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United States Senate
Committee on the Judiciary

Hearing on
"From Selma to Shelby County:
Working Together to Restore the
Protections of the Voting Rights Act"

Dirksen Senate Office Building, Room 226
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1:00 p.m.

On behalf of the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), we are pleased to submit this statement to the Senate Judiciary Committee in connection with the hearing, "From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act." We are grateful to Chairman Patrick J. Leahy, Ranking Member Charles Grassley, and Members of the Judiciary Committee for holding this important hearing in response to the United States Supreme Court's devastating ruling last month in *Shelby County, Alabama v. Holder*, and we welcome this essential dialogue about the value and imperative of political inclusion and equality, principles that the Voting Rights Act was enacted to protect. Passed at the height of the Civil Rights Movement, the Voting Rights Act is widely regarded as one of the greatest pieces of civil rights legislation in our nation's history. It continues to be of critical importance to LDF's clients, and to voters of color more broadly, as an essential protection in defending and expanding the right to vote for voters of color, as well as language minorities.[1]

Notwithstanding the Voting Rights Act's essential role as our democracy's discrimination checkpoint, and our continuing need for its critical protections, on June 25, 2013, the United States Supreme Court in *Shelby County, Alabama v. Holder*

[1] Founded under the direction of Thurgood Marshall, LDF has been a pioneer in the efforts to secure, protect, and advance the voting rights of people of color in this nation, particularly those of Black Americans. LDF has been involved in nearly all of the precedent-setting litigation relating to the voting rights of people of color since its founding in 1940. LDF also has played a significant advocacy role in the enactment of the Voting Rights Act of 1965 and its subsequent reauthorizations in 1970, 1975, 1982, and 2006. LDF defended the Voting Rights Act before the Supreme Court most recently in *Shelby County, Alabama v. Holder*.

("*Shelby County*"), in a radical act of judicial overreach, struck down a key provision—Section 4(b) (also known as the "coverage provision")—of the Voting Rights Act.[2] In so doing, the Supreme Court effectively rendered Section 5 of the Voting Rights Act, the "preclearance provision," inapplicable.[3]

By invalidating Section 4(b)'s coverage provision, the Supreme Court disregarded Congress's authority under the 14th and 15th Amendments to enact legislation to defend those amendments' guarantees—an authority appropriately invoked by Congress in its 2006 reauthorization of the Voting Rights Act. Congress, in reauthorizing the Voting Rights Act, undertook an extensive examination, based on many months of hearings, to identify the places that exhibited the kind of persistent racial discrimination in voting that required the specific prophylaxis offered by Section 5's preclearance structure. The Supreme Court's decision in *Shelby County* has left millions of minority voters without a key protection to stop discrimination in voting *before* it occurs, in places that require strong medicine to address the effects of both the history and ongoing reality of racial discrimination in voting.

Responding to the Supreme Court's *Shelby County* decision must be a top priority for Congress. In the hours following the decision, a number of officials from jurisdictions formerly covered by Section 5, including Texas, Mississippi, and North

[2] 570 U.S. ____ (2013) (slip op., at 24).

[3] Section 4(b) identified 15 places that Section 5 protected including: Alabama, Texas, Mississippi, Louisiana, Arizona, North Carolina, South Carolina, Georgia, Florida, Alaska, South Dakota, Virginia, Michigan, New York, and California because of the longstanding and ongoing nature of racial discrimination in voting in these areas.

Carolina, made clear their intentions to move forward with voting changes that will adversely affect access to political participation among communities of color.[4] It is, therefore, imperative that Congress respond aggressively and expeditiously to safeguard the rights of Black, Latino, Asian American, American Indian, and Alaska Native voters in those situations in which they are the most vulnerable to discrimination in voting.

This statement will address three topics that are central to Congress's response to the Supreme Court's *Shelby County* decision: (1) the expansive 2006 Congressional record that reflects the need for strong protections for voters of color from discrimination in those places formerly covered by Section 5 of the Voting Rights Act; (2) the problem that, left without Section 5's protections, communities of color in formerly covered jurisdictions are vulnerable to the myriad of discriminatory voting changes, particularly at the local level, that will arise in jurisdictions now emboldened by the Supreme Court's *Shelby County* decision; and, (3) Congress's ability to address the *Shelby County* decision and to protect vulnerable communities from racial discrimination in voting.

[4] *See, e.g.*, Ryan K. Reilly, *Harsh Texas Voter ID Law 'Immediately' Takes Effect After Voting Rights Act Ruling*, THE HUFFINGTON POST, June 25, 2013, http://www.huffingtonpost.com/2013/06/25/texas-voter-id-law_n_3497724.html (Texas Attorney General announcing, within hours of the Shelby decision, that "the state's voter ID law will take effect immediately," as may redistricting maps); Geoff Pender, *Next June, Miss. Voters must have ID: Secretary of State reveals time for implementation*, THE CLARION LEDGER, June 25, 2013, http://www.clarionledger.com/article/20130626/NEWS01/306260018/Next-June-Miss-voters-must-ID (Mississippi Secretary of State expressing his intention to move forward to implement Mississippi's voter ID law in June 2014); *Statement from Attorney General Roy Cooper on U.S. Supreme Court Decision on Voting Rights Act*. June 25, 2013, http://www.ncdoj.gov/News-and-Alerts/News-Releases-and-Advisories/Press-Releases/Statement-from-Attorney-General-Roy-Cooper-on-U-S.aspx (North Carolina Attorney General expressing that the State General Assembly is "now considering legislation that . . . would limit early voting and require voter I.D.") .

The 2006 Congressional record reflects the need for strong protections for voters of color in those places formerly covered by Section 5 of the Voting Rights Act.

In 2006, during the last reauthorization period, Congress received more testimony and information about the voting experience of citizens of color, both in and outside the jurisdictions covered by Section 5, than it had during any prior reauthorization. Over a ten-month period, the House and Senate Judiciary Committees held 21 hearings, received testimony both in support of and against reauthorization from over 90 witnesses—including state and federal officials, litigators, scholars, and private citizens—and amassed more than 15,000 pages of record evidence. A bipartisan Congress ultimately determined—by the overwhelming vote of 98-0 in the Senate and 390-33 in the House[5]—that persistent and adaptive voting discrimination remained a pervasive problem in the now formerly-covered jurisdictions, and that without Section 5 "minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years."[6] As today's witness, Representative James Sensenbrenner, then-Chair of the House Judiciary Committee, observed, the 2006 reauthorization of the Voting Rights Act was based on "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 1/2 years that I have been honored to serve as a

5 *See* 152 Cong. Rec. 14,303-304, 15,325 (2006).
6 Pub. L. No. 109-246, 120 Stat. 578, § 2(b)(9) (2006).

Member of this body."[7] The expansive record before Congress demonstrated that, while voters of color have made undeniable progress, unconstitutional discrimination remained common, persistent, and adaptive in the then-covered jurisdictions. Between 1982 and 2006, the Department of Justice blocked over 600 voting changes under Section 5 after determining that the changes were discriminatory.[8] Evidence in the Congressional record revealed that a majority of these objections were based, at least in part, on purposeful discrimination.[9]

Without Section 5's protections, voters of color are vulnerable to the myriad discriminatory voting changes that will arise in formerly covered jurisdictions now emboldened by the Supreme Court's *Shelby County* decision.

Notwithstanding Congress's carefully-considered judgment in reauthorizing Section 5 of the Voting Rights Act in 2006, the Supreme Court's *Shelby County* decision has deprived voters of color of a vital tool necessary to prevent racial discrimination in voting. Even as our country has made significant progress in combating racial discrimination in our political system—in great measure because of the protections afforded under the Voting Rights Act—the ongoing record of racial discrimination makes plain that there are continuing efforts in many places to deny voters of color the opportunity to participate equally in our shared democracy. These efforts require an aggressive response. Within hours of the *Shelby County* decision, for example, Texas Attorney General Greg Abbott announced that the State planned to "immediately"

[7] 152 Cong. Rec. 14,230 (2006).
[8] H. R. Rep. No. 109–478, at 21.
[9] November 1, 2005 Hearing, at 180-81.

implement a 2011 voter-identification law which had previously been blocked by a Section 5 federal court as the most discriminatory measure of its kind in the country.[10] Abbott likewise announced that the State may implement redistricting maps.[11] Mississippi and North Carolina quickly followed suit, announcing that they also planned to adopt discriminatory voting changes that Section 5 may have blocked.[12] These changes threaten to undermine hard-fought gains to expand democracy for people of color.

These are not isolated post-2006 efforts to discriminate in formerly covered jurisdictions. In 2008 in Alaska, Section 5 rejected plans to eliminate precincts in several Native villages, which would have required voters to travel by air or sea to cast a ballot.[13] In 2008 in Calera, Alabama, the county in which the *Shelby County* case originated, Section 5 reinstated the city's only African American city council member after he lost his seat when the Black voting-age population was inexplicably reduced from 79% to just 29%.[14] Attempts to dilute or deny voters of color full access to the political process threaten to take root in an accelerated basis across the country, and particularly in

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[10] *See supra* n. 4.

[11] *Id*.

[12] *Id*.

[13] Br. of Alaska Federation of Natives, *et al*. as Amici Curiae in Supp. of Resp'ts, at App. 32-36, *available at* http://www.naacpldf.org/files/case_issue/Shelby-Brief%20of%20Amici%20Curiae%20the%20Navajo%20Nation.pdf.

[14] Br. of Resp't.-Intervenors Earl Cunningham, *et al*., at 19-20, *available at* http://www.naacpldf.org/files/case_issue/12-96%20bs%20Earl%20Cunningham%20et%20al..pdf.

formerly-covered jurisdictions, now emboldened by the *Shelby County* decision, which do not have Section 5 to operate as an initial check on discriminatory voting changes.

In particular, in the wake of the *Shelby County* decision, two of the gravest risks to voters of color in formerly-covered places arise from the fact that, without the prophylactic protections of Section 5, (1) officials in formerly covered jurisdictions will now make changes to voting laws without providing notice to voters, and (2) discriminatory voting measures will now have to be challenged *after*, rather than *before*, such changes take effect. The challenges are likely to be particularly pronounced for voters of color at the local level, where Section 5 blocked more than 85% of proposed voting changes between 1982 and 2006, rather than at the state-level.[15] For example, in Kilmichael, Mississippi, in 2001, the white mayor and all-white Board of Alderman attempted to take the extraordinary step of cancelling elections to prevent Black citizens from electing the candidate of their choice after the 2000 Census showed that Blacks had become a majority of the City and were poised, for the very first time, to elect their candidates of choice to the city counsel.[16] Voters of color in places like Kilmichael, and scores of local communities in the previously covered jurisdictions across the United States more broadly, are vulnerable to future attempts to dilute or deny their right to vote. It is precisely in those local communities where Section 5 has been so transformative by giving voters of color opportunities to robustly participate in the political process.

[15] Justin Levitt, *Section 5 as Simulacrum*, YALE L.J. ONLINE 151 (2013), http://yalelawjournal.org/2013/06/07/levitt.html.

[16] October 25, 2005 (History) Hearing, at 1616-19.

At the same time, in the absence of Section 5's application anywhere because of the *Shelby County* decision, discriminatory voting measures now will have to be challenged through litigation *after* they take effect, through case-by-case litigation under Section 2 of the Voting Rights Act (and perhaps state law) that is time-consuming, costly, and permits racial discrimination to take root in the electoral process *before* it can be remedied. Congress made clear during the 2006 reauthorization that Section 2 litigation by itself is an inadequate response to the persistent and adaptive problem of racial discrimination in voting in certain parts of our country.[17]

Congress can and must protect vulnerable communities from racial discrimination in voting in the wake of the *Shelby County* decision

Congress can and must respond aggressively to protect voters of color from racial discrimination following the Supreme Court's ruling in *Shelby County.* Today's witness, Representative John Lewis, who was severely beaten during the Selma to Montgomery March that led to the passage of the Voting Rights Act, has described the Supreme Court's decision in *Shelby County* "as a dagger to the heart of the Voting Rights Act."[18] Congress, however, has the power to respond, as it did in 2006, to protect voters of color from the material harm resulting from the Supreme Court's *Shelby County* decision.

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[17] H. R. Rep. No. 109–478, at 57.

[18] Press Release, *Rep. John Lewis Calls Court Decision 'a Dagger' in the Heart of Voting Access*, June 25, 2013, http://johnlewis.house.gov/press-release/rep-john-lewis-calls-court-decision-%E2%80%9C-dagger%E2%80%9D-heart-voting-access.

Today is an important first step of a bipartisan effort to address the *Shelby County* decision. Since its enactment in 1965, the Voting Rights Act has enjoyed overwhelming bipartisan support. Every reauthorization has been signed into law by a Republican president. We fully hope and expect that Congress can cast partisanship aside, and take action to ensure that the cornerstone of our democracy is as strong as ever. We urge Congress to respond aggressively, intentionally, and expeditiously to ensure that voters of color can equally and fully participate in the democratic process.

Thank you for the opportunity to submit this statement.