



To: Governor Gretchen Whitmer

From: Merissa Kovach, Policy Strategist, American Civil Liberties Union

Date: October 22, 2021

Re: SBs 303 and 304 and HB 5007

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### **New Strict Voter Identification Requirements**

The ACLU of Michigan is opposed to Senate Bills 303, 304, and House Bill 5007. These bills stand to disenfranchise tens of thousands of eligible and registered Michiganders and will discourage many other eligible but unregistered voters from participating due to the costs and administrative burdens of getting a qualifying ID if they do not already have one. Eliminating the Affidavit Ballot option for in-person ballots and imposing strict ID requirements on mail ballots also target Black and low-income Michiganders, who disproportionately lack access to qualifying ID and face severe financial and administrative burdens in acquiring ID. These bills run contrary to the expansive franchise granted by the Michigan and U.S. Constitutions and violate the federal Voting Rights Act as well.

SB 303 and 304 together eliminate the option for Michigan voters to submit an affidavit, signed under penalty of perjury, attesting to their identity and eligibility when attempting to vote without a qualifying photo ID. Instead, those voters without a qualifying ID will need to submit a provisional ballot that will be rejected unless they produced a qualifying ID and additional documentation within several days of the election. In the 2016 General Election alone, **more than 18,000 voters** relied on the Affidavit Ballot option to cast their ballots. All of this alone, combined with the lack of any significant evidence of voter fraud related to Affidavit Ballots, provides more than enough reason to reject these bills. But looking behind these overall numbers to who relies upon Affidavit Ballots shows even deeper problems with these bills.

An analysis of Michigan voters relying on the Affidavit Ballot in the November 2016 General Election by Dr. Daniel A. Smith, Professor and Chair of the Department of Political Science at the University of Florida, found that about **half of Affidavit Ballots were cast in precincts with disproportionately Black populations** (from 20.5% to 100% African-American, with an average population that is 44.8% Black). His analysis is attached in full to this testimony. Moreover, the data demonstrates that **voters living in 100% Black precincts were 16 times more likely to cast an Affidavit Ballot than voters living in precincts with no Black residents**. Smith's analysis reveals

a similarly stark picture in terms of income, with roughly **half of Affidavit Ballots cast in precincts with a median household income of \$34,680 or less**. Additional quantitative political science work also shows that minority voters in Michigan “are about five times more likely to lack access to ID than white voters.”<sup>1</sup> These bills will disenfranchise Black and lower-income voters at staggeringly disproportionate rates.

Given these statistics, it is no surprise that in 2016 the federal Fifth Circuit Court of Appeals struck down a similar strict voter ID law in Texas under Section 2 of the Voting Rights Act due to its racially disparate impact.<sup>2</sup> That court found that the Texas law imposed “significant and disparate burdens on the right to vote” and affirmed the district court’s finding that the law had a “stark, racial disparity between those who possess or have access” to a qualifying ID and that the law had “a discriminatory effect on minorities’ voting rights.”<sup>3</sup> Similarly, the federal Fourth Circuit Court of Appeals struck down as unconstitutional a strict voter ID law in North Carolina that targeted Black voters, finding that the North Carolina General Assembly used the bill “to entrench itself” and “did so by targeting voters who, based on race, were unlikely to vote for the majority party.”<sup>4</sup> Just last year, the Missouri Supreme Court also struck down a law that tightened voter ID requirements as violating the Missouri Constitution.<sup>5</sup>

In 2020, **more than 3,000,000 voters** cast an absentee ballot. SB 303’s requirement that absentee voters provide a copy of the same type of ID or personal identifying information in order to vote by absentee ballot doubles down on the discriminatory impact of the legislation. This law is not supported by any need or any evidence of voter fraud in Michigan’s absentee voting process but once again will deprive disproportionately low-income and minority voters of their right to vote absentee. Beyond the analysis conducted by Dr. Smith and others concerning disparate ID possession rates by race and income level, recent Census Bureau figures also show that non-white Michiganders face other barriers to either acquiring an ID or sending in a copy of their ID if they do have one.

While HB 5007 requires the Secretary of State to provide state identification cards free of cost, the underlying costs and logistics of obtaining identification for some Michiganders is costly or unobtainable. Results from the Census Bureau’s 2019 American Community Survey show that while 92.6% of white Michiganders own a computer and 86.8% have broadband internet, the rate of computer ownership and broadband internet subscription drop to 89.1% and 79.2% for Black

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<sup>1</sup> Marc Meredith, Michael Morse, Phoebe Henninger, *Who Votes Without Identification? Using Individual-Level Administrative Data to Measure the Burden of Strict Voter Identification Laws* (Mar. 4, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3205769](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3205769).

<sup>2</sup> *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).

<sup>3</sup> *Id.* at 256, 264–65.

<sup>4</sup> *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016).

<sup>5</sup> *Priorities USA v. State*, 591 S.W.3d 448, 451 (Mo. 2020), *reh'g denied* (Jan. 30, 2020).

Michiganders.<sup>6</sup> Accessing transportation to either apply for ID in-person or make a copy of an ID is also more challenging for voters of color, with only 5.5% of white Michiganders but 18.9% of Black Michiganders lacking access to a vehicle.<sup>7</sup> At the same time, paying for the documents needed to get one would fall hardest on Black and Latino Michiganders, with 21.9% and 19%, respectively, living under the poverty line, compared to only 6.5% of white Michiganders.<sup>8</sup>

As you are well aware, Michigan voters recently supported in overwhelming numbers an amendment to the Michigan Constitution that provided greater protections to the right to vote both in-person and by absentee that “shall be liberally construed in favor of voters' rights in order to effectuate its purpose.”<sup>9</sup> These bills run contrary to the text and spirit of the Michigan and federal constitutions as well as the federal Voting Rights Act. Michigan voters deserve better.

### **Prohibition on in-kind contributions**

SB 303 includes broad prohibitions on funding for elections. The effects of which may be the most dangerous and damaging aspect of this legislation because it will surely undermine the ability of election officials to administer elections and serve the needs of voters. Section 946(1) prohibits “in-kind contributions, or other consideration, from any individual or entity . . . to conduct or administer elections.” This language will have such far reaching consequences it would be futile to provide a comprehensive list of its impact. To at least illustrate the scope of the impact SB 303 will have on election administration, the following would be prohibited:

- Federal government election funding to cities and townships.
- Places of worship, nursing homes, and extended stay homes donating space for polling places.
- Clerks applying for grants to fund absentee ballot drop boxes and needed technology upgrades.
- The loaning of personnel and election equipment between communities.
- The ability of citizens to volunteer their time to assist with elections.

### **Prohibition on SOS or clerks from sending unsolicited absentee ballot applications**

For the November 2020 election, many voters used the applications mailed to them by the Secretary of State – an entity they knew they could trust. SB 303 will prohibit the Department of State and local clerks, entities entrusted by Michigan voters with the administration of elections, from doing what any person, organization, or political party can do: proactively mail an absent

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<sup>6</sup> 2019 American Community Survey, Table S0201, Selected Population Profile in the United States, 2019 1-Year ACS Estimates, Michigan, <https://data.census.gov/cedsci/table?q=ACSSPP1Y2011.S0201&t=-01%20-%20All%20available%20basic%20races%20alone%3A400%20-%20Hispanic%20or%20Latino%20%28of%20any%20race%29%20%28200-299%29&g=0400000US26&tid=ACSSPP1Y2019.S0201&hidePreview=true>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> MI CONST Art. 2, § 4.

voter ballot application to registered voters in Michigan. Government initiating the process of voting ensures all voters have equal access to the ballot regardless of party or zip code. It improves participation in our elections and builds trust.

Making it more difficult for registered voters to submit an absent voter ballot application will not make the absentee voting process more secure. There are already safeguards in place, which worked in 2020, to ensure people do not obtain ballots they are not entitled to through signature verification processes and other security features.

SB 303's restrictions on how a Michigan voter may receive an absent voter ballot application raises concerns under the Michigan Constitution<sup>10</sup>. Proposal 3 of 2018, supported by over two-thirds of voters in 2018, granted Michigan voters a constitutional right "to vote an absent voter ballot without giving a reason," and requires that the provision's text "be liberally construed in favor of voters' rights in order to effectuate its purposes." The Michigan Court of Appeals agreed last year that proactively providing absent voter applications to registered Michigan voters is consistent with the Secretary of State's "constitutional obligation" to effectuate the Constitution's purpose.

### **Conclusion**

In this time of great political polarization, we must do all we can to increase citizen participation in our democratic institutions. This includes protecting the fundamental right to vote. Senate Bills 303, 304, and House Bill 5007 should be vetoed because of the numerous legal issues outlined in this memo, and because it will impede the civic engagement that we so desperately need from our citizenry.

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<sup>10</sup> [Article 2, § 4 of the Michigan Constitution](#)