ACLU of New York

125 Broad Street, 19th floor
New York, NY 10004
212-607-3300
www.nyclu.org

Testimony of the New York Civil Liberties Union
Before the Joint Legislative Budget Hearing on Public Protection

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The New York Civil Liberties Union (NYCLU) appreciates this opportunity to submit the following testimony for the Joint Legislative Budget Hearing on Public Protection. The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices throughout the state and over 85,000 members and supporters.

The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution. This includes our work in pursuit of community safety, due process, and equal protection under the law.

We submit this testimony to express the NYCLU's concerns about several proposals in the FY 2026 Public Protection and General Government (PPGG) Article VII bill, urging the legislature to reject the proposed rollback of landmark discovery reforms, the addition of several new crimes, and an expanded ban on access to the Metropolitan Transportation Authority (MTA) system. We also offer recommendations for how the state can ensure due process for immigrant New Yorkers, reduce the criminalization of poverty in New York, and improve the prison labor system.

I. Reject Proposals to Roll Back Discovery Reform

The Legislature overhauled New York's criminal discovery laws in 2019, significantly improving how the government discloses evidence in criminal prosecutions. Governor Hochul's proposal in Part B of the PPGG Article VII bill would unwisely roll back some of the most critical improvements, including by:

(1) Weakening the prosecution's overall production obligation. Current law requires the prosecutor to turn over all materials "that relate to the subject matter of the case." The budget proposal would limit that requirement to those materials "relevant to the subject matter of the charges against the defendant in the instant case." This change would allow a prosecutor—not the defendant or their attorney—to decide what evidence is relevant to the defendant's case, and withhold the rest. It would also create opportunities for the prosecution to hold evidence back from some defendants but not others, or delay production of some evidence until amended charges are filed or additional defendants added.

(2) Eliminating the requirement that prosecutors produce certain subpoenaed materials. Existing law requires prosecutors to attempt in good faith to locate and make "available for discovery" evidence held by third parties, but does not require prosecutors to subpoena such evidence from third-parties so long as the defendant can do so on their own. The

proposed budget language would broaden that exception to the brink of absurdity, relieving prosecutors of the obligation to produce any subpoenaed evidence at all—even if subpoenaed willingly—if the defendant could have independently subpoenaed the same materials.

(3) Hiding more witness information. Prosecutors would be allowed to withhold even more witness information, including physical addresses and contact information, as long as they provide the defendant with one form of "adequate" contact info. "Adequate" is not defined.

(4) Letting police hide the ball. Under the proposed language, evidence held by the police department would "be deemed to be in the *constructive* possession of the prosecution" (meaning the prosecution is deemed to have control over the evidence but does not physically have it), but the prosecution would only be obligated to produce materials in its "actual" possession in order to certify discovery compliance. This scheme would allow the prosecution to certify trial readiness before the police have provided the prosecution all its discoverable evidence.

(5) Marginalizing discovery violations. The proposed language would allow prosecutors who disclose evidence too late—i.e., after certifying discovery compliance—to avoid dismissal or other sanction simply by filing an amended certificate of compliance, as long as the first one was filed in good faith after an exercise of due diligence. Prosecutors and police would be permitted to continue investigating and producing discoverable material up to the eve of trial, even after filing a certificate of discovery compliance, so long as they supplement the certificate. Improperly certifying trial readiness would be sanctionable only if not done in good faith, and then only to the extent of actual prejudice to a defendant, and then only if additional discovery time—in which time a defendant would have an even longer pretrial wait during which they are potentially jailed—would not cure the failure to disclose.

Taken together, if these changes accomplish the Governor's goal of reducing pretrial dismissals for lack of timely discovery, it will be at least in part by severely curtailing timely discovery itself. The Legislature must reject these proposed changes.

II. Reject the Creation of New Crimes

As a general matter, the NYCLU opposes the creation of new—or the expansion of existing—crimes. Continuing to expand the reach of the criminal legal system through new crimes and harsher punishments does nothing to address the root causes of criminal activity and is an ineffective tool for deterring future conduct. As such, we express our opposition to Parts D, L, O, and P of the PPGG Article VII bill.

With respect to Part D, we are skeptical that a new domestic violence crime will operate as intended. The criminal legal system already regularly fails to protect survivors of domestic violence, and we are doubtful that further reliance on that system will be effective here.

With respect to Parts O and P—and as we note further below in our discussion on the proposed transit ban—it's time to move beyond reflexive responses to fear mongering about subway safety. Overall crime rates in the MTA system have been trending down, and law enforcement officials are not lacking for options when it comes to criminal offenses with which to charge people (one need only look to the laundry list of offenses that can already be charged but that Part P seeks to

use as the basis for charging yet another new crime). Proposals around transit safety need to be grounded in facts, not rhetoric and fear mongering. Rather than doubling down on failed approaches to criminalization, the state should invest resources into supportive housing, healthcare, and other investments in meaningful solutions that actually make and keep our communities safe.

Part L proposes the criminalization of the distribution of child sexual abuse material (CSAM) created or altered by "digitization." Digitization, as defined at N.Y. Penal Law § 245.15, means "to alter an image in a realistic manner utilizing an image or images of a person, other than the person depicted, or computer generated images." Production, promotion, performance or possession of both obscene digitized CSAM (i.e., depictions of minors engaged in acts that would be considered obscene even as to adults) and ordinary digitized CSAM would be a felony.

As outrageous as it is, fully-simulated CSAM is protected by the First Amendment under *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), so long as its creation didn't involve real minors (i.e., either as a "morphed" image—strangers' nude parts on a recognizable minor's face—or where images of minors are used as training models). And while it is an open question whether the First Amendment protects morphed images (and it most likely does not), that question is less relevant here because the state's definition of digitization is almost certainly vague and overbroad.

We urge the legislature to reject any proposals in the PPGG Article VII bill that would create new or expand existing crimes.

III. Reject the Proposed Expansion of the Transit Ban

The NYCLU opposes the proposal in Part N to "Enhance the Transit Ban." This proposal, which purports to ban people convicted of certain offenses committed in or "adjacent to" any MTA facility or conveyance from accessing the transit system, is yet another example of an ill-conceived intervention in the subway system driven by fear-mongering. Rather than focusing on the reality that overall crime rates in the subway system have continued to trend downward in recent years, Governor Hochul and Mayor Adams have continued to insist that perceptions matter more than facts in proposing more and more interventions that rely on law enforcement and National Guard deployments, the rollout of faulty technologies, and—as here—an expanded footprint for the criminal legal system in controlling where New Yorkers can and cannot go.

The proposed language raises serious legal questions about the right to travel, especially in a place like New York City where public transit is so ubiquitous and where it is often the only means of transportation available for residents to get to their jobs, attend classes, receive medical care, and—at its most fundamental level—simply have the ability to participate in society. The proposed transit ban will of course have the greatest impact on poorer New Yorkers who are more reliant on public transit and will make reentry even harder for those who are trying to reestablish their lives in the city following a criminal conviction. For all the professed concerns about recidivism, this proposed legislation risks creating insurmountable barriers for someone looking to obtain and maintain steady employment in a transit-reliant city, creating factors that may make it even more likely that they come into contact with the criminal legal system again.

There are also obvious practical challenges with the proposed ban, not the least of which is how it will be enforced. Facial recognition is—rightly—off the table, but beyond that, it is unclear what mechanism the MTA is expected to use to enforce these bans without troubling and intrusive new forms of surveillance or encouraging even more wasteful law enforcement deployments. And the

vague language with respect to the scope of criminal conduct that renders one subject to the ban raises serious questions about how it will be interpreted and applied. The proposal would render one subject to a ban for conduct committed in "*or adjacent to*" to an MTA facility or conveyance, without any clarification on just what "adjacent to" means. A subway station is an MTA facility; a bus is an MTA conveyance. Does one fall within the reach of this ban because of conduct committed on a sidewalk next to either of these?

It's time to think beyond the criminal legal system as the be-all and end-all solution to every subway-related concern. Banning more people from the MTA system in a city where mass transit is what enables our very ability to live a life of personal and economic stability will do nothing to improve public safety. We urge the Legislature to reject this misguided proposal.

IV. Recommendations

The legislature should not merely reject the more harmful provisions in the governor's proposed executive budget, but must also push for the inclusion of affirmative policies and funding commitments to advance justice in New York State.

First, the legislature must ensure due process for immigrant New Yorkers. It must expand on the commitments it has made in prior budgets to guarantee funding for legal services for immigrant New Yorkers, who are particularly vulnerable under a second Trump administration. The legislature must commit $100 million in the FY 2026 budget to the Office of New Americans to sustain existing grants, connect immigrant New Yorkers to legal resources, and help legal services providers build out their capacity. It must also commit $65 million to the Education Department to expand immigration legal clinics at state-accredited law schools and assist people seeking U.S. Department of Justice accreditation to provide non-legal assistance to people navigating the immigration system. And not least of all, the legislature must guarantee sustainable long-term legal services for immigrant New Yorkers by passing the Access to Representation Act (S.141/A.270), which would create a statutory right for immigrant New Yorkers to state-funded counsel.

Second, the legislature should also use this year's budget as an opportunity to mitigate the harms posed by regressive court fees and fines by passing the End Predatory Court Fees Act (S.318), which would eliminate fees that attach automatically to all criminal convictions and traffic tickets. These fees—which are unrelated to a person's sentence, and by design exist solely to raise revenue—impose an effective regressive tax on low-income New Yorkers by placing the burden of funding government services on the backs of those targeted by a broken criminal legal system. The bill would also give judges more discretion to set the amount of fines imposed as part of a person's sentence, and end the practice of incarcerating people for failure to pay a fee or fine.

And, third, the legislature must stand up for incarcerated workers. The wages of incarcerated workers have been stagnant since 1993, while the costs of goods in commissary have seen steep increases. It is essential that the legislature increase pay for incarcerated workers by passing the Prison Minimum Wage Act (S.439A /A.3596A) and raising the wage for incarcerated workers to half of the state minimum wage.

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The NYCLU thanks the Legislature for the opportunity to provide testimony and for your work on the budget.