

Department of Legislative Services
Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 878 (Senator Sydnor)
Education, Energy, and the Environment

Voting Rights Act of 2023 - Counties and Municipalities

This emergency bill establishes various State law provisions relating to voting rights, including provisions (1) protecting the voting rights and abilities of protected class members in local government elections; (2) prohibiting voter intimidation, deception, or obstruction; (3) requiring language-related assistance in local government elections under specified circumstances; (4) establishing a preclearance requirement; and (5) establishing a Statewide Election Database and Information Office.

Fiscal Summary

State Effect: General fund expenditures increase, potentially beginning as early as FY 2023, as discussed below. Revenues are not expected to be affected.

Local Effect: Local government expenditures increase, potentially beginning as early as FY 2023, as discussed below. Revenues are not expected to be affected. **This bill may impose a mandate on a unit of local government.**

Small Business Effect: Minimal.

Analysis

Bill Summary:

Protected Class Members

Denying, Impairing, or Diminishing the Right to Vote of Protected Class Members

The bill prohibits a local government from denying, impairing, or diminishing the right to vote of protected class members through any (1) qualification for eligibility to be a voter

or other prerequisite to voting or (2) ordinance, regulation, or other law regarding the administration of elections, or any standard, practice, procedure, or policy.

“Protected class” means a class of citizens who are members of a race, color, or language minority group, as referenced in the federal Voting Rights Act of 1965.

“Local government” means a municipality or county, or a county board of education.

Actions by a local government that constitute a violation include:

- implementation of a qualification for eligibility to be a voter or other prerequisite to voting, or an ordinance, regulation, or other law regarding the administration of elections, or any standard, practice, procedure, or policy that (1) results or will result in any disparity or reduction in voter participation, access to voting opportunities, or ability to participate in the political process among protected class members in a jurisdiction or (2) based on the totality of the circumstances, results in any impairment of the opportunity or ability of protected class members to participate in the political process and elect candidates of their choice or otherwise influence the outcome of elections; or
- enactment of a qualification for eligibility to be a voter or other prerequisite to voting, or an ordinance, regulation, or other law regarding the administration of elections, or any standard, practice, procedure, or policy that has the purpose of, or will have the effect of, diminishing the ability of any protected class voter to participate in the electoral process or elect the preferred candidates of choice of the protected class voter.

Diluting or Abridging the Vote of Protected Class Members

The bill prohibits a local government from employing any method of election that has the effect, or is motivated in part by the intent, of impairing the ability of protected class members to participate in the political process and elect candidates of their choice or otherwise influence the outcome of elections, as a result of diluting or abridging the vote of the protected class members.

Implementation of election methods by a local government that constitute a violation include:

- an at-large method of election where (1) racially polarized voting by protected class voters occurs or (2) based on the totality of the circumstances, the opportunity or ability of protected class voters to participate in the political process and elect candidates of their choice or otherwise influence the outcome of elections is impaired;

- a district-based method of election or an alternative method of election where the candidates or electoral choices preferred by protected class members would usually be defeated and where (1) racially polarized voting by protected class voters occurs or (2) based on the totality of the circumstances, the ability of the voters to participate in the political process and elect candidates of their choice or otherwise influence the outcome of elections is impaired; or
- any method of election that has the purpose of, or will have the effect of, diminishing the ability of any protected class voter to participate in the electoral process or elect the preferred candidates of choice of the protected class voter.

“Racially polarized voting” means voting in which there is divergence between the candidate or electoral choice preferred by protected class voters and the candidate or electoral choice preferred by other voters.

Parameters for Consideration of Factors and Evidence

The bill establishes specified parameters for the Circuit Court for Anne Arundel County’s consideration of factors and evidence in determining whether a violation has occurred.

Persons Authorized to File an Action

The persons authorized to file an action in the Circuit Court for Anne Arundel County are (1) an aggrieved person; (2) an organization whose membership includes or is likely to include aggrieved persons; (3) an organization whose mission would be frustrated by a violation of the bill’s provisions that protect the rights and abilities of protected class members; (4) an organization that would expend resources in order to fulfill its mission as a result of a violation of the bill’s provisions; or (5) the Civil Rights Division of the Office of the Attorney General (OAG).

Remedies for Violations of the Rights of Protected Class Members

Notwithstanding any other law, if the court finds a violation of the bill’s provisions that protect the rights and abilities of protected class members, the court must order appropriate specified remedies that are tailored to address the violation in the local government and ensure that protected class voters have equitable access to fully participate in the electoral process. The court must consider remedies proposed by any parties to an action.

The court may take action or order a remedy only if it will not diminish the ability of protected class voters to participate in the political process and elect their preferred candidates or otherwise influence the outcome of elections.

The court has the power to require a local government to implement remedies that are inconsistent with any other provision of State or local law where the inconsistent provision of law would otherwise preclude the court from ordering an appropriate remedy in the matter.

Filing and Other Procedures

The bill establishes procedures for (1) filing an action against a local government, including providing advance notice to the local government; (2) seeking preliminary relief just prior to an election; and (3) a local government's consideration, enactment, and implementation of specified new policies or remedies, including allowing the public to provide input, allowing a local government to take corrective action or pass resolutions before the filing of an action, requiring the Civil Rights Division to approve or reject a remedy proposed before the filing of an action, and authorizing parties to submit a claim for reimbursement for specified costs.

Prohibition Against Voter Intimidation, Deception, or Obstruction

Under the bill, a person, whether acting under color of law or otherwise, is prohibited from engaging in acts of intimidation, deception, or obstruction that interfere with an individual's right to vote.

Actions that constitute violations include:

- the use of force or threats to use force, or the use of any other conduct to practice intimidation that causes or will reasonably have the effect of causing interference with an individual's right to vote;
- the knowing use of a deceptive or fraudulent device, contrivance, or communication that causes or will reasonably have the effect of causing interference with any individual's right to vote; or
- the obstruction of, impediment to, or other interference with access to a polling place, a ballot drop box, or an office or a place of business of an election official or a voter or an election official in a manner that causes or will reasonably have the effect of causing interference with any individual's right to vote or any delay in voting or the voting process.

The persons authorized to file an action in the Circuit Court for Anne Arundel County alleging a violation of the prohibition are (1) an aggrieved person; (2) an organization whose membership includes or is likely to include aggrieved persons; (3) an organization whose mission would be frustrated by a violation of the prohibition; (4) an organization that would expend resources in order to fulfill its mission as a result of a violation of the prohibition; or (5) the Civil Rights Division.

If the Circuit Court for Anne Arundel County finds a violation, the court must order appropriate remedies that are tailored to address the violation. The remedies ordered may include providing for additional time to vote during an election. A person who violates the prohibition or who aids in the violation of the prohibition is liable for any damages awarded by the court, including nominal damages for any violation and compensatory or punitive damages for any willful violation.

Additional Authority of the Civil Rights Division

In any action or investigation to enforce the bill's provisions, the Civil Rights Division may (1) examine witnesses; (2) receive oral and documentary evidence; (3) determine material facts; and (4) issue subpoenas in accordance with the ordinary rules of civil procedure.

Actions Brought under the Bill

The bill establishes that actions brought under the bill must be subject to expedited pretrial and trial proceedings and receive an automatic calendar preference. If a party seeks preliminary relief alleging a violation of the bill that relates to an upcoming election, the Circuit Court for Anne Arundel County must grant relief if it determines that (1) the party is more likely than not to succeed on the merits and (2) it is possible to implement an appropriate remedy that would resolve the alleged violation in the upcoming election.

Interpretation of Law and Regulations Protecting the Right to Vote

The bill establishes that statutes, rules and regulations, and local laws, town charters, or ordinances related to the right to vote must be construed liberally in favor of (1) protecting the right to cast a ballot; (2) ensuring that eligible voters are not impaired in registering to vote or voting, including having their votes counted; and (3) ensuring protected class voters equitable access to opportunities to register to vote and to vote.

Language-Related Assistance

The bill establishes requirements related to the provision of language-related assistance in local government elections.

Under the bill, the State Board of Elections (SBE) must designate one or more languages other than English for which there is a significant and substantial need for language-related assistance in a local government election if based on the best available data:

- more than 2%, but in no instance fewer than 100 individuals, of the voting age population of the local government (1) speak a particular language other than English; (2) does not speak English as their primary language; and (3) speaks, reads,

- or understands the English language less than “very well” as reported in U.S. Census Bureau or other data; or
- more than 4,000 individuals of the voting age population of the local government speak a particular language other than English and are limited English proficient.

On or before January 1, 2024, and every three years thereafter, SBE must publish and maintain on its website a list of (1) each local government election that requires language-related assistance in a language other than English and (2) the type of language-related assistance that is required to be provided in the local government election. SBE must distribute this list to each local government in time to allow local governments to provide language-related assistance.

A local government that administers elections must provide language-related assistance and materials in voting and elections to limited English proficient voters in each language designated by SBE for the local government election. The local government must provide competent assistance and physical and online voting materials in each designated language. For each designated language, the language-related assistance must include (1) registration and voting notices; (2) election-related forms and instructions; and (3) except as otherwise provided, ballots and other materials or information relating to the electoral process. In the case of a language that is oral or unwritten, the local government may provide only oral instructions, assistance, or other information relating to the electoral process in the applicable language. Materials provided in a designated language must be of equal quality to the corresponding English language materials. All translations must convey the intent and essential meaning of the original text or communication and may not solely rely on automatic electronic translation services. In addition, language-related services must include the presence of bilingual poll workers where available.

SBE must adopt regulations that establish a review process to determine whether a significant and substantial need exists for a language to be designated for language-related assistance in a local government election. The review process must include at minimum (1) an opportunity for a voter or group of voters to request that SBE consider designating a language for language-related assistance and (2) an opportunity for public comment. On receipt of a request and consideration of any public comment, SBE must designate any language for which it determines the criteria for designation are met.

The bill authorizes specified persons to file an action in the Circuit Court for Anne Arundel County (similar to the authorizations to file actions above). Any local government that seeks to provide only English language materials despite a determination by SBE that it must provide language-related assistance may file an action against SBE in the Circuit Court for Anne Arundel seeking a declaratory judgment allowing the local government to provide only English language materials. The court must enter the

declaratory judgment in favor of the local government only if the court finds that the determination by SBE was arbitrary and capricious or an abuse of discretion.

Preclearance Requirement

The bill requires a covered jurisdiction to receive preclearance from the Civil Rights Division or the Circuit Court for Anne Arundel County prior to the enactment or implementation of a covered policy. The bill establishes procedures for (1) the public to comment and provide feedback; (2) the Civil Rights Division to review, approve, or deny (or invoke an extension for) a preclearance of a covered policy; (3) the alternative for a covered jurisdiction to submit a covered policy to the Circuit Court for Anne Arundel County for preclearance instead of the Civil Rights Division; and (4) an emergency preclearance process under certain circumstances. The bill authorizes SBE, in consultation with the Civil Rights Division, to adopt regulations to carry out the purposes of the preclearance provisions, including the adoption of an emergency preclearance process.

The bill also specifies the persons authorized to file an action in the Circuit Court for Anne Arundel County (similar to the authorizations to file actions above) to enjoin the enactment or implementation of a covered policy and seek sanctions if a jurisdiction enacts or implements a covered policy without first obtaining preclearance.

“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 the bill, the federal Voting Rights Act, the Fifteenth Amendment to the U.S. Constitution, or a voting-related violation of the Fourteenth Amendment to the U.S. Constitution;
- 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 Fourteenth Amendment to the U.S. Constitution concerning discrimination against members of a protected class;
- 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 ten years.; or
- where, based on data made available by the U.S. Census Bureau, 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.

“Covered policy” includes a new or modified local government qualification for admission as a voter, prerequisite to voting, or any of the following ordinances, regulations, standards, practices, procedures, or policies concerning:

- a change to the method of election or dates of election of members of a governing body or an elected school board;
- a change to the boundaries of election districts or wards in a local government, including changes made under a decennial redistricting measure;
- a change to the form of government for a local government;
- an annexation, an incorporation, a dissolution, a consolidation, or a division of a local government;
- a change to the process of removal of individuals from voter registration lists and other activities concerning the cancellation or denial of voter registration;
- a change to the assignment of a voting precinct, polling place, or drop box location, including the relocation of voters assigned to polling places, the relocation or reduction of hours of any polling place or ballot drop box, or the reduction or consolidation of the number of polling places or ballot drop boxes;
- a change to the provision of translation or interpretation services to voters in any language other than English, including the creation or distribution of voting materials in any language other than English;
- a change to the provision of assistance to voters with disabilities, including the creation or distribution of voting materials for voters with disabilities; or
- any additional subject matter that SBE, in consultation with the Civil Rights Division, may identify for inclusion by regulation if the Civil Rights Division determines that any qualification for admission as a voter, prerequisite to voting, or any ordinance regulation, standard, practice, procedure, or policy concerning the subject matter may have the effect of impairing or diminishing the right to vote of any protected class voter.

“Government enforcement action” means a denial of administrative or judicial preclearance by the State or federal government, pending litigation filed by a federal or State entity, a final judgment or adjudication, a consent decree, or similar formal action.

“Preclearance” means the requirement that a local government submit the proposed enactment or implementation of a covered policy, in writing, to the Civil Rights Division or the Circuit Court for Anne Arundel County for approval or denial.

Statewide Election Database and Information Office

The bill establishes a Statewide Election Database and Information Office within SBE.

Organization

The office is headed by a director who is appointed by the Governor, meets minimum specified degree criteria, and is an employee of SBE. The director is responsible for the operation and administration of the office. SBE must provide the office with sufficient staff to perform its functions.

Functions

The purpose of the office is to assist the State and local governments with (1) evaluating whether, and to what extent, current laws and practices related to election administration are consistent with the bill's provisions; (2) implementing best practices in election administration to further the purposes of the bill; and (3) investigating any potential infringement on the right to vote.

The office must maintain the following data and records in an electronic format:

- estimates of total population, voting age population, and citizen voting age population by race, color, and language minority group, broken down annually to the precinct level for each local government, based on information from the U.S. Census Bureau, including from the American Community Survey, or information of comparable quality collected by a similar governmental agency;
- election results at the precinct level for State and local government elections;
- regularly updated voter registration lists, geocoded locations for each registered voter, and other voter records, including voter history files for each election in each local government;
- districting plans and precinct boundaries for each election in each local government, which must be provided in a shapefile or comparable electronic format;
- geocoded locations of polling places and ballot drop boxes for each election in each local government, and a list or description of the districts or geographic areas served by each polling place or ballot drop box location; and
- any other information that the director determines advisable to maintain in furtherance of the purposes of the office and the bill.

Except for any data, information, or estimates that identify individual voters, the data, information, and estimates maintained by the office must be posted on SBE's website and

made available to the public at no cost. The data must be prepared using the most advanced, peer-reviewed, and validated methodologies.

Support of, and Coordination with, Local Governments and State Entities

On certification of election results and the finalization of other voter records, including voter history files, after each local government election, the entity responsible for administering the local government's election must transmit to the office, in electronic format, copies of the following: (1) electronic results at the precinct level; (2) contemporaneous registration lists; (3) voter records or voter history files; (4) election district and precinct boundaries; and (5) lists of polling place and ballot drop box locations and lists or descriptions of the districts or geographic areas served by the locations.

At least once a year, or more frequently on request of the director, any State entity identified by the director as possessing data, statistics, or other information the director requires to carry out the director's responsibilities must provide the data, statistics, or information to the director.

The director may provide nonpartisan technical assistance to local governments, researchers, and members of the public seeking to use the resources of the statewide database.

Severability

The bill establishes that if any provision of the bill or its application to any person, local government, or circumstance is held to be invalid by a court of competent jurisdiction, the invalidity does not affect other provisions or applications of the bill that can be given effect without the invalid provision or application.

Current Law:

Prohibition Against the Denial or Abridgement of the Right to Vote

Under Section 2 of the federal Voting Rights Act of 1965, no voting qualification or prerequisite to voting or standard, practice, or procedure may be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or status as a member of a language minority group. A violation of that prohibition is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by the prohibition in that its

members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Prohibitions Against Voter Intimidation, Deception, or Obstruction

Federal law prohibits a person, whether acting under color of law or otherwise, from intimidating, threatening, coercing, or attempting to intimidate, threaten, or coerce a person for the purpose of interfering with the right of the person to vote, or to vote as they choose, or causing the person to vote for, or not to vote for, any candidate, in a federal election. If any person has engaged in, or there are reasonable grounds to believe any person is about to engage in such conduct, the U.S. Attorney General may institute a civil action or other proper proceeding for preventive relief.

State law prohibits a person from willfully and knowingly:

- (1) influencing or attempting to influence a voters' voting decision through the use of force, threat, menace, intimidation, bribery, reward, or offer of reward;
- (2) influencing or attempting to influence a voter's decision whether to go to the polls to cast a vote through the use of force, fraud, threat, menace, intimidation, bribery, reward, or offer of reward; or
- (3) engaging in conduct that results or has the intent to result in the denial or abridgement of the right of any citizen of the United States to vote on account of race, color, or disability.

A person who violates these prohibitions is guilty of a misdemeanor and subject to a fine of up to \$5,000 and/or imprisonment for up to five years. A person who violates the prohibitions under (2) and (3) without knowing that the act is illegal is subject to a civil penalty of up to \$5,000.

Chapter 396 of 2015 (Voter's Rights Protection Act of 2015) authorizes the Maryland Attorney General (and, under certain circumstances, the State Prosecutor) to institute an action in circuit court for injunctive relief to prohibit a person from committing an imminent violation or continuing to commit a violation of those State law prohibitions.

Language Accessibility – Federal Voting Rights Act

Under Section 203 of the federal Voting Rights Act of 1965, States and political subdivisions that meet specified thresholds of numbers of citizens of voting age who are members of a single language minority and are limited-English proficient must provide any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, in the language of the applicable minority group as well as in the English language. If the language of the

applicable minority group is oral or unwritten, or in the case of Alaskan natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

Civil Rights Division of the Office of the Attorney General

The Civil Rights Division of OAG was created in 2017. The Civil Rights Division (1) reviews and responds to constituent complaints directed to the Attorney General involving civil rights issues; (2) engages in community outreach activities to educate the public about civil rights; (3) reviews and evaluates possible civil rights violations based upon patterns or practices that have a significant impact in Maryland; (4) partners with the Maryland Commission on Civil Rights and other organizations or government agencies on matters related to discrimination, injustice, etc.; and (5) monitors legislation and administrative rules that involve civil rights with a view toward making recommendations.

State Fiscal Effect: General fund expenditures are expected to increase, likely significantly, as a result of the bill, due to additional costs for SBE and OAG (Civil Rights Division), and potentially also for the Judiciary (Circuit Court for Anne Arundel County):

- *State Board of Elections* – General fund expenditures increase for SBE to establish and operate the Statewide Election Database and Information Office if not also to fulfill its other responsibilities under the bill, including administering the language-related assistance provisions. SBE indicates it cannot estimate the extent to which its expenditures increase, but that the increase is likely significant. *For illustrative purposes only*, the fiscal 2024 budget as introduced includes \$7.3 million in expenditures (predominantly for salaries, wages, and fringe benefits), and 37 authorized positions, for SBE’s general administration. If it is assumed that expenditures increase approximately proportionally with the number of authorized positions, an increase of five authorized positions to meet SBE’s responsibilities under the bill results in an increase in expenditures of approximately \$987,900.
- *Office of the Attorney General (Civil Rights Division)* – General fund expenditures for OAG increase by \$173,400 in fiscal 2024 and by ongoing amounts in future years. This estimate reflects the cost of hiring one full-time assistant Attorney General to assist with litigation, review, and preclearance work generated by the bill. It assumes a July 1, 2023 start date and includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses. To the extent this position is hired prior to July 1, 2023, expenditures also increase (by a smaller amount) in fiscal 2023.
- *Judiciary (Circuit Court for Anne Arundel County)* – Depending on the amount of litigation and preclearance work that results from the bill, the Circuit Court for Anne Arundel County (partially paid for by the State) may need additional resources

to handle the additional work; however the extent of any need cannot be reliably estimated at this time.

Because the bill takes effect upon enactment, general fund expenditures may increase as early as fiscal 2023.

Local Fiscal Effect: Local government expenditures are expected to increase as a result of (1) costs associated with any litigation and enacting and implementing of remedies for violations of the bill's provisions; (2) providing any language-related assistance not already provided pursuant to federal law; and (3) any increase in local court administration costs for the Circuit Court for Anne Arundel County associated with litigation under the bill. The extent to which local government expenditures increase cannot be reliably estimated. Because the bill takes effect upon enactment, local government expenditures may increase as early as fiscal 2023.

Additional Information

Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: HB 1104 (Delegate Smith) - Ways and Means.

Information Source(s): Charles, Garrett, and Prince George's counties; cities of Havre de Grace and Takoma Park; Maryland Municipal League; Judiciary (Administrative Office of the Courts); Department of Budget and Management; Office of the Attorney General; Maryland State Board of Elections; Department of Legislative Services

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Analysis by: Arnold Adja

Direct Inquiries to:
(410) 946-5510
(301) 970-5510