Chair Mike Weissman
Vice Chair Tom Sullivan
State, Veterans, & Military Affairs Committee
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Testimony of Campaign Legal Center in Support of Senate Bill 001

I. INTRODUCTION

Campaign Legal Center ("CLC"), is pleased to offer this testimony in support of Senate Bill 001, the Colorado Voting Rights Act ("S.B. 001" or the "COVRA"). 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, New York, Connecticut, and Minnesota, and brought the first-ever litigation under the Washington Voting Rights Act in Yakima County, Washington.

CLC strongly supports S.B. 001 because it will allow historically disenfranchised communities across Colorado to participate equally in the election of their representatives. CLC's testimony will focus on the various procedural benefits that S.B. 001 will provide to voters and local governments alike in enforcing voting rights and protecting historically disenfranchised communities.

II. BACKGROUND

States can offer new hope for voters by adopting state voting rights acts that improve upon their federal counterpart. By passing the COVRA, Colorado 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 COVRA will mark a new era of voter protections for the people of Colorado by 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, specifically with vote dilution and vote suppression 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.

Since the U.S. Supreme Court's 2013 decision in *Shelby County v. Holder*,[3] communities across the country have faced a resurgence of voter suppression tactics. The ruling gutted the preclearance requirement of the federal VRA, enabling states with a history of discrimination to implement restrictive voting laws without federal oversight.[4] As a result, polling place closures, voter roll purges, and new barriers to registration have disproportionately impacted Black, Indigenous, and other communities of color.[5] In *Brnovich v. Democratic National Committee*, the Court

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[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 Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2157 (2015).

[3] 570 U.S. 529 (2013).

[4] *Id.*

[5] *See, e.g.*, Jasleen Singh & Sara Carter, *States Have Added Nearly 100 Restrictive Laws Since SCOTUS Gutted the Voting Rights Act 10 Years Ago*, Brennan Ctr. For Just. (June 23,

further weakened the VRA by making it even harder for voters to challenge discriminatory laws in court.[6] This decision has made it more difficult to prove claims of racial discrimination under Section 2 of the VRA, leaving voters with fewer legal avenues to defend their rights. Meanwhile, Congress has repeatedly failed to restore and strengthen the federal VRA by neglecting to pass the John R. Lewis Voting Rights Advancement Act. These developments have left millions of voters vulnerable to discrimination and suppression. In response to this national landscape, states must step in and ensure their voters have the legal tools necessary to defend their freedom to vote.

As historically disenfranchised communities continue to encounter significant barriers to exercising their rights, more states are stepping up to protect ballot access by passing their own state voting rights acts. With Congress struggling to enact reforms and courts weakening the federal VRA, state-level protections have become essential for combating discriminatory voting practices and ensuring a more inclusive and accountable democracy. These laws equip voters with tools to challenge unfair election policies while enabling local governments to implement proactive safeguards against disenfranchisement. Even if the federal VRA is restored and strengthened, state VRAs will remain crucial tools for addressing the unique needs of each state.

Momentum for state VRAs is growing. California (2002), Washington (2018), Oregon (2019), Virginia (2021), New York (2022), Connecticut (2023), and Minnesota (2024) have already enacted such protections, while states like Maryland, New Jersey, Florida, Michigan, and Arizona are working to follow suit. Colorado should take advantage of this opportunity and join these other states in ensuring all of its citizens have equal access to the democratic process.

The COVRA will apply more efficient processes and procedures to enforcing the voting rights of traditionally disenfranchised communities, saving Colorado time and money when going through voting rights litigation. It also makes it less costly for historically disenfranchised communities and local governments to collaboratively develop a remedy before resorting to expensive litigation.

III. REASONS TO SUPPORT S.B. 001

The COVRA innovates on the federal VRA, as well as other state VRAs, by providing voters with stronger tools to challenge discriminatory policies and streamlining the procedural mechanisms for these kinds of claims. It creates a private cause of action for both vote dilution and vote suppression that are less costly and less

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2023), https://www.brennancenter.org/our-work/analysis-opinion/states-have-added-nearly-100-restrictive-laws-scotus-gutted-voting-rights.

[6] 594 U.S. 647 (2021).

burdensome means of enforcing voting rights for communities or color. Additionally, its notice requirements encourage collaboration between voters and local governments, enabling tailored remedies that address the specific needs and demographics of each jurisdiction. As discussed below, the following features of the COVRA are reasons to support the bill:

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

A. S.B. 001 avoids lengthy litigation by allowing jurisdictions to proactively remedy potential violations.

As set forth in § 1-47-202 of the COVRA, a prospective plaintiff must send a jurisdiction written notice of a violation and wait 60 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. § 1-47-202(1). The COVRA recognizes that many jurisdictions will seek to enfranchise historically disenfranchised voters by remedying potential violations. In doing so, these notice and safe-harbor provisions allow jurisdictions to avoid the costs and delay of lengthy litigation.

The COVRA 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. § 1-47-203(3)(b). Similar provisions are already part of voting rights acts in California, Oregon, New York, Connecticut, and Minnesota.

In contrast, no such presuit provision exists in Section 2 of the federal VRA. As a result, voters often spend considerable time and money investigating potential violations of the federal VRA, the cost of which is later borne by the taxpayer. This innovation on the federal VRA will encourage local governments to work with voters to find a solution, while saving the expense of litigation.

B. S.B. 001 will provide guidance to Colorado State judges as they interpret laws, policies, procedures, or practices that govern or affect voting.

The COVRA specifies that judges should liberally construe the statute in favor of protecting the right to vote. § 1-47-104. This language fulfills the promises of the Colorado Constitution's explicit guarantees that "[a]ll elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage"[7] and that "[t]he general assembly shall pass laws to secure the purity of elections, and guard against abuses of the elective franchise."[8]

The COVRA's instruction to courts to construe laws in favor of the right to vote is in line with the spirit of the Colorado Constitution. 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. State VRAs in Washington, New York, Connecticut, and Minnesota contain a similar instruction.

C. S.B. 001 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 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. Gingle*s, 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 COVRA improves on the federal VRA in several ways: it ensures that integrated as well as segregated historically disenfranchised communities 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 are able to bring vote dilution claims.

Unlike the federal VRA, the COVRA does not require historically disenfranchised communities to be segregated residentially to receive protections

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[7] Colo. Const. art. II, § 5.

[8] Colo. Const. art. VII, § 11.

under the statute. Like the state VRAs passed in California, Washington, Oregon, Virginia, New York, and Connecticut, the COVRA 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. § 1-47-205(3). 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 historically disenfranchised communities persist. Thus, many historically disenfranchised communities 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 COVRA takes this reality into [9][10]

Decades of experience litigating cases under Section 2 of the federal 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 COVRA will allow violations to be remedied quickly and at much less expense to taxpayers than existing federal law and make it easier for historically disenfranchised communities to vindicate their rights and obtain remedies to resolve racial vote dilution. In previous federal VRA cases in Colorado, voters have had to spend time and money defending against allegations that historically disenfranchised communities were not sufficiently segregated to meet this condition, despite evidence making it clear that voters were denied the equal opportunity to elect their candidate of choice.[11]

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.

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[10] Like other state VRAs, the COVRA does allow courts to consider whether a community is sufficiently compact or concentrated in determining a remedy to a vote dilution violation. § 1-47-205(3).

[11] *See, e.g.*, *Sanchez v. State of Colo.,* 97 F.3d 1303, 1314 (10th Cir. 1996).

This is why it is critical that the COVRA 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. §§ 1-47-106(2)(a)(I)(A), 1-47-106(2)(b)(I)(A). The COVRA also sets out reliable and objective standards for courts to apply in their assessment of RPV. § 1-47-205(1).

But where election results used to assess RPV are unavailable, the COVRA 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. §§ 1-47-106(2)(a)(I)(B), 1-47-106(2)(b)(I)(B). 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.[12]

Finally, the COVRA 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. §§ 1-47-103(25), 1-47-205(1)(a)(I). Coalition claims reflect the COVRA's spirit and intent to protect all historically disenfranchised communities 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 dilution together, they should be able to work together to prove it and combat it.

D. S.B. 001 provides a framework for determining denials of the right to vote that provides clarity to courts and voters alike.

The COVRA provides a stronger standard for proving that a challenged practice denies or impairs a protected class's access to the ballot. Every enacted state VRA affirms the right to vote without facing discriminatory election rules and practices, often referred to as "vote denial" or "voter suppression." While the federal VRA once provided strong protections against these tactics, the U.S. Supreme Court has significantly weakened its enforcement, making it increasingly difficult to challenge more sophisticated forms of voter suppression. The COVRA fills this gap.

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

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[12] *See, e.g.*, *Gingles,* 478 U.S. at 47.

make in *Brnovich*. 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. *Brnovich*, 594 U.S. at 666. 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 COVRA, however, establishes a clear, consistent standard that benefits voters, local governments, and courts. To establish a *prima facie* case of vote suppression under § 1-47-204 of the COVRA, plaintiffs must show, by a preponderance of the evidence, that the challenged actions results or will result in a material disparity between a protected class and other eligible electors with respect to voter participation, voting opportunities, or the opportunity or ability to participate in the political process. After that showing has been made, the burden shifts to the political subdivision to demonstrate by clear and convincing evidence that the challenged action is necessary to further an important, particularized governmental interest. Even where that burden has been met, the challenged action may still be invalid where plaintiffs can show it is not the less restrictive means of achieved the identified interest—that is, where plaintiffs can show by a preponderance of the evidence that the political subdivision could comparably further the identified important, particularized governmental interest through an alternative policy that results in a smaller disparity between members of the protected class and other eligible electors.

This burden-shifting framework is modeled on a similar framework that is used in nearly all anti-discrimination statutes. This standard is an important way that the COVRA demonstrates respect for local control of elections. Unlike the Supreme Court's decision in *Brnovich* interpreting the federal VRA, this standard gives a political subdivision an opportunity to justify the change and to respond to plaintiffs' claims. Political subdivisions maintain local control, so long as any action that results in a material disparity furthers an important, particularized governmental interest and is the least restrictive means of doing so.

E. S.B. 001 expands the remedies that historically disenfranchised communities can seek to ensure their electoral enfranchisement.

Under the COVRA, if a violation under §§ 1-47-105, 1-47-106, or 1-47-107 is found, the court shall order appropriate remedies that are tailored to address the violation. 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.

The COVRA also specifies that courts may not defer to a proposed remedy simply because it is proposed by the local government. § 1-47-206(2)(b). 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 devise

a [legally acceptable] remedial plan."[13] 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.[14] 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 COVRA avoids this problem by allowing the court to consider remedies offered by any party to a lawsuit, and prioritizing remedies that are tailored to address the violation.

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 the COVRA and strengthen voting rights in the state of Colorado. The COVRA signifies a pivotal inflection point for the state of Colorado to lead in protecting voting rights and eliminating barriers to citizens making their voices heard.

Respectfully submitted,

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

[14] *Id.*