Date of Hearing: April 29, 2015

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING
Sebastian Ridley-Thomas, Chair
AB 182 (Alejo, Bonta, and Roger Hernández) – As Amended April 9, 2015

SUBJECT: California Voting Rights Act of 2001.

SUMMARY: Expands the California Voting Rights Act of 2001 (CVRA) to allow challenges to district-based elections to be brought under the CVRA, as specified. Specifically, **this bill**:

1) Prohibits, pursuant to the CVRA, district-based elections from being imposed or applied in a manner that impairs the ability of a protected class of voters to elect candidates of its choice as the result of the dilution or abridgement of the rights of voters who are members of a protected class.

2) Provides that the fact that a district-based election was imposed on a political subdivision as a result of an action filed pursuant to the CVRA shall not be a defense to an action alleging that the district-based elections violate the provisions of this bill. Provides that a court-ordered district-based election system that is adopted on or after January 1, 2016, as a result of an action filed pursuant to the CVRA, shall be subject to a rebuttable presumption that the system does not violate this bill. Provides that this presumption applies only to the exact district-based election system that was approved by the court.

3) Requires a court, upon finding that a political subdivision's district-based elections violate this bill, to implement an effective district-based elections system that provides the protected class the opportunity to elect candidates of its choice from single-member districts. Permits the court, if it is not possible to create a district plan in which the protected class has the opportunity to elect candidates of its choice without increasing the size of the governing body, or if the additional districts alone will not provide an appropriate remedy, to order additional remedies, including, any of the following:

    a) Incrementally increasing the size of the governing body, if approved by the voters in the jurisdiction;

    b) Approving a single-member district-based election system that provides the protected class the opportunity to join in a coalition of two protected classes to elect candidates of their choice if there is a demonstrated political cohesion among the protected classes;

    c) Requiring elections for members of the governing body of the political subdivision to be held on the same day as a statewide election; or,

    d) Issuing an injunction to delay an election.

4) States that the purpose of the Legislature in enacting this bill is to address ongoing vote dilution and discrimination in voting as matters of statewide concern, in order to enforce the fundamental rights guaranteed to California voters under specified provisions of the

California Constitution. Requires the provisions of this bill to be construed liberally in furtherance of this legislative intent to eliminate minority vote dilution. Declares the intent of the Legislature that any remedy implemented under this bill shall comply with the 14th Amendment to the United States Constitution.

5) Contains a severability clause.

EXISTING LAW:

1) Prohibits, pursuant to the CVRA, an at-large method of election from being imposed or applied in a political subdivision in a manner that impairs the ability of a protected class of voters to elect a candidate of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgement of the rights of voters who are members of a protected class.

2) Defines "protected class," for the purposes of the CVRA, to mean a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act (52 U.S.C. Sec. 10301 et seq.) (VRA).

3) Provides that a violation of the CVRA may be established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision. Provides that elections conducted prior to the filing of an action are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action.

4) Provides that the occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class. Provides that one circumstance that may be considered when determining whether a violation of the CVRA exists 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.

5) Provides that the fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, but may be a factor in determining an appropriate remedy.

6) Provides that proof of intent on the part of voters or elected officials to discriminate against a protected class is not required to find a violation of the CVRA.

7) Provides that other factors such as the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of the election system, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education,

employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns are probative, but not necessary factors to establish a violation of the CVRA.

8) Requires a court, upon finding that an at-large method of election violates the CVRA, to implement appropriate remedies, including the imposition of district-based elections, which are tailored to remedy the violation.

9) Permits any voter who is a member of a protected class and who resides in a political subdivision where a violation of the CVRA is alleged to file an action in the superior court of the county in which the political subdivision is located.

10) Permits a prevailing plaintiff party in an action brought pursuant to the CVRA to recover reasonable attorney's fees and litigation expenses, including, but not limited to, expert witness fees and expenses as part of the costs. Prohibits a prevailing defendant party from recovering any costs unless the court finds the action to be frivolous, unreasonable, or without foundation.

FISCAL EFFECT: None. This bill is keyed non-fiscal by the Legislative Counsel.

COMMENTS:

1) **Purpose of the Bill**: According to the author:

> AB 182 will expand the California Voting Rights Act of 2001 to better protect minority communities across the state. Voter disenfranchisement still persists today. This measure is a means for us to protect voters from being excluded and ensure that we have a working democracy in California for years to come.
>
> This bill will allow challenges to district-based elections that are being imposed or applied in a manner that impairs the ability of a protected class of voters to elect candidates of their choice. In this context, the court may issue a range of remedies all provided within the framework of a districted system. AB 182 provides a non-exhausted list of remedies intended to provide guidance for courts and local governing bodies considering possible remedial action.

2) **California Voting Rights Act of 2001**: SB 976 (Polanco), Chapter 129, Statutes of 2002, enacted the CVRA to address racial block voting in at-large elections for local office in California. In areas where racial block voting occurs, an at-large method of election can dilute the voting rights of minority communities if the majority typically votes to support candidates that differ from the candidates who are preferred by minority communities. In such situations, breaking a jurisdiction up into districts can result in districts in which a minority community can elect the candidate of its choice or otherwise have the ability to influence the outcome of an election. Accordingly, the CVRA prohibits an at-large method of election from being imposed or applied in a political subdivision in a manner that impairs the ability of a protected class of voters to elect the candidate of its choice or to influence the outcome of an election, as a result of the dilution or the abridgement of the rights of voters

who are members of the protected class.

At the time the CVRA was enacted, challenges to at-large elections systems that diluted the voting strength of protected classes of voters generally were brought under Section 2 of the VRA. In *Thornburg v. Gingles* (1986) 478 U.S. 30, the U.S. Supreme Court announced three preconditions that a plaintiff first must establish to prove that an election system diluted the voting strength of a protected minority group, in violation of Section 2 of the VRA:

a) The minority community was sufficiently concentrated geographically that it was possible to create a district in which the minority could elect its own candidate;

b) The minority community was politically cohesive, in that minority voters usually supported minority candidates; and,

c) There was racially polarized voting among the majority community, which usually (but not necessarily always), voted for majority candidates rather than for minority candidates.

While plaintiffs must establish the three preconditions outlined in *Gingles* in order to prevail in a challenge brought under Section 2 of VRA, the CVRA was designed so that plaintiffs would not need to establish that a minority community was geographically concentrated in order to prevail. Instead, the CVRA provides that the fact that members of a protected class are not geographically compact or concentrated "may be a factor in determining an appropriate remedy," but "may not preclude a finding of racially polarized voting."

The first case brought under the CVRA was filed in 2004, and the jurisdiction that was the target of that case—the City of Modesto—challenged the constitutionality of the law. Ultimately, the City of Modesto appealed that case all the way to the U.S. Supreme Court, which rejected the city's appeal in October 2007. The legal uncertainty surrounding the CVRA may have limited the impacts of that law in the first five years after its passage.

Since the case in Modesto was resolved, however, many local jurisdictions have converted or are in the process of converting from an at-large method of election to district-based elections due to the CVRA. In all, more than 140 local government bodies have transitioned from at-large to district-based elections since the enactment of the CVRA. While some jurisdictions did so in response to litigation or threats of litigation, other jurisdictions proactively changed election methods because they believed they could be susceptible to a legal challenge under the CVRA, and they wished to avoid the potential expense of litigation.

This bill expands the CVRA to permit challenges to be brought to district-based election systems that impair the ability of a protected class of voters to elect the candidates of its choice, as a result of the dilution or the abridgement of the rights of voters who are members of the protected class. Challenges to district-based election systems under the CVRA would be subject to the same standards and procedures that currently apply to challenges to at-large election systems that are brought under the CVRA. As is the case with challenges to at-large election systems under the CVRA, prevailing plaintiff parties that bring successful challenges to district-based election systems under this bill would be able to recover attorney's fees, including expert witness fees and expenses. Prevailing defendant parties are not able to

recover costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

The primary difference between challenges brought under the CVRA to at-large elections and challenges brought to district-based elections under this bill are the remedies that would be available when a court finds that a violation exists. While existing law does not explicitly limit the remedies that a court may consider in response to an at-large election system that violates the CVRA, it does state that the imposition of district-based elections may be an appropriate remedy for such a violation. By contrast, if a district-based election system were found to violate the CVRA under the provisions of this bill, the court would be required to devise a single-member district-based election system that provides the protected class of voters the opportunity to elect candidates of its choice from single-member districts. If a plan cannot be created that would give the protected class the opportunity to elect candidates of its choice, the court would be allowed to consider other appropriate remedies, including increasing the size of the governing body if approved by the voters of the jurisdiction, creating a single-member district-based election system in which a coalition of two protected classes that are politically cohesive can elect the candidates of their choice, requiring elections for the governing board of the political subdivision to be held on the same day as a statewide election, or issuing an injunction to delay an election.

3) **Federal Voting Rights Act of 1965 & *Shelby County v. Holder***: The 15th Amendment to the U.S. Constitution provides, in part, that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous conditions of servitude." Additionally, the 15th Amendment authorizes Congress to enact legislation to enforce its provisions. The 15th Amendment was ratified in February 1870.

   In 1965, Congress determined that state officials were failing to comply with the provisions of the 15th Amendment. Congressional hearings found that litigation to eliminate discriminatory practices was largely ineffective because state and local jurisdictions would institute new discriminatory practices to replace any such practices that were struck down in court. As a result, Congress passed and President Johnson signed the VRA. The VRA, among other provisions, prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" from being imposed by any "State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."

   Section 2 of the VRA is a nationwide prohibition against voting practices and procedures, including redistricting plans and at-large election systems, poll worker hiring, and voting registration procedures, that discriminate on the basis of race, color, or membership in a language minority group. Section 2 allows the U.S. Attorney General (AG), as well as affected private citizens, to bring lawsuits in federal court to challenge practices that may violate the VRA. Section 4 of the VRA sets the criteria for determining whether a jurisdiction is covered under certain provisions of the VRA, including the requirement for review of changes affecting voting under Section 5. Section 5 of the VRA requires certain states and covered jurisdictions to receive approval for any changes to law and practices affecting voting from the U.S. Department of Justice (DOJ) or the U.S. District Court of the

District of Colombia to ensure that the changes do not have the purpose or effect of "denying or abridging the right to vote on account of race or color." The requirement to obtain approval under Section 5 is commonly referred to as a "preclearance" requirement.

While much of the VRA is permanent, certain special provisions of the VRA are temporary, including Section 5. When the VRA was enacted, Section 5 was scheduled to expire in five years. Subsequently, Congress extended those provisions for another five years in 1970, an additional seven years in 1975, and an additional 25 years in 1982, and again for an additional 25 years in 2006. As a result, Section 5 currently is scheduled to expire in 2031.

In April 2010, Shelby County in Alabama filed suit in the U.S. District Court for the District of Columbia challenging the constitutionality of Section 5 of the VRA, and of the coverage formulas contained in Section 4(b) of the VRA. Because the State of Alabama was covered under the preclearance requirements of Section 5, Shelby County was also covered as a political subdivision of Alabama. In the lawsuit, Shelby County argued that Congress exceeded its authority under the 15th Amendment and thus violated the 10th Amendment and Article IV of the U.S. Constitution when it voted to reauthorize Section 5 without changing or updating the formulas that determined which jurisdictions were covered under Section 5. The District Court rejected Shelby County's arguments, and upheld the constitutionality of the Section 5 reauthorization and the coverage formulas contained in Section 4(b). On appeal, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the ruling of the District Court, and Shelby County subsequently appealed to the U.S. Supreme Court.

On June 25, 2013, the U.S. Supreme Court, in *Shelby County v. Holder*, held that the coverage formula in Section 4(b) of the VRA is unconstitutional and can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5 of the VRA. The Court stated that although the formula was rational and necessary at the time of its enactment, it is no longer responsive to current conditions. The Court, however, did not strike down Section 5, which contains the preclearance conditions. Without Section 4(b), however, no jurisdiction will be subject to Section 5 preclearance unless Congress enacts a new coverage formula.

The effect of the *Shelby County* decision is that the jurisdictions identified by the coverage formula in Section 4(b) no longer need to seek preclearance from the U.S. AG or the U.S. District Court for the District of Columbia before implementing new voting changes, unless they are covered by a separate court order entered under Section 3(c) of the VRA.

All or specific portions of the following states were required to have their voting changes precleared before the U.S. Supreme Court decision in Shelby: Alabama, Alaska, Arizona, Florida, Georgia, Louisiana, Michigan, Mississippi, New Hampshire, New York, North Carolina, South Carolina, South Dakota, Texas, and Virginia. Also included were the California counties of Kings, Monterey, and Yuba. Merced County previously was subject to the preclearance requirement, but it successfully bailed out from Section 5 coverage in 2012 through a court approved consent decree negotiated with the U.S. DOJ.

According to the U.S. DOJ, the ruling in Shelby County does not affect Section 3(c) of the VRA. Jurisdictions covered by a preclearance requirement pursuant to court orders under

Section 3(c) remain subject to the terms of those court orders. Additionally, the Supreme Court's decision states that Section 2 of the VRA, which prohibits discrimination in voting based on race or language minority status, and which applies on a permanent nationwide basis, is unaffected by the decision. Likewise, other provisions of the VRA that prohibit discrimination in voting remain in full force and effect, as do other federal laws that protect voting rights, including the Uniformed and Overseas Citizens Absentee Voting Act, the National Voter Registration Act, and the Help America Vote Act.

4) **Consolidation Issues and Los Angeles County**: Existing law requires all state, county, municipal, district, and school district elections that are held on a statewide election date to be consolidated with the statewide election, except that the Los Angeles County Board of Supervisors is allowed to deny a request for consolidation of an election with the statewide election if the voting system used by the county cannot accommodate the additional election. This unique provision allowing Los Angeles County to deny consolidation requests was created through the passage of SB 693 (Robbins), Chapter 897, Statutes of 1985, in response to attempts by a number of cities in Los Angeles to move their municipal elections to the same day as statewide elections. Los Angeles County sought the ability to deny consolidation requests because its voting system could accommodate only a limited number of contests at each election, and the county was concerned that the move by cities to hold their elections at the same time as the statewide election would exceed the capacity of their voting system. Los Angeles County still uses a variant of the voting system that it used in 1985, though the county is currently in the planning and design stage for developing and transitioning to a new voting system. One of the principles that the county has articulated to guide the development of its new voting system is having a system that has "sufficient technical and physical capacity to accommodate…consolidation of elections with local districts and municipalities." That voting system, however, may not be available for use countywide until 2020.

   Because of the capacity limitations of Los Angeles County's voting system, the county routinely has denied requests from various local governmental bodies in the county that have sought to hold their elections at the same time as—and to have their elections consolidated with—statewide elections. Last month, however, the Los Angeles County Board of Supervisors voted to change its policy regarding requests for consolidations of local elections with the statewide primary or general election. Rather than routinely denying such requests, under the new policy, the Board of Supervisors will consider approving requests by local government bodies to have their elections consolidated with statewide elections on a case-by-case basis. The board will consider approving such a request from a local governmental body if an analysis indicates that the ballots in the area of the county where the governmental body is located have had sufficient capacity to accommodate additional contests at previous statewide elections.

   This bill provides, as one potential remedy for a violation of its provisions, that a court may order that a jurisdiction's governing board elections be held on the same day as a statewide election. A jurisdiction in Los Angeles County, however, may not be able to receive approval for its election to be consolidated with the statewide election until Los Angeles County replaces its voting system. In that case, such a court order could force a local jurisdiction in Los Angeles County to hold its elections on the same day as a statewide

election, but not have that election be consolidated with the statewide election. When two elections are held on the same day, but are not consolidated, those elections are commonly referred to as "concurrent" elections. When concurrent elections are conducted, voters who are voting in both elections have separate ballots for each election, and can have separate polling locations for each election. As a result, concurrent elections can cause voter confusion, and otherwise can create challenges for voters, candidates, and election officials. If a jurisdiction is required to hold concurrent elections as a result of this bill, any benefit to changing the election date may be limited.

5) **Related Legislation**: AB 1301 (Jones-Sawyer), which is also being heard in this committee today, would require local governments to submit specified changes to elections policies and procedures to the Secretary of State for approval before those changes could go into effect. AB 1301 is loosely modeled after the preclearance requirements in the VRA, as outlined above.

   AB 277 (Roger Hernández) provides that the CVRA applies to charter cities, charter counties, and charter cities and counties. AB 277 was approved by this committee on a 5-2 vote, and is pending on the Assembly Floor.

6) **Previous Legislation**: This bill is similar to SB 1365 (Padilla) of 2014, which was vetoed by Governor Brown. In his veto message, the Governor stated "[w]hile there is progress to be made, the federal Voting Rights Act and the California Voting Rights Act already provide important safeguards to ensure that the voting strength of minority communities is not diluted."

7) **Double-Referral**: This bill has been double-referred to the Assembly Judiciary Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union of California (co-sponsor)
Asian Americans Advancing Justice—Los Angeles (co-sponsor)
Lawyers' Committee for Civil Rights of the San Francisco Bay Area (co-sponsor)
Mexican American Legal Defense and Educational Fund (co-sponsor)
National Association of Latino Elected and Appointed Officials Educational Fund (co-sponsor)
Secretary of State Alex Padilla (co-sponsor)
California Common Cause
California Communities United Institute
California Immigrant Policy Center
National Association of Social Workers, California Chapter

Opposition

None on file.

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