CLC
ADVANCING DEMOCRACY THROUGH LAW

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Rhode Island General Assembly
April 15, 2026

Testimony of Campaign Legal Center in Support of House Bill 8334

I. INTRODUCTION

Campaign Legal Center ("CLC") offers this testimony in support of House Bill 8334, the Rhode Island Voting Rights Act ("RIVRA"), with recommended amendments to strengthen it. CLC is a nonpartisan, nonprofit organization dedicated to advancing democracy through law. Through its extensive redistricting and voting rights work, CLC seeks to ensure fair representation at the federal, state, and local levels. CLC supported the enactment of state voting rights acts in Washington, Oregon, Virginia, New York, Connecticut, Minnesota, and Colorado, and it brought the first-ever lawsuit under the Washington Voting Rights Act in Yakima County, Washington, and under the Virginia Voting Rights Act in Virginia Beach, Virginia.

CLC strongly supports the RIVRA because it will enable historically disenfranchised communities across Rhode Island to protect their right to participate equally in the election of their representatives. CLC's testimony will highlight how HB 8334, with recommended amendments, will codify and improve upon the framework established by the federal Voting Rights Act of 1965.

II. BACKGROUND

States can offer new hope for voters by adopting state voting rights acts that improve upon their federal counterpart. By passing the RIVRA, Rhode Island can reduce the cost of enforcing voting rights and make it possible for traditionally disenfranchised communities to enforce their rights. States can clarify that government-proposed remedies do not get deference as they might in federal court.

Importantly, they can also empower state courts to apply a wider range of locally tailored remedies that better serve historically disenfranchised communities.

The federal VRA was 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]

Despite this success, "litigating Section 2 cases [is still] expensive and unpredictable."[2] Plaintiffs must collect vast amounts of extraneous evidence as part of Section 2's totality-of-the-circumstances analysis, and litigation often devolves into protracted disputes about what the law requires in the first place, given Section 2's sparse text and sometimes contradictory case law. As a result, these cases require extended discovery, lengthy trials, and exorbitant costs for litigants and taxpayers alike. Given the heavy burden of litigating claims under Section 2, many vote dilution violations go unaddressed. States can address this problem by codifying parallel protections in state law that are clearer and more workable to enforce.

The need for state-level protection is underscored by the steady erosion of voting rights guarantees at the federal level. Since the U.S. Supreme Court's 2013 decision in *Shelby County v. Holder*,[3] jurisdictions with histories of discrimination have been able to implement restrictive voting policies, including dilutive election systems and redistricting maps, without federal oversight. In *Brnovich v. Democratic National Committee*, the Court further weakened Section 2 of the federal VRA by making it even harder for voters to challenge discriminatory laws in court.[4] And the Supreme Court is now considering multiple cases that could wipe away Section 2's remaining protections. In *Louisiana v. Callais*, opponents of the federal VRA asked the Court to find that compliance with Section 2's vote-dilution prohibition is itself unconstitutional. In *Turtle Mountain Band of Chippewa Indians et al., v. Howe* and other cases, voting rights opponents have asked the Court to find that private individuals cannot file suit at all under Section 2, leaving them without the ability to enforce their own voting rights.

At the same time, Congress has not acted to restore or strengthen the federal VRA, failing repeatedly to pass the much-needed John R. Lewis Voting Rights

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[1] Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 920–22 (2008).

[2] Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2157 (2015).

[3] 570 U.S. 529 (2013).

[4] 594 U.S. 647 (2021).

Advancement Act. And the current presidential administration has dismantled the voting rights enforcement arm of the Civil Rights Division of the U.S. Department of Justice. These developments have left millions of voters vulnerable to discrimination and suppression. In response to this national landscape, states must step in and ensure their voters have the legal tools necessary to defend their freedom to vote.

Momentum for state VRAs is growing. California (2002), Washington (2018), Oregon (2019), Virginia (2021), New York (2022), Connecticut (2023), Minnesota (2024), and Colorado (2025) have already enacted such protections, while states like Maryland, New Jersey, Florida, Michigan, Louisiana, and Alabama are working to follow suit. Rhode Island should take advantage of this opportunity and join these other states in ensuring all of its citizens have equal access to the democratic process.

The RIVRA will apply more efficient processes and procedures for enforcing the voting rights of traditionally disenfranchised communities. It will also make it less costly for historically disenfranchised communities and local governments to collaboratively develop a remedy before resorting to expensive litigation.

III. REASONS TO SUPPORT THE RIVRA

The RIVRA will ensure that Rhode Island citizens have powerful legal tools to combat racial discrimination in voting, including by allowing voters to challenge voter suppression and vote dilution. The federal VRA contains analogous provisions, but federal courts have blunted those tools over the years. With the recommended amendments, HB 8334 creates broader and stronger standards, reaching suppressive and dilutive practices that the federal VRA does not. In addition to enabling Rhode Islanders to vindicate their civil rights in court, the RIVRA's pre-suit notice and safe harbor provisions also allow jurisdictions to remedy potential violations without the need for expensive litigation. As discussed below, the following features of the RIVRA are reasons to support the bill:

- The RIVRA provides a framework for determining whether vote dilution or vote denials have occurred that is tailored to the barriers to voting that historically disenfranchised communities face at the local level.
- The RIVRA prioritizes remedies for voting discrimination that enable historically disenfranchised communities to equally participate in the franchise.
- The RIVRA's pre-suit notice provisions allow jurisdictions to proactively remedy potential violations.
- The RIVRA provides express statutory guidance to ensure courts interpret voting-related conflicts in favor of the right to vote.

- The RIVRA expands access to language assistance for more voters with limited English proficiency than the federal VRA.

A. The RIVRA codifies strong protections against voter suppression.

The voter suppression cause of action, found in Section 17-31-3(a) of HB 8334, enables voters to uproot practices that create racially discriminatory barriers to the ballot box—for example, insufficient polling locations in certain neighborhoods, arbitrary voter purges, or discriminatory allocations of election administration resources.

Under the federal VRA, voters can challenge practices that "result[] in a denial or abridgement" of the right to vote on account of race or color.[5] The Supreme Court, however, has greatly limited the kinds of claims that voters can bring under that provision. Specifically, the Supreme Court created five additional "guideposts" for proving voter suppression that have little bearing on whether voter suppression has occurred.[6] This complex, multi-factor analysis also makes Section 2 voter suppression claims costly and time-consuming to litigate.

The RIVRA simplifies and strengthens the legal test that applies to voter suppression claims, allowing it to eliminate discriminatory practices that the federal VRA does not reach. Under the RIVRA, a violation is established by showing either that the challenged practice results in a material disparity in the ability of a protected class to participate in the electoral process compared to other members of the electorate, *or* that, under the totality of circumstances, the practice results in an impairment of the ability of a protected class member to participate in the political process. Under the federal VRA, on the other hand, voters must show both a material disparity *and* an impairment under the totality of the circumstances—in addition to satisfying the host of additional factors courts have engrafted onto Section 2.

Once plaintiffs have made the required showing, the RIVRA affords the jurisdiction an opportunity to avoid liability by proving that the challenged practice is necessary to significantly further a compelling governmental interest and that no less suppressive alternative exists. This burden-shifting framework is modeled on a similar framework that is used in nearly all anti-discrimination statutes. This standard is an important way that the RIVRA demonstrates respect for local control of elections. Unlike the Supreme Court's decision in *Brnovich* interpreting the federal VRA, this standard gives a political subdivision an opportunity to justify the change and respond to plaintiffs' claims. This section of the RIVRA would offer some of the strongest protections against voter suppression in the country. It will also simplify and streamline these claims, saving time and money for plaintiffs, defendants, and courts.

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[5] 52. U.S.C. § 10301.

[6] *See Brnovich v. DNC*, 594 U.S. 647, 666, 669–72 (2021).

Proposed Amendment: Consistent with the voter suppression cause of action in the federal VRA, the voter suppression cause of action in the RIVRA is designed to address the types of harms faced by race, color, and language minority groups. Therefore, we recommend amending HB 8334 to create a separate cause of action prohibiting discrimination based on religion, sex, sexual orientation, gender identity or expression, disability, age, or change in marital status. This approach was taken by the Colorado Voting Rights Act in order to enshrine protections for voters who face discrimination in areas other than race.

B. The RIVRA codifies strong protections against vote dilution.

The vote dilution cause of action, found in in Section 17-31-3(a) of HB 8334, empowers voters to challenge methods of election that give protected class members an unequal opportunity to participate in the political process. Local methods of election might be vote dilutive if a racial, ethnic, or language-minority group lacks an equal opportunity to elect candidates of their choice, for example, because of an at-large system that allows a local majority to win every seat, or because of a district plan that cracks communities across multiple districts or packs them into just one.

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) bloc voting usually prevents minority voters from electing their candidates of choice.[7] The latter two conditions together refer to the existence of racially polarized voting. If these three conditions 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.

As with its voter suppression provisions, HB 8334 codifies into state law the same types of protections against vote dilution that are covered by the federal VRA but strengthens and streamlines the legal standard. It requires plaintiffs to prove two things: a harm and a remedy. Plaintiffs must show that either racially polarized voting or the totality of circumstances combine with a locality's method of election to impair a racial, ethnic, or language-minority group's ability to nominate or elect the candidates of their choice. Plaintiffs must also show that a change to the current method of election would likely mitigate that impairment. By streamlining the increasingly complex standard for federal vote-dilution claims that federal courts have developed over four decades, the RIVRA aligns the applicable legal test with the core of the vote dilution injury.

Importantly, unlike under the federal VRA, a protected class does not need to be residentially segregated—that is, be sufficiently large and geographically compact

[7] *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

to constitute the majority in a single-member district—to receive protections under the RIVRA. Following the passage of civil rights legislation, residential segregation has decreased in some parts of the United States, but racially polarized voting and underrepresentation of minority communities persist.[8] Thus, many communities that do not face residential segregation may still lack equal opportunities to elect candidates of choice to their local government. By not requiring minority communities to be segregated to prove minority vote dilution, the RIVRA addresses vote dilution in all its forms. That critical innovation is also a central feature of state voting rights acts passed in California, Washington, Oregon, Virginia, New York, Connecticut, Minnesota, and Colorado.

Proposed Amendment: Section 17-13-3(c) of HB 8334 contains a list of factors relevant to establishing voter suppression or vote dilution under the totality of the circumstances, but omits certain factors that have been identified as relevant by the Supreme Court, Congress, and other courts. These include the use of racial appeals in political campaigns, disparities in campaign contributions by protected class members, and the lack of responsiveness by elected officials to the needs of the protected class community. We recommend amending the bill to include these factors because, in the words of the U.S. Supreme Court, they are relevant to determining how a challenged map or method of election "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [protected class voters] and white voters to elect their preferred representatives" or influence the outcome of elections.[9]

C. The RIVRA expands the remedies that historically disenfranchised communities can seek to ensure their electoral enfranchisement.

If a violation of the RIVRA is found, Section 17-31-9(f) of HB 8334 instructs state courts to order appropriate remedies that are tailored to address the violation in the local government. This provision recognizes that vote dilution and suppression tactics take many different forms and are not solely limited to traditional methods of voter discrimination. Examples of such remedies may 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; or adding voting hours, days, or polling locations.

We recommend amending HB 8334 to specify that courts may not defer to a proposed remedy simply because it is proposed by the political subdivision. This amendment would directly respond to an egregious flaw in federal law, where Section 2 of the federal VRA has been interpreted by federal courts to grant government

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[8] *See generally* Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. CHI. L. REV. 1329 (2016).

[9] *See, e.g.*, *Gingles*, 478 U.S. at 47.

defendants the "first opportunity to devise a [legally acceptable] remedial plan."[10] This often leads to jurisdictions choosing a remedy that only minimally addresses a discriminatory voting practice rather than fully enfranchising those who won the case. This practice is antithetical to the concept of remedying racial discrimination; courts should not defer to the preferences of a governmental body that has been found to violate anti-discrimination laws in fashioning a remedy for that body's own discriminatory conduct. This problem can be avoided by adding provisions to this bill that allow courts to consider remedies offered by any in parties to the lawsuit and specify that courts must weigh all proposed remedies equally 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.

D. <u>The RIVRA encourages voters and local governments to work together to resolve voting-rights issues.</u>

The RIVRA also innovates upon its federal counterpart by requiring a notice-and-remedy procedure before plaintiffs can file a lawsuit, encouraging good-faith collaboration to avoid the need for litigation altogether. Under that requirement, a prospective plaintiff must send a jurisdiction written notice of a violation and wait 60 days before suing. During that time, both parties can work together towards a solution to the alleged violation. These provisions reflect a recognition that many localities will seek to remedy potential violations on their own, and the RIVRA's notice and safe-harbor provisions enable them to do so without the costs and delay of litigation.

By contrast, no such pre-suit notice and safe-harbor provisions exist in Section 2 of the federal VRA. As a result, voters often spend considerable time and money investigating potential violations of the federal VRA, the cost of which is later borne by Rhode Island taxpayers.

<u>Proposed Amendment:</u> Currently, the RIVRA would provide cost reimbursement for plaintiffs who file a lawsuit but not those who follow the notice-and-remedy procedure. We recommend amending HB 8334 to provide for limited cost reimbursement to plaintiffs for pre-suit notices, in recognition of the fact that notice letters often require community members to hire specialized 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 state voting rights acts in California, Oregon, New York, Connecticut, Minnesota, and Colorado. Otherwise, plaintiffs may be pushed toward other options—such as filing in federal court—which can be more costly but may offer a path to recovering fees.

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[10] *Cane v. Worcester County*, 35 F.3d 921, 927 (4th Cir. 1994).

E. The RIVRA provides guidance to state judges as they exercise discretion and interpret laws, policies, procedures, or practices that govern or affect voting.

Section 17-31-8 of HB 8334 specifies that judges should resolve ambiguities in Rhode Island state and local election laws and exercise their judicial discretion in favor of protecting the right to vote. Article II of the Rhode Island Constitution states that "[e]very citizen of the United States of the age of eighteen years or over who has had residence and home in this state for thirty days next preceding the time of voting, who has resided thirty days in the town or city from which such citizen desires to vote, and whose name shall be registered at least thirty days next preceding the time of voting as provided by law, shall have the right to vote." The RIVRA's instruction essentially codifies the existing protections of the Rhode Island Constitution, recognizing that vigorous political participation is the foundation of our democracy and that the right to vote is preservative of all other rights.

The RIVRA provides a default pro-voter rule for judges interpreting laws, policies, procedures, or practices and exercising their discretion that govern or affect voting, which will reduce litigation costs by avoiding unnecessary arguments over statutory interpretation. State VRAs in Washington, New York, Connecticut, Minnesota, and Colorado contain a similar instruction.

F. The RIVRA expands access to language assistance for Rhode Island voters with limited English proficiency.

Even proficient English speakers often find election materials to be complicated and confusing. For voters with limited English proficiency, it can be far more challenging to navigate the voting process, understand the candidates and issues, and make informed decisions. Unfortunately, under Section 203 of the federal VRA, many of these eligible voters do not receive voting materials or assistance in their primary languages in counties throughout the state. The RIVRA enables Rhode Island to go above and beyond the language assistance requirements set by federal law.

The federal Voting VRA requires a jurisdiction to provide language assistance if more than 5% or more than 10,000 of its voting-age citizens belong to a single language-minority community and have limited proficiency in English, and the community's illiteracy rate is higher than the national illiteracy rate.[9] This can leave smaller but still significantly-sized communities without any language assistance at all. The RIVRA introduces a more flexible and responsive two-tiered language assistance threshold system that ensures that jurisdictions that do not meet the threshold for full language assistance coverage can still receive some language access services. Section 17-31-5 of HB 8334 requires a language-minority community be provided with translated election forms, public notices, signage and sample ballots if

it meets a threshold of more than 3% of the jurisdiction's voting-age citizens (with a minimum number of 100 individuals) or more than 5,000 voting-age citizens. This tiered structure ensures that both large and smaller emerging language communities receive the level of support they need to cast effective ballots, ensuring that voters who have historically been excluded finally receive meaningful support, while also balancing the administrative demands placed on smaller jurisdictions

Proposed Amendment: We recommend amending HB 8334 to ensure that jurisdictions that qualify for this second tier of language assistance will have access to that assistance without having to specially request it, as this would be an unnecessary burden on communities that already face significant barriers to political participation. We also recommend amending HB 8334 to require the Secretary of State to make determinations of which jurisdictions meet the demographic thresholds for language access coverage every five years, rather than every two years, as five years is the timeframe contained in the federal Voting Rights Act.[11]

IV. CONCLUSION

We strongly urge you to pass House Bill 8334 out of this committee with the recommended amendments, adding Rhode Island to the growing list of states that have passed their own state voting rights acts. Rhode Island voters deserve the strong, state-level tools and resources the RIVRA provides to defend against discriminatory voting practices and serve as a bulwark against federal attacks on the right to vote.

Respectfully submitted,
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[11] 52. U.S.C. § 10503(b)(2)(A).