SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF STANISLAUS

ENRIQUE SANCHEZ, et al (PLAINTIFF) VS CITY OF MODESTO, et al (DEFENDANT)

NATURE OF HEARING CONT 1/6/05 - DEFT'S (CITY OF MODESTO) MOTION FOR JUDGMENT ON THE PLEADINGS CASE NO. 347903

JUDGE: ROGER M. BEAUCHESNE Bailiff: V. Holliday Date: March 25, 2005
Clerk: C. Pope Reporter: None Modesto, California

APPEARANCES:
For Plaintiff: No appearance.
For Defendant: No appearance.

Case is regularly called for hearing.

There being no appearance, or request for hearing on the Court's tentative ruling, this matter stands submitted on the pleadings, and the Court's tentative ruling is confirmed, to wit:

Defendant City of Modesto's Motion for Judgment on the Pleadings, Continued from 1/06/05 - **GRANTED** without leave to amend. The California Voting Rights Act violates the federal and state constitutions in the following ways:

1) It violates the equal protection clause of the 14th amendment to the United States Constitution on its face due to use of federal definitions of "protected class" but does not have the required "sunset" provision - terminates automatically within a few years - which enables racially discriminatory statutes to survive constitutional attack;

2) It violates the equal protection clause of the 14th amendment to the United States Constitution on its face but its legislative record lacks the required findings concerning need and remedial effect;

3) Its liability without remedy clause makes its attorney fee and cost provision a violation of Article XVI, section 6, of the California Constitution as a gift of public funds. This cannot be remedied due to the absence of a severance clause.

Elections Code section 14026(d) states that the California Voting Rights Act uses the definition of "protected class" "as this class is referenced and defined in the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.) ". Where federal statutes are involved, "in determining their meaning and effect the state courts are bound by the interpretation put upon them by the courts of the United States." *MacKenzie v. Hare* (1913) 165 Cal. 776, 779.

Elections Code section 14032 gives standing to sue under the California Voting Rights Act only to members of protected classes. The parties disagree as to whether the federal definition of protected class excludes Caucasians, but agree that it does exclude English speakers. 42 U.S.C. 1973b(f)(1) specifically prohibits voting discrimination against "citizens of language minorities", which are defined as: "Such minority citizens are from environments in which the dominant language is other than English." This specifically includes Spanish speakers, aka Hispanics. 28 Code of Federal Regulations (C.F.R.) section 51.2, states (Court's emphasis):

"Language minorities or language minority group is used, as [sic] defined, in the Act [federal Voting Rights Act], to refer to persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage."

28 C.F.R. 51.2 redefines "language minority" from its plain meaning of those who predominantly speak a non-English language into not merely "ethnicity", but confines it to a limited number of specified ethnic groups.

Not all ethnic minorities have standing to sue under the Federal Voting Rights Act - the federal courts have interpreted the definition of protected class under 42 U.S.C. 1973 so as to exclude Polish speakers from those having standing to sue. Polish-American Congress v. City of Chicago (2002) 211 F.Supp. 1098, 1107.

A statutory classification based on ethnicity or language is suspect, just as classifications based on race or national origin. Olagues v. Russoniello (9th Cir. 1986) 797 F.2d 1511, 1520-1521.

42 U.S.C.b(f)(1), as interpreted by 28 C.F.R. 51.2 and subsequent federal opinions, and incorporated into the California Voting Rights at Elections Code section 14026(d), uses "suspect classifications" meriting strict constitutional scrutiny. It gives standing to persons of Spanish ancestry but not to those of Polish or Portuguese ancestry.

The goals advanced by the 14th Amendment's equal protection clause are as impaired by laws which discriminate between speakers of different languages, or of language-based ethnicity, as by laws which discriminate between persons of different races. Plaintiff's opposing memo admits this at 10:15-24 (Court's emphasis):

"The Equal Protection Clause directs that "all persons

similarly circumstanced shall be treated alike." Equal protection analysis always begins by determining whether - or how - the government is distinguishing among people. Thus, in order to determine if strict scrutiny review is even warranted, the first inquiry is whether the government is creating a racial classification at all." … If the statute does not employ a racial (or otherwise suspect) classification, it is subject to rational basis review under the equal protection clause."

Shaw v. Reno (1993) 509 U.S. 630, 642-643 states:

"No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute. Express racial classifications are immediately suspect because, absent searching judicial inquiry . . ., there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."

Connerly v. State Personnel Board (2001) 92 Cal.App.4th 34, 44-45, states (Court's emphasis):

"Where a statutory scheme, on its face, employs a suspect classification, the scheme is, on its face, in conflict with the core prohibition of the equal protection clause. It is not entitled to a presumption of validity and is instead presumed invalid. And the express use of suspect classifications in a statutory scheme immediately triggers strict scrutiny review."

Plaintiffs have the burden of proving that the California Voting Rights Act is valid once defendants establish that it merits strict scrutiny. Plaintiffs did not meet that burden. Plaintiffs could not meet that burden. There is no time limit in the Act. This was fatal in the opinion of the Third District Court of Appeal in Connerly v. State Personnel Board (2001) 92 Cal.App.4th 34, holding at 64-65 (Court's emphasis):

"The statutory scheme does not arguably withstand strict scrutiny. No justification has been shown. There was no specific finding of identified prior discrimination in the contracting for professional bond services. There was no effort to measure the remedy against the consequences of identified discrimination. There was no effort to limit recovery to those who actually suffered from prior discrimination. There was no showing that non-race-based and non-gender-based remedies would be inadequate or even considered. The scheme is unlimited in duration. And, except for its limitation to citizens and lawfully admitted aliens, the scheme is unlimited in reach."

Parents Involved v. Seattle School Dist. (2001) 377 Fed.3d 949, 969, states (9th Circuit's emphasis): "Sixth, and finally, any program of racial preferences, regardless of its ultimate aspirations, must be *time-limited.*"

The presence of a time limit, though, does not save a statute from constitutional attack if it is not supported by adequate findings of need. That happened in City of Richmond v. Croson (1989) 488 U.S. 469, 511:

"Proper findings are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. '[I]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious or racial group with the political strength to negotiate a 'piece of the action' for its members."

The legislative record for the California Voting Rights Act has no findings of need whatever. It makes the legislative intent clear - they seek to overturn the law underlying certain rulings limiting remedies for racially polarized aka Hispanic vs. non-Hispanic voting to instances where elective districts can be formed with a majority of Hispanic voters. The legislature, however, failed to specify the need for this, which results in a failure to prove any of the many other things necessary to survive strict scrutiny - that the remedies are tailored to deal only with the proven need and not create further constitutional violations, etc.

The legislature could have borrowed related federal findings of need, in particular those concerning discrimination against Hispanic voters used to justify the federal Voting Rights Act, Justice Department records concerning California counties subject to mandatory "pre-clearance" requirements (42 USC 1973c) due to past discrimination against Hispanic voters, and the records of California state and federal trial and appellate cases concerning voting rights discrimination against Hispanic voters. The legislature was certainly aware of the latter - it adopted the California Voting Rights Act because it disagreed with those cases which found that relief could not be granted because no districts with Hispanic majorities could be created. But the legislature neglected to incorporate the records of any of these three types of proceedings into the legislative record of the California Voting Rights Act.

Plaintiffs' counsel shows some awareness of this, and requested judicial notice of part of the congressional record for the federal 1965 Voting Rights Act, but Defendants properly object to that on the grounds that only a partial record was supplied. Plaintiffs must present the whole record if they want judicial notice of it, in addition to evidence that it was incorporated into the legislative record. Defendants also object to Plaintiffs' request for judicial notice of some unsigned & inadequately authenticated letters from the Justice Department. Those objections are also sustained.

Plaintiffs have not presented any evidence of need for the suspect classifications in the California Voting Rights Act. At most Plaintiffs' opposing memorandum cites two instances, at page 8, where federal district courts rejected Hispanic voting rights claims for inability to establish that the Hispanic minority voters could be provided with an elective district where they could form a majority. Skorepa v. City of Chula Vista (S.D. Cal. 1989) 723 F.Supp 1384, 1390, and Aldasoro v. Kennerson (S.D. Cal. 1995) 922 F.Supp. 339, 369. Had this statute been limited to areas of California subject to the Justice Department's "pre-clearance" requirements, and incorporated the federal findings justifying the pre-clearance requirement, Plaintiffs would have a better argument.

But the California Voting Rights Act is not limited to such areas. It applies to all of California, while there are no findings whatever in the legislative record of need for this statute. The Court does not know the scope of the injury at issue, which means there is no way to determine if there is a need for any action at all or if the new constitutional injury created by the Act is outweighed by the scope of the injury the Act purports to cure. Nor can the Court determine if the remedy created by the Act is limited only to that necessary to cure the injury from racially polarized voting, because there is no evidence whatever of the extent of injury.

Election Code section 14027(a) states: "A violation of Section 14027 is established if it is shown that racially polarized voting occurs …" Election Code section 14027(c) states: "The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section, but may be a factor in determining an appropriate remedy." Election Code section 14030 provides a prevailing plaintiff with reasonable attorney fees and "litigation expenses, including but not limited to, expert witness fees and expenses as part of the costs."

Plaintiffs under the Act can obtain these attorney fees and expenses merely by establishing that racially polarized voting occurs in a public entity's elections, whether or not any remedy is possible. If a California city has at large city council elections plus one (1) voter of Alaskan native ancestry who repeatedly runs for the council and always gets just one vote (his own) and files suit under the California Voting Rights Act, he would be a prevailing party under the Act though no remedy is possible, and so be entitled to attorney fees and expenses. Defendants contend, and Plaintiffs do not dispute, that a local government cannot be required to carve an electoral district for an impossibly small number of voters (such as this hypothetical's one Alaskan native). Holder v. Hall (1994) 512 U.S. 874, 881. See Defendants' moving memorandum at 15: 9-12 & 15: 23-28. While it is doubtful this hypothetical city could be sued every day under the Act in this situation, it could probably be sued every election cycle, and have to pay attorney fees over and over for a situation it cannot remedy or avoid.

This is an invalid gift of public funds under Article XVI, section 6 of the California Constitution. A lawsuit against a public entity which results in no change whatever in the status quo ante serves no public purpose, and does not constitute a valid claim against the public for attorney fee and cost purposes. Jordan v. Department of Motor Vehicles (2002) 100 Cal.App.4th 431, 450-451 held (this Court's emphasis):

"Section 6 of article XVI of the California Constitution provides that the Legislature has no power "to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation . . . ." The term "gift" in the constitutional provision "includes all appropriations of public money for which there is no authority or enforceable claim," even if there is a moral or equitable obligation. "An appropriation of money by the legislature for the relief of one who has no legal claim therefore must be regarded as a gift within the meaning of that term, as used in this section, and it is none the less a gift that a sufficient motive appears for its appropriation, if the motive does not rest upon a valid consideration."

"It is well settled that the primary question to be considered in determining whether an appropriation of public funds is to be considered a gift is whether the funds are to be used for a public or private purpose. If they are to be used for a public purpose, they are not a gift within the meaning of this constitutional prohibition.

The settlement of a good faith dispute between the state and

a private party is an appropriate use of public funds and not a gift because the relinquishment of a colorable legal claim in return for settlement funds is good consideration and establishes a valid public purpose. The compromise of a wholly invalid claim, however, is inadequate consideration and the expenditure of public funds for such a claim serves no public purpose and violates the gift clause."

The Court is mindful of a trial court's limited role in evaluating constitutional challenges to legislative enactments. Plaintiffs correctly argue: "[I]t is an established canon of statutory construction that statutes must be construed, if possible, to render them constitutional." See, e.g., In re Marriage of Steiner and Hosseini (2004) 117 Cal.App.4th 519, 529. Nevertheless, the arguments presented by Defendant compel the Court to find the California Voting Rights Act unconstitutional.