

March 14, 2023

***Submitted Electronically***

Brian J. Feldman, Chair  
Cheryl C. Kagan, Vice Chair  
Senate Education, Energy, and the Environment Committee  
2 West  
Miller Senate Office Building  
Annapolis, MD 21401

***RE: Senate Bill 878 –The Maryland Voting Rights Act of 2023 – Favorable***

Dear Chair Feldman and Vice Chair Kagan:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF),<sup>1</sup> we appreciate the opportunity to submit written testimony in strong support of SB 878, the Maryland Voting Rights Act of 2023 (MDVRA).<sup>2</sup> The MDVRA builds upon the best parts of the landmark federal Voting Rights Act of 1965<sup>3</sup> and recent efforts by states such as New York and neighboring Virginia to provide much-needed protections against voting discrimination.<sup>4</sup> Through this critical legislation, Maryland would set a new standard for state-level protections for Black voters and other voters of color, and immediately become a national leader in building an inclusive, multiracial democracy.

The MDVRA's voter protections include stronger and more efficient causes of action against vote suppression and vote dilution than currently exist in the federal VRA;<sup>5</sup> an important private right of action against voter intimidation, obstruction, or interference;<sup>6</sup> as well as expanded language access

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<sup>1</sup> Since its founding in 1940, LDF has used litigation, policy advocacy, public education, and community organizing strategies to achieve racial justice and equity in the areas of education, economic justice, political participation, and criminal justice. It has been a separate organization from the NAACP since 1957.

<sup>2</sup> S.B. 878, 2023 Leg. 445<sup>th</sup> Sess. (Md. 2023), <https://mgaleg.maryland.gov/2023RS/bills/sb/sb0878F.pdf>; cross-filed as H.B.1104, 2023 Leg., 445<sup>th</sup> Sess. (Md. 2023), <https://mgaleg.maryland.gov/2023RS/bills/hb/hb1104F.pdf> (hereinafter MDVRA).

<sup>3</sup> 52 U.S.C. § 10301 et. seq.

<sup>4</sup> A.6678E / S.1046E, 2022 Reg. Sess. (NY 21-22), <https://www.nysenate.gov/legislation/bills/2021/A6678> (hereinafter NYVRA); SB 1395, 2022 Reg. Sess. (VA. 2021). <https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+SB1395>

<sup>5</sup> MDVRA § 15.5-201-206.

<sup>6</sup> MDVRA § 15.5-601.

provisions<sup>7</sup> and increased transparency of important election data.<sup>8</sup> LDF strongly supports the entire bill—in fact advancing the MDVRA is a top affirmative voting rights priority for our organization. While we support the full legislation, our testimony submitted today will focus on the legislation’s “preclearance” requirement that certain jurisdictions with a demonstrated history of discrimination secure pre-approval from state officials or a court before changing certain voting polices. Several partners and allies in this effort will submit testimony in support of other key components of the legislation.

For the reasons outlined herein, Maryland should enact the MDVRA. Prior to enactment we also recommend some improvements to better tailor the legislation to Maryland’s particular needs, which we outline below.

### **The Legal Defense Fund’s Long History of Protecting and Advancing Voting Rights**

Founded in 1940 under the leadership of Maryland native Thurgood Marshall, 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. Justice Marshall—who litigated LDF’s watershed victory in *Brown v. Board of Education*,<sup>9</sup> which set in motion the end of legal apartheid in this country and transformed the direction of American democracy in the 20th century—referred to *Smith v. Allwright*,<sup>10</sup> the 1944 case ending whites-only primary elections, as his most consequential case. He often shared that he held this view because he believed that the right to vote, and the opportunity to access political power, was critical to fulfilling the guarantee of full citizenship promised to Black people in the 14th Amendment to the U.S. Constitution.

LDF has prioritized its work protecting the right of Black citizens to vote for more than 80 years—representing Dr. Martin Luther King Jr. and other marchers in Selma, Alabama in 1965, advancing the passage of the Voting Rights Act (VRA) and litigating seminal cases interpreting its scope,<sup>11</sup> and working in communities across the South to strengthen and protect the ability of Black citizens to participate in the political process free from discrimination.

Currently, Black voters face the greatest threat of discrimination and disenfranchisement since the Jim Crow era which the VRA helped bring to a close. In the wake of recent Supreme Court cases

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<sup>7</sup> MDVRA § 15.5-301.

<sup>8</sup> MDVRA § 15.5-505.

<sup>9</sup> 347 U.S. 483 (1954).

<sup>10</sup> 321 U.S. 649 (1944).

<sup>11</sup> LDF is currently lead counsel in a federal VRA case pending before the Supreme Court this term. *Merrill v. Milligan*, 595 U.S. \_\_\_\_ (2022).

that have undercut the federal VRA,<sup>12</sup> as Congress struggles to respond with federal legislation,<sup>13</sup> and as states across the country move to further restrict the franchise,<sup>14</sup> LDF has prioritized working to advance state voting rights acts to meet the urgent need to protect Black voters from discrimination. In 2022, we advocated successfully for the enactment of the John R. Lewis Voting Rights Act of New York (NYVRA).<sup>15</sup> This year we are working with robust coalitions of civil and voting rights advocates to advance similar laws in Maryland, Connecticut and New Jersey.<sup>16</sup> As the most diverse state on the East Coast<sup>17</sup> with historic new Black leadership, a state with a longstanding history of racial discrimination that has made substantial strides in opening its democracy,<sup>18</sup> and as the birthplace of our founder Thurgood Marshall, we are excited to work with the General Assembly to ensure that Maryland can lead the way forward. The Free State can become a national leader by meeting a critical local need.

Even when Congress acts to restore and strengthen the federal VRA and the Supreme Court corrects course to fully value the voting rights of all eligible Americans, state VRAs will remain important tools to protect voters of color from discrimination. States have plenary authority to make rules and standards for state and local elections, and can more finely tailor a suite of protections to specific needs and conditions.

### **Why Preclearance is Important in Maryland**

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.<sup>19</sup> Voting

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<sup>12</sup> See *Shelby County v. Holder*, 570 U.S. 529 (2013). See *Brnovich v. Democratic National Committee*, 590 U.S. (2021).

<sup>13</sup> Freedom to Vote: John R. Lewis Act, H.R. 5746, 117th Cong. (2021).

<sup>14</sup> *Voting Laws Roundup: February 2023*, Brennan Center for Justice (Feb. 22, 2023), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2023>

<sup>15</sup> NYVRA.

<sup>16</sup> Meghan Holden, Chris Ford, Sarai Bejarano, Yanidsi Velez, Rachel Schmidt, Dera Silvestre, and Mannal Haddad, *Civil Rights Organizations and Connecticut Legislators Call for Passage of a State Voting Rights Act*, NAACP Legal Defense Fund, available at <https://www.naacpldf.org/press-release/civil-rights-organizations-and-connecticut-legislators-call-for-passage-of-a-state-voting-rights-act/>; *New Jersey Voting Rights Act*, NJVRANOW, available at <https://njvra.org/>.

<sup>17</sup> Marissa J. Lang and Ted Mellnik, *Census data shows Maryland is now the East Coast's most diverse state, while D.C. is Whiter*, Washington Post, available <https://www.washingtonpost.com/dc-md-va/2021/08/12/dc-virginia-maryland-census-redistricting-2/>

<sup>18</sup> Bennett Leckrone, *Election Reforms Will Make Voting More Accessible In Maryland, Advocates Say*, MARYLAND MATTERS, available at <https://www.marylandmatters.org/2021/06/16/election-reforms-will-make-voting-more-accessible-in-maryland-advocates-say/>

<sup>19</sup> See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

is “the citizen’s link to his laws and government”<sup>20</sup> and “the essence of a democratic society.”<sup>21</sup> If the right to vote is undermined, the Court has cautioned, other rights “are illusory.”<sup>22</sup> Thus, in a democracy, safeguarding the right to vote “is a fundamental matter.”<sup>23</sup>

Preclearance has proven to be a tremendously powerful and effective tool to protect these rights. Such programs require certain jurisdictions with demonstrated histories of discrimination to secure the approval of state officials or a court before implementing changes to voting policies or practices that could harm voters of color.<sup>24</sup> Preclearance programs are based upon the simple premise that when it comes to a matter as fundamental as the right to vote, an ounce of prevention can be worth a pound of cure.

Preclearance was the “heart” of the federal Voting Rights Act of 1965<sup>25</sup> because it prevented voting discrimination *before* it occurred. Challenging voting discrimination can be expensive and time-consuming,<sup>26</sup> and often several elections take place before discriminatory rules are addressed through litigation or policy action.<sup>27</sup> What the Supreme Court observed over fifty years ago remains true today: “Voting suits are unusually onerous to prepare” and “[l]itigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials . . . .”<sup>28</sup> Once an election has taken place under a discriminatory system, it generally cannot be undone; there is no “do over” when a person’s right to vote is denied or abridged in an election. It was for this reason that the drafters of the federal Voting Rights Act devised preclearance as a way to have a second set of eyes

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<sup>20</sup> *Evans v. Cornman*, 398 U.S. 419, 422 (1970).

<sup>21</sup> *Harman v. Forssenius*, 380 U.S. 528, 537 (1965).

<sup>22</sup> *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

<sup>23</sup> *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

<sup>24</sup> 52 U.S.C. § 10303; NYVRA § 17-210.

<sup>25</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

<sup>26</sup> Leah Aden, *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation*, NAACP Legal Defense and Educ. Fund, Inc. (Sep. 2021), <https://www.naacpldf.org/wp-content/uploads/Section-2-costs-9.19.21-Final.pdf>; Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 92 (2005) (“Two to five years is a rough average” for the length of Section 2 lawsuits).

<sup>27</sup> In just one example, Plaintiffs successfully challenged Texas’ voter identification law, which an appellate court once considered the most restrictive in the country. During three years of appeals after a federal court held that the law created an unconstitutional burden on the right to vote, Texas voters elected dozens federal, state, and local candidates. *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).

<sup>28</sup> *Katzenbach*, 383 U.S. at 314.

on potentially discriminatory voting policies *before* they can go into effect, thus “shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims.”<sup>29</sup>

Notably, many jurisdictions that were subject to federal preclearance saw the program not as a burden, but rather as a valuable way to garner expert advice on the probable impact of proposed voting changes and minimize the chances of costly litigation down the line.<sup>30</sup>

In 2013, the U.S. Supreme Court struck down the particular criteria for determining which jurisdictions would be covered by the federal preclearance program, not the concept of preclearance itself.<sup>31</sup> One indication of the effectiveness of federal preclearance is that, after the program became inoperative, voters in jurisdictions that were previously required to pre-clear voting changes began to face substantially increased discrimination.<sup>32</sup>

The recent process of redrawing district lines after the 2020 Census demonstrates why bringing the successful preclearance process to Maryland will both prevent future discrimination and also save voters and taxpayers time and money. In several jurisdictions throughout the state, the process caused public concern about the potential discriminatory impact of newly drawn districts, and some places required expensive and time-consuming litigation to address these concerns.<sup>33</sup>

One case in point involves Baltimore County’s districting plan. Despite demographic shifts over the past decade that led to nearly half the County population being people of color, the County Council enacted a districting plan that packed Black voters into a single super-majority district while maintaining significant White majorities in the six remaining districts.<sup>34</sup> The Council acted in the face of sustained advocacy by voting rights groups and clear warnings that the proposed plan would violate federal non-discrimination standards.<sup>35</sup> Local residents and civil rights groups sued under the federal

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<sup>29</sup> *Id.* at 328.

<sup>30</sup> See Brief for the States of New York, California, Mississippi, and North Carolina As Amici Curiae in Support of Respondents, *Shelby County, Ala. v. Holder* (U.S. 2013); Brief for the States of North Carolina, Arizona, California, Louisiana, Mississippi, and New York as Amici Curiae in Support of Eric H. Holder, Jr., et al., *Northwest Austin Municipal Utility District No. 1 v. Holder*, 08-322 at 11 (2009); see also Brief for Amicus Curiae, the City of New York, the Council of the City of New York, Michael R. Bloomberg, in his Capacity as Mayor of the City of New York, and Christine S. Quinn, in her Capacity as the Speaker of the City Council of the City of New York, in Support of Respondents, *Shelby County, Ala. v. Holder*, No. 12-96 (U.S. 2013).

<sup>31</sup> *Shelby County, Alabama v. Holder*, 570 U.S. 529 (2013).

<sup>32</sup> Leah Aden, *Democracy Diminished*, LDF’s Thurgood Marshall Institute, available at [https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished\\_-10.06.2021-Final.pdf](https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished_-10.06.2021-Final.pdf).

<sup>33</sup> See testimony by ACLU of Maryland for more detail on the 2020 districting cycle in the state.

<sup>34</sup> *Baltimore County Branch of the NAACP v. Baltimore County*, 2022 WL 657562 (D. Md. 2022).

<sup>35</sup> Bennett Leckrone, *In Baltimore County Redistricting Case, Plaintiffs Say New Council Map Doesn’t Comply With Voting Rights Act*, MARYLAND MATTERS, available at <https://www.marylandmatters.org/2022/03/10/in-baltimore-county-redistricting-case-plaintiffs-say-new-council-map-doesnt-comply-with-voting-rights-act/>.

Voting Rights Act and secured a court ruling invalidating the discriminatory plan.<sup>36</sup> This process, however, cost organizations time and effort better spent on affirmative priorities such as expanding voting access; and will almost certainly cost Baltimore County taxpayers at least one million dollars in legal fees.<sup>37</sup>

Given the County's history of discrimination,<sup>38</sup> it would likely qualify as a "covered jurisdiction" under the MDVRA's preclearance program.<sup>39</sup> If the MDVRA had been in place and Baltimore County was deemed covered by the preclearance program, the Attorney General or the Anne Arundel Circuit Court would almost certainly have declined to preclear the proposed districting plan under the MDVRA's standard of review,<sup>40</sup> and the County would have gone back to the drawing board to produce a nondiscriminatory plan--producing fair districts more quickly and saving taxpayer resources.

Similarly, just last month, Black voters and organizations that represent them, such as the NAACP and the Caucus of African American Leaders, were forced to sue the Town of Federalsburg to end a discriminatory at-large election system that has kept governance exclusively White for two centuries in a community that is now nearly half Black.<sup>41</sup> Black residents warned of the discriminatory impact of the current at-large system prior to filing suit.<sup>42</sup> While plaintiffs will likely prevail under the federal Voting Rights Act, there will be substantial cost to both voters and taxpayers to achieve a fair system. Federalsburg may or may not become a "covered jurisdiction" under MDVRA's preclearance program, but it is just one example of a broader problem. At least nine counties in Maryland use full or partial at-large election systems, in addition to municipalities such as Federalsburg.<sup>43</sup>

Establishing a preclearance program for the local redistricting that will occur after the next Census will help avoid such discriminatory actions thus resulting in fairer outcomes and saving

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<sup>36</sup> *Baltimore County Branch of the NAACP v. Baltimore County*, 2022 WL 657562 (D. Md. 2022).

<sup>37</sup> Meredith Curtis Goode, "Victory: Federal Judge Orders Baltimore County to Submit Redistricting Plan that Complies with Voting Rights Act," ACLU of Maryland (Feb. 22, 2022), available at <https://www.aclu-md.org/en/press-releases/victory-federal-judge-orders-baltimore-county-submit-redistricting-plan-complies>.

<sup>38</sup> No Black candidate was elected to County office until 2002, and only one Black official has served at any given time since.

<sup>39</sup> MDVRA § 15.5-401(B).

<sup>40</sup> MDVRA § 15.5-404(E).

<sup>41</sup> Ezola Webb & Meredith Curtis Goode, "Black Voters, Advocates Challenge Election System in Eastern Shore Town Shamefully Marking Bicentennial with Continued All-White Government," ACLU of Maryland (Feb. 22, 2023), available at <https://www.aclu-md.org/en/press-releases/black-voters-advocates-challenge-election-system-eastern-shore-town-shamefully>.

<sup>42</sup> *Id.*

<sup>43</sup> Maryland House Bill 655, [https://mgaleg.maryland.gov/2021RS/fnotes/bil\\_0005/hb0655.pdf](https://mgaleg.maryland.gov/2021RS/fnotes/bil_0005/hb0655.pdf).

taxpayer money. But the benefits of preclearance go well beyond redistricting. For example, a shortage of election judges and voting machines has led to long lines at the polls, particularly in Black and brown communities.<sup>44</sup> Under preclearance certain jurisdictions would need to submit their proposed allocation of polling locations across communities for review to ensure that resource allocation decisions do not leave Black or Latino neighborhoods with longer lines on Election Day.<sup>45</sup>

While preclearance would impose a small compliance requirement on covered localities, it would ultimately save many of those jurisdictions significant time and money by identifying discriminatory policies *before* they are enacted, thereby avoiding subsequent litigation. Moreover, it would serve as a powerful prophylactic to prevent voting discrimination and promote fairness and equal access to the fundamental right to vote for Maryland citizens.

### **How the MDVRA's Preclearance Program Works**

The MDVRA's preclearance program is modeled after the program enacted by New York State in 2022,<sup>46</sup> which was in turn based upon the successful federal program.<sup>47</sup> The program requires a limited set of jurisdictions with a demonstrated history of discrimination to secure pre-approval from the Attorney General or a court before making changes to an enumerated set of voting practices. To ensure that covered jurisdictions may move forward with nondiscriminatory changes in a timely manner, a jurisdiction may seek preclearance either through a streamlined administrative process with defined timelines run by the Attorney General<sup>48</sup> or by the Circuit Court for Anne Arundel County.<sup>49</sup>

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<sup>44</sup> Scott Dance & Cassidy Jensen, *As Maryland voters cast in-person ballots Tuesday, election judge shortages punctuate an unusual primary election season*, Baltimore Sun, available at <https://www.baltimoresun.com/politics/bs-md-pol-election-day-updates-20220719-sh6cvarkofgvzmmx4vdzug2yca-story.html>; Hannah Klain, Kevin Morris, Rebecca Ayala, and Max Feldman, BRENNAN CENTER, *Waiting to Vote*, available at [https://www.brennancenter.org/our-work/research-reports/waiting-vote#footnoteref6\\_etr2asr](https://www.brennancenter.org/our-work/research-reports/waiting-vote#footnoteref6_etr2asr); Barry Simms, *Some counties reducing numbers of polling places due to election judge shortage*, WBALTV11, available at <https://www.wbaltv.com/article/maryland-election-judge-shortage-counties-reduce-number-of-polling-places/33457657#> (reporting the reduction in polling sites in certain counties due to election judge shortages); Ovetta Wiggins, Rebecca Tan, Rachel Chason, and Erin Cox, *Citing a history of voter suppression, Black Marylanders turn out to vote in person*, The Washington Post, available at [https://www.washingtonpost.com/local/md-politics/maryland-early-voting-prince-georges-trust/2020/10/25/847c5afc-1537-11eb-ad6f-36c93e6c94fb\\_story.html](https://www.washingtonpost.com/local/md-politics/maryland-early-voting-prince-georges-trust/2020/10/25/847c5afc-1537-11eb-ad6f-36c93e6c94fb_story.html) (discussing the long lines Black voters had to wait in when voting in the 2020 election); Rachel Baye, *Maryland lawmakers say local election officials violated state law by opening fewer polling places*, WYPR, available at <https://www.wypr.org/wypr-news/2022-09-30/maryland-lawmakers-say-local-election-officials-violated-state-law-by-opening-fewer-polling-places> (discussing the consolidation of polling places for the 2022 election, resulting in declines of as much as 45% of a county's voting locations); *Election Data Overview*, Ways and Means Committee Briefing, available at <https://s3.documentcloud.org/documents/23115106/election-data-overview-9-29-22.pdf> (showing the comparative difference in the amount of polling places per county in 2018 versus in 2022).

<sup>45</sup> MDVRA § 15.5-401(C)(6).

<sup>46</sup> NYVRA § 17-210.

<sup>47</sup> 52 U.S.C. § 10303.

<sup>48</sup> MDVRA § 15.5-404.

<sup>49</sup> MDVRA § 15.5-406.

A covered jurisdiction may appeal the denial of preclearance by the Attorney General<sup>50</sup> or the Circuit Court.<sup>51</sup>

### Covered Jurisdictions

To determine which jurisdictions are subject to the preclearance requirement, the MDVRA constructs a coverage framework consisting of four district criteria, or “prongs.” Each prong provides a different way to assess the jurisdiction’s history of discrimination in a manner that courts have found relevant to the accessibility of the political process. Critically, each prong is time-bound, only encompassing jurisdictions that meet its criteria within a certain number of years. This ensures that the coverage framework is responsive to current conditions. It also means that jurisdictions that come under preclearance are not covered in perpetuity; but rather can roll out of coverage after a sustained period of nondiscriminatory voting administration.

The following criteria qualify a county, municipality, or school board as a covered jurisdiction:

*Any local government with at least one voting rights violation in the past 25 years.*<sup>52</sup> Past voting discrimination is perhaps the clearest sign that a jurisdiction may engage in future voting discrimination. The federal Voting Rights Act’s preclearance coverage was based upon whether certain jurisdictions had discriminatory practices in place when the law was passed.<sup>53</sup> The leading legislation in Congress to restore federal preclearance determines geographic-based preclearance coverage based largely upon voting rights violations within the past 25 years, similar to this prong of the MDVRA’s coverage.<sup>54</sup> The 25-year rolling look-back window provides a long enough period to establish patterns<sup>55</sup> while also ensuring that coverage is based upon present conditions rather than the more distant past.<sup>56</sup>

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<sup>50</sup> MDVRA § 15.5-404(G).

<sup>51</sup> MDVRA § 15.5-406(I).

<sup>52</sup> MDVRA § 15.5-401(B)(1)(I) (“Covered jurisdiction means any local government: that, within the immediately preceding 25 years has become subject to a court order or government enforcement action based on a finding of a violation of this title, the federal Voting Rights Act, the 15th Amendment to the U.S. Constitution, or a voting-related violation of the 14th Amendment to the U.S. Constitution.”).

<sup>53</sup> 52 U.S.C. § 10303.

<sup>54</sup> H.R.4, 117<sup>th</sup> Cong. (2021).

<sup>55</sup> Voting discrimination, for example, is often concentrated during redistricting, which occurs once-per-decade after each decennial census, and a 25-year look-back allows consideration of two redistricting cycles—including the post-redistricting litigation that may span several years before a court adjudication that a redistricting plan illegally discriminated against voters of color.

<sup>56</sup> Although states have more leeway to pass voting protections than does Congress (which must act pursuant to the Elections Clause or specific authority to enforce the U.S. Constitution), it is notable that this 25-year rolling look-back period is consistent with the period of time the U.S. Supreme Court has considered voting and other civil rights violations to be relevant for informing current conditions. In the 1999 case *Lopez v. Monterey County*, the Court upheld

*Any local government with at least three race-based civil rights violations in the past 25 years.*<sup>57</sup> Congress and the courts have long recognized that underlying social conditions resulting from past and ongoing discrimination often interact with particular voting rules to cause or exacerbate voting disparities.<sup>58</sup> For example, courts have long considered “the effects of discrimination in such areas as education, employment, and health” to be relevant to analyzing potential voting rights violations,” because such conditions can “hinder [a minority group’s] ability to participate effectively in the political process.”<sup>59</sup> The MDVRA relies upon the same body of law and social science research and evidence or findings in constructing its preclearance program. Jurisdictions that have engaged in discrimination in these and other areas of civil rights are more likely to engage in voting discrimination, and discrimination in these areas can make voting more difficult or impossible.

*Any local government with a significant number of citizens of voting age population of any protected class where the arrest rate of that protected class is significantly higher than that of the population as a whole.*<sup>60</sup> Getting arrested is the first step in engagement with the criminal legal system, which can have both immediate and long-term effects on an individual’s and a community’s engagement in the political process. Most directly, Maryland does not permit those convicted of felonies to vote while incarcerated.<sup>61</sup> In addition, studies have shown that voter turnout is lower in neighborhoods with high incarceration rates, even among residents with no criminal convictions themselves.<sup>62</sup> Congress and the Supreme Court have required lower courts to consider in evaluating

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the constitutionality of Section 5 at that time, and rejected a challenge brought by a jurisdiction that was covered based on conditions in the jurisdiction in 1968. 525 U.S. 266, 282-285 (1999). *Lopez* thereby recognizes that evidence of voting discrimination from 30 years ago may justify preclearance, and that Congress, in 1982, acted properly in subjecting jurisdictions to preclearance for 25 additional years based on evidence of voting discrimination from 1968. Similarly, in *Tennessee v. Lane*, the Court upheld Title II of the Americans with Disabilities Act (“ADA”) as applied to court access by looking to evidence of discrimination dating back to 1972—32 years before the Court’s decision in *Lane*, and 18 years before Congress enacted the ADA in 1990. *Tennessee v. Lane*, 541 U.S. 509, 525 & nn. 12, 14 (2004).

<sup>57</sup> MDVRA § 15.5-401(B)(1)(II) (“Covered jurisdiction means any local government: that, within the immediately preceding 25 years has become subject to at least three court orders or government enforcement actions based on a finding of a violation of a federal or state civil rights law or the 14th Amendment to the U.S. Constitution concerning discrimination against members of a protected class.”).

<sup>58</sup> *See, e.g., Gingles*, 478 U.S. at 44-47.

<sup>59</sup> *Id.* at 36-47 (quoting S. Rep. No. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-207).

<sup>60</sup> MDVRA § 15.5-401(B)(1)(III) (“Covered jurisdiction means any local government: where the combined misdemeanor and felony arrest rate of members of any protected class consisting of at least 10,000 citizens of voting age or whose members comprise at least 10% of the citizen voting age population of the local government, exceeds the proportion that the protected class constitutes of the citizen voting age population of the local government as a whole by at least 20% at any point within the immediately preceding 10 years.”).

<sup>61</sup> Julie Zauzmer Weil and Ovetta Wiggins, *D.C. and Maryland have new policies allowing prisoners to vote. Making it happen is hard*, The Washington Post, available at <https://www.washingtonpost.com/dc-md-va/2020/09/28/dc-maryland-prisoners-voting/>.

<sup>62</sup> Traci Burch, *Major Empirical Research Effort Finds Incarceration Suppresses Overall Voter Turnout*, AMERICAN BAR FOUNDATION, available at <https://www.americanbarfoundation.org/news/467>.

claims of racial discrimination in voting brought under Section 2 of the Voting Rights Act of 1965, “the extent to which minorities in the state or political subdivision bear the effects of discrimination in education, employment, and health, which hinder their ability to participate effectively in the political process.”<sup>63</sup> As part of this analysis, courts have considered whether and to what extent there are “disparities . . . in the numbers of law enforcement stops, arrests, fines, and fees.”<sup>64</sup>

*Any local government with a significant number of citizens of voting age population of any protected class where there is significant residential segregation.*<sup>65</sup> As noted above, Congress and the courts have recognized that underlying social conditions resulting from past and ongoing discrimination often interact with particular voting rules to cause or exacerbate voting disparities. Courts have considered the degree to which neighborhoods are racially segregated as a relevant factor when considering whether voters of color are being unfairly marginalized in the political process due to the lingering effects of discrimination.<sup>66</sup> Voters of color are more likely to face discriminatory voting outcomes in places where they are already facing discrimination in housing, and residential segregation can make voting more difficult directly by affecting the accessibility of polling locations, for example.

These four coverage prongs are modeled after the recently enacted New York Voting Rights Act.<sup>67</sup> Taken as a whole, they serve to identify jurisdictions where recent discrimination substantially increases the risk of current or future voting discrimination. Through further research and consultation with local experts, LDF is recommending some changes and additions to these coverage prongs that will help further tailor the MDVRA’s preclearance framework to Maryland’s unique circumstances and needs. These recommendations are detailed in the section below.

### Covered Voting Policies and Practices

A key difference between the MDVRA and the federal preclearance program is that rather than require covered jurisdictions to preclear any change to voting policy or practices,<sup>68</sup> the MDVRA

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<sup>63</sup> See S. Rep. No. 97-417, at 28-29 (Senate Judiciary Committee report on 1982 Amendments to Section 2 of the Voting Rights Act, 52 U.S.C. § 10301); see also *Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986).

<sup>64</sup> See, e.g., *Missouri State Conf. of the Nat’l Ass’n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1071 (E.D. Mo. 2016), *aff’d*, 894 F.3d 924 (8th Cir. 2018).

<sup>65</sup> MDVRA § 15.5-401(B)(1)(IV) (“Covered jurisdiction means any local government: where, based on data made available by the U.S. Bureau of the Census, the dissimilarity index of any protected class that consists of at least 25,000 citizens of voting age for the local government or whose members comprise at least 10% of the voting age population of the local government, has been in excess of 50 with respect to the race, color, or language minority group that comprises a majority within the local government at any point during the immediately preceding 10 years.”).

<sup>66</sup> See, e.g., *Holloway v. City of Virginia Beach*, 531 F. Supp. 3d 1015, 1087 (E.D. Va. 2021); *N.A.A.C.P. Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 408 (S.D.N.Y. 2020), *aff’d* 984 F.3d 213 (2d Cir. 2021); *United States v. City of Euclid*, 580 F. Supp. 2d 584, 606 (N.D. Ohio 2008).

<sup>67</sup> NYVRA § 17-210.

<sup>68</sup> 52 U.S.C. § 10303.

enumerates a specific set of “covered policies” and practices that experience shows have the potential to be deployed in a discriminatory fashion.<sup>69</sup> These covered policies include changes to forms of government, election methods, district lines, polling locations, and language or disability assistance.<sup>70</sup> The aim is to protect voters against discriminatory changes while making compliance as efficient as possible both for covered jurisdictions and the preclearance administrator.

### Standard of Review for Preclearance Decisions

The MDVRA differs from federal preclearance and the New York model in that it provides for a standard of preclearance review that is more protective of voters. Under the federal preclearance program, a voting change would be precleared as long as the change would not diminish the voting power of a protected class, a standard that came to be known as anti-retrogression.<sup>71</sup> This standard is the result of statutory interpretation by the Supreme Court, not the explicit intent of the drafters of the VRA.<sup>72</sup> The MDVRA includes this standard because it is clear and relatively easy to administer: do not make voters of color worse off.<sup>73</sup>

Anti-retrogression, however, is not sufficient to address discrimination in certain circumstances—such as when a local population has already been suffering from discrimination for years (so a change might not be a step backwards, but maintains a discriminatory regime), or when fairness requires voters of color be given additional opportunities to elect candidates of choice (such as when population shifts should require an additional majority-Black district). For this reason, the MDVRA also prohibits the preclearance of any enumerated policy that “is more likely than not to violate a provision” of the MDVRA as a whole.<sup>74</sup>

### **Recommendations for Improving the MDVRA’s Preclearance Framework**

Based upon LDF’s extensive experience with preclearance at the federal level, our work to help design the preclearance provision of the recently-enacted John R. Lewis Voting Rights Act of New York,<sup>75</sup> our work with legislators in Connecticut and other states to help craft programs that meet

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<sup>69</sup> MDVRA § 15.5-401(C).

<sup>70</sup> Id.

<sup>71</sup> *Beer v. United States*, 425 U.S. 130 (1976).

<sup>72</sup> Id.

<sup>73</sup> MDVRA 15.5-404(E); 15.5-406(G).

<sup>74</sup> Id.

<sup>75</sup> NYVRA § 17-210.

local needs,<sup>76</sup> and our consultations with local experts on Maryland voting patterns and discrimination, we recommend some targeted improvements to the current MDVRA framework. These improvements are intended to help meet Maryland's specific needs by either adjusting existing coverage prongs or by adding new ones.

### Combine the Legal Violation Coverage Prongs

The MDVRA has separate coverage prongs for voting violations and other race-based civil rights violations. LDF recommends combining these into a single prong which is simpler and allows racial discrimination in areas beyond voting to play a strong role in the preclearance framework. This is the approach taken by Connecticut in its state voting rights act.<sup>77</sup> It will be especially helpful in Maryland where lack of prior preclearance coverage or widespread Section 203 language access coverage means that voting discrimination was less likely to be successfully remedied through federal Voting Rights Act lawsuits or administrative action in the past.

### Amend the Criminal Legal System Prong to Add Traffic Stops

As noted above, courts have found disparities in arrest rates and traffic stops are both indicators of discrimination in a particular jurisdiction.<sup>78</sup> Since Maryland collects and makes publicly available traffic stop data by race,<sup>79</sup> this is a helpful metric to add to the criminal legal system prong of the preclearance coverage framework.

### Add Coverage Prongs Based Upon Voter Participation Disparities

LDF recommends adding two coverage prongs that would include in the preclearance program jurisdictions where there is a substantial disparity (at least 10%) in either voter registration or voter turnout rates between members of a protected class and the jurisdiction as a whole.

Disparities in participation as measured by voter registration and voter turnout are direct evidence of unequal access to the ballot.<sup>80</sup> For this reason, registration and turnout disparities in a

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<sup>76</sup> SB471, 2022 General Assembly, 2022 Reg. Sess., (CT. 2022). <https://www.cga.ct.gov/2022/fc/pdf/2022SB-00471-R000454-FC.pdf>.

<sup>77</sup> Id. § 5(c)(1).

<sup>78</sup> See, e.g., *Missouri State Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1071 (E.D. Mo. 2016), *aff'd*, 894 F.3d 924 (8th Cir. 2018).

<sup>79</sup> *Race-Based Traffic Stop Data Dashboard*, Governor's Office of Crime Prevention, Youth, and Victim Services, available at <http://goccp.maryland.gov/data-dashboards/traffic-stop-data-dashboard/>.

<sup>80</sup> Studies have shown that eligible citizens of color often face more substantial burdens or barriers to exercising their fundamental right to vote. *The Impact of Voter Suppression on Communities of Color*, BRENNAN CENTER FOR JUSTICE, available at <https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color>.

particular jurisdiction were specifically cited in the federal Voting Rights Act as factors for consideration during federal preclearance determinations.<sup>81</sup>

Unfortunately substantial, greater-than-average voter registration and turnout disparities persist in Maryland, and the overall diversity of the state means that a significant number of Black and brown potential voters are sidelined each election. In April 2022, the nonpartisan Voter Participation Center conducted a nationwide analysis to identify the most severe participation disparities across race, gender, and age. The Center found a 33.3% disparity between White turnout and participation by voters of color in the state in the 2020 election, which put Maryland in the top third of the country.<sup>82</sup> In addition, the share of the citizen population registered to vote was nearly 10% lower than overall share of citizen population for people of color in Maryland.<sup>83</sup> The Center placed Maryland in its top quintile with respect to the need to reduce registration disparities between citizen populations by race.<sup>84</sup>

### Add Coverage Prong Based Upon Failure to Submit Required Changes

We recommend adding an additional prong that would retain preclearance coverage for any covered jurisdiction that fails to submit required voting changes to either the Attorney General or a court. This prong would not add to the number of jurisdictions covered under the program, but would rather extend the time period that already-covered jurisdictions would be within the program if they do not follow the rules; therefore it provides a strong incentive for covered jurisdictions to comply.

### Align Population Thresholds and Disparities Across Coverage Prongs

To provide consistency, better tailor to Maryland's particular needs, and better ensure that the coverage framework is neither overinclusive nor underinclusive, LDF recommends aligning the minimum protected class population thresholds and the minimum disparity metrics across the relevant coverage prongs (dissimilarity index, criminal legal system disparities, and voter participation disparities).

In consultation with local experts, we recommend that only jurisdictions with at least six-thousand (6,000) members of any particular protected class, or for which a protected class makes up at least fifteen percent (15%) of its population be eligible to be subject to the preclearance

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<sup>81</sup> 52 U.S.C. § 10303 (a)(2).

<sup>82</sup> Voter Participation Center, *Demographic and Turnout Trends from Voter File/Census Estimates (April 2022)*, available at [https://docs.google.com/spreadsheets/d/1Lldx15dtruOmvT7\\_fZsZSR35ci67hKreJ-jdp7BYRIY/edit#gid=799968722](https://docs.google.com/spreadsheets/d/1Lldx15dtruOmvT7_fZsZSR35ci67hKreJ-jdp7BYRIY/edit#gid=799968722).

<sup>83</sup> Id., available at [https://docs.google.com/spreadsheets/d/1Lldx15dtruOmvT7\\_fZsZSR35ci67hKreJ-jdp7BYRIY/edit#gid=1187652746](https://docs.google.com/spreadsheets/d/1Lldx15dtruOmvT7_fZsZSR35ci67hKreJ-jdp7BYRIY/edit#gid=1187652746).

<sup>84</sup> Id., available at [https://docs.google.com/spreadsheets/d/1Lldx15dtruOmvT7\\_fZsZSR35ci67hKreJ-jdp7BYRIY/edit#gid=1792381242](https://docs.google.com/spreadsheets/d/1Lldx15dtruOmvT7_fZsZSR35ci67hKreJ-jdp7BYRIY/edit#gid=1792381242).

requirement.<sup>85</sup> Further, we suggest that jurisdictions where protected class members suffer from disparities of ten percent (10%) or greater with respect to the relevant metric (arrest rates, traffic stops, voter participation) qualify for preclearance coverage (assuming they meet the population thresholds).

### **Other Recommended Changes to MDVRA**

After reviewing the legislative text, LDF has suggested other targeted changes to MDVRA's sponsors. These are largely technical changes to better implement the intent of the legislation. We are happy to answer questions about any of them if / when they are presented to this Committee.

### **Conclusion**

This Committee hearing takes place soon after the 58<sup>th</sup> anniversary of the Bloody Sunday Selma-to-Montgomery march that led directly to the passage of the federal VRA. Maryland now has an opportunity to carry forward that legacy by enacting its own VRA. We urge this Committee to seize this opportunity by moving the MDVRA forward to the Senate floor; and we stand ready to work with you to protect Black voters, and other voters of color, in the Free State.

Please feel free to contact Adam Lioz at (917) 494-2617 or [alioz@naacpldf.org](mailto:alioz@naacpldf.org) with any questions or to discuss the MDVRA in more detail.

Sincerely,

*/s/ Adam Lioz*

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### **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.

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<sup>85</sup> This does not mean that all such jurisdictions would be covered. They would still need to meet the primary metric of discrimination. It just means that no jurisdictions that do not meet this threshold requirement would be covered.