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University of California, Los Angeles (UCLA) Voting Rights Project

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**Written Testimony of the University of California, Los Angeles (UCLA) Voting Rights
Project Regarding the New York Voting Rights Act (S7528)
Senate Standing Committee on Elections**

Introduction

The UCLA Voting Right Project (VRP) is pleased to submit this written testimony on S7528, the New York Voting Rights Act.¹ The UCLA VRP was founded in August 2018 and is focused on providing equitable voting opportunities to voters in local and county-level jurisdictions. The project's co-founders, Dr. Matt Barreto, Ph.D. and Chad Dunn, J.D., have served as either an expert witness or as a trial and appellate attorney in dozens of voting rights cases. Many of these cases were filed under Sections 2 and/or 5 of the federal Voting Rights Act. Further, Dr. Barreto has worked on over a dozen California Voting Rights Act cases, provided testimony in Washington state on the Washington Voting Rights Act, and was commissioned by the California Citizens Redistricting Committee to serve as an expert for local and state-wide redistricting.²

The UCLA VRP supports the New York Voting Rights Act. The UCLA VRP believes that this Act will advance voting rights in New York state for all New Yorkers and will make New York a voting-rights expansive state that provides a remedy for the failures of the Federal Voting Rights Act. Pre-*Shelby County*, areas of New York state were covered under Section 5 of the Federal Voting Rights act; these covered jurisdictions are now not subject to any preclearance or oversight. The New York Voting Rights Act makes important refinements to the Federal Voting Rights Act's Section 2, clarifying coverage of the more innocuous or insidious electoral features that dilute the votes of protected classes. UCLA VRP further believes that passage of the New York Voting Rights Act will place New York in line with other rights-expansive states, such as California and Washington.

¹ The views expressed in this testimony do not represent the University of California, Los Angeles or the State of California, and are restricted to just the opinions of the three authors cited.

² Matt Barreto, *A Summary of Voting Patterns in Los Angeles County*, 2011 (Report Commissioned by: The California Citizens Redistricting Committee).

This testimony will provide an overview of the benefits of the California Voting Rights Act and Washington Voting Rights Act on all voters and the need for the New York Voting Rights Act in New York state. The UCLA VRP has experience working with the federal, California and Washington Voting Rights Acts, and it wishes to relay that experience in support of the proposed Senate Bill S7528.

Benefits of State-Level Voting Legislation: California and Washington

From our experience in California, it is clear that even residents in diverse states experience voting rights infringements, and that these infringements are pervasive. In order to curb voting rights infringements unaddressed by federal law, California enacted the California Voting Rights Act (CVRA) in 2001. The specific purpose of the Act was to “address the ongoing vote dilution and discrimination in voting” in California.³ To do so, the CVRA prohibits the use of at-large elections and district-based elections in a political subdivision if either scheme impairs the ability of a protected class to elect a candidate of their choice.⁴ A key benefit of the CVRA is that it lessens the evidentiary burdens for plaintiffs to establish a voting rights violation. Unlike the Federal Voting Rights Act, plaintiffs do not have to show geographic compactness or proof that a jurisdiction intended to discriminate against a protected class through a voting scheme to establish a violation.⁵ Further, the CVRA does not establish a racial quota system, and does not call for racial classification in the analysis or evaluation of at-large electoral systems.

There is underrepresentation of minorities in elected positions in local government all over the country,⁶ which can be in part attributable to unremedied vote dilution from the use of at-large or discriminatory election schemes. Since enacting the CVRA, however, minority representation has increased in California. With increased minority representation there has been higher rates of voter participation in the state. The National Demographics Corporation finds that the CVRA has been instrumental in changing 195 California jurisdictions from at-large to district elections, including 131 school districts, 28 cities, 27 community college districts, 8 special

³ AB 182, Sec. 1.

⁴ *Id.*

⁵ Cal. Elec. Code §§ 14028 (c)-(d).

⁶ Karen Shanton, *The Problem of African American Underrepresentation in City Councils*, DEMOS (Oct. 20, 2014), <https://www.demos.org/research/problem-african-american-underrepresentation-city-councils>.

districts, and 1 county.⁷ While Section 2 of the Federal Voting Rights Act covered these jurisdictions, it was the ability to act under state law that has facilitated the changes in local government electoral schemes. A study from 2018 by the League of California Cities stated that “at least 88 cities have made the change to by-district elections and two more . . . agreed to make the change for 2022.”⁸

With election schemes newly purged of discriminatory processes, leadership for local governments in California has become more diverse. Greater diversity in local governments better reflect the population of the communities that live in these jurisdictions, while also better representing the diverse interests in those communities. For example, some jurisdictions in California that switched from at-large to by-district voting on account of the CVRA—such as Palmdale in Los Angeles County—elected their first minority candidates to local government soon after.⁹ A study authored by Loren Collingwood and Sean Long has found that the CVRA contributed to a considerable increase in minority representation in local government throughout the state. This increase is most significant among localities with larger Latina/o populations, with an estimated change of 21% in minority representation, equal to over one full district seat.¹⁰ This follows naturally from enhancing the ability of communities of color to elect their candidate of choice, which in turn has increased minority voter participation. For example, Black and Latino/a voter participation in California increased 26% from 2014 to 2018.¹¹ A greater chance of electoral success has enhanced the participation of communities of color in the state.

California voter registration has climbed since the CVRA was passed in 2001. In 2002, the California Secretary of State’s office reports that over 15 million people were registered in California. In 2020, over 20 million voters registered in the state. We believe that a significant proportion of these voters chose to engage in the franchise because the CVRA gave them, for the

⁷ <https://www.ndcresearch.com/updated-counts-cvra-driven-changes/>.

⁸ James L. Markman, Youstina N. Aziz, and Douglas Johnson, *The California Voting Rights Act: Recent Legislation & Litigation Outcomes*, THE LEAGUE OF CALIFORNIA CITIES (May 3, 2018), <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2018/Spring-Conference-2018/5-2018-Spring-Aziz-Johnson-Markman-California-Vot.aspx>.

⁹ Agnes Constante, *California’s Latinos and Asian Americans Target City Councils with District Elections*, NBC NEWS (June 3, 2018), <https://www.nbcnews.com/news/asian-america/california-s-latinos-asian-americans-target-city-councils-district-elections-n879376>.

¹⁰ Loren Collingwood and Sean Long, *Can States Promote Minority Representation? Assessing the Effects of the California Voting Rights Act*, URBAN AFF. REV., 1, 27 (2019).

¹¹ Michael Finch II, *Census: Black, Latino, Younger Voters Made Large Gains in the 2018 Midterms*, SAC BEE (April 26, 2019 2:40AM), <https://www.sacbee.com/news/politics-government/article229676869.html>.

first time, the ability to elect their candidates of choice. Overall, voter participation and registration in California has increased notably since the passage of the CVRA.

Seeing the improvement to which the CVRA has given rise, Washington state signed into law the Washington Voting Rights Act (WVRA) in 2018. Substantively similar to the CVRA,¹² the WVRA targets the use of at-large election schemes in local and county-wide elections. The WVRA also establishes a process for cities, counties, and school districts to move from at-large to single-member elections before the filing of a lawsuit through a notice provision.¹³

Proponents of the WVRA cited the success of the CVRA in improving minority representation in local governments, where minority communities were historically excluded.¹⁴ Additionally, while the WVRA is relatively new, it has already made an impact on voters. Before the WRA, only charter cities or counties could change their election systems. Other local governments had two options: hold a vote to become a charter city/county or undergo a federal lawsuit under the VRA—both expensive and time-consuming options. The WVRA empowers communities to voluntarily reform their election systems without resource-draining litigation. In the short time it has been law, we are already seeing it have an important impact.

Voting Rights in the *Shelby* Landscape

Post-*Shelby County*, it has become even more clear that states will have to step in to protect their own voters. Within hours of the *Shelby County* decision, previously covered jurisdictions moved to push through discriminatory voting practices that the Federal VRA would have blocked through Section 5. On the day the Supreme Court decided *Shelby County*, Texas moved to implement a voter ID law (SB 14) that had been denied preclearance;¹⁵ North Carolina passed a strict form of voter identification, shortened the early voting period from 17 to 10 days before election day, eliminated same-day registration, prevented out-of-precinct ballots from being counted, and ended a successful pre-registration program for 16 and 17-year olds (HB

¹² Lilly Fowler, *WA to Protect Against Voting Discrimination with New Law*, CROSSCUT (Mar. 6, 2018), <https://crosscut.com/2018/03/washington-voting-rights-act-legislature-discrimination-law-jay-inslee>. (Stating that the California Voting Rights Act “severed as model for Washington’s bill.”).

¹³ RCW 29A.92.050.

¹⁴ http://www.wavotingrights.org/sites/default/files/WA_VOTING_RIGHTS_ACT_2015.pdf.

¹⁵ Ed Pilkington, *Texas Rushes Ahead with Voter ID Law After Supreme Court Decision*, GUARDIAN (June 25, 2013, 3:32 PM), <https://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-court-decision> [<https://perma.cc/KF76-9MBK>].

589);¹⁶ and shortly after, Galveston County, Texas made the change from nine Justices of the Peace to four, a move the Department of Justice rejected in 2012.¹⁷ These are only a small sample from the hundreds of voting law changes implemented by jurisdictions fully or partially covered by the Federal Voting Rights Act Section 5 in the wake of *Shelby* that this testimony could cite.

Racial resentment persists in the post-*Shelby* world and will continue to persist if unaddressed. Analysis of American National Election Studies data up to 2016 reveals continuing racial resentment, and the mean level of support for racially liberal policies is significantly higher among blacks than it is among whites.¹⁸ Additionally, voting rights have been rolled back nationally in the Trump era. The Trump administration’s Department of Justice has stopped defending voting rights and actively undermines voting rights cases. On February 27, 2017, the Department of Justice dropped the federal government’s longstanding position that a Texas voter ID law under legal challenge was intentionally racially discriminatory, despite having successfully advanced that argument in multiple federal courts.¹⁹ The Department of Justice filed a brief in the Supreme Court in *Husted v. A. Philip Randolph Institute* in August, 2017 arguing that it should be easier for states to purge registered voters from their roll—reversing not only its longstanding legal interpretation, but also the position it had taken in the lower courts in that case. In 2018, the Department of Justice sued the state of Kentucky to force it to “systematically remove the names of ineligible voters from the registration records.”²⁰ On January 29, 2019, the Department of Justice reversed its position in a Texas voting rights case, arguing that the state of Texas should not need to have its voting changes pre-cleared with the federal government despite federal court findings of intentional discrimination.²¹

Moreover, during his first year in office, President Trump signed an Executive Order creating the Presidential Advisory Commission on Election Integrity, headed by Vice President

¹⁶ After intense litigation, this voting law was invalidated in *North Carolina NAACP v. McCrory*. See Johnathan Turley, *Cara Gallagher, Backsliding & Voting Rights Post-Shelby* (June 24, 2016), <https://jonathanturley.org/2016/06/24/backsliding-voting-rights-post-shelby/>) & <https://www.brennancenter.org/our-work/court-cases/north-carolina-naacp-v-mccrory>).

¹⁷ Harvy Rice, *Lawsuit Says Galveston Remap Discriminatory*, HOUSTON CHRON. (Aug. 26, 2013), <http://www.houstonchronicle.com/news/houstontexas/texas/article/Lawsuit-says-Galveston-remap-discriminatory-4761878.php> [https://perma.cc/4523-2E7K].

¹⁸ Cindy D. Kam & Camille D. Burge, *Racial Resentment and Public Opinion across the Racial Divide*, 72(4) POL. RES. Q. 767, 770-77 (2019).

¹⁹ <https://civilrights.org/trump-rollbacks/>.

²⁰ *Id.*

²¹ *Id.*

Mike Pence and Kansas Secretary of State Kris Kobach. Kobach is widely known as an architect of some of the most egregious anti-immigrant and voting suppressive laws as Secretary of State of Kansas.²² The Trump administration also named Hans Von Spakovsky as a member of the Commission. Spakovsky is credited as being a leader in spreading the myth of voter fraud and encouraging the enactment of suppressive voting laws.²³ After its formation, the White House Commission on Election Integrity sent letters to 50 state governments asking those governments to provide voter data, including the full first and last names of all registrants, middle names or initials if available, addresses, dates of birth, political party (if recorded in the state), the last four digits of social security numbers (if available), voter history (elections voted in) from 2006 onward, active/inactive status, cancelled status, information regarding any felony convictions, information regarding voter registration in another state, information regarding military status, and overseas citizen information.²⁴ While Kobach asked for “publicly-available voter roll data,” much of this information, like someone’s Social Security number or military status, is private and subject to potential manipulation for nefarious purposes. The request led to a number of lawsuits.²⁵ Due to multiple lawsuits, the Commission was disbanded.

Failures of Current New York State Law

In 2018, New York’s outdated voter registration method, lack of early voting, obstacles for receiving an absentee ballot, and holding of primaries for state and federal elections on different days amounted to policies that caused New Yorkers to be disenfranchised.²⁶ In 2017, the Department of Justice issued a notice that the federal government may sue New York over

²² Ari Berman, *The Trump Administration is Planning an Unprecedented Attack on Voting Rights*, NATION (June 30, 2017), <https://www.thenation.com/article/archive/the-trump-administration-is-planning-an-unprecedented-attack-on-voting-rights/>.

²³ *Id.* See also, Jane Mayer, *The Voter-Fraud Myth*, NEW YORKER (Oct 22, 2012), <https://www.newyorker.com/magazine/2012/10/29/the-voter-fraud-myth>.

²⁴ Liz Stark & Grace Hauck, *Forty-Four States and DC Have Refused to Give Certain Voter Information to Trump Commission*, CNN (July 5, 2017), <https://www.cnn.com/2017/07/03/politics/kris-kobach-letter-voter-fraud-commission-information/index.html>.

²⁵ Ari Berman, *The Trump Administration is Planning an Unprecedented Attack on Voting Rights*, NATION (June 30, 2017), <https://www.thenation.com/article/archive/the-trump-administration-is-planning-an-unprecedented-attack-on-voting-rights/>; see *Trump’s Controversial Election Integrity Commission is Gone Here’s What Comes Next*, <https://www.washingtonpost.com/news/monkey-cage/wp/2018/01/04/trumps-controversial-election-integrity-commission-is-gone-heres-what-comes-next/>.

²⁶ Sean Morales-Doyle and Chisun Lee, *New York’s Worst-in-the-Country Voting System*, ATLANTIC (Sept. 13, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/new-yorks-worst-in-the-country-voting-system/570223/>. See Jeffrey Toobin, *The Problem With Voting Rights In New York*, NEW YORKER (Oct. 11, 2016), <https://www.newyorker.com/news/daily-comment/the-problem-with-voting-rights-in-new-york>.

alleged failures to comply with federal voter registration laws that require drivers' license applications to also act as applications for voter registration.²⁷

Although New York had historically inadequate voting laws, the state has passed expansive voter registration and access laws since 2019. The legislation passed in 2019 expanded early voting, allowed the pre-registering of 16 and 17-year olds if they apply for a driving permit, and will now hold all state primaries along with federal primaries in June.²⁸ The New York legislature also began the process of passing constitutional amendments for same-day voter registration and no-fault absentee ballots.²⁹ These pro-democracy and equality policies help remedy the problems that caused disenfranchisement and low voter turnout in New York state.

While New York has passed legislation to advance voting, there is no state law that provides redress for protected classes of persons that live in jurisdictions that have discriminatory election schemes. As aforementioned, areas of New York, such as Bronx County, Kind County, and New York County, were all covered under Section 5 of the Federal Voting Rights Act.³⁰ These areas are no longer covered under federal or state law. Additionally, there are only a few towns in New York state that use ward or district-based systems of election. According to a report by the New York state government, “[a]s of 2012, only 11 of 932 towns in New York use the ward system, and since the mid-1970’s, voters have defeated its implementation wherever it has been on the ballot.”³¹ New York state does not have its own state law that would allow for voters to challenge this at-large system. Since a majority of voters have defeated ballot measures to change from at-large to ward based election systems, harmed communities in small jurisdictions may not be able to remedy discrimination. It is evident that New York states needs to implement the New York Voting Rights Act (New York VRA) in order to provide a state remedy for the fundamental right to vote for protected communities.

Benefits of the New York Voting Rights Act

²⁷ Vivian Yee, *U.S. Threatens to Sue New York State Over Voting Violations*, NEW YORK TIMES (Jan. 13, 2017), <https://www.nytimes.com/2017/01/13/nyregion/new-york-state-dmv-voting-violations.html>.

²⁸ Zack Finck, *It's Official: Early Voting is Coming to New York*, NY1 (Jan 24, 2019), <https://www.ny1.com/nyc/all-boroughs/news/2019/01/24/it-s-official--early-voting-is-coming-to-new-york>.

²⁹ *Id.*

³⁰ <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>.

³¹ New York State Division of Local Government Services, *Local Government Handbook 75* (2018), https://www.dos.ny.gov/lg/publications/Local_Government_Handbook.pdf.

The New York VRA is a necessary because it directly fills a gap in the legal protection of voters from discrimination on the state level. States that have state-level voting rights acts have more jurisdictions that switch from at-large election schemes to district based systems than do states that lack similar laws.³² District based systems typically result in the election of more diverse candidates and enhanced voter participation; our experience in California demonstrates this result.

The New York VRA builds upon the successes of California and Washington's respective voting rights acts and grants more protection for protected classes by providing a separate cause of action against voter suppression. This cause of action against voter suppression does not just target the use of voting qualifications, regulations, and policies that abridge the right to vote, but also disallows the holding of municipal or local elections on dates other than those for the federal and statewide general and primary. Holding municipal or local elections on dates different than state and federal elections has been one strategy used to block voters from exercising their rights, and it is a strong merit of the New York VRA that it directly targets this practice.

The New York VRA also provides a cause of action that allows voters who are being discriminated against to challenge at-large, district based, and alternative election schemes that impair the ability for protected classes to elect candidates of their choice, as opposed to just at-large election schemes. While at-large elections are used to dilute voting power of protected classes, it is UCLA VRP's experience that other electoral schemes are also used to discriminate. This provision provides voters with an important tool to redress their injuries.

An important feature of the New York Voting Rights Act is that it does not require that plaintiffs filing a cause of action for vote dilution to show both that there is racially polarized voting *and* that, under a totality of the circumstances, the protected class has less of an ability to influence the outcome of elections. Instead, the New York VRA permits plaintiffs to show either that racially polarized voting occurs or that, under a totality of the circumstances, there is the effect of discrimination against a protected class through the use of an electoral scheme. This is more protective than Section 2 of the Federal Voting Rights Act because it provides a remedy for two types of aggrieved plaintiffs under protected by the federal law: plaintiffs that live in smaller

³² Agnes Constante, *California's Latinos and Asian Americans Target City Councils with District Elections*, NBC NEWS (June 3, 2018), <https://www.nbcnews.com/news/asian-america/california-s-latinos-asian-americans-target-city-councils-district-elections-n879376>.

jurisdictions who may not be able to acquire enough precinct data that may be needed to show racially polarized voting and plaintiffs that do not have access to the precinct level data or who cannot access the expertise needed to show racially polarized voting. These are not the only types of plaintiffs that this feature would benefit. Through the totality of the circumstance's analysis, the New York VRA provides plaintiffs with judicial redress for the effects of discrimination. Individual plaintiffs who are laymen or even lawyers unexperienced in voting rights law, face an uphill battle in Section 2 litigation because of the expense of acquiring the necessary data and the experts needed for racially polarized voting analyses. While organizations such as UCLA VRP are well positioned to file Section 2 Federal Voting Rights Act cases, citizens experiencing local effects of discrimination in voting and who are without access to national voting rights organizations are not similarly positioned. The New York VRA fixes this inequality by providing multiple ways to establish a violation under the law.

Moreover, unlike Section 2 of the Federal Voting Rights Act, the New York VRA does not require that protected classes need to be geographically compact nor concentrated to find a violation. The New York Voting Rights Act also allows for considerations of coalition districts, or districts in which multiple protected classes within a jurisdiction vote similarly. While under the Federal Voting Rights Act, districts that have the effect of racial discrimination or discrimination against a protected class may be permissible if the motivation behind the district was for purposes of politics, this bill prohibits the consideration of politics as a defense for a discriminatory district.

Additionally, the New York VRA does not prejudge the circumstances or voting patterns in any jurisdiction. Instead, the law calls upon lawmakers, attorneys, political scientists, and statisticians to conduct independent data analysis using the most appropriate methodology. Based on the results of the data analysis, other facts, and evidence provided, there can be a determination if a given jurisdiction is in violation or not. In our experience with state voting rights acts in California and Washington, the political data, history, and current facts do vary from jurisdiction to jurisdiction and the New York Voting Rights Act does not prejudge a jurisdiction before this analysis has been completed. Jurisdictions will only be in violation if an independent data analysis or proof under a totality of the circumstances finds relevant results of effects of discrimination. The New York VRA does not automatically attribute intentional discrimination to jurisdictions that may be found in violation based on an effect's framework.

The New York Voting Rights Act provides more considerations than the Federal Voting Rights Act, the CVRA, or the WVRA for finding effects of discrimination under the totality of circumstances test. Under the New York VRA, the extent to which members of a protected class contribute to political campaigns at a lower rate and the extent to which protected class members vote at lower rates than other members of the electorate are to be considered. The inclusion of these factors above address a problem that plaintiffs that are members of historically disenfranchised communities face when bringing Section 2 lawsuits; the community has been discriminated in the electoral sphere for such long periods of time that the protected class members do not engage in the electoral process and therefore candidates of choice might have not run in recent elections nor protected class members vote at high enough rates for protected class candidates because of the lack of ability to overcome discrimination in the past.

Importantly, the New York VRA provides local governments with a workable standard to stop the effect of discrimination. Although change election systems can be a daunting task for local governments, changes to ensure that all communities in a locality are represented fairly is critical to democracy. From our experience in California, election scheme changes are not onerous or insurmountable tasks for local jurisdictions. Indeed, local jurisdictions in California have decided to switch from at-large to district based elections without the threat of a lawsuit because these jurisdictions recognize the important non-discriminatory elections and the ease of implementing the law. Further, the New York VRA also provides a safe harbor for jurisdiction after enactment by requiring prospective plaintiff send a notice letter to a jurisdiction that they allege to be in violation of the New York VRA and have that prospective plaintiff wait fifty day after sending the notice letter to start a judicial action. After receiving a New York VRA notice letter or within fifty days, the governing body can pass a resolution of intention to enact and implement a remedy for a New York VRA violation. A jurisdiction that passed a New York VRA resolution can enter into an agreement with a prospective plaintiff to allow the jurisdiction ninety days to comply with the New York VRA before filing suit. These provisions provide jurisdictions with ample opportunity to remedy a possible New York VRA violation without a lawsuit. The experience of some jurisdictions that have been subjected to Federal Voting Rights Act preclearance in the past shows that greater scrutiny of elections can have long term, worthwhile effects.

Conclusion

The New York Voting Rights Act would be a tremendous civil right statute in New York and would provide voters with protections they otherwise would not have under federal law. The UCLA Voting Rights Project is wholly in support of the enactment of the New York Voting Rights Act and urges this committee and the New York state legislature to vote for its passage.

Thank you for your time and consideration.



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