Election Law Clinic
HARVARD LAW SCHOOL

Maryland House of Delegates
Ways & Means
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Testimony in Support of HB1043

Chair Atterbeary, Vice Chair Wilkins, and Members of the House Ways and Means 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 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 protected the rights of people 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. The Fifth Circuit Court of Appeals ruled in 2023 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, leaving more and more voting rights enforcement in the hands of the federal Department of Justice.[5]

With federal protections withering, HB1043 is a necessary bulwark against vote suppression or dilution on account of race. This testimony focuses on the vote dilution provision of HB1043, § 15.5–202, 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

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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. for Westchester Cnty.); Clarke v. Town of Newburgh, 2025 WL 337909 (N.Y. App. Div. 2025);

[2] 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). HB1044 reinstates preclearance at the State level.

[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); 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).

[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).

to improve on the FVRA and provide Marylanders necessary protections in the face of eroding federal rights. We respectfully request a **favorable report** on HB1043.

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. HB1043 enables plaintiffs to prove a vote dilution claim by showing either (A) evidence of either racially polarized voting ("RPV") or (B) an impairment of the right to vote through the totality of the circumstances; and (C) an undiluted benchmark plan that mitigates the alleged impairment. If the plaintiffs succeed through either path, 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. Under the FVRA, RPV occurs when racial minorities prefer different candidates to those preferred by the racial majority, and the racial majority usually votes cohesively enough to defeat the racial minority group's candidates of choice.[6] Section 15.5-202(D) allows 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 plaintiffs are not required to prove the reasons that 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. Totality of the Circumstances.

Alternatively, a jurisdiction can show an impairment of the right to vote through a "totality of the circumstances" analysis. This provision allows courts to evaluate vote dilution claims based on a wide range of evidence and allows claims even where there is insufficient data available to meet the burden of proof under the Act's RPV prong. This analysis recognizes that the government usually collects the relevant data for proving RPV, and plaintiffs should not be punished if that data is insufficient. Section 15.5-203(A)(1) provides examples of the kinds of evidence that the court can consider for this analysis. Courts may consider historical evidence, such as past discrimination or a lack of success for candidates from the protected class. Courts can also consider evidence of current barriers for the protected class, such as discrimination in housing, education, and employment, or a lack of responsiveness from elected officials. And courts can also consider evidence of racism from political campaigns or directed at candidates from protected classes. Importantly, this list is

[6] Thornburg v. Gingles, 478 U.S. 30, 56 (1986).

not exhaustive, meaning courts also have the flexibility to consider other appropriate evidence that may be relevant to the case.[7]

C. Objective benchmarks.

Whether plaintiffs follow the RPV or totality of circumstances analyses, they must also provide an objective benchmark that is likely to "mitigate the impairment of the equal opportunity of protected class members to nominate or elect candidates of their choice." Since the FVRA's passage, courts have struggled to establish what constitutes an "undiluted vote."[8] Unfortunately, federal courts addressed that problem by requiring plaintiffs to draw an "undiluted map" that contains an additional majority-minority district.[9] That decision excluded entire categories of vote dilution claims from the FVRA's protections, like challenges to the size of a government body.[10] State courts have adopted a similar approach under other SVRAs.[11] Section 15.5-202(B)(2) explicitly allows plaintiffs to prove dilution by offering an "alternative method of election" that can cure the alleged burden on voters. This language expands the types of claims litigants can bring and gives courts better tailored remedies to adopt.

It also prevents plaintiffs from seeking outsized influence in a jurisdiction – single-member districts may not always be an appropriate benchmark, because when there is significant residential segregation such districts may provide representation that is far greater than proportional. This combination of factors grants plaintiffs more flexibility under the MDVRA than the FVRA while placing reasonable limits on their claims.

II. HB1043's vote dilution claims provide more meaningful protections for voters of all races than the FVRA.

HB1043's vote dilution standard applies the practical wisdom of hundreds of vote dilution claims litigated under Section 2 of the FVRA over decades. HB1043 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.

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[7] *See* Part II.E, *infra*, for more information on the benefits of HB1043's approach to the totality of the circumstances analysis.
[8] *See* Ruth Greenwood & Nicholas Stephanopoulos, *Voting Rights Federalism*, 73 EMORY L.J. 299, 344-46 (2023). *See generally* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001).
[9] Holder v. Hall, 512 U.S. 874, 881 (1994) (plurality opinion).
[10] *Id.*
[11] *See* Pico Neighborhood Ass'n v. City of Santa Monica, No. S263972, 2023 WL 5440486, at *7 (Cal. Aug. 24, 2023).

A. HB1043 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.[12] That hurdle means communities can only bring federal dilution claims in racially segregated areas. Sections 15.5-202(B)(2) and 15.5-202(C) 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.[13] 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.[14] Residential desegregation does not mean that protected classes do not face burdens on their voting rights. HB1043 recognizes that reality in the face of declining federal protections.

B. HB1043 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.[15] The Federal Court of Appeals for the Eighth Circuit recently followed Justice Gorsuch and concluded that Section 2 of the FVRA does not authorize private suits.[16] They 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.[17] If other federal courts follow suit, Marylanders will lose their ability to enforce their right to meaningful participation in Federal court. HB1043 addresses this problem. Section 15.5-204 explicitly provides 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. HB1043 allows claims to be brought at lower costs than the FVRA

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[12] *Gingles*, 478 U.S. at 50. *See also* Allen v. Milligan, 599 U.S. 1, 18-20 (2023) (upholding and applying *Gingles*).
[13] *See* Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1348, 1358 (2016).
[14] *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)).
[15] Brnovich v. Dem. Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring).
[16] Arkansas NAACP, 86 F.4th 1204, 1206–07 (8th Cir. 2023).
[17] 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.

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.[18] 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.[19] The MDVRA simplifies vote dilution claims by allowing parties to rely on either RPV or a totality of the circumstances theory. Those two theories often run together. 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 state money as compared to federal litigation.

D. HB1043 appropriately recognizes the aggregated interests of multiple protected classes.

Federally, several courts have held that multiple protected classes cannot bring voting rights act claims together.[20] But there are many cases where multiple communities vote together with similar preferences and thus deserve protection against vote dilution. Section 15.5-202(D)(2) fixes this problem, allowing multiple protected classes to show that their electoral preferences are cohesive in the aggregate without having to separately define the preference choices of each protected class.

This provision also addresses the limits of one of the most common empirical methods courts use to assess the presence of RPV – "King's Ecological Inference."[21] In some cases, one portion of the community will be a protected class that is so small that experts cannot accurately assess their preferences alone using King's EI.[22] Because HB1042 allows multiple protected classes to show that they share common electoral preferences, litigants can aggregate minority preference and get meaningful results from the King's EI analysis. HB1043 thus ensures that even relatively small protected classes that vote cohesively with

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[18] 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).
[19] *Id.*
[20] Galveston Cnty., Texas, 86 F.4th at 217, 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").
[21] Ecological inferences (EI) is the process of using aggregate (i.e. "ecological") data to infer conclusions about individual-level behavior when no individual-level data are available. Alexander A. Schuessler, *Ecological Inference*, 96 PROC. NATL. ACAD. SCI. 10578, 10578 (1999). Over time, EI has become the "gold standard for racially polarized voting" in federal voting rights litigation. *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").
[22] *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.").

another protected class can vindicate their rights to meaningful participation in the democratic process.

E. HB1043 gives courts more guidance for their totality of the circumstances analysis.

Federal Courts applying the FVRA engage in a similar totality of circumstances analysis as that in HB1043. At times, that analysis can seem unguided and open-ended. Sometimes it can lead courts to overweight some evidence while unreasonably excluding other evidence. HB1043 improves on those circumstances by specifying the types of factors that a court may consider for the totality of the circumstances inquiry in § 15.5–203(A)(1) and giving courts more concrete guidance on how to weigh those factors. Importantly, § 15.5–203(A)(2) clarifies that plaintiffs may prove a violation without providing evidence of every item on the list, and it affirms that courts must consider the evidence before them in a holistic fashion.

In our experience working on litigation under the FVRA and SVRAs, 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. Because of this variation in record keeping, no single factor should be sufficient to prevent a plaintiff from prevailing on their claim. Sections 15.5–203(A)(2) reflects this practical reality, ensuring that plaintiffs can still successfully prove their claim dilution claim using other kinds of evidence, even if they cannot collect evidence about one factor.

III. Conclusion

We respectfully request a **favorable report** on HB1043.

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Respectfully submitted,

AJ Williamson, Student
Election Law Clinic
Harvard Law School
6 Everett Street, Suite 4105
Cambridge, MA 02138
Tel: (617) 496-0222
awilliamson.jd26@hlsclinics.org

Nithin Venkatraman, Student
Election Law Clinic
Harvard Law School
6 Everett Street, Suite 4105
Cambridge, MA 02138
Tel: (617) 496-0222
nvenkatraman.jd24@hlsclinics.org