Sen. Ron Latz, Chair
Sen. Clare Oumou Verbeten, Vice Chair
Minnesota Senate Judiciary Committee
95 University Ave. W.
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Chair Latz and Members of the Senate Judiciary and Public Safety Committee:

Campaign Legal Center ("CLC") is pleased to offer this testimony in support of the Minnesota Voting Rights Act, SF 3994 (the "MNVRA").

CLC is a nonpartisan, nonprofit organization dedicated to advancing democracy through law. Through our extensive work on redistricting and voting rights, CLC seeks to ensure that every United States resident receives fair representation at the federal, state, and local levels. CLC supported the enactment of state voting rights acts in Washington, Oregon, Virginia, New York, and Connecticut, and brought the first-ever litigation under the Washington Voting Rights Act in Yakima County, Washington.

CLC strongly supports the MNVRA because it will allow communities of color across Minnesota to participate equally in the election of their representatives. This testimony discusses the pronounced need for this legislation and highlights the ways that the MNVRA codifies, clarifies, and improves upon federal law to assure Minnesota voters and local governments alike a clear and consistent processes for protecting voting rights.

I. BACKGROUND

The federal Voting Rights Act of 1965 is one of the most transformative pieces of civil rights legislation ever passed. Section 2 of the federal VRA "prohibits voting practices or procedures that discriminate on the basis of race, color, or membership in [a] language minority group." The 1982 amendments to Section

2, which allowed litigants to establish a violation of the VRA without first proving discriminatory intent, created a "sea-change in descriptive representation" across the country.[1]

But a recent groundless ruling by the federal courts has threatened critical avenue for Minnesotans to protect their right to vote under the federal VRA. In that case, the federal Court of Appeals for the 8th Circuit held the federal VRA lacks a private right of action, making it more difficult for Minnesotans to enforce their equal right to vote and participate in the political process.[2] This is only the latest in a long line of judicial decisions over the last 30 years that have chipped away at the protections under the federal VRA.

Passing the MNVRA will ensure that Minnesota voters *always* have a private right of action to challenge barriers to effective participation in their communities, regardless of what federal courts do to further weaken federal protections. The MNVRA also clarifies and improves upon federal law to provide a clear framework to identify and fix vote dilution and barriers to voting access in a way that is collaborative, efficient, and cost-effective for both voters and local governments."

II. REASONS TO SUPPORT THE MNVRA

A. <u>The MNVRA provides a framework for determining denials of the right to vote that provides clarity to courts and votes alike.</u>

The MNVRA codifies the right of voters to challenge laws and practices that deny or impair a protected class's access to the ballot, based on the private right of action against vote denial that is available under Section 2 of the federal VRA. 52 U.S.C. § 10301(a). Like the federal VRA, the MNVRA's language is sufficiently broad to cover any conduct related to voting that could result in racial discrimination. *Id.* And like the federal VRA, MNVRA claims can be brought against policies that are intentionally discriminatory *or* that have discriminatory effects. 52 U.S.C. § 10301(b).

However, the federal VRA does not set forward a clear legal standard for deciding vote denial claims, and the Supreme Court has never provided one. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2325 (2021) ("[T]he

[1] Michael J. Pitts, The Voting Rights Act and the Era of Maintenance, 59 ALA. L. REV. 903, 920-22 (2008).
[2] *Ark. State Conference NAACP v. Ark. Bd. of Apportionment*, No. 22-1395 (8th Cir. Nov. 20, 2023).

Court declines in these cases to announce a test to govern all VRA § 2 challenges to rules that specify the time, place, or manner for casting ballots."). The Supreme Court instead announced a flawed set of "guideposts" to help inform decisions. *Id.* These guideposts are not dispositive, make it harder to challenge voter suppression, and distract from the core question of whether the challenged act or practice has a discriminatory effect on voters of color. As a result, lower courts do not have a unified legal standard for evaluating these claims.

The MNVRA therefore distills the current ambiguous body of federal law by providing a simple and predictable standard for determining when a local government's practice has denied or impaired a community of color's access to the ballot. Under the MNVRA, a violation is established by showing that the practice results in a disparity in the ability of voters of color to participate in the electoral process, or that, under the totality of circumstances, the practice results in an impairment of the ability of voters of color to participate in the franchise. The elements in this legal standard are informed by federal case law. For example, the racial disparity standard in Subd. 1(1) is drawn from principles acknowledged by the Supreme Court. *See Brnovich*, 141 S. Ct. at 2325 ("The size of any disparities in a rule's impact on members of different racial or ethnic groups is an important factor to consider."). And the totality-of-circumstances standard is similarly drawn from federal law. *Id.* at 2341 (Section 2 "commands consideration of 'the totality of circumstances' that have a bearing on whether a State makes voting 'equally open' to all and gives everyone an equal 'opportunity' to vote.") (quoting 52 U.S.C. § 10301(b)).

The MNVRA also simplifies federal law by barring the consideration of certain "guideposts" that have added unneeded complexity to vote denial claims. For example, the MNVRA excludes consideration of the so-called "pedigree" of a challenged practice. In *Brnovich*, the Supreme Court held that the fact that a practice was widely used in 1982 (when Section 2 of the federal VRA was amended) should weigh against plaintiffs. However, the fact that a particular practice may have been prevalent has no relevance to the harm it causes to voters of color. The MNVRA's language barring consideration of this and other such "guideposts" is critical to ensuring predictable, equitable resolution of potential violations and to restoring and codifying the robust protections against voter suppression envisioned by the drafters of the federal VRA.

B. The MNVRA provides a framework for determining vote dilution that clarifies and simplifies federal law.

Like the federal VRA, the MNVRA prohibits discriminatory maps or methods of election that result in vote dilution, including dilutive at-large elections or dilutive districting plans. The MNVRA's guarantee that protected class voters are afforded an "opportunity . . . to participate in the political process and elect representatives of their choice" codifies similar language in the federal VRA. *See* 52 U.S.C. § 10301(b).

Federal courts impose a complex and burdensome test to prove vote dilution. To bring a vote dilution claim under Section 2 of the federal VRA, a plaintiff must show that: (1) the minority group being discriminated against is sufficiently large and geographically compact to constitute the majority of voters in a single-member district; (2) the minority group is politically cohesive; and (3) white bloc voting usually prevents minority voters from electing their candidates of choice. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). The second and third of these preconditions are together understood to require a showing of racially polarized voting. If all three of these preconditions are met, the court then considers whether, under the totality of the circumstances, the practice or procedure in question has the "result of denying a racial or language minority group an equal opportunity to participate in the political process."[3]

The MNVRA, like every other state VRA, clarifies and simplifies this complex test to make it more administrable, predictable and less costly. The MNVRA requires plaintiffs to establish two elements: a "harm" element (meaning that plaintiffs must demonstrate that they do not have equal opportunity or ability to elect candidates of their choice) and a "benchmark" against which to measure the harm (meaning that plaintiffs must identify a reasonable alternative to the existing system that can serve as the benchmark undiluted voting practice).

The "harm" element can be proven in either of two ways. Plaintiffs can prove that there exists racially polarized voting resulting in an impairment in the ability of protected class voters to elect candidates of choice, or that the impairment arises from the totality of the circumstances.

Racially polarized voting (RPV) means that there is a significant divergence in the electoral choices or candidate preferences of protected class voters, as

[3] Section 2 of the Voting Rights Act, U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/section-2-voting-rights-act.

compared to other voters. Because RPV is considered a "linchpin of a Section 2 vote dilution claim,"[4] federal courts have developed guidance about what type of evidence is (and is not) relevant to establishing the existence of RPV. The MNVRA helpfully codifies these guardrails in statutory text, which helps to focus the inquiry, provide clarity to judges and litigants, and avoid needless legal disputes. For example, the bill makes clear that reasons for *why* RPV may exist are irrelevant to the question of whether voting patterns are racially polarized in a jurisdiction.[5] This allows state courts to avoid needless and expensive legal disputes arising in federal VRA litigation about whether partisan preferences should have an impact on RPV analysis. The bill also codifies the right to coalition claims and provides guidance to courts about how to assess RPV in such claims, directly tracking the weight of authority across federal circuit courts.

Plaintiffs can alternatively show harm by proving that, under the totality of circumstances, the equal opportunity or ability to elect candidates of their choice is denied or impaired. Measuring RPV often depends on statistical analysis of election return data, which is sometimes unavailable, especially in smaller jurisdictions and in places with long histories of vote dilution and disenfranchisement where candidates preferred by minority voters simply stop running for office. Thus, the effect of vote dilution itself means that minority communities will often be hard pressed to find "proof" that RPV exists in actual election results. This is why it is critical that the MNVRA has an alternate path to prove the "harm" element under the totality of the circumstances.

The "benchmark" element can be satisfied if the plaintiff can identify a remedy that would mitigate the identified harm. For example, if a lawsuit challenges an at-large election that denies voters of color any representation, this element can be satisfied if there is a potential district-based map that would provide protected-class voters with a district in which they can elect candidates of choice. If a lawsuit challenges a districting plan that, for instance, packs voters of color into only one district in which they can elect candidates of choice, this

[4] *Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1207 (5th Cir. 1989).
[5] *Gingles*, 478 U.S. at 51, 62-63, 74 (plurality) (The "legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate or candidates" and "the reasons [minority] and white voters vote differently have no relevance to the central inquiry of § 2."); *see id.* at 100 (O'Connor, J., concurring). *See also Gomez v. City of Watsonville*, 863 F.2d 1407, 1416 (9th Cir. 1988) (holding that courts should look "only to actual voting patterns" to determine whether voting is racially polarized and not speculate as to the reasons why); *Collins v. City of Norfolk, Va.*, 816 F.2d 932, 935 (4th Cir. 1987).

element can be satisfied if an alternate plan is drawn in which voters of color have two districts in which they elect candidates of choice.

The idea of a benchmark requirement comes from federal law, but federal courts have set a high bar for vote-dilution claims. *See Thornburg v. Gingles*, 478 U.S. 30 (1986); *Holder v. Hall*, 512 U.S. 874 (1994). However, the MNVRA provides for a more flexible benchmarking requirement. In particular, the MNVRA does not require plaintiffs to demonstrate an illustrative districting plan with a "geographically compact," *i.e.*, segregated, majority in a single-member district. *See Bartlett v. Strickland*, 556 U.S. 1 (2009). Instead, plaintiffs need only show that there is a new method of election or change to the existing method of election that would mitigate the impairment. This makes it possible for communities of color that are *not* residentially segregated but still experiencing vote dilution to enforce their rights.

Following the passage of civil rights legislation, residential segregation has decreased in some areas of the United States, yet racially polarized voting and underrepresentation of communities of color persist. Thus, many communities of color that do not face residential segregation may still lack equal opportunities to elect candidates of choice to their local government. We appreciate the Minnesota legislature taking this reality into account by not requiring minority communities to be segregated to prove minority vote dilution under the MNVRA.

The MNVRA also explicitly allows two or more protected classes of voters within an election district to bring a coalition claim, so long as they can establish that they are politically cohesive. Coalition claims reflect the MNVRA's spirit and intent to protect all communities of color from discriminatory voting rules and election systems, whether they impact one or more racial or ethnic groups. If two or more communities vote in a bloc together, organize to elect candidates together, and suffer from vote dilution together, they should be able to work together to prove it and combat it.

C. <u>The MNVRA avoids lengthy litigation by allowing jurisdictions to proactively remedy potential violations.</u>

Under the MNVRA, a prospective plaintiff must send a jurisdiction written notice of a violation and wait 60 days before bringing a lawsuit. During that time, both parties must collaborate in good faith to find a solution to the alleged problem. If the jurisdiction adopts a resolution identifying a remedy, it gains a safe harbor from litigation for an additional 90 days. The MNVRA recognizes

that many jurisdictions will seek to enfranchise communities of color by remedying potential violations. Such notice and safe-harbor provisions will enable them to do so without the costs and delay of lengthy litigation.

The MNVRA also provides for limited cost reimbursement for pre-suit notices, in recognition of the fact that notice letters often require community members to hire experts to perform statistical analysis, and to ensure that such expenses do not prevent people from enforcing their civil rights. Similar provisions are already part of voting rights acts in California, Oregon, and New York.

D. The MNVRA ensures that courts will select the remedy best suited to mitigate a violation.

In keeping with the broad discretion that federal and state courts have to craft appropriate remedies, the MNVRA requires courts to consider remedies that have been used in similar factual situations in federal courts or in other state courts. Examples of such remedies include replacing a discriminatory at-large system with a district-based or alternative method of election; new or revised redistricting plans; adjusting the timing of elections to increase turnout; and adding voting hours, days, or polling locations.

But the MNVRA does depart from the practice of federal courts in one important respect: the law specifies that courts may not defer to a proposed remedy simply because it is proposed by the local government. This directly responds to an egregious practice among federal courts of granting deference to the government defendants' choice of remedy.[6] This often leads to jurisdictions choosing a remedy that only minimally addresses a discriminatory voting practice, precluding consideration of remedies that would fully enfranchise those who won the case. For example, in *Cane v. Worcester County*, the Fourth Circuit applying the federal VRA explained that the governmental body has the first chance at developing a remedy and that it is only when the governmental body fails to respond or has "a legally unacceptable remedy" that the district court can step in.[7] In *Baltimore County Branch of the NAACP v. Baltimore County*, the district court likewise accepted the defendant county's proposed map, despite plaintiffs' objections and presentation of an alternative map.[8] This is antithetical to the concept of remedying racial discrimination; courts should not defer to the preferences of

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[6] *See, e.g.*, *Cane v. Worcester County*, 35 F.3d 921, 927 (4th Cir. 1994)
[7] *Id.*
[8] *Baltimore Cnty. Branch of Nat'l Ass'n for the Advancement of Colored People v. Baltimore Cnty., Minnesota*, No. 21-CV-03232-LKG, 2022 WL 888419, at *1 (D. Md. Mar. 25, 2022).

a governmental body that has been found to violate anti-discrimination laws in fashioning a remedy for that body's own discriminatory conduct. The MNVRA avoids this problem by allowing the court to consider remedies offered by *any* party to a lawsuit and decide which one is best suited to help the impacted community, instead of giving deference to the remedy proposed by the government body that violated that community's rights.

II. THE MNVRA'S MINIMUM PROTECTIONS ARE NEEDED IN LIGHT OF MINNESOTA'S PAST AND PRESENT REALITIES.

Minnesota has a history of both public and private discrimination against racial, color, and language minorities bearing on the right to participate equally in the franchise. Historically, Minnesota has impaired the ability of members of minority groups to participate in the political process and nominate or elect candidates of their choice by imposing qualifications for electors and other prerequisites to voting, passing ordinances, regulations, and other laws regarding the administration of elections, implementing standards, policies, and taking or failing to take other actions.

For example, the state constitution of 1857 limited the right to vote to white residents and Native American voters "who have adopted the customs and habits of civilization," and invoked a cultural purity test for Native American residents, requiring only Native American applicants to appear before a district court to determine whether each individual was "capable of enjoying the rights of citizenship within the State."[9]

Furthermore, the Minnesota state legislature twice rejected expanding suffrage to Black residents, voting down proposed constitutional amendments to do so in 1865 and again in 1867.[10] The state only granted nonwhite men the right to vote in 1868, three years after the end of the Civil War.[11]

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[9] The Constitution of the State of Minnesota, 1857; Native American Rights Fund, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf.

[10] Minnesota House Public Information Office, *Black Suffrage*, https://www.house.mn.gov/hinfo/swkly/1995-96/select/black.txt; Minnesota Historical Society, *African American Suffrage in Minnesota, 1868*, https://www.mnopedia.org/event/african-american-suffrage-minnesota-1868.

[11] *Id*.

Discrimination in Minnesota is not just limited to the distant past. Civil rights plaintiffs and the federal government have filed litigation and taken other action against political subdivisions in Minnesota under the Federal Voting Rights Act of 1965, as amended, alleging violations of section 2 of that act.[12] Individuals who are members of racial, color, or language minority groups have also faced voter intimidation and disinformation in Minnesota. For example, voters of color in 2020 in the cities of Minneapolis and St. Paul were targeted by a plan to hire and deploy armed para-militia to polling locations, an attempt that was enjoined by a federal district court judge.[13]

Minnesota also has a history of discriminating against minority groups in a variety of areas that hinder their ability to participate effectively in the political process. Housing discrimination in Minnesota has included the use of redlining, housing deeds that impose racial restrictions, and predatory lending practices aimed at disadvantaging Minnesotans of minority groups.[14]

There are also persistent racial disparities in political participation in Minnesota that indicate unequal barriers to the ballot box. The U.S. Census shows that 84.1% of non-Hispanic white Minnesotans were registered to vote as of the November 2020 election, only 79.4% of Asian Minnesotans, 74.7% of Latino Minnesotans, 70.5% of Black Minnesotans were registered to vote as of that same election. [15] Moreover, while 79.9% of non-Hispanic white Minnesotans actually voted in the November 2020 election, only 66.1% of Black

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[12] *Shakopee Mdewakanton Sioux Community v. City of Prior Lake, Minn.*, 771 F.2d 1153 (8th Cir. 1985) https://casetext.com/case/shakopee-mdewakanton-v-city-of-prior-lake.

[13] Joshua Partlow, *Former Special Forces sought by private security company to guard polling sites in Minnesota, company says*, Washington Post, (Oct. 9 2020), https://www.washingtonpost.com/politics/private-security-minnesota-election/2020/10/09/89766964-0987-11eb-991c-be6ead8c4018_story.html; Libor Jany, *At behest of Trump campaign official, Minneapolis police union calls for retired officers to act as 'eyes and ears' on Election Day*, Star Tribune (Oct. 29, 2020), https://www.startribune.com/at-behest-of-trump-campaign-official-minneapolis-police-union-calls-for-retired-officers-to-act-as-e/572904421/; *Red Lake Nation ejects Republican poll watcher*, Indianz.Com (Nov. 3, 2004), https://indianz.com/News/2004/11/03/red_lake_nation_13.asp.

[14] Minnesota Historical Society, *Racial Housing Covenants in the Twin Cities*, https://www.mnopedia.org/thing/racial-housing-covenants-twin-cities#:~:text=Minneapolis%20real%20estate%20developers%20began,contemporary%20racial%20disparities%20in%20Minnesota; Ben Horowitz, et al, *Systemic racism haunts homeownership rates in Minnesota*, Federal Reserve Bank of Minneapolis, https://www.minneapolisfed.org/article/2021/systemic-racism-haunts-homeownership-rates-in-minnesota.

[15] U.S. Census, *Voting and Registration in the Election of November 2020*, Table 4b, https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html.

Minnesotans, 64% of Asian Minnesotans, and 62.7% of Latino Minnesotans actually voted in that same election.[16] While turnout and registration statistics for Native American Minnesotans currently unavailable, the average voter turnout rate in majority-Native American voting districts in Minnesota was only 49% in the November 2020 election.[17]

IV. CONCLUSION

We thank Sen. Champion for his authorship and leadership on the MNVRA. And we urge members of the committee to support this legislation.

Respectfully submitted,

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[16] Id.

[17] National Congress of American Indians Policy Research Center, *Native Vote Report: 2020 AI/AN Turnout and Registration Data* (June 6, 2022), http://www.nativevote.org/wp-content/uploads/2022/08/20220607_Native-Vote-Report-AIAN-Turnout-and-Registration-Data-FINAL.pdf.