Election Law Clinic
HARVARD LAW SCHOOL

Maryland Senate
Education, Energy, and the Environment
February 26, 2025

Testimony in Support of SB342 with Amendments

Chair Feldman, Vice Chair Kagan, and Members of the Senate Education, Energy, and the Environment Committee,

As students at the Election Law Clinic at Harvard Law School, we are pleased to offer this testimony in support of the Maryland Voting Rights Act of 2025. We write to provide the Committee with more information on the Act's prohibitions on vote dilution, rooted in our experience working on litigation under other State Voting Rights Acts ("SVRAs") and the Federal Voting Rights Act ("FVRA").[1]

Maryland needs a State Voting Rights Act with strong protections against suppressive and dilutive policies to counter the erosion of federal voting rights protections. For 60 years, the FVRA has protected peoples' rights to engage in the political process. But these historic protections are dwindling. The U.S. Supreme Court has stripped away the preemptive protections of preclearance[2] and has raised the bar to successfully prove vote dilution and denial claims.[3] Several lower federal courts have also further undermined the FVRA. In 2023, the Fifth Circuit Court of Appeals ruled that multiple racial minorities cannot bring a "coalition district" claim together under Section 2 of the FVRA, breaking with decades of precedent and practice and making it harder for racial minorities to come together to express their shared political preferences.[4] That same year, the Eighth Circuit Court of Appeals ruled that private parties cannot sue to enforce Section 2 of the FVRA, despite over 50 years of contrary precedent.[5]

With federal protections withering, SB342 is a necessary bulwark against voter suppression and dilution on account of race. This testimony focuses on SB342's vote dilution provisions, sections 8-903 and 4-603, and explains the elements of a vote dilution claim under the Act. We also discuss how the MDVRA uses decades of voting rights litigation experience to improve on the FVRA and provide Marylanders necessary protections in the face of eroding

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[1] As part of our work with the clinic, we have assisted in vote dilution litigation under the Federal Voting Rights Act and the New York Voting Rights Act. *See, e.g.*, Nairne v. Ardoin, 715 F.Supp.3d 808 (M.D. La. 2024); Serratto v. Town of Mount Pleasant, No. 55442/2023 (Sup. Ct. N.Y.); Clarke v. Town of Newburgh, 2025 WL 337909 (N.Y. App. Div. 2025).

[2] Shelby Cnty. 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).

[3] *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); Brnovich v. Dem. Nat'l Comm., 141 S. Ct. 2321, 2338–40 (2021) (setting out five additional guideposts that courts may consider when reviewing vote denial claims).

[4] 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.").

[5] Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment, 86 F.4th 1204, 1206–07 (8th Cir. 2023) (finding that Section 2 of the FVRA does not include a private right of action).

federal rights. We respectfully request that this Committee report SB342 **favorably with amendments.**

I. Proving a Vote Dilution Claim.

Vote dilution occurs when one or more groups of voters are denied an equal opportunity to convert their votes into political power by electing candidates that their community supports. Vote dilution operates by packing and cracking voters of a protected class so other groups maintain outsized influence over an elected body. SB342 enables plaintiffs to prove a vote dilution claim by showing (A) evidence of racially polarized voting ("RPV") and (B) an undiluted benchmark plan that mitigates the alleged impairment. If the plaintiffs succeed, a court can grant a remedy.

A. Racially Polarized Voting ("RPV").

RPV analysis is a standard part of litigation under Section 2 of the FVRA. RPV occurs when racial minorities prefer different candidates to those preferred by the racial majority, and the racial majority usually votes as a bloc to defeat the racial minority group's candidates of choice.[6] One of the most common empirical methods courts use to assess the presence of RPV is a statistical test called "King's Ecological Inference," or King's EI. Ecological inference is the process of using aggregate (i.e. "ecological") data to infer conclusions about individual-level behavior when no individual-level data are available.[7] Over time, Ecological Inference has become the "gold standard for racially polarized voting" in federal voting rights litigation.[8]

Sections 8-904 and 4-604 allow plaintiffs to prove RPV through evidence of election results for local, state, or federal elections, or other evidence of the protected class's electoral preferences, and does not require litigants to explain why RPV exists. Rather, the proposed MDVRA recognizes that where RPV exists and a protected class is systematically unable to elect a candidate of choice, discrimination in access to representation has occurred.

B. Objective benchmarks.

Plaintiffs must also provide an objective benchmark that will mitigate their alleged harm. That requirement flows from §8-903(B)(2), which requires plaintiffs to show that "the method of election dilutes or abridges the voting strength of members of a protected class." Plaintiffs make that showing by producing a non-dilutive alternative election plan to the

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[6] Thornburg v. Gingles, 478 U.S. 30, 56 (1986).
[7] Alexander A. Schuessler, *Ecological Inference*, 96 PROC. NATL. ACAD. SCI. 10578, 10578 (1999)
[8] *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").

Court. California and Washington have interpreted similar language in their State VRAs the same way.[9]

II. SB342's vote dilution claims provide more meaningful protections for voters of all races than the FVRA.

SB342's vote dilution standard applies the practical wisdom of hundreds of vote dilution claims litigated under Section 2 of the FVRA over decades. SB342 also meaningfully improves on the protections currently provided by the FVRA, which have been limited in harmful ways and are subject to escalating attacks in federal courts. The MDVRA builds on the FVRA by allowing claims by a broader set of protected classes, explicitly protecting their right to sue, enabling them to aggregate their claims to increase their power, and providing important guidance to courts applying the law.

A. SB342 allows communities to bring vote dilution claims even if they are not racially segregated.

Under the FVRA, plaintiffs must show that a protected class is sufficiently numerous and geographically compact to constitute a majority in a reasonably configured single-member district.[10] That hurdle means communities can only bring federal dilution claims in racially segregated areas. Sections 8-904(A) and 4-604(A) do away with that requirement and allow protected classes to obtain relief without being residentially segregated. That choice is consistent with the realities of modern racial vote dilution: though residential segregation is decreasing, racially polarized voting remains high.[11] But because the FVRA requires minority groups to be geographically compact, federal protection for minority voters will decrease as protected communities become less segregated—even if they cannot win representation because of the prevailing method of election.[12] Residential desegregation does not mean that protected classes do not face burdens on their voting rights. SB342 recognizes and addresses that reality in the face of declining federal protections.

B. SB342 provides an unambiguous private right of action.

Though private plaintiffs successfully brought and won suits under the FVRA for decades, their ability to bring such claims is now under attack in the federal judiciary. In 2021, Justice Gorsuch cast doubt on the availability of a private right of action in Section 2 of the FVRA.[13] The U.S. Court of Appeals for the Eighth Circuit recently followed Justice

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[9] *See* Pico Neighborhood Assn. v. City of Santa Monica, 15 Cal. 5th 292, 314–15 (Ca. 2023); Portugal v. Franklin Cnty., 1 Wash.3d 629, 638–39 (Wash. 2023).
[10] Gingles, 478 U.S. at 50. *See also* Allen v. Milligan, 599 U.S. 1, 18-20 (2023) (upholding and applying Gingles).
[11] *See* Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1348, 1358 (2016).
[12] *See* Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. CHI. L. REV. 1329, 1334–35 (2016) (citing Thornburg v. Gingles, 478 U.S. 30, 50 (1986)).
[13] Brnovich, 141 S. Ct. at 2350 (Gorsuch, J., concurring).

Gorsuch and concluded that Section 2 of the FVRA does not authorize private suits.[14] It came to this conclusion despite the fact that most Supreme Court jurisprudence relating to the Voting Rights Act of 1965 arose from cases brought by private parties.[15] If other federal courts follow suit, Marylanders will lose their ability to enforce their right to meaningful participation in federal court. SB342 addresses this problem. Sections 8-905 and 4-605 explicitly provide a private right of action so that members of the public can sue to seek remedies for vote dilution, ensuring that protected classes can protect their voting rights. While this explicit right would have seemed unremarkable just a few years ago, it is now notable and potentially critical to protecting voting rights in Maryland.

C. SB342 allows claims to be brought at lower costs than the FVRA

Federal voting rights act litigation is notoriously complex and expensive. The burden of proof for FVRA vote dilution claims is exceedingly high and rigid, and often requires expert witnesses, specialized lawyers, and voluminous evidence to litigate.[16] As a result, federal litigation costs regularly stretch into the millions of dollars—costs that are borne not just by the plaintiffs, but by the defending jurisdiction and the courts deciding the case.[17] The MDVRA simplifies vote dilution claims by allowing parties to rely solely on RPV without a costly "totality of the circumstances" analysis as required under federal law. The RPV and totality of the circumstances analyses often point in the same direction. Still, federal courts require both analyses in every vote dilution case even if one type of evidence would be sufficient. Simplifying the dilution claim will reduce the need for experts and the time necessary to sift through often voluminous case records, saving the litigants money as compared to federal litigation.

III. Conclusion

We respectfully request a **favorable report with amendments** on SB342.

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Respectfully submitted,

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[14] Arkansas NAACP, 86 F.4th 1204, 1206–07 (8th Cir. 2023).
[15] J. Christian Adams, *Two Quirky Appellate Decisions on Section 2 of the Voting Rights Act*, THE FEDERALIST SOCIETY (Dec. 19, 2023), https://fedsoc.org/commentary/fedsoc-blog/two-quirky-appellate-decisions-on-section-2-of-the-voting-rights-act.
[16] Leah Aden, *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation*, LDF, https://www.naacpldf.org/wp-content/uploads/Section-2-costs-08.13.18_1.pdf (last visited Feb. 20, 2025).
[17] *Id.*

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