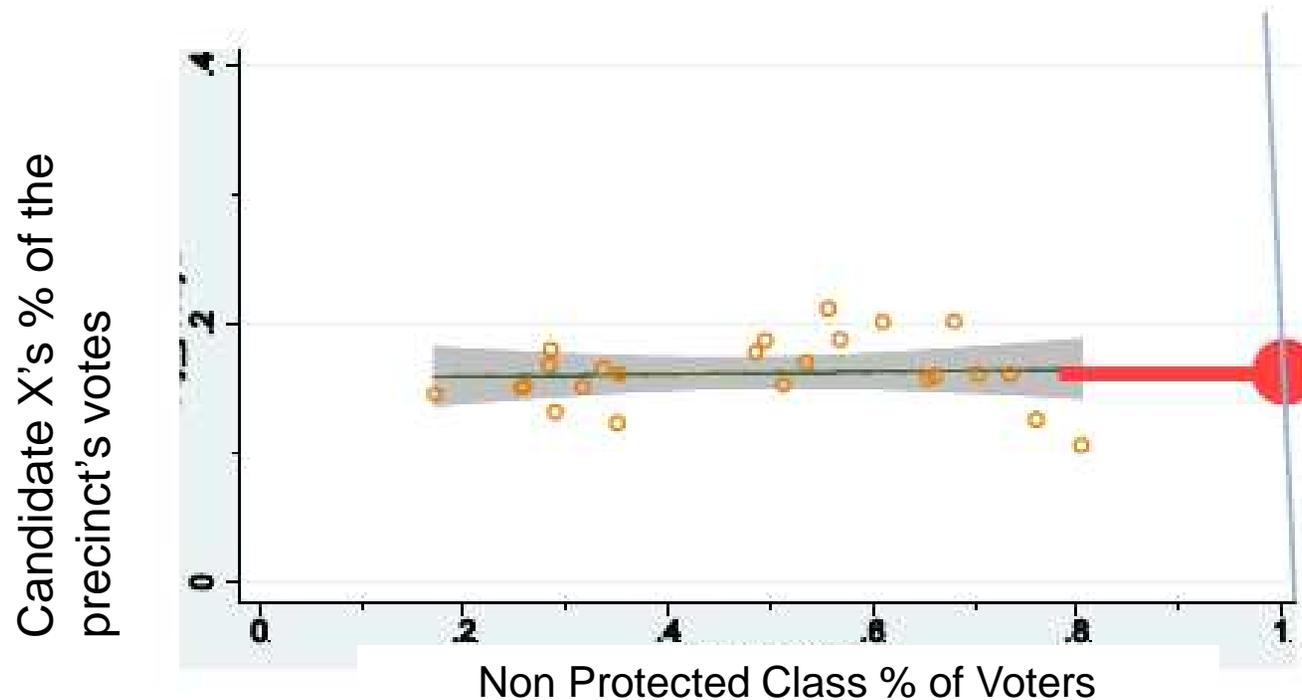
An example of a good fit of the regression line to the dots, with a narrow confidence interval (the grey area) and, as a result, a clear preference.



**BBK**

[www.BBKlaw.com](http://www.BBKlaw.com)  
©2017 BEST BEST & KRIEGER LLP

## Level II Analysis – Example #2



An example of a decent, but not great fit, with no change in the candidate's percentage as the ethnicity of the precinct changes:



[www.BBKlaw.com](http://www.BBKlaw.com)  
© 2017 BEST BEST & KRIEGER LLP

## Demographics – Reviewing the Level II Results

- Are the results “statistically significant” at the 90% level or higher?
- Do the results show that the voters of a “protected class” voted in a bloc for a certain candidate or candidates?
- Do the results show that the other voters voted in a bloc to defeat that/those preferred candidate(s)?
- Do the “R-Squared” values indicate that race/ethnicity were a significant variable in those measures of candidate preference?



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

# Resolution of Intention

- Adopt as close to the 45<sup>th</sup> day as possible to maximize the 90-day window to hold 4 public hearings, draw maps, and adopt ordinance
  - NOTE: The receipt of the letter is not the trigger – do not assume you have 135 days.
- Resolution content
  - State intent to transition
  - Identify steps it will undertake (i.e. hearings, hiring demographer, etc.)
  - Indicate timeline for procedure



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

# Public Hearings - Set 1

- Legal Command
  - Hold 2 public hearings before drawing maps
    - Must be within a period of no more than 30 days of each other
  - Invite public to provide input regarding the composition of the districts
  - Agency may conduct outreach, including to non-English-speaking communities, to explain the districting process and to encourage public participation
- Practical Direction
  - Outline the legal restrictions on district drawing
  - Obtain clear direction from council on the kinds of local features to be considered



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

# Map Drawing

- Legal Command
  - Population Fairness (as nearly equal in population as may be)
  - May give consideration to the following:
    - Topography
    - Geography
    - Cohesiveness, Contiguity, Integrity, and Compactness of territory
    - Community of interests
  - Federal case law also clear that respect for the previous choices of voters by avoiding head-to-head contests not impermissible (i.e. incumbency)
  - Race cannot be the predominant factor
- Practical Direction
  - Request at least 3 maps
  - Public may submit own maps



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

# Public Hearings - Set 2

- Legal Command
  - Hold 2 public hearings after all maps drawn
    - “. . . publish and make available for release at least one draft map” and include scheduling
    - Must be within a period of no more than 45 days of each other
  - Invite public to provide input regarding the content of the draft map or maps and the proposed sequence of elections
  - “The first version of a draft map shall be published at least seven days before consideration at a hearing. If a draft map is revised at or following a hearing, it shall be published and made available to the public for at least seven days before being adopted.”
- Practical Direction
  - Discard maps without support from legislative body early on
  - Focus attention on maps and key features
  - Ensure elected officials understand implications of scheduling



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

# Ordinance Adoption

- Adopt the ordinance like a regular ordinance
  - Introduce at a first reading
  - Adopt at a second reading
    - Note: AB350 requires adoption not effective.
- Some agencies pair up the last public hearing with the introduction of the ordinance
  - This is fine under the statute, but consider what happens if issues arise at the hearing and maps need to change.



[www.BBKlaw.com](http://www.BBKlaw.com)

© 2017 BEST BEST & KRIEGER LLP

# Expense Recovery

- Prospective plaintiff who sent letter has 30 days to submit a written demand for reimbursement for the cost of the work product generated to support the letter
  - Must be substantiated with financial documentation, e.g. detailed invoice for demography services.
  - May request additional documentation if the provided documentation is insufficient to corroborate the claimed costs
- Must reimburse within 45 days of receipt of the written demand
- If more than one prospective plaintiff is entitled to reimbursement, the political subdivision shall reimburse the prospective plaintiffs in the order in which they sent a letter. Cumulative amount of reimbursements to all prospective plaintiffs not to exceed cap



[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

# BONUS

*Interesting Issues Coming  
Down the Pipeline*



**BBK**

[www.BBKlaw.com](http://www.BBKlaw.com)

©2017 BEST BEST & KRIEGER LLP

# Thomas A. Rice & Doug Johnson

Best Best & Krieger LLP

Office: Ontario

Phone: (909) 466-4913

Email: [thomas.rice@bbklaw.com](mailto:thomas.rice@bbklaw.com)

[www.bbklaw.com](http://www.bbklaw.com)

National Demographics Corporation

President

Phone: (909) 624-1442

Email: [djohnson@NDCresearch.com](mailto:djohnson@NDCresearch.com)

[www.ndcresearch.com](http://www.ndcresearch.com)



**BEST BEST & KRIEGER**  
ATTORNEYS AT LAW