

May 1, 2024

Submitted electronically

Michigan Legislature
Michigan Senate Elections and Ethics Committee
Room 1100
Binsfeld Office Building
201 Townsend Street
Lansing, MI 48933

Re: Support for the Michigan Voting Rights Act (“MIVRA” or SB 401, 402, 403, and 404)

Dear Members of the Senate Elections and Ethics Committee:

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”) writes to convey our strong support for the Michigan Voting Rights Act (“MIVRA” or SB 401, 402, 403, and 404).

Founded in 1940 under the leadership of Thurgood Marshall, who would later become the United States Supreme Court’s first Black justice, LDF is America’s premier legal organization fighting for racial justice. Through litigation, advocacy, and public education, LDF seeks structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans.

For more than 80 years, LDF has prioritized its work protecting the right of Black citizens to vote—representing Dr. Martin Luther King, Jr., and other marchers in Selma, Alabama in 1965, advancing the passage of the federal Voting Rights Act of 1965 (“federal VRA”) and litigating seminal cases interpreting its scope,¹ and working in communities across the nation to protect and strengthen Black citizens’ ability to participate in the political process free from discrimination.

Justice Marshall—who litigated LDF’s watershed victory in *Brown v. Board of Education*,² which set in motion the end of legal apartheid in this country 70 years ago this month and transformed the direction of American democracy—referred to *Smith v. Allwright*,³ the 1944 case ending whites-only primary elections in Texas, as his most consequential case. He held this view because he believed that the right to vote, and

¹ LDF was lead counsel in the landmark 2023 federal VRA case *Allen v. Milligan*, 599 U.S. 1 (2023).

² 347 U.S. 483 (1954).

³ 321 U.S. 649 (1944).

the opportunity to access political power, were critical to fulfilling the guarantee of full citizenship promised to Black people in the 14th Amendment to the U.S. Constitution.

Black voters face the greatest threat of discrimination and disenfranchisement since the Jim Crow era. As too many states move to further restrict the franchise,⁴ it is critical for states like Michigan to prioritize legislation like the MIVRA to meet the urgent need to protect Black voters and other voters of color from discrimination. LDF worked with partners to successfully advocate for the enactment of the John R. Lewis Voting Rights Act of New York (the New York Voting Rights Act or “NYVRA”) in 2022 and the John R. Lewis Voting Rights Act of Connecticut (the Connecticut Voting Rights Act or “CTVRA”) in 2023.⁵ This year we are working with robust coalitions of civil and voting rights advocates seeking to advance similar laws here in Michigan, as well as in Minnesota, Maryland, New Jersey, and Florida.⁶

We commend you for considering this critical legislation. The MIVRA will affirm Michigan’s place as a national leader on voting rights by building on the success of the NYVRA and CTVRA, as well as similar state VRAs that have been enacted in Virginia, Oregon, Washington, and California.⁷ In our testimony below we describe the urgent need for strong voting rights protections in Michigan due to ongoing obstacles to equitable participation by voters of color and shortcomings in current legal protections; and detail the specific ways that the MIVRA addresses these concerns.

I. The Need for Strong Voting Rights Protections in Michigan

The importance of the right to vote cannot be overstated. The United States Supreme Court has long described voting as a fundamental right, because it is preservative of all other rights.⁸ Voting is “the citizen’s link to his laws and government”⁹ and “the essence of a democratic society.”¹⁰ If the right to vote is

⁴ Brennan Ctr. for Just., *Voting Laws Roundup: 2023 in Review* (Jan. 18, 2024), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2023-review>.

⁵ NYVRA, N.Y. Elec. L. §§ 17-200–222; CTVRA, Conn. Gen. Stat. §§ 9-368i–q.

⁶ See NAACP Legal Def. & Educ. Fund, *Michigan Voting Rights Act*, <https://www.naacpldf.org/michigan-voting-rights-act/>; NAACP Legal Def. & Educ. Fund, *Minnesota Voting Rights Act*, <https://www.naacpldf.org/case-issue/minnesota-voting-rights-act-mnvra/>; NAACP Legal Def. & Educ. Fund, *Florida Voting Rights Act*, <https://www.naacpldf.org/case-issue/florida-voting-rights-act/>; NAACP Legal Def. & Educ. Fund, *New Jersey Voting Rights Act, NJVRANOW* (2023), <https://njvra.org/>; NAACP Legal Def. & Educ. Fund, *Maryland Needs Its Own Voting Rights Act* (2023), <https://www.naacpldf.org/case-issue/maryland-voting-rights-act/>.

⁷ See H.B. 1890, 2021 Sess. (Va. 2021), <https://lis.virginia.gov/cgi-bin/legp604.exe?212+sum+HB1890>; Or. Rev. Stat. § 255.400 *et seq.*; Wash. Rev. Code Ann. § 29A.92.900 *et seq.*; California Voting Rights Act of 2001, Cal. Elec. Code § 14027; *see also* Test. of Prof. J. Morgan Kousser, *Legislative Proposals to Strengthen the Voting Rights Act, Hr’g Before the Subcomm. on the Const., C.R. & C.L. of the U.S. H. Comm. on the Judiciary*, at 2 (Oct. 17, 2019), <https://docs.house.gov/meetings/JU/JU10/20191017/110084/HHRG-116-JU10-Wstate-KousserJ-20191017.pdf> (noting the “striking success of minorities in using the state-level California Voting Rights Act”).

⁸ *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

⁹ *Evans v. Cornman*, 398 U.S. 419, 422 (1970).

¹⁰ *Harman v. Forssenius*, 380 U.S. 528, 537 (1965).

undermined, the Court has cautioned, other rights “are illusory.”¹¹ Thus, in a democracy, safeguarding the right to vote “is a fundamental matter.”¹²

Black voters and other voters of color in Michigan have endured a history of racial discrimination in voting that continues to the present day. The State of Michigan long denied this fundamental right to its Black citizens and other citizens of color, and severe racial disparities in political participation and representation continue to this day. As discussed in more detail below, Black voters and other voters of color continue to suffer from the effects of discrimination and ongoing structures and practices—often at the local level—that perpetuate Michigan’s legacy of racial discrimination in voting.

A. Michigan’s History of Racial Discrimination in Voting

Michigan’s Constitution is replete with a history and ongoing indicia of racial discrimination in voting. In 1835, Michigan’s Constitution afforded only white men the right to vote.¹³ In 1850, Michigan’s Constitution extended the right to vote to some “civilized . . . Indians.”¹⁴ Michigan twice rejected expanding the right to vote to Black men, overwhelmingly voting against a constitutional amendment in 1850¹⁵ and again in 1867.¹⁶ It was not until 1869, after the Civil War, when Michigan ratified the Fifteenth Amendment to the United States Constitution granting Black men the right to vote.¹⁷ Even during that time, most Native Americans were still denied the right to vote.¹⁸

Today, Michigan’s Constitution still contains vague, ambiguous, and racially tinged language. Most notably, Michigan’s Constitution includes a “purity clause,” which provides that laws may be passed to “preserve the purity of elections” and to “guard against abuses of the elective franchise.”¹⁹ Many Michiganders today see the “purity clause” as coded language to keep the elective franchise racially pure. Indeed, this clause is commonly invoked in defense of laws or policies that restrict the right to vote in ways that often disproportionately impact voters of color, such as photo voter ID laws.²⁰

Until the 2013 decision in *Shelby County v. Holder*, discussed in more detail below, certain local governments in Michigan were “covered jurisdictions” under the federal Voting Rights Act due to historical indicia of racial discrimination in voting,

¹¹ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

¹² *Reynolds v. Sims*, 377 U.S. 533, 561 (1964).

¹³ Mich. Const. art. II, § 1 (1835).

¹⁴ Mich. Const. art. VII, §§ 1, 6 (1850).

¹⁵ Emil Olbrich, *The Development of Sentiment on Negro Suffrage to 1860*, 3 Bull. Univ. Wisc. 1, 97–98 (1912).

¹⁶ Chris Jaehnig, *African American Michigan: The Reconstruction Era*, Daily Mining Gazette (May 9, 2020), <https://www.mininggazette.com/news/features/2020/05/african-american-michigan-the-reconstruction-era/>.

¹⁷ *Id.*

¹⁸ Native Am. Fund, *Native American Voting Rights Project*, <https://narf.org/cases/voting-rights/>.

¹⁹ Mich. Const. art. II, § 4 (2) (2024).

²⁰ See Joshua Perry, *The Messy History of Michigan’s “Purity Clause”*, 120 Mich. L. Rev. 22, 22–23, 30–34 (2022), https://repository.law.umich.edu/mlr_online/vol120/iss1/2/.

obligating those jurisdictions to obtain approval from the United States Department of Justice or a federal court before making any changes to their voting laws or practices.²¹ As recently as 2007, the U.S. Department of Justice objected to a proposal by the Town of Buena Vista—one of the Michigan local governments covered under the federal Voting Rights Act—after the Town sought to close a branch office of the Michigan Secretary of State without first seeking preclearance, noting that the branch office played a critical role in providing residents of color with photo IDs needed to vote.²²

Michigan’s voters of color have also faced a history of voter intimidation, including from government officials and approved election observers. For example, during the 1999 general election in the City of Hamtramck, officially sanctioned election observers harassed dozens of voters of color, including compelling them to take oaths of allegiance.²³ Several groups registered with the City Clerk as challengers with the expressed interest of “keeping the elections ‘pure,’” evoking a historically racist concept and echoing troubling language in the Michigan Constitution.²⁴ The City took no action to prevent the continued harassment of voters, and in fact, the chair of an election precinct directed official election inspectors to demand a driver’s license and voter registration card from anyone who “looks Arabic.”²⁵

B. Continued Obstacles and Discrimination in Voting

Although Michigan has made improvements in voting rights in recent years,²⁶ voters of color are still at risk of racial discrimination in voting. The risk of voter suppression is especially severe in Michigan because the state has some of the most decentralized elections in the country.²⁷ Under Michigan’s highly decentralized system for election administration, state, county, and municipal governments each hold certain responsibilities resulting in local policies and practices that can differ widely in each of

²¹ U.S. Dep’t of J., C.R. Div., *Jurisdictions Previously Covered by Section 5*, <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>.

²² U.S. Dep’t of Just., *Section 5 Objection Letter Concerning Buena Vista Township (Saginaw Cty.)* (Dec. 26, 2007), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_071226.pdf.

²³ Compl. at 2, *United States v. City of Hamtramck*, No. 00-73541 (E.D. Mich. Aug. 4, 2000), ECF No. 1, <https://www.justice.gov/crt/case-document/file/1184211/download>.

²⁴ *Id.*

²⁵ *Id.* at 4–5.

²⁶ In 2018, a ballot initiative led by a coalition of voting rights activists resulted in Proposal 18-3, a Michigan constitutional amendment expanding early voting and same-day registration. See NAACP Legal Def. & Educ. Fund & ACLU Michigan, *The Michigan Voting Rights Act 3* (Feb. 2024), <https://www.naacpldf.org/wp-content/uploads/2024-04-03-LDF-MIVRA18.pdf>. Voting rights advocates returned in 2022 to advance another set of reforms into law, this time expanding early voting, protecting the right to vote by affidavit, and expanding the oversight powers of the state Board of Canvassers. *Id.* In 2023, lawmakers passed legislation allowing young people to pre-register to vote and providing automatic voter registration opportunities for people completing prison sentences. *Id.*

²⁷ See Mich. Dep’t State, *Michigan’s Elections System Structure Overview*, <https://cms3.revize.com/revize/auburnhillsmi/government/uploads/SOS%20Website%20Info.pdf>.

the state's 1,603 different jurisdictions, creating a risk that harmful procedures may be adopted without sufficient checks.²⁸

Voters of color in Michigan suffer from severe racial disparities in voter registration and turnout. Based on data from the U.S. Census Bureau, 75.2% of non-Hispanic white citizens in Michigan were registered to vote as of the November 2020 election.²⁹ By contrast, only 72.4% of Black citizens, 58.9% of Latino citizens, and 49.6% of Asian citizens in Michigan were registered to vote as of that election.³⁰ Similarly, 68.2% of Michigan's non-Hispanic white citizens voted in the 2020 election. This compares to only 63.8% of Michigan's Black citizens, 45.1% of Michigan's Asian citizens, and 54.7% of Michigan's Latino citizens.³¹ These disparities strongly indicate the presence of unequal barriers in the registration and voting process that impede participation by eligible voters of color in Michigan.³²

Voters of color also suffer from systemic underrepresentation in local governments. Based on data obtained from the American Local Government Database, there is evidence of underrepresentation of voters of color in the county legislatures of more than 75% of Michigan large counties³³ within the last 10 years, where there was a notable gap between the proportion of people of color within a county's population and the proportion of people of color in county legislatures.³⁴ There is also evidence of similar indicators of underrepresentation in other local governments across the state.³⁵ Although such descriptive underrepresentation itself is not necessarily unlawful (the relevant metric is the ability of voters of color to elect candidates of choice, regardless

²⁸ *Id.* At the state level, the Secretary of State supervises election officials; the Board of State Canvassers oversees statewide candidate petitions and ballot proposals; and the Bureau of Elections provides technical assistance and oversight. At the county level, clerks receive candidate petitions, campaign finance disclosures, and train precinct inspectors; County Election Commissions provide election materials; and Boards of County Canvassers conduct oversight on votes within the jurisdiction. At the city and town level, clerks directly administer all elections; Election Commissions establish precincts, appoint inspectors, and provide election material; and Boards of Canvassers provide oversight of votes.

²⁹ U.S. Census Bureau, *Voting and Registration in the Election of November 2020* (April 2021), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html> (Table 4b, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States: November 2020).

³⁰ *Id.*

³¹ *Id.*

³² Recent research indicates that the Census Bureau's statistics on turnout may overestimate the incidence of voting among communities of color, suggesting that racial turnout disparities may be even greater than Census data reveals. See Stephen Ansolabehere, Bernard L. Fraga & Brian F. Schaffner, *The CPS Voting and Registration Supplement Overstates Minority Turnout*, J. Pol. (2021), <https://www.journals.uchicago.edu/doi/abs/10.1086/717260?journalCode=jop>. That being said, census data from the most recent midterm election did not reveal disparities in political participation between white voters and Black voters, although it did continue to reveal persistent and severe disparities in political participation between white voters and other minority groups. U.S. Census Bureau, *supra* note 29. Although strong Black turnout in the most recent midterm is an important success to celebrate, there is a risk of backsliding in future elections if Michigan does not enshrine robust tools to combat racial discrimination in voting.

³³ The American Local Government Database provided data on the race of local elected officials in Michigan's 22 largest counties.

³⁴ See Justin de Benedictis-Kessner et al., *American Local Government Elections Database*, 10 Sci. Data 912 (2023), <https://doi.org/10.1038/s41597-023-02792-x>.

³⁵ NAACP Legal Def. & Educ. Fund & ACLU Michigan, *supra* note 26, at 5.

of such candidates' race), substantial racial disparities in political participation coupled with signs of systemic underrepresentation are concerning red flags of racial discrimination in voting.

The severe racial disparities in voter registration and turnout, together with the systemic underrepresentation of voters of color in local governments, paint a stark picture of enduring racial discrimination in voting. These patterns are often associated with racially discriminatory barriers to the franchise, such as insufficient polling places in communities of color that suppress turnout among voters of color, or district maps that crack or pack voters of color to dilute their voting strength. Moreover, in smaller jurisdictions in Michigan, the prevalence of at-large election structures—a form of election which, when combined with racially polarized voting or other relevant factors, can “operate to minimize or cancel out the voting strength of racial minorities in the voting population”—raises questions about potential vote dilution that may be going unchallenged at present.³⁶

C. Voting Rights Litigation in Michigan

Within recent decades, racial discrimination in voting in Michigan has resulted in at least ten lawsuits under the federal Voting Rights Act.³⁷ For example, in 2017, the United States Department of Justice successfully sued the city of Eastpointe for diluting the voting power of Black residents through its at-large elections in violation of Section 2 of the federal Voting Rights Act.³⁸ The at-large structure used for elections to the Eastpointe City Council submerged the vote of Eastpointe's large and growing Black population, denying Black voters—who made up 39% of the city at the time of the lawsuit—any opportunity to elect candidates of their choice.³⁹

More recently, in Flint, residents sued the City Clerk due to the failure to open its office for more than half of the 40-day period during which voters could cast absent-

³⁶ *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (internal quotations and brackets omitted). The majority of cities and nearly all school districts use at-large elections. See Mich. Municipal League, *Handbook for Municipal Officials* 10 (2015), <https://mml.org/pdf/resources/publications/ebooks/HMO%20-%20complete%20book.pdf> (“Most Michigan cities have at-large elections for councilmembers, rather than ward elections where voters in each ward (geographic section of the city) elect a councilmember or members.”); Ballotpedia, *Analysis of school district and board member characteristics* (Aug. 24, 2022), https://ballotpedia.org/Analysis_of_school_district_and_board_member_characteristics_2022 (reporting that 99.11% of seats on Michigan's school boards are elected at large).

³⁷ See Mich. L. Voting Rts. Initiative, *Section 2 Cases Database*, <https://voting.law.umich.edu/database/>.

³⁸ Compl. at 3, *United States v. City of Eastpointe*, No. 2:17-cv-10079 (E.D. Mich. Jan 10, 2017) WL 106900.

³⁹ *Id.* at 4.

voter ballots.⁴⁰ The local clerk’s office only agreed to open the office to permit absent-voter balloting after facing a lawsuit brought by the ACLU of Michigan on behalf of impacted citizens.⁴¹

Following the 2020 election, LDF, on behalf of the Michigan Welfare Rights Organization and three Detroit residents, filed suit under Section 11(b) of the VRA to prevent political operatives from disenfranchising Black voters in Michigan by pressuring Michigan state and local officials to refuse to certify election results and, specifically, not to count votes from Wayne County, Michigan, where Detroit is the county seat.⁴²

D. Current Limitations of the Federal Voting Rights Act

Although the individual and collective provisions of the federal Voting Rights Act have been effective at combatting a wide range of barriers and burdens,⁴³ federal courts have weakened many of the federal VRA’s protections in recent years, making it increasingly challenging for litigants to vindicate their rights under the law. As a result, despite the federal VRA’s importance, voters of color often face significant barriers to participate in the political process and elect candidates of their choice.

For nearly 50 years, Section 5 of the federal VRA protected millions of voters of color from racial discrimination in voting by requiring certain states and localities to obtain approval from the federal government *before* implementing a voting change.⁴⁴ However, in *Shelby County, Alabama v. Holder*, the United States Supreme Court rendered Section 5’s “preclearance” process inoperable by striking down Section 4(b) of the VRA, which identified the places where Section 5 applied.⁴⁵ Predictably, the *Shelby*

⁴⁰ See ACLU Mich., *Flint Voters Sue their City Clerk for Violating Right to Vote by Absentee Ballot* (July 17, 2020), <https://www.aclu.org/press-releases/flint-voters-sue-their-city-clerk-violating-right-vote-absentee-ballot>. By refusing to open the office, voters were effectively denied the right to vote in person by absentee ballot. Other voters reported not receiving an absentee ballot in the mail after applying. Amidst the early days of the COVID-19 pandemic, these failures were especially egregious, as many voters sought to avoid potential vectors for infection and opted to exercise their absentee rights instead. Although the Clerk’s office opened in response to the lawsuit, the office proceeded at trial and lost; a Michigan circuit court issued a writ of mandamus commanding the Clerk’s office to exercise its proper duties under Michigan law. Order at 2–3, *Barkey v. Brown*, No. 20-114457-CZ (Mich. Cir. Ct. for Cnty. of Genesee July 27, 2020), https://www.aclumich.org/sites/default/files/field_documents/absentee_voting_rights_in_flint_and_detroit_-_barkey_v_brown_-_order.pdf.

⁴¹ *Id.*

⁴² Press Release, NAACP Legal Def. & Educ. Fund, LDF Files Lawsuit Against President Trump and the Trump Campaign’s Attempts to Overturn the Election by Disenfranchising Black Voters in Michigan (Nov. 20, 2020), <https://www.naacpldf.org/press-release/ldf-files-lawsuit-against-president-trump-and-the-trump-campaigns-attempts-to-overturn-the-election-by-disenfranchising-black-voters-in-michigan/>; Press Release, NAACP Legal Def. & Educ. Fund, Federal Court Permits LDF Lawsuit Against President Trump, Trump Campaign, Republican National Committee to Proceed (Nov. 29, 2022), <https://www.naacpldf.org/press-release/federal-court-permits-ldf-lawsuit-against-president-trump-trump-campaign-republican-national-committee-to-proceed/>.

⁴³ Myrna Pérez, *Voting Rights Act: The Legacy of the 15th Amendment*, Brennan Ctr. for Just. (June 30, 2009), <https://www.brennancenter.org/our-work/analysis-opinion/voting-rights-act-legacy-15th-amendment>.

⁴⁴ 52 U.S.C. § 10304.

⁴⁵ See *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 557 (2013).

County decision unleashed a wave of voter suppression in states that were previously covered under Section 4(b).⁴⁶ This onslaught accelerated after the 2020 election, which saw historic levels of participation by voters of color (albeit with persistent racial turnout gaps).⁴⁷ Following that election, in 2021, state lawmakers introduced more than 440 bills with provisions that restrict voting access in 49 states, and 34 such laws were enacted.⁴⁸ This wave of harmful legislation shows no signs of abating—in the 2023 legislative sessions, at least 14 states enacted 17 restrictive voting laws that will be in effect for the November 2024 election.⁴⁹

Section 2 of the federal VRA offers a cause of action—which means that a person is legally entitled to file a lawsuit—regarding any voting practice or procedure that “results in a denial or abridgment of the right of any citizen of the United States to vote on account of race.”⁵⁰ However, both vote dilution⁵¹ and voter suppression⁵² claims under Section 2 impose a high bar for plaintiffs. Section 2 cases are expensive, can take years to reach resolution, and often require multiple expert witnesses for both plaintiffs and defendants.⁵³ Section 2 cases could require six- or seven-figure expenditures by plaintiffs, posing a significant challenge to litigants who may lack the resources and

⁴⁶ See NAACP Legal Def. & Educ. Fund, *Democracy Diminished* (Oct. 6, 2021), https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished_-10.06.2021-Final.pdf.

⁴⁷ Kevin Morris & Coryn Grange, *Large Racial Turnout Gap Persisted in 2020 Election*, Brennan Ctr. for Just. (Aug. 6, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/large-racial-turnout-gap-persisted-2020-election>.

⁴⁸ Brennan Ctr. for Just., *Voting Laws Roundup: December 2021* (Dec. 21, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021>.

⁴⁹ Brennan Ctr. for Just., *Voting Laws Roundup: 2023 in Review* (Jan. 18, 2024), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2023-review>.

⁵⁰ 52 U.S.C. § 10301. The U.S. Court of Appeals for the Eighth Circuit, which does not cover Michigan, recently held that voters and organizations that represent them can no longer bring lawsuits directly under Section 2 of the federal Voting Rights Act (VRA). *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023). The Eighth Circuit’s opinion flies in the face of six decades of decisions in hundreds of cases under Section 2 of the federal Voting Rights Act.

⁵¹ As recently reaffirmed by the Supreme Court in *Allen v. Milligan*, 599 U.S. 1 (2023), vote dilution cases under Section 2 are governed by the test set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Under this test, plaintiffs must first prove three preconditions before showing that, under the totality of the circumstances, that voters of color have less opportunity to participate in the political process and elect candidates of choice. *Id.* Over the course of nearly 40 years of litigation under this standard, federal courts across the country have applied this test in increasingly limited ways, *see, e.g., Bartlett v. Strickland*, 556 U.S. 1 (2009), leading to costly and prolonged litigation when voters of color seek to vindicate their rights.

⁵² The Supreme Court has never provided a legal standard to govern voter suppression or vote denial claims under Section 2. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2325 (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.”). In *Brnovich*, the Supreme Court announced a flawed set of “guideposts” to help guide courts in evaluating these claims, but the guideposts have little relevance to the core question of whether the challenged act or practice has a discriminatory effect on voters of color, and have only served to increase the burden and complexity for voters who seek to use Section 2 to vindicate their rights in the face of racial discrimination in voting.

⁵³ *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: H’rg Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 92 (2005), https://commdocs.house.gov/committees/judiciary/hju24120.000/hju24120_of.htm (“Two to five years is a rough average” for the length of Section 2 lawsuits).

specialized legal expertise to effectively prosecute Section 2 claims.⁵⁴ Due to these challenges, some potential Section 2 violations are never identified, addressed, or litigated in court.⁵⁵

Section 2 claims are also expensive for jurisdictions to defend, regularly costing states and localities considerable amounts of taxpayer money. For example, when Eastpointe faced a lawsuit under Section 2 of the federal VRA brought by the Department of Justice, the city estimated it would cost taxpayers \$1 million to defend their at-large election system.⁵⁶ In a recent Section 2 case challenging the at-large elections used by a school district in upstate New York, the district paid its lawyers more than \$7 million for unsuccessfully defending a lawsuit brought by the local NAACP branch—and, after the NAACP branch prevailed, was ordered to pay over \$4 million in plaintiffs’ attorneys’ fees and costs as well.⁵⁷ In *Veasey v. Abbott*, the federal lawsuit in which LDF challenged the State of Texas’s voter ID law with other civil rights groups and the U.S. Department of Justice (DOJ), the district court and the Fifth Circuit Court of Appeals required Texas to pay more than \$6.7 million toward the non-DOJ plaintiffs’ documented litigation costs.⁵⁸

Above and beyond its cost, litigation under Section 2 of the federal VRA simply cannot keep up with the urgency of the political process. Because elections occur frequently, discriminatory electoral maps or practices can harm voters almost immediately after rules are changed. Section 2 cases can last two to five years, and unlawful elections often take place before a case can be resolved.⁵⁹ In *Allen v. Milligan*, for example, though the Supreme Court ultimately held that Alabama’s congressional

⁵⁴ *Voting Rights and Election Administration in the Dakotas: Hr’g Before the Subcomm. on Elections of the Comm. on H. Admin.*, 116th Cong. 64 (2019), <https://www.govinfo.gov/content/pkg/CHRG-116hhrg37645/html/CHRG-116hhrg37645.htm>.

⁵⁵ Test. of Prof. Justin Levitt, *Congressional Authority to Protect Voting Rights After Shelby County v. Holder: Hr’g Before the Subcomm. on the Const., C.R. & C.L. of the H. Comm. on Judiciary*, 116th Cong. 14 (Sept. 24, 2019) <https://www.govinfo.gov/content/pkg/CHRG-116hhrg39700/pdf/CHRG-116hhrg39700.pdf>.

⁵⁶ Simon Shaykhet, *Eastpointe struggling to find solution as they face allegations about voting rights’ violations*, ABC WXYZ Detroit (Jan. 17, 2017), <https://www.wxyz.com/news/region/macomb-county/eastpointe-struggling-to-find-solution-as-they-face-allegations-about-voting-rights-violations>.

⁵⁷ Jennifer Korn, *ERCSD Threatens to Fire Teachers if Legal Fees Not Cut to \$1: NAACP Leaders Respond*, Rockland Cnty. Times (Jan. 21, 2020), <https://www.rocklandtimes.com/2021/01/21/ercsd-threatens-to-fire-teachers-if-legal-fees-not-cut-to-1-naacp-leaders-respond/>; Report & Recommendation, *NAACP, Spring Valley Branch v. East Ramapo Central Sch. Dist.*, No. 7:17-08943-CS-JCM (S.D.N.Y. Dec. 29, 2020).

⁵⁸ See Mike Scarcella, *5th Circuit Upholds \$6.7 Mln in Fees For Plaintiffs in Voting Rights Case*, Reuters (Sept. 4, 2021), <https://reut.rs/3tN14L7>.

⁵⁹ See NAACP Legal Def. & Educ. Fund, *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation 2* (Feb. 2021), <https://www.naacpldf.org/wp-content/uploads/Section-2-costs-2.19.21.pdf>; see also *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 572 (2013) (Ginsburg, J., concurring) (“An illegal scheme might be in place for several election cycles before a Section 2 plaintiff can gather sufficient evidence to challenge it.”).

map violated the VRA, the state had already selected a class of representatives in Congress using the illegal map in 2022, nearly a year before the decision.⁶⁰

The U.S. Court of Appeals for the Sixth Circuit, which issues rulings that apply to Michigan, has further weakened the VRA by wrongly interpreting the law to not permit voters of different races or ethnicities to band together to vindicate their right to a fair chance to elect candidates of their choice when their common candidate preferences are distinct from those of a white majority.⁶¹ This ruling is an obstacle to fair representation for voters of color in the state.

II. The MIVRA Provides Comprehensive Protections to Root Out Discriminatory Barriers to the Franchise

The MIVRA brings together powerful measures, adapted both from the federal Voting Rights Act as well as other state VRAs, to root out discriminatory barriers to the franchise in Michigan. Its provisions would strengthen democracy for all Michigan voters, and provide critical protections for voters of color, who have long been denied an equal opportunity to participate in the political process. We urge the committee to adopt all of the provisions in SB 401, 402, 403, and 404, and focus here on several of the most crucial provisions in this package.

A. New Causes of Action to Combat Racial Discrimination in Voting (SB 401)

The MIVRA provides voters of color, as well as organizations that represent or serve them, with new causes of action to combat racial discrimination in voting. The bill incorporates commonsense improvements on federal law, modeled on provisions in similar laws that have been adopted in state VRAs across the country, to make it more efficient for voters with meritorious claims to prove their cases in Michigan state courts.

i. Cause of Action Against Vote Dilution

Section 9 of SB 401 provides a cause of action to challenge dilutive methods of election or district maps that weaken or drown out the voices of Black voters and other voters of color which can be enforced by the Attorney General or by voters or certain organizations through a private right of action. The MIVRA codifies into Michigan law the same types of protections against racial vote dilution that have long been covered by Section 2 of the federal Voting Rights Act,⁶² but adopts a clarified, streamlined, and strengthened legal standard to adjudicate these claims.⁶³ The legal standard for the MIVRA's cause of action against vote dilution is based on similar protections against

⁶⁰ *Allen v. Milligan*, 599 U.S. 1 (2023). Although the District Court originally preliminarily enjoined the use of the map in the 2022 election, the Supreme Court vacated this order when granting certiorari. *Id.*

⁶¹ *Nixon v. Kent County*, 76 F.3d 1381, 1390 (6th Cir. 1996).

⁶² *See Thornburg v. Gingles*, 478 U.S. 30 (1986).

⁶³ *See* SB 401, Sec. 9(2), 2023-2024, <https://legislature.mi.gov/documents/2023-2024/billintroduced/Senate/pdf/2023-SIB-0401.pdf> (hereafter "SB 401" or "MIVRA").

vote dilution that have been adopted in California, Washington, Oregon, Virginia, New York, and Connecticut.⁶⁴

The MIVRA’s vote dilution provision will enable voters of color to contest at-large local elections that dilute minority voting strength. It will also provide a framework for contesting district-based elections that configure districts in a manner that denies voters of color an equal opportunity to participate in the political process and elect candidates of choice, for instance, through districting plans that crack communities of color into multiple districts or pack voters of color into just one district.

Like other state VRAs, the MIVRA’s legal standard for vote dilution clarifies and simplifies the test under the federal VRA, so it is more administrable, predictable and less costly for voters of color to vindicate their rights. The MIVRA requires plaintiffs to establish two elements: a “harm” element and a “benchmark” element.⁶⁵ The “harm” element can be satisfied in either of two ways. First, plaintiffs can prove that there exists racially polarized voting that results in the usual defeat of the candidates or electoral choices preferred by voters of color.⁶⁶ Alternatively, plaintiffs can satisfy the totality of circumstance factors.⁶⁷ Finally, the “benchmark” element can be satisfied if the plaintiff can identify a remedy that would mitigate the harm suffered by voters of color.⁶⁸

In addition, the MIVRA clearly authorizes two or more minority groups that are politically cohesive within a particular jurisdiction to join together to bring a vote

⁶⁴ See, e.g., NYVRA, N.Y. Elec. Law § 17-206(2)(b)(i); CTVRA, Conn. Gen. Stat. § 9-368j(b).

⁶⁵ See SB 401, Sec. 9(2)(a).

⁶⁶ See SB 401, Sec. 9(2)(a)(i). This inquiry draws from federal law: Racially polarized voting has been long been acknowledged as the “linchpin” of Section 2. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Allen v. Milligan*, 599 U.S. 1 (2023). Numerous federal courts have recognized that “[e]vidence of racially polarized voting is the linchpin of a section 2 vote dilution claim.” See *Westwego Citizens for Better Gov’t v. City of Westwego*, 872 F.2d 1201, 1207 (5th Cir. 1989); *Cano v. Davis*, 211 F. Supp. 2d 1208, 1238 (C.D. Cal. 2002), *aff’d*, 537 U.S. 1100 (2003); *Harding v. Cnty. of Dallas, Texas*, 336 F. Supp. 3d 677, 690 (N.D. Tex. 2018), *aff’d* 948 F.3d 302 (5th Cir. 2020); see also *McMillan v. Escambia Cnty.*, 748 F.2d 1037, 1043 (5th Cir. 1984) (“racially polarized voting will ordinarily be the keystone of a dilution case”).

⁶⁷ SB 401, Sec. 9(2)(a)(ii). The totality of circumstance factors, codified at SB 401, Sec. 11, are based on the Senate Report concerning the 1982 amendments to the federal Voting Rights Act see also *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. DNC*, 141 S. Ct. 2321, 2333 (2021) (same).

⁶⁸ SB 401, Sec. 9(2)(b). For example, if a lawsuit challenges an at-large election that denies voters of color any representation, this element can be satisfied if there is a potential district-based map that would provide protected class voters with a district in which they can elect candidates of choice. If a lawsuit challenges a districting plan that, for instance, packs voters of color into only one district in which they can elect candidates of choice, this element can be satisfied if an alternate plan is drawn in which voters of color have two districts in which they can elect candidates of choice. The idea of a benchmark requirement comes from federal law, see *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Holder v. Hall*, 512 U.S. 874 (1994). However, the MIVRA provides for a more flexible benchmark requirement than federal law, because, among other things, the MIVRA does not limit plaintiffs to demonstrating an illustrative districting plan with a “geographically compact” majority in a single-member district. See *Bartlett v. Strickland*, 556 U.S. 1 (2009). Instead, plaintiffs need only show that there is a new method of election or change to the existing method of election that would mitigate the impairment.

dilution claim, departing from the Sixth Circuit’s problematic interpretation of the federal VRA on this important point.⁶⁹

The MIVRA will make vote dilution litigation more predictable, less time-intensive, and less costly than litigation under the federal VRA. This will benefit both voters who seek to vindicate their rights as well as local governments seeking to comply with the law.

ii. Cause of Action Against Voter Suppression

Section 7 of SB 401 provides voters of color, and organizations that represent or serve them, with cause of action to challenge policies or practices that result in racial disparities in voter participation, which can also be enforced by the Attorney General. The MIVRA codifies into Michigan law the same types of protections against voter suppression or vote denial that have long been covered by Section 2 of the federal Voting Rights Act,⁷⁰ but adopts a clarified, streamlined, and strengthened legal standard for these claims.⁷¹ The legal standard for the MIVRA’s cause of action against voter suppression builds on similar protections against voter suppression that have been adopted in recent years in states including New York⁷² and Connecticut.⁷³

The MIVRA permits a plaintiff to demonstrate unlawful voter suppression in either of two ways. First, a plaintiff can prove that a challenged act or practice results in a racial disparity in voter participation, access to voting opportunities, or the opportunity or ability to participate in the political process.⁷⁴ Second, a plaintiff can prove a violation by satisfying the aforementioned totality of circumstances factors.⁷⁵

The MIVRA’s protections against voter suppression will enable voters of color to address practices that create racially discriminatory barriers to the ballot, including, among other things, inaccessible or insufficient polling locations in communities of color, wrongful voter purges that disproportionately harm voters of color without justification, the holding of local elections on unusual off-cycle dates that disproportionately suppresses turnout among voters of color when compared to on-cycle elections, or improper election administration decisions or equipment allocations that lead to longer lines.

iii. Safe Harbor for Local Governments to Voluntarily Remedy Potential Violations

Section 13 of SB 401 contains “safe harbor” protections for local governments that wish to voluntarily remedy potential violations without litigation. Prospective

⁶⁹ SB 401, Sec. 9(2)(d).

⁷⁰ Section 2 of the federal VRA prohibits political subdivisions from taking action with “the purpose or with the effect of denying or abridging the right to vote on account of race or color.” 52 U.S.C. § 10303.

⁷¹ The MIVRA’s legal standard for voter suppression claims is designed to avoid the problematic body of federal law governing these claims under *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

⁷² NYVRA, N.Y. Elec. L. § 17-206(b).

⁷³ CTVRA, Conn. Gen. Stat. § 9-368j(a)(2)(A).

⁷⁴ SB 401, Sec. 7(1)(a).

⁷⁵ SB 401, Sec. 7(1)(b).

MIVRA plaintiffs are required to notify local governments in writing of any alleged violation before they can commence any action in court, subject to a few limited exceptions. Local governments are afforded a safe harbor period during which they can adopt a resolution committing to voluntarily remedy the alleged violation.

This provision incentivizes local governments to resolve violations amicably, collaboratively, and outside of court. Similar notification and safe harbor procedures in other state VRAs have proven effective at incentivizing voluntarily resolution of potential violations outside of court.

B. Judicial Preapproval for Jurisdictions That Violate the Law (SB 401)

Section 23(2) of SB 401 provides a remedial “judicial preapproval” process, informed by the so-called “bail-in” provisions of Section 3(c) of the federal Voting Rights Act, to allow courts to require judicial preapproval before voting changes can go into effect in local governments that have violated the voting rights laws.⁷⁶ This provision will require local governments that are “bailed-in” by a court to demonstrate that proposed changes to their voting rules will neither diminish the opportunity of voters of color to participate and elect candidates of their choice nor violate the MIVRA. This provision will empower courts to prevent new violations from taking effect for up to 10 years after an initial violation in a particular local government. These procedures will serve as an important remedy to protect voters of color without the need for additional litigation. After a local government has been “bailed in” to the judicial preapproval process, instead of forcing voters to carry the burden of proving in court that the local government has violated the MIVRA, the local government would bear the burden of proof when seeking to implement a new voting-related policy.

C. Mandatory Notice for Voting-Related Changes (SB 401)

Section 20 of SB 401 requires notice of voting-related changes by local governments before they can take effect. This provision applies to a defined set of voting-related changes that experience has shown create a particular risk of discrimination against voters of color, including, among other things, changes to district boundaries or to the method of election used by a local government. This provision will help prevent racially discriminatory policies or practices from being implemented without scrutiny, by ensuring that the public is notified before changes go into effect. It will enable parties to seek to resolve disputes and prevent potential unlawful racial discrimination in voting before changes take effect. These provisions are based on

⁷⁶ Section 23(2) of SB 401 requires courts to “bail in” a jurisdiction for judicial preapproval for up to 10 years whenever the jurisdiction violates the MIVRA, the federal VRA, or other state or federal constitutional or statutory protections against racial discrimination in voting, if the court finds that the violation is susceptible to repetition, the remedy is susceptible to circumvention, there is evidence of intentional discrimination by the local government, or the local government failed to adopt broad prophylactic measures to prevent future violations. In contrast, Section 3(c) of the federal VRA authorizes a court to “bail in” a jurisdiction after a finding of intentional racial discrimination in violation of the U.S. Constitution.

similar provisions codifying advance notice and a waiting period prior to making voting-related changes adopted by Virginia.⁷⁷

D. Establishing the Voting and Elections Database and Institute (SB 402)

The MIVRA will establish a publicly accessible database of election information and demographic data housed at a Michigan academic institution, modeled on similar databases that have been adopted in other states, including Connecticut.⁷⁸ This database will provide voters with public information that is critical for voting rights analysis but can often be difficult to access, including redistricting maps in electronic format, Census and American Community Survey data on racial demographics, locations of polling places, anonymized voter files, and district-level election results.

Making this information easily accessible will foster unprecedented transparency in Michigan’s elections and facilitate evidence-based practices across the state. In concert with the MIVRA’s other measures, the database will empower Michigan voters and community groups to identify and resolve potential voting rights problems, while also helping election administrators and local officials to understand and address such issues proactively.

E. Expanding Language Access (SB 403)

The MIVRA will enhance the support provided to voters with limited English proficiency. Under current federal law, only localities in which 10,000 voting age citizens or 5% of the total voting age citizen population has limited English proficiency are required to provide language assistance, and this assistance is required for only a limited set of languages.⁷⁹ As a result, only four localities in Michigan are required to provide language assistance,⁸⁰ and no federal or state law requires language assistance for the state’s substantial Arabic-speaking population. The MIVRA establishes new thresholds that will require a broader set of local governments to provide language assistance to better enfranchise language-minority voters. This reform has been adopted in recent years in an increasing number of states, including New York and Connecticut.⁸¹

F. Codifying the Democracy Canon (SB 401)

Section 5 of SB 401 enshrines a “democracy canon” into state law by instructing judges to interpret laws and rules in a pro-voter, pro-democracy way whenever reasonably possible. This ensures that courts will construe election and voting laws—

⁷⁷ See VAVRA, Va. Code Ann. § 24.2-129.

⁷⁸ See, e.g., CTVRA, Conn. Gen. Stat. § 9-368k.

⁷⁹ U.S. Dep’t of Just., *Section 203 of the Voting Rights Act*, <https://www.justice.gov/crt/language-minority-citizens> (last updated Mar. 11, 2020).

⁸⁰ *Voting Rights Act Amendments of 2006, Determinations Under Section 203*, 86 Fed. Reg. 69,613 (Dec. 8, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-12-08/pdf/2021-26547.pdf>. The four localities are Clyde township (Hispanic), Covert township (Hispanic), Fennville city (Hispanic) and Hamtramck city (Bangladeshi).

⁸¹ NYVRA, N.Y. Elec. L. § 17-208; CTVRA, Conn. Gen. Stat. § 9-368l.

including the MIVRA—in favor of protecting the rights of voters, ensuring voters of color have equitable access to fully participate in the electoral process.

III. Equitable Voting Rights Protections Have Concrete Benefits.

By enacting the MIVRA, Michigan can pave the way for a more equal future. Equitable voting rights protections, like those in the federal VRA and state level voting rights acts, have had powerful effects in making the democratic process fairer, more equal, and more inclusive. These effects include reducing racial turnout disparities,⁸² making government more responsive to the needs of legislative priorities of communities of color,⁸³ and increasing diversity in government office,⁸⁴ so that elected representatives more fully reflect the communities they serve.

There is also evidence that measures like those in SB 401 can have powerful, downstream benefits in economic equality and health. Recent analyses show that incremental improvements in diversity in local representation translate into more equitable educational and policy outcomes.⁸⁵ And Professor Thomas A. LaVeist of Tulane University, in a landmark study, identified the federal VRA as a causal factor in reducing infant mortality in Black communities where the law’s protections had led to fairer representation.⁸⁶ For these reasons, the American Medical Association has recognized voting rights as a social determinant of health and declared support for “measures to facilitate safe and equitable access to voting as a harm-reduction strategy to safeguard public health.”⁸⁷

⁸² Zachary L. Hertz, *Analyzing the Effects of a Switch to By-District Elections in California*, Univ. Chi. (July 19, 2021), https://electionlab.mit.edu/sites/default/files/2021-07/hertz_2020.pdf.

⁸³ Sophie Schllit & Jon C. Rogowski, *Race, Representation, and the Voting Rights Act*, 61 Am. J. Pol. Sci. 513 (2017), <https://www.jstor.org/stable/26379507>.

⁸⁴ Loren Collingwood & Sean Long, *Can States Promote Minority Representation? Assessing the Effects of the California Voting Rights Act*, 57 Urb. Aff. Rev. 731, 757 (2021), https://www.collingwoodresearch.com/uploads/8/3/6/0/8360930/cvra_project.pdf; see Pei-te Lien et al., *The Voting Rights Act and the Election of Nonwhite Officials*, 40 Pol. Sci. & Pol. 489 (2007), <https://www.jstor.org/stable/20452002>; Paru R. Shah et al., *Are We There Yet? The Voting Rights Act and Black Representation on City Councils, 1981-2006*, 75 J. Pol. 993 (2013), <https://www.journals.uchicago.edu/doi/abs/10.1017/S0022381613000972?journalCode=jop>.

⁸⁵ See, e.g. Vladimir Kogan et al., *How Does Minority Political Representation Affect School District Administration and Student Outcomes*, EdWorkingPapers (2020), <https://www.edworkingpapers.com/ai20-244> (discussing “evidence that increases in minority representation lead to cumulative achievement gains . . . among minority students”); Brett Fischer, *No Spending Without Representation: School Boards and the Racial Gap in Education Finance* (2020), <https://ssrn.com/abstract=3558239> (presenting “causal evidence that greater minority representation on school boards translates into greater investment in minority students”).

⁸⁶ Thomas A. LaVeist, *The Political Empowerment and Health Status of African-Americans: Mapping a New Territory*, 97 Am. J. Socio. 1080 (1992), <https://www.jstor.org/stable/2781507>.

⁸⁷ Am. Med. Ass’n, *Support for Safe and Equitable Access to Voting H-440.805* (2022), <https://policysearch.ama-assn.org/policyfinder/detail/voting?uri=%2FAMADoc%2FHOD.xml-h-440.805.xml>; see also Anna K. Hing, *The Right to Vote, The Right to Health: Voter Suppression as a Determinant of Racial Health Disparities*, 12 J. Health Disparities Rsch. & Prac. 48 (2019), <https://digitalscholarship.unlv.edu/jhdrp/vol12/iss6/5>.

In short, the MIVRA can have significant, potentially transformative benefits for democracy and society in this state.

* * *

LDF, the nation's oldest and premier civil rights legal organization, is dedicated to the full and equal participation of all people in our democracy, and fully supports the MIVRA. We thank you for the opportunity to provide this testimony. If you have any questions, or wish to discuss, please feel free to contact Michael Pernick at (917) 790-3597 or mpernick@naacpldf.org.

Sincerely,

/s/ Michael Pernick

Michael Pernick
NAACP Legal Defense and Educational Fund, Inc.
40 Rector Street, 5th Fl.
New York, NY 10006

Adam Lioz
NAACP Legal Defense and Educational Fund, Inc.
700 14th Street N.W., Ste. 600
Washington, DC 20005

NAACP Legal Defense and Educational Fund, Inc.

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 voting 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.