

July 15, 2021

Submitted by email

Michigan Senate
100 N Capitol Ave, Lansing, MI 48933

Re: Opposition to S.B. 303 & S.B. 304

Dear Senators:

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”) writes to urge you to reject the House substitutes for Senate Bills (“S.B.”) 303 and 304 and to take no further action to consider or enact these bills.¹ S.B. 303 and S.B. 304 already threatened to undermine Michiganders’ voting rights in the form in which they passed the Michigan Senate. As amended by the House of Representatives, the bills are more troubling still. Together, S.B. 303 and S.B. 304 would likely disenfranchise the disproportionately Black and low-income voters who lack access to photo identification, subject these voters and other historically marginalized groups to potentially arbitrary and unreliable signature-matching standards, and force more Michigan voters to cast provisional ballots—while decreasing the likelihood that such provisional ballots will count. The two bills would also burden all eligible Michiganders’ right to vote by imposing these new hurdles, potentially violating the U.S. Constitution, the Michigan Constitution, and federal law.

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

S.B. 303 would rewrite Michigan’s voter identification requirements to make them far more restrictive.² It would achieve this result by removing the mitigating provision in existing Michigan law that enables in-person voters to cast a regular ballot if they attest in an affidavit that they are not in possession of photo identification³—an option that thousands of Michiganders, including

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

² S.B. 303 (amending Mich. Comp. Laws § 168.523).

³ *Id.*; see Mich. Sec’y of State, *Affidavit of Voter Not in Possession of Picture Identification*, Michigan.gov (last visited May 25, 2021), https://www.michigan.gov/documents/sos/Affidavit_of_Voter_in_Possession_209344_7.pdf?20130614121635.

Senator Ed McBroom, have used in past elections.⁴ Under S.B. 303, the only option for these voters would be cast a provisional ballot, which, under S.B. 304, would be less likely to be tabulated.

This change in Michigan law would needlessly burden the fundamental right to vote. The affidavit option under Michigan’s current voter ID law for in-person voting, which S.B. 303 would abolish, is a particularly important safeguard for voters who lack access to any approved form of photo ID, or to the underlying documents necessary to obtain such ID. Nor is there any evidence of fraud related to the affidavit option. A spokesperson for former Secretary of State and current Senator Ruth Johnson confirmed this point in 2016,⁵ and no such evidence has been presented in any more recent election either.

Moreover, S.B. 303’s strict photo ID requirement appears likely to interact with existing law and S.B. 304, if that bill is enacted, to disenfranchise some voters who do not possess any approved form of photo ID. As discussed above, the bill would require voters who cannot present photo ID to cast provisional ballots. To make those provisional ballots count, however, a voter would have to appear at their clerk’s office within six days of the election—and present photo ID.⁶ For voters issued a provisional ballot, under S.B. 303’s restrictions, precisely because they are unable to present photo ID at the polls, this will likely be impossible.

Black voters will likely face heightened burdens under S.B. 303 and S.B. 304. In Michigan, Black voters are six times more likely than white voters to lack photo ID.⁷ In recent elections, voters in Detroit, where Black residents are

⁴ Jonathan Oosting, *GOP targets no-ID ballots to cut fraud. Only 0.2% voted that way in Michigan.*, Bridge Michigan (May 19, 2021), <https://www.bridgemi.com/michigan-government/gop-targets-no-id-ballots-cut-fraud-only-02-voted-way-michigan> (“I have voted at times by filling out an affidavit because I forgot my driver’s license,” McBroom said in 2016. ‘And now I’m going to be told that I have got to find time when my clerk’s at the office because she’s not in the office on most days.’”).

⁵ Jonathan Oosting, *Strict voter ID law approved in Michigan House*, Detroit News (Dec. 7, 2016), <https://www.detroitnews.com/story/news/local/2016/12/07/strict-voter-law-approved-michigan-house/95127394/> (“We are not aware of fraud related to the affidavit’ option, said Fred Woodhams, a spokesman for Republican Secretary of State Ruth Johnson . . .”).

⁶ See Mich. Comp. Laws § 168.813(1) (“A provisional ballot must only be tabulated . . . if the identity and residence of the elector is established using identification for election purposes . . .”); Mich. Sec’y of State, *Provisional Ballot – Notices to Voter 2*, Michigan.gov (last visited May 26, 2021), https://www.michigan.gov/documents/Fed_ID_Req_Notice_New_95240_7.pdf (describing procedures for “any voter who is required to vote a Provisional Envelope ballot because he or she is unable to satisfy Michigan’s voter identification requirement”).

⁷ Phoebe Henninger et al., *Who Votes Without Identification? Using Individual-Level Administrative Data to Measure the Burden of Strict Voter Identification Laws* 13 (Sept. 29, 2020), https://scholar.harvard.edu/files/morse/files/mich_voter_id.pdf; see also Joel Kurth & Ted Roelofs, *Poor in Michigan with no ID. “I am somebody. I just can’t prove it.”*, Bridge Michigan

79% of the population,⁸ have signed a disproportionate number of affidavits attesting to a lack of photo ID.⁹ Thus, as one recent study found, implementing a stricter voter ID law in Michigan that “requir[ed] people to have access to ID in order to vote will have a disparate racial impact.”¹⁰ Such a law’s disenfranchising effects would fall hardest on Black voters, the study shows, who “are particularly likely to lack access to ID.”¹¹

II. S.B. 303’s Signature-Matching Provisions for In-Person Voting Will Likely Result in Unreliable and Arbitrary Rejections, Causing More Voters to Cast Provisional Ballots, and Increasing Wait-Times at the Polls.

As amended by the House of Representatives, S.B. 303 would require election workers—who are not trained to analyze signatures—to compare in-person voters’ wet signatures on the poll books with an electronic signature, and issue the voter a regular ballot only if, in the poll workers’ untrained opinions, the two signatures match.¹² This procedure would likely result in a high number of qualified voters being forced to cast provisional ballots—which, under S.B. 304, may not be counted.

In the context of absentee voting, the U.S. Election Assistance Commission reports that “non-matching signature” is a leading reason for ballot rejection.¹³ Yet, as the Eleventh Circuit has explained, even when trained election officials apply uniform standards and expert judgment to the task of deciding whether two signatures come from the same person, “the inherent nature of signatures” can produce superficial differences that cause officials to make the wrong call, potentially resulting in wrongful disenfranchisement.¹⁴ Further, signature variations that can lead to rejections “are more prevalent in people who

(Sept. 26, 2017), <https://www.bridgemi.com/urban-affairs/poor-michigan-no-id-i-am-somebody-i-just-cant-prove-it>.

⁸ Julia Mack & Scott Levin, *See list of Michigan cities with most African American residents, and geographic shifts since 1970*, MLive.com (June 23, 2020), <https://www.mlive.com/public-interest/2020/06/see-list-of-michigan-cities-with-most-african-american-residents-and-geographic-shifts-since-1970.html>.

⁹ Oosting, *GOP targets no-ID ballots*, *supra* note 4 (reporting that approximately “1 in 4” of the 11,417 affidavit voters in Michigan in the November 2020 election “were signed in Detroit”); Mike Wilkinson, *Voting without an ID? Not a big problem in most of Michigan*, Bridge Michigan (Dec. 13, 2016), <https://www.bridgemi.com/michigan-government/voting-without-id-not-big-problem-most-michigan> (“By far, the voters most likely not to have ID lived in counties and cities with larger minority populations: 30 percent of all voters statewide without ID voted in Detroit; 39 percent were in Wayne County (which comprises just 17 percent of all active registered voters in the state).”).

¹⁰ Henninger et al., *supra* note 7 at 3.

¹¹ *Id.* at 15.

¹² S.B. 303 (amending Mich. Comp. Laws § 168.523).

¹³ U.S. Elec. Assist. Comm’n, *2018 Comprehensive Report* 14 (June 2019), https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf.

¹⁴ *Lee*, 915 F.3d at 1320.

are elderly, disabled, or who speak English as a second language.”¹⁵ These risks are magnified by S.B. 303, as poll workers without specialized training would be making these signature-matching decisions. Voters of color, voters with disabilities, naturalized-citizen voters, and elderly voters would likely face a higher risk of additional burdens under S.B. 303.

In addition, if S.B. 303 is enacted, Michigan voters will likely face longer lines and increased wait-times at polling places, as poll workers puzzle over even insubstantial variations between two signatures—one digital and potentially outdated—for each and every voter they process. For many voters, especially those with personal or professional commitments that limit their availability during work hours, elderly voters, and voters with disabilities or other medical conditions, waiting in such lines may not be feasible. These burdens, too, are likely to disproportionately harm historically marginalized groups, including Black voters, who already face longer lines at polling locations¹⁶ and may not be able to take time off from work to navigate long wait-times.¹⁷

Moreover, the potentially high stakes of longer lines and wrongfully rejected signatures, including disenfranchisement, counsel strongly against implementing S.B. 303’s signature-matching provisions. Voting is a fundamental right, and any burden on that right must be balanced against a legitimate and countervailing state interest.¹⁸ Here, the burdens are both severe and

¹⁵ *Saucedo*, 335 F. Supp. at 205–206.

¹⁶ M. Keith Chen et al., *Racial Disparities in Voting Wait Times: Evidence from Smartphone Data* (Oct. 30, 2020), <https://arxiv.org/pdf/1909.00024.pdf>; Daron Shaw, *Report on Provisional Ballots and American Elections* (June 21, 2013), [http://web.mit.edu/support-thevoter/www/files/2013/08/Provisional-Ballots-Shaw-and-Hutchings.docx .pdf](http://web.mit.edu/support-thevoter/www/files/2013/08/Provisional-Ballots-Shaw-and-Hutchings.docx.pdf); Joshua Field et al., *Uncounted Votes: The Racially Discriminatory Effects of Provisional Ballots*, Center for American Progress (Oct. 2014), https://cdn.americanprogress.org/wp-content/uploads/2014/10/ProvisionalBallots-report.pdf?_ga=2.111276417.42375908.1621859427-264694957.1618767359.

¹⁷ Black Michiganders have a median income of \$36,833, far less than that of non-Hispanic white Michiganders (\$63,704. See *S1903, Median Income in the Past 12 Months (In 2019 Inflation-Adjusted Dollars)*, 2019 American Community Survey 1-Year Estimates, United States Census Bureau. As federal courts have recognized, lower-income Black workers “are likely to be working for an hourly wage and are less likely to be able to take off from work” to vote during business hours than those in higher-paying, salaried jobs. *Operation PUSH v. Allain*, 674 F. Supp.1245, 1256 (N.D. Miss. 1987), *aff’d sub. nom. Operation PUSH v. Mabus*, 932 F.2d 400 (5th Cir. 1991)

¹⁸ See *Burdick v. Takushi*, 504 U.S. 428 (1992) (“A court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiffs seeks to vindicate’ against ‘the precise interest put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’”) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); see also *Fla. Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *6 (N.D. Fla. Oct. 16, 2016) (“If disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does.”).

unnecessary, because it is already a felony in Michigan “to falsely impersonate another person” at a polling place, or to “vote or attempt to vote under the name of another person.”¹⁹

III. S.B. 304’s Provisional Ballot Rules Impose Severe Burdens.

S.B. 304 would extend the harms of S.B. 303, requiring voters who cast provisional ballots to produce photo ID within dix days after Election Day in order to make those provisional ballots count.²⁰ As discussed above, this requirement would especially burden those voters who, under the restrictions S.B. 303 would impose, are forced to cast a provisional ballot for being unable to present photo ID. However, S.B. 304 would also extend this needless requirement to other categories of provisional-ballot voters, including voters whose signatures are judged not to match under S.B. 303’s new procedures, voters who present photo ID but are unable to document their current address, and some same-day registrants whose names are not yet on the voter registration lists, if election works cannot contact the city or township clerk to verify the voters’ registration.²¹

These changes would likely create discriminatory harms. Already, Black voters and other voters of color are more likely to be forced to vote by provisional ballot,²² and more likely to have those provisional ballots rejected.²³ By burdening the process of perfecting a provisional ballot, S.B. 304 would heighten the burdens caused by S.B. 303’s voter ID and signature-matching provisions for Black voters, who are less likely to possess photo ID,²⁴ as well as elderly

¹⁹ Mich. Comp. Laws § 168.932a(a) (“A person shall not, at an election, falsely impersonate another person, or vote or attempt to vote under the name of another person, or induce or attempt to induce a person to impersonate another person or to vote or attempt to vote under the name of another person.”).

²⁰ S.B. § 304 (amending Mich. Comp. Laws § 168.523a).

²¹ Michigan Legislature, House Fiscal Agency, *Legislative Analysis: Provisional Ballots 2* (June 24, 2021), <https://www.legislature.mi.gov/documents/2021-2022/billanalysis/House/pdf/2021-HLA-0303-3F1C4843.pdf> (summarizing effects of S.B. 303 and S.B. 304, as reported from the House Elections and Ethics Committee). 1

²² Daron Shaw, *Report on Provisional Ballots and American Elections* (June 21, 2013), [http://web.mit.edu/supportthevoter/www/files/2013/08/Provisional-Ballots-Shaw-and-Hutchings.docx .pdf](http://web.mit.edu/supportthevoter/www/files/2013/08/Provisional-Ballots-Shaw-and-Hutchings.docx.pdf); Joshua Field et al., *Uncounted Votes: The Racially Discriminatory Effects of Provisional Ballots*, *Center for American Progress* (Oct. 2014), https://cdn.americanprogress.org/wp-content/uploads/2014/10/ProvisionalBallots-report.pdf?_ga=2.111276417.42375908.1621859427-264694957.1618767359.

²³ Thessalia Merivaki & Daniel A. Smith, *A Failsafe for Voters? Cast and Rejected Provisional Ballots in North Carolina*, *Sage Journals* (Sept. 19, 2019) <https://journals.sagepub.com/doi/10.1177/1065912919875816>; Joshua Field et al., *Uncounted Votes: The Racially Discriminatory Effects of Provisional Ballots*, *Center for American Progress* (Oct. 2014), https://cdn.americanprogress.org/wp-content/uploads/2014/10/ProvisionalBallots-report.pdf?_ga=2.111276417.42375908.1621859427-264694957.1618767359.

²⁴ Henninger et al., *supra* note 7 at 13.

voters, voters with disabilities, and voters who speak a language other than English, who are more likely to have their signatures rejected at the polls.²⁵

IV. Potential Violations of Michigan and Federal Law

For these reasons, enacting S.B. 303 and S.B. 304 will likely produce harmful results and may lead to at least five violations of the United States Constitution, the Michigan Constitution, the Voting Rights Act of 1965, and Title II of the Americans with Disabilities Act.

First, by abolishing the affidavit option for voters who lack photo identification, S.B. 303 would call into question the constitutionality of Michigan’s voter ID law as a whole. In 2007, the Michigan Supreme Court relied on the existence of “the affidavit alternative” to uphold the statute from challenge under the Michigan and U.S. Constitutions as a severe burden on the right to vote or an impermissible poll tax.²⁶ If the affidavit option is removed, Michigan’s voter ID law will likely be subject to renewed challenge on similar grounds—and significant elements of the Court’s 2007 analysis will not apply.

Second, because S.B. 303 will likely cause a disproportionate number of Black voters to cast provisional ballots—which, under S.B. 304, will be less likely to be uncounted—the two bills may violate the Fourteenth and Fifteenth Amendments to the United States Constitution and the Voting Rights Act of 1965,²⁷ which prohibit discriminatory denial or abridgment of the right to vote, a right that “includes the right to have the ballot counted.”²⁸

Third, by burdening all Michiganders’ right to vote and imposing this burden without serving a legitimate state interest, S.B. 303 and S.B. 304 may

²⁵ See *Saucedo*, 335 F. Supp. at 205–206.

²⁶ *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 456–57 (Mich. 2007) (holding that Michigan’s voter ID law does not impose a severe burden because “the statute explicitly provides that an elector without photo identification need only sign an affidavit in the presence of an election inspector before being ‘allowed to vote’”); *id.* at 464–65 (holding that the law “is not an unconstitutional poll tax” because “[a] voter who does not otherwise possess adequate photo identification is not required to incur the costs of obtaining photo identification as a condition of voting” and may instead “simply sign an affidavit in the presence of an election inspector”).

²⁷ See U.S. Const. amends. XIV, XV; 52 U.S.C. § 10301.

²⁸ *Reynolds v. Sims*, 377 U.S. 533, 555 n. 29 (1964). Under the Voting Rights Act, voting is specifically defined to include: “all action necessary to make a vote effective in any . . . election, including, but not limited to . . . having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.” 52 U.S.C. § 10310(c)(1).

violate the First and Fourteenth Amendments to the United States Constitution and Article 1, § 2 of the Michigan Constitution.²⁹

Fourth, as a fundamental right, the right to vote is a liberty interest protected by the Fourteenth Amendment’s Due Process Clause.³⁰ Because S.B. 303’s signature-matching process appears to lack reliable standards and may create an inappropriate risk of erroneous deprivation of the right to vote, it may violate procedural due process.³¹

Fifth, because S.B. 304’s signature-matching rules will likely lead to increased and disproportionate rejections among people with disabilities,³² the bill also raises significant concerns under Title II of the Americans with Disabilities Act.³³

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For the foregoing reasons, we respectfully urge the members of the Michigan Senate to reject the House of Representatives’ substitutes for S.B. 303 and S.B. 304—and to take no further action on either of these harmful bills. Please feel free to contact Steven Lance at (347) 947-0522 or by email at slance@naac-pldf.org with any questions or to discuss these concerns in more detail.

Sincerely,

/s/ Steven Lance

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²⁹ See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (“A court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiffs seeks to vindicate’ against ‘the precise interest put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’”) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); Mich. Const. art. 1 § 2; *In re Request for Advisory Opinion*, 740 N.W.2d at 463 (adopting the *Anderson-Burdick* test for equal-protection challenges to voting laws under Article 1, § 2 of the Michigan Constitution).

³⁰ See *Miller v. Blackwell*, 348 F. Supp. 2d 916, 919–20 (N.D. Ohio 2004) (“The right to vote . . . implicates a liberty interest protected by the Due Process Clause of the Fourteenth Amendment.”).

³¹ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

³² *Saucedo*, 335 F. Supp. at 205–206.

³³ 42 U.S.C. § 12131.

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.