Testimony of the NAACP Legal Defense & Educational Fund, Inc. Before the New York State Senate Standing Committee on Elections in Support of S7528, the New York Voting Rights Act

March 3, 2020

The NAACP Legal Defense & Educational Fund, Inc. (LDF)[1] submits this testimony in support of Senate Bill S7528, the New York Voting Rights Act. From its founding in 1940 by Thurgood Marshall, LDF has been a leader in the crusade to secure, protect, and advance the voting rights of Black voters and other communities of color. LDF is dedicated to expanding democracy, eliminating disparities, and achieving racial justice via litigation, public policy, and public education. Beginning with *Smith v. Allwright*,[2] our successful U.S. Supreme Court case challenging the use of whites-only primary elections in 1944, LDF has been fighting for decades on behalf of Black voters to protect their rights to equal and active political participation.

The New York Voting Rights Act represents a critical opportunity for New York to confront head-on its extended legacy of voting discrimination.[3] The U.S. Supreme Court's 2013 decision in *Shelby County, Alabama v. Holder*,[4] which LDF litigated, gutted an essential provision of the federal Voting Rights Act of 1965 (VRA) that had for nearly fifty years required jurisdictions with a history of voting discrimination to submit any proposed changes to their voting practices or procedures to a federal authority for preclearance prior to implementation. New York's Bronx, Kings, and New York Counties were each included among these covered jurisdictions.[5] New York first came under partial preclearance coverage following the VRA's 1970 renewal given its use of a literacy test and correspondingly low voter registration.[6]

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[1] LDF has been fully separate from the National Association for the Advancement of Colored People (NAACP) since 1957, though LDF was originally founded by the NAACP and shares its commitment to equal rights.

[2] 321 U.S. 649 (1944).

[3] *See, e.g.*, Bennett Liebman, *The Quest for Black Voting Rights in New York State*, 11 Alb. Gov. L. Rev. 389 (2018) (detailing "New York State['s] long history of discriminating against minorities in extending the voting franchise").

[4] 570 U.S. 529 (2013).

[5] U.S. Department of Justice, Jurisdictions Previously Covered by Section 5, https://www.justice.gov/crt/jurisdictions-previously-covered-section-5.

[6] *See NAACP v. New York*, 413 U.S. 345, 352-53 (1973).

The "preclearance provision" of Section 5 of the VRA served as a critically important means of protecting voters of color from voting discrimination in New York. New York notably acknowledged its significance in its amicus brief filed in the *Shelby* case, noting that "the Section 5 preclearance process has helped bring about tremendous progress in the covered jurisdictions and continues to be a vital mechanism to assist . . . in working to achieve the equality in opportunities for political participation that is a foundational principle of our democracy."[7]

In the absence of preclearance protection, voters of color in New York have been disproportionately impacted by a number of issues in recent years, including voter purges, years-long delay in filling legislative vacancies in both the New York State Senate and Assembly, and State failures to meet legal obligations regarding voter registration.[8] While New York has made some recent progress, including the implementation of early voting in 2019,[9] there remain serious gaps in the State's protection of the rights of voters of color.

Racially discriminatory practices in the electoral system have consequences that preclearance can prevent and correct. Preclearance was designed as a unique and powerful intervention to stop discrimination before elections take place. An election with conditions later found to be racially discriminatory has consequences. Officials elected under unlawful conditions influence and create policy that affects all constituents in their jurisdiction. They may write and implement legislation that allows them to maintain power or that targets communities with viable claims of discrimination. Even if future elections are not tainted by discriminatory practices, those elected to office under unlawful conditions have already accessed and used powers intended only for candidates who constituents fairly and democratically elected. The inability of the courts to retroactively correct these wrongs further disenfranchises and discourages voters who may understandably believe that their vote does not matter if discriminatory voting practices are left unaddressed.

While Section 2 of the VRA authorizes plaintiffs to challenge racial discrimination in voting after a discriminatory voting practice is implemented, and is a vital tool of enforcement, it cannot redress some of the most egregious voting harms. Even when we prevail in Section 2 cases, irreparable damage is already done. For example, in Texas, during the three years we spent challenging the state's voter ID law, elections continued to take place. In that time, and under conditions the court later found impermissible, voters elected a U.S. senator, all 36 members of the Texas delegation to the U.S. House of Representatives, a Governor, a Lieutenant governor, an Attorney General, a Controller, various statewide Commissioners, four Justices of the Texas Supreme Court, candidates for special election in the state Senate,

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[7] Brief for the States of New York, California, Mississippi, and North Carolina as *Amici Curiae* in Support of Respondents, 2, *Shelby County, Alabama v. Holder*, 570 U.S. 529 (2013).

[8] NAACP Legal Defense & Educational Fund, Inc., Democracy Diminished: State and Local Threats to Voting Post-*Shelby County, Alabama v. Holder*, pp. 50-51, available at https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished-Redraft-D-10-7-19.pdf.

[9] New York State, Early Voting in New York, https://www.ny.gov/early-voting-new-york.

State boards of education, 16 state senators, all 150 members of the state House, over 175 state court trial judges, and over 75 district attorneys. We proved at trial that more than half a million eligible voters were disenfranchised by the ID law but there was no retroactive solution available. As a result, the voices and votes of thousands were successfully suppressed.

Litigation is time-consuming and expensive. Voters should not have to wait years to ensure that their right to vote is vindicated. Additionally, voters should not have to spend an exorbitant amount of money to litigate a Section 2 case to ensure their vote has been counted.[10]

The New York Voting Rights Act gives New York the chance to bridge remaining gaps in voter protection and ensure that all eligible New Yorkers have the opportunity to exercise their fundamental right to vote. By enacting S7528, New York will step forward as a vital national leader in voting rights by building on the important efforts of states such as Washington and California, which has documented significant progress via its enactment of the California Voting Rights Act in 2001.[11]

By taking measures such as reintroducing a preclearance mechanism, the New York Voting Rights Act can restore key former voting protections that were lost following the *Shelby* decision. LDF, the nation's oldest and premier civil rights law firm, is dedicated to the full and equal participation of all people in our democracy, and fully supports Senate Bill S7528.

Respectfully submitted,

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[10] NAACP LDF, *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation* (Feb. 14, 2019), https://www.naacpldf.org/wp-content/uploads/Section-2-costs02.14.19.pdf.

[11] *See, e.g.*, Testimony of Professor J. Morgan Kousser Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S. House Committee on the Judiciary Legislative Proposals to Strengthen the Voting Rights Act, Oct. 17, 2019, p.2, available at https://docs.house.gov/meetings/JU/JU10/20191017/110084/HHRG-116-JU10-Wstate-KousserJ-20191017.pdf (noting the "striking success of minorities in using the state-level California Voting Rights Act" and the Act's embodiment of the "continuing need of anti-discrimination laws").