Date of Hearing: April 25, 2018

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING
Marc Berman, Chair
AB 2432 (Obernolte) – As Introduced February 14, 2018

SUBJECT: California Voting Rights Act.

SUMMARY: Prohibits a court from imposing district-based elections upon a finding of a violation of the California Voting Rights Act (CVRA) unless the plaintiff has established that the district-based elections would remedy the dilution or abridgment of voting rights and that alternatives to district-based elections would not achieve greater voting rights and other benefits.

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 the 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) Requires a court, upon finding a violation of the CVRA, to implement appropriate remedies, including the imposition of district-based elections, which are tailored to remedy the violation.

3) 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.

4) Requires a prospective plaintiff, before commencing an action to enforce the CVRA, to send a written notice by certified mail to the political subdivision against which the action would be brought asserting that the political subdivision's method of conducting elections may violate the CVRA. Prohibits the prospective plaintiff from commencing an action to enforce the CVRA within 45 days of the political subdivision's receipt of the written notice.

5) Permits a political subdivision, before receiving a written notice described above or within 45 days of receipt of a notice, to pass a resolution outlining its intention to transition from at-large to district-based elections, as specified. Prohibits a prospective plaintiff from commencing a legal action against a political subdivision to enforce the CVRA within 90 days of the political subdivision's passage of such a resolution.

6) Permits a prevailing plaintiff party in an action brought under the CVRA, other than the state or political subdivision thereof, to recover reasonable attorney's fees and litigation expenses including, but not limited to, expert witness fees and expenses. 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 2432 will raise the standard that must be met by those bringing lawsuits against cities under the [CVRA] trying to force locals to establish district-based elections. In 2002, SB 976 (Polanco) created separate criteria under state law for filing of civil rights actions in "at-large" district elections in addition to those currently provided for in federal law. This resulted in a massive amount of lawsuits being brought against local jurisdictions. Now, many local jurisdictions are preemptively changing to district-based elections in fear of being sued.
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> These predatory lawsuits have caused locals to simply choose to move to districts in order to avoid the potential of a costly court battle, which the local is almost certain to lose. The problem is, there doesn't seem to be a necessity for the plaintiff to prove that district-based elections will solve a weakening of someone's voting rights. AB 2432 will direct courts that a plaintiff needs to prove that district-based elections actually do create more fairness, rather than just assuming moving to districts is always best. Some local areas, especially small cities, maintain that district-based elections actually worsen the pool of potential candidates. These cities, however, often still choose to move to districts to save the city the time and money of an almost inevitable lawsuit. AB 2432 will give communities that believe in their at-large elections a more reasonable chance of being able to hold onto their current elections systems, as long as they do not harm anyone's voting rights.

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 election systems that diluted the voting strength of protected classes of voters generally were brought under Section 2 of the federal Voting Rights Act (VRA). In *Thornburg v. Gingles* (1986) 478 U.S. 30, the United States 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 Assembly Judiciary Committee analysis of SB 976 described the rationale behind this policy, noting that "geographical compactness 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," while concluding that considerations about the geographical compactness of minority communities was an appropriate consideration when trying to fashion an appropriate remedy once racially polarized voting had been shown.

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 United States 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 200 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.

3) **Appropriate Remedies Under the California Voting Rights Act**: Although the CVRA was specifically designed to address at-large election systems that dilute or the abridge of the rights of voters, the CVRA does *not* require the elimination of at-large elections or the imposition of district-based elections as a remedy for a CVRA violation. Instead, a court that finds a violation of the CVRA is required to "implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation." If district-based elections would not remedy a CVRA violation in a jurisdiction where such a violation was found, a court could impose other remedies that were tailored to address the CVRA violation.

As detailed above, the CVRA specifically was designed so that a plaintiff did not have to establish that it was possible to draw a district in which the minority could elect its own candidate in order for the plaintiff to prevail on a claim that an at-large method of election violated the CVRA. Because this bill does not change the factors that a plaintiff must demonstrate in order to establish that an at-large method of election *violates* the CVRA, nothing in this bill should change the likelihood that a political subdivision would be able to

successfully defend its at-large method of election against a CVRA challenge.

Instead, this bill affects the *remedies* that may be imposed when a political subdivision's at-large election system is found to violate the CVRA and requires the plaintiff to prove certain factors before a court can impose district-based elections as a remedy. Specifically, the plaintiff not only would have to establish that district-based elections would remedy the dilution or abridgment of voting rights, but also that alternatives "would not achieve greater voting rights and other benefits." That requirement could significantly complicate the task of developing appropriate remedies once a CVRA violation was found by a court. Given that there are countless ways in which a jurisdiction could modify the manner in which it conducts elections, it is unclear exactly how CVRA plaintiffs would demonstrate that *no* hypothetical alternative exists that could achieve greater voting rights or other benefits. Furthermore, it is unclear what types of "other benefits" must be considered when examining alternatives to district-based elections, and how those other benefits are to be weighed against benefits to voting rights. Furthermore, it is notable that under this bill, the imposition of district-based elections is the *only* remedy for which the plaintiffs would need to make such a showing before the court could impose that remedy. In fact, while this bill prohibits the imposition of district-based elections if the plaintiff is unable to establish that alternatives would not achieve greater benefits, it does not appear to prohibit the imposition of any other remedy even in situations where the court determines that the imposition of district-based elections would achieve greater benefits. Finally, it is unclear whether the protection of voting rights and the purposes of the CVRA generally are served by imposing a burden on the plaintiffs—after they have already demonstrated that an at-large method of election dilutes or abridges the rights of a protected class of voters—to demonstrate that alternatives to district-based elections would not achieve greater voting rights and other benefits. This burden on the plaintiffs seems to disfavor the establishment of districts to remedy a CVRA violation, even though the establishment of districts is the only thing that provides a political subdivision with complete protection from a CVRA claim.

4) **Previous Legislation to Facilitate Changes from At-Large to District-Based Elections**: At the time the CVRA was enacted, local government bodies generally were required to receive voter approval to move from an at-large method of election to a district-based method of election for selecting governing board members. That voter approval requirement made it difficult for jurisdictions to proactively transition to district-based elections to address potential liability under the CVRA. If a jurisdiction attempted to transition from at-large to district-based elections to address CVRA concerns, but the voters rejected the proposal, the jurisdiction nonetheless would remain subject to a lawsuit under the CVRA. Furthermore, to the extent that there was racially polarized voting on the question of whether to transition from at-large to district-based elections, the results of the vote on that question could provide further evidence for a lawsuit under the CVRA.

   As the number of jurisdictions that faced lawsuits or threats of lawsuits under the CVRA increased, many jurisdictions sought ways to transition from at-large to district-based elections without having to receive voter approval for such a change. Most notably, many school districts have transitioned from at-large to district-based elections without receiving voter approval in an effort to avoid potential liability under the CVRA. Even though state law generally requires such a transition to be approved by the voters in a school district, existing law also permits the State Board of Education (SBE) to waive all or part of any section of the Education Code, with certain identified exceptions, upon request by the governing board of a

school district or county board of education. The SBE generally is required to approve any and all requests for waivers unless it makes a finding that one of seven enumerated conditions exists. Since 2009, the SBE has approved waivers to permit approximately 158 school districts to change from at-large to district elections without receiving voter approval, as would otherwise be required by the Education Code.

In response to concerns that community college districts were subject to liability under the CVRA but were unable to change from at-large to district-based elections without voter approval, AB 684 (Block), Chapter 614, Statutes of 2011, established a process under which a community college district could transition from at-large to district-based elections without receiving voter approval if such a transition was approved by the Board of Governors (BOG) of the California Community Colleges, among other provisions. Since the enactment of AB 684, the BOG has approved requests from approximately 28 community college districts to change from at-large to district elections.

During the 2015-2016 Legislative Session, the Legislature took further steps to facilitate transitions from at-large to district elections. Specifically, SB 493 (Cannella), Chapter 735, Statutes of 2015, permitted a city with a population of fewer than 100,000 people to change the method of electing council members to a by-district method of election without receiving voter approval if such a change was made in furtherance of the purposes of the CVRA. AB 278 (R. Hernandez), Chapter 736, Statutes of 2016, expanded on SB 493 by allowing any city, regardless of population, to change the method of electing its governing board members from at-large to a by-district method of election without receiving voter approval. Similarly, AB 2389 (Ridley-Thomas), Chapter 754, Statutes of 2016, permitted a special district to change the method of electing its governing board members from at-large to a by-district method of election without receiving voter approval, if the change was made in furtherance of the purposes of the CVRA.

In addition to taking steps to make it easier for local governments to comply with the CVRA by transitioning from at-large to district-based elections, the Legislature also enacted new laws designed to provide a more formal mechanism for prospective plaintiffs and local jurisdictions to address at-large election systems that are potentially unlawful under the CVRA prior to litigation being filed. Specifically, AB 350 (Alejo), Chapter 737, Statutes of 2016, required that written notice be provided before an action can be brought against a political subdivision under the CVRA, and capped the amount of attorney's fees that a prospective plaintiff could recover from a political subdivision under the CVRA if the subdivision promptly transitioned from an at-large to a district-based method of election upon receiving such a written notice.

Under the provisions of AB 350, once a jurisdiction receives a written notice from a prospective plaintiff alleging that the jurisdiction's method of conducting elections may violate the CVRA, the jurisdiction has 45 days to pass a resolution outlining its intention to transition from at-large to district-based elections (a jurisdiction may also choose to enact such a resolution before receiving any such written notice). If a jurisdiction has passed such a resolution, no legal action may be filed against the jurisdiction alleging a CVRA violation within 90 days of the resolution's passage. To take full advantage of the cap on attorney's fees to prospective plaintiffs that is provided in AB 350, a jurisdiction would have a maximum of 135 days (45 days to pass a resolution plus 90 days to adopt districts) from the

time it received a written notice from the prospective plaintiffs until it had to finalize the new district boundaries.

5) **Arguments in Opposition**: In opposition to this bill, the American Civil Liberties Union of California Center for Advocacy and Policy writes:

> AB 2432 places an unnecessary and undue burden on CVRA plaintiffs by requiring a demonstration that district-based elections would directly remedy voter dilution or abridgment of voting rights and that alternatives to district-based elections would not achieve greater voting rights and other benefits, without articulating the standard of proof that would be applied. The CVRA was enacted in [2002] to allow plaintiffs to challenge discriminatory election systems in a manner that is more efficient and more cost effective than filing suit under Section 2 of the Federal Voting Rights Act of 1965. The CVRA does not mandate the abolition of at-large election systems; rather it prohibits these systems from being used to dilute or abridge the rights of voters in a protected class. Furthermore, the CVRA allows plaintiffs to directly challenge racially polarized voting in at-large election systems for local offices throughout California…
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> AB 2432 undermines the intent of the CVRA and removes the judge's discretion to order an appropriate remedy tailored to the specific violation, which is the backbone of the CVRA. Moreover, requiring the plaintiff to demonstrate that district-based elections would remedy the vote dilution or voting rights discrimination fails to reflect that even carefully crafted remedies can take several election cycles to address the years, if not generations, of discrimination. This requires plaintiffs to predict inherently unpredictable future election cycles and outcomes, and is overly burdensome and costly. In some election systems, the election system has served to disenfranchise voters for such a long time that many strategies must be adopted to overcome voter dilution.

6) **Related Legislation**: AB 2123 (Cervantes), which is pending in the Assembly Judiciary Committee, permits a prospective plaintiff and a political subdivision to agree to extend the deadline by up to 90 days for completing the transition from an at-large to a district-based election system in accordance with the CVRA. AB 2123 was heard in this committee on April 11, 2018 and was approved on a 6-1 vote.

   AB 2231 (Brough), which is also being heard in this committee today, makes numerous significant changes to the CVRA that generally would make it harder for plaintiffs to successfully challenge at-large voting systems under the CVRA.

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

REGISTERED SUPPORT / OPPOSITION:

Support

None on file.

Opposition

American Civil Liberties Union of California Center for Advocacy and Policy
League of Women Voters of California
Mexican American Legal Defense and Educational Fund (MALDEF)

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