



PROTECTING THE VOTE FOR ALL AMERICANS

TESTIMONY TO MICHIGAN HOUSE COMMITTEE ON ELECTIONS AND ETHICS RE: HB 5032

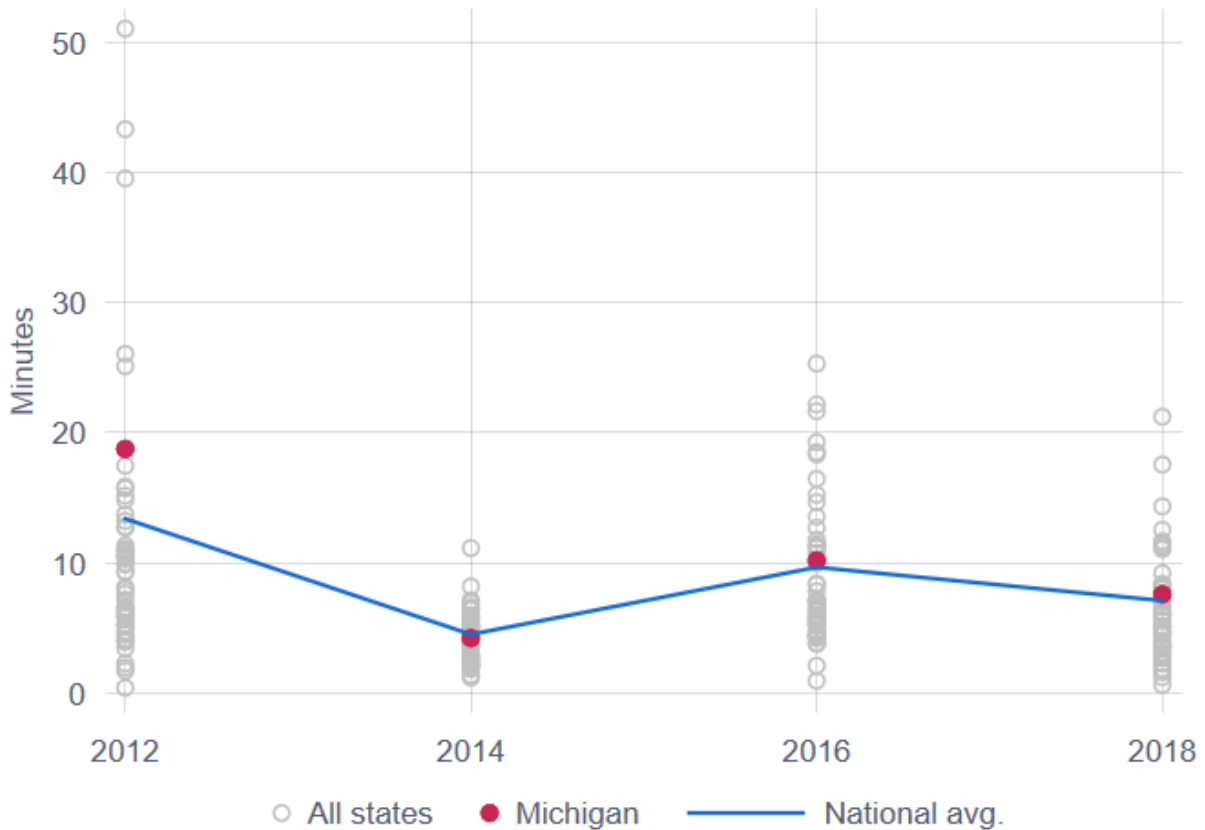
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My name is Jon Sherman, and I am Senior Counsel with Fair Elections Center in Washington, DC. Fair Elections Center is a national, nonpartisan voting rights and election reform organization which works to remove barriers to registration and voting for traditionally underrepresented constituencies. Established in 2017 to continue the work of the Fair Elections Legal Network (itself founded in 2006), the Center works to improve election administration through legislative and administrative reform, to protect access to the ballot through litigation, and to provide election law expertise, voter information, and technical assistance to voter mobilization organizations. We have worked on Michigan voting rights and election reform issues since 2012 and currently work to improve access to voter registration and voting for many of the state's young voters through our Campus Vote Project.

HB 5032 raises the maximum precinct population size from 2,999 to 5,000 registered voters, and permits municipalities to consolidate precincts into a single precinct, if the municipality has 5,000 or fewer active, registered voters, again up from 2,999. Both of these changes are deeply problematic, in light of Michigan's recent history with substantial wait times at polling sites and the projected turnout for the 2020 presidential election.

First, Michigan had substantial wait times in the 2012 presidential election, an average of 18.75 minutes per voter. The chart on the next page is drawn from the Cooperative Congressional Election Study, which is the largest academic election study in the United States, and shows that Michigan had voting wait times above the national average as recently as the 2012 general election. Michigan has managed to bring its wait times down to the national average and could surely improve even further to bring wait times *below* the national average. It would be malpractice for the state to increase precinct sizes now by two-thirds of their current maximum and risk backsliding into more substantial, above-average wait times.



Second, a presidential election year is not the moment to experiment with precinct consolidation. That would be true in any general election with a highly competitive race that draws massive turnout. But turnout rates nationwide and in Michigan in last year's midterm election are canaries in the coal mine. 2020 presidential election rates will likely be much higher than previous election cycles, including the 2016 presidential election, and will likely far exceed projected turnout, given the presidential race's intense focus on Michigan as a potentially decisive swing state. Michigan's turnout in the 2018 midterm election was 88.6 percent of the state's 2016 presidential election turnout: 4,250,585 in 2018 to 4,799,284 in 2016. That is a radical shift in turnout for a midterm election, which should give every election official in Michigan pause. In 2014, during the last general election with gubernatorial and Secretary of State races on the ballot, only 3,156,531 votes were cast, 65.77 percent of the 2016 presidential election turnout and 66.72 percent of the 2012 presidential election turnout. Given 2014 also saw a number of competitive federal and statewide races including a U.S. Senate race, as well as gubernatorial, Secretary of State, and Attorney General elections, this massive midterm turnout increase must be attributed to other factors, factors that almost certainly will continue to hold true for the 2020 presidential election.

Third, as most municipalities already have room to consolidate precincts under the existing statutory maximum, the cost-savings from such an untested change are far outweighed by the potential downsides. The 2018 Biennial Precinct Report issued by the Michigan Department of

State's Bureau of Elections reflects that a relatively small proportion of the state's cities and townships—114 out of 1,520 or 7.5 percent—have multiple precincts and an average of 2,000 or more registered voters per precinct. Notably, many of the 114 municipalities in that subset are much closer to the 2,000 mark than the 2,999 per-precinct maximum of registered voters. Just 13 of these 114 multi-precinct municipalities have an average of 2,500 or more registered voters per precinct: Bay City, Marshall, Sault Ste. Marie, Peninsula, Blackman, Leoni, Spring Arbor, Ishpeming, Fruitport, Walled Lake, Wixom, St. Clair, and Three Rivers. Accordingly, even under the existing maximum of 2,999 registered voters per precinct, all of these 114 municipalities with over 2,000 registered voters on average per precinct still have room—and many have substantial room—to consolidate precincts up to 2,999. For example, in 2018, Pontiac had 43,536 registered voters and 21 precincts for an average of 2,073 registered voters per precinct. Using the 2,999 maximum, it could consolidate its precincts down to 15 precincts, without any change in existing law. Similarly, St. Clair Shores had an average of 2,070 registered voters per precinct, Saginaw had an average of 2,250, and Traverse City had an average of 2,003. Even with some inevitable growth in the number of registered voters, all of these municipalities already have substantial room to experiment with precinct consolidation in the 2020 primary and general elections, without any increase in the existing statutory maximum for precinct populations. Furthermore, the fact that municipal clerks have *voluntarily* kept average precinct sizes well below the maximum of 2,999 speaks volumes about the need to keep precinct sizes manageable for high-turnout elections and the lack of necessity for this ill-advised and untested elevation of the maximum.

Additionally, countless other municipalities have average precinct populations well below the 2,000 mark. Detroit, for instance, has an average of 929 registered voters per precinct. Though geography and average distance to polling sites of course exert independent pressures on precinct size, there is room to consolidate under existing laws without taking the drastic step of moving up the threshold to 5,000 registered voters. Similarly, Lansing has an average of only 1,788 registered voters per precinct, and Grand Rapids has an average of only 1,736 registered voters per precinct. Again, all of these municipalities already have substantial room to experiment with consolidation in the 2020 primary and general elections, without any increase in the existing statutory maximum for precinct populations.

The cost-benefit analysis strongly counsels against this reform, and, at a bare minimum, militates against testing this increase in the maximum precinct size in a presidential election year that is projected to have astronomical turnout. It would be far more prudent to stagger increases in the precinct size maximum and to do pilot tests of these increases in select jurisdictions statewide. Even with Proposition 3's reforms in place, the state has not yet had sufficient experience with these no-excuse absentee voting and the other changes to know whether they will substantially or only slightly diminish the demand for Election-Day voting resources, including staffing and machines, in a high-turnout election. State and local election officials, as well as lawmakers, can and should observe their impact in 2020 and can then adjust precinct sizes based on that data collected in 2020.

Fourth, all of the above drives inexorably at the conclusion that adopting HB 5032 would put Michigan's election system in jeopardy of violating the Constitution with respect to the right

to vote. Under the Supreme Court’s case law regarding the right to vote as protected by the First and Fourteenth Amendments to the U.S. Constitution, any burden on the right to vote must be balanced against a state’s interest in that requirement. The Supreme Court has set forth the following test:

[T]he rigorosity of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to “severe” restrictions, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1992). But when a state election law provision imposes only “reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters, “the State’s important regulatory interests are generally sufficient to justify” the restrictions. *Anderson*, 460 U.S., at 788, 103 S.Ct., at 1569–1570; *see also id.*, at 788–789, n. 9, 103 S.Ct., at 1569–1570, n. 9.

Burdick v. Takushi, 504 U.S. 428, 434 (1992). If Michigan legislators decide to increase the precinct size to 5,000 registered voters, that new law will likely draw a lawsuit asserting such a change is unduly burdensome to voters. This would be particularly true for a class of voters who work one or more jobs, care for family members including kids, and cannot afford to take a long time away from those obligations to vote. Even with no-excuse absentee voting, it is likely that such a drastic change in the maximum precinct size would yield much longer lines in a high-turnout election, pushing the wait times up to 30-45 minutes to even an hour in some jurisdictions. The other risk of course is that if anything were to go wrong, say with electronic pollbook or direct recording electronic (DRE) voting machine functionality, the backlog of voters would be much harder to process and clear efficiently in a precinct of 5,000 registered voters. Technological or human error could result in very lengthy wait times and, at that point, with much larger precinct sizes, it would be impossible to correct.

Fifth and finally, even if this Committee still believes that some increase in the maximum precinct size is desirable or tolerable, it of course should not begin with a 66.67 percent increase on the existing level. It should start with a much smaller increase of several hundred registered voters and see how that fares in the 2020 elections. Staggered increases in the threshold would be a much safer approach that would be unlikely to produce extreme results or draw advocacy and litigation against municipalities that pushed precinct sizes into the 3,500-plus range. I cannot recall any other state ever increasing its maximum so dramatically and so quickly.

Thank you for considering these points. Respectfully, this Committee should amend HB 5032 to remove the provisions increasing the maximum precinct size.