Rep. Mike Freiberg, Chair
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Elections Finance and Policy Committee
Minnesota House of Representatives
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Chair Freiberg and Members of the House Elections Finance and Policy Committee:

Campaign Legal Center ("CLC")[1] writes to thank you for including the important provisions of the Minnesota Voting Rights Act, HF 3527 (the "MNVRA") in the House Elections Omnibus DE Amendment.

CLC strongly supports the MNVRA because it will allow communities of color across Minnesota to participate equally in the election of their representatives. This letter highlights the ways that the MNVRA codifies, clarifies, and improves upon federal law to ensure that Minnesota voters and local governments alike have clear and consistent processes for protecting voting rights.

I. BACKGROUND

The federal Voting Rights Act of 1965 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

[1] CLC is a nonpartisan, nonprofit organization dedicated to advancing democracy through law. Through our 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 and Connecticut, and brought the first-ever litigation under the Washington Voting Rights Act in Yakima County, Washington.

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.[2]

But a recent groundless ruling by the federal courts has removed an avenue for Minnesotans to protect their right to vote under the federal VRA. In that case, the 8th Circuit held the federal VRA lacks a private right of action, making it more difficult for Minnesotans to enforce their equal right to vote and participate in the political process.[3] This is only the latest in a long line of judicial decisions over the last 30 years that have chipped away at the protections under the federal VRA.

Passing the MNVRA will ensure that Minnesota voters *always* have a private right of action to challenge barriers to effective participation in their communities, regardless of what federal courts do to further weaken federal protections. The MNVRA also clarifies and improves upon federal law to provide a clear framework to identify and fix vote dilution and barriers to voting access in a way that is collaborative, efficient, and cost-effective for both voters and local governments.

III. REASONS TO SUPPORT THE MNVRA

A. <u>The MNVRA provides a framework for determining denials of the right to vote that provides clarity to courts and voters alike.</u>

The MNVRA codifies the right of voters to challenge laws and practices that deny or impair a protected class's access to the ballot, based on the private right of action against vote denial that is available under Section 2 of the federal VRA. 52 U.S.C. § 10301(a). Like the federal VRA, the MNVRA's language is sufficiently broad to cover any conduct related to voting that could result in racial discrimination. *Id.* And like the federal VRA, MNVRA claims can be brought against policies that are intentionally discriminatory *or* that have discriminatory effects. 52 U.S.C. § 10301(b).

However, the federal VRA does not set forward a clear legal standard for deciding vote denial claims, and the Supreme Court has never provided one. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2325 (2021) ("[T]he

[2] Michael J. Pitts, The Voting Rights Act and the Era of Maintenance, 59 ALA. L. REV. 903, 920-22 (2008).
[3] *Ark. State Conference NAACP v. Ark. Bd. of Apportionment*, No. 22-1395 (8th Cir. Nov. 20, 2023).

Court declines in these cases to announce a test to govern all VRA § 2 challenges to rules that specify the time, place, or manner for casting ballots."). The Supreme Court instead announced a flawed set of "guideposts" to help inform decisions. *Id.* These guideposts are not dispositive, make it harder to challenge voter suppression, and distract from the core question of whether the challenged act or practice has a discriminatory effect on voters of color. As a result, lower courts do not have a unified legal standard for evaluating these claims.

The MNVRA therefore distills the current ambiguous body of federal law by providing a simple and predictable standard for determining when a local government's practice has denied or impaired a community of color's access to the ballot. Under the MNVRA, a violation is established by showing either 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. The elements in this legal standard are informed by federal case law. For example, the racial disparity standard in Subd. 1(1) is drawn from principles acknowledged by the Supreme Court. *See Brnovich*, 141 S. Ct. at 2325 ("The size of any disparities in a rule's impact on members of different racial or ethnic groups is an important factor to consider."). And the totality-of-circumstances standard is similarly drawn from federal law. *Id.* at 2341 (Section 2 "commands consideration of 'the totality of circumstances' that have a bearing on whether a State makes voting 'equally open' to all and gives everyone an equal 'opportunity' to vote.") (quoting 52 U.S.C. § 10301(b)).

The MNVRA also simplifies federal law by barring the consideration of certain "guideposts" that have added unneeded complexity to vote denial claims. For example, the MNVRA excludes consideration of the so-called "pedigree" of a challenged practice. In *Brnovich*, the Supreme Court held that the fact that a practice was widely used in 1982 (when Section 2 of the federal VRA was amended) should weigh against plaintiffs. However, the fact that a particular practice may have been prevalent has no relevance to the harm it causes to voters of color. The MNVRA's language barring consideration of this and other such "guideposts" is critical to ensuring predictable, equitable resolution of potential violations and to restoring and codifying the robust protections against voter suppression envisioned by the drafters of the federal VRA.

B. The MNVRA provides a framework for determining vote dilution that clarifies and simplifies federal law.

Like the federal VRA, the MNVRA prohibits discriminatory maps or methods of election that result in vote dilution, including dilutive at-large elections or dilutive districting plans. *See* 52 U.S.C. § 10301. The MNVRA's guarantee that protected class voters are afforded an "opportunity . . . to participate in the political process and elect representatives of their choice" codifies similar language in the federal VRA. *See* 52 U.S.C. § 10301(b).

Federal courts impose a complex and burdensome test on vote dilution claims. 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) the minority group is politically cohesive; 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). The second and third of these preconditions are together said to require a showing of racially polarized voting. If all three of these preconditions 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."[4]

The MNVRA, like every other state VRA, clarifies and simplifies this complex test to make it more administrable, predictable and less costly. The MNVRA requires plaintiffs to establish two elements: a "harm" element (meaning that plaintiffs must demonstrate that they do not have equal opportunity or ability to elect candidates of their choice) and a "benchmark" against which to measure the harm (meaning that plaintiffs must identify a reasonable alternative to the existing system that can serve as the benchmark undiluted voting practice).

The "harm" element can be proven in either of two ways. First, plaintiffs can prove that there exists racially polarized voting that results in an impairment in the ability of protected class voters to elect candidates of choice, a showing required under the federal VRA. 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 statistical analysis of election return data, which is

[4] Section 2 of the Voting Rights Act, U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/section-2-voting-rights-act.

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 MNVRA has two paths to prove the "harm" element. Plaintiffs can alternatively prove that, under the totality of circumstances, the equal opportunity or ability to elect candidates of their choice is denied or impaired.

The "benchmark" element can be satisfied if the plaintiff can identify a remedy that would mitigate the identified harm. For example, if a lawsuit challenges an at-large election that denies voters of color any representation, this element can be satisfied if there is a potential district-based map that would provide protected-class voters with a district in which they can elect candidates of choice. If a lawsuit challenges a districting plan that, for instance, packs voters of color into only one district in which they can elect candidates of choice, this element can be satisfied if an alternate plan is drawn in which voters of color have two districts in which they elect candidates of choice.

The idea of a benchmark requirement comes from federal law, but federal courts have set a high bar for vote-dilution claims. *See Thornburg v. Gingles*, 478 U.S. 30 (1986); *Holder v. Hall*, 512 U.S. 874 (1994). However, the MNVRA provides for a more flexible benchmarking requirement. In particular, the MNVRA does not require plaintiffs to demonstrate an illustrative districting plan with a "geographically compact," *i.e.*, segregated, majority in a single-member district. *See Bartlett v. Strickland*, 556 U.S. 1 (2009). Instead, plaintiffs need only show that there is a new method of election or change to the existing method of election that would mitigate the impairment. This makes it possible for communities of color that are *not* residentially segregated but still experiencing vote dilution to enforce their rights.

C. <u>The MNVRA avoids lengthy litigation by allowing jurisdictions to proactively remedy potential violations.</u>

Under the MNVRA, a prospective plaintiff must send a jurisdiction written notice of a violation and wait 60 days before bringing a lawsuit. During that time, both parties must collaborate in good faith to find a solution to the alleged problem. If the jurisdiction adopts a resolution identifying a remedy, it gains a safe harbor from litigation for an additional 90 days. The MNVRA 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 MNVRA 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. Similar provisions are already part of voting rights acts in California, Oregon, and New York.

D. The MNVRA ensures that courts will select the remedy best suited to mitigate a violation.

In keeping with the broad discretion that federal and state courts have to craft appropriate remedies, the MNVRA requires courts to consider remedies that have been used in similar factual situations in federal courts or in other state courts.

But the MNVRA does depart from the practice of federal courts in one important respect: the law specifies that courts may not defer to a proposed remedy simply because it is proposed by the local government. This directly responds to an egregious practice among federal courts of granting government defendants the "first opportunity to suggest a legally acceptable remedial plan."[5] This often leads to jurisdictions choosing a remedy that only minimally addresses a discriminatory voting practice, precluding consideration of remedies that would fully enfranchise 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.[6] 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.[7] 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 MNVRA avoids this problem by allowing the court to consider remedies offered by *any* party to a lawsuit and decide which one is best suited

[5] *Cane v. Worcester County*, 35 F.3d 921, 927 (4th Cir. 1994)
[6] *Id.*
[7] *Baltimore Cnty. Branch of Nat'l Ass'n for the Advancement of Colored People v. Baltimore Cnty., Minnesota*, No. 21-CV-03232-LKG, 2022 WL 888419, at *1 (D. Md. Mar. 25, 2022).

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 thank Representative Greenman for her authorship and leadership on the MNVRA. And we urge members of the committee to support this omnibus legislation and the voting rights provisions therein. Thank you.

Respectfully submitted,

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