March 26, 2018

By Email

The Members of the Georgia General Assembly
State Capitol Building
Atlanta, Georgia 30334

Re: Senate Bill 363

Dear Members of the Georgia General Assembly:

The NAACP Legal Defense and Educational Fund, Inc. (LDF), on our own behalf and on behalf of the American Civil Liberties Union of Georgia (ACLU of Georgia) and the Georgia State Conference of the NAACP (Georgia NAACP),1 write to express in the strongest possible terms our opposition to Senate Bill (S.B.) 363. We are deeply concerned that the enactment of S.B. 363 will suppress minority voter participation and run afoul of federal laws.

If passed, S.B. 363 proposes to shorten voting hours on Election Day in Atlanta, a majority-Black and the most populous city in Georgia, from 8:00 p.m. to 7:00 p.m.2 Members of the Georgia General Assembly introduced this proposal on January 29, 2018 and the Senate passed it on February 23, 2018 with all of the Black representatives who voted on the bill opposing it.3 The House proposed a version of this bill, which passed through favorable out of committee on March 14, 2018, that has been amended to also effectively eliminate early voting on the Sunday before Election Day in Georgia.4 Such Sunday voting is widely-known in Georgia and elsewhere as Souls to the Polls wherein Black voters worship together and then march or share rides to vote, which has resulted in high Black voter turnout.5

An appendix to this letter includes brief descriptions of LDF, ACLU of Georgia, and Georgia NAACP.6

2 S.B. 363, supra note 2.
4 The proposed bill’s text limits early voting to just one weekend day before an election. See S.B. 363, supra note 2. Thus, when applied in conjunction with existing state law, which requires that any election with state or federal candidates must allow voting on a Saturday, the pending bill effectively and strategically eliminates Sunday voting. Ga. Code Ann. § 21-2-385 (d)(1)(D) (West).
As nonprofit, nonpartisan civil rights, civil liberties, and advocacy organizations, our aim is to ensure that all voters, in particular people of color, have full, equal, and active access to the one fundamental right that is preservative of all other rights: the right of citizens to access the ballot box and elect candidates of their choice. It is our firm belief that Georgia should be providing more opportunities for voters to access the ballot box, including by, among other things, facilitating expansive opportunities for voting on Election Day and in advance of it, not sharply reducing them, as S.B. 363 proposes. This is why LDF, in coordination with Georgia NAACP, ACLU of Georgia, and other voting rights and pro-democracy groups, successfully opposed the Assembly’s attempts—in two successive legislative sessions—in 2014 and 2015 to pass bills that would have drastically reduced early voting in Georgia.\footnote{Zachary Roth, \textit{In Voting Rights Win, Bill to Cut Georgia Early Voting is Dead}, MSNBC (Apr. 6, 2015), http://www.msnbc.com/msnbc/voting-rights-win-bill-cut-georgia-early-voting-dead; PPG’s Advocacy Halts Efforts to Reduce Early Voting in Georgia, NAACP LDF (Mar. 24, 2014), http://www.naacpldf.org/press-release/ppgs-advocacy-halts-efforts-reduce-early-voting-georgia.}

Indeed, a Presidential Commission on Election Administration, a bipartisan commission of experts, has recommended the expansion of early voting opportunities as a means to both improve voters’ experiences with voting and promote confidence in election administration across the country.\footnote{The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration, \textit{Presidential Comm. on Election Administration}, introductory letter, (Jan. 2014), https://www.nased.org/PCEA_FINAL_REPORT_JAN_2014.pdf (identifying as a key recommendation “measures to improve access to the polls through expansion of the period for voting before the traditional Election Day”) [hereinafter American Voting Experience].} According to the Commission, “[s]tated simply, early voting offers Americans opportunities to participate in the electoral process that simply cannot be afforded by the [typically] contained twelve-hour period of the traditional Election Day.”\footnote{\textit{Id.} at 54-56 (“Having chosen the day and time for voting that is convenient for them, early voters are described as being in a more ‘celebratory’ frame of mind than under the often rushed circumstances they face on Election Day when they must vote at a specific location on a specific day.”).} Sunday voting before Election Day and the additional hour to vote in Atlanta are the types of expansions of voting opportunities contemplated by these bipartisan experts.

We write, therefore, to urge you to oppose this proposed bill, which promises to undermine hard-fought progress to expand access to the ballot in Georgia, and, in the process possibly run afoul of federal laws, such as Sections 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the U.S. Constitution, and expose Georgia to prophylactic review of its voting changes, like S.B. 363, by the federal government under Section 3(c) of the Voting Rights Act.\footnote{Section 2 of the Voting Rights Act prohibits voting standards, practices, or procedures that were either enacted with a racially discriminatory intent, or that have racially discriminatory results. \textit{See} 42 U.S.C. § 1973(a). One of the chief purposes of Section 2 is to prohibit practices that directly deny the exercise of the right to vote, as may be the case here with the proposed severe cuts to early voting opportunities and voting hours in Atlanta.} S.B. 363, if implemented, has the potential to be discriminatory for the following reasons.
First, with respect to reducing the opportunity to vote in Atlanta by an hour, there are hundreds of thousands of voters in Atlanta, a substantial percentage of whom are Black and other people of color, who could be adversely impacted by this proposed measure. Indeed, opponents of S.B. 363 have expressed the need for the polling sites in Atlanta to remain open until 8:00 due to the need for voters in Atlanta to overcome traffic in the evening on Election Day.

Second, with respect to effectively eliminating Sunday voting, S.B. 363, if enacted into law, is very likely to disproportionately impact a substantial number of Black voters and other voters of color for whom Sunday voting during the early voting period is an important channel through which to participate in Georgia’s political process. In the 2012 presidential elections, for example, Black voters comprised nearly 35 percent of all early voters in Georgia. And, in 2016, the state’s early voter turnout broke its 2008 record for early voting in advance of the presidential preference primary, demonstrating the ongoing need for early voting opportunities in Georgia. Such early voting is most common in the weeks immediately before the election, including the Sunday before Election Day. Indeed, our understanding is that 52,000 voters, 53 percent of whom are people of color, throughout Georgia would be affected by S.B. 363. As explained by a member of the General Assembly, David Knight, “more than 75 percent of all early voting occurs in the last three weeks of an election.”

The Fourteenth and Fifteenth Amendments of the U.S. Constitution provide for the fundamental right to vote and prohibit voting practices adopted with a discriminatory purpose. U.S. Const. amends. XIV & XV. Georgia’s Constitution explicitly grants the right to vote. Ga. Const. art. II, § 1, ¶ II (“shall be entitled to vote.”).

Section 3(c) of the Voting Rights Act is a remedial provision that provides an avenue to “bail in” jurisdictions and require them to preclear voting changes upon a finding of intentional discrimination. 42 U.S.C. § 1973a(c). It can restore the federal protection afforded by Section 5 of the Voting Rights Act, which was immobilized by the U.S. Supreme Court in Shelby County, Alabama v. Holder ruling. Indeed, before Shelby, it is unlikely that S.B. 363 would have been precleared under Section 5 because of the retrogressive impact that its restrictions would have on voting opportunities, particularly for Black and other people of color in Georgia, who have used Sunday voting for several years, and the additional hour to vote in Atlanta for even longer.


Call to Action, PROGEORGIA (Mar. 23, 2018) (data on file with ProGeorgia).

Lauren Coleman, Get to the Polls Early...Well, not that Early, ELECTION LAW SOCIETY AT WILLIAM & MARY LAW SCHOOL (Feb. 8, 2012), http://electls.blogs.wm.edu/2012/02/08/ga-early-voting/.
widely used by Georgia’s voters. Under these circumstances, eliminating voting the Sunday before Election Day raises serious concerns under federal law. Indeed, the Fourth Circuit Court of Appeals rejected North Carolina’s attempt to eliminate Sunday voting as part of its omnibus voter suppression law, finding that the Legislature did so with a racially discriminatory purpose and thereby violated the United States Constitution.

Third, the adverse effects of proposed S.B. 363, if passed, may be exacerbated by widespread polling place closures throughout Georgia. During the past several years, county officials have successfully closed and consolidated polling locations. These efforts, standing alone, create administration challenges at the polls for Georgia residents seeking to exercise their right to vote, including voter confusion and long lines. Moreover, the reduction in resource allocation prevents officials from realizing the benefits of pre-Election Day voting. Despite successful opposition to mitigate some of the closures and consolidations of polling places, there does not appear to be any signs of abatement. The prospect of continued closures, combined with cuts to early voting, including Sunday voting, pose an intolerable obstacle to access to democracy for Georgia residents.

Fourth, S.B. 363’s lead sponsor Sen. Matt Brass’s “uniformity” and “traffic concerns” justifications as bases for proposing such a restrictive limitation on voting opportunities, weighed against the denial and/or abridgement of the right to vote that it may cause, is unpersuasive. If,

18 N. Carolina State Conference of NAACP v. McCrory, 831 F.3d 204, 226-27 (4th Cir. 2016), cert denied sub nom North Carolina v. N. Carolina State Conference of NAACP, 137 S. Ct. 1399 (2017) (rejecting North Carolina’s justifications for changes to early voting, which included “purported inconsistencies in voting across counties” and finding “what comes as close to a smoking gun as we are likely to see in modern times, [North Carolina’s] very justification for a challenged statute hinges explicitly on race—specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise.”); see also Ohio State Conference of NAACP v. Husted, 768 F.3d 524 (6th Cir. 2014) (affirming preliminary injunction against Ohio’s proposal to limit early in-person voting on Sundays, vacated on other grounds, Ohio State Conference of the NAACP v. Husted, No. 14-3877, 2014 WL 10384647 at *1 (6th Cir. Oct. 1, 2014).
20 American Voting Experience, supra note 8, at 55 (“[I]f jurisdictions overcompensate by significantly reducing the number of polling places, staff, and other resources available for Election Day,” expanding early voting will not relieve the congestion on Election Day.).
21 Sam Levine, Georgia Election Officials Reverse Decision to Close Polling Places in Black Neighborhoods, Huff. Post (Aug. 15, 2017) (“Georgia local election officials on Monday reversed a decision to close polling places in mostly African-American precincts after critics sued them over the closures and said the changes would lead to confusion.”); Georgia: Make Elections Fair and Accessible by Keeping Polling Places Open, LET AMERICA VOTE (Nov. 29, 2017), https://policy.letamericavote.org/let-america-vote-case-study-polling-place-closures-848db5dafcafe (cataloguing community opposition efforts that successfully discouraged the adoption, either in full or in part, of consolidation plans in Fulton (which includes Atlanta), Macon-Bibb, Hancock, and Irwin counties); see also John Whitesides, Polling Places Become Battleground in U.S. Voting Rights Fight, Reuters (Sept. 16, 2016).
22 Niesse, supra note 12.
according to Sen. Brass, “the spirit of the Voting Rights Act is one person, one vote, and one person should not be allowed to vote one hour longer than another person,” then the legislature should extend voting hours to 8:00 p.m. throughout Georgia, rather than reduce it for voters in Atlanta. If, according to Sen. Brass, some of his constituents who commute to Atlanta complain about traffic leaving the city on Election Day, which may cut into their ability to vote before 7:00 p.m., a solution also could be to extend voting hours in counties neighboring Atlanta (and elsewhere). To this end, as part of Atlanta crosses over into DeKalb County, Rep. Bee Nguyen asked Sen. Brass if he reached out to election officials in DeKalb—rather than just Fulton—to see if those county officials had any concerns about S.B. 363. Sen. Brass responded no, explaining that no one came to him or mentioned any of these concerns about DeKalb. In fact, the DeKalb County Board of Registration and Election submitted a letter opposing S.B. 363.

Finally, LDF has been unable to identify any analysis conducted by the General Assembly demonstrating that (1) restricting voting hours in Atlanta will not disproportionately harm Black and other voters of color, or (2) eliminating Sunday voting throughout Georgia will not disproportionately harm Black and other voters of color. There has been, notably, the suggestion by a Georgia legislator in 2014 that he opposed new Sunday voting hours because Black and other voters of color take advantage of these voting opportunities disproportionately, explaining that he “prefer[s] more educated voters than a greater increase in the number of voters.” This is critically important since some of Georgia’s legislators, in opposing S.B. 363, have put the Georgia Assembly on notice that the bill is likely to suppress the turnout of racial minority voters. The failure to study the real-world implications and burdens for many Georgia voters, particularly Black voters and other voters of color, borne by these proposed changes compels us to oppose this measure in the strongest possible terms collectively.

In addition, Sen. Brass’s purported justification also appears pretextual given the context in which he proposed this bill. Sen. Brass, who is affiliated with the Republican party, filed this bill after Sen. Jen Jordan, a Democrat, won a special election in December 2017 to represent a district that encompasses parts of Atlanta (in Fulton and DeKalb) and Cobb counties. Cobb County’s voting hours end at 7:00 p.m., the time Atlanta’s hours would be reduced to under S.B. 363.

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25 *Id.*
26 *Democracy Diminished*, supra note 19 at 18.
27 *Governmental Affairs*, supra note 24.
28 In addition, election law scholar, Richard L. Hasen, posits that uniformity of election administration across counties with different size populations, such as contemplated by S.B. 363, may run afoul of *Bush v. Gore* or other equal protection principles “whenever a rule of election administration treats differently populated counties the same but the relevant rule significantly affects the level of services provided to individual voters.” Richard L. Hasen, *When Is Uniformity of People, Not Counties, Appropriate in Election Administration? The Cases of Early and Sunday Voting*, 2015 U. CHI. LEGAL F. 193, 196 (2016). S.B. 363 would impose uniformity across counties with vastly different populations, in turn, creating burdens for voters living in the demographically larger city of Atlanta. Such a regulation, therefore, would affect the level of services—that is, access to the polls—for voters in Atlanta, the most populous city in Georgia, but not voters in other cities with drastically smaller voting-age populations.
363. Critically, the U.S. Supreme Court has warned that measures designed to harm racial minority voters for political interests can run afoul of the federal constitution.\(^\text{29}\)

Please note that we are prepared to take decisive, public action if this proposed legislation becomes law. We are hopeful that we can resolve this critical matter promptly and amicably, given the limited number of scheduled days left in this legislative session, and that you will stand with us in opposing this measure.

Sincerely,

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Cc (by email): Voter Advocates Representing Organizations Opposed to S.B. 363

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\(^\text{29}\) See, e.g., Cooper v. Harris, 137 S. Ct. 1455, 1473 n.7 (2017) (citing Miller v. Johnson, 515 U.S. 900, 915-16 (1995)).
Appendix

Since its founding in 1940, LDF has been a pioneer in the struggle to secure and protect the voting rights of Black people. LDF has been involved in much of the precedent-setting litigation related to securing voting rights for people of color. See, e.g., Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013) (LDF defending Section 5 of the Voting Rights Act before the U.S. Supreme Court); Ga. State Conf. of NAACP v. Fayette Cty. Bd. of Comm’rs, 118 F. Supp. 3d 1338 (N.D. Ga. 2015) (a challenge to the at-large electoral method to the county board of commissioners and board of education). LDF uses legal, legislative, public education, and advocacy strategies to promote the full, equal, and active participation of Black people in America’s democracy. LDF has been a separate entity from the NAACP, and its state branches, since 1957.

In 2012, LDF successfully challenged Florida’s early voting restrictions before a three-judge federal court in Florida v. United States, 885 F. Supp.2d 299 (D.D.C. 2012). This case involved Florida’s proposal to dramatically cut its early voting period for five counties by reducing the number of early voting days from twelve to eight, eliminating early voting on the Sunday immediately preceding Election Day, and reducing the total number of hours that early voting polling stations were required to be open. Critically, Black voters in Florida used the early voting period, including Sunday voting, to vote in historic numbers in the 2008 elections, with more than half of them casting ballots during the nearly two-week early voting period.

The ACLU of Georgia is dedicated to preserving the civil liberties enshrined in the U.S. Constitution and Bill of Rights. Through litigation, lobbying, and communications, the ACLU of Georgia works to preserve and enhance the rights of all citizens of Georgia without political partisanship. Foremost among these rights are freedom of speech and religion, the right to equal treatment under law, and the right to privacy.

Recently, the ACLU of Georgia protected the sacred, constitutional right to vote for nearly 160,000 Georgians. On the eve of a final court date, Secretary of State Brian Kemp finally agreed to comply with state and federal laws that require him to update automatically the addresses of Georgia voters who move within the same county.

Georgia NAACP is a non-partisan, interracial membership organization founded in 1941 in Savannah, Georgia. Its mission is to ensure equal political, educational, social, and economic rights of all persons, and Black people in particular, and to eliminate racial discrimination. Georgia NAACP has engaged in a wide range of activities, including advocating for the full and equal voting rights of Black people and other communities of color in Georgia and supporting the enactment of major civil rights legislation, including the Voting Rights Act. Georgia NAACP’s members reside in almost every county in the state.

Recently, in GA NAACP v. State of Georgia and Brian Kemp, a federal court entered a consent order that prohibited the State from cutting off voter registration beyond 30 days of any federal elections, including in federal runoff elections. Consent Decree, GA NAACP v. State of Georgia and Brian Kemp, No. 17 Civ. 1427 (N.D. Ga. Oct. 17, 2017), EFC No. 42.