

# CLIENT NEWS BRIEF

## Ninth Circuit Upholds California's Voters' Choice Act

The Ninth Circuit Court of Appeals recently affirmed the constitutionality of California's Voters' Choice Act (VCA), which provides for an all-mail ballot election system. The court's opinion validates the ability of states and local election officials to implement and operate systems that are designed to increase voter turnout.

In this litigation, Lozano Smith represented respondent County of Madera, which had opted in to the VCA system for the 2018 election cycle and beyond.

### Background

Responding to low voter turnout in the 2014 election cycle, the California Legislature enacted the VCA in 2016. Prior to the VCA, California voters could opt to vote by mail on an individual basis. Under the VCA, a ballot is automatically mailed to every registered voter 29 days before the election date. A voter may cast the ballot by mailing the ballot back in, depositing the ballot at a designated locked mailbox location, or turning in the ballot at a "vote center" (which replaces traditional polling places).

However, the VCA did not require all California counties to adopt the new system. Instead, under a pilot program, 14 enumerated counties were authorized to opt in after January 1, 2018. With an exception for Los Angeles County (which has its own set of options by statute), all other counties may opt in to the VCA system on or after January 1, 2020. For the 2018 election cycle, five counties—Madera, Napa, Nevada, Sacramento, and San Mateo—opted in to the VCA system. The option of voting by mail is still open in non-VCA counties.

### ***Jeffrey Short, et al. v. Edmund G. Brown et al.***

On February 26, 2018, plaintiffs Jeffrey Short, Trina T.R. Heter, and the Sacramento Valley Lincoln Club sued the State of California and the counties of Madera, Nevada, and Sacramento, seeking to enjoin the operation of the VCA. The individual plaintiffs were citizens of counties who could not opt in to the VCA until 2020, and they alleged that the VCA's structure violated the Fourteenth Amendment's Equal Protection Clause by permitting voters in certain counties to receive a mail ballot automatically, while requiring voters in other counties to register to receive a mail ballot. According to the plaintiffs, this would result in the dilution of votes in non-VCA counties because voter turnout would likely be greater in VCA counties, as intended by the Legislature.

In the trial court, the plaintiffs' motion for preliminary injunction was denied based on the hardship that enjoining the 2018 elections would create. However, the trial court also held that the plaintiffs had raised "serious questions on the merits" as to the constitutionality of the VCA related to vote dilution.

The plaintiffs appealed to the Ninth Circuit Court of Appeals. On June 22,

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2018, the Ninth Circuit denied the appeal. The Ninth Circuit held that the injunction request was properly denied based on hardship, and further held that the injunction should also have been denied based on a lack of substantive merit. Consistent with established constitutional law holding that challenges to state election laws are only strictly scrutinized when there is a severe burden on the right to vote, the Ninth Circuit held that the VCA did not burden the right to vote, but simply made it easier for some voters to cast mail ballots by mail. The burden on non-VCA county voters in having to request a mail ballot was considered minimal at best, and thus not demanding of strict scrutiny. Assuming such a slight burden even would exist, the Ninth Circuit held that California had a legitimate interest in increasing voter turnout, and that there was a specific interest in the incremental phasing that the VCA provides for, to allow for reporting back on the results of the VCA for legislative guidance.

## Takeaways

The Ninth Circuit's opinion supports the proposition that unless there is a substantial burden placed on the voters, state legislatures have ample discretion as to how to deal with low voter turnout, including the implementation of pilot programs that can eventually be applied to the entire state.

If you have any questions about *Short et al. v. Brown et al.*, or the VCA in general, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).

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