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**Testimony of the New York Civil Liberties Union  
Before the Nassau County Legislature  
Regarding The Mask Transparency Act, A Local Law to Prohibit the Use of  
a Mask or Facial Covering for the Purposes of Concealing an Individual’s  
Identity in a Public Place, Clerk Item No. 142-24**

**August 5, 2024**

The New York Civil Liberties Union (NYCLU) appreciates the opportunity to submit the following testimony in opposition to Nassau County’s proposed “Mask Transparency Act,” a Local Law to Prohibit the Use of a Mask or Facial Covering for the Purposes of Concealing an Individual’s Identity in a Public Place, Clerk Item No. 142-24 (2024).<sup>1</sup> The NYCLU advances civil rights and civil liberties so that all New Yorkers can live with dignity, liberty, justice, and equality. Founded in 1951 as the state affiliate of the American Civil Liberties Union, we marshal an expert mix of litigation, policy advocacy, field organizing, and strategic communications. Informed by the insights of our communities and coalitions and powered by 90,000 member-donors, we work across complex issues to create more justice and liberty for more people.

The proposed mask ban would prohibit anyone (i) from entering or appearing “on or within any sidewalk, walkway, alley, street, road, highway, or other public right-of-way or public property or private property without the consent of the owner or tenant” (ii) if they are wearing any form of facial covering that disguises a person’s face or voice (iii) with the intent to conceal their identity.<sup>2</sup> The legislation states that it “shall not apply to facial coverings worn to protect the health or safety of the wearer, for religious or cultural

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<sup>1</sup> The NYCLU’s comments are based on the “Amendment in the Nature of a Substitution” with a date stamp of July 29, 2024 from the Clerk’s office. While the sponsoring legislator had indicated that the language of the mask ban would change from that passed out of the Public Safety and Rules Committee in July, neither the original nor the amended version of the bill has been publicly posted on the County Legislature’s website, including in the Agenda Packet for the August 5th meeting. See Pilip, M. 2024. “Breaking News” [Instagram]. 15 July. Available at: <https://www.instagram.com/p/C9dGy0Yp8sp/> (accessed 1 August 2024). The NYCLU was able to access the amended bill, and notes that the proposed amendment meaningfully differs from the version considered by the Public Safety and Rules Committee in that it both eliminates an age requirement and sets forth what are seemingly vague, narrowing principles that create more questions about the bill than answers. It is this amended version of the bill that will be voted upon by the County Legislature on August 5, 2024.

<sup>2</sup> Clerk Item No. 142-24 § 3(a).

purposes, or for the peaceful celebration of a holiday or similar religious or cultural event for which the wearing of masks or facial coverings are customarily worn.”<sup>3</sup> However, it also notes that “a law enforcement officer may require a person or persons to remove the[ir] mask during traffic stops or when the officer has reasonable suspicion of criminal activity and/or intention to partake in criminal activity.”<sup>4</sup> A new subsection—3(b), added in an amendment filed with the Clerk on July 29th—sets forth a range of circumstances that are seemingly intended to narrow the circumstances under which masking is prohibited. These circumstances include: when more than one person wearing a mask or facial covering is congregated in a public place, when any person knowingly permits or helps people who are masked to congregate in a public place, where someone masked is acting with the intent (via force or threat of force) to injure or interfere with any person’s exercise of their rights or intimidate a person or class of persons from exercising their rights, when someone masked acts intending to “intimidate, threaten, abuse, or harass” another, or when someone “is engaged in conduct that could *reasonably lead* to the institution of a civil or criminal proceeding” and is masked “with the *intent* of avoiding identification” if a criminal or civil proceeding were to be brought.<sup>5</sup> Those found guilty of violating the law can be punished with a fine of up to \$1000 *and* can be incarcerated for up to one year.<sup>6</sup>

The NYCLU strongly opposes this ban because it fails to adequately protect health and safety, will inevitably discriminate against people with disabilities and those they associate with, contains insufficient exceptions that will not be able to be faithfully applied, opens the floodgates to disproportionate enforcement, penalizes individuals for what they are wearing rather than unlawful conduct, and fails to protect the right to anonymous political protest and shield individuals from doxxing. Further, the manner by which this legislation has made its way through the Legislature has lacked transparency and undermined the ability of residents to engage in the democratic process. We urge the Nassau County Legislature to reject this measure.

## **I. The Mask Ban Will Place the Health of Individuals, their Loved Ones, and their Communities at Risk.**

Masks are an important tool to protect against infectious disease. The United States is currently experiencing a COVID wave,<sup>7</sup> with infection rates increasing across the nation. We may also stand at the precipice of an H5N1 (bird flu) outbreak in humans,<sup>8</sup> spurring the

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* § 3(b) (emphasis added).

<sup>6</sup> *Id.* § 4.

<sup>7</sup> Fenit Nirappil & Lizette Ortega, *Covid summer wave spreads across U.S., even infecting Biden*, WASH. POST, July 18, 2024, <https://www.washingtonpost.com/health/2024/07/18/biden-covid-summer-wave-symptoms-flirt-variant/>.

<sup>8</sup> Helen Branswell (@HelenBranswell), TWITTER (Jun. 28, 2024, 2:17 pm), <https://x.com/HelenBranswell/status/1806753911841361928>.

Centers for Disease Control and Prevention to ask “health departments to distribute existing PPE stocks to farmworkers.”<sup>9</sup> Against this backdrop, New Yorkers have good reason to choose to mask to protect themselves and their loved ones against contagious disease.

What is more, masks do not merely protect people from airborne disease. Just last summer, wildfire smoke drifting in from Canada forced many New Yorkers to don masks to protect themselves<sup>10</sup> at the encouragement of government officials.<sup>11</sup> And there is good reason to believe that these smokey conditions will continue to recur.<sup>12</sup>

New Yorkers mask for many reasons. Some do so because they themselves are immunocompromised or at high-risk of adverse outcomes from contagious disease. Others mask to protect a loved one or roommate who is high-risk. Still others wish to avoid Long COVID, a condition that has plagued 30% of people have contracted COVID<sup>13</sup>—some of whom had no obvious risk factors prior to infection. Some mask to avoid air pollution accompanying wildfire smoke. Still others mask because they are looking forward to an

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<sup>9</sup> U.S. Department of Agriculture, *USDA, HHS Announce New Actions to Reduce the Impact and Spread of H5N1*, May 5, 2024, <https://www.usda.gov/media/press-releases/2024/05/10/usda-hhs-announce-new-actions-reduce-impact-and-spread-h5n1>.

<sup>10</sup> Emma Newburger, *New York City Tops World’s Worst Air Pollution List from Canada Wildfire Smoke*, CNBC, Jun. 7, 2023, <https://www.cnbc.com/2023/06/07/canadian-wildfire-smoke-nyc-residents-urged-to-stay-inside.html>.

<sup>11</sup> See, e.g., Eduardo Cuevas, *Should New Yorkers be Wearing Face Masks Outside? NY Experts Say Yes. Here’s Why*, LOHUD.COM, Jun. 7, 2023, <https://www.lohud.com/story/news/2023/06/07/nyc-wear-face-masks-if-people-must-go-outside-amid-wildfire-smoke/70297465007/> (“For people who must be outdoors, a high-quality mask, like an N95, KN95 or KF94, is recommended,” Dr. Ashwin Vasani, commissioner of the New York City Department of Health and Mental Hygiene, told reporters.); NYC Health, *Guidance of Mask Use When Outdoor Air Quality Is Poor Due to Air Pollution from Wildfire or Other Smoke*, <https://www.nyc.gov/assets/doh/downloads/pdf/eode/mask-guidance-smoke.pdf> (last visited Aug. 1, 2024); New York State, *Governor Hochul Announces One Million N95 Masks to be Made Available to New Yorkers as Effects of Canadian Wildfires Continue to Impact Air Quality in New York State*, Jun. 7, 2023, <https://www.governor.ny.gov/news/governor-hochul-announces-one-million-n95-masks-be-made-available-new-yorkers-effects-canadian> (“Every part of New York State has experienced unhealthy air quality in the last 24 hours as a result of Canadian wildfires, and our number one priority right now is keeping New Yorkers safe,” Governor Hochul said. “Prolonged exposure to this harmful air will cause negative health impacts, which is why we’re making high-quality masks available at high-traffic areas across New York.”); Dan Diamond, *NYC Tells Vulnerable Residents to Mask Up as Wildfire Smoke Engulfs City*, THE WASHINGTON POST, Jun. 7, 2023, <https://www.washingtonpost.com/weather/2023/06/07/nyc-mask-guidance-air-quality-canada-wildfire/>.

<sup>12</sup> Brianne Roesser, *New York Could Grapple with Wildfire Smoke Again this Summer*, SPECTRUM NEWS 1, Apr. 23, 2024, <https://spectrumlocalnews.com/nys/buffalo/news/2024/04/23/new-york-could-grapple-with-wildfire-smoke-again-this-summer>; Austyn Gaffney, *Western Wildfire Smoke Reaches the East Coast*, THE NEW YORK TIMES, Jul. 25, 2024, <https://www.nytimes.com/2024/07/25/climate/wildfire-smoke-climate.html>.

<sup>13</sup> Alice Burns, *As Recommendations for Isolation End, How Common is Long COVID?*, KFF, Apr. 9, 2024, <https://www.kff.org/coronavirus-covid-19/issue-brief/as-recommendations-for-isolation-end-how-common-is-long-covid/>.

event on the horizon and do not want to get sick and be unable to attend. A mask ban threatens to exile all of these people from society.

## **II. The Mask Ban Violates the Americans with Disabilities Act and Rehabilitation Act.**

The mask ban will effectively force individuals with a disability-related need to wear a mask of some type to remove that mask, whether completely or temporarily, as a condition of engaging in activities of daily life in the community.

It is unlawful to harass or otherwise discriminate against individuals based on disability. Nassau County should not put their law enforcement personnel into the position where they will violate the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act (“Section 504”).<sup>14</sup>

The ADA and Section 504—standing as the pillars of federal disability law—require governments to provide people with disabilities, their families, loved ones, and others who “associate” with people with disabilities,<sup>15</sup> equal access to government programs, services and activities — including public transportation, schools, voting precincts, and town meetings.<sup>16</sup> Under the ADA and Section 504, Nassau County cannot exclude people with disabilities or their families and caregivers from the public sphere, deny them equal access to the public sphere, or segregate them unnecessarily from the public sphere. Nassau County is obligated to provide reasonable modifications to its policies, practices, and

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<sup>14</sup> In enacting the ADA, Congress recognized that “discrimination against individuals with disabilities continues to be a serious and pervasive social problem” in “such critical areas as . . . health services . . . and access to public services.” 42 U.S.C. § 12101(a)(2)-(3). Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, states that, “[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” Similarly, Section 504 provides that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .” 29 U.S.C. § 794(a).

<sup>15</sup> Both the ADA and Section 504 protect against “associational discrimination.” Is it unlawful to discriminate against an individual, whether disabled or not, because of a relationship or association with an individual with a disability. That relationship includes family, business, professional, or social relationships. 42 U.S.C. § 12188; 29 U.S.C. § 794a(a)(2).

<sup>16</sup> In 2021, for example, a federal judge ruled that a ban on school-masking requirements in Texas interfered with the ability of school districts in the state to comply with the ADA, noting that a mask ban would deny some disabled students with equal opportunity to participate in in-person instruction — lest they risk going to class with unmasked peers. Brian Lopez, *Texas Schools Can Again Set Their Own Face Mask Rules After Federal Judge Overrules Gov. Greg Abbott’s Ban*, TEXAS TRIBUNE, Nov. 10, 2021, <https://www.texastribune.org/2021/11/10/texas-schools-mask-mandate-ban-overturned/>.

procedures in order to give people with disabilities, as well as their families, associates, and caregivers, an equal opportunity to participate in society.

The mask ban could diminish, or eliminate, access to the kinds of programs, services, and activities covered by the ADA and Section 504 by people who are protected by these laws—such as cancer patients who may need to wear a mask due to a compromised immune system. The ban could also limit the day-to-day activities of persons covered by the ADA and Section 504 by removing a person’s ability to mask safely. Without the ability to mask safely in public, an individual is deprived of their ability to safely assemble with others and to engage in all aspects of their community. People with disabilities, and those with whom they “associate,” must be afforded the freedom to wear masks in order to protect and save their lives, without fear of being arrested and threatened with fines and prison time. As now written, the proposed amended mask ban will also potentially criminalize an *unmasked* “associate” of a person with disabilities because that person “knowingly permits or aids masked persons to congregate in a public place.”

Moreover, people wearing a mask for disability-related reasons may be subject to harassment due to inevitable misunderstanding of any legal interpretation of the mask ban that may be offered by Nassau County. Even with appropriate and widespread messaging to support those who wear masks for a disability-related purpose, there may be public altercations or inappropriate interactions in public or private settings, such as restaurants, stores, or the other retail establishments where individuals wearing a mask are told they have to remove their mask or that it is otherwise unlawful for them to be wearing a mask when the intent simply is not to conceal the identity of the wearer.

### **III. The Mask Ban’s Exceptions are Insufficient and There is No Way the Exceptions Will be Faithfully and Fairly Applied.**

While Clerk Item No. 142-24 includes exceptions,<sup>17</sup> the exceptions are insufficient and there is no way to ensure that these exceptions can be faithfully applied. Several exceptions—including those establishing that the mask ban “shall not apply to facial coverings worn to protect the health or safety of the wearer [or] for religious or cultural purposes”—have carried over from the July version of the bill. However, none of the deficiencies present in these exceptions have been addressed.

The “health and safety” exception applies only to those who are masking to protect *their own* health and safety. This offers little protection to an immunocompromised person whose family members must travel through the world unmasked and may return home to infect

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<sup>17</sup> The mask ban proposal considered by the Committee in July only applied the mask ban law to people “over 16 years of age.” The amended mask ban proposal removed the 16-year-old age restriction and will apply to all masked individuals of any age.

them. In addition, as written, the exception does not permit an individual who may be ill or shedding a virus from masking to protect the health and safety of *others*.

And, while the mask ban contains an exemption for “facial coverings worn [...] for religious or cultural purposes,” Nassau County appears to have no policies governing how law enforcement must engage with people wearing certain Islamic religious garments, such as niqabs and burqas that some Muslim women wear to cover their face in public. Earlier this year, the Nassau County Executive indicated that decisions about religious head and face coverings are best left to the unfettered discretion of the police department and sheriff’s office.<sup>18</sup> This lack of a clear and codified policy inevitably will lead to abuses, either through ignorance or prejudice.

The amendments to Clerk Item No. 142-24 seek to incorporate additional exceptions through the addition of Section 3(b), seemingly with the intent to try and narrow the application of the proposed mask ban. However, Section 3(b) is both ill-conceived and poorly drafted. The added language creates enormous uncertainty and vagueness about whether and when law enforcement may invoke the mask ban. For example, does a person who is unmasked (seemingly a prerequisite for the application of the statute per 3(a)) but who “knowingly permits or aids persons [who are] masked or disguised to congregate in a public place”<sup>19</sup> run afoul of the law? What is regarded as conduct that “could reasonably lead to the institution of a civil or criminal proceeding”?<sup>20</sup> Creating such vague uncertainties fails to provide individuals the notice and due process protections that the Constitution demands.

What is more, a mask ban with exceptions invites scrutiny of every person who chooses to wear a mask. How are police or courts to determine an individual’s subjective reason for masking?<sup>21</sup> How will the county address people who mask for more than one reason? Indeed, existing biases will color who police believe is masking to protect their health, who they think is masking to express their religion, who they believe is masking for a peaceful celebration, and who they think is masking to “conceal their identity” or because they *intend* “to partake in criminal activity.”

Further, police are not the only ones who will be in the business of scrutinizing those who choose to mask in Nassau County. Indeed, in North Carolina, people going through cancer

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<sup>18</sup> Michael O’Keefe, *Two Cases in which Defendants were Ordered to Remove Religious Coverings Shine Spotlight on Policies*, *Newsday*, February 20, 2024, <https://www.newsday.com/long-island/long-island-religious-coverings-policies-lawsuits-sosv6vj4>.

<sup>19</sup> Clerk Item No. 142-24 § 3(b)(1).

<sup>20</sup> *Id.* § 3(b)(4).

<sup>21</sup> Both subsections 3(a) and (b) include provisions that require that the intent of the wearer be known. *See, e.g., id.* § 3(a) (“The law shall not apply to facial coverings worn to protect the health and safety of the wearer, for religious or cultural purposes, or for the peaceful celebration of a holiday or similar religious or cultural event for which the wearing of masks or facial coverings are customarily worn.”); *id.* § 3(b)(4) (noting a person will violate the mask ban if they are “engaged in conduct that could reasonably lead to the institution of a civil or criminal proceeding against her or him *with the intent* of avoiding identification in such a proceeding”) (emphasis added). Simply put, these provisions treat law enforcement as if they are omniscient.

treatment have reported being subject to public harassment for masking under that state’s mask ban’s health exception.<sup>22</sup>

#### **IV. The Mask Ban Opens the Floodgates for Disproportionate Enforcement.**

The legislative proposal allows law enforcement officers to require a person to remove a facial covering during a traffic stop or if the officer has a “reasonable suspicion of criminal activity and/or the *intention* to partake in criminal activity.”<sup>23</sup> This provision—as well as the overarching ban—is likely to be used to disproportionately scrutinize and police Black and Brown residents of Nassau County.

People of color have consistently been over-policed and subject to greater suspicion and scrutiny, as evidenced by the racial disparities that are pervasive in policing practices—whether looking at stop-and-frisk data,<sup>24</sup> traffic stop data,<sup>25</sup> or which communities are more heavily policed.<sup>26</sup> And, this disparity has persisted when police have been called upon to intervene in relation to public health measures. At the height of the pandemic, law enforcement’s role in enforcing public health policies predictably resulted in racially disparate patterns of enforcement and criminalization of communities that have long been

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<sup>22</sup> Carly Haynes, ‘Scared to Put on My Mask’: Cancer Patient Says She was Intentionally Coughed on in Spat Over Mask, WRAL NEWS, Jun. 12, 2024, <https://www.wral.com/story/scared-to-put-on-my-mask-cancer-patient-says-she-was-intentionally-coughed-on-in-spat-over-mask/21478890/>.

<sup>23</sup> Clerk Item No. 142-24 § 3(a) (emphasis added). It is, however, entirely unclear whether the proposed amended new section 3(b) is intended to limit the circumstances afforded law enforcement under section 3(a) to force mask removal. For example, may law enforcement only force unmasking of individual riding in a vehicle that is subject to a traffic stop if there are other persons so masked or disguised in the car? It is also entirely unclear whether, or how, section 3(a)’s requirement that a law enforcement officer possess “reasonable suspicion of criminal activity and/or intention to partake in criminal activity” applies to the circumstances set forth in section 3(b).

<sup>24</sup> See, e.g., Long Island United to Transform Policing & Community Safety, *Monitoring Police Reform in Nassau County: Tracking Implementation Three Years After George Floyd’s Death* (“Monitoring Police Reform”), Oct. 2023, at 10-11 (noting that Black and Latinx people are disproportionately subjected to pat-downs in Nassau County); NYCLU, *A Closer Look at Stop-and-Frisk in NYC*, Dec. 12, 2022, <https://www.nyclu.org/data/closer-look-stop-and-frisk-nyc>.

<sup>25</sup> *Monitoring Police Reform*, *supra* note 24, at 12 (describing how in Nassau County Black and Latinx people were more likely to be subject to a vehicle and traffic stop, and noting that the disparities became more pronounced between 2021 and 2022); NYCLU, *NYPD Traffic Stops Data*, Sept. 14, 2023, <https://www.nyclu.org/data/nypd-traffic-stops-data> (“data shows that NYPD officers are more likely to stop, arrest, search, and use force against Black and Latinx drivers”).

<sup>26</sup> See, e.g., Dee Gill, *Smartphone Records Reveal Racial Disparities in Neighborhood Policing*, UCLA Anderson Review, Oct. 25, 2023, <https://anderson-review.ucla.edu/smartphone-records-reveal-racial-disparities-in-neighborhood-policing/> (“A study of police movements in 23 major U.S. cities finds officers spend considerably more time in Black neighborhoods than in other areas with similar socioeconomic demographics and crime-driven demand for policing.”); Robyn Smyton, *How Racial Segregation and Policing Intersect in America*, Tufts Now, Jun. 17, 2020 (“due to a number of factors, ‘predominately Black neighborhoods are simultaneously over-policed when it comes to surveillance and social control, and under-policed when it comes to emergency services’”); *NYPD Traffic Stops Data*, *supra* note 25 (noting that “[t]here are . . . geographic disparities that show drivers in certain boroughs and particular neighborhoods are more likely to face NYPD scrutiny”).

subject to aggressive over-policing. For example, according to data released by the NYPD, more than 80 percent of those ticketed for social distancing-related enforcement at the start of the pandemic were Black and Latinx.<sup>27</sup>

Nassau County has certainly been no exception when it comes to discriminatory policing trends.<sup>28</sup> For example, as documented in a 2023 report, the Nassau County Police Department has disproportionately flagged people of color with no criminal history as gang members based on their clothing, appearance, association, or “mere presence at a location.”<sup>29</sup>

There is no reason to believe that a mask ban would be enforced any differently. Rather, a ban will invite law enforcement to continue to stop, surveil, and scrutinize people of color—particularly Black and Latinx people, who are traditionally subject to higher rates of policing, observant Muslim individuals who are likely to be wearing religious head and face garb, and Asian-Americans, who are more likely to mask<sup>30</sup> and have been subjected to increased discrimination since the start of the pandemic<sup>31</sup>—as well as poor people, who are more likely to rely on less expensive, lower quality, non-medical grade masks that may read to police as more “suspicious.”

## **V. The Mask Ban Seeks to Severely Penalize People for their Attire Rather than Conduct.**

Individuals who are deemed to have violated the mask ban can be subject to a \$1000 fine, up to a year imprisonment, or both. This subjects individuals to hefty fines and up to a year of imprisonment for what they elect to wear. It requires the police, prosecutors, and courts look into a person’s mind and perceive the intent (or perhaps prevailing intent) behind wearing a mask. There is simply no reasonable way to enforce the proposed ban.

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<sup>27</sup> Erin Durkin, *Black and Latino New Yorkers get Vast Majority of Social Distancing Summonses*, POLITICO, May 5, 2020, <https://www.politico.com/states/new-york/albany/story/2020/05/08/black-and-latino-new-yorkers-get-vast-majority-of-social-distancing-summuses-1283223>.

<sup>28</sup> See generally *Monitoring Police Reform*, supra note 24.

<sup>29</sup> LatinoJustice PRLDEF, #FlaggedForLife, <https://www.latinjustice.org/en/pressreport/flagged-life> (last visited Aug. 1, 2024); see also LatinoJustice PRLDEF, *Flagged for Life: Dragnet “Gang” Surveillance and Policing in Nassau County*, Jan. 2023, <https://www.latinjustice.org/sites/default/files/2023-08/LatinoJustice%20Flagged%20for%20Life%20Report.pdf>.

<sup>30</sup> Brittany N. Hearne & Michael D. Nino, *Understanding How Race, Ethnicity, and Gender Shape Mask-Wearing Adherence During the COVID-19 Pandemic: Evidence from the COVID Impact Survey*, 9 SPRINGER NATURE, 176 (2022).

<sup>31</sup> Neil G. Ruiz, Juliana Mensace Horowitz, & Christine Tamir, *Many Black and Asian Americans Say They Have Experienced Discrimination Amid the COVID-19 Outbreak*, PEW RESEARCH CENTER, July 1, 2020, <https://www.pewresearch.org/social-trends/2020/07/01/many-black-and-asian-americans-say-they-have-experienced-discrimination-amid-the-covid-19-outbreak/>.



If—as Clerk Item No. 142-24 asserts—what is precipitating the call for this legislation is the desire to address “harassing, menacing, or criminal behavior,”<sup>32</sup> the response should not be to institute this ill-conceived mask ban. Rather, unlawful behavior will be treated and prosecuted as such, and ranges existing in sentencing decisions already give room to account for the circumstances surrounding any action or event being prosecuted.<sup>33</sup>

## **VI. The Mask Ban Fails to Protect the Right to Anonymous Political Protest and Provide Protection Against Retaliation or Doxxing.**

The U.S. Supreme Court consistently has held that the First Amendment protects the right to anonymous political association. In 1958, a unanimous Court concluded in *NAACP v. Alabama* that the state could not compel the NAACP to disclose the names and addresses of its members, as doing so in the past had exposed those members to “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”<sup>34</sup> Compelled disclosure of NAACP members’ names, the Court reasoned, was “likely to affect adversely the ability of . . . members to pursue their collective efforts to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through . . . the consequences of this exposure.”<sup>35</sup>

Since *NAACP*, the Court has reaffirmed on a half-dozen occasions the right to anonymous political expression and association.<sup>36</sup> Each time, the Court stressed that individual privacy protections and the risk of harassment and retaliation outweighed the government’s proffered justification, even where that interest could be deemed a fundamental one.<sup>37</sup> It has noted that the First Amendment protects the right of anonymous expression *even in the absence of a risk of harassment or retaliation*, writing that “[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible,”<sup>38</sup>

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<sup>32</sup> Clerk Item No. 142-24 § 2.

<sup>33</sup> Federal legislation has long prohibited the types of intimidating and harassing actions this bill purports to address. The Ku Klux Klan Act of 1871, now codified at 42 U.S.C. § 1985, addresses behaviors that are intended to interfere with an individual’s civil rights. Section 1985(3), for example, specifically makes it a civil rights violation where “two or more persons . . . go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws. . . .” This covers situations in which people violate civil rights while masked and obviates the need for the proposed mask ban.

<sup>34</sup> *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

<sup>35</sup> *Id.* at 462-463.

<sup>36</sup> *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Talley v. California*, 362 U.S. 60 (1960); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Brown v. Socialist Workers ‘74 Campaign Committee*, 459 U.S. 87 (1982); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Buckley v. American Constitutional Law Foundation (ACLF)*, 525 U.S. 182 (1999).

<sup>37</sup> *Bates*, 361 U.S. at 524-525.

<sup>38</sup> *McIntyre*, 514 U.S. at 341-342.

and noting that the right of anonymous expression was grounded in a historical “tradition of anonymity in the advocacy of political causes.”<sup>39</sup>

The Internet, and social media in particular, have made identifying individuals who gather in public much easier than it was when the Court decided *NAACP*—so much so that individual fears of harassment and retaliation over political speech are arguably more salient today than they were in the 1960s. At Columbia University, for example, activists were targeted by a “doxxing truck” that displayed their names and photos on a billboard under the heading “Columbia’s Leading Anti-Semites,”<sup>40</sup> and peaceful protestors were advised<sup>41</sup> to wear face coverings to avoid being doxxed. Some well-known and influential New Yorkers, including hedge fund manager William Ackman, have called on employers not to hire students who have been critical of Israel’s conduct, and at least one New York law firm has rescinded offers of employment to law students who participated in protests and other law firms are actively engaged in surveillance of law students to make those students unemployable.<sup>42</sup>

## **VII. In Advancing the Mask Ban, the County Legislature Has Sought to Avoid Transparency and Undermine the Democratic Process.**

The Public Safety and Rules Committee first considered this bill on July 15, 2024, and passed it the same day. In advance of that hearing, the NYCLU sought a copy of the proposed legislation. We were told by the Legislative Clerk’s Office that we would need to file a request under the Freedom of Information Law (FOIL) in order to receive it. While we did ultimately obtain copies of the legislation through the Democratic Counsel’s Office and in response to our FOIL, other members of the public did not have similar access. We have only received a copy of the “Amendment in Nature of a Substitution” to the July 15, 2024 bill, amended as the bill’s sponsor indicated it would be, from Democratic Counsel’s Office. As of the time we submitted this written testimony on August 2, 2024, neither the version

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<sup>39</sup> *Id.* at 343.

<sup>40</sup> Karam, Esha. ‘Doxxing Truck’ Displaying Names and Faces of Affiliates it Calls ‘Antisemites’ Comes to Columbia, COLUMBIA SPECTATOR, Oct. 25, 2023, <https://www.columbiaspectator.com/news/2023/10/25/doxxing-truck-displaying-names-and-faces-of-affiliates-it-calls-antisemites-comes-to-columbia/>.

<sup>41</sup> Ramirez, Isabella. *Shafik, ‘Disheartened’ by ‘Abhorrent Rhetoric,’ Reaffirms Safety in New Statement on Escalating Violence in Israel and Gaza*, COLUMBIA SPECTATOR, Oct. 18, 2023, <https://www.columbiaspectator.com/news/2023/10/18/shafik-disheartened-by-abhorrent-rhetoric-reaffirms-safety-in-new-statement-on-escalating-violence-in-israel-and-gaza/>.

<sup>42</sup> Farrell, Maureen. *A Prestigious Law Firm Rescinded Job Offers for Columbia and Harvard Students, but It May Reverse Itself*, THE NEW YORK TIMES, Oct. 17, 2023, <https://www.nytimes.com/2023/10/17/business/davis-polk-employment-columbia-harvard-israel-palestine.html>; Emily Flitter, *A Wall Street Law Firm Wants to Define Consequences of Israel Protests*, THE NEW YORK TIMES, July 8, 2024, <https://www.nytimes.com/2024/07/08/business/sullivan-cromwell-israel-protests.html?searchResultPosition=3>; Joe Patrice, *Biglaw Firm’s Antisemitism Fight Seems More Concerned With Anti-War Protests*, ABOVE THE LAW, June 20, 2024, <https://abovethelaw.com/2024/06/sullivan-cromwell-law-school-antisemitism/>.

of the bill passed out of Committee in July nor the amended version has been made publicly available, despite the fact that the mask ban has been placed atop the August 5th Legislative Calendar<sup>43</sup> for the County Legislature’s consideration and vote.

The shroud of secrecy that has surrounded this process is simply unacceptable. Legislation should be clearly posted and easily accessible to the public on the County Legislature’s website in advance of any hearings or votes. The democratic process demands that the public have appropriate notice of what the Legislature is debating and ample opportunity to review and comment on legislative proposals.<sup>44</sup> Erecting barriers to public participation illustrates the Majority’s utter contempt and disdain for Nassau residents.

In this instance, we suspect that the Legislature sought to move in an opaque manner because it is well known that mask bans are—for good reason—distinctly unpopular. As described in our testimony, mask bans pose a threat to the health and safety of individuals and their communities, they have been used to squash political protest, doxx, surveil and retaliate against people with unpopular political beliefs, and in the jurisdictions where they already exist, have been used to selectively enforce and criminalize people of color.

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The NYCLU thanks the Legislature for the opportunity to provide testimony and, for all of the reasons included in this testimony, urges lawmakers to reject Clerk Item No. 142-24.

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<sup>43</sup> See Nassau County Legislature, Legislative Calendar for Aug. 5, 2024, <https://nassaucounty.ny.iqm2.com/Citizens/FileOpen.aspx?Type=1&ID=1693&Inline=True> (last accessed Aug. 2, 2024 at 11:04 AM).

<sup>44</sup> The Nassau County Charter requires nothing less. See Nassau County Charter § 105(2).