

Sent via email

May 29, 2021

Texas Senate
P.O. Box 12068
Austin, Texas 78711

RE: LDF Opposition Senate Bill 7 Conference Committee Report

Dear Lieutenant Governor Patrick, President Pro Tempore Birdwell, and Members of the Texas Senate:

The NAACP Legal Defense and Educational Fund (“LDF”) writes to express our strong opposition to the Conference Committee Report on Senate Bill 7 (“S.B. 7”)¹. This Conference Committee Report should be **voted down** in its entirety, for the reasons described in LDF testimony submitted on March 22, 2021 to the Senate State Affairs Committee² and on March 25, 2021³ to the House Elections Committee, as well as because the Conference Committee Report on S.B. 7 now includes out-of-bound amendments to S.B. 7 that target Black voters with surgical precision.⁴ This procedurally irregular conduct, adding an out-of-bounds amendment, which would target voting by Black Texans specifically, may evince the Legislature’s intent to discriminate against Black voters, which would violate the Fourteenth and Fifteenth Amendments to the U.S. Constitution, and Section 2 of the Voting Rights Act of 1965.

I. The Conference Committee Report on S.B. 7 Includes Out-of-Bound Amendments and Was Surrounded by Procedural Irregularities.

The Conference Committee Report on S.B. 7 includes text that was not included in the versions of S.B. 7 passed by the Senate and House of Representatives, respectively. The text added by the Committee Report on S.B. 7 significantly alters Texas’ early voting period. Legislative rules require that both chambers of the legislature must first adopt an out-of-bounds resolution for the conference committee to consider or add text to a bill the committee is attempting to reconcile.⁵ Because

¹ S.B. 7, 87th Leg., Reg. Sess. (Tex. 2021).

² NAACP LDF, LDF Opposition to Senate Bill 7 (Mar. 22, 2021), <https://www.naacpldf.org/news/ldf-submits-testimony-opposing-texas-senate-bill-7/>.

³ NAACP LDF, LDF Opposition to House Bill 6 (Mar. 25, 2021), https://www.naacpldf.org/wp-content/uploads/20210324_LDF-Opposition-TX-H.B.-6-v02.pdf.

⁴ *N.C. State Conference NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

⁵ Texas Legislative Council, The Legislative Process in Texas 6 (Feb. 2021), <https://tlc.texas.gov/docs/legref/legislativeprocess.pdf#page=12>.

there was no out-of-bounds resolution voted on for S.B. 7 prior to the inclusion of this provision altering early voting hours, the procedure used to include this text was procedurally improper.

In Texas, a conference committee's charge is limited to reconciling differences between the two chambers, and the committee may not change, alter, amend, or omit text that is not in disagreement without the adoption of an "out of bounds" resolution by both chambers.⁷³ Moreover, the committee "may not add text on any matter that is not in disagreement or that is not included in either version of the bill in question without such a resolution."⁶ The legislative process in Texas is supposed to be governed by the Texas Constitution, Statutes of the State of Texas, and the rules of procedure of the Senate and House of Representatives.

The Chairs of the House and Senate Elections Committees tweeted they "reached an agreement" on the contents of the Conference Committee Report, and the content of Senate Bill 7, stating that "[e]ven as the national media minimizes the importance of election integrity, the Texas Legislature has not bent to headlines or corporate virtue signaling."⁷⁷ Yet at the time of this statement by the Chairs, on behalf of the Texas Legislature, the several Democratic members of the Conference Committee, and the only people of color on the Committee, had not seen the Conference Committee Report, nor the contents of the bill the Chairs claimed the Texas Legislature had recommended.⁷⁸ The Chairs admitted on Twitter they had released the statement in error. The Committee Chairs then released the actual Conference Committee Report the next day.

The text of the Committee Report itself also raises procedural red flags. The Conference Committee Report on S.B. 7, in Section 3.10, adds that in a county with a population of 30,000 or more, voting by personal appearance on the "last Sunday of the early voting period ... may not be conducted earlier than 1 p.m. or later than 9 p.m."⁷ This specific limitation on Sunday early voting, including requiring voting occur only after 1 p.m., was not included in either version of S.B. 7 that passed the House of Representative nor the Senate.⁸

II. The Out-of-Bounds Amendments to S.B. 7 in the Conference Committee Report Target Black Voters.

⁶ Texas Legislative Council, The Legislative Process in Texas 6 (Feb. 2021), <https://tlc.texas.gov/docs/legref/legislativeprocess.pdf#page=12>.

⁷ S.B. 7, § 3.10 (amending Tex. Election Code § 85.006(b),(e), such that "(e)In a primary election or the general election for state and county officers in a county with a population of 30,000 ~~[100,000]~~ or more, the early voting clerk shall order voting by personal appearance ~~[voting]~~ at the main early voting polling place to be conducted on the last Saturday of the early voting period for at least 12 hours, except that voting may not be conducted earlier than 6 a.m. or later than 9 p.m., [on the last Saturday] and on the last Sunday of the early voting period for at least six [five] hours, except that voting may not be conducted earlier than 1 p.m. or later than 9 p.m."

⁸ Tex. Leg. Online, *Bill lookup*, <https://capitol.texas.gov/billlookup/Text.aspx?LegSess=85R&Bill=SB7>.

The Committee Report’s attack on early voting has a foreseeable and disparate impact on Black, Latino, and other voters of color in Texas. The Conference Committee Report on S.B. 7 has gone a step farther, even, by eliminating Sunday morning voting immediately prior to Election Day. This alteration will have a foreseeable and racially disparate impact on Black voters because it frustrates “Souls to the Polls”.

Early voting in Texas increased significantly in the 2020 election cycles.⁹ Early voting, both in person and through the mail, was a key factor in the increase in overall voter turnout in the 2020 Presidential election, accounting for over 9.7 million of the 11.3 million votes cast (over 85%).¹⁷ Urban counties with significant Black and Latino populations witnessed early voting increases at a rate significantly higher than in suburban and rural counties in Texas, with larger white populations.¹⁰

Yet the Conference Committee Report on S.B. 7 not only includes cuts to early voting, it includes a never-before seen provision amending the Texas Election Code to prevent early voting from occurring the Sunday before Election Day at a time before 1:00 pm. This provision would directly and significantly impact “Souls to the Polls” – a popular voting method in the Black community whereby voters caravan to early voting sites following Sunday church services. Souls to the Polls is nationally recognized as critical to the Black community because it has allowed churches to leverage the transportation they already provide to and from church to bring voters to early voting polling sites.¹¹ Indeed, Souls to the Polls was popular and used by the

⁹ See Jeremy Schwartz & Mandi Cai, Texas is on track for record turnout in this election after breaking early voting records, (Oct. 31, 2020) <https://www.ksat.com/news/texas/2020/10/31/texas-is-on-track-for-record-turnout-in-this-election-after-breaking-early-voting-records/>, and Texas Presidential Election Results 2020, NBC News, <https://www.nbcnews.com/politics/2020-elections/texas-president-results> (last updated Mar. 31, 2021); Jake Lahut, Massive turnout in Houston is making Texas a top state to watch, Business Insider, (Nov. 3, 2020), <https://www.businessinsider.com/harris-county-turnout-numbers-texas-flip-2020-11>, and <https://www.nbcnews.com/politics/2020-elections/texas-president-results>.

¹⁰ Jozelyn Escobedo, How the four major counties in North Texas voted during the 2020 election, WFAA (Nov. 4, 2020) <https://www.wfaa.com/article/news/politics/elections/voter-turnout-2020-presidential-election-north-texas/287-64a24012-a038-49d7-8db3-26d0923994c5>; Texas Presidential Election Results 2020, NBC News, <https://www.nbcnews.com/politics/2020-elections/texas-president-results> (last updated Mar. 31, 2021); Jake Lahut, Massive turnout in Houston is making Texas a top state to watch, Business Insider, (Nov. 3, 2020), <https://www.businessinsider.com/harris-county-turnout-numbers-texas-flip-2020-11>, and <https://www.nbcnews.com/politics/2020-elections/texas-president-results>.

¹¹ See, e.g., *Florida v. U.S.*, 885 F. Supp.2d 299 (D.D.C. 2012); *Ohio State Conf. NAACP v. Husted*, 43 F.Supp.3d 808 (S.D. Ohio 2014) (“limitations on Sunday voting opportunities imposed by Directive 2014–17 will burden the African–American voting phenomenon known as “Souls to the Polls,” wherein African Americans have purportedly voted in person in large numbers following Sunday church services during the EIP voting period”), 768 F.3d 524 (2014); *N.C. State Conf. of NAACP v. McCrory*, 182 F.Supp.3d 320 (M.D.N.C. 2016); *One Wisc. Inst. Inc. v. Thomsen*, 198 F.Supp.3d 896 (W.D. Wisc. 2016).

Black community in Texas in the November 2020 Presidential election.¹² Eliminating voting before 1:00 pm on Election Day targets with surgical precision a nationally recognized and critically important day of voting used by the Black community, including Black Texans without any justification or opportunity for public input into this major change.

III. The Out-of-Bounds Amendments to S.B. 7 that Target Voting by Black Texans May Evince the Legislature’s Intent to Discriminate Against Black Voters, in Violation of the U.S. Constitution and Federal Law.

The facts recited above, including the sequence of events (particularly the exclusion of Committee members of color from the Conference Committee Report drafting process for S.B. 7), procedural departures from the ordinary legislative processes (the Conference Committee Chairs including an out-of-bounds amendment to S.B. 7 without first passing an out-of-bounds resolution), the lack of any neutral justification for the proposals, and the foreseeable disparate impact on Black voters suggest that the provision limiting early voting on the Sunday before Election Day, at the very least, raises serious concerns under the Fourteenth and Fifteenth Amendments to the U.S. Constitution and the Voting Rights Act of 1965.¹³ This provision, at the very least, will burden the right to vote without any legitimate state interest, which may also violate the First and Fourteenth Amendment to the U.S. Constitution.

For the reasons described above, LDF respectfully urges you to vote “down” the Conference Committee Report on S.B. 7. Please feel free to contact Kathryn Sadasivan by email at ksadasivan@naacpldf.org with any questions or to discuss these concerns in more detail.

Sincerely,

/s/ Kathryn C. Sadasivan

Sam Spital, Director of Litigation

Lisa Cylar Barrett, Director of Policy

Kathryn C. Sadasivan, Redistricting Counsel

Steven Lance, Policy Counsel

NAACP Legal Defense & Educational Fund,

¹² *Souls to the Polls: An Early Voting Event with Social Distancing*, The North Dallas Gazette (Oct. 20, 2020), <https://northdallasgazette.com/2020/10/20/souls-to-the-polls-an-early-voting-event-with-social-distancing/>.

¹³ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); 52 U.S.C. 10301.

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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 education, economic justice, political participation, and criminal justice. Throughout its history, LDF has worked to enforce and promote laws and policies that increase access to the electoral process and prohibit voter discrimination, intimidation, and suppression. 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.