



## Testimony of the NAACP Legal Defense & Educational Fund, Inc. Before the New York State Senate Standing Committee on Elections

September 20, 2021

The NAACP Legal Defense & Educational Fund, Inc. (“LDF”)<sup>1</sup> submits this testimony to urge the Elections Committee to prioritize passage of Senate Bill S1046A, the John R. Lewis Voting Rights Act of New York (the “NYVRA”).

The John R. Lewis Voting Rights Act of New York represents a critical opportunity for New York to confront head-on its extended legacy of voting discrimination.<sup>2</sup> The U.S. Supreme Court’s 2013 decision in *Shelby County, Alabama v. Holder*,<sup>3</sup> gutted an essential provision of the federal Voting Rights Act of 1965 that had for nearly fifty years required jurisdictions with a history and ongoing record 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 jurisdictions.<sup>4</sup>

This “preclearance provision” of Section 5 of the federal Voting Rights Act (“federal VRA”) served as a critically important means of protecting voters of color and language minority voters from voting discrimination in New York. New York notably acknowledged the significance of preclearance under the federal VRA 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.”<sup>5</sup>

While New York has made some progress in recent years, including the implementation of early voting, online voter registration, and expansion in absentee ballot eligibility, there

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<sup>1</sup> 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.

<sup>2</sup> 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”).

<sup>3</sup> 570 U.S. 529 (2013).

<sup>4</sup> U.S. Department of Justice, Jurisdictions Previously Covered by Section 5, <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>.

<sup>5</sup> 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).

remain serious gaps in the State’s protection of the rights of voters of color, especially at the local level. The NYVRA gives New York the chance to bridge those gaps by ensuring that all eligible New Yorkers have the opportunity to exercise their fundamental right to vote. In enacting the NYVRA, New York will step forward as a vital national leader in voting rights, building on the important efforts of states such as California, Washington, Oregon, and Virginia, each of which have enacted state-level voting rights acts.<sup>6</sup>

The NYVRA takes a number of critical steps to restore key protections that were lost following the *Shelby* decision and expand the tools available to protect the right to vote. Our testimony will focus on the current limitations in the federal Voting Rights Act (“federal VRA”), and the ways in which two important provisions of the NYVRA—private rights of action and preclearance—can help augment federal legislation to protect voters of color.

### **I. Limitations in the Federal VRA.**

The individual and collective provisions of the federal VRA have been effective at combatting a wide range of barriers and burdens that have excluded voters of color from the political process.<sup>7</sup> However, in the decades since its passage, federal courts have eliminated or weakened some of the federal VRA’s protections, making it increasingly complex and burdensome for litigants to vindicate their rights under the law. As a result, despite the importance of the federal VRA, voters of color often still lack an equal opportunity to participate in the political process and elect candidates of their choice.

Section 2 of the federal VRA offers a private right of action—which means that a person is legally entitled to file a lawsuit—against any voting practice or procedure that “results in a denial or abridgment of the right of any citizen of the United States to vote on account of race.”<sup>8</sup> But Section 2 litigation imposes a heavy burden on plaintiffs. Section 2 lawsuits are labor-intensive and generally require multiple expert witnesses for both plaintiffs and defendants.<sup>9</sup> Plaintiffs and their lawyers risk at least six- or seven-figure expenditures in Section 2 litigations, often over multiple years.<sup>10</sup> Individual plaintiffs, even when supported

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<sup>6</sup> 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://bit.ly/2X631EZ> (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”).

<sup>7</sup> Myrna Pérez, *Voting Rights Act: The Legacy of the 15th Amendment*, BRENNAN CENTER FOR JUSTICE (June 30, 2009), <https://bit.ly/3cjDezF>.

<sup>8</sup> 52 U.S.C. § 10301.

<sup>9</sup> *Id.* (citing Mike Faulk, *Big Costs, Heavy Hitters in ACLU Suit Against Yakima*, YAKIMA HERALD (Aug. 10, 2014) <https://bit.ly/3ckou3C>).

<sup>10</sup> LDF, *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation 2* (Feb. 2021) <https://bit.ly/391to32>; *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 92 (2005) (“Two to five years is a rough average” for the length of Section 2 lawsuits).

by civil rights organizations, lack the resources and expertise to effectively prosecute Section 2 claims.<sup>11</sup> Due to these challenges, some potential Section 2 violations go unnoticed and are never resolved or litigated in court.<sup>12</sup>

Section 2 claims are also expensive for jurisdictions to defend, regularly costing states and localities considerable amounts of taxpayer money. For example, the East Ramapo Central School District recently paid its lawyers in excess of \$7 million for unsuccessfully defending a Section 2 lawsuit brought by the local NAACP branch, and have been ordered to pay over \$4 million in plaintiffs' attorneys' fees and costs as well.<sup>13</sup> The Town of Islip paid its lawyers over \$3 million for defending a Section 2 lawsuit and paid plaintiffs' attorneys nearly \$1 million to settle the claims.<sup>14</sup> In *Veasey v. Perry*, which LDF litigated alongside other civil rights groups and the U.S. Department of Justice (DOJ), the district court and an appellate court recently affirmed an order that requires Texas to pay more than \$6.7 million in the (non-DOJ) plaintiffs' documented costs.<sup>15</sup>

For nearly 50 years, Section 5 of the federal VRA, the core provision of this legislation, protected millions of voters of color from racial discrimination in voting, by requiring certain states and localities to obtain approval from the federal government *before* implementing a voting change.<sup>16</sup> In *Shelby County, Alabama v. Holder*, the Supreme Court rendered Section 5 inoperable by striking down Section 4(b) of the VRA, which identified the places in our country where Section 5 applied.<sup>17</sup> The *Shelby County* decision unleashed a wave of voter suppression in states that were previously covered under Section 4(b) ("covered jurisdictions").<sup>18</sup> In 2021 alone, state lawmakers have carried over, prefled, or introduced

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<sup>11</sup> Voting Rights and Election Administration in the Dakotas: Hearing Before the Subcomm. on Elections, 116th Cong. 64 (2019).

<sup>12</sup> Congressional Authority to Protect Voting Rights After *Shelby County v. Holder*: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on Judiciary, 116th Cong. 14 (Sept. 24, 2019) (Written Testimony of Professor Justin Levitt).

<sup>13</sup> Jennifer Korn, *ERCSD Threatens to Fire Teachers if Legal Fees Not Cut to \$1: NAACP Leaders Respond*, ROCKLAND COUNTY TIMES, Jan. 21, 2020, <https://bit.ly/39dKvji>; Report and Recommendation, *NAACP, Spring Valley Branch v. East Ramapo Central School Dist.*, No. 7:17-08943-CS-JCM (S.D.N.Y. Dec. 29, 2020).

<sup>14</sup> Sophia Chang, *Islip Spends Nearly \$3M So Far to Fight Voting Rights Case*, NEWSDAY (Dec. 16, 2019), <https://nwsdy.li/3EeAYWq>; Priscilla Korb, Judge Rules in Town of Islip Voting Rights Case, PATCH (Oct. 27, 2020), <https://bit.ly/3k4sIQz>.

<sup>15</sup> See Mike Scarcella, *5<sup>th</sup> Circuit Upholds \$6.7 Mln in Fees for Plaintiffs in Voting Rights Case*, Reuters (Sept. 4, 2021), <https://reut.rs/3tN14L7>.

<sup>16</sup> 52 U.S.C. § 10304.

<sup>17</sup> See *Shelby Cty v. Holder*, 570 U.S. 529, 557 (2013).

<sup>18</sup> See *Democracy Defended*, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, THURGOOD MARSHALL INSTITUTE, <https://bit.ly/3lMApe3>; see also LDF, *A Primer on Sections 2 and 3(c) of the Voting Rights Act*, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, 1 (2021), <https://bit.ly/39csLUt>.

389 bills with provisions that restrict voting access in 48 states, twenty-two of which have been enacted.<sup>19</sup>

## II. The NYVRA's Private Right of Action Against Voter Suppression and Vote Dilution.

The NYVRA provides voters of color, as well as private organizations that represent or serve voters of color, with a private right of action against municipalities that adopt or maintain policies or practices that suppress minority votes or dilute minority voting strength.

**Voter suppression.** The NYVRA provides an efficient and predictable framework for prosecuting voter suppression claims. The NYVRA allows voters of color to address practices that suppress minority turnout, including, among other things, inconvenient or insufficient polling locations; wrongful voter purges; lack of availability of drop boxes; or improper election administration decisions that lead to longer lines.<sup>20</sup> These provisions are especially important in light of the Supreme Court's recent opinion in *Brnovich v. Democratic National Committee*, which added new and additional burdens to challenges of voter suppression laws brought under Section 2 of the federal VRA.<sup>21</sup>

**Vote dilution.** The NYVRA provides an effective means of prosecuting racial vote dilution claims. Modeled off the success of the California Voting Rights Act, the NYVRA will create a clear and straightforward framework for contesting at-large municipal elections that dilute minority voting strength.<sup>22</sup> The NYVRA also provides a clear framework for contesting district-based and alternative methods of election that dilute minority voting strength.<sup>23</sup> The NYVRA will make this type of litigation less time-intensive and less costly for all parties as compared to the federal VRA.

**Notification and safe harbor.** The NYVRA contains important safe harbor provisions that provide protection for municipalities seeking to resolve potential violations. Prospective plaintiffs are required to notify municipalities in writing of any alleged violation *before* commencing any action in court. Municipalities are then afforded a "safe harbor" period during which it may take steps to cure the alleged violation without exposure to litigation.

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<sup>19</sup> See *Democracy Defended*, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, THURGOOD MARSHALL INSTITUTE, <https://bit.ly/3lMApe3>; *State Voting Bills Tracker 2021*, BRENNAN CENTER FOR JUSTICE (updated May 28, 2021) <https://bit.ly/3tK7rOa>.

<sup>20</sup> NYVRA § 17-206(1).

<sup>21</sup> See *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021); *Statement on Brnovich v. Democratic National Committee*, NAACP Legal Defense & Educational Fund, Inc. (July 1, 2021), <https://bit.ly/3zbBxws>.

<sup>22</sup> NYVRA § 17-206(2).

<sup>23</sup> *Id.*

These provisions incentivize municipalities to resolve NYVRA violations outside of court.<sup>24</sup> Indeed, in California, the notification and safe harbor procedure has proven highly successful at accomplishing precisely this goal – one study identified 140 California jurisdictions that voluntarily resolved potential voting rights violations after the California Voting Rights Act was enacted.<sup>25</sup>

### III. The NYVRA's Preclearance Program

The NYVRA establishes a preclearance program that requires certain municipalities with a history of civil rights abuses or other indicators of historical racial discrimination to obtain approval from the Attorney General or a state court before making changes to its election rules or practices. The NYVRA requires these municipalities to demonstrate that changes will not diminish the ability of minority groups to participate in the political process before they can be implemented.<sup>26</sup> Unlike the federal VRA, which required covered jurisdictions to obtain preclearance for *all* voting-related changes, the NYVRA requires preclearance for only an enumerated set of changes.<sup>27</sup> While preclearance would impose a small compliance requirement on covered municipalities, it would save covered municipalities significant time and money by identifying discriminatory policies before they are enacted, thereby avoiding subsequent litigation.

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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 the NYVRA. Please feel free to contact LDF Redistricting Counsel Michael Pernick at (917) 790-3597 or by email at [mpernick@naacpldf.org](mailto:mpernick@naacpldf.org) with any questions or to discuss these issues in more detail.

Respectfully Submitted,

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<sup>24</sup> NYVRA § 17-206(7).

<sup>25</sup> Lawyers' Committee for Civil Rights of the San Francisco Bay Area, VOTING RIGHTS BARRIERS & DISCRIMINATION IN TWENTY-FIRST CENTURY CALIFORNIA: 2000- 2013, 7 (2014), <https://bit.ly/3chJRlQ>.

<sup>26</sup> NYVRA § 17-212.

<sup>27</sup> *Id.*

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NAACP Legal Defense and Educational Fund, Inc. (“LDF”)

Since its founding in 1940, LDF has used litigation, policy advocacy, public education, and community organizing strategies to achieve racial justice and equity in the areas of education, economic justice, political participation, and criminal justice. Throughout its history, LDF has worked to enforce and promote laws and policies that prohibit voter discrimination, intimidation, and suppression and increase access to the electoral process. 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.