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Testimony at The
Senate Committee on Elections
Public Hearing
New York Voting Rights Act (S7528)

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Good morning Senator Myrie and esteemed members of the Senate. Thank you for the opportunity to speak before this panel today with regards to the proposed New York Voting Rights Act (S7528). Please note that the State Board has not taken a position in relation to this proposal. The following general comments are offered in relation to Senate Bill 7528 introduced on January 23, 2020.

Securing, protecting and making meaningful the fundamental right to vote is a governing imperative. As the Supreme Court rightly observed in 1964:

> "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even more basic, are illusory if the right to vote is undermined."[i]

Senate Bill 7528 adds a title 2 "New York Voting Rights Act" to Article 17 of the Election Law. The new title is intended to protect the right to vote by supplementing the federal voting rights act with a state analog. The

legislation specifically seeks to prevent any diminution of voting rights that could flow from *Shelby County v. Holder*, 570 U.S. 529 (2013). *Shelby County* virtually ended preclearance under the Voting Rights Act of 1964.[ii]

One direct result of the legislation would be that nearly all election procedures and laws would not go into effect without the consent of the Civil Rights Bureau of the State Attorney General or a court order, and such applications could lawfully take two months or more to occur after an implementation plan is submitted by the Board of Elections. Based on the criteria in the Senate Bill 7528 the State of New York would seem to be a covered jurisdiction[iii] as would every board of elections. Senate Bill 7528 also creates various private rights of action applicable in the voting dilution and authorizes sweeping *ad hoc* remedies. In the context of a dilution claim, a state court is empowered to implement remedies "notwithstanding any other provision of state or local law." These changes can include but are not limited to changes to district-based elections from at-large, elimination of staggered elections of officeholders, moving the dates of an election or primary when they are not held at the time of the regular June Primary or November general election, adding "voting hours or days," "additional polling locations," additional means of voting "such as voting by mail," "ordering of special elections," "expanded opportunities for voter registration," "modifying the election calendar," and implementing alternative voting methods like rank-choice or cumulative voting.

In addition to empowering state courts to alter any state or local law, the legislation also empowers the Civil Rights Bureau in the Office of the Attorney General to unilaterally approve any remedial plan consented to by the offending jurisdiction which may include any of the remedial provisions that could have otherwise been ordered by a court. In other words, the Civil Rights Bureau can authorize the abrogation and alteration of any statutory election requirement to remedy a violation it identifies.

With respect to redistricting, a new "statewide database" maintained by SUNY of various information related to demographics and election

results. Within SUNY there is designated a "Director of the statewide database" appointed by the governor required to oversee various aspect of data collection and providing the data to the public. This include voter files, maps, poll site locations and census data and the "apportionment plans for every election in every political subdivision." The Director and staff appointed by the director will use "the most advanced, peer-reviewed, and validated methodologies" to make estimates of race, ethnicity and language minority groups for all political subdivisions, including school districts.

The bill enacts new state law provisions requiring assistance for language minority groups. Election materials are required to be provided in a language when *any* political subdivision has "more than two percent of the citizens of voting age …are members of a single language minority group and speak English 'less than very well'." A political subdivision with more than 4,000 members of a single language group with limited proficiency in English regardless of percentage will also be required to provide voting materials in such languages. The current federal standard is five percent or 10,000 and is generally determined at county level.[iv] In New York voting materials are required to be provided in Spanish under § 203 of the Voting Rights Act in seven counties, and Spanish language materials are provided in eight other counties under other provisions of law. Voting materials in Korean (one county), Chinese (three counties) and Bengali (one county) are also required under current federal law. The provisions of this bill, in part due to the lower percentage thresholds but more so owing to the formula's applicability to all political subdivisions, would require providing voting materials in several additional languages and it would require program changes and certification of language upgrades to voting systems. The Director of the SUNY statewide database is tasked with determining boards of elections in February 2021 as to their obligations to provide language assistance under the new law and shall renew such determinations every third year thereafter.

Issues for Consideration

Preclearance In Intrastate Context

Preclearance under federal law was a device by which the federal government sought to prevent states and local governments from taking measures that would threaten the franchise. This model made sense because the federal government had no control over state legislatures or local governments in the first instance. Accordingly, preclearance allowed the federal government, being constrained by principles of federalism from directly legislating for states, to protect the franchise based on its jurisdictional authority to protect voting rights from abridgment. In contrast, preclearance within a state's own bureaucracies may not make sense. Unlike the federal government in its relationship to the states, the New York state legislature has the ability to pass specific laws that are directly applicable to every aspect and detail of the administration of elections and apportionment in New York. Just last year the legislature advanced dozens of historic voting reforms.

It is also important to consider that federal preclearance arose against a backdrop of repeated, purposeful efforts by certain states to abridge voting rights. This is not the context presented in New York *today*. In the past twenty years, not one New York preclearance application was denied.[v] Post *Shelby County,* several states have taken measures that are profoundly disenfranchising (powerful evidence that *Shelby County* was wrongly decided), but New York has moved its laws decisively in favor of enfranchisement.

Fidelity to State Law and Consistency of Law

While it makes sense to remedy a violation of the franchise by whatever means *necessary*, it is not sensible to invite an election administration patchwork *unnecessarily*. The provisions of Senate Bill 7528 that authorize state court remedies or consent arrangements with the

Bureau of Civil Rights to negate any state or local law related to election administration invites inconsistency in the application of the election law. Complicating election administration and ballot access rules by allowing drastically different paradigms that apply inconsistently could pose an impediment of its own to the meaningful exercise of the franchise. At very least, the authority granted by the legislation to abrogate a state law should be a last resort, premised on a judicial finding that a violation cannot be otherwise adequately remedied within the bounds of existing state law.

Fragmenting Election Administration and Resources

Senate Bill 7528 mandates what will often be a sixty-day review of all election laws implementation plans, regulations and procedures by the Bureau of the New York State Attorney General. That office is empowered to define its review process and criteria and can impose whatever administrative procedures on boards of elections and other entities that make submissions. Virtually no law or procedure related to elections can be effectuated without going through this prior approval.

It is notable that when the New York State Board of Elections was created, significant powers associated with election law enforcement and administration were transferred from the Office of the Attorney General to the State Board to amalgamate such authority and to provide for a transparent and bipartisan mode of administration. On passage of the legislation in 1974, the sponsor noted:

> …we may perhaps be restoring the present lack of confidence that the people of our State may now have in our electoral process and that we may also be putting into one unit this dispersed authority that now exists in our State concerning the administration of the Election Law. By that I refer to the fact that some of its functions are in the Department of State and some are in the office of

> the Attorney General, Department of Law. This bill—one of the primary functions of this bills is to create a bipartisan election commission and I think by so doing for the first time in the history of our State we are doing something that I think the framers of our Constitution intended to do but never quite succeeded in doing, and that was to create a State agency of a bi-partisan nature to administer the Election Law.
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> Debate on Assembly Bill Number 11600, 3143-3144 [1974].

Senate Bill 7528 seems to move in the opposite direction—not in terms of its intended benefits—but in terms of imposing new layers of bureaucracy across agencies (OAG and SUNY) with respect to implementing any election law, regulation or procedure. Make no mistake that such added bureaucracy would be totally appropriate *if needed* to remedy violations of the franchise. But inasmuch as the legislature has the ability to promulgate any substantive rule related to elections, can place into law any standard of apportionment or redistricting it deems necessary, the provident exertion of the legislature's power to set the standards it wants would seem more useful than establishing a review process. This is particularly so in a context where there is no demonstrated evidence that such laws would be ignored or implemented in bad faith by those charged with implementing them.[vi]

The task of aggregating election and demographic data and determining jurisdictions in which statutory thresholds are met to provide election materials in additional languages should reside with the New York State Board of Elections. Of course, as with any new mandate, it is only meaningful if its implementation is properly funded.

Funding the Reforms that Expand the Franchise

Last year alone the legislature advanced 53 chapters amending the election law to improve voter registration, increase voter turnout and improve election administration generally. Respectfully, the most effective way to expand and protect the right to vote is to ensure that the reforms passed by the legislature can be translated into reality. This requires adequate funding.

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[i] *Wesberry v Sanders*, 376 U.S. 1, 17 (1964).

[ii] Federal preclearance required any law or procedure implicating voting in "covered" jurisdictions to be reviewed by the Federal Department of Justice to ensure the procedures or law do not "deny or abridge the right to vote on account of race, color, or membership in a language minority group." Generally, procedures or laws governing voting in covered jurisdictions could not go into effect unless they passed preclearance.

[iii] The legislation is not entirely clear whether "the state" is a political subdivision under the definition of the term in the bill, but regardless any general procedure that would apply in any covered jurisdiction would require preclearance. Similarly, in reverse, a court order that finds a state election law a violation of the due process of equal protection clause (of which there have been multiple in the preceding twenty-five years) would seem to capture all of New York's boards of elections as covered jurisdictions.

[iv] 28 CFR 55.1

[v] In the 15 years before Shelby County, preclearance blocked 86 laws from going into effect nationwide. None were in New York. Between 1974 and 1998, thirteen New York preclearance applications were denied, and none since. None of the preclearance denials involved an administrative action of the State Board of Elections, and only one involved a board of elections at all.

[vi] Notably much of the legislation is geared to apportionment and redistricting by local governmental entities. Many of the ends sought by the legislation could perhaps be advanced by the simple expedient of legislation that would plainly authorize the Attorney General to bring actions related to dilution and, as the bill does, set the standards for such litigation.