

February 20, 2024

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 660 –The Maryland Voting Rights Act of 2024 – Favorable

Dear Chair Feldman and Vice Chair Kagan:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF),¹ we appreciate the opportunity to submit written testimony in strong support of SB 660, the Maryland Voting Rights Act of 2024 (“MDVRA”).² The MDVRA builds upon the best parts of the landmark federal Voting Rights Act of 1965³ and recent efforts by states such as New York, Connecticut, and neighboring Virginia to provide much-needed protections against voting discrimination.⁴ Through this critical legislation, Maryland would help set the 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;⁵ an important private right of action against voter intimidation, obstruction, or interference;⁶ as well as expanded language access provisions.⁷ 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

¹ 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.

² S.B. 660, 2024 Leg., 446th Sess. (Md. 2024),

<https://mgaleg.maryland.gov/mgaweb/Legislation/Details/SB0660?ys=2024RS> (hereinafter “MDVRA”), (cross-filed as H.B. 800, 2024 Leg., 446th Sess. (Md. 2024), <https://mgaleg.maryland.gov/2024RS/bills/hb/hb0800F.pdf>).

³ 52 U.S.C. § 10301 et seq.

⁴ A.6678E / S.1046E, 2022 Reg. Sess. (N.Y. 21-22), <https://www.nysenate.gov/legislation/bills/2021/A6678> (hereinafter “NYVRA”); S.B. 1395, 2022 Reg. Sess. (Va. 2021), <https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+SB1395>; H.B. 6941, 2023 Reg. Sess (Conn. 2023), <https://www.cga.ct.gov/2023/ACT/PA/PDF/2023PA-00204-R00HB-06941-PA.PDF> (hereinafter “CTVRA”).

⁵ MDVRA § 15.5–201-206.

⁶ MDVRA § 15.5–501.

⁷ MDVRA § 15.5–301.

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.

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*,⁸ 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*,⁹ 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 marchers, including Dr. Martin Luther King, Jr., in Selma, Alabama in 1965, advancing the passage of the Voting Rights Act (VRA) and litigating seminal cases interpreting its scope,¹⁰ 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.

Black voters face some of the greatest threats 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 that have undercut the federal VRA,¹¹ as Congress struggles to respond with federal legislation,¹² and as states across the country move to further restrict the franchise,¹³ 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).¹⁴ In 2023 we worked alongside local and national partners to help enact the John R. Lewis Voting Rights Act of Connecticut (“CTVRA”).¹⁵ This year we are working with robust

⁸ 347 U.S. 483 (1954).

⁹ 321 U.S. 649 (1944).

¹⁰ LDF was lead counsel in a recent federal VRA case before the Supreme Court. *Merrill v. Milligan*, 142 S.Ct. 879 (2022).

¹¹ See *Shelby County v. Holder*, 570 U.S. 529 (2013). See *Brnovich v. Democratic National Committee*, 590 U.S. (2021).

¹² Freedom to Vote Act, H.R. 11, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/house-bill/11>; John R. Lewis Voting Rights Advancement Act of 2023, H.R. 14, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/house-bill/14>; Freedom to Vote Act, S. 1, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/senate-bill/1>.

¹³ *Voting Laws Roundup: 2023 in Review*, Brennan Center for Justice (Jan. 18, 2024), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2023-review>.

¹⁴ NYVRA.

¹⁵ CTVRA.

coalitions of civil and voting rights advocates to advance similar laws in Florida, Minnesota, and New Jersey.¹⁶ As the most diverse state on the East Coast¹⁷ with historic new Black leadership, a state with a longstanding history of racial discrimination that has made substantial strides in opening its democracy,¹⁸ 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 if Congress ultimately 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.¹⁹ Voting is “the citizen’s link to his laws and government”²⁰ and “the essence of a democratic society.”²¹ If the right to vote is undermined, the Court has cautioned, other rights “are illusory.”²² Thus, in a democracy, safeguarding the right to vote “is a fundamental matter.”²³

Preclearance has proven to be a tremendously powerful and effective tool to protect these rights. Preclearance 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.²⁴ Such 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.

¹⁶ NAACP Legal Def. & Educ. Fund, *Florida Needs Its Own Voting Rights Act*, <https://www.naacpldf.org/case-issue/florida-voting-rights-act/>; NAACP Legal Def. & Educ. Fund, *Maryland Needs Its Own Voting Rights Act*, <https://www.naacpldf.org/case-issue/maryland-voting-rights-act/>; NAACP Legal Def. & Educ. Fund, *New Jersey Needs Its Own Voting Rights Act*, <https://www.naacpldf.org/case-issue/new-jersey-voting-rights-act/>; Democracy For The People Act, H.F. 3, 93rd Sess. (Minn. 2023), https://www.revisor.mn.gov/bills/text.php?number=HF3&type=bill&version=6&session=ls93&session_year=2023&session_number=0&format=pdf.

¹⁷ Marissa J. Lang & Ted Mellnik, *Census data shows Maryland is now the East Coast’s most diverse state, while D.C. is r*, Wash. Post (Aug. 12, 2021), <https://www.washingtonpost.com/dc-md-va/2021/08/12/dc-virginia-maryland-census-redistricting-2/>.

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

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

²⁰ *Evans v. Cornman*, 398 U.S. 419, 422 (1970).

²¹ *Harman v. Forssenius*, 380 U.S. 528, 537 (1965).

²² *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

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

²⁴ 52 U.S.C. § 10303; NYVRA § 17–210; CTVRA § 414(c)-(f).

Preclearance was the “heart” of the federal Voting Rights Act of 1965²⁵ because it prevented voting discrimination *before* it occurred. Challenging voting discrimination can be expensive and time-consuming,²⁶ and often several elections take place before discriminatory rules are addressed through litigation or policy action.²⁷ What the Supreme Court observed over fifty years ago remains true today: “Voting suits are unusually onerous to prepare” and “[I]itigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials”²⁸ 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 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.”²⁹

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.³⁰

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.³¹ 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.³²

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

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

²⁶ Leah Aden, *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation*, NAACP Legal Def. & Educ. Fund, Inc. (Sept. 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: Hr’g Before the Subcomm. on the Const. of the H. Comm. on the Judiciary, 109th Cong. 79 (2005) (“Two to five years is a rough average” for the length of Section 2 lawsuits), https://commdocs.house.gov/committees/judiciary/hju24120.000/hju24120_of.htm.

²⁷ 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).

²⁸ *Katzenbach*, 383 U.S. at 314.

²⁹ *Id.* at 328.

³⁰ See Brief for the States of New York, California, Mississippi, and North Carolina As Amici Curiae in Support of Respondents, *Shelby County 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 v. Holder*, No. 12-96 (U.S. 2013).

³¹ *Shelby County v. Holder*, 570 U.S. 529 (2013).

³² Leah Aden, *Democracy Diminished*, NAACP Legal Def. & Educ. Fund’s Thurgood Marshall Inst. (Oct. 6, 2021), https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished_-10.06.2021-Final.pdf.

public concern about the potential discriminatory impact of newly drawn districts, and some places required expensive and time-consuming litigation to address these concerns.³³

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.³⁴ 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.³⁵ Local residents and civil rights groups sued under the federal Voting Rights Act and secured a court ruling invalidating the discriminatory plan.³⁶ 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.³⁷

Given the County’s history of discrimination,³⁸ it would likely qualify as a “covered jurisdiction” under the MDVRA’s preclearance program.³⁹ 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,⁴⁰ 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, last year, 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.⁴¹ Black residents warned of the discriminatory impact of the current at-large system prior to filing suit.⁴² Under a court order, Federalsburg created a new election system that led to the election of the community’s first ever Black town council members in

³³ ACLU of Maryland, Testimony for the Ways and Means Committee (Mar. 7, 2023), https://mgaleg.maryland.gov/cmte_testimony/2023/wam/1nse5lqvngZ_P9ljK6PoDcUMxyTW0tzHy.pdf.

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

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

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

³⁷ 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), <https://www.aclu-md.org/en/press-releases/victory-federal-judge-orders-baltimore-county-submit-redistricting-plan-complies>.

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

³⁹ MDVRA § 15.5–401(B).

⁴⁰ MDVRA § 15.5–404(E).

⁴¹ 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), <https://www.aclu-md.org/en/press-releases/black-voters-advocates-challenge-election-system-eastern-shore-town-shamefully>.

⁴² *Id.*

October 2023.⁴³ This victory, however, has come at substantial cost to both voters and local taxpayers. And, there are other communities where residents of color suffer underrepresentation yet the particular circumstances are less amenable to a federal lawsuit.⁴⁴

At least nine counties in Maryland use full or partial at-large election systems, in addition to municipalities such as Federalsburg.⁴⁵ Nearly two-thirds of municipalities with substantial populations of people of color use at-large systems.⁴⁶ These systems and unfair district maps have contributed to significant underrepresentation for Black Marylanders and other people of color at the local level. Approximately one-third of Maryland counties and one-quarter of municipalities with substantial populations of people of color have all-white government, according to an analysis by ACLU of Maryland.⁴⁷

Establishing a preclearance program for the local redistricting that will occur after the next Census will help avoid such discriminatory election systems, resulting in fairer outcomes and saving 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.⁴⁸ Under preclearance, certain municipalities would need to submit their proposed

⁴³ Order directing Def. to submit to this court, by no later than 5/23/2023, a status report, *Caroline County NAACP et al. v. Federalsburg*, No. 1:23-cv-00484-SAG (D. Md. 2024), ECF No. 27; Joe Heim & Erin Cox, *After lawsuit, a town elects first Black leaders in its 200-year history*, Wash. Post (Oct. 1, 2023), <https://www.washingtonpost.com/dc-md-va/2023/10/01/federalsburg-election-naACP-aclu-maryland/>.

⁴⁴ The Town of Delmar is an example of a community with a substantial Black population that does not appear to be sufficiently concentrated in one part of the community to meet the requirements of a federal lawsuit. See Data USA, *Delmar, MD*, <https://datausa.io/profile/geo/delmar-md/>; Rachel Lord, *Delmar Commission Election to Take Place on Nov. 16*, Morning Star Publications (Sept. 23, 2021), <https://starpublications.online/delmar-commission-election-to-take-place-on-nov-16/>.

⁴⁵ H.B. 655, 2021 Leg., 443rd Sess. (Md. 2021), https://mgaleg.maryland.gov/2021RS/fnotes/bil_0005/hb0655.pdf.

⁴⁶ *Why Maryland Needs Its Own Voting Rights Act*, ACLU of Maryland, https://www.aclu-md.org/sites/default/files/mdvra_need_public_onepager_mdga24.pdf.

⁴⁷ *Id.*

⁴⁸ Scott Dance & Cassidy Jensen, *As Maryland voters cast in-person ballots Tuesday, election judge shortages punctuate an unusual primary election season*, Baltimore Sun (July 19, 2022), <https://www.baltimoresun.com/politics/bs-md-pol-election-day-updates-20220719-sh6cvarkofgvzmmx4vdzug2yca-story.html>; Hannah Klain, Kevin Morris, Rebecca Ayala, & Max Feldman, *Waiting to Vote*, Brennan Center, 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, <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, & Erin Cox, *Citing a history of voter suppression, Black Marylanders turn out to vote in person*, Wash. Post (Oct. 25, 2020), https://www.washingtonpost.com/local/md-politics/maryland-early-voting-prince-georges-trust/2020/10/25/847c5afc-1537-11eb-ad6f-36c93e6e94fb_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 (Sept. 30, 2022), <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); Maryland General Assembly's House Ways and Means Committee *Election Data Overview* (Sept. 29, 2022), <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).

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.⁴⁹

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 programs enacted by New York State in 2022⁵⁰ and Connecticut in 2023,⁵¹ which were in turn based upon the successful federal program.⁵² 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 General⁵³ or by the Circuit Court for Anne Arundel County.⁵⁴ A covered jurisdiction may appeal the denial of preclearance by the Attorney General⁵⁵ or the Circuit Court.⁵⁶

Covered Jurisdictions

To determine which jurisdictions are subject to the preclearance requirement, the MDVRA constructs a coverage framework consisting of five distinct 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:

⁴⁹ MDVRA § 15.5–401(C)(2). Because county election administration is largely controlled by the State Board of Elections, counties are only subject to preclearance for the purposes of redistricting.

⁵⁰ NYVRA § 17–210.

⁵¹ CTVRA § 414(c)-(f).

⁵² 52 U.S.C. § 10303.

⁵³ MDVRA § 15.5–404.

⁵⁴ MDVRA § 15.5–406.

⁵⁵ MDVRA § 15.5–404(G).

⁵⁶ MDVRA § 15.5–406(I).

*Any local government with at least one voting rights violation in the past 25 years.*⁵⁷ 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.⁵⁸ 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.⁵⁹ The 25-year, rolling look-back window provides a long enough period to establish patterns⁶⁰ while also ensuring that coverage is based upon present conditions rather than the more distant past.⁶¹

*Any local government with at least one race-based civil rights violation “concerning a pattern, practice, or policy of discrimination” in the past 25 years.*⁶² 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.⁶³ 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.”⁶⁴ 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

⁵⁷ MDVRA § 15.5–401(B)(1) (“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.”).

⁵⁸ 52 U.S.C. § 10303.

⁵⁹ John R. Lewis Voting Rights Advancement Act of 2023, H.R. 14, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/house-bill/14>.

⁶⁰ 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.

⁶¹ 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 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).

⁶² MDVRA § 15.5–401(B)(2) (“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.”).

⁶³ See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 44–47 (1986).

⁶⁴ *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).

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 traffic stop rate or arrest rate of that protected class is significantly higher than that of the population as a whole.*⁶⁵ Getting stopped or 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.⁶⁶ In addition, studies have shown that voter turnout is lower in neighborhoods with high incarceration rates, even among residents with no criminal convictions themselves.⁶⁷ Congress and the Supreme Court have required lower courts to consider in evaluating 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."⁶⁸ 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."⁶⁹ Unlike many other states, Maryland collects and makes publicly available traffic stop data by race, making it feasible to include this metric along with arrest rates.⁷⁰

*Any local government 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.*⁷¹ Disparities in participation as measured by voter registration and voter turnout are direct evidence of unequal access to the ballot.⁷² For this reason, registration and turnout disparities in a

⁶⁵ MDVRA § 15.5-401(B)(4) ("Covered jurisdiction means any local government: where the traffic stop rate, or 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 10% at any point within the immediately preceding 10 years.").

⁶⁶ Julie Zauzmer Weil & Ovetta Wiggins, *D.C. and Maryland have new policies allowing prisoners to vote. Making it happen is hard*, Wash. Post (Sept. 28, 2020), <https://www.washingtonpost.com/dc-md-va/2020/09/28/dc-maryland-prisoners-voting/>.

⁶⁷ Traci Burch, *Trading Democracy for Justice: Criminal Convictions and the Decline of Neighborhood Political Participation*, American Bar Foundation (Aug. 2013), <https://www.americanbarfoundation.org/resources/trading-democracy-for-justice-criminal-convictions-and-the-decline-of-neighborhood-political-participation/>.

⁶⁸ See S. Rep. No. 97-417, at 28-29 (Senate Judiciary Comm. 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).

⁶⁹ See, e.g., *Missouri State Conf. NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1071 (E.D. Mo. 2016), *aff'd*, 894 F.3d 924 (8th Cir. 2018).

⁷⁰ Governor's Office of Crime Prevention, Youth, and Victim Services, *Race-Based Traffic Stop Data Dashboard*, <http://goccp.maryland.gov/data-dashboards/traffic-stop-data-dashboard/>.

⁷¹ MDVRA § 15.5-401(B)(5)&(6).

⁷² Studies have shown that eligible citizens of color often face more substantial burdens or barriers to exercising their fundamental right to vote. Brennan Center, *The Impact of Voter Suppression on Communities of Color* (Jan. 10, 2022), <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.⁷³

Unfortunately, substantial voter registration and turnout disparities persist in Maryland, which 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.⁷⁴ 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.⁷⁵ The Center placed Maryland in its top quintile with respect to the need to reduce registration disparities between citizen populations by race.⁷⁶ This general picture is confirmed by U.S. Census data for the 2022 elections which reports significant voter registration and turnout disparities between white Marylanders and residents of color, including a more than 10 point turnout gap between white and Black voters and 20 points (or a 50% difference) between white and Latine voters.⁷⁷

*Retain preclearance coverage for any covered jurisdiction that fails to submit required voting changes to either the Attorney General or a court.*⁷⁸ This prong does 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. These five coverage prongs are modeled after the recently enacted New York Voting Rights Act and Connecticut Voting Rights Act.⁷⁹ Taken as a whole, they serve to identify jurisdictions where recent discrimination substantially increases the risk of current or future voting discrimination.

Covered Voting Policies and Practices

The MDVRA enumerates a specific set of “covered policies” and practices that jurisdictions are required to submit for expert review prior to enactment that experience shows have the potential to be deployed in a discriminatory fashion.⁸⁰ These covered policies include changes to forms of government, election methods, district lines, polling locations, and language or disability assistance.⁸¹

⁷³ 52 U.S.C. § 10303(a)(2).

⁷⁴ Voter Participation Center, *Demographic and Turnout Trends from Voter File/Census Estimates (April 2022)*, https://docs.google.com/spreadsheets/d/1Lldx15dtruOmvT7_fZsZSR35ci67hKreJ-jdp7BYRIY/edit#gid=799968722.

⁷⁵ *Id.*, at https://docs.google.com/spreadsheets/d/1Lldx15dtruOmvT7_fZsZSR35ci67hKreJ-jdp7BYRIY/edit#gid=1187652746.

⁷⁶ *Id.*, at https://docs.google.com/spreadsheets/d/1Lldx15dtruOmvT7_fZsZSR35ci67hKreJ-jdp7BYRIY/edit#gid=1792381242.

⁷⁷ U.S. Census Bureau, *Voting and Registration in the Election of November 2022: Table 4b (Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2022 [<1.0 MB])* (Apr. 2023), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-586.html>

⁷⁸ MDVRA § 15.5-401(B)(3).

⁷⁹ NYVRA § 17-210, CTVRA § 414(c)-(f).

⁸⁰ MDVRA § 15.5-401(C).

⁸¹ *Id.*

The aim is to protect voters against discriminatory changes while making compliance as efficient as possible both for covered jurisdictions and the preclearance administrator.

Counties are subject to preclearance only for the purposes of redistricting and method of election since their election administration is largely controlled by state law and the State Board of Elections.⁸² Municipalities, on the other hand, are subject to fewer protections or controls on how they administer elections; and are therefore subject to preclearance for a wider range of practices.⁸³

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.⁸⁴ This standard is the result of statutory interpretation by the Supreme Court, not the explicit intent of the drafters of the VRA, who focused on remedying discrimination in voting not only preventing it from getting worse.⁸⁵ The MDVRA includes this standard because it is clear and relatively easy to administer: do not make voters of color worse off.⁸⁶

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.⁸⁷

Taken as a whole, MDVRA’s preclearance program is designed to help both voters and local jurisdictions avoid voting discrimination before it occurs and save all members of a community the time and expense of bringing a lawsuit to resolve such discrimination after the fact. Because the opportunity to obtain advanced review of voting changes by experts in the Attorney General’s office is a substantial benefit, the MDVRA makes this review available to all Maryland communities, not just those required to preclear changes. Any local government may submit any proposed policy change for preclearance review, regardless of whether that government is a “covered jurisdiction” or the change affects a “covered policy” under the law.⁸⁸ In addition, the MDVRA provides for a Voting Rights Act Implementation Fund that can assist local jurisdictions with the minimal cost associated with preclearance submissions.⁸⁹

⁸² MDVRA § 15.5–401(C)(2).

⁸³ MDVRA § 15.5–401(C)(2)(I).

⁸⁴ *Beer v. United States*, 425 U.S. 130 (1976).

⁸⁵ *Id.*

⁸⁶ MDVRA 15.5–404(A); 15.5–406(G).

⁸⁷ *Id.*

⁸⁸ MDVRA 15.5–402(B).

⁸⁹ MDVRA 15.5–703.

Conclusion

This Committee hearing takes place just prior to the 59th 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 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.