April 10, 2026

The Honorable Scott Wiener
Chair, Senate Election Committee
1020 N Street, Room 533
Sacramento, CA 95814

RE: SB 1164 (Cervantes): Part of the California Voting Rights Act of 2026 – SUPPORT

Dear Chair Wiener,

On behalf of Campaign Legal Center, I am writing to express our **strong support** for SB 1164 (Cervantes). 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 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.

California demonstrated its voting rights leadership when it became the first state to enact its own state-level voting rights act in 2001. This is an opportunity for California to once again demonstrate its pre-eminent respect and solicitude for the right to vote. The California Voting Rights Act of 2026—including SB 1164 (Cervantes)—is a powerful and effective response to the moment that will ensure that California voters are protected against unequal access to the democratic process.

While California has made many advances in the fight against discrimination, voter suppression, and vote dilution, California's own history of discrimination illustrates that vigilance and thoughtful policymaking are key to expanding and solidifying those advances. Over the last half century, California voters have relied upon the federal Voting Rights Act (VRA) to protect their right to vote on an equal basis. Even in recent years, many jurisdictions have been found to engage in vote dilution in violation of either the federal or California voting rights acts. Today, California still suffers from racial disparities in political participation, and many language minority groups lack access to translated voting materials. Further, federal courts have repeatedly weakened the protections of the federal VRA and voters' ability to enforce them.

For these reasons—outlined further in this letter—California must respond to the moment and enact SB 1164 (Cervantes).

I. Background

While California has made significant progress over the last 150 plus years, the state has a checkered past with respect to discrimination in voting. The original California Constitution of 1849 only allowed white, male citizens to vote. *See* Cal. Const. art. 2, § 1 (1849) ("Every white male citizen of the United States . . . shall be entitled to vote"). It also disenfranchised all people convicted of "infamous" crimes. *Id.* art. 2, § 5. California voted against ratifying the Fifteenth Amendment in 1870.[1] Then, in 1879, California expressly amended its Constitution to declare that "no native of China" could vote.[2]

For decades, California voters relied upon the federal Voting Rights Act for protection from discrimination. After the Voting Rights Act of 1965 was passed, multiple California counties were subjected to preclearance. Monterey County, for example, failed to receive preclearance for voting changes from the United States Department of Justice for multiple voting related changes.[3] And Los Angeles County was found to have engaged in intentional discrimination against Hispanic voters.[4]

However, in recent years, federal courts and federal enforcement priorities have substantially weakened the protections of the federal VRA. In 2013, the U.S. Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 preclearance by invalidating its coverage formula.[5] As one would expect, this opened the floodgates for previously covered jurisdictions to impose restrictive voting laws.[6] In 2021, the Supreme Court significantly narrowed voter suppression claims under Section 2 of the VRA in *Brnovich v. DNC*.[7] This year, the Court will issue a significant decision that will shape vote dilution claims under Section 2 of the VRA. In *Louisiana v. Callais*, the Court could further narrow the protections available under the federal VRA and make it impossible to address racial vote dilution through Section 2.[8] In addition, one federal circuit court has repeatedly held that Section 2 of the VRA cannot be enforced by private litigants, which may be reviewed by the Supreme Court in the near future.[9]

More than two decades ago, California enacted the first state-level voting rights act, the CVRA of 2001, to address the persistent harms caused by dilutive at-large election systems. Since

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[1] Patrick Berry and Stuard Baum, *California Voters Will Have the Chance to Restore Voting Rights to Tens of Thousands*, Brennan Center for Justice (June 25, 2020), https://www.brennancenter.org/our-work/analysis-opinion/california-voters-will-have-chance-restore-voting-rights-tens-thousands.
[2] *Id.*
[3] *See Lopez v. Monterey Cnty., Cal.*, 519 U.S. 9 (1996); *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999); *Gonzalez v. Monterey Cnty., Cal.*, 808 F. Supp. 727 (N.D. Cal. 1992).
[4] *See Garza v. Cnty. of Los Angeles, Cal.*, 756 F. Supp. 1298 (C.D. Cal. 1990).
[5] *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).
[6] *See, e.g.*, *How Shelby County v. Holder Broke Democracy*, Legal Def. Fund, https://www.naacpldf.org/shelby-county-v-holder-impact/ (last visited Mar. 24, 2026).
[7] *Brnovich v. DNC*, 594 U.S. 647 (2021).
[8] *Louisiana v. Callais*, No. 24-109 (U.S. 2024).
[9] *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 586 F. Supp. 3d 893 (E.D. Ark. 2022) (concluding Section 2 lacks a private right of action), *aff'd* 86 F.4th 1204 (8th Cir. 2023); *Turtle Mountain Band of Chippewa Indians v. Howe*, 137 F.4th 710 (8th Cir. 2025).

then, more than 600 local governments have abandoned at-large elections, many in response to claims of vote dilution under the CVRA of 2001.[10] But the CVRA of 2001 only addresses the dilutive effect of at-large election systems—it does nothing about dilutive districted systems or any forms of voter suppression. Because of its limited scope, Californians cannot rely on the current CVRA alone to meet the challenges facing voters today.

Neither the federal VRA nor the current CVRA are poised to meet the needs of these voters moving forward. That's why California must act now to protect the rights of millions of California voters.

II. Reasons to Support SB 1164 (Cervantes)

SB 1164 is a well-designed state voting rights act that establishes both important protections and thoughtful procedures to make those protections a reality. It builds on the model set by CVRA of 2001 with new protections against voter suppression and broader protections against vote dilution. These protections under California law echo and improve on the federal VRA but do not depend on federal statutes or case law. And the procedures that enforce them are designed to maximize protections for voters while minimizing the need for protracted litigation through collaborative notice letter procedures and preapproval requirements for prior offenders.

A. SB 1164 codifies strong and enduring protections against vote dilution.

The vote dilution cause of action, found in Section 5 of SB 1164, provides an enduring protection against dilutive election systems that improves upon both the federal VRA and existing CVRA. Specifically, SB 1164 would prohibit state and local governments from implementing "any method of election that has the effect, will likely have the effect, or is motivated in part by the intent, of diluting the vote of protected class members."[11] This provision replaces the CVRA's current vote dilution cause of action, which only applies to at-large election systems. Instead, SB 1164 would protect against *any* election system that is dilutive.

This prohibition creates two kinds of claims plaintiffs can bring together or independently: an effects-based claim and an intent-based claim. For an effects-based claim, SB 1164 establishes an administrable, straightforward test for vote dilution that requires plaintiffs to establish two elements: an "impairment" element and a "benchmark" against which to measure the impairment.[12] The "impairment" element can be satisfied 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 nominate or elect candidates of choice.[13] This inquiry is directly drawn from federal law. *Second*, plaintiffs can alternatively prove that, under the totality of circumstances, the equal opportunity or ability to elect or nominate candidates of their choice is

[10] To learn more about the CVRA of 2001, including the urgent need for reform, see *Securing Fair Representation in California, Building on the California Voting Rights Act's Success to Address Emerging Threats to Democracy*, ACLU of Southern California & ACLU of Northern California (Sep. 2025), https://www.aclusocal.org/publications/securing-fair-representation-california/.
[11] SB 1164, Sec. 5, *proposed* Cal Elec. Code 14028(b)(2).
[12] *Id*. Sec. 5, *proposed* Cal. Elec. Code 14028(b)(3).
[13] *Id*. Sec. 5, *proposed* Cal. Elec. Code 14028(b)(3)(A)(i).

impaired.[14] This inquiry is guided by the totality of circumstances factors in SB 1164, which are generally drawn directly from federal law and discussed in more detail below.[15] Alternatively, plaintiffs can bring an intent-based claim under SB 1164. Similar to the federal VRA, this would be an option but not a requirement: plaintiffs *may* invoke evidence of intent, but they are not *required* to provide evidence of intent to prove vote dilution.[16]

The flexibility to prove the "impairment" requirement in either of two ways serves an important policy function. On the one hand, permitting plaintiffs to satisfy the "impairment" requirement based on the presence of racially polarized voting that results in an impairment in the ability of protected class voters to elect candidates of their choice, without requiring proof of the "totality of the circumstances," is appropriate because "[e]vidence of racially polarized voting is the linchpin of a [racial] vote dilution claim."[17] Streamlining vote dilution litigation to allow harm to be demonstrated solely based on racially polarized voting that results in an impairment in the ability of protected class voters to elect candidates of choice—especially when confirmed and concretized by a showing that a less dilutive remedy is lawfully available (more on this below)—serves judicial efficiency, because the wide-ranging "totality of circumstances" inquiry can require significant evidence and often results in costly and prolonged litigation.[18] Moreover, permitting harm to be demonstrated solely based on the presence of dilutive racially polarized voting makes litigation outcomes more predictable because the inquiry is quantitative and objective, thereby increasing the likelihood of efficient resolution of violations without the need for litigation in the first place. Finally, SB 1164 expands plaintiffs' options for demonstrating racially polarized voting by including "political preferences" in the definition of "racially polarized voting."[19] This change allows plaintiffs to use survey data about the political views of racial groups in areas where there is insufficient data to measure racial voting patterns.

On the other hand, permitting plaintiffs to satisfy the "impairment" element based on the "totality of circumstances," without requiring plaintiffs to prove the existence of racially polarized voting through a quantitative analysis, serves an important purpose because racially polarized voting analyses are often associated with complex and costly expert studies that may not be

[14] *Id.* Sec. 5, *proposed* Cal. Elec. Code 14028(b)(3)(A)(ii).
[15] *Id.* Sec. 5, *proposed* Cal. Elec. Code 14028(c)(1).
[16] *Id.* Sec. 5, *proposed* Cal. Elec. Code 14028(b)(4).
[17] *See Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1207 (5th Cir. 1989) (citation and quotation omitted); *Thornburg v. Gingles*, 478 U.S. 30, 48-49 n.15 (1986) ("[T]he most important Senate Report factors bearing on § 2 challenges to multimember districts are the 'extent to which minority group members have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized.' [S. Rep., at 28-29]. If present, the other [Senate] factors . . . are supportive of, but *not essential to*, a minority voter's claim."); *Wright v. Sumter Cnty. Bd. of Elections and Registration*, 979 F.3d 1282, 1305 (11th Cir. 2020) ("[Racially polarized voting] will ordinarily be the keystone of a dilution case."); *Ga. State Conf. of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1342, 1347-48 & n.9 (11th Cir. 2015); *United States v. City of Euclid*, 580 F. Supp. 2d 584, 605 (N.D. Ohio 2008).
[18] *See generally The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation*, Legal Def. Fund (Aug. 8, 2024), https://www.naacpldf.org/wp-content/uploads/Section-2-VRA-costs_as-of-8.8.24-final-00246.pdf.
[19] SB 1164, Sec. 2, *proposed* Cal. Elec. Code 14026(h).

possible in small jurisdictions. Measuring racially polarized voting often depends on election return data, which is sometimes unavailable, especially in smaller jurisdictions or in jurisdictions where candidates preferred by protected class voters simply stop running for office due to a long history of vote dilution and disenfranchisement.[20] Thus, one of the consequences of vote dilution—a lack of candidates preferred by protected class voters running in the first place—will often mean that prospective plaintiffs will be hard pressed to find "proof" that racially polarized voting exists in actual election results.[21] Proof of racially polarized voting is also simply not necessary in all cases, especially where dilution is obvious based on the totality of circumstances inquiry.

Compared to the federal VRA, these simplified elements provide a more relevant standard for protecting voters from dilutive election systems. Judicial application of the federal VRA requires plaintiffs in each case to establish three preconditions—(1) the minority group must be large and geographically compact enough to form a majority in a reasonably configured single-member district in an illustrative plan for benchmarking purposes; (2) the minority group must be politically cohesive; and (3) the majority must vote sufficiently as a block to usually defeat the minority's preferred candidate—and also establish that under the totality of the circumstances, protected class members have less opportunity to participate in the political process or elect candidates of their choice.[22] Each of these requirements must always be satisfied, even when a more flexible benchmark could easily concretize a violation, or when the presence of a violation is crystal clear based on either dilutive racially polarized voting or a totality of circumstances analysis.

SB 1164's "benchmark" element serves to confirm and concretize the vote dilution by demonstrating that a fairer system is possible. The requirement to set forth a benchmark is satisfied if the plaintiff can identify a constitutional remedy that would likely mitigate the harm suffered by protected class members.[23] For example, if a lawsuit challenges an at-large election that denies protected class members any representation, the benchmark element can be satisfied if there is a potential district-based map[24] or an alternative method of election, like proportional ranked choice voting or cumulative voting, that would provide protected class voters with an opportunity to elect candidates of choice.[25] Similarly, if a lawsuit challenges a districting plan that, for instance, packs protected class members into only one district in which they can elect candidates of choice, the

[20] *See* Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 Emory L.J. 299, 348-49 & n.273 (2023) (citing Christopher S. Elmendorf et al., *Racially Polarized Voting*, 83 U. Chi. L. Rev. 587, 682-89 (2016)).
[21] *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994); *Cofield v. City of LaGrange*, 969 F. Supp. 749, 777 (N.D. Ga. 1997).
[22] *See generally Thornburg v. Gingles*, 478 U.S. 30 (1986).
[23] SB 1164, Sec. 5, *proposed* Cal. Elec. Code 14028(b)(3)(B).
[24] *See, e.g.*, *Allen v. Milligan*, 599 U.S. 1, 19-20 (2023).
[25] *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1560 & n.21 (11th Cir. 1984); *Ala. State Conf. of the NAACP v. City of Pleasant Grove, Ala.*, No. 2:18-cv-02056-LSC, 2019 WL 5172371, at *1 (N.D. Ala. Oct. 11, 2019); *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010); *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740 (N.D. Ohio 2009).

benchmark element can be satisfied if an alternate plan is drawn in which protected class members have two districts in which they can elect candidates of choice, or if an alternative method of election could be implemented that would mitigate the dilution resulting from the configuration of the districts.

The idea of a benchmark builds on both federal and state jurisprudence. In federal vote dilution claims, there is a similar concept that requires plaintiffs to draw an illustrative districting plan with a "geographically compact" majority in a single-member district.[26] SB 1164 provides for a more flexible benchmarking requirement than federal law by drawing from California cases implementing the CVRA.[27] Instead, plaintiffs need only show that there is a new method of election or change to the existing method of election that would likely mitigate the impairment while meeting other constitutional requirements.[28] This makes it possible for communities of protected class members that are *not* residentially segregated but are still experiencing vote dilution to enforce their rights. Plaintiffs still have the option of using illustrative districting plans as a "benchmark" to support a vote dilution claim.

As described above, one of the two ways to satisfy the "impairment" element of the legal standard for vote dilution involves a "totality of circumstances" inquiry.[29] SB 1164 codifies several nonexclusive examples of "totality of the circumstances" factors.[30] These factors include the history of discrimination within the local government, the extent to which members of the protected class have been elected to office within the local government, and the existence of racially polarized voting.[31]

The "totality of the circumstances" factors codified in SB 1164 are based on the Senate Report concerning the 1982 amendments to the federal Voting Rights Act. These so-called "Senate Factors" have been applied by federal courts.[32] SB 1164 adds to and better spells out those factors where necessary to ensure that voters' rights are fully protected.[33] Its list of factors is not an exact copy of the Senate Factors identified by the United States Supreme Court in *Gingles*; it also includes additional factors, including factor (iv) (whether members of protected classes register or vote at lower rates) and factor (vi) (whether candidate members of protected classes qualify for the ballot or receive financial support at lower rates). To be sure, every factor that is listed in SB 1164 would be relevant in federal Section 2 litigation because the "Senate Factors"

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[26] *See Bartlett v. Strickland*, 556 U.S. 1 (2009).
[27] *See, e.g.*, *Pico Neighborhood Ass'n v. Santa Monica*, 15 Cal. 5th 292, 315 (2023).
[28] SB 1164, Sec. 5, proposed Cal. Elec. Code 14028(b)(3)(B).
[29] SB 1164, Sec. 5, *proposed* Cal. Elec. Code 14028(b)(3)(A)(ii).
[30] *Id.* Sec. 5, *proposed* Cal. Elec. Code 14028(c)(1)(A).
[31] *Id.*
[32] *See Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986) (The 1982 Senate Report is the "authoritative source for legislative intent" in analyzing the amended Section 2); *accord. Allen v. Milligan*, 599 U.S. 1, 10, 30 (2023) (referencing the Senate Report); *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 660 (2021) (same).
[33] S. Rep. No. 97-417, 97th Cong, 2nd Sess. at 28-29 (1982).

are not exhaustive. But SB 1164 simply provides a clearer and more detailed list of factors, thus reducing litigation costs and uncertainty for all parties. This also protects voters against the possibility of an increasingly hostile federal judiciary subsequently deciding not to give proper consideration to some of these factors.

SB 1164 also provides guidance for courts applying totality of circumstances factors. For example, it explains that "no set number or combination of the factors . . . is required to be met to determine that a violation occurred."[34] SB 1164 also explains that evidence is "more probative if it relates to the political subdivision in which the alleged violation occurred, but evidence related to the state or the geographic region in which that political subdivision is located may also be probative."[35] Notably, this provision makes clear that evidence of the factors will hold at least some probative value regardless of where in the state it arises from.

These provisions codify the weight of authority from federal courts construing the Senate Factors.[36] The Senate Report that gave rise to the factors indicates: "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other."[37] And federal courts commonly apply the commonsense principle codified in SB 1164 that the most probative evidence relates directly to the local government at issue in the case, but other evidence still holds probative value.[38] By codifying these rules, SB 1164 ensures that parties will not need to litigate the proper way to construe and apply the totality of the circumstances factors, thus reducing litigation costs and uncertainty.

B. SB 1164 adds protections against voter suppression to the CVRA.

SB 1164 creates a new cause of action under state law to protect California voters from voter suppressive policies and practices.[39] This provision prohibits state agencies and local governments from implementing "any election policy or practice that results in, is likely to result

[34] SB 1164, Sec. 5, *proposed* Cal. Elec. Code 14028(c)(1)(B).

[35] *Id.* Sec. 5, *proposed* Cal. Elec. Code 14028(c)(1)(D).

[36] *See, e.g.*, *Gingles*, 478 U.S. at 79 (requiring an "intensely local appraisal" at the totality of circumstances stage).

[37] S. Rep. No. 97–417, *supra* n.29 at 29. *See also Brnovich*, 594 U.S. at 669-72 (indicating that under the totality of circumstances, any relevant circumstances "may" be considered, and suggesting that some circumstances are less relevant to vote denial cases); *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994) ("An inflexible rule would run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.'"); *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213, 230 (2d Cir. 2021) (clarifying that no specific factors or specific number of factors must be shown).

[38] The Fifth Circuit, for instance, has held that "the exogenous character of [state-wide] elections does not render them nonprobative" in a case involving a smaller jurisdiction, *Rangel v. Morales*, 8 F.3d 242, 247 (5th Cir. 1993), but also that "exogenous elections . . . are less probative than elections involving the specific office that is the subject of the litigation." *Clark v. Calhoun Cnty.*, 88 F.3d 1393, 1397 (5th Cir. 1996). *See also Cottier v. City of Martin*, 551 F.3d 733, 740-41 (8th Cir. 2008) (considering evidence relating to the city, county, and state in a case alleging that the city of Martin's wards diluted Native American votes, but giving "little weight" to evidence that "involved elections outside of Martin.").

[39] SB 1164, Sec. 5, *proposed* Cal. Elec. Code 14028(a)(1).

in, or is motivated in whole or in part by the intent to result in, voter suppression."[40] This protection is similar to the vote denial protections under Section 2 of the federal Voting Rights Act.[41] And it builds upon similar protections against voter suppression or vote denial that have been adopted in states seeking to address shortcomings in Section 2 of the federal VRA, including New York, Connecticut, Colorado, and Minnesota.[42] The existing CVRA does not provide explicit protection against voter suppression.

Under SB 1164, plaintiffs can establish a voter suppression claim in three ways: two methods of establishing an effects-based claim and a separate intent-based claim. First, plaintiffs can demonstrate a violation if a policy or practice results in a "material disparity affecting protected class members in voter participation, access to voting opportunities, or the opportunity or ability to participate in any stage of the political process."[43] Second, plaintiffs can demonstrate a violation if they show, under the totality of the circumstances, an impairment of their equal opportunity or ability to participate in any stage of the political process.[44] Third, plaintiffs may establish a violation with direct or circumstantial evidence of intentional discrimination—but that evidence is not required for an effects-based claim.[45]

The flexibility to allow plaintiffs to demonstrate an effects-based voter suppression claim using either of two methods serves an important policy function. On the one hand, the statute permits plaintiffs to prove a violation using statistically significant quantitative evidence demonstrating a causal relationship between a challenged act or practice and a disparity affecting protected class members. This allows claims to be quickly and easily resolved when there is clear, irrefutable statistical evidence of a disparity. For example, if a jurisdiction holds elections "off-cycle" (*i.e.*, on a date that does not align with typical even-year November elections), and the off-cycle election disproportionately suppresses turnout among a particular protected class compared to "on-cycle" elections (*i.e.*, elections at the same time as federal and state elections in November of even years), the off-cycle election could violate the voter suppression provision and a court could order the jurisdiction to move its elections on-cycle.[46]

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[40] *Id.* Sec. 5, *proposed* Cal. Elec. Code 14028(a)(2).

[41] SB 1164's guarantee that protected class voters are afforded an "equal opportunity or ability of members of the protected class to nominate or elect candidates of their choice" mirrors similar language in the federal VRA. *See* 52 U.S.C. § 10301(b).

[42] NYVRA, N.Y. Elec. Law § 17-206(2)(b)(i) (McKinney 2024); CTVRA, Conn. Gen. Stat. § 9-368j(b) (2023); Col. Rev. Stat. § 1-47-105 (2025); MNVRA, Minn. H.F. 4772, 2024, Minn. Laws, ch. 112, art 3.

[43] SB 1164, Sec. 5, *proposed* Cal. Elec. Code 14028(a)(3)(A).

[44] *Id.* Sec. 5, *proposed* Cal. Elec. Code 14028(a)(3)(B).

[45] *Id.* Sec. 5, *proposed* Cal. Elec. Code 14028(a)(6).

[46] *See NAACP v. Hampton Cnty. Election Comm'n*, 470 U.S. 166, 182-83 (1985); *NAACP, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 401 (S.D.N.Y. 2020); *United States v. Vill. of Port Chester*, No. 06-CV-15173(SCR), 2008 WL 190502, at *28 (S.D.N.Y. Jan. 17, 2008); *Corbett v. Sullivan*, 202 F. Supp. 2d 972, 984-85 (E.D. Mo. 2002).

On the other hand, the statute permits plaintiffs to prove a voter suppression violation based on the "totality of circumstances." This serves an important purpose because statistical evidence may not always be available to show that a particular harmful act or practice results in a racial disparity. If, for example, a county permitted voter registration for only three hours one day a week, and the totality of circumstances showed that this action made it more difficult for Black people to register than white people, Black people would be able to prove a violation, even without data demonstrating a racial disparity. Or, if a jurisdiction invests resources in voter registration opportunities for certain communities but not for communities with particular protected classes, a judge could conclude, under the totality of the circumstances, that this failure violates the voter suppression provision even if data demonstrating a racial disparity has not yet manifested.

SB 1164 codifies into California law the same kind of protections against voter suppression that have long been covered by Section 2 of the federal VRA,[47] but adopts a clarified, streamlined, and strengthened legal standard for these claims. The material disparity standard is drawn from principles acknowledged by the Supreme Court,[48] and the totality of circumstances standard is similarly drawn from federal law.[49] Like Section 2 of the federal VRA, this provision is sufficiently broad to cover any conduct related to voting that could result in racial discrimination in voting.[50] And, like Section 2 of the federal VRA, claims can be brought against policies that are intentionally discriminatory *or* that have discriminatory effects.[51]

Yet, federal courts have substantially constrained the vote denial protections available under Section 2 of the federal VRA, creating a gap that SB 1164 fills. The U.S. Supreme Court

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[47] *See, e.g.*, *Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524 (6th Cir. 2014), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656 (6th Cir. 2016).

[48] *See Brnovich*, 594 U.S. at 649 ("The size of any disparities in a rule's impact on members of different racial or ethnic groups is an important factor to consider.").

[49] *Id.* at 674 (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.").

[50] Federal courts have considered Section 2 vote denial challenges to a wide variety of practices. These include inequalities in access to voter registration, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 408 (5th Cir. 1991); changes to early voting and polling locations, *Allen v. Waller Cty.*, 472 F. Supp. 3d 351 (S.D. Tex. 2020); *Sanchez v. Cegavske*, 214 F. Supp. 3d 961, 973 (D. Nev. 2016); *Spirit Lake Tribe v. Benson Cty.*, No. 2:10-CV-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010); voter purges, *Toney v. White*, 488 F.2d 310 (5th Cir.1973); *Allen v. City of Evergreen*, No. 13-0107-CG-M, 2014 WL 12607819 (S.D. Ala. Jan. 13, 2014); property qualifications, *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586 (9th Cir. 1997); *Murray v. Kaple*, 66 F. Supp. 2d 745 (D.S.C. 1999); English-literacy requirements, *P.R. Org. for Political Action v. Kusper*, 490 F.2d 575 (7th Cir.1973); *United States v. Berks Cty.*, 277 F. Supp. 2d 570 (E.D. Pa. 2003); *Hernandez v. Woodard*, 714 F. Supp. 963 (N.D. Ill. 1989); notary requirements, *People First of Ala. v. Merrill*, 491 F.Supp.3d 1076, 1123 (N.D. Ala. 2020); *Goodloe v. Madison Cty. Bd. of Elect. Comm'rs*, 610 F. Supp. 240 (S.D. Miss. 1985); and practices related to election workers, *United States v. Brown*, 561 F.3d 420 (5th Cir. 2009); *Coal. for Educ. in Dist. One v. Bd. of Elections of City of N.Y.*, 495 F.2d 1090 (2d Cir. 1974); *Harris v. Siegelman*, 695 F. Supp. 517 (M.D. Ala. 1988). *See also* Brief for NAACP Legal Def. & Educ. Fund, Inc., as Amicus Curiae in Support of Respondents, *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647 (2021).

[51] *See* 52 U.S.C. § 10301(b).

has never offered a legal standard to govern vote denial claims under Section 2.[52] In *Brnovich v. Democratic National Committee*, however, the Court advanced a narrow view of how Section 2 applies to vote denial claims.[53] The text and legislative history of Section 2 are clear: Congress intended to protect voters from time, place, and manner voting rules that have a discriminatory effect on protected class members.[54] Yet, in declining to provide a test for vote denial, the Court in *Brnovich* instead announced a flawed set of "guideposts" to inform decision-making in these cases.[55] The guideposts, which are discussed in more detail below, include considerations entirely unrelated to the effect of the challenged practice on protected class members. They include, for example, whether the challenged practice was standard in 1982, when Congress enacted Section 2's current language, and whether voters can rely on a different voting method to avoid the challenged practice.[56]

Brnovich substantially narrowed Section 2's protections against vote denial by raising the bar for plaintiffs seeking to vindicate these claims. The guideposts are not dispositive and distract from the core question of whether the challenged act or practice has a discriminatory effect on protected class members. And, because a practice can both have a discriminatory effect and, for instance, have been standard in 1982, the guideposts can be used to insulate some practices with discriminatory effects from the law. What's more, the Court in *Brnovich* endorsed the problematic state practice of relying on an amorphous risk of voter fraud to justify restrictive voting practices, even without any evidence of actual voter fraud.[57] After *Brnovich*, lower courts do not have a unified legal standard for evaluating vote denial claims. And there has not been a single successful vote denial claim to reach final judgment since *Brnovich*.[58]

SB 1164 explicitly bars consideration of the widely criticized "guideposts" that the Supreme Court identified in *Brnovich*.[59] Specifically, SB 1164:

- excludes consideration of the number or share of protected class members that are *not* burdened by the challenged act or practice.[60] For example, if a plaintiff alleges that Black voters are harmed because a polling place is closed in a particular Black neighborhood, it should not be relevant that there is a different Black neighborhood in a different part of the political subdivision that still has access to a different polling place.

[52] *Brnovich*, 594 U.S. at 648 (2021) ("the 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.").
[53] *Id.* at 669-72.
[54] *Id.* at 701-02 (Kagan, J., dissenting).
[55] *Id.* at 669-72.
[56] *Id.* at 670-71.
[57] *Id.* at 672.
[58] Mich. L. Voting Rts. Initiative, *Section 2 Cases Database*, https://voting.law.umich.edu/database/ (last visited Apr. 10, 2026).
[59] 594 U.S. 647, 668-72 (2021).
[60] SB 1164, Sec. 5, *proposed* Cal. Elec. Code 14028(c)(3)(A)(i).

- excludes consideration of the so-called "pedigree" of the challenged act or practice.[61] In *Brnovich*, the Supreme Court held that the fact that a practice was widely used in 1982 (when Section 2 was amended) should weigh against plaintiffs. However, the fact that a particular practice may have been used has no relevance to the harm to protected class members. It may have always been discriminatory, or changing circumstances could have altered its impact over time.
- excludes consideration of the use of the challenged act or practice in other jurisdictions.[62] For example, if a jurisdiction imposes a voter registration procedure that is racially discriminatory, the fact that similar procedures may be used elsewhere should not be a defense.
- excludes consideration of other forms of voting.[63] For example, if a plaintiff brings a claim because a political subdivision shut down a polling place in a Black community, the fact that those voters can vote by mail should not be relevant to the claim.
- precludes local governments from avoiding liability simply by claiming that their actions are necessary to prevent "voter fraud," without providing any proof that the challenged policy or voting rule is actually necessary to solve a demonstrated problem.[64]
- ensures that claims can be brought against policies or practices that are intentionally discriminatory or that have discriminatory effects.[65] This tracks the federal VRA.[66]

By barring consideration of the guideposts established by the Supreme Court in *Brnovich*, SB 1164 ensures that California courts focus on the core question of whether the challenged act or practice has a discriminatory effect on protected class members. This is critical to ensure efficient and predictable resolution of potential violations and to codify, on the state level, the robust protections against voter suppression envisioned by the drafters of the federal VRA.

C. SB 1164 provides effective mechanisms to enforce its voting rights protections.

1. SB 1164 establishes a collaborative notice letter process

SB 1164 builds on the pre-existing notice letter process to provide an efficient means of realizing the protections of the CVRA without undue expense for voters, courts, and governments.[67] This is intended to allow local governments to proactively remedy potential violations before litigation occurs.

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[61] *Id.* Sec. 5, proposed Cal. Elec. Code 14028(c)(3)(A)(ii).
[62] *Id.* Sec. 5, *proposed* Cal. Elec. Code 14028(c)(3)(A)(iii).
[63] *Id.* Sec. 5, *proposed* Cal. Elec. Code 14028(c)(3)(A)(iv).
[64] *Id.* Sec. 5, *proposed* Cal. Elec. Code 14028(c)(3)(B). This provision relies on the standards set out in *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 246 (4th Cir. 2014) and *Veasey v. Abbott*, 830 F.3d 216, 262-64 (5th Cir. 2016).
[65] SB 1164, Sec. 5, *proposed* Cal. Elec. Code 14028(a)(3)(A).
[66] *See* 52 U.S.C. § 10301(b); *see also Milligan*, 599 U.S. at 25 (2023) ("we have reiterated that § 2 turns on the presence of discriminatory effects, not discriminatory intent.").
[67] SB 1164, Sec. 1, *proposed* Cal Elec. Code 10010.

SB 1164 also creates a notice letter and "safe harbor" process for resolving voter suppression claims. Section 9 provides local governments with a 45-day "safe harbor" period after receiving a notification letter during which they cannot be sued, in order to encourage local governments to voluntarily remedy voter suppression violations without the need for litigation.[68] Simply passing any resolution without committing to adopt a specific remedy does not qualify for the safe harbor protection. For instance, courts in other states evaluating similar provisions have held that merely adopting a resolution to investigate whether a violation exists, and committing to adopt a remedy if the local government concludes that a violation exists, is insufficient to trigger the safe harbor.[69] This provision of SB 1164 is consistent with that holding, and is intended to incentivize local governments to engage in collaborative efforts to resolve potential violations without litigation. If the local government does not adopt a valid resolution within the 45-day safe harbor period, the prospective plaintiffs may file a lawsuit.

SB 1164 also contains three primary exceptions to this notification and safe harbor process. If any of these exceptions are present, plaintiffs may immediately file suit without having to first submit a notification letter or otherwise comply with these pre-suit requirements. *First*, plaintiffs seeking preliminary relief with respect to an upcoming election are not required to follow the notice letter process.[70] This exception exists to ensure that the notification and safe harbor requirements do not result in delays that could potentially preclude the plaintiff from obtaining relief for a particular upcoming election. For this reason, an "upcoming election" is not time-limited but applies whenever a plaintiff seeks preliminary relief for an upcoming election. This provision does not have time limitations because plaintiffs may seek preliminary relief substantially far in advance of an election in order to ensure sufficient time for discovery, motion practice, trial proceedings, and appellate review.

Second, plaintiffs do not have to send a notification letter before filing a lawsuit if another party has already submitted a notification letter alleging a substantially similar violation and is eligible to file a lawsuit.[71] This exception exists to avoid unnecessary notification proceedings and attendant delay in resolving potential discrimination once a local government has failed to take action in response to a notification letter. Moreover, it gives plaintiffs the necessary flexibility to add or change the parties on a complaint so long as one prospective plaintiff has complied with SB 1164's notification and safe harbor requirements.

Third, plaintiffs need not file a notice letter if they can show that the prospect of obtaining relief via a notice letter would be futile.[72] This exception would apply if a plaintiff previously

[68] SB 1164, Sec. 9, *proposed* Cal. Elec. Code 14030(b).
[69] *See, e.g.*, Decision & Order on Motion to Dismiss at 1-2, *Clarke v. Newburgh*, Index No. EF002460-2024, (N.Y. Sup. Ct. May 17, 2024), Doc No. 31 (defendants fail to "satisfy the requirements" to trigger the "safe harbor" because "the resolution that Defendants passed . . . lacks the intention to enact and implement specific remedies, the steps to accomplish that process, and a timetable for implementation.").
[70] SB 1164, Sec. 9, *proposed* Cal. Elec. Code 14030(b)(5)(A).
[71] SB 1164, Sec. 9, *proposed* Cal. Elec. Code 14030(b)(5)(B).
[72] SB 1164, Sec. 9, *proposed* Cal. Elec. Code 14030(b)(5)(C).

submitted a notification letter and the local government "failed to implement" a remedy. This exception is also intended to apply either if the local government fails to implement any remedy or if a purported remedy adopted by a local government fails to actually remedy the alleged violation.

2. Preapproval for prior offending jurisdictions

SB 1164 creates a preapproval process that can proactively protect voters before a violation of the CVRA even occurs in jurisdictions in California that have been found to violate federal or state voting laws. Under a process to be developed by the California Attorney General, certain jurisdictions will be required to submit requests to preapprove election policy or procedure changes prior to implementing them.[73] These preapproval procedures will serve as an important remedy to protect members of protected classes without the need for additional litigation.

Most jurisdictions in California won't be subject to preapproval. Only jurisdictions that have admitted to or been found liable of violating the CVRA, the federal VRA, the federal Civil Rights Act, or constitutional protections for the right to vote are subject to preapproval.[74] This provision is informed by the "bail-in" provisions of Section 3(c) of the federal Voting Rights Act,[75] but there are a few important differences. *First*, Section 3(c) of the federal VRA only provides discretionary bail-in. In other words, even where jurisdictions have violated statutory or constitutional protections for the right to vote, judges are not required to subject those jurisdictions to preclearance. *Second*, Section 3(c) of the federal VRA does not impose any cap on the amount of time that local governments can be subject to judicial approval.[76] In contrast, SB 1164 limits preapproval to a maximum of 10 years.[77]

Third, unlike the federal VRA's preclearance regime, SB 1164 does not require review of all changes to election law. Instead, preapproval is only required for certain "covered practice[s]," which are particularly likely to have discriminatory effects. These covered practices include adopting new methods of election, new districting plans, annexing or deannexing territory, and reducing language assistance.[78] Research has shown that these practices are especially likely to emerge in communities experiencing backlash to the growing influence of racial minorities participating in the electoral process.[79] Because the preapproval process is targeted at only the

[73] SB 1164, Sec. 10, *proposed* Cal. Elec. Code 14030.5(c).
[74] *Id*., Sec. 10, *proposed* Cal. Elec. Code 14030.5(a).
[75] 52 U.S.C. § 10302(c).
[76] 52 U.S.C. § 10302(c).
[77] SB 1164, Sec. 10, *proposed* Cal. Elec. Code 14030.5(a).
[78] *Id.* Sec. 10, *proposed* Cal. Elec. Code 14030.5(b).
[79] The Need to Enhance the Voting Rights Act: Practice-Based Coverage: Hearing on H.R. 4 Before the H. Comm. on the Judiciary, 117th Cong. 10 (2021) (written Testimony of Professor Bernard L. Fraga, Emory University, at i, 8); Bernard L. Fraga, *A Population-Limited Trigger for Practice-Based Preclearance Under the Voting Rights Act*, Emory University (July 27, 2021), https://docs.house.gov/meetings/JU/JU10/20210727/113962/HHRG-117-JU10-Wstate-FragaB-20210727.pdf (finding that a population-based coverage formula can help protect the rights of Asian American and Latino voters who may live in areas that do not have a history of repressing the Black vote); Erin Hustings, Terry Ao Minnis & Andrea Senteno, *Practice-Based Preclearance: Protecting Against Tactics*

jurisdictions and covered practices that are most likely to create violations of the CVRA, it is an efficient way to avoid the costs that litigation imposes on plaintiffs, governments, and courts.

3. Guidance for California Courts

SB 1164 also provides guidance to California courts to ensure that the intent of the legislature is clear and that the statues are applied in a way that protects voters. For example, as mentioned above, the bill contains provisions clarifying how courts should apply concepts like racially polarized voting and the totality of the circumstances.[80]

SB 1164 also provides several clear definitions of critical terms that make the statute's application simpler and clearer for parties and courts.[81] For example, "protected class" is defined to include coalitions of "two or more" smaller protected classes.[82] This definition clarifies for courts that, as several federal courts have held, coalitions of politically cohesive groups can suffer from and sue to remedy vote dilution together.[83]

And to minimize the risk of unforeseen ambiguities diminishing protections for voters, Section 7 of SB 1164 also enshrines a "democracy canon" into California law.[84] This provision instructs judges to interpret laws and rules in a pro-voter, pro-democracy way whenever reasonably possible. This ensures that courts must construe SB 1164, or any other "provision of state law, regulation, charter, home rule ordinance, or other enactment of the state or any political subdivision relating to voting or the right to vote," in favor of protecting the rights of voters, ensuring protected class members have equitable access to fully participate in the electoral process.

The democracy canon is law in numerous other states and federal jurisdictions. It has been acknowledged and followed by numerous federal and state courts across the country but is not universally followed.[85] It has also been enshrined into state law in certain states.[86] While California courts have applied canons of construction to protect other rights, they have never adopted a canon protecting the right to vote.[87]

Persistently Used to Silence Minority Communities' Votes, Asian Americans Advancing Justice, MALDEF & NALEO Education Fund at 7-13 (Nov. 2019), https://www.maldef.org/wp-content/uploads/2019/11/Practice-Based-Preclearance-Report-Nov-2019-FINAL.pdf (discussing areas where certain minority populations are emerging for the first time, including Georgia and North Carolina for Asian American communities, and North and South Dakota for Latino communities).

[80] SB 1164, Sec. 5, *proposed* Cal. Elec. Code 14028(c).

[81] *See generally* SB 1164, Sec. 2.

[82] *Id.* Sec. 2, *proposed* Cal Elec. Code 14026(g).

[83] *See Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs.*, 906 F.2d 524, 526 (11th Cir. 1990); *Pope v. Cnty. of Albany*, 687 F.3d 565, 572 & n.5 (2d Cir. 2012); *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 275-76 (2d Cir. 1994), *vacated on other grounds*, 512 U.S. 1283 (1994); *Badillo v. City of Stockton*, 956 F.2d 884 (9th Cir. 1992).

[84] SB 1164, Sec. 7.

[85] *See* Richard L. Hasen, *The Democracy Canon*, 62 Stan. L. Rev. 69 (2009).

[86] *See, e.g.*, N.Y. Elec. Law § 17-202 (McKinney 2023) (interpretation of laws related to the elective franchise); Minn. Stat. Ann. § 200.53 (West 2024).

[87] Cal. Const. art. I, §§ 3(b)(1) & (2).

4. Tools empowering voters and community organizations

SB 1164 builds on the CVRA of 2001 by retaining and clarifying the private right of action. Now, the statute is clear that not only can individual voters file suits to vindicate their rights, but organizations may also file suits to vindicate the rights of voters.[88] The language also clarifies the standard for when organizations are "aggrieved" by a violation of this chapter—making litigation more accessible and predictable.[89]

SB 1164 also enables courts to award reasonable attorney's fees and litigation costs, including expert witness fees and expenses, to the party that prevails in a lawsuit brought to enforce this bill.[90] Fee-shifting provisions like those in SB 1164 are common in civil rights statutes, including the Voting Rights Act of 1965[91] and the Civil Rights Act of 1964.[92] The CVRA of 2001 also had a fees provision, though the language was not as clear as possible on issues like recovering the costs of expert witnesses.[93] By contrast, SB 1164 expressly includes common costs of voting rights litigation, like expert witness costs.[94]

These provisions promote access to justice and level the playing field between individuals and government entities. Their goal is to ensure that individuals, especially those with limited financial resources, are not deterred from pursuing legal action to enforce their rights. Importantly, these provisions support the principle that those who successfully enforce their rights should not have to bear the cost of their own legal representation.

SB 1164 defines a party as "prevailing" in a lawsuit against a state or local government if bringing the lawsuit results in the government offering "some or all" the relief that was sought in the lawsuit.[95] The scope of the "some or all" language indicates an intent to award fees for plaintiffs who secure any relief at all, including voluntary action on the part of the defendant after the filing of a suit. This definition is intended to draw on California's catalyst theory, which posits that, even without a final judgment, "a plaintiff will be considered the 'successful party' where an important right is vindicated 'by activating defendants to modify their behavior.'"[96] This definition represents a policy choice by the state of California to award attorney's fees to citizens who have enforced their civil rights and obtained any relief as a result of their litigation.

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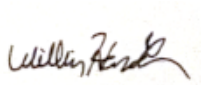
[88] SB 1164, Sec. 9, proposed Cal. Elec. Code 14030(a)(1).
[89] SB 1164, Sec. 9, proposed Cal. Elec. Code 14030(a)(2).
[90] SB 1164, Sec. 9, *proposed* Cal. Elec. Code 14030(i)(1).
[91] 52 U.S.C. § 10310(e).
[92] 42 U.S.C. § 1988(b).
[93] Cal. Elec. Code § 14030.
[94] SB 1164, Sec. 9, *proposed* Cal. Elec. Code 14030(i)(1).
[95] SB 1164, Sec. 9, proposed Cal. Elec. Code 14030(i)(2).
[96] *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 566-67 (2004); *see also id*. at 570 (terms "prevailing party" and "successful party" are synonymous); *Tipton-Whittingham v. City of Los Angeles*, 34 Cal. 4th 604, 608 (2004) (noting California recognizes catalyst fee theory).

* * *

The Legislature must act now to pass these desperately needed, robust, state-level voting rights protections. For these reasons, **Campaign Legal Center is proud to strongly support SB 1164 (Cervantes)**.

Respectfully submitted,



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