



## JOHN R. LEWIS VOTING RIGHTS ACT OF NEW YORK

### 1. INTRODUCTION

The New York State Constitution recognizes that vigorous political participation is the foundation of our democracy and that the right to vote is preservative of all other rights. It begins with a prohibition against disenfranchisement that is reinforced through that document, most expressly through protections for the right of suffrage in Article II and protections against partisan and minority vote dilution in Article III.<sup>1</sup>

However, even unequivocal constitutional guarantees require strong statutory enforcement mechanisms. The Fifteenth Amendment to the United States Constitution is clear in its terms to prohibit racial discrimination in voting. But 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 for a century after its ratification. The Voting Rights Act of 1965 (“federal VRA”) was a necessary and effective step towards making good on a constitutional guarantee of equal voting rights. Yet new means of excluding voters of color from the political process have emerged, and federal courts have limited the law’s effectiveness.

At the state level, New York has an extensive history and ongoing record of discrimination against racial, ethnic, and language minority groups in voting.<sup>2</sup> The result is a persistent gap between white New Yorkers and residents of color 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 outpace Black, Hispanic, and Asian New Yorkers—the latter two groups by particularly wide margins.<sup>3</sup> New York’s access to political participation record has been the source of

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<sup>1</sup> 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”).

<sup>2</sup> 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).

<sup>3</sup> U.S. Census Bureau, *Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2020*, <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html>.

nationwide derision as states with flagrant records of discrimination, including Ohio and North Carolina, have tried to justify exclusionary tactics by pointing to New York’s shortcomings.<sup>4</sup> New York has made significant strides to improve access to the franchise since 2019,<sup>5</sup> but many discriminatory practices remain in place and opportunities for discrimination remain widely available.

The scale and multiple levels of New York’s election system also make meaningful investigation and prosecution of voting rights violations a daunting task. New York contains 62 counties, 62 cities, 932 towns, 551 villages,<sup>6</sup> and 1,863 special purpose (e.g., school, water, fire, sewer, etc.) districts.<sup>7</sup> Each of these more than 3,400 jurisdictions holds elections concerning public offices, budgets, and/or capital bonds; most provide primary services that New Yorkers rely upon daily, including public education, sanitation, policing, fire services, water, parks, and libraries, to name a few.

Unfortunately, laws and practices that have either the purpose or effect of discriminating against voters of color remain prevalent; some of the most common examples include at-large election systems, redistricting plans that dilute minority voting strength, polling location plans with too few and/or too inconvenient sites, and failures to provide adequate language assistance. This situation is untenable. Voters of color must have equal opportunities to participate in New York’s political process—but they have too often been left on disadvantageous footing due to laws and practices that have a discriminatory purpose or discriminatory results.

New York can address these pervasive problems by building on the comprehensive framework of the federal VRA and the efforts of California, Oregon, Washington, and Virginia to improve state law voting rights protections. The John R. Lewis Voting Rights Act of New York (NYVRA) builds on these foundations to confront evolving barriers to effective participation and to root out longstanding discriminatory practices more effectively. The NYVRA 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 ensuring that all voters are able to cast a meaningful ballot, but especially helps to accelerate the participation of those

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<sup>4</sup> 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>.

<sup>5</sup> See, e.g., Jesse McKinley, *Early Voting and Other Changes to Election Laws Are Coming to New York*, N.Y. Times (Jan. 10, 2019), <https://www.nytimes.com/2019/01/10/nyregion/voting-reform-election-ny.html> (describing the Legislature’s passage of early voting, consolidation of state and federal primaries, and initial advancement of proposed constitutional amendments opening the door for the future ratification of same-day registration and absentee voting).

<sup>6</sup> N.Y. Department of State, Division of Local Government Services, “What Do Local Governments Do,” <https://www.dos.ny.gov/lg/localgovs.html>.

<sup>7</sup> 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).

minority voters who have been historically denied an equal opportunity to participate in the political process.

If enacted, the NYVRA, S.1046A (Myrie), A.6678A (Walker), would be the strongest and most comprehensive state voting rights act to date—and it would continue this state’s march towards becoming a leader in promoting equal access to political participation.

## **2. FEDERAL AND STATE VOTING RIGHTS ACTS ENFORCE CRUCIAL CONSTITUTIONAL GUARANTEES**

The individual and collective provisions of the federal Voting Rights Act of 1965 have been effective at combatting a wide range of barriers and burdens that have excluded voters of color from the political process.<sup>8</sup>

The primary tool to challenge voting discrimination in court in the federal VRA is Section 2, which provides Attorney General enforcement and a nationwide private right of action against all extant forms of racial discrimination in voting, regardless of location.<sup>9</sup> Until 2013, the primary mechanism to prevent voting discrimination from occurring, including in parts of New York, was preclearance under Section 5, which shifted the advantage of time and inertia from the perpetrators of discrimination to its victims. Section 5 required states and political subdivisions with a particularly troubling history and ongoing record of discrimination to preclear changes to their election practices with the U.S. Department of Justice or a federal court in Washington, D.C.<sup>10</sup> The federal 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)<sup>11</sup> and 203<sup>12</sup> 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.<sup>13</sup>

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<sup>8</sup> Myrna Pérez, *Voting Rights Act: The Legacy of the 15th Amendment*, BRENNAN CENTER FOR JUSTICE (June 30, 2009), <https://bit.ly/3cjDezF>.

<sup>9</sup> 52 U.S.C. § 10301.

<sup>10</sup> 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), <https://repository.law.umich.edu/mjlr/vol50/iss3/2>.

<sup>11</sup> 52 U.S.C. § 10303(e).

<sup>12</sup> 52 U.S.C. § 10503.

<sup>13</sup> 52 U.S.C. § 10101(b).

However, in the decades since its passage, federal courts have eliminated or weakened some of the federal VRA’s protections, making it increasingly burdensome for litigants to vindicate their rights under the law. As a result, despite the importance of the federal VRA, voters of color often still lack an equal opportunity to participate in the political process and elect candidates of their choice.

**A. Federal courts have eliminated or weakened some protections in the federal VRA.**

In the past decade, the Supreme Court has undercut both key pillars of the federal VRA: Section 2 and Section 5.

VRA Section 2 facilitates Attorney General enforcement and provides a private right of action—which means that a person is legally entitled to file a lawsuit—against any voting practice or procedure that “results in a denial or abridgment of the right of any citizen of the United States to vote on account of race.”<sup>14</sup> Section 2 applies to (i) voting rules that dilute minority voting strength by making it difficult or impossible for voters of color to band together to elect their preferred candidates (“vote dilution” claims) or (ii) voting rules that create barriers to the right to vote for voters of color (“vote denial” claims).<sup>15</sup>

With respect to Section 2 vote dilution claims, in 1986 the Supreme Court adopted an intricate test that requires plaintiffs to satisfy three preconditions and prevail under a complex multi-factor analysis.<sup>16</sup> As noted below, this makes such claims expensive and time-consuming. With respect to Section 2 vote denial claims, in 2021 the Supreme Court

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<sup>14</sup> 52 U.S.C. § 10301. Critically, Section 2 does not require voters to prove they were victims of intentional discrimination. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court explained that Congress was overturning *Mobile v. Bolden*, 446 U.S. 55 (1980), when it enacted the 1982 VRA amendments. *Mobile* declared that minority voters had to prove an election mechanism was “intentionally adopted or maintained by state officials for a discriminatory purpose,” in order to satisfy either § 2 of the VRA or the Fourteenth or Fifteenth Amendments. *Thornburg*, 478 U.S. at 35. In response to *Mobile*, Congress revised § 2 to clarify that a violation could be established “by showing discriminatory effect alone...” *Id.*

<sup>15</sup> See LDF, *A Primer on Sections 2 and 3(c) of the Voting Rights Act*, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, 1 (2021), <https://bit.ly/39csLUt>.

<sup>16</sup> *Thornburg v. Gingles*, 478 U.S. 30, 46–51 (1986). To satisfy the *Gingles* preconditions, *first*, a minority group must be “sufficiently large and geographically compact to constitute a majority in a single-member district.” *Id.* at 50. *Second*, a minority group must be “politically cohesive.” *Id.* at 51. *Third*, a minority group must demonstrate “that the white majority votes sufficiently as a bloc” to allow it “usually to defeat the minority’s preferred candidate.” *Id.* Once the preconditions are met, Section 2 applies only if, “under the totality of the circumstances,” the challenged law “result[s] in unequal access to the electoral process.” *Id.* at 46.

put forth a set of “guideposts” that threatens to severely curtail the broad application that Congress intended.<sup>17</sup>

For nearly 50 years, Section 5 of the federal VRA – the core provision of this legislation – protected millions of voters of color from racial discrimination in voting, by requiring certain states and localities to obtain approval from the federal government before implementing a voting change.<sup>18</sup> In its 2013 *Shelby County v. Holder* ruling, the Supreme Court rendered Section 5 inoperable by striking down Section 4(b) of the VRA, which identified the places in our country where Section 5 applied.<sup>19</sup> The *Shelby County* decision unleashed a wave of voter suppression in states that were previously covered under Section 4(b) (“covered jurisdictions”).<sup>20</sup> In 2021 alone, state lawmakers introduced more than 440 bills with provisions that restrict voting access in 49 states, 34 of which were enacted.<sup>21</sup> The *Shelby County* decision is also having profound ramifications for redistricting because for the first time in six decades of map drawing people of color in covered jurisdictions are not protected by Section 5.

**B. Litigation under Section 2 of the federal VRA is complex, costly, and time intensive.**

Following the *Shelby County* decision, communities of color continue to rely upon Section 2 of the VRA to ensure that they can participate equally in the political process and elect their preferred candidates. But Section 2 claims continue to impose a heavy burden on plaintiffs: they are time consuming and expensive. As a result, some potential Section 2 violations go unnoticed and unaddressed. Even when voters ultimately win lawsuits, several unfair elections may be held while the litigation is pending.<sup>22</sup>

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<sup>17</sup> *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

<sup>18</sup> 52 U.S.C. § 10304.

<sup>19</sup> See *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013).

<sup>20</sup> See *LDF Testifies Before Congress on Voter Suppression Crisis Post Shelby*, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND (June 25, 2019), <https://bit.ly/2NVvkDe>; see also NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, *DEMOCRACY DIMINISHED: STATE AND LOCAL THREATS TO VOTING POST SHELBY CTY, ALA. V. HOLDER*, (last updated Oct. 6, 2021), [https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished\\_-10.06.2021-Final.pdf](https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished_-10.06.2021-Final.pdf).

<sup>21</sup> *Voting Laws Roundup December 2021*, BRENNAN CENTER FOR JUSTICE (December 21, 2021) <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021>.

<sup>22</sup> See *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation as of September 2021*, NAACP Legal Defense and Educational Fund, <https://www.naacpldf.org/wp-content/uploads/Section-2-costs-9.19.21-Final.pdf>.

Courts have recognized that Section 2 litigation is an extremely complex area of law,<sup>23</sup> and there is a dearth of lawyers who have experience litigating Section 2 claims.<sup>24</sup> Section 2 lawsuits are labor intensive and generally require multiple expert witnesses for both plaintiffs and defendants.<sup>25</sup> As a result of these costs, plaintiffs and their lawyers risk at least six- or seven-figure expenditures in Section 2 litigations.<sup>26</sup> Individual plaintiffs, even when supported by civil rights organizations, often lack the resources and expertise to effectively prosecute Section 2 claims.<sup>27</sup> Due to these challenges, some potential Section 2 violations go unnoticed and are never resolved or litigated in court.<sup>28</sup>

Section 2 claims are also expensive for jurisdictions to defend, regularly costing states and localities considerable amounts of taxpayer money. For example, in 2020, East Ramapo Central School District paid its lawyers in excess of \$7 million for unsuccessfully defending a Section 2 lawsuit brought by the local NAACP branch, and have been ordered to pay over \$4 million in plaintiffs' attorneys' fees and costs as well.<sup>29</sup>

Litigation under Section 2 also cannot keep up with the urgency of the political process, meaning that even when voters ultimately prevail, they often suffer violations

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<sup>23</sup> *Id.* (citing *Johnson v. Hamrick*, 196 F.3d 1216, 1223 (11th Cir. 1999) (“the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns”); *Williams v. Bd. of Comm’rs of McIntosh Cnty.*, 938 F. Supp. 852, 858 (S.D. Ga. 1996); *Project Vote v. Blackwell*, 1:06-CV-1628, 2009 WL 917737, \*10 (N.D. Ohio Mar. 31, 2009) (calling voting rights “an area of law that [is] anything but simple”).

<sup>24</sup> *Id.* (citing Br. of Joaquin Avila, *Shelby Cnty., Ala. v. Holder*, No. 12-96 (U.S. Feb. 1, 2013)).

<sup>25</sup> *Id.* (citing Mike Faulk, *Big Costs, Heavy Hitters in ACLU Suit Against Yakima*, YAKIMA HERALD (Aug. 10, 2014) <https://bit.ly/3ckou3C>).

<sup>26</sup> LDF, *supra* note 15, at 3 (citing Br. of Joaquin Avila, *Shelby Cnty., Ala. v. Holder*, No. 12-96 (U.S. Feb. 1, 2013)); *see also* *Shelby Cnty.*, 570 U.S. at 572 (Ginsburg, J., concurring) (stating that Section 2 “litigation places a heavy financial burden on minority voters”).

<sup>27</sup> *Voting Rights and Election Administration in the Dakotas: Hearing Before the Subcomm. on Elections*, 116th Cong. 64 (2019) (testimony of Jacqueline De León, staff attorney at the Native American Rights Fund) (testifying that Section 2 litigation “is prohibitively expensive for a small organization like NARF to reach every single instance of discrimination that is happening across the country”).

<sup>28</sup> *Congressional Authority to Protect Voting Rights After Shelby County v. Holder: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on Judiciary*, 116th Cong. 14 (Sept. 24, 2019) (Written Testimony of Professor Justin Levitt) (explaining that, without preclearance, it is “difficult to learn about and draw appropriate attention to discriminatory policies, so that the few entities with sufficient resources and expertise know where to litigate in the first place.”).

<sup>29</sup> Jennifer Korn, *ERCSD Threatens to Fire Teachers if Legal Fees Not Cut to \$1: NAACP Leaders Respond*, ROCKLAND COUNTY TIMES, Jan. 21, 2020, <https://bit.ly/39dKvij>; Report and Recommendation, *NAACP, Spring Valley Branch v. East Ramapo Central School Dist.*, No. 7:17-08943-CS-JCM (S.D.N.Y. Dec. 29, 2020).

of their fundamental rights along the way. Because elections are frequent, election-based harms take effect almost immediately after rules are changed. However, on average, Section 2 cases can last two to five years, and unlawful elections often occur before a case is resolved.<sup>30</sup> For example, Section 2 litigation concerning the Town of Hempstead’s at-large elections for Town Board took over a decade to resolve.<sup>31</sup> From the August 1988 initial filing to plaintiffs’ victory in June 1999, Hempstead held six Town Board elections and elected 18 total Board members under the discriminatory at-large system.<sup>32</sup>

**C. State voting rights acts provide necessary tools to augment the federal VRA.**

Given the limitations and challenges of the federal VRA, several states have taken important steps to fill in the gaps by enacting state-level voting rights acts. The California Voting Rights Act (“CVRA”), adopted in 2002, simplifies vote dilution causes of action against local governments using at-large elections.<sup>33</sup> At-large elections have no districts; everyone votes for every seat. This can deny voters of color an equal voice because a white majority can win every seat, even in a diverse community.<sup>34</sup> CVRA 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.”<sup>35</sup> Unlike the federal VRA, the CVRA does not require plaintiffs to prove that the minority group at issue is sufficiently large and compact to constitute a majority in a potential district.<sup>36</sup>

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<sup>30</sup> *Shelby*, 570 U.S. at 572 (Ginsburg, J., concurring) (“An illegal scheme might be in place for several election cycles before a Section 2 plaintiff can gather sufficient evidence to challenge it.”).

<sup>31</sup> *Goosby v. Town of Hempstead*, 180 F.3d 476 (2d Cir. 1999).

<sup>32</sup> *See id.* at 484-85 (“The Town Board has six members, each of whom is elected at-large to serve a four-year term. These elections are staggered so that three members, or half the Board, are elected every two years.”).

<sup>33</sup> CAL. ELEC. CODE, California Voting Rights Act of 2001, § 14025 et. seq. (2002). Although called the CVRA of 2001, the legislation was actually enacted into law in 2002. 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).

<sup>34</sup> LDF, *At-Large Voting: Frequently Asked Questions*, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND [https://ippsr.msu.edu/sites/default/files/LLP/Presentations/At\\_large\\_voting\\_faq.pdf](https://ippsr.msu.edu/sites/default/files/LLP/Presentations/At_large_voting_faq.pdf).

<sup>35</sup> CAL. ELEC. CODE, California Voting Rights Act of 2001, § 14027 (2002).

<sup>36</sup> *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *see also* CAL. ELEC. CODE § 14028(c) (2001) (“The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027.”).

The State of Washington enacted its own state-level VRA in 2018, which is modeled on the CVRA but more expansive in that it provides a vote dilution cause of action for voters of color in both at-large and district-based local elections.<sup>37</sup> The following year, the State of Oregon enacted a state-level voting rights act that applies just to school district elections (as compared to the California and Washington Acts, which apply to all local governments).<sup>38</sup> In 2021, Virginia enacted the Virginia Voting Rights Act, which, among other things, provides: (1) new private rights of action against vote denial and vote dilution (applying to both dilutive at-large and district-based elections); (2) broader language assistance requirements than the federal VRA; and (3) pre-litigation mechanisms mandating public input before municipalities can modify election rules, a notice tool that was required of covered jurisdictions under the federal VRA but was lost with the *Shelby County* decision.<sup>39</sup>

These laws also make it easier for prevailing plaintiffs to recover attorneys' fees and costs (including expert witness fees), incentivizing private parties to enforce the law and for local governments to remedy violations before costly litigation.<sup>40</sup> The CVRA 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."<sup>41</sup> 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."<sup>42</sup>

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."<sup>43</sup> And in November 2019, the first major study of the CVRA's effects showed

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<sup>37</sup> Wash. Rev. Code Ann. § 29A.92.900 et seq.; see also ACLU Washington Voting Rights FAQ, <https://bit.ly/3lipxun>.

<sup>38</sup> Ore. Rev. Stat. § 255.400 et seq.

<sup>39</sup> Virginia House Bill 1890 (2021 Session), <https://bit.ly/39dpyEt>.

<sup>40</sup> See, e.g., CAL. ELEC. CODE § 14031 (2001), Wash. Rev. Code Ann. § 29A.92.900, Ore. Rev. Stat. § 255.400 et seq., and Virginia House Bill 1890 (2021 Session).

<sup>41</sup> *Maria P. v. Riles*, 743 P.2d 932, 937 (Cal. 1987).

<sup>42</sup> Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 185 (2003) (citation omitted).

<sup>43</sup> 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->

a significant (10-12%) increase in the election of minority candidates where districts switched from at-large systems to district-based elections.<sup>44</sup> 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." This is critical because recent analyses show that incremental improvements in diversity in local representation translate into more equitable policy outcomes.<sup>45</sup>

### **3. NEW YORKERS FACE ENDURING AND EVOLVING THREATS TO VOTING RIGHTS**

While voter suppression has been associated in the public mind with the Jim Crow South, New York State has its own sordid history of voting discrimination. Starting in the late 18<sup>th</sup> century, New York adopted a series of restrictive voting laws designed to disenfranchise minority and immigrant voters.<sup>46</sup> 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.

#### **A. Weakening the Voices of Voters of Color**

In recent years, New York has seen the investigation and successful prosecution of infringements on minority voting rights, particularly where counties or cities have drawn voting districts that make it difficult or impossible for voters of color to elect their favored candidates.<sup>47</sup> For example, the Albany County legislative redistricting plan has been the subject of racial vote dilution litigation three times in the past 25 years.<sup>48</sup> 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

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content/uploads/Voting-Rights-Barriers-In-21st-Century-Cal-Update.pdf.

<sup>44</sup> 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), [https://www.collingwoodresearch.com/uploads/8/3/6/0/8360930/cvra\\_project.pdf](https://www.collingwoodresearch.com/uploads/8/3/6/0/8360930/cvra_project.pdf).

<sup>45</sup> See, e.g. Vladimir Kogan, Stephane Lavertu, and Zachary Peskowitz, *How Does Minority Political Representation Affect School District Administration and Student Outcomes*, EdWorkingPapers (June 19, 2020), <https://www.edworkingpapers.com/ai20-244> ("We find some evidence that increases in minority representation lead to cumulative achievement gains . . . among minority students" and "[t]hese gains do not come at the expense of white students' academic performance"); Brett Fischer, *No Spending Without Representation: School Boards and the Racial Gap in Education Finance* (March 20, 2020), <https://ssrn.com/abstract=3558239> (presenting "causal evidence that greater minority representation on school boards translates into greater investment in minority students").

<sup>46</sup> Daniel Brook, *New York Should Hate the Voting Rights Act*, SLATE, Feb. 21, 2013, <https://bit.ly/2Ptx1WN>.

<sup>47</sup> See, e.g., *Pope v. County of Albany*, 94 F.Supp.3d 302, 351 (N.D.N.Y. 2015).

<sup>48</sup> *Id.*

litigation. Instead, the burden would 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 racially polarized voting patterns denies minority voters the opportunity to elect candidates of choice. In a racially polarized election, racial groups vote as a bloc, preferring the same candidates. Black people, for example, vote together for their preferred (frequently Black) candidate, and most non-Black voters support the opposing (typically white) candidate. Recent New York examples of discriminatory at-large elections featuring racially polarized voting include the Village of Port Chester in Westchester County,<sup>49</sup> the Town of Islip in Suffolk County,<sup>50</sup> and the East Ramapo Central School District in Rockland County.<sup>51</sup> These cases are neither unique nor outliers. As in Washington and California, the overwhelming majority of New York school districts, villages, and towns use at-large elections, which can lead to a white majority winning all available representation even when voters of color make up a substantial part of the population.<sup>52</sup>

Numerous racially diverse communities in New York lack any semblance of descriptive representation for voters of color on local councils—that is, minority voters make up a significant portion of the citizen voting age population, but none of the elected officials are people of color, potentially indicating the presence of racial vote dilution.<sup>53</sup> A more efficient private right of action that reduces plaintiffs’ burden of proof and cost while also giving defendants greater incentive and opportunity to resolve cases without resort to taxpayer-funded litigation would allow for more pervasive investigation,

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<sup>49</sup> See, e.g., *United States v. Village of Port Chester*, 704 F.Supp.2d 411, 447 (E.D.N.Y. 2010).

<sup>50</sup> *Flores v. Town of Islip*, No. 18-CV-3549 (GRB)(ST), 2020 WL 6060982, at \*1 (E.D.N.Y. Oct. 14, 2020) (entering consent decree).

<sup>51</sup> *Nat’l Ass’n for Advancement of Colored People, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 373 (S.D.N.Y. 2020), *aff’d sub nom. Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021).

<sup>52</sup> Jessica Trounstine and Melody E. Valadini, *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).

<sup>53</sup> The lack of descriptive representation is *only* a rough indicator. The mere fact that some elected members of the local council may be people of color is not necessarily indicative of a lack of racial vote dilution or suppression. See *E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d at 400 (“If, as here, a successful minority candidate is not minority preferred, that is evidence of racial polarization, not the lack thereof.”), *aff’d* 984 F.3d 213 (“minority [candidate] success may be discounted if it results from ‘politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election’ or efforts to ‘thwart successful challenges to electoral schemes on dilution grounds’”).

prosecution, and remedy of vote dilution cases. The CVRA’s focus on at-large elections provides a valuable first step, but some racially and ethnicity diverse counties and municipalities that administer elections by district also experience racially polarized voting that limits the effective choices of minority voters.<sup>54</sup>

## **B. Barriers to the Ballot**

Voter suppression in the form of burdensome barriers to the ballot also exists in New York.<sup>55</sup> The state’s low registration and turnout rates testify to this: In the November 2016, 2018, and 2020 elections, New York ranked among the bottom ten states on both measures.<sup>56</sup> One example of a common practice that results in voter suppression and is especially difficult to remedy in a timely fashion through affirmative litigation is polling place designations that are inaccessible 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 affect minority voters can take expert analysis and significant time, making it difficult to bring successful remedial litigation before an election.

The implementation of early voting has been a bellwether practice on this front. In 2019, Rensselaer County designed an early voting plan that made early voting virtually impossible for the overwhelming majority of the county’s minority voters.<sup>57</sup> The Board of Elections designated only two early voting sites—fewer than required for a county with more than 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 people of color in the county.<sup>58</sup> Instead, the two chosen sites were located in areas that are not densely populated, and

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<sup>54</sup> 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.”).

<sup>55</sup> 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>.

<sup>56</sup> See U.S. Census Bureau, *Reported Voting and Registration for States: November 2020*, <https://www2.census.gov/programs-surveys/cps/tables/p20/585/table04a.xlsx>.

<sup>57</sup> See July 22, 2019 Letter from Melanie Trimble et al. to Commissioners, Rensselaer County Board of Elections.

<sup>58</sup> U.S. Dep’t of Justice, Language Minority Citizens, <https://www.justice.gov/crt/language-minority-citizens>.

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 for voters of color, Rensselaer County and the Rensselaer County Board of Elections refused to make early voting accessible to the citizens of Troy. Over the course of three election cycles, local community groups and civil rights groups dedicated substantial time and resources to press the Rensselaer County Board of Elections for equitable access to early voting for Troy voters, including several sophisticated analyses demonstrating the inadequacy of their early voting site plans and proposing better alternative sites. The Rensselaer County Board of Elections persistently ignored these analyses and alternatives sites.

Ultimately, the Attorney General and local community sued successfully in state court, obtaining relief under Election Law § 8-600 from the County's failure to provide minimum statutory levels of access to early voting; however, relief was stayed for the 2021 primary election and was not implemented until the 2021 general election.<sup>59</sup> Troy voters' experience illustrates both "the inordinate amount of time and energy required" to combat voting discrimination on a case-by-case basis and the importance of passing legislation that would "shift the advantage of time and inertia" away from local governments with a record of discrimination.<sup>60</sup> In addition, a streamlined anti-discrimination claim could have strengthened local voters' case and undercut the County's resistance to making changes to provide voters of color equal access to early voting.

During the November 2020 election, voters waited on hours-long lines through several days of early voting in counties where the boards of elections failed to provide either an adequate number of sites or operating hours for early voting sites. Many boards of elections responded to the demand by increasing the number of early voting hours, but several county boards refused to take any steps to alleviate lines so long that they discouraged voters from casting ballots. In Rockland County, the local branches of the NAACP brought a successful emergency action under state anti-discrimination laws and early voting regulations to extend hours during the final weekend of early voting.<sup>61</sup>

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<sup>59</sup> *People by James v. Schofield*, 154 N.Y.S.3d 359 (N.Y. Sup. Ct.), *aff'd*, 199 A.D.3d 5 (N.Y. App. Div. 2021) (granting motion to intervene brought by Troy Branch of the NAACP and Black and disabled voters, and otherwise affirming on the merits). A 2020 amendment to Election Law § 8-800 specifically required county boards to provide early voting opportunities in the most populous areas, further strengthening the case against Rensselaer.

<sup>60</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

<sup>61</sup> *Spring Valley Branch of the NAACP et al. v. Rockland Cnty Bd. of Elections*, 03592/2020 (N.Y. Sup. Ct. 2020).

There was a similarly successful lawsuit in Ulster County.<sup>62</sup> However, these court victories came several days into the early voting period,<sup>63</sup> after many voters had already been harmed—and they did not solve similar problems elsewhere in New York. For example, Suffolk County voters—particularly in Latinx and Black neighborhoods—waited on line for hours, sometimes in the rain and cold temperatures during the pandemic, to cast their ballots<sup>64</sup> while the Suffolk County Board of Elections refused to expand either the number of early voting hours or sites to alleviate waiting times. Unfortunately, the short timeframe and the resources required to bring suit prevented voters from bringing similarly successful litigation there.

These examples illustrate a simple truth: Instead of requiring voters of color to play the role of watchdog against their own disenfranchisement, jurisdictions should bear the burden of ensuring that their election schemes 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. Further, streamlined anti-discrimination claims can strengthen voters' hands in regions not subject to preclearance, and help them fight discrimination that is harmful but less blatant than the examples cited above.

### C. Inadequate Language Assistance

Providing adequate election assistance to language minority voters has also been a problem in New York—a state that enjoys enviable language diversity. 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.”<sup>65</sup> Currently, seven counties in New York—and all of the political subdivisions (e.g., cities, school districts) in those counties—must provide assistance to Spanish-speaking voters.<sup>66</sup> 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

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<sup>62</sup> *McKenzie v. Ulster County Board of Elections*, EF2020-2716 (Ulster Cty. Sup. Ct. 2020).

<sup>63</sup> See Robert Brum & Nancy Cutler, *Rockland early voting hours extended, accommodations added, following lawsuit*, Rockland/Westchester Journal News (Oct. 30, 2020), <https://bit.ly/3JR8nYT>.

<sup>64</sup> See, e.g., Rachelle Blidner et al., *Liners go to polls in droves to vote in the election of a lifetime*, Newsday, Nov. 3, 2020, <https://www.newsday.com/long-island/long-island-voting-scene-polls-1.50054978>.

<sup>65</sup> *Section 203 of the Voting Rights Act*, U.S. Dept. of Justice, <https://www.justice.gov/crt/language-minority-citizens> (last updated Mar. 11, 2020).

<sup>66</sup> 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>.

Indian languages. Nonetheless, some of these jurisdictions have failed to meet these limited federal obligations,<sup>67</sup> 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)<sup>68</sup> have done, New York State could provide language assistance well above the federal law minimum.

Even under an expanded language assistance scheme proposed in the New York City Council,<sup>69</sup> 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 has any guarantee of receiving language assistance in elections, other than Spanish speakers in a few counties.<sup>70</sup> 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 the fastest growing communities of immigrants and people of color.<sup>71</sup> 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.

#### **D. Lack of Transparency Creates Opportunities for Discrimination**

Ensuring that voters, advocates, researchers, and authorities have efficient access to high quality electronic records is critical to rigorous enforcement of voting rights laws, and for voters to be able to understand how their local election rules stack up against

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<sup>67</sup> 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”).

<sup>68</sup> See generally Ca. Sec’y of State, *Language Requirements for Election Materials*, <https://www.sos.ca.gov/elections/voting-resources/language-requirements> (last visited Feb. 11, 2022); NYC Civic Engagement Commission, *Language Access Plan*, <https://www1.nyc.gov/site/civicengagement/about/language-access-plan.page> (last visited Feb. 11, 2022).

<sup>69</sup> 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://on.nyc.gov/36BtUqr>.

<sup>70</sup> See, e.g., *In Matter of Rockland County Board of Elections*, Memo. of Agreement (MOA) Concerning Minority Language Access, N.Y. Atty. Gen. Civ. Rights Bureau, Sept. 12, 2012, <https://on.ny.gov/3sdmfXD>; *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](https://www.justice.gov/sites/default/files/crt/legacy/2012/04/20/orange_cd_ny.pdf).

<sup>71</sup> 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](http://www.aafny.org/doc/AAF_poverty_2018.pdf).

others across the state. Discrimination is difficult to uncover and prove if advocates cannot quickly examine local practices and compare outcomes across jurisdictions.

Currently, however, it is very difficult for voters, academics, or civil rights advocates to receive critical election data in a timely fashion from county boards of elections or from jurisdictions that administer their own elections. 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 Freedom of Information Law (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 given that these records are often key to uncovering and proving discrimination.

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.<sup>72</sup> BOENYC failed to produce records within the 60-day time period designated by FOIL. 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.

### **E. Voter Intimidation**

The 2020 election demonstrated once again that voter intimidation is re-emerging as a significant problem across the country. Recent elections have seen extremists showing up at polling places armed to the teeth; truck caravans driving into Black or Latino neighborhoods to intimidate voters; and police presence at several polling places in communities where the relationship with law enforcement is historically fraught.<sup>73</sup> In Michigan cities of Detroit and Flint, Black voters received robocalls with deceptive information about when and where to vote.<sup>74</sup>

Even before that, however, in 2019, Rensselaer County threatened to send voter registration data to U.S. Immigration and Customs Enforcement, only backing down

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<sup>72</sup> May 16, 2019 Letter from Perry Grossman, Susan Lerner, and John Powers, to John Wm. Zacccone and Michael J. Ryan, Board of Elections in the City of New York.

<sup>73</sup> LDF, *Democracy Diminished*, *supra* note 22 at 2, 10, 20, 35, 59; NAACP Legal Def. and Educ. Fund, Inc., *Democracy Defended* 12-14, 21-22 (Sept. 2, 2021), [https://www.naacpldf.org/wp-content/uploads/LDF\\_2020\\_DemocracyDefended-1-3.pdf](https://www.naacpldf.org/wp-content/uploads/LDF_2020_DemocracyDefended-1-3.pdf).

<sup>74</sup> Sam Gringlas, “Far-Right Activists Charged Over Robocalls That Allegedly Targeted Minority Voters,” NATIONAL PUBLIC RADIO (October 1, 2020), <https://n.pr/3sdlk9D>; Ron Fonger, “Attorney general warns of false robocalls targeting Flint voters,” MICHIGAN LIVE (Nov. 3, 2020), <https://bit.ly/3BH1NnL>.

when they were sued under the federal VRA.<sup>75</sup> Last year, at the request of the Buffalo Police Department, the Erie County District Attorney’s Office designated an assistant district attorney to investigate voter intimidation and other election-related issues.<sup>76</sup>

The NYVRA combats the rise in voter intimidation by giving any voter the right to sue a person or group engaging in “acts of intimidation, deception, or obstruction that affects the right of voters to access the elective franchise.”<sup>77</sup> This expands upon the protections in the federal VRA and provides a state-court, civil cause of action that is not currently available under New York law.

**4. THE NYVRA WILL PROVIDE BETTER TOOLS TO ERADICATE EXISTING DISCRIMINATION AND PREVENT BACKSLIDING WHILE AFFIRMATIVELY EXPANDING PARTICIPATION.**

Enacting the NYVRA is 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 VRA is uncertain due to a federal judiciary that grew more hostile to voting rights as a result of appointments by the prior administration. The NYVRA builds upon the demonstrated track record of success in California, Oregon, Virginia, and Washington, as well as the historic success of the federal VRA, by offering the most comprehensive state law protections for the right to vote in the United States. The law will address many long-overlooked infringements on the right to vote, and will make New York a national leader in voting rights at a time when too many other states are trying to restrict access to the franchise.

The NYCLU and LDF support the bill in its entirety. The information below focuses on seven sections as particularly important to ensuring equal opportunity for eligible citizens to participate in the political process.<sup>78</sup>

***Section 1: The Democracy Canon.*** Section 1 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 election laws in “in favor of voter enfranchisement, which

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<sup>75</sup> Mallory Moench & Kenneth C. Crowe II, *Rensselaer County Board of Elections to give ICE voter registration information*, Times Union (July 18, 2019), <https://bit.ly/36nnGtZ>.

<sup>76</sup> WGRZ Staff, *Erie County District Attorney's office investigating voter intimidation, fraud allegations at polling location*, WGRZ 2 (Oct. 27, 2021), <https://bit.ly/3vboOLy>.

<sup>77</sup> S.1046A (N.Y. 2021-2022) (creating N.Y. Elec. Code § 17-214); A.6678A (N.Y. 2021-2022) (same).

<sup>78</sup> See S.1046A (N.Y. 2021-2022) (creating N.Y. Elec. Code §§ 17-202, 17-206, 17-208, 17-210, 17-212, 17-214, 17-220); A.6678A (N.Y. 2021-2022) (same).

could be overcome only by clear statutory language to the contrary or strong competing policy reasons.”<sup>79</sup>

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 and protects equitable access to those fundamental rights for racial and language minority groups.

**Section 2: Vote Denial & Dilution.** Section 2 of the NYVRA (proposed Election Law §17-206) provides a framework to ferret out vote dilution and barriers that deny voting opportunities 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 County, the Towns of Hempstead and Islip, the City of New Rochelle, and the Village of Port Chester, and the East Ramapo Central School District. Unfortunately, these jurisdictions are not outliers, 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.<sup>80</sup>

Section 2 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 or district lines dilute minority voting strength compared to federal law. Much like state voting rights acts in California, Oregon, Washington, and Virginia, 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. This is primarily because NYVRA does not require plaintiffs to prove certain background facts that are difficult to establish but not essential to ensuring nondiscrimination, such as whether a particular group of voters of color can make up a numerical majority in a hypothetical district. In addition, 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 a safe harbor to cure violations without lengthy and expensive litigation.

At times, a local jurisdiction may find itself in a bind because a voting practice or procedure has a discriminatory impact within its borders but the city or town lacks the

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<sup>79</sup> See Richard Hasen, *The Democracy Canon*, 62 Stan. L. Rev. 69, 77 (Dec. 2009). 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....” 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.

<sup>80</sup> See, e.g., Thomas C. Zambito, *East Ramapo wants to cut NAACP legal fees to \$1, if not teachers could be fired*, The Journal-News, Jan. 13, 2021, <https://bit.ly/3BL5INV> (“The district has already paid its own lawyers between \$7.2 million and \$8.9 million from its budget . . .”).

legal authority to change the rule on its own. The NYVRA solves this problem and saves all parties the time and cost of securing a court order by permitting any such jurisdiction to propose a remedial change to the Office of the Attorney General and granting the Civil Rights Bureau the authority to approve the change.<sup>81</sup>

The NYVRA builds upon both the federal VRA and other state VRAs by providing a clearer and more efficient framework for prosecuting discriminatory barriers to the ballot, as well as racial gerrymandering claims. The NYVRA will ensure that voters are better able to hold jurisdictions accountable for maintaining practices that suppress turnout in communities of color such as inconvenient polling locations; inadequate voting hours; off-cycle election dates; wrongful voter purges; and staggered elections, among others.

**Section 3: Statewide Database.** Section 3 of the NYVRA (proposed Election Law § 17-208) offers New York an opportunity to bring its elections into the 21<sup>st</sup> 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 voters, civil rights organizations, academics, and others 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. This information is essential to compare and contrast voting practices and outcomes across the state—but right now acquiring it requires approaching each jurisdiction of interest in a piecemeal fashion.

For example, a research collaboration on political participation in school districts between NYCLU, education scholars, sociologists, and political scientists has required 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 its 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 is necessary to making recommendations to improve the abysmal turnout rates in school district elections.<sup>82</sup>

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<sup>81</sup> S.1046A (N.Y. 2021-2022) (creating N.Y. Elec. Code § 17-206(7)(c)); A.6678A (N.Y. 2021-2022) (same). Once approved by the Civil Rights Bureau, the change goes into effect “notwithstanding any other provision of law, including any other state or local law.”

<sup>82</sup> Perry Grossman, *Current Conditions of Voting Rights Discrimination: New York*, at Oct. 6, 2021 <https://andstillvote.org/wp-content/uploads/2021/10/New-York-State-Report.pdf> (“Based on an original analysis of recent school board elections in twenty-five large, diverse school districts in Nassau, Westchester, Suffolk, Rockland, and Oneida Counties conducted by the New York Civil Liberties Union,

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 4: Language Access.*** Section 4 of the NYVRA (proposed Election Law § 17-210) requires more robust language assistance than federal law for limited English proficient voters. 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, Westchester, Monroe, and 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 across 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 required by Section 3 can also help election officials and enforcement authorities determine 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: Preclearance.*** Section 5 of the NYVRA (proposed Election § 17-212) brings the framework of the most effective civil rights law in American history to New

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an estimated 6.3 percent of CVAP voted in school district elections. The analysis of voter records for the years 2016- 2019 shows the racial disparity in school district election turnout rates is large.”).

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.<sup>83</sup> 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.”<sup>84</sup>

Even if voters of color 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 voters facing discrimination 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 certain changes to their election laws have neither the purpose nor effect of making minority voters worse off.<sup>85</sup> 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 convenient for minority voters, the Board of Elections has justified the shift and shown that the change is not retrogressive.

Preclearance was effective at protecting minority voters. Some covered counties (including in New York City) appreciated preclearance because the process ensured the use of best practices for fostering political participation, particularly among voters of color. Covered jurisdictions have also made clear that they viewed preclearance as a way to prevent expensive and prolonged litigation; in this way it serves as a form of alternative dispute resolution (ADR). 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.”<sup>86</sup> In 2009, the State of New York 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

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<sup>83</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).

<sup>84</sup> H.R. Rep. No. 109-478, at 6.

<sup>85</sup> *Katzenbach*, 383 U.S. at 314.

<sup>86</sup> See, e.g., Brief of Appellee Travis County, *Northwest Austin Municipal Utility District No. 1 v. Holder*, 08-322 at 11 (2009), [https://campaignlegal.org/sites/default/files/FINAL\\_TRAVIS\\_COUNTY\\_BRIEF.pdf](https://campaignlegal.org/sites/default/files/FINAL_TRAVIS_COUNTY_BRIEF.pdf).

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.<sup>87</sup>

Preclearance under Section 5 of the NYVRA is patterned on the same law that the New York State Attorney General defended as having “minimal burdens” compared to “real and substantial benefits.”<sup>88</sup> 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 changes that must be submitted for preclearance.<sup>89</sup> Yet because a key purpose of preclearance is to guard against new, inventive ways to discriminate, the Act also allows the Attorney General to add to the list of covered practices any voting rule that causes persistent problems.

The NYVRA’s preclearance regime 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

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<sup>87</sup> 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), <https://campaignlegal.org/sites/default/files/1996.pdf>.

<sup>88</sup> 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), <https://bit.ly/3p5w0oM>.

<sup>89</sup> S.1046A (creating N.Y. Elec. Code § 17-212) (requiring preclearance for “any new or modified voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy concerning and of the following topics: (a) Districting or redistricting; (b) Method of election; (c) Form of government; (d) Annexation of a political subdivision; (e) Incorporation of a political subdivision; (f) Consolidation or division of political subdivisions; (g) Removal of voters from enrollment lists or other list maintenance activities; (h) Number, location, or hours of any election day or early voting poll site; (i) Dates of elections and the election calendar, except with respect to special elections; (j) Registration of voters; (k) Assignment of election districts to election day or early voting poll sites; (l) Assistance offered to members of a language-minority group; and (m) [additional topics as may be designated by the Attorney General]”); A.6678A (same).

benefit from long-term savings that come with more inclusive, and better-functioning election administration.

**Section 6: Voter Intimidation.** Section 6 of the NYVRA (proposed Election Law § 17-214) provides New Yorkers with a civil cause of action against voter intimidation, deception, or obstruction that is more important than ever given recent efforts to stoke fear, spread disinformation, and obstruct access to ballot box 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. The NYVRA provides voters with critical protection against the rise in voter intimidation and deception that has occurred and is likely to continue as the beneficiaries of voter suppression see increased threats to their power from the ballot box.

**Section 7: Making Private Enforcement Feasible.** Section 7 of the NYVRA (proposed Election Law § 17-220) ensures that there are adequate incentives for voters, advocacy organizations, and public-minded attorneys 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 the 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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**For more information about the NYVRA, please contact Perry Grossman of NYCLU at [pgrossman@nyclu.org](mailto:pgrossman@nyclu.org) or Steven Lance of LDF at [slance@naacpldf.org](mailto:slance@naacpldf.org).**

**New York Civil Liberties Union ("NYCLU")**

*Founded in 1951 as the New York affiliate of the American Civil Liberties Union, NYCLU is a not-for-profit, nonpartisan organization with eight chapters and regional offices, and more than 160,000 members across the state. Its mission is to defend and promote the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including freedom of speech and religion, and the right to privacy, equality and due process of law, with particular attention to the pervasive and persistent harms of racism. The NYCLU works toward this mission by advocating for all New Yorkers to have equal access to opportunities and the equal ability to participate in government decisions that affect them. This includes planning and development decisions, which historically have excluded or intentionally discriminated against Black, Indigenous, and Latinx New Yorkers. The NYCLU is incorporated under the laws of the State of New York, with its principal place of business in New York, New York.*

**NAACP Legal Defense and Educational Fund, Inc. ("LDF")**

*Since its founding in 1940, LDF has used litigation, policy advocacy, public education, and community organizing strategies to achieve racial justice and equity in education, economic justice, political participation, and criminal justice. Throughout its history, LDF has worked to enforce and promote laws and policies that increase access to the electoral process and prohibit voter discrimination, intimidation, and suppression. LDF has been fully separate from the National Association for the Advancement of Colored People ("NAACP") since 1957, though LDF was originally founded by the NAACP and shares its commitment to equal rights.*