MEMORANDUM

To: **Sen. Zellnor Y. Myrie, Chair, Elections Committee, New York State Senate; Assemblywoman Latrice M. Walker, Chair, Standing Committee on Elections Law, New York State Assembly**

From: **NAACP Legal Defense and Educational Fund, Inc. (LDF) and New York Civil Liberties Union**

Re: **Key Provisions of the John R. Lewis Voting Rights Act of New York (S.1046/A.6678)**

Date: **May 31, 2022**

I. Introduction

We thank the Chairs of the respective committees of jurisdiction and lead sponsors of the legislation, for sponsoring and championing the John R. Lewis Voting Rights Act of New York (S.1046/A.6678, hereinafter "NYVRA"). As the legislation heads to the chamber floors, we gather here sources and information that elucidate the critical importance of this landmark legislation's various provisions. In particular, while the NYVRA is largely modeled on the federal Voting Rights Act (VRA) of 1965, the legislation improves upon the protections of the federal VRA in several ways detailed below.

II. Preclearance

The NYVRA creates a state-level preclearance program. Why is this so important?

By implementing state-level preclearance, the NYVRA builds on the heart of the protections provided by the federal Voting Rights Act of 1965–one of the most effective civil rights laws in history.[1] Preclearance requires jurisdictions with a recent history of discrimination to obtain approval from the Attorney General or a court before changing voting rules and practices that are

[1] *See Nw. Austin, Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 198, 201 (2009) (the "historic accomplishments of the [VRA] are undeniable").

known and well-documented as presenting risk of discrimination, like purging people from the voter rolls or moving polling locations.[2]

Preclearance was the "heart" of the federal Voting Rights Act of 1965[3] because it prevented voting discrimination *before* it occurred. Proving voting discrimination can be expensive[4] and time-consuming,[5] and often several elections take place before discriminatory rules are addressed through litigation or policy action.[6] What the Supreme Court observed over fifty years ago remains true today: "Voting suits are unusually onerous to prepare" and "[l]itigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials . . . ."[7] Once an election has taken place under a discriminatory system, it generally cannot be undone; there is no "do over" when a person's right to vote is denied or abridged in an election. Voting rights is truly an arena where an ounce of prevention can be worth a pound of cure. It was for this reason that the drafters of the federal Voting Rights Act devised preclearance as a way to have a second set of eyes on potentially discriminatory voting policies before they can go into effect, thus "shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims."[8]

Until recently, there was broad bipartisan support for federal preclearance.[9] The 1982 Amendments to the Voting Rights Act, which included a 25-year extension of preclearance, passed with overwhelming bipartisan support, 389-24 in the United States House of

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[2] NYVRA § 17-210.

[3] *South Carolina v. Katzenbach,* 383 U.S. 301, 315 (1966).

[4] Leah Aden, *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation*, Legal Defense and Educ. Fund, Inc. (Sep. 2021), https://www.naacpldf.org/wp-content/uploads/Section-2-costs-9.19.21-Final.pdf.

[5] Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 92 (2005) ("Two to five years is a rough average" for the length of Section 2 lawsuits).

[6] In just one example, Plaintiffs successfully challenged Texas' voter identification law, which an appellate court once considered the most restrictive in the country. During three years of appeals after a federal court held that the law created an unconstitutional burden on the right to vote, Texas voters elected dozens federal, state, and local candidates. *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).

[7] *Katzenbach*, 383 U.S. at 314.

[8] *Id.* at 328.

[9] *See*, *e.g.*, To Agree to the Conference Report on S. 1564, The Voting Rights Act of 1965 (Aug. 4, 1965), https://www.govtrack.us/congress/votes/89-1965/s178; Pub. L. No. 91-285, 84 Stat. 314 (signed into law by President Richard Nixon on June 22, 1970); Pub. L. No. 94-73, 89 Stat. 402 (signed into law by President Gerald Ford on August 6, 1975); Pub. L. No. 97-205, 96 Stat. 134 (signed into law by President Ronald Reagan on June 29, 1982); Pub. L. No. 102-344, 106 Stat. 921 (signed into law by President George W. Bush on August 26, 1992).

Representatives and 85-8 in the United States Senate.[10] The amendments were signed by President Ronald Reagan.[11] The 2006 reauthorization of the federal Voting Rights Act passed 98-0 in the Senate and 390-33 in the House and was subsequently signed into law by President George W. Bush.[12]

In 2013, the U.S. Supreme Court struck down the particular criteria for determining which jurisdictions would be covered by the federal preclearance program,[13] not the concept of preclearance itself.[14] One indication of the effectiveness of federal preclearance is that, after precelearance became inoperative, voters in jurisdictions that were previously required to pre-clear voting changes began to face substantially increased discrimination.[15]

Three New York counties were required to seek preclearance and the State of New York filed amicus briefs in both the *Shelby County* and *Northwest Austin* cases that extolled the efficient and effective prophylaxis of preclearance for New York elections.[16] New Yorkers deserve the benefit of that cost-efficient and effective program to prevent discriminatory voting practices. Each of the policies covered by preclearance under the NYVRA is drawn from real-world experience. Changes to polling place locations or assignments, problematic language assistance materials, and improper voter registration record purges have disproportionately disenfranchised New York voters of color in the past, but escaped notice and remedy until after the harm was done.[17] State preclearance will ensure that these and other practices with a history of racially discriminatory impact receive greater scrutiny before implementation.

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[10] *Id.*

[11] *Id*.

[12] *Id.*

[13] *Shelby County, Alabama v. Holder,* 570 U.S. 529 (2013).

[14] *Id.* at 545-46.

[15] Leah Aden, *Democracy Diminished*, LDF's Thurgood Marshall Institute, https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished_-10.06.2021-Final.pdf.

[16] *See* Brief for the States of New York, California, Mississippi, and North Carolina As Amici Curiae in Support of Respondents, *Shelby County, Ala. v. Holder* (U.S. 2013); 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); *see also* Brief for Amicus Curiae, the City of New York, the Council of the City of New York, Michael R. Bloomberg, in his Capacity as Mayor of the City of New York, and Christine S. Quinn, in her Capacity as the Speaker of the City Council of the City of New York, in Support of Respondents, *Shelby County, Ala. v. Holder*, No. 12-96 (U.S. 2013).

[17] Perry Grossman, *Current Conditions of Voting Rights Discrimination: New York, Report for Submission by The Leadership Conference on Civil and Human Rights* 30-33 (Oct. 6, 2021), https://andstillivote.org/wp-content/uploads/2021/10/New-York-State-Report.pdf.

New York's coverage provision ensures that political subdivisions are subject to preclearance based on current and recent data indicating lingering effects of discrimination that bear on the equality of opportunities for political participation, so that the administrative burden of preclearance lasts no longer than necessary. Even if the federal preclearance requirement is restored, the state-based program will be more closely connected to the particular needs of New York's communities and tailored to work efficiently and effectively with New York election officials.

There are four distinct criteria through which a jurisdiction can become required to "preclear" an enumerated set of their voting changes. Why is each "prong" of the coverage framework relevant and important?

Political subdivisions with voting rights violations within 25 years.[18]

A strong indicator of whether a jurisdiction may engage in voting discrimination in the future is whether the jurisdiction has engaged in such discrimination in the past. The federal Voting Rights Act's preclearance coverage was based upon whether certain jurisdictions had discriminatory practices in place when the law was passed.[19] The leading legislation to restore federal preclearance shifts the focus for establishing geographic-based preclearance coverage to voting rights violations within the past 25 years, similar to this prong of the NYVRA's coverage.[20] The 25-year rolling look-back provides a long enough period to establish patterns[21] while also ensuring that coverage is based upon present conditions rather than the more distant past.[22]

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[18] NYVRA § 17-210(3)(a) ("any political subdivision which, within the previous twenty-five years, has become subject to a court order or government enforcement action based upon a finding of any violation of this title, the federal voting rights act, the fifteenth amendment to the United States constitution, or a voting- related violation of the fourteenth amendment to the United States constitution").

[19] 52 U.S.C. § 10303.

[20] Freedom to Vote: John R. Lewis Act (H.R. 5746), *available at* https://www.congress.gov/bill/117th-congress/house-bill/5746/text

[21] Voting discrimination, for example, is often concentrated during redistricting, which occurs once-per-decade after each dicennialk census, and a 25-year look-back allows consideration of two redistricting cycles—including the post-redistricting litigation that may span several years before a court adjudication that a redistricting plan illegally discriminated against voters of color.

[22] Although states have more leeway to pass voting protections than does Congress (which must act pursuant to the Elections Clause or specific authority to enforce the U.S. Constitution), it is notable that this 25-year rolling look-back period is consistent with the period of time the U.S. Supreme Court has considered voting and other civil rights violations to be relevant for informing current conditions. In the 1999 case *Lopez v. Monterey County*, the Court upheld the constitutionality of Section 5 at that time, and rejected a challenge brought by a jurisdiction that was covered based on conditions in the jurisdiction in 1968. 525 U.S. 266, 282-285 (1999). *Lopez* thereby recognizes that evidence of voting discrimination from 30 years ago may justify preclearance, and that Congress, in 1982, acted properly in subjecting jurisdictions to preclearance for 25 additional years based on evidence of voting

Political subdivisions with at least three civil rights violations involving racial discrimination within 25 years.[23]

Congress and the courts have long recognized that underlying social conditions resulting from past and ongoing discrimination often interact with particular voting rules to cause or exacerbate voting disparities.[24] For example, courts have long considered "the effects of discrimination in such areas as education, employment, and health" to be relevant to analyzing potential voting rights violations," because such conditions can "hinder [a minority group's] ability to participate effectively in the political process."[25] The NYVRA relies upon the same body of law and social science research and evidence or findings in constructing its preclearance program. Jurisdictions that have engaged in discrimination in these and other areas of civil rights are more likely to engage in voting discrimination, and discrimination in these areas can make voting more difficult or impossible.

Counties with significant racial disparities in arrest rates.[26]

As New York Senator Jacob Javits said during Congress' passage of the 1982 Amendments to the federal Voting Rights Act—which overruled the Supreme Court's decision in *Mobile v. Bolden*[27] and made clear that establishing liability under the Voting Rights Act did not require proof of intent—the purpose of the Voting Rights Act was "'not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with

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discrimination from 1968. Similarly, in *Tennessee v. Lane*, the Court upheld Title II of the Americans with Disabilities Act ("ADA") as applied to court access by looking to evidence of discrimination dating back to 1972—32 years before the Court's decision in *Lane*, and 18 years before Congress enacted the ADA in 1990. *Tennessee v. Lane*, 541 U.S. 509, 525 & nn. 12, 14 (2004).

[23] NYVRA § 17-210(3)(b) ("any political subdivision which, within the previous twenty-five years, has become subject to at least three court orders or government enforcement actions based upon a finding of any violation of any state or federal civil rights law or the fourteenth amendment to the United States constitution concerning discrimination against members of a protected class").

[24] *See*, *e.g.*, *Gingles*, 478 U.S. at 44-47.

[25] *Id.* at 36-47 (quoting S. Rep. No. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-207).

[26] NYVRA § 17-210(3)(c) ("any county in which, based on data provided by the division of criminal justice services, the combined misdemeanor and felony arrest rate of members of any protected class consisting of at least ten thousand citizens of voting age or whose members comprise at least ten percent of the citizen voting age population of the county, exceeds the proportion that the protected class constitutes of the citizen voting age population of the county as a whole by at least twenty percent at any point within the previous ten years").

[27] 446 U.S. 55 (1980).

the accumulation of discrimination.'"[28] Accordingly, Congress and the Supreme Court have required lower courts to consider in evaluating claims of racial discrimination in voting brought under Section 2 of the Voting Rights Act of 1965, "the extent to which minorities in the state or political subdivision bear the effects of discrimination in education, employment, and health, which hinder their ability to participate effectively in the political process."[29] As part of this analysis, courts have considered whether and to what extent there are "disparities . . . in the numbers of law enforcement stops, arrests, fines, and fees."[30]

The NYVRA relies upon a well-established body of federal law and social science research and evidence concerning the intersection of racial disparities in socioeconomic conditions in constructing its preclearance program.[31] In testimony that the court in the *Ferguson-Florissant School District* racial vote dilution case credit, Prof. David Kimball, a political scientist at the University of Missouri-St. Louis testified that "neighborhoods with higher levels of contact with the criminal justice system tend to have lower levels of voter participation."[32] Prof. Kimball further testified that these lower levels of participation occur "because of the resulting 'loss of economic resources,' and because criminal justice system involvement 'tends to foster more negative attitudes and less trust of local government, which lowers the benefit side of the cost of voting calculation and makes those distrustful individuals less likely to see the benefit of voting in local elections.'"[33] Prof. Kimball also noted that "contact with the criminal justice system causes people 'more difficulty engaging in . . . local organizations and social networks that help bring people into local government and local community affairs.'"[34]

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[28] *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (quoting S.Rep. No. 97–417 at 5, 97th Cong. 2nd Sess. 28 (1982), U.S.Code Cong. & Admin.News 1982, p.182 (quoting 111 Cong.Rec. 8295 (1965) (remarks of Sen. Javits))).

[29] *See* S. Rep. No. 97-417, at 28-29 (Senate Judiciary Committee report on 1982 Amendments to Section 2 of the Voting Rights Act, 52 U.S.C. § 10301); *see also Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986).

[30] *See*, *e.g.*, *Missouri State Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1071 (E.D. Mo. 2016), *aff'd*, 894 F.3d 924 (8th Cir. 2018).

[31] *See, e.g.*, Brandon Rudolph Davis, *Feeling Politics: Carceral Contact, Well-Being, and Participation*, 49 Pol. Studies J. 591 (May 2021) ("carceral contact has a strong direct effect on well-being and a strong indirect effect on political participation mediated through measures of well-being"); Ariel White, *Misdemeanor Disenfranchisement? The Demobilizing Effects of Brief Jail Spells on Potential Voters*, 113 American Political Science Review 311–324 (2019) ("Black defendants show substantial turnout decreases due to jail time. . . . These results paint a picture of large-scale, racially-disparate voter demobilization in the wake of incarceration."); Traci Burch, *Trading Democracy for Justice*, University of Chicago Press (2013) ("intensive involvement with the criminal justice system has a politically demobilizing effect on low-income and minority neighborhoods. . . . [E]ach new prison admission prior to the election lowers overall neighborhood voter turnout by 1.4 percentage points. . . . [P]eople living in the highest-imprisonment neighborhoods are 74 percent less likely to vote[.]").

[32] 201 F. Supp. 3d at 1071.

[33] *Id.*

[34] *Id.*

In the *Ferguson-Florissant School District* racial vote dilution case, the court considered, among other evidence, a report from the Missouri Attorney General's office that evaluated racial disparities in vehicle stops by police based on data collected for the purpose of evaluating whether and to what extent law enforcement agencies engaged in racial profiling, i.e., "the inappropriate use of race by law enforcement when making a decision to stop, search or arrest a motorist." [35] One measure that the Missouri Attorney General's report relied upon was the "disparity index," which reflects "each [racial] group's proportion of total traffic stops to its proportion of the driving-age population 16 years old and older."[36] In a longitudinal study conducted by professors at York University and Ontario Tech University for a report submitted to the Ottawa Police Services Board and Ottawa Police Service, the researchers used a "20% rule" to determine when a group was substantially over-represented or under-represented with respect to involuntary police contact.[37] The researchers noted that "the '20% rule' allows our data analysis to be more robust; it has a conservative implication" because the 20% rule "puts aside a pool of 'high incidences' and 'low incidences' between +19.99% and -19.99% as cushion of research errors, and reserves 'disproportionalities' to those incidences with percentages of differences +20% or higher and those -20% or lower." The researchers further explained that the "20% rule . . . filters out most common errors in data collection prior to data analysis, and allows a 'cushion' for a relatively conservative analysis before coming to a conclusion."[38] Moreover, according to a 2020 analysis by scholars at Northwestern University, the average African American lives in a community where the racial disparity in municipal policing was 19%.[39] The 20% threshold is therefore narrowly tailored to identify those counties in which there is evidence of racial discrimination in policing.

NYVRA imposes a standard that is far more conservative. A jurisdiction is covered if the arrest rate of the racial group of interest, that is, the group's share of overall arrests exceeds the group's proportion of the citizen voting age population by at least 20 percentage points. For example, if

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[35] 201 F. Supp. 3d at 1071 (citing Eric Schmitt Missouri Attorney General, *2014 Vehicle Stops Executive Summary*, https://ago.mo.gov/home/vehicle-stops-report/2014-executive-summary).

[36] *2014 Vehicle Stops Executive Summary*.

[37] *See* Lorne Foster and Les Jacobs, *Traffic Stop Race Data Collection Project II, Progressing Towards Bias-Free Policing: Five Years of Race Data on Traffic Stops in Ottawa* 63-64, (Nov. 12, 2019), https://www.researchgate.net/publication/344906290_Traffic_Stop_Race_Data_Collection_Project_II_Progressing_Towards_Bias-Free_Policing_Five_Years_of_Race_Data_on_Traffic_Stops_in_Ottawa?channel=doi&linkId=5f989205458515b7cfa3f85f&showFulltext=true; Lorne Foster, Les Jacobs, Bobby Siu, *Race Data and Traffic Stops in Ottawa, 2013-2015*, *A Report Submitted to Ottawa Police Services Board and Ottawa Police Service* 24, 33-34 (Oct. 2016) https://www.researchgate.net/publication/344906617_Final_OPS_OTTAWA_REPORT_-_2016EN.

[38] *Traffic Stop Race Data Collection Project II* at 64.

[39] *See* Beth Redbird and Kat Albercht, Racial Disparity in Arrests Increased as Crime Rates Declined, Northwestern Institute for Policy Research Working Paper Series (June 18, 2020), https://www.ipr.northwestern.edu/documents/working-papers/2020/wp-20-28.pdf.

Black people accounted for 10% of a county's citizen voting age population, but at least 30% of total adult arrests, then the county would be covered under this prong. For another example, if a hypothetical county had 10,000 Asian American citizens of voting age, and that population amounted to 5% of the county, then the county would be covered if Asian Americans accounted for at least 25% of arrests. This standard is extremely conservative as a measure of inequity. Indeed, for any group whose proportion of citizen voting age population is 20 percent or less of the county total, coverage requires a finding that the group accounts for a share of total arrests that is *at least double* its prevalence in the population. The measure is simple and transparent to calculate, requiring only the application of simple arithmetic to publicly available data from the state Department of Criminal Justice Services and the U.S. Census Bureau.[40] Furthermore, this prong of the coverage formula sets a substantial floor for its application, i.e., only protected classes "consisting of at least ten thousands citizens of voting age or . . . at least ten percent of the citizen voting age population of the county."[41] This high threshold for application avoids the distortions that may occur when calculating disparities that may arise with protected classes that constitute a very small proportion of a county's population.[42]

By setting a high population threshold for the applicability of this prong and then applying a conservative threshold for identifying substantial racial disparities in criminal law enforcement, this prong of the coverage formula provides for a measure of systemic inequity of the kind that reflects lingering effects of discrimination that would bear on political participation.

Political subdivisions with significant residential segregation.[43]

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[40] *See, e.g.,* Dep't of Criminal Justice Services, *NYS Adult Arrests and Prison Sentences by Race/Ethnicity in 2019*, https://www.criminaljustice.ny.gov/crimnet/ojsa/comparison-population-arrests-prison-demographics/2019%20Population%20Arrests%20Prison%20by%20Race.pdf.

[41] NYVRA § 17-210(3)(c).

[42] *See, e.g.*, Virginia Dep't of Criminal Justice Services, *Report on Analysis of Traffic Stop Data Collected Under Virginia's Community Policing Act* 27 (July 1, 2021) https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/research/report-analysis-traffic-stop-data.pdf ("An unusually high traffic stop DI can occur when a racial or ethnic group comprises a very small percentage of a locality's driving-age population, but also comprises a high percentage of its traffic stops. This is especially true when a local LEA [(law enforcement agency)] reports a small number of stops to begin with. For example, the Falls Church City Sheriff's Office had an extremely high driver stop DI of 94.6 for American Indian drivers. This group made up only 0.35% of the jurisdiction's total driving-age population, but it made up 33% of the drivers stopped by the LEA. In this case, the LEA reported only 3 traffic stops, 1 of which involved an American Indian driver.").

[43] NYVRA § 17-210(3)(d) ("any political subdivision in which, based on data made available by the United States census, the dissimilarity index of any protected class consisting of at least twenty-five thousand citizens of voting age or whose members comprise at least ten percent of the citizen voting age population of the political subdivision, is in excess of fifty with respect to non-Hispanic white citizens of voting age within the political subdivision at any point within the previous ten years").

As noted above, Congress and the courts have recognized that underlying social conditions resulting from past and ongoing discrimination often interact with particular voting rules to cause or exacerbate voting disparities and the NYVRA relies upon a well-established body of federal law and social science research concerning the intersection of racial disparities in socioeconomic conditions in constructing its preclearance program.

Courts have considered the degree to which neighborhoods are racially segregated as a relevant factor when considering whether voters of color are being unfairly marginalized in the political process due to the lingering effects of discrimination.[44] Voters of color are more likely to face discriminatory voting outcomes in places where they are already facing discrimination in housing, and residential segregation can make voting more difficult directly by affecting the accessibility of polling locations, for example.

The housing segregation prong of the coverage framework relies on only the most current available data on racial residential housing patterns that is maintained and routinely published by the U.S. Census Bureau. The formula relies only on recent data to ensure that the burdens of preclearance are based on current evidence of systemic discrimination that touches the political process. The Dissimilarity Index is a well-established and commonly used measure of residential segregation.[45] For example, in its recent in-depth investigation into residential segregation on Long Island, Newsday found that "Nassau County's score of 78 ranked it as America's most segregated county among those with 1.2 million-1.6 million residents" and "[w]ith an index of 63, Suffolk County ranked 10th in the nation among similarly sized counties."[46] Prof. Douglas Massey remarked that Nassau and Suffolk Counties are "typical of what we call hyper-segregated patterns."[47] Demographers John Logan and Brian Stults described a Dissimiliarty Index comparable to Nassau County's score as "near-apartheid."[48] Problematic

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[44] *See*, *e.g.*, *Holloway v. City of Virginia Beach*, 531 F. Supp. 3d 1015, 1087 (E.D. Va. 2021); *N.A.A.C.P. Spring Valley Branch v. E. Ramapo Cent. Sch. Dist*., 462 F. Supp. 3d 368, 408 (S.D.N.Y. 2020), aff'd 984 F.3d 213 (2d Cir. 2021); *United States v. City of Euclid*, 580 F. Supp. 2d 584, 606 (N.D. Ohio 2008).

[45] *Id.*

[46] Olivia Winslow, *Dividing Lines, Visible and Invisible*, Newsday (Nov. 17, 2019) https://projects.newsday.com/long-island/segregation-real-estate-history/#nd-promo.

[47] *Id.*

[48] *See* John R. Logan and Brian J. Stults, *Metropolitan Segregation: No Breakthrough in Sight* at 2, U.S. Census Bureau Center for Economic Studies Working Paper CES 22-14, (Aug. 12, 2021), https://www2.census.gov/ces/wp/2022/CES-WP-22-14.pdf ("Asians have long been the least segregated group, steadily at an average around the country of 40. Scholars describe this as a "moderate" level of segregation, but it means that 40% of Asians live in neighborhoods where they are over-represented. However it is quite "moderate" in contrast to African Americans, whose segregation reached near-apartheid level of 79 in the 1960's and 1970's, and for whom the average in 1980 was still 77.")

levels of residential segregation can exist even below the level of "hyper-segregation."[49] A Dissimilarity Index greater than 50 means that a majority of the members of a political subdivision's racial minority group would have to move for the area to achieve integration and reflects a significant degree of residential segregation,[50] indicating the presence of systemic inequity of the kind that reflects lingering effects of discrimination that would bear on political participation.

III. Causes of Action

The prohibition against "vote dilution" is distinct from the analogous federal claim in a few important ways. Why does the NYVRA depart from the federal model here?

A key difference is that the NYVRA does not require plaintiffs to prove, as a threshold matter, that the affected group of voters is numerous and compact enough to form a majority in a hypothetical remedial district.[51]

By removing the numerosity and compactness requirements—the first of three "necessary preconditions" that plaintiffs must prove to prevail in a federal VRA case[52]—the NYVRA builds on lessons learned from decades of voting rights litigation under Section 2 of the Voting Rights Act, as well as the success of other state voting rights acts such as the California VRA. Experience litigating VRA Section 2 cases under *Gingles* has shown that the numerosity and compactness requirements are an unnecessary barrier to remedying significant racial discrimination in voting. Removing a requirement that can be difficult to prove, but need not be present for actual voting discrimination to exist will make it easier for communities of color to vindicate their rights and obtain remedies to resolve racial vote dilution. California's experience since 2002, as well as that of three other states in recent years, has shown no parade of horribles resulting from this practical improvement.

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[49] *See* John R. Logan, Brian J. Stults, and Reynolds Farley, *Segregation of Minorities in the Metropolis: Two Decades of Change*, 41 Demography 1, 7 (Feb. 2004) ("Metropolitan areas have been classified by their level of segregation, from least (D < 40), to moderate (D = 40-50), to next most (D = 50-60), to most (D > 60).").

[50] *See, e.g.*, Mark Nichols, *After a Half-Century of Federal Oversight, Segregated Neighborhoods Are Still Pervasive: ABC News Analysis*, ABCNews (Feb. 9, 2022), (referring to an "'extreme dissimilarity index' of 50 or higher—meaning at least half of the population would have had to move to another neighborhood in the area to achieve total integration . . . ."), https://abcnews.go.com/US/half-century-federal-oversight-segregated-neighborhoods-pervasive-abc/story?id=82678035; Joe Cortright, America's Least (and Most) Segregated Metro Areas: 2020, *City Observatory* (Oct. 10, 2021), https://cityobservatory.org/most_segregated2020/ ("Still, a dissimilarity index of 50 or more is quite high, and many metro areas continue to have even higher levels of segregation.").

[51] NYVRA § 17-206(2).

[52] *See Gingles*, 478 U.S. at 50-51.

To date, four other states have enacted state voting rights acts with protections against racial dilution.[53] All have dispensed with the numerosity and compactness requirement that is the first *Gingles* precondition. None of these states have found negative consequences to doing so. Doing away with this requirement has worked because, among other reasons, the crucial element of a racial vote dilution claim—a pattern of racially-polarized voting—is actually quite difficult to establish and creates a sufficiently high bar to prevent meritless claims. Establishing racially polarized voting typically requires proving (1) that voters of the racial minority group of interest typically vote for the same candidates; (2) voters of the racial majority group typically vote for the same candidates; and (3) that in multiple elections over time, the preferred candidates of the majority group usually (not invariably, but usually) defeat the preferred candidates of the minority group.

Currently, the numerosity and compactness requirements are a barrier to remedying significant racial discrimination in voting under federal law. Take for example, a school district that includes significant white and Latino populations where the preferred candidates of white voters consistently defeat the preferred candidate of Latino voters, leaving Latino families without a voice on the school board. If the school district encompasses multiple villages where white and Latino voters are dispersed equally throughout the villages but segregated within each village, the Latino community will not be geographically compact enough to allow for the drawing of a Latino-majority single-member ward. In that scenario, federal law would deny Latino voters an opportunity to achieve political representation. Here, dispensing with the *Gingles* compactness requirement provides Latino voters with an opportunity to bring a claim and potentially achieve a menu of potential remedies, including cumulative voting, limited voting, ranked choice voting, more polling places, more voting days, etc., to provide more equitable representation.

On the numerosity side, the inflexible requirement in federal law that a racial group must be able to constitute a numerical majority in a hypothetical single member district only dates to 2009.[54] Moreover, the plurality opinion in *Bartlett* Court made clear that states were permitted to use crossover or influence districts.[55] But experience has shown that this judicially created rule imposes unnecessary barriers to resolving racial vote dilution through federal litigation. Instead, the NYVRA standard–similar to the state voting rights acts in California, Oregon, Washington, and Virginia–embraces the concept of an influence district. In such a district, as Justice O'Connor phrased it, "minority voters may not be able to elect a candidate of choice but can play

[53] *See* 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."); *see also* Wash. Rev. Code Ann. § 29A.92.900 et seq.; Ore. Rev. Stat. § 255.400 et seq.; Virginia House Bill 1890 (2021 Session), https://bit.ly/39dpyEt.

[54] *See Bartlett v. Strickland*, 556 U.S. 1, 26 (2009).

[55] *Id.* at 23-24.

a substantial, if not decisive, role in the electoral process."[56] Although the United States Supreme Court has held that the federal Voting Rights Act does not require the drawing of minority influence districts, the California Supreme Court has written approvingly of influence districts.[57] The California Supreme Court is poised to answer the question of whether and under what circumstances the California Voting Rights Act, upon which the NYVRA's vote dilution causes of action are patterned, permits liability and remedy upon proof of an influence district.[58] In doing so, it is notable that the California Supreme Court granted review and ordered de-publication of an intermediate court opinion declining to find liability under the CVRA where the relevant racial group constituted less than a "near-majority" of a single-member district.[59] In an amicus brief in support of neither party, the California Attorney General argued that under the CVRA, a plaintiff need not "show that a district could be drawn that would have a near-majority of residents in the protected class . . . . Rather, a plaintiff need only show an at-large electoral system is responsible for the protected class's lack of electoral influence based on a totality of the circumstances and the specific facts of the particular case."[60]

Social scientists with deep experience in the voting rights field have written about influence districts and illustrated manageable standards for determining where influence districts may be appropriate.[61] Prof. Richard Engstrom, a leading political scientist in the voting rights field who has been repeatedly qualified and credited as an expert by federal courts in Voting Rights Act cases, has described one such manageable standard: "A district in which minority voters, unable to elect a representative or candidate of their choice if such individual would be from within their own group, can either: (a) cast a decisive vote, or be expected to cast such a vote, for their choice among the candidates contesting the seat; or (b) cast enough votes, or be expected to cast enough votes, for their choice among the candidates contesting the seat to constitute at least half of the margin of votes by which the candidate wins."[62]

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[56] *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003).

[57] *Wilson v. Eu*, 1 Cal. 4th 707, 715 (1992).

[58] *See Pico Neighborhood Ass'n v. City of Santa Monica*, 474 P.3d 635 (Cal. 2020).

[59] *Id.* (ordering depublication of 51 Cal. App. 5th 1002 (Cal. Ct. App. Aug. 5, 2020).

[60] Amicus Brief of Attorney General Rob Bonta in Support of Neither Party, *City of Santa Monica v. Pico Neighborhood Ass'n*, No. S263972, 2021 WL 3128068 at *7-*8 (Cal. July 12, 2021).

[61] Richard L. Engstrom, *Influence Districts: The Concept and the Courts*, in The Most Fundamental Right: Contrasting Perspectives on The Voting Rights Act (Daniel McCool ed., Indiana Univ. Press, 2012).

[62] Richard L. Engstrom, *Redistricting: Influence Districts—A Note of Caution and a Better Measure*, The Chief Justice Earl Warren Institute on Law and Social Policy, University of California, Berkeley Law School (May 2011), https://www.law.berkeley.edu/files/Influence_Districts.pdf.

Once a protected class of voters shows either that an at-large system is in use or that their candidates of choice are "usually defeated," the NYVRA allows plaintiffs to prove a vote dilution claim either by demonstrating the presence of racially-polarized voting or demonstrating dilution under a totality of the circumstances test.[63]

When white voters and voters of color prefer different candidates, white voters' preferences dominate electoral outcomes, and there is an alternative voting structure that would allow voters of color to achieve fairer representation, it is clear that cases of racial vote dilution exist. In certain situations, such as when a jurisdiction uses at-large elections and voters of color usually can't elect any candidates of choice, establishing racially polarized voting is sufficient to prove that vote dilution is occurring.

However, this "racially-polarized voting" (RPV) can be difficult to prove in some situations, and even if it cannot be established, that does not mean there is no discrimination present. Other factors such as whether the jurisdiction has ever elected candidates from the protected class or the presence of sharp economic disparities can also shed light on whether the electoral system in use is unfairly weakening the voices of voters of color, as the Supreme Court and Congress have recognized. That is why it is critical to have two paths to prove a vote dilution case, not a one-size-fits-all approach.

RPV means that there is a significant divergence in the electoral choices or candidate preferences of protected class voters, as compared to other voters. Court cases going back to the Supreme Court's 1986 decision in *Thornburg v. Gingles* have made clear that RPV can create an unfair playing field for voters of color, especially in at-large election structures or when district lines are drawn unfairly. A focus on racially-polarized voting in vote dilution claims recognizes two fundamentally inequitable distortions in the political process, as Professor Sam Isaacharoff recognized: "First, electoral systems that fail to curb the deleterious consequences of racial bloc voting reward a racially defined majority faction with disproportionate political power and, consequently, with disproportionate access to the goods and services distributed through the legislative process. Second, the emergence of a racially defined majority faction compounds the potential for continued social and economic subordination of historically disadvantaged minorities."[64]

Recent New York examples of discriminatory at-large elections featuring racially polarized voting include the Village of Port Chester in Westchester County, the Town of Islip in Suffolk

[63] NYVRA § 17-206(2).

[64] Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 Mich. L. Rev. 1833, 1837 (1992).

County, and the East Ramapo Central School District in Rockland County.[65] These New York cases are not outliers—the overwhelming majority of New York school districts, villages, and towns use at-large elections, which can lead to white majority voters winning all available representation even when voters of color make up a substantial part of the population.[66] Academics Jessica Trounstine and Melody E. Valdini discuss this in their article, The Context Matters: The Effects of Single-Member Versus At-Large Districts on City Council Diversity, as do Richard L. Engstrom and Michael D. McDonald in their book chapter, "The Effects of At-Large Versus District Elections on Racial Representation in U.S. Municipalities," within the book *Electoral Laws and their Political Consequences*.[67] As a result, in part, of the prevalence of at-large election structures, numerous racially diverse communities in New York State lack fair representation on local elected bodies.[68]

By making it possible for plaintiffs to prove racial vote dilution by demonstrating that voting in the political subdivision is racially polarized, the NYVRA builds directly on the success of the California Voting Rights Act, as well as other state-level voting rights acts. This is also consistent with the Supreme Court's recognition, in *Thornburg v. Gingles* and other cases, that racially polarized voting is one of the "most important" factors in racial vote dilution claims.[69] As the Supreme Court has explained, the centrality of racially polarized voting to vote dilution claims stems from the fact that at-large election structures or district lines that are unfairly manipulated "can dilute the voting strength of politically cohesive minority group members."[70] Thus, the NYVRA recognizes the centrality of RPV to vote dilution cases by making it possible to prove a violation where RPV is accompanied by either an at-large structure or the usual defeat of protected class members' preferred candidates in a districted or alternative method of election.

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

[66] Gerald Benjamin, *At-Large Elections in N.Y.S. Cities, Towns, Villages, and School Districts and the Challenge of Growing Population Diversity*, 5 ALB. GOV'T L. REV. 733, 734 (2012) ("At-large elections of board members are the norm in New York's towns, villages, and school districts, and are used in about a quarter of the state's cities as well. Additional cities elect some, but not all, of their councils on an at-large basis. And in some counties, the use of multi-member districts to choose some county legislators is, in effect, the analog of an at-large election process.")

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

[68] *See*, *e.g.*, Benjamin, *At-Large Elections in N.Y.S.*, 5 Albany Gov't L. Rev. at 734 (citing underrepresentation of minorities, particularly Latinos, on municipal councils and school boards, in jurisdictions that use at-large elections).

[69] *Gingles*, 478 U.S. at 48 n.15.

[70] *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994).

With respect to the "totality of the circumstances," this second way to prove a violation is also drawn from the federal VRA's text and case law. This prong allows plaintiffs to introduce expert and fact evidence under a range of relevant factors identified by the Supreme Court, Congress, and other courts to demonstrate that the challenged map or method of election, in the words of the United States Supreme Court, "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [protected class voters] and white voters to elect their preferred representatives" or influence the outcome of elections.[71]

California, Washington, and other states have successfully used statutory language similar to this part of the NYVRA to identify and mitigate racial vote dilution and increase the fairness of the political process for all voters at the local level. A few sources attesting to these states' success are attached and described below.

First, a 2019 academic paper by Loren Collingwood and Sean Long of the University of California, Riverside finds that the California Voting Rights Act's ("CVRA's") provisions enabling challenges against at-large elections where RPV is present have increased the representation of people of color on city councils by 10 to 12 percent on average in affected cities—and by over 20 percent in high-density cities with larger Latino populations.[72] Based on this finding, Collingwood and Long conclude that "states seeking to increase local-level minority representation should consider policies similar to those found in the CVRA."[73]

Second, a 2014 report on the CVRA's impact by the Lawyers' Committee for Civil Rights of the San Francisco Bay Area reports that 140 California jurisdictions voluntarily resolved potential voting rights violations after the CVRA was enacted.[74] The Lawyer's Committee report also identifies 16 voting rights cases brought under the CVRA between 2003 and 2014 where voters of color either won in court or reached favorable settlements—a positive indication of change happening both through litigation and, in even more cases, without unnecessary litigation.[75]

Third, a 2021 academic analysis by Zachary L. Hertz of the University of Chicago identifies "initial evidence suggesting that there is . . . a causal link between a CVRA-induced change in

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[71] *Gingles*, 478 U.S. at 47.

[72] Loren Collingwood and Sean Long, *Can States Promote Minority Representation? Assessing the Effects of the California Voting Rights Act*, 57 Urban Affairs Rev. 731, 757 (2021).

[73] *Id.* at 731.

[74] Lawyers' Comm. for Civil Rights of the S.F. Bay Area, *Voting Rights Barriers & Discrimination in Twenty-First Century California: 2000-2013* 7 (Mar. 2014), https://lccrsf.org/wp-content/uploads/2014/03/REPORT-Voting-Rights-Barriers-Report-2014.pdf.

[75] *Id.* at 6.

electoral institution and a reduction in the turnout gap."[76] In other words, the CVRA has led to higher voter turnout among voters of color, narrowing the gap in turnout between voters of color and white voters.[77]

Washington, which passed its state-level voting rights act more recently, has already seen successful settlements to end discriminatory election structures and improve fair and equal access to the political process for voters of color.[78]

The NYVRA builds on these states' experience, informed by decades of case law under Section 2 of the Voting Rights Act.

When plaintiffs seek to establish the presence of racially-polarized voting, the NYVRA explicitly prohibits judges from considering evidence of voter intent or arguments that there are other, race-neutral explanations for divergences in voting preferences among races.[79]

The NYVRA sets out practical guidelines to make sure courts assessing RPV are doing so properly. That means both that: (1) courts should follow the reliable, objective standards for RPV analysis established through decades of federal VRA litigation and peer-reviewed academic study; and that (2) RPV, once demonstrated, cannot be disproven or called into question by pointing to factors other than race that supposedly "explain" it.

Whether RPV exists is an objective, empirical question that is central to assessing racial vote dilution. Arguments or evidence about *why* RPV exists are irrelevant to the question of *whether* RPV exists. In addition, as the Supreme Court explained in *Gingles,* arguments that seek to find causes other than race for RPV are generally unreliable and misleading because, in America, circumstances like socioeconomic status or political preferences are themselves both correlated with and shaped by race. Similarly, requiring evidence that white voters' political polarization is

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[76] Zachary L. Hertz, *Analyzing the Effects of a Switch to By-District Elections in California* (July 19, 2021), https://electionlab.mit.edu/sites/default/files/2021-07/hertz_2020.pdf.

[77] Turnout, of course, is only one indicator of possible discrimination. At times substantial and successful effort to boost turnout among protected class members can mask present discrimination.

[78] *See, e.g.*, Kate Smith, *Judge OKs new map, rules in Yakima County voting rights settlement,* Yakima Herald (Oct. 29, 2021), https://www.yakimaherald.com/news/local/judge-oks-new-map-rules-in-yakima-county-voting-rights-settlement/article_d63a5522-e32e-543c-99cf-8edab7d4cf58.html; Phil Ferolito, Yakima County agrees to settlement in lawsuit alleging disenfranchisement of Latino voters, Yakima Herald-Republic (Aug. 31, 2021), https://www.yakimaherald.com/news/local/yakima-county-agrees-to-settlement-in-lawsuit-alleging-disenfranchisement-of-latino-voters/article_66ba7168-89a7-540d-aa45-2402349fbf53.html; Cameron Probert, *Franklin County agrees to settle voting rights lawsuit over Latino representation*, Tri-City Herald (May 4, 2022), https://www.yakimaherald.com/news/northwest/franklin-county-agrees-to-settle-voting-rights-lawsuit-over-latino-representation/article_b22a997f-a294-5cdf-b291-8589d9d7c541.html.

[79] NYVRA § 17-206(2)(c)(vi).

caused by racial animus would be inappropriately burdensome for protected class voters and would "ask[] the wrong question.[80] As Justice Brennan explained in *Gingles*, "All that matters under § 2 and under a functional theory of vote dilution" such as the NYVRA adopts "is voter behavior, not its explanations."[81] Thus, arguments or evidence that purport to show a factor other than race as the "real" cause of racially polarized voting–or that focus on voter intent rather than voter behavior–are not germane to establishing RPV.

As the Supreme Court, Congress, and other courts have recognized for decades, when voting in a jurisdiction is racially polarized, the harms of racial vote dilution are more likely to occur. Thus, a key component of evaluating vote dilution under the NYVRA is assessing whether RPV exists.

New York state courts generally do not have as much experience analyzing whether and to what extent racially polarized voting is present in a jurisdiction as federal courts do. There are objective, generally-accepted, peer-reviewed, and reliable ways to evaluate and prove racial voting patterns. It is also important that courts not be distracted or misled by extraneous or irrelevant arguments that do not bear on the empirical question of whether RPV exists. That is why the NYVRA sets out guidelines for what should and should not be considered as part of RPV analysis.

The 1986 Supreme Court case of *Thornburg v. Gingles* includes a memorable explanation of why it is inappropriate to confuse the question of *whether r*acially polarized voting exists with the questions of *why* racially polarized voting might exist, or whether factors other than race might "explain" it. One reason, *Gingles* explains, is that "geographically insular racial and ethnic groups frequently share socioeconomic characteristics, such as income level, employment status, amount of education, housing and other living conditions, religion, language, and so forth."[82]

In addition, a minority group's shared political concerns also stem from features of the group's shared experience and circumstances, including socioeconomic status. Given American history and continuing realities, such experiences and circumstances are both correlated with race and shaped by past and present racial discrimination.[83] These shared political preferences, moreover, are in significant part "a function of group status, and as such are largely involuntary."[84]

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[80] *Gingles*, 478 U.S. at 72-73.

[81] *Id.* at 73.

[82] *Id.* at 64.

[83] *Gingles*, 478 U.S. 30 at 64-65.

[84] *Id.* (quoting Katharine I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 La. L. Rev. 851, 902 (1982)).

Thus, considerations such as employment, living conditions, education, income, and even opinions on political issues cannot be meaningfully analyzed in isolation from race. As one example, the Supreme Court noted that many Black voters are concerned "with police brutality, substandard housing, unemployment, etc., because these problems fall disproportionately upon the group."[85] Similarly, attempting to attribute a group of voters' political cohesion to their shared socioeconomic circumstances rather than race is misleading because such circumstances, in the United States, are often "causally related to race or ethnicity" themselves."[86]

For these reasons, as *Gingles* makes clear, adopting any definition of RPV, or test for RPV, that would allow its presence to be disproven, distracted from, or called into question by evidence of other, "race-neutral" factors that purportedly contribute to the polarization would defeat a central purpose of both the federal Voting Rights Act and the NYVRA: "to eliminate the negative effects of past discrimination on the electoral opportunities of minorities."[87]

Gingles also teaches that a "proposed requirement that plaintiffs demonstrate that racial animosity determined white voting patterns" would make it inappropriately burdensome for voters of color to vindicate their rights, require unnecessarily divisive fact-gathering on discriminatory intent, and thereby pose a "grave threat to racial progress and harmony[.]"[88] Moreover, as Justice Brennan explained for the Court's plurality, "[f]ocusing on the discriminatory intent of the voters, rather than the behavior of the voters, also asks the wrong question."[89] The right question is simply whether voting is racially polarized. Accordingly, the NYVRA explicitly provides that "evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class is not required[.]"

Thus, by setting out clear and manageable guidelines endorsed by the United States Supreme Court, the NYVRA ensures that courts assessing the existence of racially polarized voting are considering the right evidence, applying the right standards, and answering the right question.

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[85] *Id.* at 64.

[86] *Id.*

[87] *Id.* at 65.

[88] *Id.* at 72-73.

[89] *Gingles*, 478 U.S. at 73.

IV. Language Assistance

The NYVRA builds upon Section 203 of the federal VRA to expand language access protections for voters with limited English proficiency. Why does the legislation depart from the federal model in some places and not others?

The NYVRA lowers the threshold number of voters needing language assistance to trigger the requirement that voting materials be provided in languages other than English.[90]

New York has some of the richest language diversity in the nation. Section 203 of the federal Voting Rights Act is a great start, but it is not sufficient to meet New York's unique needs. Language assistance should not be a barrier to political participation for any otherwise eligible voter. New York's large population and exceptional language diversity means that there are significant numbers of naturalized citizens who are limited English proficient voters that are not currently receiving language assistance in many political subdivisions around the state.[91] By expanding access to language assistance, NYVRA will not only provide vital technical assistance to voters, but also signal to new American communities that their political participation is both welcome and encouraged.

The NYVRA creates a floor of the raw number of people who need such assistance before requiring jurisdictions to provide it.[92]

NYVRA strives to provide expansive language assistance, while also minimizing the administrative burden of implementation on local election officials for providing comprehensive high quality language assistance. The minimum eligible voter threshold is intended to most effectively reconcile those concerns. By lowering the overall percentage and numerical thresholds and also creating a floor, the NYVRA strikes a reasonable balance.

The NYVRA maintains the federal definition of "language minority"– why not expand this?[93]

New York boards of elections and other election authorities are relatively familiar with the well-established body of case law and regulations under federal law and have some institutional expertise in their implementation. Using constructions that parallel law, while lowering the

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[90] NYVRA § 17-208.

[91] *See, e.g.*, Fulvia Vargas-De León, *Protect the vote for all New Yorkers*, N.Y. Daily News (Mar. 31, 2022), https://www.nydailynews.com/opinion/ny-oped-protect-the-vote-for-all-new-yorkers-20220331-f4v5c24sdvddzbqni23lhjsupa-story.html.

[92] NYVRA § 17-208(1)(a).

[93] NYVRA § 17-204(5-a).

threshold for coverages, hews closely to that framework and allows New York to develop further competence in administering more language assistance before expanding further.

V. Democracy Canon

The "democracy canon" section of the NYVRA is intended to provide guidance to New York State judges as they interpret laws, policies, procedures, or practices that govern or affect voting. How does this guidance relate to existing judicial precedent in the state?

New York State has strong constitutional protections for the right to vote and strong Court of Appeals interpretation of these projections. The democracy canon provision is intended to codify these strong existing protections. The purpose is to ensure that New York state courts do not backslide in the application of heightened scrutiny to laws governing voting and elections.

The following statements express both the legislature's and the judiciary's understanding of the protections for the right to vote in the New York State Constitution, including the express right to vote in Art II. s.1 and the prohibition against disenfranchisement in Art. I, s.1, among others: "The authority to prescribe or maintain voting or elections policies and practices cannot be so exercised as to unnecessarily deny or abridge the right to vote. Policies and practices that burden the right to vote must be narrowly tailored to promote a compelling policy justification that must be supported by substantial evidence." These standards are consistent with longstanding Court of Appeals precedent concerning the proper standard of review for laws that burden the right to vote, including *Hopper v. Britt*, 203 N.Y. 144, 150 (1911) and *People ex. rel. Hotchkiss v. Smith*, 206 N.Y. 231, 242 (1912). This provision is intended to ensure that New York state courts do not backslide in the application of heightened scrutiny to laws governing voting and elections.

VI. Appendix: Supporting Documents for Inclusion in Legislative Record

With this memorandum, we are transmitting copies of the following documents for further background on the importance of each of the NYVRA's provisions.

A. Cases and Litigation Materials

1. *Brnovich v. Democratic National Committee*, 141 S.Ct. 2321 (2021)
2. *Shelby County, Ala. v. Holder*, 570 U.S. 529 (2013)
3. *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009)
4. *Bartlett v. Strickland*, 556 U.S. 1 (2009)
5. *Georgia v. Ashcroft*, 539 U.S. 461 (2003)
6. *Johnson v. De Grandy*, 512 U.S. 997 (1994)
7. *Thornburg v. Gingles*, 478 U.S. 30 (1986)
8. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)
9. *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987)

10. *Holloway v. City of Virginia Beach*, 531 F. Supp. 3d 1015 (E.D. Va. 2021)
11. *Nat'l Coal. on Black Civic Participation v. Wohl,* 512 F. Supp. 3d 500 (S.D.N.Y. 2021)
12. *Nat'l Ass'n for Advancement of Colored People, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368 (S.D.N.Y. 2020), *aff'd sub nom. Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021).
13. *Flores v. Town of Islip*, No. 18-CV-3549, 2020 WL 6060982 (E.D.N.Y. Oct. 14, 2020)
14. *Missouri State Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006 (E.D. Mo. 2016), *aff'd*, 894 F.3d 924 (8th Cir. 2018)
15. *United States v. Village of Port Chester*, 704 F. Supp. 2d 411 (E.D.N.Y 2010)
16. Brief for the States of New York, California, Mississippi, and North Carolina As *Amici Curiae* in Support of Respondents, *Shelby County, Ala. v. Holder* (U.S. 2013)
17. Brief for *Amicus Curia*e, the City of New York, the Council of the City of New York, Michael R. Bloomberg, in his Capacity as Mayor of the City of New York, and Christine S. Quinn, in her Capacity as the Speaker of the City Council of the City of New York, in Support of Respondents, *Shelby County, Ala. v. Holder*, No. 12-96 (U.S. 2013)
18. 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 (U.S. 2009)
19. *Pico Neighborhood Ass'n v. City of Santa Monica*, 474 P.3d 635 (Cal. 2020)
20. *Wilson v. Eu*, 1 Cal. 4th 707 (1992)
21. *People ex. rel. Hotchkiss v. Smith*, 206 N.Y. 231 (1912)
22. *Hopper v. Britt*, 203 N.Y. 144 (1911)

B. Legislative Materials

1. S. Rep. 97-417, 1982 U.S.C.C.A.N. 177 (1982) (Senate Judiciary Committee report on 1982 Amendments to Section 2 of the Voting Rights Act, 52 U.S.C. § 10301)
2. Freedom to Vote: John R. Lewis Act (H.R. 5746)

C. Articles, Reports, Academic Studies, and Other Sources

1. Perry Grossman, *Current Conditions of Voting Rights Discrimination: New York*, Report for Submission by The Leadership Conference on Civil and Human Rights (Oct. 6, 2021)
2. New York Civil Liberties Union & NAACP Legal Defense and Educational Fund, Inc., White Paper, John R. Lewis Voting Rights Act of New York (Mar. 2022)
3. Letter from Over 70 Civil Rights Organizations and Allied Groups to Gov. Kathy Hochul, Pres. Pro Tem. and Maj. Leader Andrea Stewart-Cousins, and Speaker Carl E. Heastie Endorsing the NYVRA (May 11, 2022)
4. Rachel Landry and Jarret Berg, *Impact of New York's "Wrong Church" Ballot Disqualification Rule in the 2020 General Election*, VoteEarlyNY (May 20, 2021)

5. Bertha M. Lewis and Dmitri Daniel Glinski, *Mississippi on the Hudson*, The Black Institute (2018)
6. Jonathan Brater, Kevin Morris, Myrna Pérez, *Purges: A Growing Threat to the Right to Vote*, Brennan Center for Justice at NYU School of Law (July 2018)
7. Brigid Bergin, John Keefe, Jenny Ye and Clarisa Diaz, *Brooklyn Voter Purge Hit Hispanics Hardest,* WNYC (Jun 21, 2016)
8. U.S. Dep't of Justice, *United States Announces Settlement with New York City Board of Elections Resolving Improper Removal of Voters from Registration Rolls* (October 31, 2017)
9. Erika Wood, Liz Budnitz, and Garimha Malhotra, *Jim Crow in New York*, Brennan Center for Justice at NYU School of Law (2009)
10. N.Y. State Dep't of Criminal Justice Services, *NYS Adult Arrests and Prison Sentences by Race/Ethnicity in 2019*
11. Fulvia Vargas-De León, Protect the vote for all New Yorkers, N.Y. Daily News (Mar. 31, 2022)
12. Abhay P. Aneja and Carlos F. Avenancio-León, *The Effect of Political Power on Labor Market Inequality: Evidence from the 1965 Voting Rights Act*, Working Paper, Wash. Center for Equitable Growth (Oct. 2020)
13. Abhay P. Aneja and Carlos F. Avenancio-León, Disenfranchisement and Economic Inequality: Downstream Effects of Shelby County v. Holder, 109 AEA Papers & Proceeding 161 (May 2019)
14. Leah Aden*, The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation,* NAACP Legal Defense and Educ. Fund, Inc.,(Feb. 19, 2021)
15. Leah Aden, *Democracy Diminished: State and Local Threats to Voting Post* Shelby County, Alabama v. Holder, NAACP Legal Defense and Educ. Fund, Inc.(Oct. 6, 2021)
16. Richard L. Engstrom and Michael D. McDonald, *The Effects of At-Large Versus District Elections on Racial Representation in U.S. Municipalities*
17. Jessica Trounstine and Melody E. Valdini, *The Context Matters: The Effects of Single-Member Versus At-Large Districts on City Council Diversity*
18. Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 Mich. L. Rev. 1833 (1992)
19. Richard L. Engstrom, *Redistricting: Influence Districts–A Note of Caution and a Better Measure* (May 2011)
20. Katharine I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 La. L. Rev. 851 (1982).
21. Loren Collingwood and Sean Long, *Can States Promote Minority Representation? Assessing the Effects of the California Voting Rights Act*, 57 Urban Affairs Rev. 731(2021)
22. Lawyers' Committee for Civil Rights of the S.F. Bay Area, *Voting Rights Barriers & Discrimination in Twenty-First Century California: 2000-2013* (Mar. 2014)

23. Zachary L. Hertz, Analyzing the Effects of a Switch to By-District Elections in California (July 19, 2021)
24. Asian Americans Advancing Justice | AAJC, Fair Elections Center, and NALEO Educational Fund, *Policymakers' Guide to Providing Language Access in Elections* (July 2018)
25. Richard L. Hasen, *The Democracy Canon*, 62 Stanford L. Rev. 69 (2009)
26. Kate Smith, *Judge OKs new map, rules in Yakima County voting rights settlement*, Yakima Herald (Oct. 29, 2021)
27. Phil Ferolito, *Yakima County agrees to settlement in lawsuit alleging disenfranchisement of Latino voters*, Yakima Herald-Republic (Aug. 31, 2021)
28. Cameron Probert, *Franklin County agrees to settle voting rights lawsuit over Latino representation*, Tri-City Herald (May 4, 2022)
29. Georgia Lyons, *CLC Lawsuit Enabled 9,000 Ballots To Count in New York's 2020 Election*, CLC (June 10, 2021)
30. Office of the N.Y. State Attorney General, *A.G. Schneiderman Secures Agreement with Orange County Board of Elections to Ensure Equal Access to Ballot Box For Minority And Student Voters* (Oct. 29, 2015)
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