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January 20, 2018

VIA CERTIFIED MAIL

Mr. Mister Phillips, Clerk
c/o Matthew Duffy, Superintendent
West Contra Costa Unified School District
1108 Bissell Ave.
Richmond, CA 94901

Re: California Voting Rights Act

Dear Mr. Phillips:

In 2001, the Legislature determined that the use of at-large elections (by cities and districts that are characterized by racially polarized voting) dilutes the influence of minority voting blocs. The CVRA created a private right of action to require the jurisdiction to elect its governing body from single-member districts. For example, Dublin Unified School District recently received a demand letter from the Southwestern Voter Registration Education Project, which led it to adopt districts.¹ On behalf the Bay Area Voting Rights Initiative (“BAVRI”), I give notice of our belief, supported by evidence, that at-large voting dilutes minority electoral influence in the election of board members to the West Contra Costa Unified School District (WCCUSD), thus violating [Elections Code Section 14047](#). The Board should consider this advice as an opportunity to engage the community in a collaborative process that avoids adversary litigation.

“The failure of minority candidates to be elected to office does not by itself establish the presence of racially polarized voting.” [Jagueri v. Palmdale](#), (2014) [226 Cal. App. 4th 781](#). However, [Elections Code, Section 14028\(a\)](#) unconditionally requires a showing of racially polarized voting. Racially polarized voting occurs when some candidates preferred by one race or language group receive a higher level of support from that group than from the electorate at-large.² This differential is inferred by comparing the vote share in precincts in which different percentages of the voters belong to the race or group in question. Proof of intentional discrimination by voters or elected officials is not required. [Elections Code, Section 14028\(d\)](#).

As demonstrated below, this condition clearly exists in West Contra Costa Unified School District. Once racial polarization is established, it is probative, but not necessary, to show that minority candidates have been disproportionately unsuccessful

¹<https://www.dublin.k12.ca.us/cms/lib/CA01001424/Centricity/Domain/1/Shenkman%20Letter%20re%20CVRA.pdf>

² [Elections Code, Section 14026\(e\)](#): “a difference ... in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate.”

in the at-large system. [Section 14028\(e\)](#). The federal Voting Rights Act does not prohibit at-large voting unless it is possible to create at least one district that has a majority of minority voters. However, the California Legislature has a much stronger preference for single member constituencies. Wherever there is racially polarization, the jurisdiction must create single member districts that attempt to increase the influence of minority voting blocs. The approval of voters or the concurrence of individual cities within the district is not required.

At large elections are exceptional for a jurisdiction the size of WCCUSD. Except for Irvine, no city with a larger population elects its council at large. Of the 29 school districts in California that are larger than WCCUSD, all but nine elect trustees by district. (Three of the exceptions are in Contra Costa county, and two others – San Francisco Unified and Fremont Unified – are in the Bay Area.) It is also anomalous that many sizable Contra Costa cities still elect at-large, but several (Concord, Antioch, and Brentwood) are currently being challenged. At least 125 smaller school boards have been districted as a result of CVRA lawsuits or by preemptive orders from the county board of education (or committee on school district organization). Even Martinez Unified capitulated and will create districts, which may have less than 2000 voters.³

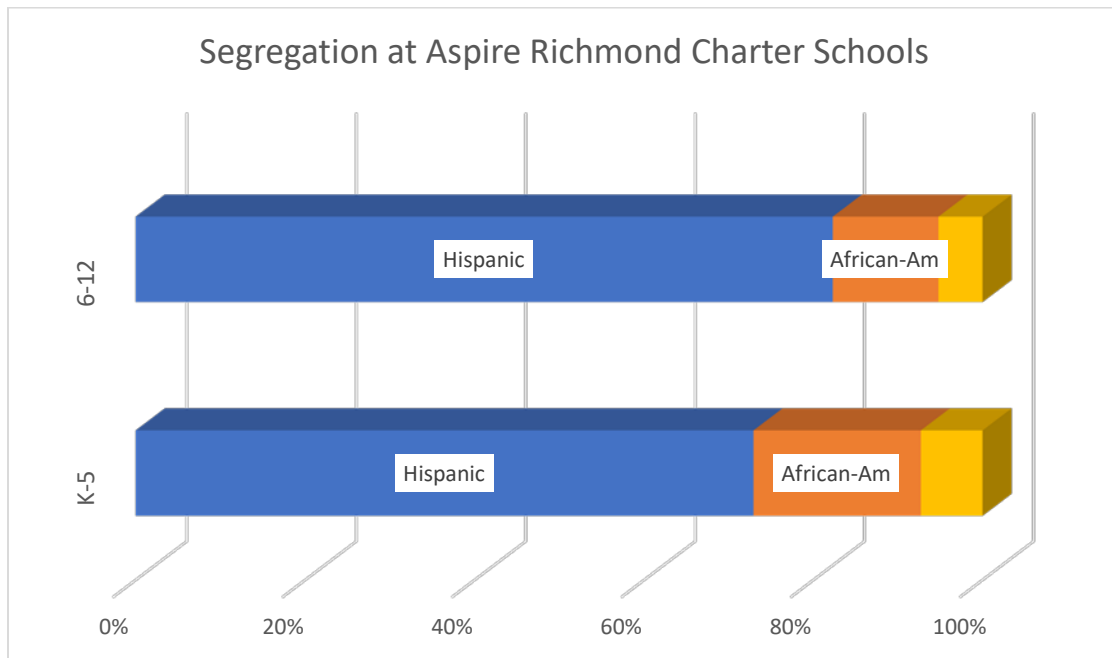
In 2016, the Legislature created a safe harbor to enable jurisdictions voluntarily to adopt district elections prior to such costly litigation. [AB 350](#) requires a prospective plaintiff to send a notice to a city or district that their use of at-large elections “may violate the CVRA.” [Election Code 10010\(f\)](#) allows the attorney sending such a notice to recover up to \$30,000 for the costs of demographic studies and other work product generated to support the notice. The law is intended to allow the city to consider the evidence by staying the plaintiff’s right to sue for 45 days, at which point litigation can proceed if the city has not enacted an ordinance agreeing to single-member districts. Apparently, some jurisdictions have paid this award as a bounty, even though the demand letter provided no detailed evidence. Cities typically retain both an attorney and demographer to propose maps. The city of Martinez, for example, recently announced that it expects to pay up to \$60,000 to a demographer and \$45,000 to outside counsel, even though it has only 20,000 registered voters.⁴ To the extent permitted by the statutory fee limitation, it is our intention to assist the district in preparing and presenting maps to the public.

The evidence strongly suggests that single member districts would lead to greater accountability and community confidence, which could stem the growth of segregated charter schools and promote more integrated, publicly-controlled schools. In order to improve its own performance, the district should embrace electoral reform,

³ <https://martinez-ca.schoolloop.com/cvra>

⁴ <http://www.cityofmartinez.org/civicax/filebank/blobdload.aspx?BlobID=16602#page=3>

including single-member districts and electing at least three members during the presidential year. District elections are also more economical, because they do not require that ballots be prepared for every precinct in every election.



Minorities may feel that they have not been well served by Board-administrated schools. The most current state indicators show persistent differentials for Hispanic and African-American students. While improved participation by minority voters will not instantly fix these inequities, it is a democratic imperative that the Board try to achieve more complete enfranchisement of the entire community.

State Indicators	White	Asian	Hispanic	African American
<u>Suspension Rate (K-12)</u>				
<u>English Language Arts (3-8)</u>				
<u>Mathematics (3-8)</u>				

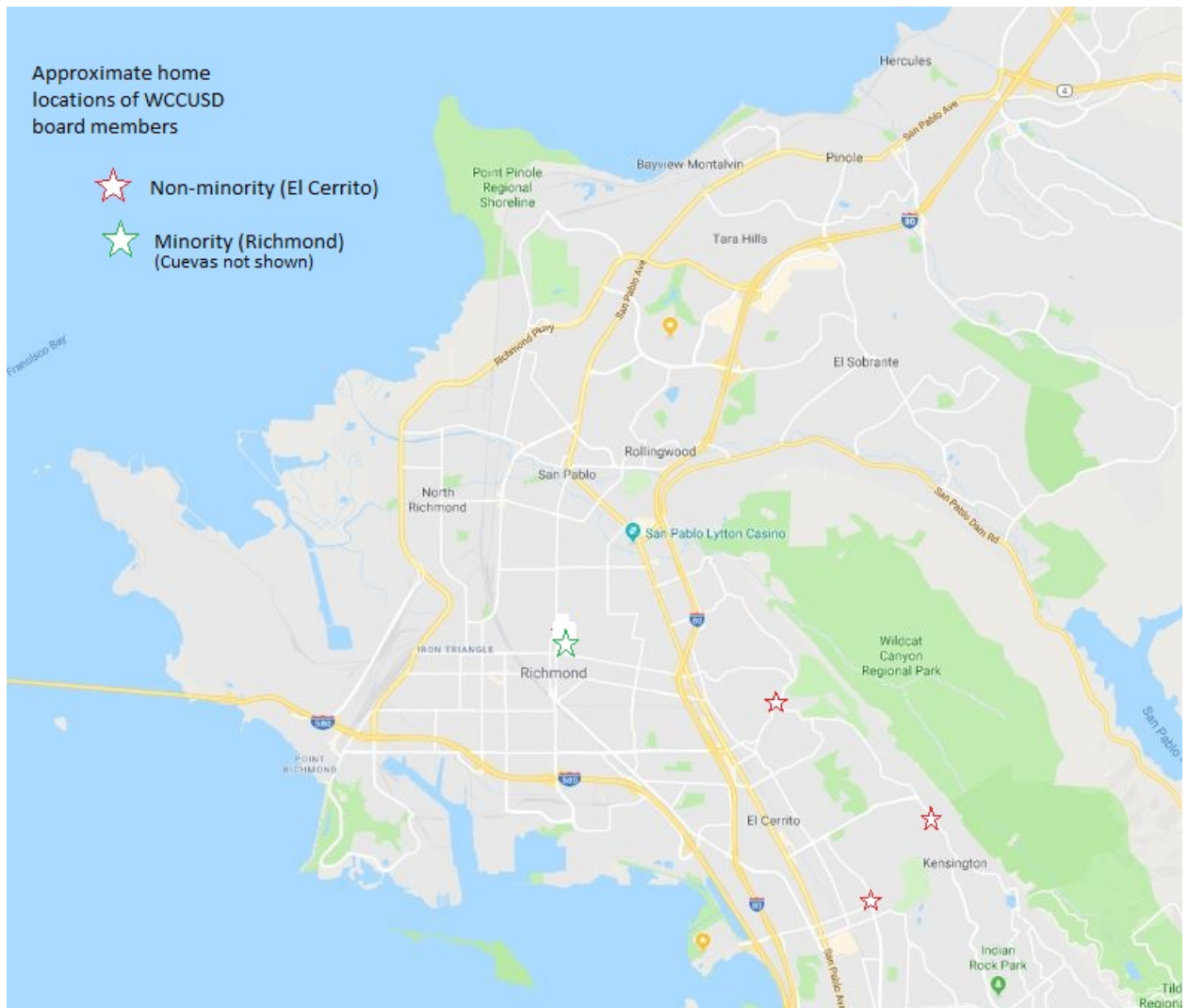
Demand letters often focus not on the benefits of improved accountability, but on the high cost of litigation, particularly attorneys’ fees, and the absence of any successful attempt to avoid judicial imposition of single member districts. For example, the letter sent to Dublin USD boasts of the attorney’s success in Jagueri, in which the plaintiffs’ attorneys reportedly claimed \$3.4 million in fees. The few jurisdictions that have resisted districting have uniformly failed.⁵ In the case of WCCUSD, the dilution of

⁵ Sanchez v. City of Modesto (App. 5 Dist. 2006) [51 Cal.Rptr.3d 821](#), 145 Cal.App.4th 660, *review*

minority voter influence is clearer than many of these precedents. Although such a change may be disruptive, it is usually possible to provide an effective remedy that gives incumbents a reasonable opportunity to seek reelection.

Minority Communities Are Underrepresented.

WCCUSD provides a particularly dramatic case of chronic under-participation and underrepresentation of the minority communities. 89 percent of the students are minorities, yet three of the five board members are white residents of the eastern half of El Cerrito, a town whose entire population is less than 10 percent of the district.

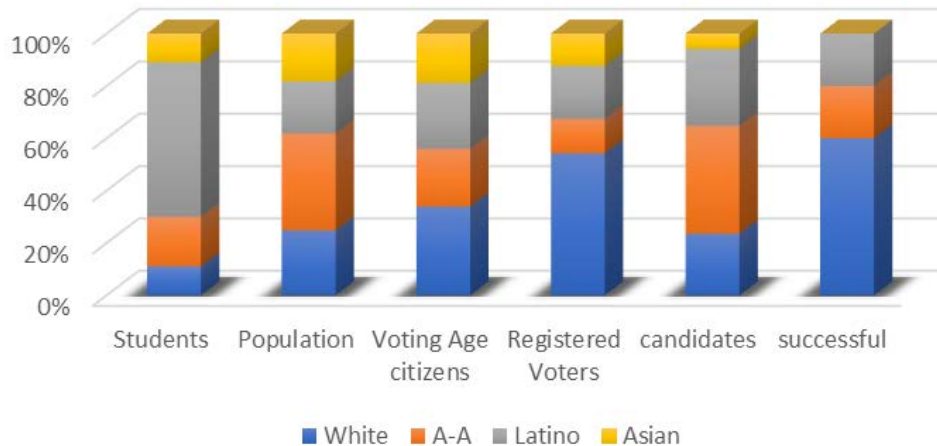


The purpose of the CVRA is to ensure that minorities have the opportunity to vote effectively for candidates that they refer, who are not necessarily candidates of the same race. In many cases, racial polarization can be established based on differences

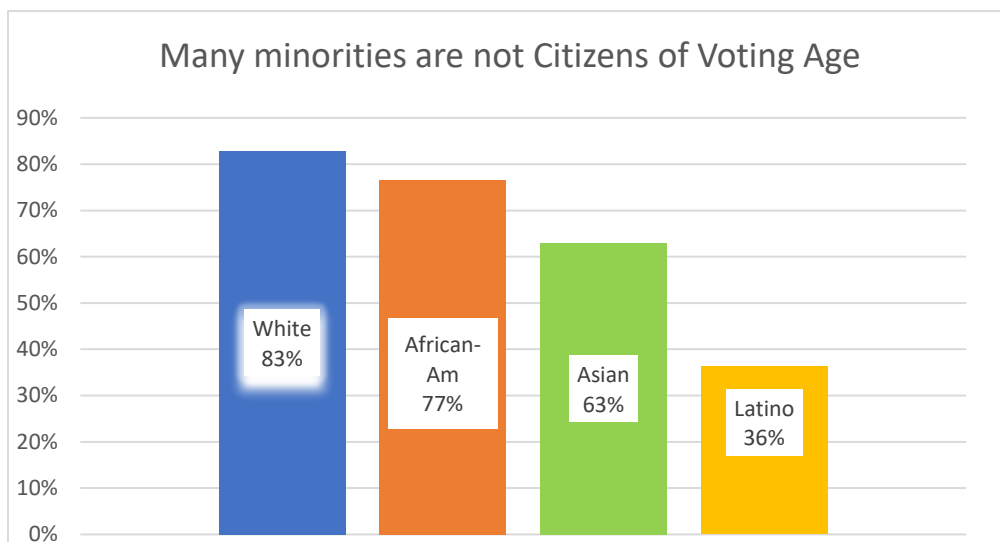
denied, cert. denied 552 U.S. 974 (2007); Rey v. Madera Unified School Dist. (App. 5 Dist. 2012, [203 Cal.App.4th 1223](#)).

among precincts in voting on statewide propositions or local questions of particular interest to the minority community. However, in the case of WCCUSD, there is a consistent pattern that most minority candidates receive strong support from those precincts with larger minority populations, but are unable to prevail at large. In this case, districting is an effective and legally required remedy.

A Board that is 60% White Governs Schools that Are 89% Minority

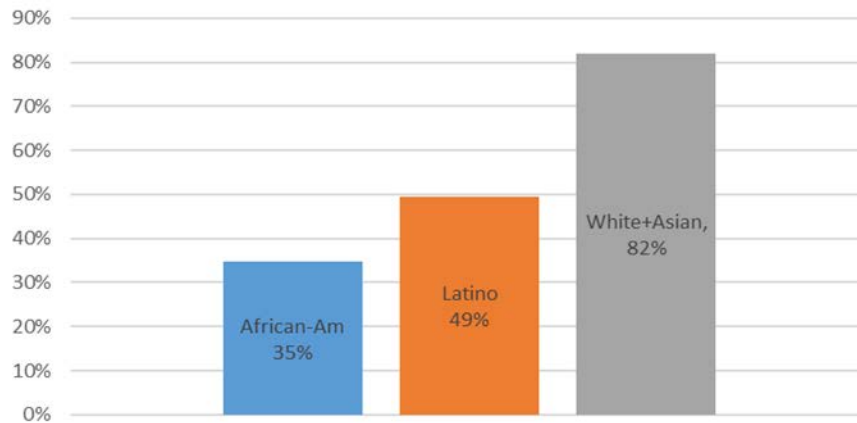


As the chart suggests, there are several factors that cause or aggravate minority underrepresentation in the district’s at-large elections. The white population includes a higher percentage of citizens of voting age. [Education Code, Section 1002\(a\)](#) requires trustee districts to be as equal in population as practicable. Because the new districts will be based on total population (not just citizens, adults or registered voters), they increase the influence of those communities where many parents and other residents are not qualified to vote.



As the largest elected jurisdiction in west county, WCCUSD has an obligation to promote democratic engagement. Even among citizens of voting age, minorities in Contra Costa have registered to vote at disturbingly low levels. This may be an effect as well as a cause of the failure to elect more officials of color. Among registered voters, turnout by minorities may also be lower. Districting mitigates this effect by distributing board members based on population, rather than numbers of registered voters.

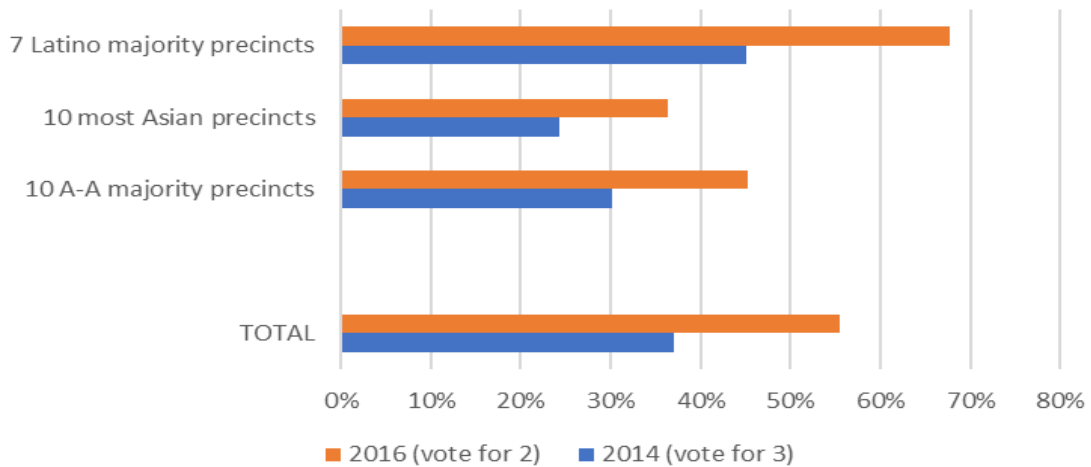
MANY ELIGIBLE MINORITIES DO NOT REGISTER TO VOTE
[countywide data]



Minority Precincts Disproportionately Support Minority Candidates, but Usually these Candidates Do Not Win At-Large

Vote dilution examines the behavior of those residents who are registered to vote. As a threshold matter, there are significant differentials in voter turnout, drop-off (failing to vote for school board), and undervote (casting fewer votes than allowed). Precincts with Latino majorities actually vote for more candidates, but due to the at-large election, only one of the five Latino candidates in the last two cycles has been

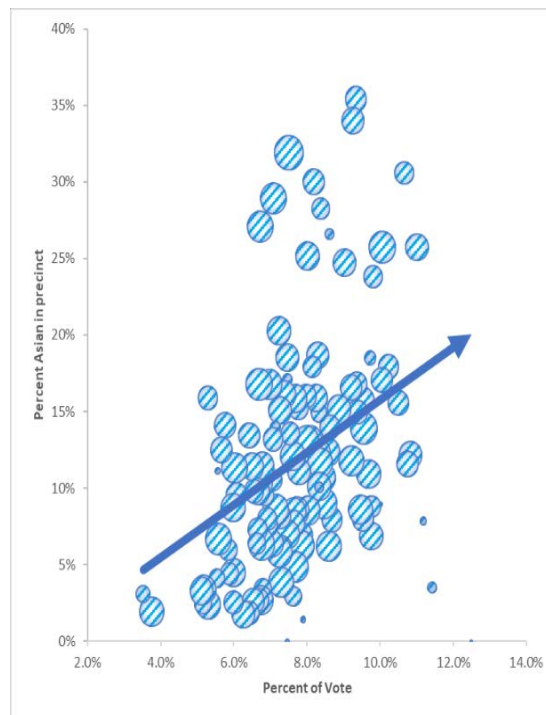
Percentage of Votes Cast per Registered Voter



elected. Eight of the ten most Asian precincts (26-35% Asian) are in Hercules. These precincts comprise about 10 percent of the electorate. Perhaps because no candidate shares either Asian ethnicity and these voters' geography, they vote at a much lower rate than the rest of the district. The 10 majority African-American precincts are all in Richmond. Although there were seven African-American candidates in the last two cycles, only one was successful. These voters also undervote, possibly reflecting demoralization that could be reversed if they had a board member dedicated to a majority black district.

A claim of vote dilution can also be tested by plotting each candidate's performance in each precinct against a horizontal axis indicated how the precinct varies from the city's average racial composition. Dilution may be indicated if candidates preferred by the group show lower levels of support as the percentage of non-group voters in the precinct increases, while other candidates outperform their citywide average in the non-minority precincts. Plotting the results of the 2014 and 2016 elections against the racial composition of the precinct demonstrates that exact pattern.⁶

PERFORMANCE OF ASIAN CANDIDATE BY PRECINCT

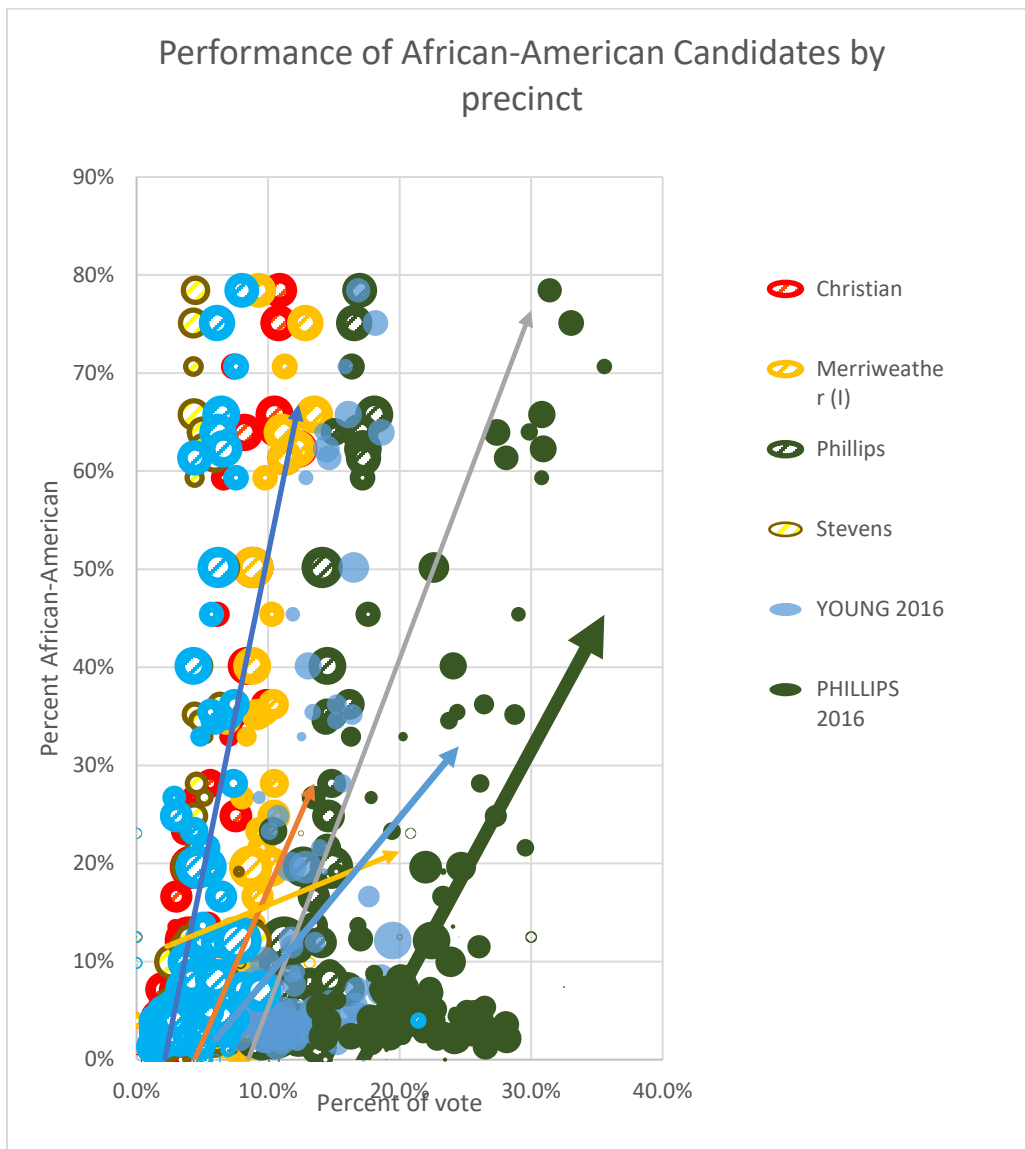


In this graph and those that follow, each ball represents a precinct, sized to the number of voters. Here, the percentage of the total vote won by the only Asian candidate (Peter Chau in 2014) is shown on the X-axis, with the Asian percentage in the

⁶ In order to be more easily interpreted by the public, statistical evidence is presented graphically. Formal regression results may also be made available if required by the board.

precinct shown on the Y-axis. In this race, each voter had three votes. If each voter cast all the votes to which he was entitled, the maximum for any one candidate would be 33%. There is a clear correlation between his performance and the composition of the precinct, which demonstrated polarized voting. Chau's percentage of the total vote in the precinct increases about 5% for each 10% increase in the Asian population.

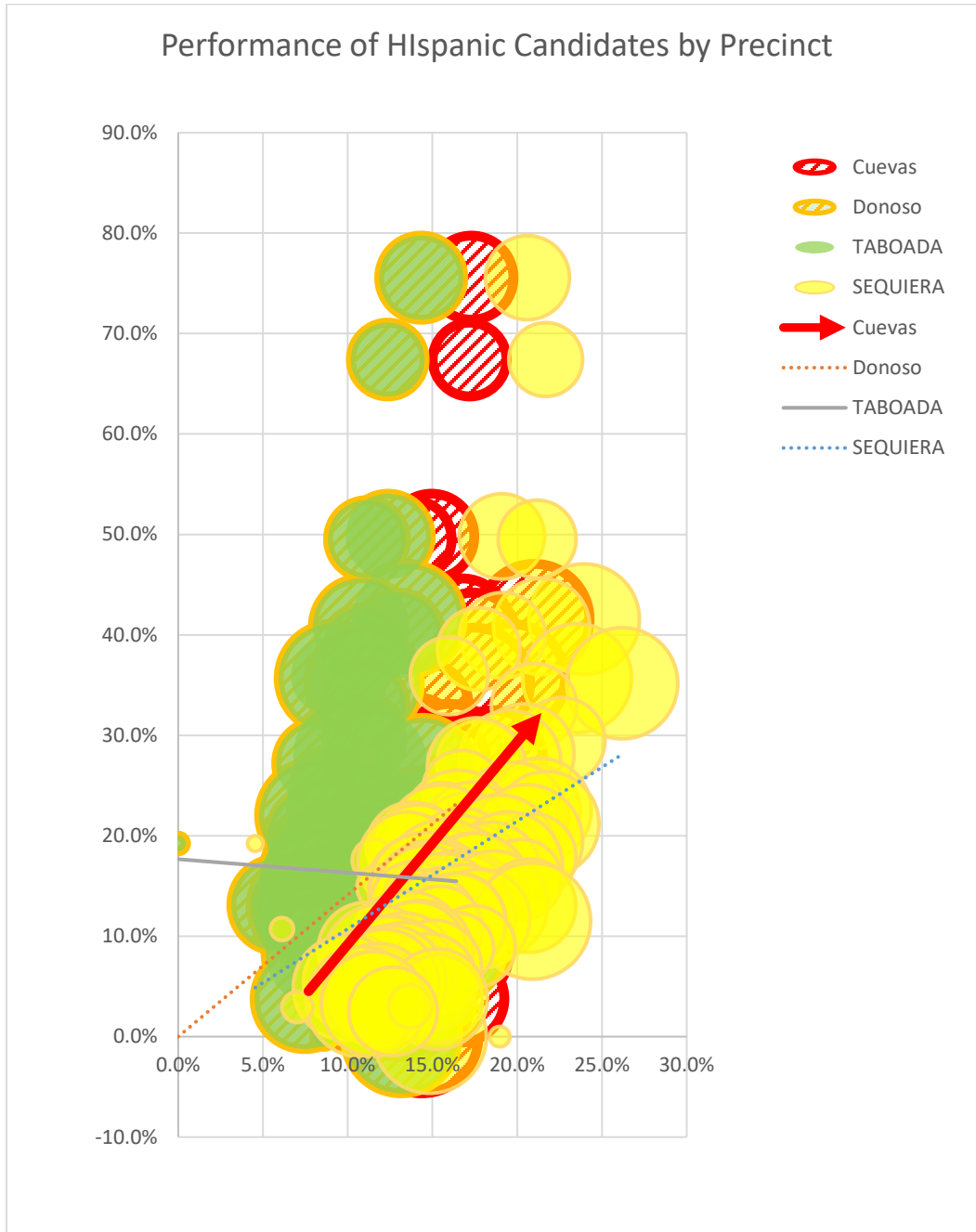
The evidence from the performance of African-American candidates also confirms polarization. These candidates do better in precincts with higher percentages of African-American voters. In this graph, 2014 performance is indicated by striped balls; 2016 by solid balls, all of which are sized to reflect the number of voters in the precinct.



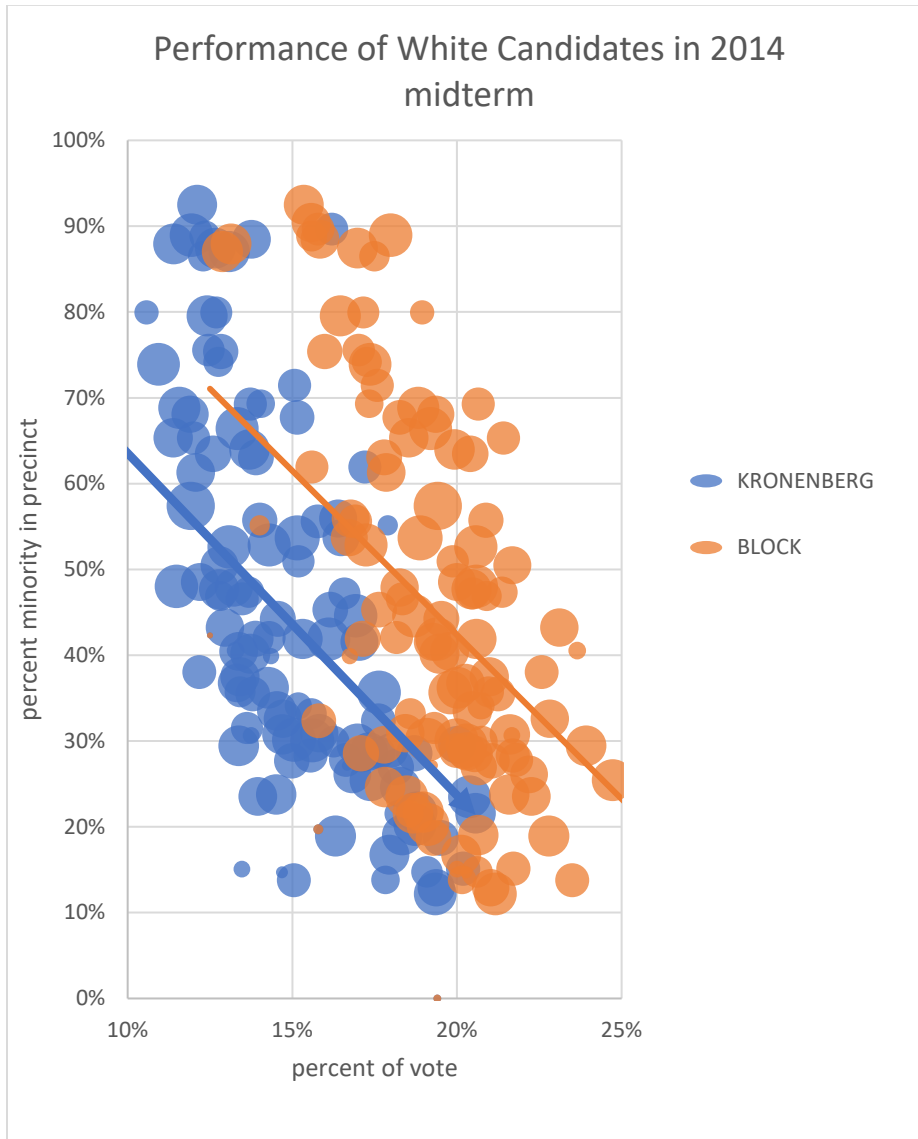
Almost every candidate demonstrates a strong correlation between performance and precinct composition. This is particularly true of the sole African-American who

was elected, Mister Phillips in 2016. In the precincts with the highest percentage of African-American voters, he gets more than a third of the total vote. Even candidates who perform less well depend disproportionately on these precincts.

A review of the Latino candidates completes the demonstration of racially polarized voting. Again, the only prevailing candidate, Valerie Cuevas, relied heavily on these precincts, which supported her at higher levels than precincts with fewer Latino voters. In all but one case, the unsuccessful candidates also performed better in precincts where there were more Latino voters.



Although the white candidates enjoy support from throughout the jurisdiction, it is not surprising that their support is strongest in those precincts that have fewer, rather than more, minority voters. Focusing on the only two white candidates in the last midterm (2014), both of whom were elected, they perform well in many high-minority precincts, but even better in precincts with mostly white voters.



There are Other Benefits, and Some Risks, in Adopting Single Member Districts.

Even if there is no racially polarized voting, the public interest may be served by moving from at-large election to districts. Single member districts reduce the cost of elections, both to candidates and to the school board. Assuming that the election continues to be staggered, the printing required on ballots and pamphlets will be roughly halved, reducing the registrar's variable fees. Districting will substantially

reduce the entry costs of running for office.

Districting sometimes reduces the electoral strength of the very groups that it is designed to help. If minorities vote as a bloc, they may exercise have decisive influence in the election of every at-large member, which they would lose if districted. Another risk is that there will be no qualified candidate willing to stand for election in a new district. In such a case, the remaining members appoint, which completely disenfranchises voters in the new “minority” district.⁷ But this usually occurs when the districts are small, and **each** of five new districts within WCCUSD will be larger than Danville (and all but 200 cities statewide).

Districting can also force the community to choose among a favorite incumbent and another well-qualified candidate from the same district, when all could have been elected in the at-large system. The transition sequence may also have adverse effects. In a staggered system, the incumbents serve out their term. [Education Code, Section 5030](#).⁸ In the first election, the districts with the largest minority populations generally choose district members first. [Elections Code §10010\(b\)](#) (sequence must consider purposes of CVRA and preference by members (residents?) of the districts). District members must reside within the district that elects them. [Elections Code, Section 22000\(f\)](#). This can result in the election of a district member in the district of an incumbent before the incumbent finishes his term at-large. Unless such the incumbent resigns and runs for the district position, there will be no position in which to seek reelection at the conclusion of the at-large term.

WCCUSD Should Adopt a Collaborative Process to the Determine District Boundaries.

BAVRI believes that compliance with the CVRA should be a locally-based, collaborative effort, rather than an adversary proceeding.⁹ To the extent consistent with the \$30,000 fee cap, we intend to support the development of mapping options once the

⁷ Governor Brown vetoed [AB 182 \(2015\)](#), which would have added Section 14040 to prohibit imposing district-based elections in a manner that impairs the ability of protected classes to elect candidates of their choice. This could have created a defense if abandoning at-large elections is likely to lead to this undemocratic outcome.

⁸ This section and [Education Code, Section 5021\(a\)](#) provide that the right of incumbents to continue in office must be “approved by a majority of the voters voting at the election.” In the context of resolutions adopted in response to a demand letter, the State Board has granted waivers of this election requirement. See, e.g., <https://www.cde.ca.gov/be/ag/ag/yr17/documents/jan17w08.doc>. In the event of actual litigation under the CVRA, however, a court may have authority to order a remedy that could displace incumbents.

⁹ Although BAVRI believes that it is illegal for a political party, employer, or other organization to discipline, coerce, or intimidate a civil rights litigant (see [Civil Code, Section 52.1](#)), recent actions make it necessary to defer identifying the prospective plaintiff until litigation is filed, although litigation is unnecessary and undesirable and seems unlikely to occur.

Rafferty to WCCUSD, Voting Rights Challenge, page 12

Board resolves to make districts and receives initial feedback. This will likely avoid many of the substantial costs noted above.

To preserve its safe harbor, the city council must declare an intention to move to district elections within 45 days. At this point, the city can have up to 75 more days to specify its plan. There must be a series of four public hearings, two before the city presents maps and two after. [Elections Code, Section 10010\(a\)](#). It is generally understood that the criteria correspond to those codified for population-based reapportionments and generally for municipalities: topography; geography; cohesiveness, contiguity, integrity, and compactness of territory; and community of interest. [Elections Code 22000\(a\)](#); [Government Code, Section 34884\(a\)\(1\) \[A.B. 278 \(2016\)\]](#). The mapping of districts, the sequence in which district members are elected, and other procedural change cannot have the effect of diminishing the ability of citizens of a race, color or language minority group to elect the candidates of their choice. [52 U.S.C. §10304\(b\)](#).

In the case of municipalities, special districts and community college districts, the Legislature has codified provisions that dispense with voter approval where a school board adopts a resolution changing from at-large to district elections in order to comply with the CVRA. [Elections Code, Section 10650](#) (special districts); [Government Code, Section 34886](#) (cities); [Education Code, Section 72036](#) (community college district). It is still necessary to obtain approval from the county committee under [Education Code, Section 5019\(a\) or 5020\(d\)](#). However, the State Board of Education has implemented a policy of granting waivers to the requirement that districting for purposes of complying with the CVRA be submitted to the voters for approval. See [Education Code, Section 33050](#).

An action to comply with the California Voting Rights Act opens opportunities for other reforms in electoral practices and governance. Such changes might include increasing the number of board members to seven, preferably without increasing the three members elected during the low-turnout midterm election cycle. Given the large size of the jurisdiction, the public may determine that seven districts would better serve the diverse communities of interest within WCCUSD. A larger board could also reduce the likelihood that any incumbent would be boxed out of a fair opportunity to run for reelection. Judicial approval or waiver by the State Board can dispense with the statutory requirement that voters approve such a change. [Education Code, Section 5030](#). The California Voter Participation Rights Act, effective this month, encourages local jurisdictions to increase turnout by consolidating with statewide elections. [Elections Code, Section 14050, et seq.](#) Because turnout in the 2014 midterm was so abysmal, WCCUSD may consider electing the majority of its members (three of five or four of seven) during the statewide general election each presidential year. This can be accomplished by electing one or two members to short terms in 2018.

CONCLUSION

WCCUSD is one of the largest school districts in the state to elect its governing board at-large. Because voting is racially polarized, minority communities are chronically underrepresented. This may diminish public confidence and engagement, adversely affect the quality of district-administered schools, and contribute to the growth of segregated charter schools. Large geographic areas are also completely unrepresented, including all of San Pablo, El Sobrante, Pinole, and North Richmond, which further reduces public engagement. The cost of running for election is unnecessarily high, and district elections could cut WCCUSD's election costs almost in half.

It is in the public interest that WCCUSD begin the transition to five or seven district members, the majority of which should be elected in the general election of presidential election years, when participation is highest. The process should engage the community, consider additional reforms in governance, and seek consensus.

I realize that your next regular meeting is not until February 7, 2018, but prompt action is necessary to complete the various hearings required within the timeframe established in the Elections Code. I am happy to speak with your counsel or with board members individually and to attend any regular or special meetings at which you consider this matter.

Sincerely,

A handwritten signature in black ink that reads "Scott J. Rafferty". The signature is written in a cursive style with a large, stylized 'S' and 'R'.

Scott J. Rafferty

