Senate Committee on Government Operations
Vermont Senate
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Testimony of Campaign Legal Center in Support of Senate Bill 298

I. INTRODUCTION

Campaign Legal Center ("CLC") is pleased to offer this testimony in support of the strongest version of Senate Bill 298, the Vermont Voting Rights Act ("S.B. 298" or the "VTVRA").

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, Virginia, New York, Connecticut, Minnesota, and Colorado, and it brought the first-ever lawsuit under the Washington Voting Rights Act in Yakima County, Washington, and under the Virginia Voting Rights Act in Virginia Beach, Virginia.

CLC strongly supports the adoption of state voting rights acts across the country because they allow historically disenfranchised communities to participate equally in the election of their representatives. Passage of a Vermont Voting Rights Act will allow Vermonters to vindicate their right to vote by building upon the model of the federal Voting Rights Act ("VRA"). CLC's testimony will highlight how S.B. 298 will codify protections against voter suppression and vote dilution in Vermont law and, by incorporating the proposed amendments, offer a more reliable, effective, and cost-efficient means for resolving these violations than the current federal framework under Section 2 of the Voting Rights Act of 1965.

II. BACKGROUND

The federal VRA was 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 collect vast amounts of extraneous evidence as part of Section 2's totality-of-the-circumstances analysis, and litigation often devolves into protracted disputes about what the law requires in the first place, given Section 2's sparse text and sometimes contradictory case law. As a result, these cases require extended discovery, lengthy trials, and exorbitant costs for litigants and taxpayers alike. Given the heavy burden of litigating claims under Section 2, many vote dilution violations go unaddressed. States can address this problem by codifying parallel protections in state law that are clearer and more workable to enforce.

The need for state-level protection is underscored by the steady erosion of voting rights guarantees at the federal level. Since the U.S. Supreme Court's 2013 decision in *Shelby County v. Holder*,[3] jurisdictions with histories of discrimination have been able to implement restrictive voting policies, including dilutive election systems and redistricting maps, without federal oversight. In *Brnovich v. Democratic National Committee*, the Court further weakened Section 2 of the federal VRA by making it even harder for voters to challenge discriminatory laws in court.[4] And the Supreme Court is now considering multiple cases that could wipe away Section 2's remaining protections. In *Louisiana v. Callais*, opponents of the federal VRA asked the Court to find that compliance with Section 2's vote-dilution prohibition is itself unconstitutional. In *Turtle Mountain Band of Chippewa Indians et al., v. Howe* and other cases, voting rights opponents have asked the Court to find that private individuals cannot file suit at all under Section 2, leaving them without the ability to enforce their own voting rights.

At the same time, Congress has not acted to restore or strengthen the federal VRA, failing repeatedly to pass the much-needed John R. Lewis Voting Rights Advancement Act. And the current presidential administration has dismantled the

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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] 594 U.S. 647 (2021).

voting rights enforcement arm of the Civil Rights Division of the U.S. Department of Justice. 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.

Momentum for state VRAs is growing. California (2002), Washington (2018), Oregon (2019), Virginia (2021), New York (2022), Connecticut (2023), Minnesota (2024), and Colorado (2025) have already enacted such protections, while states like Maryland, New Jersey, Florida, Michigan, and Alabama are working to follow suit. Vermont should take advantage of this opportunity and join these other states in ensuring all of its voters have equal access to the democratic process.

III. REASONS TO SUPPORT S.B. 298

S.B. 298 will codify protections against racial discrimination in voting in Vermont law and, with the proposed amendments, provide Vermont voters with powerful tools to challenge voter suppression and vote dilution. The federal VRA contains analogous provisions, but federal courts have blunted those tools over the years. The strongest version of S.B. 298 will establish broader and stronger standards, reaching suppressive and dilutive practices that the federal VRA does not.

A. <u>The VTVRA codifies protections against voter suppression.</u>

The VTVRA's prohibition of vote denial is intended to uproot practices that create racially discriminatory barriers to the ballot box—for example, insufficient polling locations in certain neighborhoods, arbitrary voter purges, or discriminatory allocations of election administration resources.

Under the federal VRA, voters can challenge practices that "result[] in a denial or abridgement" of the right to vote on account of race or color.[7] The Supreme Court, however, has greatly limited the kinds of claims that voters can bring under that provision. Specifically, the Supreme Court created five additional "guideposts" for proving voter suppression that have little bearing on whether voter suppression has occurred.[8] This complex, multi-factor analysis also makes Section 2 voter suppression claims costly and time-consuming to litigate.

With the proposed amendments, S.B. 298 simplifies and strengthens the legal test that applies to voter suppression claims, allowing it to eliminate discriminatory practices that the federal VRA does not reach. Under the amended version of the S.B. 298, a voter suppression violation is established by showing either that the challenged practice results in a material disparity in the ability of a protected class to participate in the electoral process compared to other members of the electorate, *or* that, under the totality of circumstances, the practice results in an

impairment of the ability of a protected class member to participate in the political process. Under the federal VRA, on the other hand, voters must show both a material disparity *and* an impairment under the totality of the circumstances—in addition to satisfying the host of additional factors courts have engrafted onto Section 2.

The proposed amendments to the VTVRA also provide jurisdictions with an opportunity to avoid liability by proving that the challenged practice is necessary to significantly further a compelling governmental interest and that no less suppressive alternative exists. This burden-shifting framework is modeled on a similar framework that is used in nearly all anti-discrimination statutes. 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 respond to plaintiffs' claims. With the proposed amendments, S.B. 298 would offer some of the strongest protections against voter suppression in the country. It will also simplify and streamline these claims, saving time and money for plaintiffs, defendants, and courts.

B. <u>The VTVRA codifies protections against vote dilution.</u>

S.B. 298's prohibition of vote dilution is directed at methods of election that give protected class members an unequal opportunity to participate in the political process (for example, because of an at-large system that allows a local majority to win every seat).

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 (the latter two of these requirements collectively understood as a showing of racially polarized voting).[5] 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.

With the proposed amendments, S.B. 298 would improve on the federal VRA by ensuring that integrated as well as segregated communities can influence elections and elect their candidates of choice and providing plaintiffs an alternative to proving racially polarized voting.

[5] *Thornburg v. Gingle*s, 478 U.S. 30, 50–51 (1986).

Unlike the federal VRA, the amended version of S.B. 298 does not require historically disenfranchised communities to be residentially segregated—that is, be sufficiently large and geographically compact to constitute the majority in a district—to receive its protections. 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.[8] Thus, many 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 amended version of S.B. 298 takes this reality into account.[9] That critical innovation is also a central feature of state voting rights acts passed in California, Washington, Oregon, Virginia, New York, Connecticut, Minnesota, and Colorado.

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 amendments to S.B. 298 provide for 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. S.B. 298's strengthening amendments also set 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 amendments to S.B. 298 also allow 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 U.S. 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.[11]

IV. CONCLUSION

We strongly urge you to enact the strongest version of S.B. 298 and strengthen voting rights for all Vermonters. With the anticipated amendments, S.B. 298 signifies a pivotal inflection point for the state of Vermont to lead in protecting voting rights.

Respectfully submitted,
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