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Testimony of Campaign Legal Center in Support of Michigan Voting Rights Act

I. INTRODUCTION

Campaign Legal Center (“CLC”) is pleased to offer this testimony in support of Senate Bills 401, 402, 403, and 404, collectively referred to as the Michigan Voting Rights Act (the “MIVRA”).

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 the MIVRA because it will make it possible for historically disenfranchised communities across Michigan to protect their right to participate equally in the democratic process. Passage of the MIVRA will mark a new era of voter protections for the people of Michigan, building upon the model of the federal Voting Rights Act (VRA) of 1965 with several key improvements.

While CLC supports all provisions of the MIVRA, the focus of this testimony will be the procedural benefits that SB 401 will bring to enforcing the voting rights of traditionally disenfranchised communities, as well as the reforms contained in SB 403 that will ensure that all voters, no matter what language they speak, can participate fully in elections.

II. BACKGROUND

The federal VRA is one of the most transformative pieces of civil rights legislation ever enacted.

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 plaintiffs 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 To meet the requirements of the totality of circumstances inquiry, Plaintiffs must collect and produce mountains of historical, sociological, and factual evidence, which can require extended discovery periods, costly expert witnesses, and long trials.

Section 203 of the federal VRA requires counties or county subdivisions to provide language assistance if more than 5% or more than 10,000 of its voting-age citizens belong to a single language-minority community and have limited proficiency in English, and the community’s illiteracy rate is higher than the national illiteracy rate.³ This provision was an incredible first step in overcoming some of the barriers that prevent citizens of language minorities from voting; however, its high thresholds and limitations on which languages are covered by Section 203 still leave many without the assistance they need to navigate the voting process.

Given the limitations of Sections 2 and 203 of the federal VRA, states can serve a vital role in protecting and expanding the rights of their minority residents to vote and participate fully in American democracy. Michigan should take advantage of this opportunity and join several other states—California, Washington, Oregon, Virginia, New York, and most recently, Connecticut—in ensuring that all its citizens have equal access to the democratic process.

III. REASONS TO SUPPORT THE MIVRA

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).

³ Voting Rights Act, Section 203, 52 U.S.C. § 10503.

The MIVRA will build on the federal VRA, as well as other state VRAs, by streamlining the procedural mechanisms by which voters can bring a claim of vote dilution or vote denial. The private right of action to challenge instances of voting discrimination under SB 401 is a less costly and less burdensome means of enforcing voting rights for historically disenfranchised communities and encourages negotiation between voters and elected governments. And the reforms contained in SB 403 allow more voters with limited English proficiency to have access to translated ballots and election materials. As discussed below, the following features of the MIVRA are reasons to support the bill:

- The MIVRA's pre-suit notice provisions allow jurisdictions to proactively remedy potential violations *before* litigation occurs.
- The MIVRA provides express statutory guidance to ensure courts interpret voting-related conflicts of law in favor of the right to vote.
- The MIVRA provides a framework for assessing voting discrimination claims tailored to the barriers to voting that historically disenfranchised communities face at the local level.
- The MIVRA prioritizes remedies for voting discrimination that enable historically disenfranchised communities to equally participate in the franchise.
- The MIVRA expands access to language assistance for more voters with limited English proficiency than the federal VRA.

A. The MIVRA avoids lengthy litigation by allowing jurisdictions to proactively remedy potential violations.

As set forth in SB 401, a prospective plaintiff must send a jurisdiction written notice of a violation and wait at least 60 days before bringing a lawsuit. During that time, both parties have the opportunity to collaborate in good faith to find a solution to the alleged problem. The jurisdiction may also remedy a potential violation on its own initiative and gain safe harbor from litigation for at least 90 days. The MIVRA recognizes that many jurisdictions will seek to enfranchise historically disenfranchised communities by remedying potential violations. Such notice and safe-harbor provisions will enable them to do so without the costs and delays associated with lengthy litigation.

By contrast, no such pre-suit notice requirement 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 and litigating claims that could have been resolved sooner through collaboration, sparing costs which are later borne by the taxpayer.

In recognition of the fact that historically disenfranchised communities cannot enforce their own voting rights unless they are aware of the policy changes that

impact those rights, the MIVRA also contains provisions that require the Secretary of State to provide notice to the public of several different types of election-related changes, including changes in voting locations, hours or days available for voting, and early voting plans. Local governments must provide notice of any changes they are making to their election systems, district boundaries, voter list maintenance systems, and governmental reorganizations. These provisions ensure that impacted voters will be able to open lines of communication with their local governments, make them aware of potential violations, and work with them on proactive remedies as soon as possible.

B. The MIVRA provides guidance to Michigan judges as they interpret laws, policies, procedures, or practices that govern or affect voting.

The MIVRA specifies that judges should resolve ambiguities in interpreting Michigan state and local election laws in favor of protecting the right to vote. This language is consistent with the Michigan Constitution's explicit guarantees that, "[e]very citizen of the United States who is an elector qualified to vote in Michigan shall have...the fundamental right to vote" and that "[n]o person shall: (1) enact or use any law, rule, regulation, qualification, prerequisite, standard, practice, or procedure; (2) engage in any harassing, threatening, or intimidating conduct; or (3) use any means whatsoever, any of which has the intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote."⁴

SB 401's instruction to courts to construe laws in favor of the right to vote is in line with the spirit and the letter of the Michigan Constitution. This clarification provides a pro-voter default 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. The Connecticut and New York Voting Rights Acts contain similar provisions.

C. The MIVRA 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 (which necessarily requires the minority group to be residentially segregated); (2) there is racially polarized voting; and

⁴ Mich. Const. Art. II, § 4.

(3) bloc voting by the majority group 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 MIVRA 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 demonstrating 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 can work together to bring vote dilution claims.

Unlike the federal VRA, the MIVRA does not require historically disenfranchised communities to be segregated residentially to receive protections under the statute. Like the voting rights acts passed in California, Washington, Oregon, Virginia, New York, and Connecticut, the MIVRA 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. 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 MIVRA takes this reality into account.

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 MIVRA 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 Michigan, voters have had to spend time and money defending against allegations that voters of color 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.⁵

⁵ See *United States v. City of Eastpointe*, 378 F. Supp. 3d 589 (E.D. Mich. 2019).

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 MIVRA 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. The MIVRA also sets out reliable and objective standards for courts to apply in their assessment of RPV.

But where election results used to assess RPV are unavailable, the MIVRA 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. 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, SB 401 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. This explicit recognition of coalition claims counteracts an erroneous outlier decision of the Sixth Circuit Court of Appeals that has long made it impossible for federal coalition claims to proceed in Michigan.⁷ The MIVRA’s affirmation of coalition claims reflects its spirit and intent to protect all historically disenfranchised communities from discriminatory voting rules and election systems, whether they impact one or multiple racial groups. If two or more communities vote in a bloc together, organize to elect candidates together, and suffer from vote dilution together, they should be able to work together to prove and combat vote dilution.

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

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

⁷ See *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc).

In addition to combatting vote dilution, the MIVRA strengthens protections against practices that deny or impair 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 denial that will make Section 2 claims even more costly and time consuming to litigate. Furthermore, the lack of clarity provided by *Brnovich* leaves federal courts in the dark about the appropriate way to interpret vote denial claims under Section 2.

SB 401 fills in that gap by prohibiting local governments from enacting any voting practice which will "deny" or "impair" the right to vote of historically disenfranchised communities. 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. Under the federal VRA, on the other hand, voters have to show (among other things) *both* a disparity *and* an impairment under the totality of the circumstances. This innovation of the MIVRA 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 explicitly defined by the MIVRA, state courts will have proper guidance about how to determine whether a violation has occurred.

E. The MIVRA expands the remedies that historically disenfranchised communities can seek to ensure their electoral enfranchisement.

Under the MIVRA, if a violation is found, the court shall order appropriate remedies that are tailored to address the violation in the local government. 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. SB 401 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 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 increase turnout; and adding voting hours, days, or polling locations.

The MIVRA also 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 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.”⁸ 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. 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 MIVRA 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.

F. The MIVRA expands access to language assistance for Michigan voters with limited English proficiency.

Even proficient English speakers can often find ballots and election materials to be complicated and confusing. For voters with limited English proficiency, it can be far more challenging to navigate the voting process, understand the candidates and issues, and make informed decisions. SB 403 improves on Section 203 of the federal VRA in several important ways.

Michigan has a diverse population and a growing number of naturalized citizens who have limited proficiency in English, including the nation’s largest Arab-American community. Unfortunately, many of these eligible voters do not receive voting materials or assistance in their primary languages in counties throughout the state. SB 403 enables Michigan to go above and beyond the language assistance requirements set by federal law. The federal Voting Rights Act requires a jurisdiction to provide language assistance if more than 5% or more than 10,000 of its voting-age citizens belong to a single language-minority community and have limited proficiency in English, and the community’s illiteracy rate is higher than the national illiteracy rate.⁹ These thresholds are not sufficient to meet Michigan’s needs; only four Michigan jurisdictions are currently required to provide language assistance under federal law.¹⁰

SB 403 lowers the population threshold so that language assistance must be provided for any community that constitutes more than 2% of a county or more than 4,000 people. However, a local government does not have to provide language assistance if that 2% amounts to fewer than 100 people. In this way,

⁸ *Cane v. Worcester County*, 35 F.3d 921, 927 (4th Cir. 1994).

⁹ Voting Rights Act, Section 203, 52 U.S.C. § 10503.

¹⁰ Voting Rights Act Amendments of 2006, Determinations Under Section 203, 86 Fed. Reg. 69611 (Dec. 8, 2021).

the MIVRA strikes a reasonable balance between expanding high quality language assistance and minimizing the administrative burden of implementation on election officials.

The MIVRA also guarantees voters assistance in the state's commonly spoken languages, including Arabic and various African languages, which are not covered by Section 203 of the federal Voting Rights Act, which defines a language minority group narrowly to mean "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage."¹¹

Instead of limiting language assistance to communities with certain heritages and English literacy rates below the national level, SB 403's definition of a community that needs language assistance is more streamlined, yet more expansive. Any community that speaks a common language other than English and has limited English proficiency is eligible for language assistance if it meets the population threshold.

Together, these provisions will ensure that no Michigander is excluded from democratic participation based on their inability to speak or understand enough English to engage in the electoral process.

IV. CONCLUSION

We strongly urge you to enact the MIVRA and strengthen voting rights in the state of Michigan. The MIVRA signifies a pivotal inflection point for the state of Michigan to lead in protecting voting rights and eliminating barriers to citizens making their voices heard.

Respectfully submitted,

/s/ Lata Nott

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¹¹ Voting Rights Act, Section 208, 52 U.S.C. § 10508(e).