March 6, 2024

Dear Chair Carlson and Members of the Elections Committee,

We are writing on behalf of the League of Minnesota Cities, Association of Minnesota Counties, and Minnesota Association of County Officers to provide comments on SF 3994 to establish a Minnesota Voting Rights Act.

Our associations are not opposed to the creation of a state voting rights act that includes a private right of action independent of how the federal VRA has been construed by federal courts. We do, however, have concerns and questions about the new legal standard this bill creates and the onus it puts on local governments to effectively arbitrate complicated legal questions around the Voting Rights Act. We hope to continue discussions with the bill author to explore opportunities to more clearly delineate shared goals without introducing vague and uncertain terminology into Minnesota statute which will necessitate litigation and ultimately impact election administration efficiencies and local government budgets. For today's meeting, we have broken our questions down into various sections of the bill.

Concerns about unfamiliar/new definitions:

We are concerned about putting local governments in a position to interpret definitions that require significant contextualization from case law to effectively understand and potentially limiting a court's ability to make determinations based on decades of case law. Some of the definitions we continue to have questions about include:

- "Disparity" on lines 3.22-3.23: we remain uncertain of how the terms "variance", "validated methodologies", and "statistical significance" would be applied in the context of this definition and what entity determines what constitutes as "validated methodologies" and "statistical significance."
- "Politically cohesive" and "Polarized voting" on lines 4.19-4.20 and 4.24-2.26, respectively: If these terms remain in this legislation, it would be helpful to understand how the court/expert witnesses have interpreted these at a national level and what methodologies have been used, particularly as it relates to nonpartisan local elections. It is not clear how political cohesiveness or polarized voting under these definitions could be determined without party affiliation. If partisanship is not used in making determinations under these definitions, we would also ask for more clarity on what elements would be used in weighing how these terms apply to such cases.

Violations are based on outcomes rather than action:

Both voter suppression and voter dilution seem to establish a violation based on an outcome, not a specific action (or inaction) committed by a local unit of government. This is a type of violation structure that local government administrators are not experienced with and could cause significant confusion if they have to respond to presuit notices or accusations of violating this chapter instead of a court.

Section 5, subd. 1 states: "a political subdivision… must not adopt or enforce any law, ordinance, rule, standard practice, procedure… or take any other action or fail to take action that results in, is likely to result in, or is intended to result in…"

- We continue to have questions and concerns around how this language may impact a local government's ability to implement voting laws dictated by the state legislature in the event of an allegation of voter suppression or voter dilution as defined in this legislation. Cities and counties have very minimal discretion in elections administration.
- The language "take any other action or fail to take action that results in, is likely to result in, or intended to result in" on lines 5.26 and 5.27 seems to create implicit obligations outside of state elections law that local governments must adhere to, without telling them what those obligations are.

Factors for Determining Violation:

This section is prescribing what is to be counted as a factor indicating a violation of the voting rights act, and what should not be considered a factor. This seems to limit the courts' ability to interpret the significant volume of case law on these legal issues.

- Factor (5) includes the "use of overt or subtle racial appeals in political campaigns" as a potential factor. Could this be used as a factor in a case against a local government who has no affiliation or connection with an individual political candidate?
- Factor (11) would include "responsiveness by local officials to the particularized needs of protected class members or a community of protected class members." We continue to have questions about how this would be interpreted.

Subd. 5 dictates which factors must be excluded in these cases. This seems to restrict a court's ability to evaluate the myriad of circumstances that could impact how elections are administered. We continue to have questions on what evidence a local government could reasonably use as a means of defense based on this section.

Presuit Notice:

We appreciate this bill's efforts to try to create a process to settle legitimate voting rights claims outside a costly and time exhaustive judicial process. That said, we have concerns that the currently framed presuit notice process in SF 3994 creates financial burdens to local governments for attempting to respond to claims before a legal finding of a violation. In addition, questions remain about how much authority cities and counties will have to address alleged violations without judicial or legislative action.

The presuit notice process contained in this bill would require all private right of action claims for violating the voting rights act start with local governments. This is an extrajudicial process in which local governments would be required to attempt to provide an appropriate remedy for claims with no impartial third party or legal test of the validity of the claim which could set precedent for the voting rights act without ever having been litigated. Moreover, this process does not distinguish between claims arising from state law or policies versus local election administrator actions.

It is important to note local governments have very little discretion as it relates to voting administration. The Legislature creates election policy that is implemented by local election administrators. If this presuit notice section remains, local governments would want a separation from liability or defense for claims that are based on local administrators carrying out state directives.

Lastly, current language that requires a local government to reimburse the "reasonable costs associated with producing and sending the notice letter" if it enacts or implements a remedy during the presuit notice process could potentially discourage local governments from pursuing this route. Without a disinterested third party to determine what is "reasonable," it would be difficult to determine which costs should be subject to reimbursement by the local government.

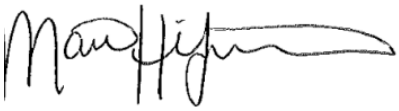
A jurisdiction may also not want to engage in negotiating potential remedies in response to a presuit notice if it could cause risks in future litigation, potentially disincentivizing the easy remedy that this bill seeks to find. It should be noted that any remedy implemented at the presuit notice process does not mean a violation of the voting rights act has occurred. At this point in the process, the alleged violation has not been tested by a court against any legal standards, except for the interpretation of a local government administrator, so while small remedies may still be actionable (like hiring more staff to a given elections precinct), large remedies such as redistricting or switching governance systems from an at-large to a ward based council system would likely seem too significant for a local government to take action on solely by a presuit notice and without significant engagement with residents or potentially a directive from a court.

To reiterate, our associations are not opposed to the reinstatement of a private right of action under the Voting Rights Act. However, we continue to have concerns around the expansion of the Federal Voting Rights Act under this legislation that establishes a new legal standard, prescriptiveness in how the law should be interpreted by courts, and would request further amendments to the presuit notice process to address concerns shared above.

We appreciate Senator Champion's willingness to meet with local governments to answer questions and discuss our concerns and hope to continue those discussions as the bill advances.

Sincerely,

Alex Hassel
Intergovernmental Relations Representative
League of Minnesota Cities



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