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Testimony of Campaign Legal Center in Support of House Bill 1104

I. INTRODUCTION

Campaign Legal Center (“CLC”), is pleased to offer this testimony in support of House Bill 1104, the Maryland Voting Rights Act (“HB 1104” or the “MDVRA”).

CLC is a nonpartisan, nonprofit organization dedicated to advancing democracy through law. Through its extensive work on redistricting and voting rights, CLC seeks to ensure that every United States resident receives fair representation at the federal, state, and local levels. CLC supported the enactment of state voting rights acts in Washington, Oregon, Virginia, and New York, and brought the first-ever litigation under the Washington Voting Rights Act in Yakima County, Washington.

CLC strongly supports HB 1104 because it will allow communities of color across Maryland to participate equally in the election of their representatives. The focus of CLC’s testimony will be to highlight the various procedural benefits that Subtitle 2 of HB 1104 will provide to voters and local governments alike in enforcing voting rights and protecting communities of color.

II. BACKGROUND

States can offer new hope for voters by adopting state voting rights acts that improve upon their federal counterpart. By passing the MDVRA, Maryland can reduce the cost of enforcing voting rights and make it possible for traditionally disenfranchised communities to enforce their rights. States can clarify that government-proposed remedies do not get deference as they might in federal

court. Importantly, they can also empower state courts to apply a wider range of locally tailored remedies that better serve communities of color.

Passage of the MDVRA will mark a new era of voter protections for the people of Maryland, building upon the model of the federal Voting Rights Act (VRA) of 1965 with several key improvements. CLC’s testimony will share highlights of how filing a claim under this state voting rights act rather than the federal VRA is an improvement, such as with vote dilution claims and available remedies.

The federal VRA is one of the most transformative pieces of civil rights legislation ever passed. Section 2 of the federal VRA “prohibits voting practices or procedures that discriminate on the basis of race, color, or membership in [a] language minority group.” The 1982 amendments to Section 2, which allowed litigants to establish a violation of the VRA without first proving discriminatory intent, created a “sea-change in descriptive representation” across the country.¹

Despite this success, “litigating Section 2 cases [is still] expensive and unpredictable.”² Plaintiffs must often collect mountains of evidence to support the totality of circumstances inquiry, which means extended discovery periods and long trials. Given the heavy burden of proving a violation of Section 2 of the federal VRA, states serve a vital role in protecting and expanding the rights to vote and participate fully in American democracy. Maryland should take advantage of this opportunity and join several other states—California, Washington, Oregon, Virginia, and most recently, New York—in ensuring all of its citizens have equal access to the democratic process.

The MDVRA will apply more efficient processes and procedures to enforcing the voting rights of traditionally disenfranchised communities, saving Maryland time and money when going through voting rights litigation. Subtitle 2 of the MDVRA makes it less costly for minority voters and their jurisdictions to collaboratively develop a remedy before resorting to expensive litigation.

III. REASONS TO SUPPORT HB 1104

The MDVRA will innovate on the federal VRA, as well as other state VRAs, by streamlining the procedural mechanisms by which voters may state a claim of vote dilution. The private right of action for voting discrimination under Subtitle 2 of the MDVRA is a less costly and less burdensome means of

¹ Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 920-22 (2008).

² Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the VRA After Shelby County*, 115 COLUMBIA L. REV. 2143, 2157 (2015).

enforcing voting rights for communities of color and encourages negotiation between voters and elected governments. As discussed below, the following features of the MDVRA are reasons to support the bill:

- The MDRVA’s presuit notice provisions allow jurisdictions to proactively remedy potential violations.
- The MDVRA provides express statutory guidance to ensure courts interpret voting-related conflicts in favor of the right to vote.
- The MDVRA provides a framework for determining whether vote dilution or vote denials have occurred that is tailored to the barriers to voting communities of color face at the local level.
- The MDVRA prioritizes remedies for voting discrimination that enable communities of color to equally participate in the franchise.

A. HB 1104 avoids lengthy litigation by allowing jurisdictions to proactively remedy potential violations.

As set forth in § 15.5-205(B) of the MDVRA, a prospective plaintiff must send a jurisdiction written notice of a violation and wait 50 days before bringing a lawsuit. During that time or before receiving any notice, the jurisdiction may remedy a potential violation on its own initiative and gain safe harbor from litigation for at least 90 days. § 15.5-205(B)(3). The MDVRA recognizes that many jurisdictions will seek to enfranchise communities of color by remedying potential violations. Such notice and safe-harbor provisions will enable them to do so without the costs and delay of lengthy litigation.

The MDVRA also provides for limited cost reimbursement for pre-suit notices, in recognition of the fact that notice letters often require community members to hire experts to perform statistical analysis, and to ensure that such expenses do not prevent people from enforcing their civil rights. § 15.5-206(A). Similar provisions are already part of voting rights acts in California, Oregon, and New York. There is a cap of \$50,000 on compensation for these costs to ensure that communities of color have the resources they need to enforce their rights while also protecting local governments from exorbitant fee requests. § 15.5-206(A)(4)(I)(2).

In contrast, no such presuit provisions exists in Section 2 of the federal VRA. As a result, voters often spend time and money well in excess of \$50,000 to investigate potential violations of the federal VRA, the cost of which is later borne by the taxpayer. Indeed, in Maryland, advocates have noted the lack of incentive for counties to negotiate to resolve problems of voting discrimination, stating that the resultant cost of a federal VRA lawsuit is “[a] payment that

could have been avoided if [the Maryland county] had been willing to negotiate, rather than litigate.”³

B. HB 1104 will provide guidance to Maryland State judges as they interpret laws, policies, procedures, or practices that govern or affect voting.

The MDVRA specifies that judges should resolve ambiguities in Maryland state and local election laws in favor of protecting the right to vote. § 15.5-102(B). This is essentially a codification of the existing protections of the Maryland Constitution and Declaration of Rights, which recognize that vigorous political participation is the foundation of our democracy and that the right to vote is preservative of all other rights.

Article I, § 1 of the Maryland Constitution states that “[e]very citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote” Article 7 of the state Declaration of Rights expands on this promise and states “[t]hat the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.”

The MDVRA’s instruction to courts to construe laws in favor of the right to vote is in line with the spirit of the Maryland Constitution and Declaration of Rights. This clarification provides a default pro-voter rule for judges interpreting laws, policies, procedures, or practices that govern or affect voting, which will reduce litigation costs by avoiding unnecessary arguments over statutory interpretation. Similar provisions are in the New York Voting Rights Act and in Voting Rights Acts recently proposed in Connecticut and New Jersey.

C. HB 1104 provides a framework for determining vote dilution in a way that is efficient and cost-effective for both voters and jurisdictions.

To bring a vote dilution claim under Section 2 of the federal VRA, a plaintiff must show that: (1) the minority group being discriminated against is sufficiently large and geographically compact to constitute the majority of

³ Deja Parker, *Town of Federalsburg sued for voting discrimination, 30 days to respond*, WMDT (Feb. 24, 2023), <https://www.wmdt.com/2023/02/town-of-federalsburg-sued-for-voting-discrimination-30-days-to-respond/>.

voters in a single-member district; (2) there is racially polarized voting; and (3) white bloc voting usually prevents minority voters from electing their candidates of choice. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). If these three conditions are met, the court then considers whether, under the totality of the circumstances, the practice or procedure in question has “the result of denying a racial or language minority group an equal opportunity to participate in the political process.”

The MDVRA improves on the federal VRA in several ways: it ensures that integrated as well as segregated communities of color are able to influence elections and elect their candidates of choice; it provides plaintiffs an alternative to proving racially polarized voting; it sets out practical guidelines for courts to properly assess racially polarized voting; and it clarifies that coalitions made up of two or more protected classes to bring vote dilution claims.

Unlike the federal VRA, the MDVRA does not require communities of color to be segregated residentially to receive protections under the statute. Like the voting rights acts passed in California, Washington, Oregon, Virginia, and New York, the MDVRA does not demand that the minority group being discriminated against prove that it is “sufficiently large and geographically compact” before being able to proceed with its lawsuit. § 15.5-202(C)(2)(IV). Following the passage of civil rights legislation, residential segregation has decreased in some areas of the United States, yet racially polarized voting and underrepresentation of communities of color persist. Thus, many communities of color that do not face residential segregation may still lack equal opportunities to elect candidates of choice to their local government. By not requiring minority communities to be segregated to prove minority vote dilution, the MDVRA takes this reality into account.⁴

Decades of experience litigating cases under Section 2 of the Voting Rights Act have shown that that the numerosity and compactness requirements for vote dilution claims are an unnecessary barrier to remedying significant racial discrimination in voting. The MDVRA will allow violations to be remedied quickly and at much less expense to taxpayers than existing federal law and make it easier for communities of color to vindicate their rights and obtain remedies to resolve racial vote dilution. In previous federal VRA cases in Maryland, voters have had to spend time and money defending against allegations that voters of color were not sufficiently segregated to meet this

⁴ Like VRAs in other states, the MDVRA does allow courts to consider whether a community is sufficiently numerous and geographically segregated in determining a remedy to a vote dilution violation. *See* § 15.5-202(C)(2)(IV).

condition, despite evidence making it clear that voters were denied the equal opportunity to elect their candidate of choice.⁵

The next requirement for a vote dilution claim under the federal VRA is for the plaintiffs to show racially polarized voting. Racially polarized voting (RPV) means that there is a significant divergence in the electoral choices or candidate preferences of protected class voters, as compared to other voters. Measuring RPV often depends on election return data, which is sometimes unavailable, especially in smaller jurisdictions and in places with long histories of vote dilution and disenfranchisement where candidates preferred by minority voters simply stop running for office. Thus, the effect of vote dilution itself means that minority communities will often be hard pressed to find “proof” that RPV exists in actual election results.

This is why it is critical that the MDVRA has two paths to prove a vote dilution case, not just a one-size-fits-all approach. The first path allows affected voters to prove vote dilution by showing that a jurisdiction maintains a dilutive at-large or other system of election and RPV is present. §§ 15.5-202(B)(1)(I), (2)(I). The MDVRA also sets out reliable and objective standards for courts to apply in their assessment of RPV. § 15.5-202(C).

But where election results used to assess RPV are unavailable, the MDVRA also allows affected voters to show that they are nevertheless denied equal opportunity to participate in the political process under the totality of the circumstances. §§ 15.5-202(B)(1)(II), (2)(II). This path allows plaintiffs to introduce expert and fact evidence under a range of relevant factors identified by the Supreme Court, Congress, and other courts to demonstrate that the challenged map or method of election, in the words of the United States Supreme Court, “interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [protected class voters] and white voters to elect their preferred representatives” or influence the outcome of elections.⁶

Finally, the MDVRA allows two or more protected classes of voters within an election district to bring a coalition claim, so long as they can establish that they are politically cohesive. § 15.5-204(A)(2). Coalition claims reflect the MDVRA’s spirit and intent to protect all communities of color from discriminatory voting rules and election systems, whether they impact one or more than one racial or ethnic group. If two or more communities vote in a bloc together, organize to elect candidates together, and tend to suffer from vote

⁵ See *Baltimore Cnty. Branch of Nat'l Ass'n for the Advancement of Colored People v. Baltimore Cnty., Maryland*, No. 21-CV-03232-LKG, 2022 WL 657562, at *7 (D. Md. Feb. 22, 2022), modified, No. 21-CV-03232-LKG, 2022 WL 888419 (D. Md. Mar. 25, 2022) (plaintiffs defending against allegations that they could not meet the requirements for vote dilution because the maps they proposed were “irregular.”).

⁶ See, e.g., *Gingles v. Thornburg*, 478 U.S. 30, 47 (1986)

dilution together, they should be able to work together to prove it and combat it.

D. HB 1104 provides a framework for determining denials of the right to vote that provides clarity to courts and voters alike.

The MDVRA provides a stronger standard for proving that a challenged practice denies or impairs a protected class's access to the ballot. Under the federal VRA, voters may challenge practices which "result in a denial or abridgement" of the right to vote because of race or color. 52. U.S.C. 10301. The Supreme Court, however, greatly limited the kinds of claims that voters could make in *Brnovich v. DNC*, 141 S.Ct. 2321 (2021). Specifically, the Supreme Court set forth additional "guideposts" for proving vote denials that will make Section 2 claims even more costly and time consuming to litigate. Furthermore, the lack of clarity provided in *Brnovich* leaves federal courts in the lurch about the appropriate way to interpret vote denial claims under Section 2.

The MDVRA fills in that gap by prohibiting a local government from enacting any voting practice which will "deny" or "impair" the right to vote of communities of color. § 15.5-201(A). A violation is established by showing *either* that that the practice results in a disparity in the ability of voters of color to participate in the electoral process, *or* that, under the totality of circumstances, the practice results in an impairment of the ability of voters of color to participate in the franchise. § 15.5-201(B). Under the federal law, on the other hand, voters have to show (among other things) both a statistical disparity and an impairment under the totality of the circumstances. This innovation of the MDVRA will allow voters of color to show that voting discrimination has occurred without having to jump over unnecessary burdens of proof. Furthermore, because the standard is more explicit under the MDVRA, state courts will have proper guidance about how to determine whether a violation has occurred.

E. HB 1104 expands the remedies that communities of color can seek to ensure their electoral enfranchisement.

Under the MDVRA, if a violation of Subtitle 2 is found, the court shall order appropriate remedies that are tailored to address the violation in the local government and prioritize the full and equitable participation access of voters. The court may only take such action if the remedy will not impair the ability of the protected class of voters to participate in the political process. This part of the bill recognizes that vote denial and vote dilution tactics take many different forms and are not solely limited to traditional methods of voter discrimination. Examples of such remedies from the language of §§ 15.5-204(B)(1)(I) - (XII) of the MDVRA include replacing a discriminatory at-large

system with a district-based or alternative method of election; new or revised redistricting plans; adjusting the timing of elections to avoid known dips in turnout; and adding voting hours, days, or polling locations.

The MDVRA also specifies that courts may not defer to a proposed remedy simply because it is proposed by the local government. § 15.5-204(B)(3). This directly responds to an egregious flaw in the federal law, where Section 2 has been interpreted by the federal courts to grant government defendants the “first opportunity to suggest a legally acceptable remedial plan.”⁷ This often leads to jurisdictions choosing a remedy that only minimally addresses a discriminatory voting practice rather than fully enfranchising those who won the case. For example, in *Cane v. Worcester County*, the Fourth Circuit applying the federal VRA explained that the governmental body has the first chance at developing a remedy and that it is only when the governmental body fails to respond or has “a legally unacceptable remedy” that the district court can step in.⁸ In *Baltimore County Branch of the NAACP v. Baltimore County*, the district court likewise accepted the defendant county’s proposed map, despite plaintiffs’ objections and presentation of an alternative map.⁹ This is antithetical to the concept of remedying racial discrimination; courts should not defer to the preferences of a governmental body that has been found to violate anti-discrimination laws in fashioning a remedy for that body’s own discriminatory conduct. The MDVRA avoids this problem by allowing the court to consider remedies offered by *any* party to a lawsuit, and prioritizing remedies that will not impair the ability of protected class voters to participate in the political process.

This bill also promotes settlement through this specification that courts must weigh all proposed remedies equally and decide which one is best suited to help the impacted community, instead of giving deference to the remedy proposed by the government body that violated that community’s rights.

IV. CONCLUSION

We strongly urge you to enact HB 1104 and strengthen voting rights in the state of Maryland. HB 1104 signifies a pivotal inflection point for the state of Maryland to lead in protecting voting rights, offering a more efficient and lower cost layer of oversight for communities. Thank you.

⁷ *Cane v. Worcester County*, 35 F.3d 921, 927 (4th Cir. 1994)

⁸ *Id.*

⁹ *Baltimore Cnty. Branch of Nat’l Ass’n for the Advancement of Colored People v. Baltimore Cnty., Maryland*, No. 21-CV-03232-LKG, 2022 WL 888419, at *1 (D. Md. Mar. 25, 2022).

Respectfully submitted,

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