

May 26, 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. 284, S.B. 285, S.B. 289, S.B. 303 & S.B. 310

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.”) 284, S.B. 285, S.B. 289, S.B. 303, and S.B. 310.¹ If enacted, S.B. 285 and S.B. 303 would threaten to disproportionately disenfranchise Black voters who lack access to photo identification, while burdening all eligible Michigan voters’ constitutional right to vote and to vote absentee. S.B. 310 would impose an unnecessary step between eligible Michiganders and their constitutional right to vote absentee, potentially violating the Michigan Constitution. S.B. 284 and S.B. 289 could prevent local jurisdictions from accessing essential funding for election administration from private or federal sources. This Committee should oppose all five bills.

I. S.B. 285’s and S.B. 303’s Strict Voter ID Provisions Would Burden the Right to Vote for All Michiganders and May Disproportionately Disenfranchise Black Voters.

Two bills before this Committee—S.B. 285 and S.B. 303—would rewrite Michigan’s voter identification requirements to make them far more restrictive and would insert them into the absentee voting process. S.B. 285 and S.B. 303 would thus impose unnecessary burdens on the right to vote and likely disenfranchise a disproportionate number of Black Michiganders.

S.B. 303 would remove the mitigating provision in Michigan’s existing voter ID law that enables in-person voters to cast a regular ballot if they attest in an affidavit that they are not in possession of photo identification²—an option

¹ See Senate Bill No. 284, 101st Leg. (Mich. Mar. 24, 2021) (hereinafter “S.B. 284”); Senate Bill No. 285, 101st Leg. (Mich. Mar. 24, 2021) (hereinafter “S.B. 285”); Senate Bill No. 289, 101st Leg. (Mich. Mar. 24, 2021) (hereinafter “S.B. 289”); Senate Bill No. 303, 101st Leg. (Mich. Mar. 24, 2021) (hereinafter “S.B. 303”); Senate Bill No. 310, 101st Leg. (Mich. Mar. 24, 2021) (hereinafter “S.B. 310”).

² S.B. 303 (amending Mich. Comp. Laws § 168.523(2)); see Mich. Sec’y of State, *Affidavit of Voter Not in Possession of Picture Identification*, Michigan.gov (last visited May 25, 2021),

that Senator Ed McBroom, a member of this Committee, has reportedly used himself in past elections, along with thousands of other Michiganders.³ Under S.B. 303, the only option for these voters would be vote a provisional ballot.

S.B. 285 would extend this stricter form of voter ID to the absentee voting process, where Michigan’s existing voter ID law does not apply, requiring anyone applying for an absent-voter ballot to present one of the enumerated forms of photo identification that currently qualify as “identification for election purposes” for voting in person.⁴ Voters applying for an absent-voter ballot by mail or electronically would be required to attach a copy of an approved form of photo ID with their application. An applicant who does not provide photo ID with their absent-voter ballot application would be sent a provisional ballot.

Both S.B. 285 and S.B. 303 would needlessly burden the fundamental right to vote. First, absentee voting is a constitutional right for all registered Michigan voters and an increasingly important means of accessing the franchise.⁵ Inserting a new and unnecessary voter ID requirement into the process of requesting an absent-voter ballot—as S.B. 285 would do—would unjustly burden the exercise of this right and the right to vote itself. Second, the affidavit option under Michigan’s current voter ID law for in-person voting, which S.B. 303 would abolish, is a particularly important safeguard for voters who lack access to an approved form of photo ID. Nor is there any evidence of fraud related to the affidavit option, as a spokesperson for former Secretary of State and current Committee Chair Ruth Johnson confirmed in 2016.⁶

Moreover, S.B. 285 and S.B. 303 appear likely to interact with existing Michigan law to completely disenfranchise some voters who do not possess any approved form of photo ID. As discussed above, the two bills would require such

[https://www.michigan.gov/documents/sos/Affidavit of Voter in Possession_209344_7.pdf?20130614121635](https://www.michigan.gov/documents/sos/Affidavit_of_Voter_in_Possession_209344_7.pdf?20130614121635).

³ Jonathan Oosting, *GOP targets no-ID ballots to cut fraud. Only 0.2% voted that way in Michigan.*, Bridge Michigan (May 19, 2021), <https://www.bridgemi.com/michigan-government/gop-targets-no-id-ballots-cut-fraud-only-02-voted-way-michigan> (“I have voted at times by filling out an affidavit because I forgot my driver’s license,” McBroom said in 2016. ‘And now I’m going to be told that I have got to find time when my clerk’s at the office because she’s not in the office on most days.’”).

⁴ S.B. 285 (amending Mich. Comp. Laws §§ 168.759 and 759a to require “identification for election purposes” at the absent-voter ballot application stage); see Mich. Comp. Laws § 168.2(k)(i–ix) (enumerating nine forms of official photo identification that qualify as “[i]dentification for election purposes”).

⁵ Mich. Const. art. 2, § 4; see Lauren Gibbons, *One big winner in Michigan’s 2020 election cycle: No-reason absentee voting*, MLive.com (Nov. 11, 2020), <https://www.mlive.com/politics/2020/11/one-big-winner-in-michigans-2020-election-cycle-no-reason-absentee-voting.html>.

⁶ Jonathan Oosting, *Strict voter ID law approved in Michigan House*, Detroit News (Dec. 7, 2016), <https://www.detroitnews.com/story/news/local/2016/12/07/strict-voter-law-approved-michigan-house/95127394/> (“We are not aware of fraud related to the affidavit’ option, said Fred Woodhams, a spokesman for Republican Secretary of State Ruth Johnson . . .”).

voters to cast provisional ballots. To make those provisional ballots count, however, it appears that a voter would have to appear at their clerk’s office within six days of the election—and *present photo ID*.⁷ For an individual who is issued a provisional ballot, under the restrictions imposed by S.B. 285 or S.B. 303, precisely because they *do not possess photo ID*, this would likely be impossible. As applied to these voters, therefore, S.B. 285 and S.B. 303 would create a “Catch-22” that would likely result in disenfranchisement.

Black voters will face heightened burdens under S.B. 285 and S.B. 303. In Michigan, Black voters are six times more likely than white voters to lack photo ID.⁸ In recent elections, voters in Detroit—where Black residents are 79% of the population⁹—have signed a disproportionate number of affidavits attesting to a lack of photo ID.¹⁰ Thus, as one recent study found, implementing a stricter voter ID law in Michigan that “requir[ed] people to have access to ID in order to vote will have a disparate racial impact.”¹¹ Such a law’s disenfranchising effects would fall hardest on Black voters, who “are particularly likely to lack access to ID.”¹²

For these reasons, enacting S.B. 285 and S.B. 303 may lead to at least four violations of the United States Constitution, the Michigan Constitution, and the Voting Rights Act of 1965.

⁷ See Mich. Comp. Laws § 168.813(1) (“A provisional ballot must only be tabulated . . . if the identity and residence of the elector is established using identification for election purposes”); Mich. Sec’y of State, *Provisional Ballot – Notices to Voter 2*, Michigan.gov (last visited May 26, 2021), https://www.michigan.gov/documents/Fed_ID_Req_Notice_New_95240_7.pdf (describing procedures for “any voter who is required to vote a Provisional Envelope ballot because he or she is unable to satisfy Michigan’s voter identification requirement”).

⁸ Phoebe Henninger et al., *Who Votes Without Identification? Using Individual-Level Administrative Data to Measure the Burden of Strict Voter Identification Laws* 13 (Sept. 29, 2020), https://scholar.harvard.edu/files/morse/files/mich_voter_id.pdf; see also Joel Kurth & Ted Roelofs, *Poor in Michigan with no ID. “I am somebody. I just can’t prove it.”*, Bridge Michigan (Sept. 26, 2017), <https://www.bridgemi.com/urban-affairs/poor-michigan-no-id-i-am-somebody-i-just-cant-prove-it>.

⁹ 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>.

¹⁰ Oosting, *GOP targets no-ID ballots*, *supra* note 3 (reporting that approximately “1 in 4” of the 11,417 affidavit voters in Michigan in the November 2020 election “were signed in Detroit”); Mike Wilkinson, *Voting without an ID? Not a big problem in most of Michigan*, Bridge Michigan (Dec. 13, 2016), <https://www.bridgemi.com/michigan-government/voting-without-id-not-big-problem-most-michigan> (“By far, the voters most likely not to have ID lived in counties and cities with larger minority populations: 30 percent of all voters statewide without ID voted in Detroit; 39 percent were in Wayne County (which comprises just 17 percent of all active registered voters in the state).”).

¹¹ Henninger et al., *supra* note 8 at 3.

¹² *Id.* at 15.

First, by causing a disproportionate number of Black voters to cast provisional ballots that are likely to go uncounted, S.B. 285 and S.B. 303 may violate the Fourteenth and Fifteenth Amendments to the United States Constitution and the Voting Rights Act of 1965,¹³ which prohibit discriminatory denial or abridgment of the right to vote—a right that “includes the right to have the ballot counted.”¹⁴

Second, by abolishing the affidavit option for voters who lack photo identification, S.B. 303 would call into question the constitutionality of Michigan’s voter ID law as a whole. In 2007, the Michigan Supreme Court relied on the existence of “the affidavit alternative” to uphold the statute from challenge under the Michigan and U.S. Constitutions as a severe burden on the right to vote or an impermissible poll tax.¹⁵ If the affidavit option is removed, Michigan’s voter ID law will likely be subject to renewed challenge on similar grounds—and significant elements of the Court’s 2007 analysis will not apply.

Third, by conditioning exercise of the constitutional right to cast an effective absent-voter ballot on a voter’s ability to present photo ID, S.B. 285 may impermissibly infringe on rights protected by Article 2, § 4 of the Michigan Constitution.¹⁶

Fourth, by burdening all Michiganders’ right to vote and imposing this burden without it serving a legitimate state interest, S.B. 285 and S.B. 303 may violate the First and Fourteenth Amendments to the United States Constitution and Article 1, § 2 of the Michigan Constitution.¹⁷

¹³ See U.S. Const. amends. XIV, XV; 52 U.S.C. § 10301.

¹⁴ *Reynolds v. Sims*, 377 U.S. 533, 555 n. 29 (1964). Under the Voting Rights Act, voting is specifically defined to include: “all action necessary to make a vote effective in any . . . election, including, but not limited to . . . having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.” 52 U.S.C. § 10310(c)(1).

¹⁵ *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 456–57 (Mich. 2007) (holding that Michigan’s voter ID law does not impose a severe burden because “the statute explicitly provides that an elector without photo identification need only sign an affidavit in the presence of an election inspector before being ‘allowed to vote’”); *id.* at 464–65 (holding that the law “is not an unconstitutional poll tax” because “[a] voter who does not otherwise possess adequate photo identification is not required to incur the costs of obtaining photo identification as a condition of voting” and may instead “simply sign an affidavit in the presence of an election inspector”).

¹⁶ See Mich. Const. art. 2, § 4; *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).

¹⁷ See *Burdick v. Takushi*, 504 U.S. 428, 434 (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

For each and all of these reasons, we urge the Committee to vote no on S.B. 285 and S.B. 303.

II. S.B. 310 Would Needlessly Impede the Effectuation of the Michigan Constitution’s Right to Vote an Absent-Voter Ballot.

We also urge the Committee to oppose S.B. 310. This bill would prohibit the Michigan Secretary of State from “sending or providing an absent voter ballot application to an elector” unless that voter has requested the application.¹⁸ The bill also prohibits the Secretary of State from publishing a PDF of an absent voter ballot application—or even providing “a direct link to an absent voter application”—on the Department of State’s official website.¹⁹

S.B. 310’s restrictions on how a Michigan voter may receive an absent-voter ballot application raise concerns under Article 2, § 4 of the Michigan Constitution. This provision, ratified by a supermajority of voters in 2018, grants to all registered Michiganders a constitutional right “to vote an absent voter ballot without giving a reason,”²⁰ and requires that the provision’s text “be liberally construed in favor of voters’ rights in order to effectuate its purposes.”²¹ As the Michigan Court of Appeals held last year, affirmatively providing absent-voter applications to registered Michigan voters is consistent with the Secretary of State’s “constitutional obligation” to effectuate Article 2, § 4’s purposes.²²

By prohibiting Michigan’s highest election official from providing absent-voter ballot applications to qualified Michigan voters—and by forcing state officials to remove the application PDF from the Michigan.gov website²³—S.B. 310 would increase the burden of obtaining an absent-voter ballot for voters. Such a result would undermine Article 2, § 4’s text and stated purposes. Indeed, S.B. 310’s provisions appear likely to burden the exercise of Michigan voters’ constitutional rights and impede the performance of election officials’

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*, 740 N.W.2d at 463 (adopting the *Anderson-Burdick* test for equal-protection challenges to voting laws under Article 1, § 2 of the Michigan Constitution).

¹⁸ S.B. 310 (inserting a new Mich. Comp. Laws § 168.759(10)).

¹⁹ *Id.*

²⁰ Mich. Const. art. 2, § 4(1)(g); see *Davis v. Sec’y of State*, No. 354622, 2020 WL 5552822, at *3 (Mich. Ct. App. Sept. 16, 2020), *appeal denied*, 951 N.W.2d 911 (Mich. 2020).

²¹ Mich. Const. art. 2, § 4(1).

²² *Davis*, 2020 WL 5552822 at *6.

²³ See Mich. Sec’y of State, *Michigan Absent Voter Ballot Application: August 3, 2021 Election*, Michigan.gov (last visited May 25, 2021), https://www.michigan.gov/documents/sos/AVApp_535884_7.pdf.

constitutional obligations.²⁴ Further, because S.B. 310 imposes an unnecessary additional burden on the exercise of the right to vote, the bill also raises concerns under the First and Fourteenth Amendments to the United States Constitution and Article 1, § 2 of the Michigan Constitution.²⁵ For these reasons, we urge the Committee to oppose it.

III. S.B. 284 and S.B. 289 Would Threaten to Deny Critical Election Funding for Under-Resourced and Majority-Black Jurisdictions.

Finally, two bills before this Committee—S.B. 284 and S.B. 289—would impose restrictions on election funding from private and federal sources that may prevent cities and other local jurisdictions from being able to adequately fund their elections. In 2020, private citizens, foundations, and at least 49 sports franchises across the nation volunteered to donate their time, money, resources, expertise, and facilities to support election administration in counties and cities facing the extraordinary challenge of conducting a presidential election during a global pandemic.²⁶ In Michigan, the contributions of civically minded sports teams, as well as these teams’ athletes and employees, helped local election officials avoid polling-place consolidations and provided access to absent-voter drop boxes in majority-Black cities such as Detroit and Flint.²⁷

S.B. 284 would prohibit local jurisdictions from accepting these commendable forms of assistance. If enacted, the bill would make it illegal for the State of Michigan, any state “department, agency, commission, or board,” or any “county, city, village or town” to “accept from an individual or entity, either directly or indirectly, a gift of money or other consideration to be used for an

²⁴ See Mich. Const. art. 2, § 4; *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).

²⁵ See *Burdick*, 504 U.S. at 434; Mich. Const. art. 1 § 2; *In re Request for Advisory Opinion*, 740 N.W.2d at 463.

²⁶ See Kenneth P. Vogel, *Short of Money to Run Elections, Local Authorities Turn to Private Funds*, N.Y. Times (Sept. 25, 2020), <https://www.nytimes.com/2020/09/25/us/politics/elections-private-grants-zuckerberg.html>; Nolan D. McCaskill, *Election sites at pro sports venues draw voters — but also pushback*, Politico (Nov. 2, 2020), <https://www.politico.com/news/2020/11/02/sports-venues-election-voting-sites-crowds-432522>.

²⁷ *Id.* (“Michigan would’ve had to consolidate polling places . . . if not for partnerships with Detroit’s sports teams”); Vince Ellis, *Why the Detroit Pistons are earning praise for voter galvanization efforts*, NBA.com (Sept. 25, 2020), <https://www.nba.com/pistons/features/why-detroit-pistons-are-earning-praise-voter-galvanization-efforts> (describing a drop box location and voter-education volunteering efforts made possible by the Detroit Pistons); *True community champions: Mayor Neeley thanks Kyle Kuzma Foundation and the NBPA Foundation for their generous donation to make every vote count*, City of Flint (Oct. 27, 2020), <https://www.cityofflint.com/2020/10/27/true-community-champions-mayor-neeley-thanks-kyle-kuzma-foundation-and-the-nbpa-foundation-for-their-generous-donation-to-make-every-vote-count-in-flint/> (announcing a donation of \$10,000 from Flint native and NBA Laker Kyle Kuzma and the National Basketball Players Association “to help install and secure additional absentee voter drop boxes throughout the [C]ity” of Flint).

election related activity or for election related equipment.”²⁸ The bill’s broadly drafted language appears to ban, among other things, all volunteer activities and donations and any unremunerated use of private facilities as voting locations or training centers. If a county clerk brought coffee to the office for her colleagues, or an election inspector’s spouse drove her to work, even those benign actions would arguably violate S.B. 284.

For its part, S.B. 289 targets federal election funding, providing that any such funding received by the State of Michigan, if its acceptance carries conditions imposed by the federal government, “must not be expended” unless the Legislature specifically appropriates it in a budget act.²⁹ If not appropriated within 90 days, “the federal funds must be returned to the federal government.”³⁰

Both S.B. 284 and S.B. 289 would do harm to the functioning of democracy in Michigan. Funding and resources for local election administration should not be held hostage to political negotiations or potential disagreements between branches of state government. Most concerning, neither bill appropriates any funds to offset the likely loss of private and federal resources their enactment would cause for cities such as Detroit and Flint. Instead of considering bills like S.B. 284 or S.B. 289, which endanger critical funding for election administration in under-resourced jurisdictions, this Committee should propose a study of funding needs for election administration in counties, townships, cities, and villages across the state—and recommend that the Legislature make adequate appropriations to meet these needs in future budgets.

* * *

For the foregoing reasons, we respectfully urge this Committee to oppose S.B. 284, S.B. 285, S.B. 289, S.B. 303, and S.B. 310. 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

Natasha Merle, Deputy Director of Litigation
Steven Lance, Policy Counsel
NAACP Legal Defense & Educational Fund, Inc.
40 Rector Street, 5th Fl.
New York, NY 10006

²⁸ S.B. 284 (adding Mich. Comp. Laws § 168.946).

²⁹ S.B. 289 (amending Mich. Comp. Laws. § 18.1453).

³⁰ *Id.*

Lisa Cylar Barrett, Director of Policy
NAACP Legal Defense & Educational Fund, Inc.
700 14th Street N.W., Ste. 600
Washington, DC 20005

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.