

May 18, 2021

Submitted by email

Senate Committee on Elections
Michigan Senate
Harry T. Gast Appropriations Room
3rd Floor, Capitol Building
100 S. Capitol Avenue, Lansing, MI 48933

Re: Opposition to S.B. 299

Dear Chair Johnson, Minority Vice Chair Wojno, and Committee Members:

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”) writes in opposition to Senate Bill (“S.B.”) 299.¹ As the United States Supreme Court has long made clear, constitutional protections on the right to vote apply to more than the act of casting a ballot.² Federal law, the U.S. Constitution, and the Michigan Constitution also protect a voter’s ballot, once cast, from “later arbitrary and disparate treatment”³ that would prevent it from being counted or from being given equal weight.⁴ “The right to vote,” simply put, “includes the right to have the ballot counted.”⁵

S.B. 299 threatens to violate this fundamental right. Under S.B. 299’s provisions, election workers would be required to stop counting votes and report their results to their county’s canvassing board by “12 noon on the day following the election,”⁶ regardless of whether all votes have been counted. If this provision had been in force as of the 2020 general election, thousands of votes—disproportionately including votes cast by Black Michiganders—would likely

¹ Senate Bill No. 299, 101st Leg. (Mich. Mar. 24, 2021) (hereinafter “S.B. 299”).

² *Bush v. Gore*, 531 U.S. 98, 104–105 (2000) (“The right to vote is protected in more than the initial allocation of the franchise.”); *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (“It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote . . . and to have their votes counted”); *United States v. Classic*, 313 U.S. 299, 314 (1941) (affirming “[t]he right of qualified voters to vote . . . and to have their ballots counted”); see also *United States v. Mosley*, 238 U.S. 383, 386 (1915) (holding that Congress’s power under the Fifteenth Amendment to protect both “the right to put a ballot in a box” and “the right to have one’s vote counted” is “unquestionable”).

³ *Bush*, 531 U.S. at 104–105.

⁴ *Reynolds*, 377 U.S. at 555 (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”); *League of Women Voters of Michigan v. Sec’y of State*, No. 353654, 2020 WL 3980216 at *8 (Mich. Ct. App. 2020) (“Voting is not the single act of marking a ballot, but the entire process,” including having absent-voter ballots counted).

⁵ *Reynolds*, 377 U.S. at 555 n. 29; see S. Rep. 97-417, 19, 1982 U.S.C.C.A.N. 177, 196 (same).

⁶ S.B. 299 (amending Mich. Comp. Laws § 168.809(1)).

have been left uncounted. We urge the Committee to reject a bill that would unconstitutionally jeopardize the rights of voters to have their ballots counted.

After polls closed on the night of Tuesday, November 3, 2020, Michigan county clerks “worked around the clock” to count the votes, with support from “more than 30,000 election workers and provision of federal funds for automatic envelope openers and more ballot tabulation machines.”⁷ Despite these extraordinary efforts, when morning came on Wednesday, November 4, “[h]undreds of thousands of ballots” remained to be counted.⁸ These uncounted votes were concentrated in populous jurisdictions, including Detroit, Grand Rapids, Flint, Warren, and Sterling Heights.⁹ As discussed below, four of these five cities are home to a disproportionately high number of Black residents.¹⁰

The delay was expected. Before Election Day, federal and state officials had advised Americans to anticipate waiting one or more days for results, due to factors including an increase in absentee voting, the refusal of some state legislatures, including Michigan’s, to allow ample time for ballot pre-processing, and the challenges of administering an election during a global pandemic.¹¹ In Michigan, county clerks and election staff counted and reported absent-voter ballots throughout the day on November 4, and the state’s unofficial results were reported at 8 p.m. that night.¹² This was only 24 hours after polls had closed—and long before several other states were able to report their results¹³—but it was eight hours after the arbitrary deadline that S.B. 299 would impose.

⁷ Off. of Sec’y of State Jocelyn Benson, *Fact Checks*, Michigan.gov (last visited May 18, 2021), https://www.michigan.gov/sos/0,4670,7-127-1633_100423_102534_102535---,00.html.

⁸ Jocelyn Benson (@JocelynBenson), Twitter (Nov. 4, 2020, 7:06 AM), <https://twitter.com/JocelynBenson/status/1323959740091826176>.

⁹ *Id.*; see Cheyna Roth, *Michigan is taking longer than many states to count its votes – here’s why*, MLive.com (Nov. 4, 2020), <https://www.mlive.com/politics/2020/11/michigan-is-taking-longer-than-many-states-to-count-its-votes-heres-why.html>.

¹⁰ *Infra* notes 14–16 and accompanying text.

¹¹ *E.g.*, U.S. Dep’t of Homeland Security, Cybersecurity & Infrastructure Security Agency, *#Protect2020 Rumor vs. Reality* (2020), <https://www.cisa.gov/rumorcontrol> (“Election results reporting may occur more slowly than prior years. This does not indicate there is any problem with the counting process or results.”); Off. of Sec’y of State Jocelyn Benson, *What Voters Need to Know in the Final Days to Cast Ballots*, Michigan.gov (Oct. 29, 2020), <https://www.michigan.gov/sos/0,4670,7-127--543761--,00.html> (“Complete Election Results Won’t Come Tuesday: Absentee ballots take longer to process and count than ballots cast at polling places. And unlike other states, Michigan law provides very limited ability for clerks to prepare them ahead of Election Day. Because of this, and the significant increase in voters casting absentee ballots, it could take until Friday, Nov. 6, for all ballots to be counted.”).

¹² *Campaign 2020: Michigan Secretary of State Update on Election Vote Count*, C-Span (Nov. 4, 2020), <https://www.c-span.org/video/?477818-1/michigan-secretary-state-update-election-vote-count>.

¹³ See Savannah Behrman, *Election results update: Biden says he has a ‘clear majority’ in speech asking for nation to be patient*, USA Today (Nov. 6, 2020),

Thus, if S.B. 299 had been law in 2020, the votes that were not counted by noon on November 4 would not have been counted, resulting in large-scale, and plainly unconstitutional, disenfranchisement.

Such disenfranchisement would have fallen hardest on Black voters. Four of the five cities in which counting continued on November 4, 2020 are home to a higher percentage of Black residents than the State of Michigan overall.¹⁴ More than three quarters of Detroit residents are Black, as are more than half of Flint residents.¹⁵ Over two thirds of Black Michiganders live in the Detroit metropolitan area.¹⁶ Based on Michigan’s experience in 2020, S.B. 299 could subject the disproportionately Black voters in these cities to a greater risk of disenfranchisement than other Michigan voters. The bill’s effect also recalls the racially charged and legally baseless attempts by some actors to “stop the count” in November 2020 by preventing votes cast by Detroit’s predominantly Black electorate from being counted.¹⁷

If the Michigan Legislature intends to facilitate the prompt reporting of election results, S.B. 299 does not appear to be an appropriate or constitutional means to do so. The bill would likely prevent legitimate votes from being counted, disproportionately disenfranchising Black voters. These foreseeable effects would likely violate the Fourteenth and Fifteenth Amendments to the United States Constitution and Section 2 of the Voting Rights Act, which prohibit discriminatory denial or abridgment of the right to vote.¹⁸ In addition, ending the tabulation of votes early enough to meet S.B. 299’s arbitrary reporting deadline would burden the right to vote without being necessary to serve a legitimate state interest, which may violate the First and Fourteenth Amendments to the United States Constitution and Article 1, § 2 of the Michigan

<https://www.usatoday.com/story/news/politics/elections/2020/11/06/election-results-updates-biden-trump-georgia-pennsylvania-nevada/6183784002/> (reporting that Pennsylvania, Nevada, Georgia, and Arizona were still counting votes on November 6, two days later).

¹⁴ As of 2019, Michigan’s overall population was approximately 14% Black. By contrast, Detroit’s population was 79% Black, Flint’s population was 54% Black, and both Grand Rapids’ and Warren’s populations were 19% Black. Julia Mack & Scott Levin, *See list of Michigan cities with most African American residents, and geographic shifts since 1970*, MLive.com (June 23, 2020), <https://www.mlive.com/public-interest/2020/06/see-list-of-michigan-cities-with-most-african-american-residents-and-geographic-shifts-since-1970.html>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See Tony Mosley & Allison Hagan, *Detroit Elections Center Employee on ‘Stop The Count’ Protest: ‘It Said A Lot’*, WBUR (Nov. 5, 2020), <https://www.wbur.org/hereandnow/2020/11/05/detroit-stop-the-vote-protest>; Olivia Lewis, *Inside Detroit’s election: Black women’s stories of the count and the mayhem*, BridgeDetroit (Nov. 10, 2020), <https://www.bridgedetroit.com/inside-detroits-election-black-womens-stories-of-the-count-and-the-mayhem/>; see also Opinion & Order at 4, *Sarah Stoddard, et al. v. City Election Commission of The City of Detroit, et al.*, No. 20-014604-CZ (Mich. Cir. Ct. Nov. 6, 2020) (finding that “there is no evidence to support accusations of voter fraud” against Detroit election workers and affirming that “every legitimate vote should be counted”).

¹⁸ See U.S. Const. amends. XIV, XV; 52 U.S.C. § 10301.

Constitution.¹⁹ Finally, by preventing validly cast absent-voter ballots from being counted, S.B. 299 may also violate the rights protected by Article 2, § 4 of the Michigan Constitution.²⁰

This Committee should therefore oppose S.B. 299. To help counties report their election results promptly, the Committee should instead consider and support legislation that carries out the Secretary of State's recommendation that Michigan "allow clerks to begin tabulating AV ballots prior to election day."²¹ According to Secretary Benson, doing so would "allow[] election night results to be reported much earlier" and ballot processing to "proceed on a more orderly, less rushed timetable[,] allowing more safeguards and internal review."²²

* * *

For the foregoing reasons, we respectfully urge this Committee to oppose S.B. 299. Please feel free to contact Steven Lance at (347) 947-0522 or by email at slance@naacpldf.org with any questions or to discuss these concerns in more detail.

Sincerely,

/s/ Steven Lance

Samuel Spital, Director of Litigation

Steven Lance, Policy Counsel

NAACP Legal Defense & Educational Fund, Inc.

40 Rector Street, 5th Fl.

New York, NY 10006

Lisa Cylar Barrett, Director of Policy

NAACP Legal Defense & Educational Fund, Inc.

700 14th Street N.W., Ste. 600

Washington, DC 20005

¹⁹ See *Burdick v. Takushi*, 504 U.S. 428 (1992) ("A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiffs seeks to vindicate' against 'the precise interest put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'") (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); Mich. Const. art. 1 § 2; *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 463 (Mich. 2007) (adopting the *Anderson-Burdick* test for equal-protection challenges to voting laws under Article 1, § 2 of the Michigan Constitution).

²⁰ See Mich. Const. art. 2, § 4; *League of Women Voters*, 2020 WL 3980216 at *8.

²¹ Mich. Dep't of State, *Audits of the November 3, 2020 General Election 27* (Apr. 21, 2021), https://www.michigan.gov/documents/sos/BOE_2020_Post_Election_Audit_Report_04_21_21_723005_7.pdf.

²² *Id.*

NAACP Legal Defense and Educational Fund, Inc. (“LDF”)

Since its founding in 1940, LDF has used litigation, policy advocacy, public education, and community organizing strategies to achieve racial justice and equity in education, economic justice, political participation, and criminal justice. Throughout its history, LDF has worked to enforce and promote laws and policies that increase access to the electoral process and prohibit voter discrimination, intimidation, and suppression. LDF has been fully separate from the National Association for the Advancement of Colored People (“NAACP”) since 1957, though LDF was originally founded by the NAACP and shares its commitment to equal rights.