

ELECTIONS LAW COMPLIANCE: THE RISING TIDE OF CVRA LAWSUITS

Sean D. De Burgh
Cole Huber LLP



How is the CVRA Violated?

- The CVRA prohibits any *political subdivision* from using any *at-large method of election* that “impairs the ability of a *protected class* to elect candidates of its choice or influence the outcome of an election, as a result of the dilution or the abridgement of the rights of voters are members of the protected class....”

Defined Terms:

- “Political subdivisions” are units of government within the state and, at the local level, include cities, counties, and—of course—special districts.
- An “at-large method of election” is a system of voting in which voters within an entire jurisdiction elect the members of the governing body. If there are two positions open on a local board, for example, candidates would run as a group and the top two vote getters would be seated following the election. In California, this is the most common way special district governing boards are elected.
- A “protected class” means a class of voters who belong to *any* “race, color, or language minority group.” It is possible for one minority group’s voting rights to be diluted even though other minority groups’ rights are not violated. In California, the most common CVRA claims involve African-American, Latino, and Asian-American populations Elec. Code, § 14026(c).

When Does “Racially Polarized Voting” Exist?

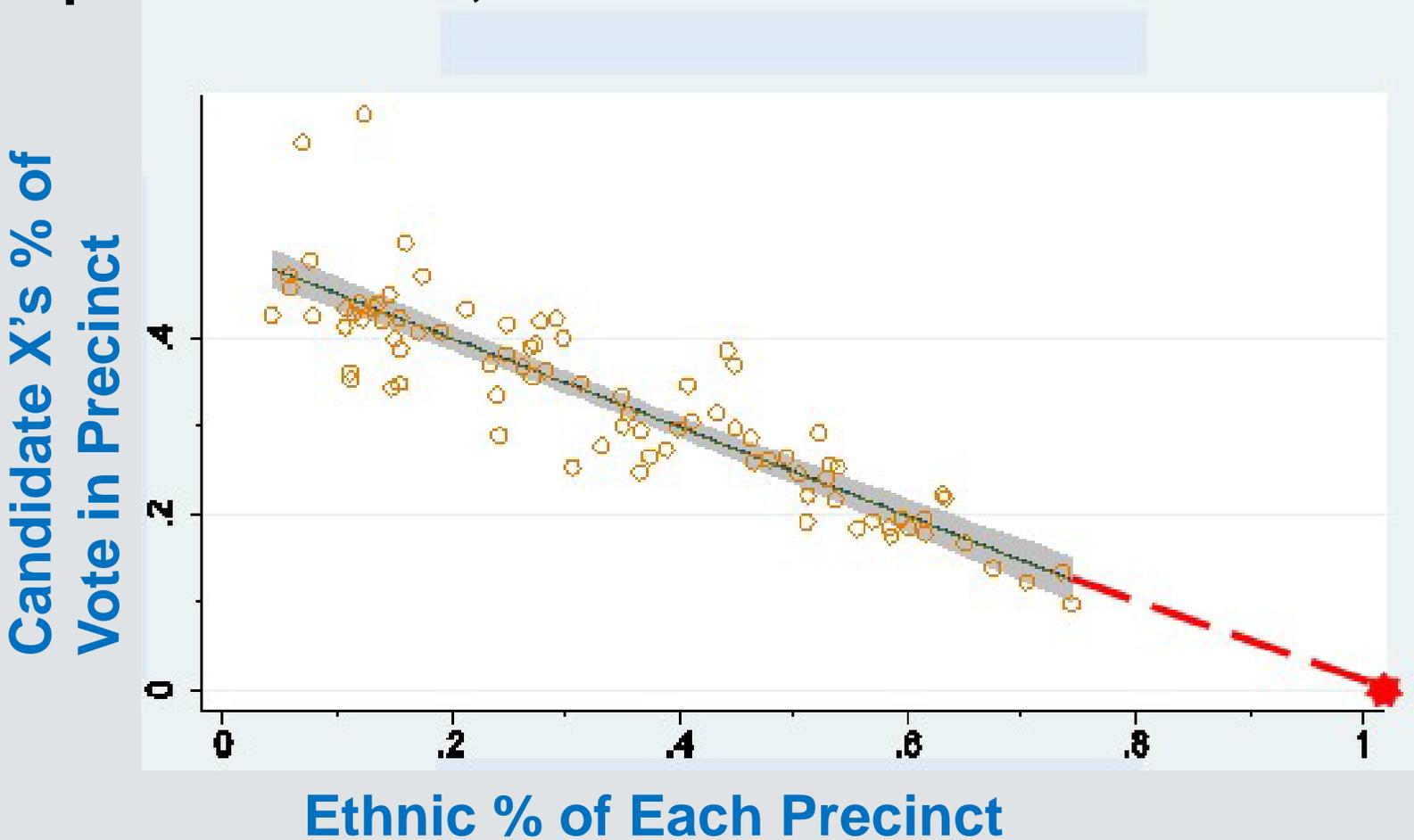
- RPV exists when there is a difference in how members of a protected class vote versus members not within the protected class. Sometimes this phenomenon is referred to as “bloc voting.” Elec. Code, § 14026(e).
- Whether RPV exists is generally determined by statistical analyses.
 - *regression analysis*
 - *ecological inference*

Determining Whether RPV Exists

- The comparison is made between the group whose voting power is asserted to be diluted and *all other voters* outside that group.

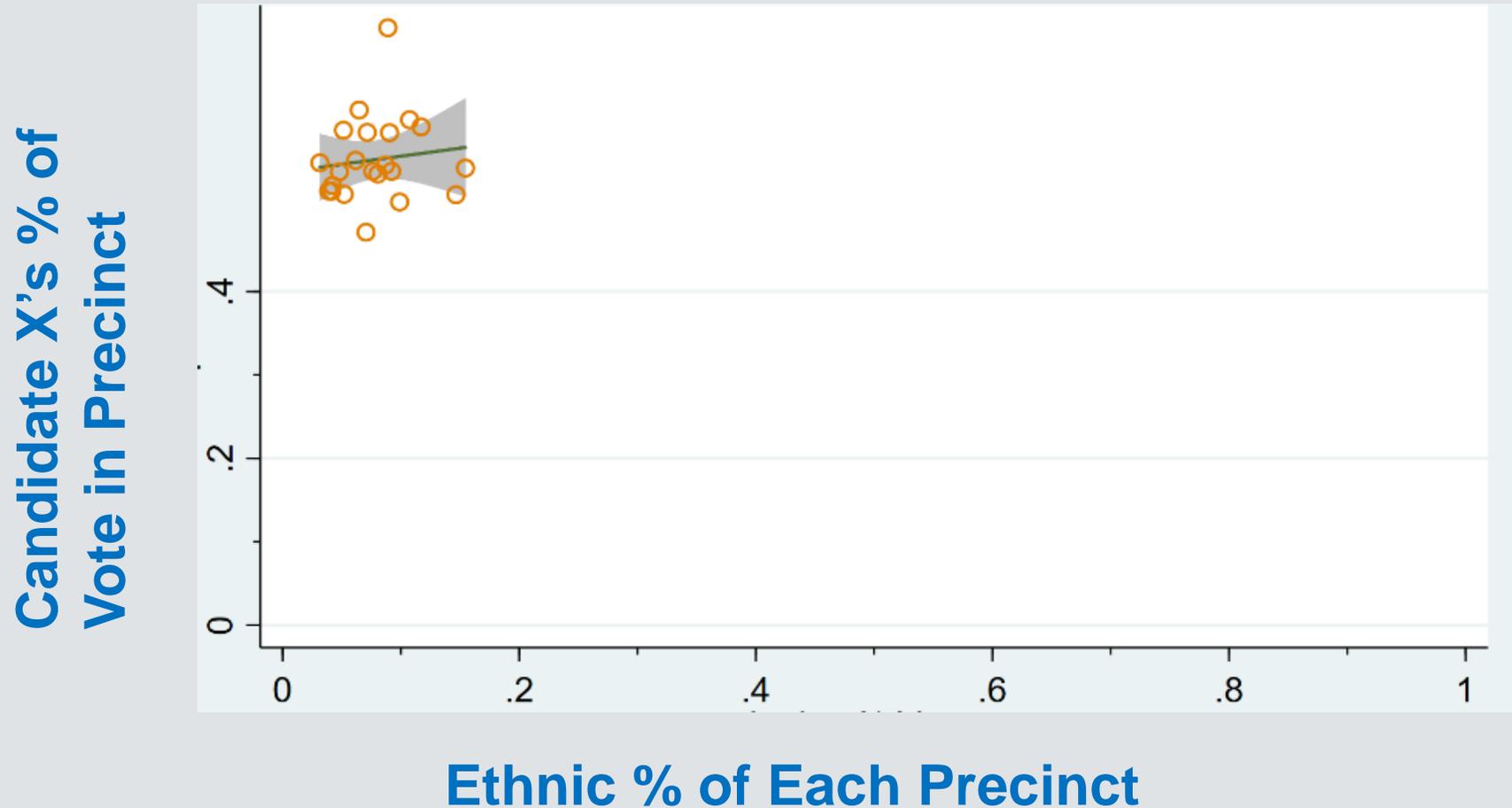
What is Racially Polarized Voting?

Example with a solid, clear statistical dataset:



What is Racially Polarized Voting?

What we often get in the real world:



Elections Analyzed for Polarization:

- agency board elections
- elections involving other agencies (such as cities, counties, and school districts)
- state elections (for the Assembly, Senate or Propositions)
- ballot initiatives (state or local)

An agency's intent or lack of intent to discriminate also is not relevant in determining whether RPV exists

That candidates of a protected class have been elected to an agency's governing board does not negate a finding that RPV exists for that class.

Under the CVRA, the history regarding class members' success as candidates is only a *factor* that may be considered in determining the existence of RPV.

What is the Remedy for CVRA Violations?

- Court can order the agency to implement by-district elections
 - *by-district elections, also referred to as “by-division” or “by-ward” elections, candidates reside within election districts that are divisible parts of the political subdivision and are elected only by voters that reside within those districts*

Changes So Far

- At least 175 school districts
- 100 cities
- Over 30 community college districts
- At least 4 water-related special districts
- 7 health care special districts
- 1 county (the only county that was not already by-district)
- 1 Community Service District
- 1 Library District
- 1 Utility District

AB 350

Created a “safe harbor” by which agencies can voluntarily convert to by-district elections and avoid having to defend against CVRA lawsuits

What Should My District Do after Getting a CVRA Demand Letter?

- CVRA requires plaintiffs to first send a written notice, or demand letter, to an agency before filing suit.
- Plaintiff must wait at least 45 days before filing an action, affording the agency a safe-harbor period to consider converting from at-large to by-district elections.
- Agency must adopt a resolution within 45 days.

PLAN MEETING

In addition to meeting to consider the resolution, your agency should plan a separate—and earlier—meeting to discuss the potential CVRA litigation in closed session.

What Happens if Your District Sticks with its At-Large Voting System?

- The standard for proving proving a CVRA case is quite low.
- A successful plaintiff is *guaranteed* an award of attorney fees when he or she prevails.
- During any remedial phases of a CVRA lawsuit, the court makes the decision as to how and where district lines are drawn.

If Your District Follows AB 350

- Guaranteed to not pay more than \$30,000 in attorneys fees.
- *Your agency* controls the districting process and *your governing board* makes the final decision about how district lines are drawn

If Your District Agrees to Switch to By-District Elections – What Happens Next?

- First step is to adopt a resolution expressing its intention to do so within 45 days of receipt of the CVRA demand letter.
- Plan for the next 90 days to be a very busy time.
 - *The Agency will be required to hold at least four public hearings as part of the AB 350 process*
 - *Agency must then publish a draft map (or maps) of the proposed districts*
 - *Agency must also publish the proposed election sequence*

What if you need additional time?

- What if 90 days isn't enough? (It usually isn't.)
- AB 2123 (2018):
 - *The agency and prospective plaintiff may agree to a 90-day extension of the conversion process (for a total of 180 days)*
 - *The agreement must provide that the district system be implemented six months before the next agency board election*
 - *Agency must publish schedule of meetings on its website within 10 days of entering into agreement*

Qualified Demographer

- It is essential that your agency have a qualified demographer to assist in, and even facilitate, the creation of districts.
- It is important that your district retain this consultant right away. He or she will need to begin working almost immediately after being retained to gather relevant Census and elections data and information.
- The demographer will also be instrumental in facilitating input from the public about communities of interest within your district (this concept is discussed below) and in drawing draft and final district maps.

Public Outreach Essential

Although little time is provided to complete the process, your district should still consider public outreach a priority. A number of agencies that have converted to by-district elections have created special websites to describe the basics about the conversion process, outline the standards for creating districts, and provide notices and schedules of public hearings. Efforts to reach out to non-English speaking communities should also be encouraged

How are districts drawn?

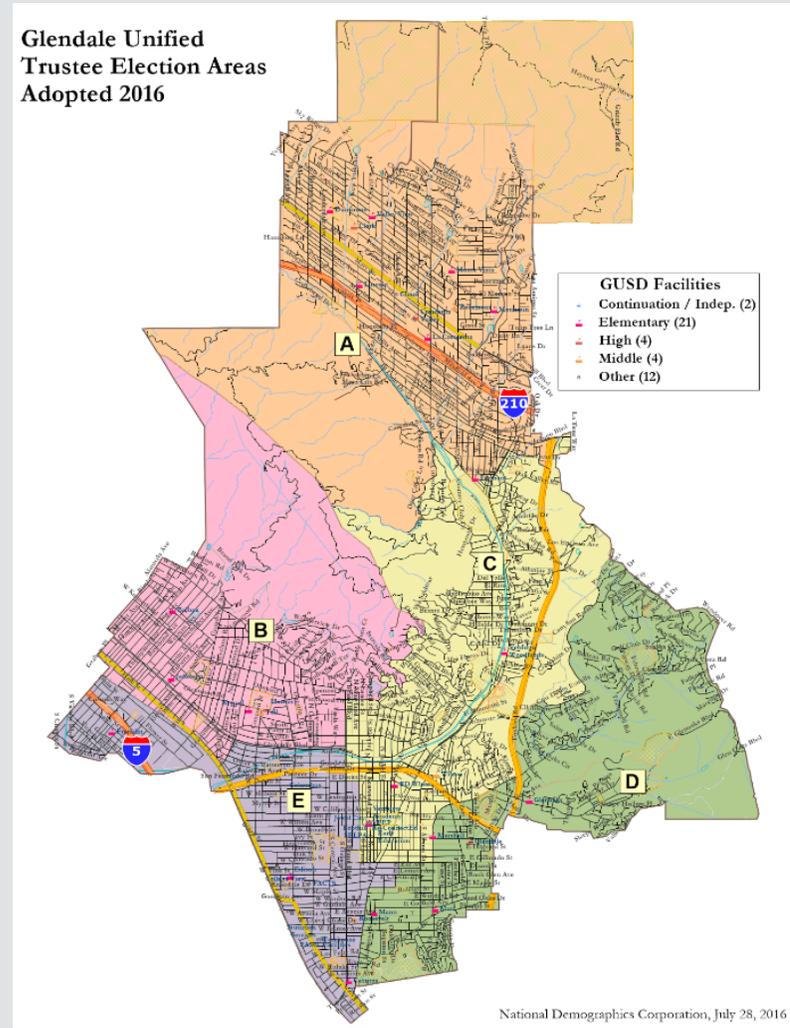
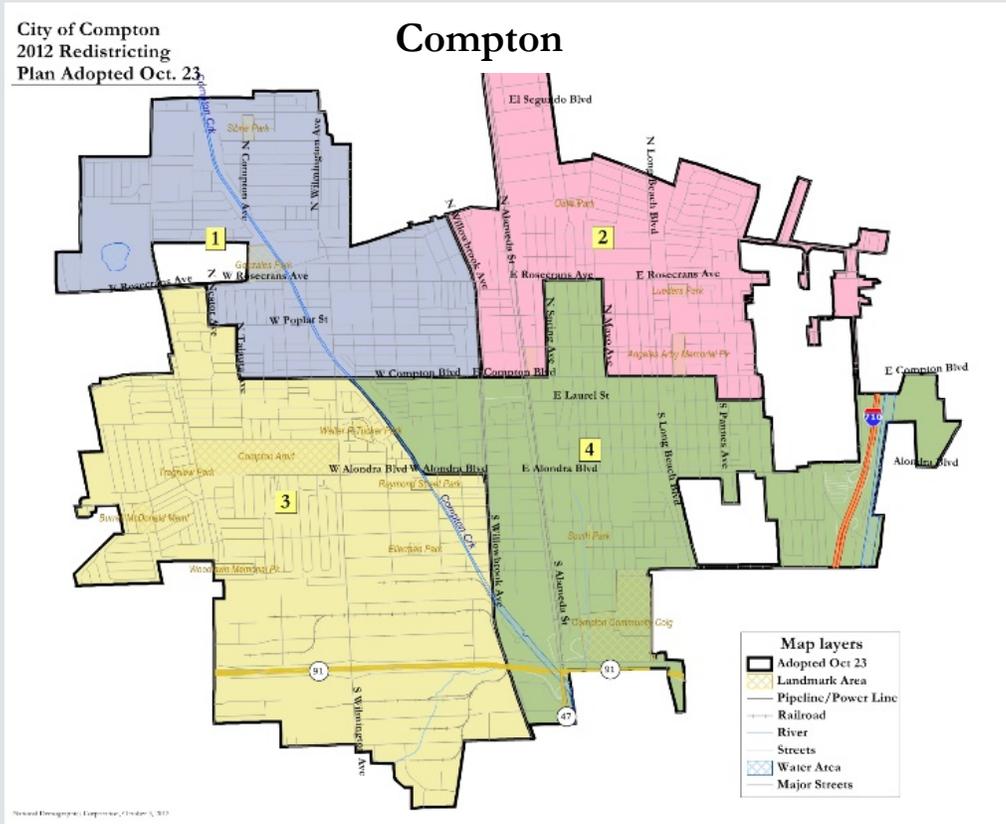
■ Federal Laws

- *Equal population*
- *Federal Voting Rights Act*
- *No racial gerrymandering*

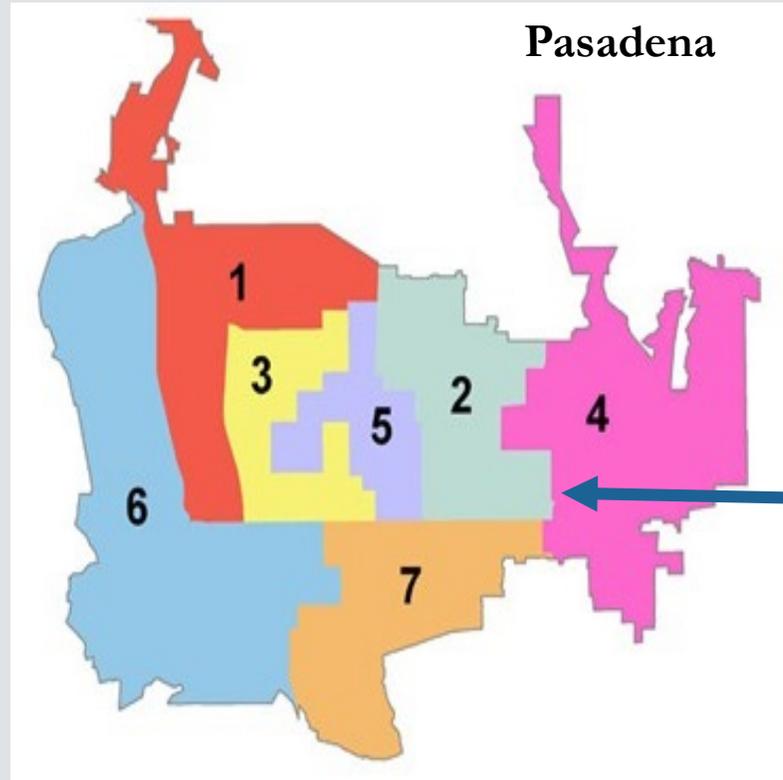
• Traditional Redistricting Principles

- Communities of interest
- Compact & Contiguous
- Follow visible (natural & man-made) boundaries
- Respect for past voter decisions
- Account for future population growth

Traditional (Compact) Maps

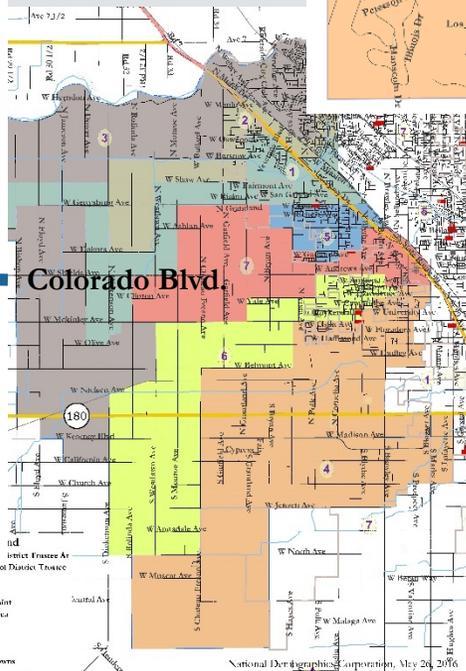
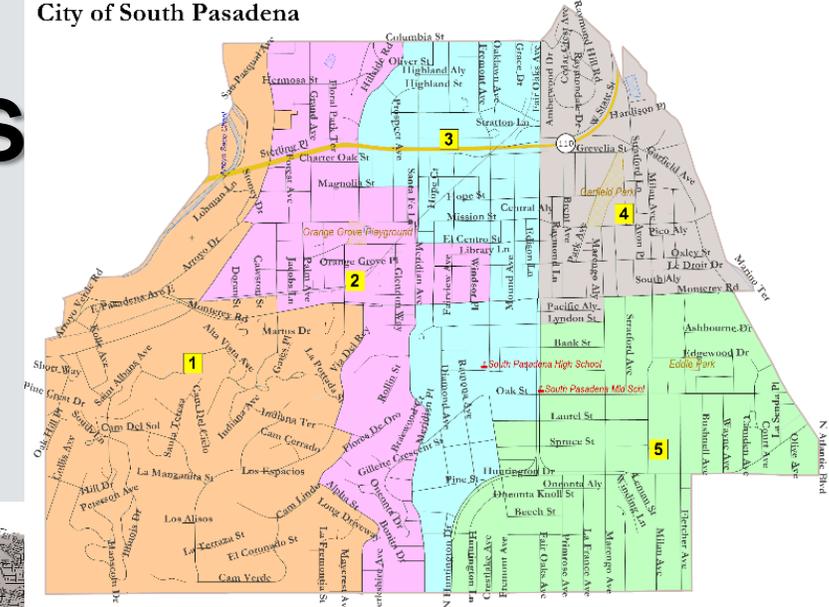


Non-Traditional Maps



Pasadena

City of South Pasadena



Central Unified

When do By-District Elections Begin?

- The subject of when and how to start district elections is a tricky one.
- Delaying the creation of districts for the convenience of the existing elected officials may not remedy a CVRA violation.
- If districts are created for 2020 elections, note that redistricting will be required for 2022 elections.

What if My District Has yet to Receive a CRVA Demand Letter

Your district need not receive a CVRA demand letter to begin the process to switch to by-district elections. A district can move away from at-large voting systems at any time.