



Robert J. Karabinchak, Chair
Mitchelle Drulis, Vice Chair
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Testimony of Campaign Legal Center in Support of Assembly Bill 1715

I. INTRODUCTION

Campaign Legal Center (“CLC”) offers this testimony in support of Assembly Bill 1715, the John R. Lewis Voter Empowerment Act of New Jersey (“NJVEA”). CLC is a nonpartisan, nonprofit organization dedicated to advancing democracy through law. Through its extensive redistricting and voting rights work, CLC seeks to ensure 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, 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 NJVEA because it will allow historically disenfranchised communities across New Jersey to participate equally in the election of their representatives. Passage of the NJVEA will enable New Jerseyans to vindicate their right to vote by building upon the model of the federal Voting Rights Act (“VRA”), with several key improvements. CLC’s testimony highlights three of those improvements: its protections against voter suppression, its protections against vote dilution, and the pre-suit notice process.

II. BACKGROUND

States can offer new hope for voters by adopting state voting rights acts that improve upon their federal counterpart. By passing the NJVEA, New Jersey 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 historically disenfranchised communities.

Passage of the NJVEA will mark a new era of voter protections for the people of New Jersey by building upon the model of the federal VRA with several key improvements. CLC's testimony highlight how filing a claim under this state voting rights act, rather than the federal VRA, is an improvement, specifically with regard to vote dilution and vote suppression claims and available remedies.

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

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).

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 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, Florida, Michigan, Louisiana, and Alabama are working to follow suit. New Jersey 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 NJVEA will apply more efficient processes and procedures for enforcing the voting rights of traditionally disenfranchised communities. It will also make it less costly for historically disenfranchised communities and local governments to collaboratively develop a remedy before resorting to expensive litigation.

III. REASONS TO SUPPORT THE NJVEA

The NJVEA ensures that New Jersey citizens have powerful legal tools to combat racial discrimination in voting, including by allowing voters to challenge voter suppression and vote dilution. The federal VRA contains analogous provisions, but federal courts have blunted those tools over the years. The standards under the NJVEA are broader and stronger, reaching suppressive and dilutive practices that the federal VRA does not. In addition to enabling New Jerseyans to vindicate their civil rights in court, the NJVEA's pre-suit notice and safe harbor provisions also allow jurisdictions to remedy potential violations without the need for expensive litigation. As discussed below, the following features of the NJVEA are reasons to support the bill:

- The NJVEA provides a framework for determining whether vote dilution or vote denials have occurred that is tailored to the barriers to voting that historically disenfranchised communities face at the local level.
- The NJVEA prioritizes remedies for voting discrimination that enable historically disenfranchised communities to equally participate in the franchise.
- The NJVEA's pre-suit notice provisions allow jurisdictions to proactively remedy potential violations.

- The NJVEA provides express statutory guidance to ensure courts interpret voting-related conflicts in favor of the right to vote.

A. The NJVEA codifies strong protections against voter suppression.

The voter suppression cause of action, found in Section 5 of the NJVEA, enables voters 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.⁵ 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.⁶ This complex, multi-factor analysis also makes Section 2 voter suppression claims costly and time-consuming to litigate.

The NJVEA 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 NJVEA, a 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.

Once plaintiffs have made the required showing, the NJVEA affords the jurisdiction 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. This standard is an important way that the NJVEA 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 respond to plaintiffs’ claims. Section 5 of the NJVEA 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.

⁵ 52. U.S.C. § 10301.

⁶ See *Brnovich v. DNC*, 594 U.S. 647, 666, 669–72 (2021).

B. The NJVEA codifies strong protections against vote dilution.

The vote dilution cause of action, found in Section 6 of the NJVEA, empowers voters to challenge methods of election that give protected class members an unequal opportunity to participate in the political process. Local methods of election might be vote dilutive if a racial, ethnic, or language-minority group lack an equal opportunity to elect candidates of their choice, for example, because of an at-large system that allows a local majority to win every seat, or because of a district plan that cracks communities across multiple districts or packs them into just one.

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.⁷ 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.

As with its voter suppression provisions, the NJVEA codifies into state law the same types of protections against vote dilution that are covered by the federal VRA but strengthens and streamlines the legal standard. It requires plaintiffs to prove two things: a harm and a remedy. Plaintiffs must show that either racially polarized voting or the totality of circumstances combine with a locality's method of election to impair a racial, ethnic, or language-minority group's ability to nominate or elect the candidates of their choice. Plaintiffs must also show that a change to the current method of election would likely mitigate that impairment. By streamlining the increasingly complex standard for federal vote-dilution claims that federal courts have developed over four decades, the NJVEA aligns the applicable legal test with the core of the vote dilution injury.

Importantly, unlike under the federal VRA, a protected class does not need to be residentially segregated—that is, be sufficiently large and geographically compact to constitute the majority in a district—to receive protections under the NJVEA. Following the passage of civil rights legislation, residential segregation has decreased in some parts of the United States, but racially polarized voting and underrepresentation of minority 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 NJVEA addresses vote dilution in all its forms. That critical innovation is also a central feature of state voting rights

⁷ *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

⁸ See generally Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. CHI. L. REV. 1329 (2016).

acts passed in California, Washington, Oregon, Virginia, New York, Connecticut, Minnesota, and Colorado.

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

If a violation of the NJVEA is found, Section 8 of the bill instructs state courts order appropriate remedies that are tailored to address the violation in the local government and prioritize the full and equitable participation and access of voters. This provision recognizes that vote dilution and suppression tactics take many different forms and are not solely limited to traditional methods of voter discrimination. Examples of such remedies may 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; or adding voting hours, days, or polling locations.

Section 8 also specifies that courts may not defer to a proposed remedy simply because it is proposed by the political subdivision. This provision directly responds to an egregious flaw in federal law, where Section 2 has been interpreted by federal courts to grant government defendants the “first opportunity to devise a [legally acceptable] remedial plan.”⁹ 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.¹⁰ 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.¹¹ This practice 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 NJVEA 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

⁹ *Cane v. Worcester County*, 35 F.3d 921, 927 (4th Cir. 1994).

¹⁰ *Id.*

¹¹ No. 21-CV-03232-LKG, 2022 WL 888419, at *1 (D. Md. Mar. 25, 2022).

impacted community, instead of giving deference to the remedy proposed by the government body that violated that community's rights.

D. The NJVEA encourages voters and local governments to work together to resolve voting-rights issues.

Section 11 of the NJVEA also innovates upon its federal counterpart by requiring a notice-and-remedy procedure before plaintiffs can file a lawsuit, encouraging good-faith collaboration to avoid the need for litigation altogether. Under that requirement, a prospective plaintiff must send a jurisdiction written notice of a violation and wait 50 days before suing. During that time, both parties can work together towards a solution to the alleged violation. The jurisdiction can also indicate its intent to remedy a potential violation on its own initiative and, in so doing, gain safe harbor from litigation for at least 140 days while it enacts and implements that remedy. These provisions reflect a recognition that many localities will seek to remedy potential violations on their own, and the NJVEA's notice and safe-harbor provisions enable them to do so without the costs and delay of litigation.

By contrast, no such pre-suit notice and safe-harbor provisions exist 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 New Jersey taxpayers.

The NJVRA also provides for limited cost reimbursement to plaintiffs for pre-suit notices, in recognition of the fact that notice letters often require community members to hire specialized 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 state voting rights acts in California, Oregon, New York, Connecticut, Minnesota, and Colorado.

E. The NJVEA provides guidance to state judges as they exercise discretion and interpret laws, policies, procedures, or practices that govern or affect voting.

Section 2 of the NJVEA specifies that judges should resolve ambiguities in New Jersey state and local election laws and exercise their judicial discretion in favor of protecting the right to vote. Article II, § 1, ¶ 3 of the New Jersey Constitution states that "Every citizen of the United States, of the age of 18 years, who shall have been a resident of this State and of the county in which he claims his vote 30 days, next before the election, shall be entitled to vote . . ." The NJVEA's instruction essentially codifies the existing protections of the New Jersey Constitution, recognizing that vigorous political participation is the foundation of our democracy and that the right to vote is preservative of all other rights.

Section 2 of the NJVEA provides a default pro-voter rule for judges interpreting laws, policies, procedures, or practices and exercising their discretion that govern or affect voting, which will reduce litigation costs by avoiding unnecessary arguments over statutory interpretation. State VRAs in Washington, New York, Connecticut, Minnesota, and Colorado contain a similar instruction.

IV. CONCLUSION

We strongly urge you to pass Assembly Bill 1715 out of this committee, adding New Jersey to the growing list of states that have passed their own state voting rights acts. New Jersey voters deserve the strong, state-level tools and resources the NJVEA provides to defend against discriminatory voting practices and serve as a bulwark against federal attacks on the right to vote.

Respectfully submitted,

/s/ Marisa Wright

Marisa Wright, Legal Fellow

Lata Nott, Director, Voting Rights Policy

CAMPAIGN LEGAL CENTER

1101 14th St. NW, Suite 400

Washington, DC 20005