Testimony of the New York Civil Liberties Union

before

THE NEW YORK STATE SENATE STANDING COMMITTEE ON ELECTIONS

regarding

The New York Voting Rights Act, S.7528 (Myrie)

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The New York Civil Liberties Union (NYCLU) respectfully submits the following testimony in support off the New York Voting Rights Act, S. 7528. The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and over 190,000 members and supporters.

The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including the right to participate in the course of our democracy by voting, and the right of every New Yorker to engage with democratic institutions regardless of race, class, language proficiency, or any improper barriers that have historically impeded ballot access.

The New York Constitution recognizes that vigorous political participation by all New Yorkers is the foundation of our democracy and that the right to vote is preservative of all other rights. Thus, our state constitution begins with a clear prohibition against disenfranchisement that is reinforced through the document, most expressly through the protections for the right of suffrage in Article II and the protections against partisan and minority vote dilution in Article III.[1] But even unequivocal Constitutional guarantees require strong statutory enforcement mechanisms. For example, the Fifteenth Amendment to the United States Constitution could not be clearer in its terms: "The right of citizens of the United States to vote shall not be denied or

[1] *See, e.g.*, N.Y. Const. Art. I, § 1 ("No member of this state shall be disfranchised"); Art. II, § 1 ("Every citizen shall be entitled to vote at every election for all officers elected by the people"); Art. III, § 4(c)(1) (requiring the state redistricting to draw districts "so that, based on the totality of the circumstances, racial or minority language groups do not have less opportunity to participate in the political process than other members of the electorate and to elect representatives of their choice").

abridged by the United States or by any State on account of race, color, or previous condition of servitude." Nonetheless, state and local governments around the country—including here in New York—resisted allowing minority citizens an equal opportunity to participate in the political process. The Voting Rights Act of 1965 was a necessary and highly effective step towards making good on the constitutional guarantee of equal voting rights. But even as the Voting Rights Act proved effective against some forms of discrimination, new means of excluding minority voters from the political process have emerged. The law must continually adapt to meet the challenges presented by ever evolving forms of discrimination. The New York Voting Rights Act builds on the granite bedrock of the Voting Rights Act of 1965 to confront evolving barriers to effective minority participation and to root out longstanding discriminatory practices more effectively. The NYVRA also takes affirmative steps to make our democracy more inclusive and robust by creating a fulsome and transparent basis for data-driven evaluation of our election practices. The NYVRA provides a means of better ensuring that all voters are able to cast a meaningful ballot, but especially helps to accelerate the participation of those minority voters who have been historically denied an equal opportunity to participate in the political process.

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The NYCLU has been working closely with other civil rights groups, community partners, and scholars to help make the NYVRA the most comprehensive and effective state voting rights act to date. The NYCLU enthusiastically supports the introduction of the NYVRA and urges its passage without delay.

The Need for a Comprehensive State Voting Rights Act

New York has an extensive history of discrimination against racial, ethnic, and language minority groups in voting.[2] The result is a persistent gap between white and non-white New Yorkers in political participation and elected representation. According to data from the U.S. Census Bureau, registration and turnout rates for non-Hispanic white New Yorkers led Black, Hispanic, and Asian New Yorkers—the latter two groups by particularly wide margins.[3] New York's poor franchise record has been the source of nationwide derision as states

[2] *See, e.g.*, Erika Wood, et al., *Jim Crow in New York*, Brennan Ctr. For Justice 5 (2010), https://bit.ly/336vnys; Juan Cartagena, *Voting Rights in New York City: 1982-2006*, 17 S. Cal. L. & Social Justice 501, 502 (2008)

[3] U.S. Census Bureau, Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2018, available at: https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-583.html

with a flagrant history of discrimination, including Ohio and North Carolina, have tried to justify exclusionary tactics by pointing to New York's lack of early voting, no-excuse absentee balloting, same-day or Election Day registration, and criminal justice-related disenfranchisement—among other shortcomings.[4] New York made strides to improve access to the franchise by enacting a slate of election reforms in 2019, but many discriminative practices remain in place and opportunities for discrimination remain widely available.

The scale and multiple levels of New York's election system makes meaningful investigation and prosecution of voting rights violations a daunting task.[5] With 62 counties, 62 cities, 932 towns, 551 villages,[6] and 1,863 special purpose (e.g., school, water, fire, sewer, etc.) districts, each of these more than 3,400 jurisdictions holds elections for public offices, tax levies, and/or capital bonds; most provide primary services that New Yorkers rely upon every day, including public education, sanitation, policing, fire protection, water, parks, and libraries, to name a few. Troublingly, there are numerous opportunities for discriminatory practices throughout the electoral process in any of these jurisdictions—from redistricting plans to polling place changes, to failures of adequate language assistance, to voter intimidation and voter deception. This situation is untenable. Minority voters must have equal opportunities to participate in the political process, but have often been left on disadvantageous footing by election laws and practices that are discriminatory in nature or discriminatorily applied.

New York can address these pervasive problems improve by building on the comprehensive framework of the Voting Rights Act of 1965 (VRA) and the efforts of California and Washington to improve state law voting rights protections. The New York Voting Rights Act, S. 7528 (Myrie), the strongest and most comprehensive state voting rights act to date, would continue this state's march towards becoming a leader in promoting political participation.

The Voting Rights Act and State Voting Rights Act Enforce Constitutional Guarantees

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[4] Jeffrey Toobin, *The Problem with Voting Rights in New York*, THE NEW YORKER, Oct. 11, 2016, https://www.newyorker.com/news/daily-comment/the-problem-with-voting-rights-in-new-york

[5] *See Number of Local Governments by State*, GOVERNING, http://www.governing.com/gov-data/number-of-governments-by-state.html (last visited December 5, 2019)

[6] N.Y. Department of State, Division of Local Government Services, "What Do Local Governments Do," https://www.dos.ny.gov/lg/localgovs.html

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Statutory protections flesh out and give teeth to the concise guarantees of equal voting rights established in the United States Constitution and in state constitutions. The federal Voting Rights Act (VRA) establishes complementary protections for the voting rights of racial, ethnic, and language minorities by laying out swords against pre-existing discrimination in voting and shields against backsliding. The primary sword is Section 2,[7] which provides a nationwide private right of action against all extant forms of racial discrimination in voting, regardless of location. Until 2013, the primary shield was preclearance under Section 5, which shifted the advantage of time and inertia from the victims of discrimination to its perpetrators by requiring states and political subdivisions with a particularly troubling history of discrimination to preclear changes to their election practices with the U.S. Department of Justice or a federal court in Washington, D.C.[8] The VRA also protects the rights of language minority groups and provides means to increase their access to and participation in the political process. Sections 4(e)[9] and 203[10] require states and political subdivisions language assistance for voters with limited English proficiency. Section 11(b) protects all voters against intimidation, regardless of race, ethnicity, or language minority status.[11]

The VRA successfully eliminated barriers to minority political participation, but also pushed perpetrators to discriminate in more subtle and sophisticated ways. In response, Congress amended the VRA to prohibit not only laws and practices adopted with discriminatory *purpose*, but also those that had discriminatory *effect*, regardless of intent. Over time, however, the federal courts increasingly narrowed the VRA's protections, raising the threshold for liability under Section 2 and disabling Section 5 preclearance altogether in the Supreme Court's 2013 *Shelby County* decision.[12]

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[7] 52 U.S.C. § 10301

[8] *See generally Shelby County v. Holder*, 133 S. Ct. 2612 (2013); Perry Grossman, *The Case for State Attorney General Enforcement of the Voting Rights Act Against Local Governments*, 50 U. MICH. J. L. REFORM 565 (2017), available at: https://repository.law.umich.edu/mjlr/vol50/iss3/2

[9] 52 U.S.C. § 10303(e).

[10] 52 U.S.C. § 10503.

[11] 52 U.S.C. §10101(b).

[12] *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 15 (2009) ("Section 2 does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters."); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 446 (2006) ("[W]hile the presence of districts where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process is relevant to the § 5 analysis, the lack of such districts cannot establish a § 2 violation.") (internal citations and quotation marks omitted).

Moreover, since the Supreme Court first recognized in 1966 that "[v]oting suits are unusually onerous to prepare,"[13] Section 2 suits have only become more complex and resource-intensive, often requiring multiple expert witnesses whose substantial fees must be paid out-of-pocket.[14] This state of affairs has made it difficult for the voting rights bar to comprehensively address violations in local governments. The Trump Administration's influence on the federal courts suggests hostility to the VRA will accelerate.

In response to these trends, California adopted its own state voting rights act in 2001. The California Voting Rights Act (CVRA) simplifies vote dilution causes of action against local governments using at-large elections.[15] It prohibits the use of at-large methods of election "in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class."[16] Under federal law, a plaintiff is required to satisfying three conditions to prove a racial vote dilution claim: (1) The minority group(s) at issue must be "sufficiently large and geographically compact to constitute a majority in a hypothetical single-member district"; (2) the minority group(s) at issue are "politically cohesive"; and (3) the jurisdiction's "white majority votes sufficiently as a bloc to enable it usually to defeat the minority-preferred candidate."[17] The second and third conditions are referred to collectively as racially-polarized voting, which is the linchpin of any vote dilution claim. In protecting "crossover" and "influence" districts, the CVRA permits plaintiffs to prove a vote dilution claim without satisfying the first condition required to prove a violation under federal law.[18] Foundationally, the CVRA affords relief to a broader range of plaintiffs and eases their burden of proof while expanding available remedies beyond the creation of majority-minority districts.[19] However, the CVRA is narrow in scope; applying only to at-large methods of

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[13] *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).
[14] *See Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1203 (5th Cir. 1989) (citation omitted).
[15] Federal courts in California recently rejected challenges to the constitutionality of the CVRA. *See Higginson v. Becerra*, 363 F. 3d 1118 (S.D. Cal. 2019*), aff'd*, No. 19-55275, 2019 WL 6525204 (9th Cir. Dec. 4, 2019).
[16] CAL. ELEC. CODE, California Voting Rights Act of 2001, § 14027 (2001).
[17] *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476, 482 (2d Cir. 1999) (citations omitted); *see Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).
[18] CAL. ELEC. CODE § 14028(c) (2001) ("[T]he fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting.")
[19] Joanna E. Cuevas Ingram, *The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act*, 15 HARV. LATINO L. REV. 183 (2012).

elections characterized by racially-polarized voting. The CVRA does not provide a cause of action against racial gerrymandering or against other forms of voter suppression. Nor does the CVRA impose any preclearance requirement on local governments.

California law makes it easier for prevailing plaintiffs to recover attorneys' fees and costs (including expert witness fees), incentivizing private parties to remedy CVRA violations.[20] California law follows the "catalyst theory," which allows plaintiffs to recover fees if the lawsuit "was a catalyst motivating defendants to provide the primary relief sought or when plaintiff vindicates an important right by activating defendants to modify their behavior."[21] By contrast, federal law limits attorneys' fees to instances where the litigation achieves a result with "judicial imprimatur," that is, "an adjudicated judgment on the merits or . . . a consent judgment that provides for some sort of fee award."[22] The threat of large fees and costs awards, as well as the relative ease of proving a violation, has forced jurisdictions using at-large elections to be mindful of their impact on minority voting rights and, in some cases, to proactively transition to elections by district. A 2014 study "identified 140 jurisdictions that voluntarily sought to change from at-large to district-based elections between 2001 and 2013—most of them school districts."[23] And in November 2019, the first major study of the CVRA's effects showed a significant (10-12%) increase in the election of minority candidates where districts switched from at-large systems to district-based elections.[24] The study's authors recommended: "states seeking to increase local-level minority representation should consider policies similar to those found in the California Voting Rights Act."

Other California laws provide additional protection to language minorities. In contrast to federal law, California law requires the provision of language assistance where "(1) the number of residents of voting age in each county and precinct who are (2) members of a single language minority, that (3) lack sufficient skills in English to vote

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[20] CAL. ELEC. CODE § 14031 (2001).
[21] *Maria P. v. Riles*, 743 P.2d 932, 937 (Cal. 1987).
[22] Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 185 (2003) (citation omitted).
[23] Lawyers' Committee for Civil Rights of the San Francisco Bay Area, VOTING RIGHTS BARRIERS & DISCRIMINATION IN TWENTY-FIRST CENTURY CALIFORNIA: 2000-2013, 7 (2014), http://www.lccr.com/wp-content/uploads/Voting-Rights-Barriers-In-21st-Century-Cal-Update.pdf
[24] Loren Collingwood and Sean Long, *Can States Promote Minority Representation? Assessing the Effects of the California Voting Rights Act*, Urban Affairs Review (Nov. 25, 2019), *available at* https://www.collingwoodresearch.com/uploads/8/3/6/0/8360930/cvra_project.pdf.

without assistance" equals 3 percent or more of the voting age population of a particular county or precinct.[25] California maintains this and other voting data necessary for redistricting and voting rights enforcement in the possession of the Statewide Database, which is housed at the University of California, Berkeley.[26]

In 2018, the State of Washington enacted the Washington Voting Rights Act (WVRA).[27] The WVRA is modeled on the CVRA and also applies only to at-large elections; however, "[n]early all local elections in Washington use at-large voting systems."[28] The WVRA took effect on July 28, 2019.

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New Yorkers Face Both Longstanding and Newly-Evolved Threats Voting Rights.

While voter suppression is an evil that has been closely associated in the public mind with the Jim Crow South, New York State has its own shameful history of voter suppression. Starting in the late 18th Century and continuing over the next two centuries, New York adopted a series of restrictive voting laws designed to disenfranchise minority and immigrant voters.[29] That history of discrimination is too voluminous to recount here, but its effects still loom large today in the relative disadvantage that minority and immigrant voters experience.

In recent years, New York has seen the investigation and successful prosecution of several infringements on minority voting rights. Successful racial vote dilution cases have remedied impermissibly diminished minority voting strength.[30] For example, the Albany County legislative redistricting plan has been the subject of racial vote dilution litigation three times in the past 25 years.[31] If Albany County had been subject to the same preclearance requirement as Kings, Bronx, and New York Counties, plaintiffs might have been spared the additional rounds of litigation. Instead, the burden would

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[25] *See* California Secretary of State, Methodology for Section 14201 Data Analysis & Determinations, https://elections.cdn.sos.ca.gov/ccrov/pdf/2017/december/17148sr.pdf(citing CAL. ELEC. CODE § 14201(c)).
[26] Statewide Database, "About Statewide Database," https://statewidedatabase.org/about.html
[27] Wash. Rev. Code Ann. § 29A.92.900 et seq.
[28] ACLU of Wash., "Voting Rights FAQ," https://www.aclu-wa.org/pages/voting-rights-faq.
[29] Daniel Brook, *New York Should Hate the Voting Rights Act,* SLATE, Feb. 21, 2013, https://bit.ly/2Ptx1WN.
[30] *See, e.g.*, *Pope v. County of Albany,* 94 F.Supp.3d 302, 351 (N.D.N.Y. 2015).
[31] *Id.*

have rested with the county to prove that the redistricting plans would not have made the minority groups at issue worse off.

Racial vote dilution prosecutions have also been successful where the toxic combination of at-large elections and racial polarization deny minority voters the opportunity to elect candidates of choice—for example, in the Village of Port Chester in Westchester County.[32] Neither Port Chester nor Albany are unique. As in Washington and California, the overwhelming majority of New York school districts and villages, and even many towns use at-large elections, which are susceptible to minority vote dilution.[33] A more efficient private right of action that reduces plaintiffs' burden of proof and cost while also giving defendant's greater incentive and opportunity to resolve cases without resort to taxpayer-funded litigation would allow for more pervasive investigation, prosecution, and remedy of vote dilution cases. The CVRA provides a valuable model. But some racially and ethnicity diverse counties and municipalities administer elections by district.[34] The CVRA and research suggests that they too experience racially polarized voting and limit the choice of minority voters. [35]

Voter suppression also exists in New York.[36] The state's low registration and turnout rates testify to this: In the November 2016 and 2018 elections, New York ranked among the bottom ten states on both measures. One example of a common practice that results in voter suppression and is especially difficult to remedy in a timely

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[32] *See, e.g.*, *United States v. Village of Port Chester,* 704 F.Supp.2d 411, 447 (E.D.N.Y 2010).

[33] Jessica Trounstine and Melody E. Valdini, *The Context Matters: The Effects of Single-Member Versus At-Large Districts on City Council Diversity*, 52 American Journal of Political Science 554-569 (2008); Richard L. Engstrom and Michael D. McDonald, "The Effects of At-Large Versus District Elections on Racial Representation in U.S. Municipalities." ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES, ed. Bernard Grofman and Arend Lijphart (1986).

[34] The New York State Legislature, the Nassau and Suffolk County Legislatures, and the New York City Councils

35 Karen Shanton, *The Problem of African American Underrepresentation on Local Councils*, 1 (2014), http://www.demos.org/sites/default/files/publications/Underrepresentation.pdf.; Zoltan Hajnal, Opinion, Ferguson: No peace without representation, L.A. Times (Aug. 26, 2014), http://www.latimes.com/opinion/op-ed/la-oe-hajnal-minority-voters-elections-20140827-story.html ("Across the nation, racial and ethnic minorities are grossly underrepresented in city government. African Americans make up roughly 12% of the national population, but only 4.3% of city councils and 2% of mayors. The figures for Latinos and Asian Americans are even worse.")

[36] Vivian Wang, Why New York Is Voter Suppression Land, N.Y. Times, Dec. 19, 2018, https://www.nytimes.com/2018/12/19/nyregion/early-voting-reform-laws-ny.html.

fashion through affirmative litigation are designations of polling places that are inconvenient for minority voters. Generally, polling places are announced within 45 days of an election or, at best, a few months prior. However, properly investigating whether a polling place change will negatively impact minority voters can take expert analysis and significant time, making it difficult to bring successful remedial litigation before an election.

For example, in 2019, Rensselaer County designed an early voting plan that virtually made early voting impossible for the overwhelming majority of the county's minority voters.[37] The Board of Elections designated only two early voting sites—the bare minimum for a county with over 100,000 registered voters. Neither of them was located in the City of Troy, the largest municipality in Rensselaer County, and home to approximately 82 percent of its Black population and over 70 percent of its non-white population overall.[38] Instead, the two chosen sites were located in areas that are not densely populated, and not meaningfully accessible by public transportation or located along prevailing commuting routes for Troy residents. In spite of advocacy groups' efforts, and calls from the City of Troy to use a site convenient to minority voters, Rensselaer County and the Rensselaer County Board of Elections refused to make early voting accessible to the citizens of Troy. The time and resources required to bring litigation to challenge this early voting plan would have been considerable and, ultimately, no case was filed.

Instead of requiring minority voters to play the role of watchdog against their own disenfranchisement, counties and county Boards of Elections should bear the burden of ensuring that their plans provide equitable access to early voting for minority voters. This burden-shifting was the primary virtue of preclearance under VRA Section 5, and it gives jurisdictions more incentive to address infringements on minority voting rights prophylactically in administering elections.

Providing adequate election assistance to language minority voters has also been a problem in New York—a state that enjoys enviable language diversity among its residents. Federal law "covers those localities where there are more than 10,000 or over 5 percent of the total voting age citizens in a single political subdivision . . . who are members of a single language minority group, have depressed literacy rates, and do not speak English very well." Currently, seven counties

[37] *See* July 22, 2019 Letter from Melanie Trimble et al. to Commissioners, Rensselaer County Board of Elections.
[38] U.S. Dep't of Justice, Language Minority Citizens, https://www.justice.gov/crt/language-minority-citizens.

in New York—and all of the political subdivisions (e.g., cities, school districts) in those counties—must provide assistance to Spanish-speaking voters.[39] Kings, Queens, and New York Counties must also offer assistance to some Chinese-speaking voters. Only Queens County has any further language assistance obligations under federal law, and those are limited to speakers of Korean and certain Indian languages. Nonetheless, some of these jurisdictions have failed to meet these limited federal obligations,[40] and many likely still do. But various other language minority groups do not currently even have a right to language assistance in voting. As other states and localities (including California and New York City) have done, New York State could provide language assistance well above the federal law minimum.

Even under the expanded language assistance scheme recently proposed in the New York City Council,[41] no assistance would be guaranteed to over 10,000 Punjabi-speaking residents or over 50,000 Tagalog speakers. Nor would any language assistance reach significant populations of African immigrants in the Bronx; Indian, Chinese, Filipino, and Greek immigrants in Queens; Italian and Albanian immigrants in the Bronx, Brooklyn, and Staten Island. Outside of New York City, no language minority (other than Spanish speakers in a few counties[42]) have any guarantee of receiving language assistance in elections. The failure of Boards of Elections and/or local governments to provide adequate language assistance outside of New York City is especially concerning because those areas are homes to

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[39] The seven counties are Bronx, Kings, Nassau, New York, Queens, Suffolk, and Westchester. Voting Rights Act Amendments of 2006, Determinations Under Section 203 (Dec. 5, 2016) https://www.govinfo.gov/content/pkg/FR-2016-12-05/pdf/2016-28969.pdf.

[40] John Hildebrand, *Most Long Island School Districts Will Have Bilingual Ballots*, NEWSDAY, March 24, 2019, https://www.newsday.com/long-island/education/school-districts-voting-english-spanish-ballots-1.28832270 ("For the first time, most of Long Island's 124 public school districts plan to provide ballots in both English and Spanish for the May budget and board vote, a response to demographic shifts and legal pressures").

[41] New York City Council, Int. 1282-2018, A Local Law to amend the New York city charter, in relation to the voter assistance advisory committee providing poll site interpreters in all designated citywide languages (Nov. 28, 2018), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3763667&GUID=C6C1C4F8-BE3D-4755-B131-EFA3D7B28DB2&Options=&Search=

[42] *See, e.g.*, *In Matter of Rockland County Board of Elections*, Memorandum of Agreement (MOA) Concerning Minority Language Access, N.Y. Atty. Gen. Civ. Rights Bureau, Sept. 12, 2012, https://ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/votingrights/Rockland%20County%20Final%20MOA%20signed%20by%20all%20parties.pdf; *United States v. Orange County*, 12 Civ. 3071 (ER) (S.D.N.Y. Apr. 12, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/04/20/orange_cd_ny.pdf.

fastest growing communities of immigrant and racial groups.[43] These groups also happen to be among the poorest, or comprised of refugee resettlement groups whose ethnicities and national origins have not traditionally settled in the United States in significant numbers.

Currently, it is very difficult to receive critical election data from county boards of elections or from jurisdictions that administer their own elections in a timely fashion. Jurisdictions, especially those that administer their own elections separate from their county board of elections, frequently keep records in poor shape and often keep voluminous relevant records in hard copy instead of electronic format. Jurisdictions are slow to respond to FOIL requests and regularly provide incomplete responses. For particularly recalcitrant jurisdictions, the amount of time required to pursue FOIL requests to a judicial resolution may preclude the timely investigation and prosecution of a claim. For example, on May 16, 2019, advocacy groups sent a FOIL request to the Board of Elections in the City of New York (BOENYC) seeking records concerning, among other things, the designation of early voting sites and the decision to assign each voter to a single early voting site instead of permitting voters to cast a ballot at any early voting site in their county of residence.[44] BOENYC failed to produce records within 60-day time period designated by BOENYC. After the advocacy groups filed a constructive denial appeal, BOENYC agreed to produce records, but not until after the close of the November 2019 election. Ensuring that voters, advocates, researchers, and authorities have efficient access to high quality electronic records is critical to expeditious enforcement.

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THE NYVRA WILL ERADICATE EXISTING DISCRIMINATORY PRACTICES AND PREVENT BACKSLIDING WHILE AFFIRMATIVELY EXPANDING PARTICIPATION.

The New York Voting Rights Act provides an opportunity for this state to provide strong protections for the franchise at a time when voter suppression is on the rise, vote dilution remains prevalent, and the future of the federal Voting Rights Act is uncertain due to a federal judiciary that is increasingly stocked with Trump appointees. New York will not be the first state to pass its own voting rights act. The New York Voting Rights Act builds upon the demonstrated track record of success in California and Washington, as well as the historic

[43] Asian American Federation, Jo-Ann Yoo, Howard Shih, "Hidden in Plain Sight: Asian Poverty in New York City," June, 2018 http://www.aafny.org/doc/AAF_poverty_2018.pdf

[44] May 16, 2019 Letter from Perry Grossman, Susan Lerner, and John Powers, to John Wm. Zaccone and Michael J. Ryan, Board of Elections in the City of New York.

success of the federal Voting Rights Act by offering the most comprehensive state law protections for the right to vote in the United States. The law will address a wide variety of long-overlooked infringements on the right to vote and also make New York a robust national leader in voting rights at a time when too many other states are trying to restrict access to the franchise.

The NYCLU supports the bill in its entirety. The testimony below focuses on seven sections as particularly important to ensuring equal opportunity for eligible citizens to participate in the political process.

Section One of the NYVRA (proposed Election Law § 17-202) brings New York in line with many other states by providing for a canon of liberal judicial construction of the election laws in "in favor of voter enfranchisement, which could be overcome only by clear statutory language to the contrary or strong competing policy reasons."[45] In his seminal work on this canon of statutory interpretation—the Democracy Canon—Prof. Rick Hasen writes that the purpose of this "Democracy Canon" is "to give effect to the will of the majority and to prevent the disfranchisement of legal voters . . . ."[46] The canon plays a role in "favoring free and competitive elections . . . " and serves "to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly to allow voters a choice on Election Day."[47] In plain terms, this provision will ensure that in any circumstances, the law favors the ability of qualified voters to cast valid, meaningful ballots and have them counted whenever possible. A Democracy Canon will not be an entirely novel concept in the Election Law—currently, Election Law § 10-126 provides for a canon of liberal construction "for the purpose of providing military voters the opportunity to vote." There is question that military voters should be afforded every opportunity to participate in New York political process. However, given the categorical public good at issue, all New Yorkers should receive the same solicitude as military voters in vindicating their rights to cast a meaningful ballot.

Section Two of the NYVRA (proposed Election Law §17-206) provides a framework to ferret out vote dilution and voter suppression in a way that is efficient and cost-effective for both voters and jurisdictions. New York jurisdictions have a record of racial vote dilution, including successful federal cases in New York City, Albany

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[45] *See* Richard Hasen, *The Democracy Canon*, 62 Stan. L. Rev. 69 (Dec. 2009).
[46] *Id.* at 77
[47] *Id.*

County, the Town of Hempstead, and the Village of Port Chester, as well as ongoing cases in the Town of Islip and the East Ramapo Central School District. Unfortunately, these jurisdictions are not outlier, but rather extreme examples of a common problem that goes largely uninvestigated. Prosecuting even these few cases has taken years and cost millions of taxpayer dollars as incumbent officials in these jurisdictions use public funds to defend the discriminatory methods of election that keep them in office. With 62 counties, 62 cities, 932 towns, 551 villages, and 1,863 special purpose (e.g., school, water, fire, sewer, etc.) districts, the scale of New York's system of local governments makes meaningful investigation and prosecution of voting rights violations a daunting task.

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Section Two of the NYVRA, patterned on the California Voting Rights Act, provides a more efficient and effective means of prosecuting cases in which at-large elections dilute minority voting strength compared to federal law. Much like the CVRA, the NYVRA will allow for cases to be investigated and violations remedied more quickly and at much less expense to the taxpayer than existing federal law. Among other provisions, the law requires plaintiffs to notify jurisdictions that their election practices may be in violation of the law prior to running up substantial fees and costs. After receiving notification of a potential violation, the law then offers jurisdictions an opportunity to cure violations without lengthy and expensive litigation. The NYVRA expands upon both the California Voting Rights Act and the federal VRA by providing a clearer and more efficient framework for prosecuting vote suppression, as well as racial gerrymandering claims—both of which are currently beyond the reach of the CVRA. The NYVRA will be an effective tool in ensuring that the Nassau County Legislature is unable to replicate its extreme racial gerrymander in the 2020 redistricting cycle. The NYVRA will ensure that voters are better able to hold jurisdictions accountable for discrimination-enhancing election practices, such as early voting plans that disproportionately disfavor minority voters; off-cycle elections dates; and the use of too few polling places in many villages, school districts, and special purpose districts.

Section 3 of the NYVRA (proposed Election Law § 17-208) offers New York an opportunity to bring its elections into the 21st century by providing a central public repository for election and demographic data with the goal of fostering evidence-based practices in election administration and unprecedented transparency.

A critical barrier to analyzing whether and to what extent New Yorkers are able to cast a meaningful ballot is the difficulty of getting

election results, voter files, shapefiles, and other key data from election authorities, as well as precinct-level Census data for each jurisdiction. In a research project on political participation in school districts that the NYCLU is currently conducting in collaboration with education scholars, sociologists, and political scientists, we have to make requests to each school district individually for voter history data, information about polling places, language assistance for voters, and other key practices. Collecting this data is particularly time consuming because almost every school district in New York state runs their own elections, separate and apart from the county boards of elections, which means they are the sole repository of their voting and elections records. The same is true of many villages and special purpose entities, which often run their own elections, separate from the county boards of elections. Analyzing these data are necessary to making recommendations to improve the abysmal turnout rates in school district elections.

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Similar to programs in California and Texas, this provision would create a non-partisan statewide database of information to be available for election administration and voting rights enforcement, including election results, voter files, shapefiles, and other key data from election authorities, as well as precinct-level Census data for each jurisdiction in the state. Making this data easily and publicly available will improve transparency by allowing voters to scrutinize whether the jurisdictions are providing equitable access to the political process. The statewide database will benefit election administrators and local governments as well by maintaining readily available data and offering technical assistance to research and implement best practices. The creation of a statewide database should also reduce the burden on boards of elections and local governments that currently have to deal with a constant stream of FOIL requests for election data and information that can and should be centrally maintained.

Section Four of the NYVRA **(**proposed Election Law § 17-210) provides New York an opportunity to improve its provision of language assistance to limited English proficient voters by creating a comprehensive statewide database of demographic and election information. New York's language diversity is one of its great strengths, but existing law requires very little language assistance to language-minority voters. For example, federal law only requires minimal language assistance to voters in New York City (except Staten Island), Nassau, Suffolk, and Westchester, a few other counties where jurisdictions are required to provide language assistance as a result of actual or threatened litigation. Federal law requires language assistance be provided only when at least 5% or 10,000 members of a

political subdivision's population are (1) citizens of voting age; (2) limited-English proficient; and (3) speak a particular language.

The federal threshold fails to address the needs of many Spanish-speaking voters around the state as well as the fast-growing population of New Yorkers from Asian-American and Pacific Islander heritage who would benefit from language assistance in voting. The NYVRA lowers those thresholds to 2% and 4,000 CVAP and applies to citizens of voting age population who speak English "less than very well" according to the Census Bureau's American Community Survey. With a comprehensive repository of demographic and election data, the statewide database can also determine whether, where, and, more precisely, in what languages jurisdictions should be providing assistance to language minority voters. New York's unique language diversity requires a more tailored approach than federal law. The NYVRA's lower threshold for providing language assistance combined with the capabilities of the statewide database provide the means to take a more precise and culturally competent approach to effectively enfranchise more historically marginalized groups of voters.

Section 5 of the NYVRA (proposed Election § 17-212) brings the framework of the most effective civil rights law in American history to New York. In passing the Voting Rights Act, Congress recognized that case-by-case litigation alone was inadequate—too slow and too costly—to eradicate discrimination and to prevent its resurgence.[48] The "unusually onerous" nature of voting rights litigation has always been the key reason for the preclearance remedy and litigation has only become more onerous today because modern voting discrimination is "more subtle than the visible methods used in 1965."[49] Even if minority voters can muster the resources to sue, these new discriminatory practices and procedures can remain in effect for years while litigation is pending. But preclearance relieves minority voters of the substantial burdens of litigation by "shifting the advantage of time and inertia" to minority voters by placing a limited duty on covered jurisdictions to demonstrate that any changes to their election laws have neither the purpose nor effect of making minority voters worse off.[50] Thus, instead of voters having to prove that new election laws and practices are discriminatory, jurisdictions have to show that their new laws and practices will not make minority voters worse off. For example, in New York, preclearance would ensure that instead of requiring voters to sue when a polling site moves to a place less

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[48] *See South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).
[49] H.R. Rep. No. 109-478, at 6.
[50] Katzenbach, 383 U.S. at 314.

convenient for minority voters, the Board of Elections has justified the change and shown that the change it is not retrogressive.

Preclearance was not only effective at protecting minority voters, some covered counties (including in New York City) appreciated preclearance because the scheme ensured the use of best practices for fostering political participation, particularly among minority groups. Covered jurisdictions have also made clear that they viewed preclearance as a way to prevent expensive and prolonged litigation. As Travis County, Texas wrote concerning its own preclearance obligations in a brief defending the constitutionality of Section 5 of the Voting Rights Act at the U.S. Supreme Court in 2009: "If ever there were a circumstance where an ounce of prevention is worth a pound of cure, it is in the fundamental democratic event of conducting elections free of racially discriminatory actions."[51] In 2009, the State of New York, in a brief joined by then-Attorney General Andrew Cuomo, also expressed that the minimal burdens of preclearance were outweighed by the legal regime's substantial benefits:

> "In contrast to the minimal burdens of Section 5, the preclearance process affords covered jurisdictions real and substantial benefits. First, the preclearance process encourages covered jurisdictions to consider the views of minority voters early in the process of making an election law change. This involvement has minimized racial friction in those communities. Second, the preclearance process has helped covered jurisdictions in identifying changes that do in fact have a discriminatory effect, thus allowing them to prevent implementation of discriminatory voting changes. Third, preclearance prevents costly litigation under Section 2. Preclearance provides an objective review of a State's election law changes. That review process tends to diminish litigation challenging election law changes."[52]

Preclearance under Section 5 of the NYVRA is patterned on the same law that Attorney General Cuomo defended as having "minimal

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[51] *See, e.g.*, Brief of Appellee Travis County, *Northwest Austin Municipal Utility District No. 1 v. Holder*, 08-322 at 11 (2009), *available at* https://campaignlegal.org/sites/default/files/FINAL_TRAVIS_COUNTY_BRIEF.pdf

[52] Brief for the States of North Carolina, Arizona, California, Louisiana, Mississippi, and New York as Amici Curiae in Support of Eric H. Holder, Jr., et al., *Northwest Austin Municipal Utility District No. 1 v. Holder*, 08-322 at 11 (2009), *available at* https://campaignlegal.org/sites/default/files/1996.pdf.

burdens" compared to "real and substantial benefits."[53] Similar to the federal preclearance program, Section 5 of the NYVRA places the authority to preclear changes in the Office of the Attorney General or certain supreme courts in each region of the state. Like the federal preclearance program, Section 5 of the NYVRA also acknowledges the need of covered jurisdictions for timely responses to preclearance submissions in order to administer elections in a consistent and efficient manner with as a little disruption as possible.

Unlike federal preclearance, which mandated review of *all* election law or practice changes by covered jurisdictions, the NYVRA lowers the burden on covered jurisdictions by specifically enumerating a more limited set of that must be submitted for preclearance. The NYVRA's preclearance scheme may appear to be a substantial lift in terms of the resources required to initiate the program on the part of both the covered jurisdictions and the Attorney General. However, the law's long effective date and trigger for implementing preclearance ensures that the program will not be in place before all involved parties are prepared to meet their obligations. Importantly, as the preclearance program continues, the covered jurisdictions and the Attorney General will benefit from long-term savings that come with more inclusive, and better-functioning election administration.

Section 6 of the NYVRA (proposed Election Law §17-214) provides New Yorkers with a civil cause of action against voter intimidation that is more important than ever, given the efforts of Donald Trump and his allies to stoke fear in naturalized citizen communities and communities of color. Currently, the only state law protection against voter intimidation is a criminal statute (Election Law 17-150) that has been rarely used in the last 100 years. In the past few years, however, New Yorkers have seen the Trump campaign and its allies exhort their followers to engage in intimidating poll watching and to spread misinformation that is intended to and can be reasonably expected to deter minority voters from registering to vote and voting. In 2019, Rensselaer County attempted to intimidate and deceive voters by threatening to send all voter registration forms received from DMV to ICE, citing baseless fearmongering around potential non-citizen voter fraud. This law provides another shield to protect against the rise in voter intimidation and deception that has

[53] New York again filed an amicus brief in support of the constitutionality of Section 5 of the Voting Rights Act in the case of *Shelby County v. Holder*, 12-96 (2013), *available* at https://www.brennancenter.org/sites/default/files/legal-work/2013.2.1%20Brief%20for%20NY%20CA%20MS%20and%20NC%20in%20Support%20of%20Respondents.pdf.

occurred and is likely to continue as the beneficiaries of voter suppression see increased threats to their power from the ballot box.

Section 7 of the NYVRA (proposed Election Law § 17-216) ensures that there are adequate incentives for private attorney generals to protect voting rights in the courts when monetary damages are otherwise unavailable. This provision permits plaintiffs' recovery of attorneys' fees under a "catalyst theory," i.e., fees may be recovered if a plaintiff's lawsuit was a catalyst motivating defendants to provide the primary relief sought or when plaintiff vindicates an important right by activating defendants to modify their behavior. This provision for the recovery of attorneys' fees, reasonable expert witness fees, and other reasonable litigation expenses not only encourages enforcement, but also, combined with the notification and safe harbor provisions of Section 2 of the NYVRA, encourages jurisdictions to settle meritorious cases to avoid waste of taxpayer money.

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CONCLUSION

As New Yorkers, we cannot demand of others what we do not demand of ourselves. If we want other states to respect the rights of minority voters, New York must do so first. If we want other states to pass laws and practices that promote, rather than inhibit, effective political participation, New York must take the lead. If we are sincere in our faith in democracy and in our belief that the legitimacy of government depends on the consent of the governed, then New Yorkers have to live that faith, even if it requires some uncomfortable measures. We cannot wait for the United States Congress to restore and expand upon the Voting Rights Act of 1965. Nor should we wait to act until the conservatives on the Supreme Court to finish their project of erasing the most effective civil rights law in the history of a country that still desperately needs effective civil rights laws.

The NYCLU urges passage of the New York Voting Rights Act without delay.