Election Law Clinic
HARVARD LAW SCHOOL

Maryland Senate
Education, Energy, and Environment Committee
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Testimony of Election Law Clinic at Harvard Law School in Support of SB660 of 2024

On behalf of the Election Law Clinic at Harvard Law School ("ELC"), and at the request of regulated lobbyist Common Cause Maryland, we are pleased to offer this testimony in support of Senate Bill 660, the Maryland Voting Rights Act of 2024 – Counties and Municipalities ("SB660").

ELC aims to build power for voters and recognizes that the struggle for voting rights is a struggle for racial justice. Much of ELC's work centers on State Voting Rights Acts ("SVRAs"), and clinical students have developed expertise in the area. ELC staff have written about how State Voting Rights Acts can help achieve the important goal of fair representation at the local level,[1] and have represented plaintiffs in Federal Voting Rights Act ("FVRA") and State Voting Rights Acts litigation.[2] ELC currently represents five Latino voters in the Town of Mount Pleasant, New York in their vote dilution claim under the John R. Lewis New York Voting Rights Act.[3] ELC has also co-authored amicus briefs in a case challenging the constitutionality of the Washington Voting Rights Act.[4]

Maryland needs a Voting Rights Act to counter the erosion of federal protections for voting rights. Historical protections that have allowed people to engage meaningfully in the political process, regardless of race, are dwindling. The U.S. Supreme Court has stripped away the protections of Section 5 of the FVRA[5] and has imposed ever higher bars to successfully prove a claim under Section 2 of the FVRA.[6] Most recently, the Fifth and Eighth Federal Circuit Courts of Appeals have rendered decisions that further undermine the FVRA.[7] SVRAs are a necessary

[1] *See* Ruth Greenwood, *Fair Representation in Local Government*, 5 IND. J. L. & SOC. EQUALITY 197 (2017); Ruth Greenwood & Nicholas Stephanopoulos, *Voting Rights Federalism*, 73 EMORY L. J. 299 (2023).
[2] *See* Holloway v. Virginia Beach, 531 F. Supp. 3d 1015 (E.D. Va. 2021), *vacated and remanded as moot*, 42 F.4th 266 (4th Cir. 2022); Aguilar v. Yakima County, No. 20-2-0018019 (Wash. Superior Ct. for Kittitas Cnty.).
[3] Serratto v. Town of Mount Pleasant, No. 55442/2023 (Sup. Ct. N.Y. for Westchester Cnty).
[4] *See* Brief of Law School Clinics Focused on Civil Rights as Amici Curiae, Portugal v. Franklin Cnty., 530 P.3d 994 (Wash. 2023); Brief for OneAmerica as Amicus Responding to Intervenor-Defendant's Motion for Judgment on the Pleadings, Portugal v. Franklin Cnty, No. 21-2-50210-11 (Wash. Super. Ct. for Franklin Cnty. Dec. 2, 2021).
[5] Shelby County v. Holder 570 U.S. 529 (2013) (finding the pre-clearance formula set out in Section 4 of the FVRA to be unconstitutional as a violation of the equal dignity of the states).
[6] *See, e.g.*, Bartlett v. Strickland, 556 U.S. 1, 14–17 (2009) (requiring that to comply with the *Gingles* 1 prong, plaintiffs must show that a demonstration district exists in which the identified minority comprises 50% plus one vote of the CVAP); and Brnovich v. Dem. Nat'l Comm., 141 S. Ct. 2321, 2338–2340 (2021) (setting out five additional guideposts that courts may consider when reviewing vote denial claims).
[7] Petteway v. Galveston Cnty., Texas, 86 F.4th 214, 217 (5th Cir. 2023), *reh'g en banc granted, opinion vacated*, 86 F.4th 1146 (5th Cir. 2023) ("The text of Section 2 does not support the conclusion that distinct minority groups may be aggregated for purposes of vote-dilution claims"); Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment, 86 F.4th 1204, 1206–07 (8th Cir. 2023) (hereafter "Arkansas NAACP") (finding that Section 2 of the FVRA does not include a private right of action).

bulwark against vote suppression or dilution on account of race. SB660 includes some of the most expansive language of any SVRA to date to protect voters. In this testimony we focus only on the vote dilution provision of SB660, § 15.5–202, and highlight what we believe are the most important and laudable aspects of those sections. We also briefly review the subpart of 202 that addresses the mechanics of litigation and provide additional explanations for some of the listed factors.

I. SB660's vote dilution provisions go beyond the FVRA to provide meaningful access to the political process for all voters, regardless of race or color.

A. Broad application

Vote dilution occurs when some groups of voters are able to convert their votes into political power while other voters only have access to meaningless ballots.[8] In its first sentence, § 15.5-202(A) recognizes the myriad ways that vote dilution can occur and holds jurisdictions accountable if they engage in the practice. This language sets the tone for a broad and powerful protection of voting rights.

B. Requiring a benchmark for an undiluted vote

The wording of § 15.5-202(B) solves a quandary that has arisen under the FVRA in vote dilution cases: namely, what is an "undiluted vote."[9] Federal courts, including the Supreme Court, have struggled with this question over the years.[10] In one instance, the lack of an agreed upon benchmark to assess alleged vote dilution against led a plurality of the Supreme Court to hold that the FVRA could not be used to allege that the size of a governmental body was racially dilutive.[11]

Section 15.5-202(B)(2) solves this problem for both plaintiffs and courts. It clarifies that plaintiffs cannot prove vote dilution claims unless they provide a benchmark against which to assess vote dilution—specifically, it requires them to show that there exists a method of election that would mitigate the alleged impairment, providing the crucial baseline comparator all parties in a litigation need to assess whether and to what extent dilution exists.[12]

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[8] The term "meaningless ballot" was first applied to explain the problem of vote dilution, as opposed to vote denial, by Justice Marshall in *City of Mobile v. Bolden*, 446 U.S. 55, 104 (1980) (Marshall, J. dissenting) ("A plurality of the Court concludes that, in the absence of proof of intentional discrimination by the State, the right to vote provides the politically powerless with nothing more than the right to cast meaningless ballots.").

[9] See Greenwood & Stephanopoulos, *supra* note 1, at 344–47; *see also* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001).

[10] *See, e.g*, Johnson v. De Grandy, 512 U.S. 997, 1013–15 (1994) (adding a proportionality assessment to the *Gingles* framework) and Bartlett, 556 U.S. at 14–17.

[11] Holder v. Hall, 512 U.S. 874, 881 (1994) (plurality opinion).

[12] The California Supreme Court recently read into the California VRA a requirement similar to the proposed § 15.5-202(B)(2) language. *See* Pico Neighborhood Ass'n v. City of Santa Monica, No. S263972, 2023 WL 5440486, at *7 (Cal. Aug. 24, 2023).

The benchmark language is also notable for an additional reason. It works with § 202(B)(1) to make clear that a plaintiff cannot win a claim by proving only the existence of racially polarized voting ("RPV").[13] A plaintiff must show a benchmark, and crucially, that benchmark proposal must "mitigate the impairment of the equal opportunity of protected class members to nominate or elect candidates of their choice." This phrase incorporates two different types of restrictions on plaintiffs. First a plaintiff must be able to show that there is a lack of electoral success by candidates of choice of the protected class (i.e. protected class members do not have an opportunity to elect candidates that is equal to the rest of the voters in the jurisdiction). Second the phrase prevents members of the protected class from seeking outsized influence in a jurisdiction. In some areas where protected class members are highly residentially segregated, it may be possible to offer a single member district plan that provides representation that is far greater than proportional. The "equal opportunity" and "mitigate the impairment" language thus combine to ensure that only those plaintiffs with *un*equal access to meaningful participation can avail themselves of the protections of the vote dilution provision.

C. Allowing non residentially segregated communities to claim vote dilution.

Beyond providing the needed clarification around benchmarks, § 15.5-202(B)(2) also allows more members of protected classes to access meaningful participation,[14] building upon the reach of the FVRA.[15] Sections 15.5-202(B)(2) and 15.5-202(C) provide that members of protected classes need not show they are able to comprise a majority in a district (i.e., that they are sufficiently residentially segregated) to obtain relief under the vote dilution provision.[16] This responds to the realities of modern racial vote dilution: though residential segregation is decreasing, racial polarization in voting remains high,[17] with the consequence that as geographically diffuse protected classes become more common, that very diffusion will cause them to lose the protections of the FVRA.[18]

D. An unambiguous private right of action

[13] This would be an awkward standard because as long as RPV existed in the jurisdiction, any party could keep returning to court to win a vote dilution claim and seek a different remedy each time.
[14] Building on Justice Marshall's language in Mobile v. Bolden, 446 U.S. 55, 104 (1980), Lani Guinier used the term "meaningful participation" to describe what civil rights activists sought in the second generation of voting rights litigation. LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY ch. 1 (1994).
[15] Under the FVRA plaintiffs must show, in part, that a minority is sufficiently large and geographically compact to constitute a numerical majority in at least one additional single-member district. *See* Thornburg v. Gingles, 478 U.S. 30, 50 (1986); *Bartlett*, 556 U.S. at 26 ("Only when a geographically compact group of minority voters could form a majority in a single-member district has the first *Gingles* requirement been met.").
[16] *Bartlett*, 556 U.S. at 26.
[17] See Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1348, 1358 (2016).
[18] *See* Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. CHI. L. REV. 1329, 1384–88 (2016).

A few years ago, the language of § 15.5-204 may have gone unheralded, but the particularity with which SB660 identifies a private right of action for harmed individuals or organizations is now notable and important. In 2021, Justice Gorsuch hinted at the lack of a private right of action under Section 2 of the FVRA.[19] And more recently in *Arkansas State Conference of the NAACP v. Arkansas Board of Apportionmen*t, a federal court of appeals denied relief under Section 2 to private individuals, concluding that the FVRA does not provide private individuals or entities a cause of action.[20] If that case holds at the Supreme Court level or if other federal appellate courts follow suit, then SB660 will provide the only hope for members of protected classes in Maryland to access meaningful participation.

E. Specification of Remedies

Two further provisions of SB660 are important to the success of the vote dilution cause of action under the proposed Maryland Voting Rights Act. Section 15.5-205(A)(1)(IV) requires that aggrieved persons send a notice letter to a jurisdiction before suing, in which they must identify their preferred remedy. This notice requirement should allow for productive settlement discussions and may avert the need for litigation in a number of instances. That section will also encourage community members to work together to develop a local system that enfranchises the entire community.

Section 15.5-205(A)(4) is also critical to the success of the Maryland Voting Rights Act because it allows the Attorney General to approve solutions to electoral systems that jurisdictions would otherwise lack authority to implement. This provision offers an efficient non-litigation route for localities to ensure members of protected classes have access to meaningful participation and allows remedies to be highly tailored to local conditions.

II. The mechanics of a proving vote dilution claim under SB660 largely reflect the realities of voting rights litigation.

A. Understanding the factors a court shall consider when adjudicating the existence of racially polarized voting.

Section 15.5–202(D) of SB660 sets out a list of factors that a court shall consider, and a separate list of items that a court shall not require, in determining whether a practice dilutes votes. Many of these provisions reflect the wisdom of hundreds of FVRA Section 2 vote dilution claims litigated over the years. For example, § 15.5-202(D)(1)(I) specifies that evidence from elections held before a case is filed is usually more probative than evidence from those held later. That specification reflects the fact that once a jurisdiction is aware of its possible legal liability, it may strategically encourage certain candidates (specifically, those who are likely to be the candidates

[19] Brnovich v. Dem. Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring).
[20] Arkansas NAACP, 86 F.4th 1204, 1206–07 (8th Cir. 2023).

of choice of the community represented by plaintiffs) to run for office, and to support their candidacies.[21]

Elsewhere in § 15.5–202(D)(1), SB660's language recognizes the limitations of the most common empirical method courts use to assess the presence of RPV ("King's EI").[22] For example, §15.5–202(D)(1)(VI) allows multiple protected classes to show their electoral preferences are cohesive in the aggregate, without having to separately define the preference choices of each protected class. This direction recognizes that there are many cases where multiple communities will vote together, and thus deserve protection against vote dilution, but where one portion of that community will be a protected class that is so small that they could not use King's EI to accurately demonstrate their preferences alone.[23]

B. Understanding factors a court shall *not* consider when adjudicating the existence of racially polarized voting.

Section 15.5–202(D)(2)(III) prevents a court from considering evidence that subgroups of protected classes have different voting patterns. It bears clarifying that this language is a useful check on the limitations of census categories for races or ethnicities that contain various subgroups within them. If those subgroups all vote differently from each other, then King's EI will not show statistically significant RPV for that larger group, and the protected class as whole could not bring a vote dilution claim. However, if just one small subset of the group votes differently, a defendant may seek to use that fact to sideline evidence from King's EI showing otherwise high levels of RPV for the larger group. For example: Suppose an Asian community is the identified protected class, and King's EI suggests that roughly 70% of voters with a census designation of Asian tend to support the same candidates for local government. But suppose further that there is a consistent group of Asian voters from one national origin that do not support those candidates (and that this fact can be shown with admissible evidence). The fact that a small subset of Asian people vote differently from the larger class should not derail a court from recognizing the otherwise high level of RPV demonstrated by the statistical techniques. Section 15.5–202(D)(2)(III) clarifies that this kind of fact cannot defeat an otherwise strong showing of RPV. In this way, this provision aligns

[21] *See, e.g.*, Collins v. City of Norfolk, Va., 883 F.2d 1232, 1242 (4th Cir. 1989) (After Plaintiffs filed suit under Section 2 of the FVRA, the Mayor supported a Black candidate who was the candidate of choice of the Black community and boasted that the legal action could be mooted if that candidate received sufficient support from white voters).

[22] *See, e.g.*, Baltimore Cnty. Branch of Nat'l Ass'n for the Advancement of Colored People v. Baltimore Cnty., MD, No. 21-CV-03232-LKG, 2022 WL 657562, at *8 & n. 4 (D. Md. Feb. 22, 2022), *modified*, No. 21-CV-03232-LKG, 2022 WL 888419 (D. Md. Mar. 25, 2022) (favorably discussing plaintiffs' EI evidence and noting that "[c]ourts have referred to ecological inference analysis as the 'gold standard' for racially polarized voting analysis").

[23] *See, e.g*, Holloway v. City of Virginia Beach, 531 F. Supp. 3d 1015, 1067 (E.D. Va. 2021) *vacated and remanded as moot*, 42 F. 4th 266 (4th Cir. 2022) ("Determining the aggregate preference for non-white voters was necessary because the City's Asian and Hispanic populations make it difficult to individually ascertain their preferred candidates using election returns by precinct").

with the §15.5–202(D)'s broader goals of streamlining litigation by disqualifying ex-ante certain arguments that are likely to be sideshows or distractions.

C. Weighing the totality of the circumstances

SB660 also gives guidance as to the types of factors that a court may consider for the totality of the circumstances inquiry in § 15.5–203(A)(1). Importantly, §§ 15.5–203(A)(2)-(3) clarify that evidence under every item of the list is not necessary for a violation to be found and direct courts to consider the evidence before them in a holistic fashion. In ELC's experience litigating these cases, this is an appropriate level of discretion to give to trial judges who have expertise in fact finding and weighing evidence in support of a specific inquiry. The kind of evidence available for jurisdictions of different types and sizes will vary enormously and may depend upon the jurisdiction's ability to collect and maintain good records. Plaintiffs should not have their case undermined just because they cannot point to a certain factor due to a jurisdiction falling short with respect to record keeping on that factor. Sections 15.5–203(A)(2)-(3) thus ensure that plaintiffs can still successfully prove their claim under a totality of the circumstances vote dilution claim using other kinds of evidence, even if they cannot collect evidence about one factor.

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