

**Testimony of the New York Civil Liberties Union**

**before**

**The New York State Senate Standing Committees on Elections  
and Local Government**

**and**

**The New York State Assembly Standing Committees on  
Election Law and Local Governments**

**Regarding**

**Elections in the Pandemic: A Review of the 2020 Primaries**

**Tuesday, August 11, 2020**



**ACLU of New York**

1 Whitehall Street, 3rd Fl.  
New York NY 10004  
nyclu.org

Donna Lieberman  
*Executive Director*

Robin Willner  
*President*

The New York Civil Liberties Union (NYCLU) respectfully submits the following testimony for Elections in the Pandemic: A Review of the 2020 Primaries. The NYCLU, the New York state affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and over 190,000 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, including the right to participate in the course of our democracy by voting, and the right of every New Yorker to engage with democratic institutions regardless of race, class, language proficiency, or any improper barriers that have historically impeded ballot access.

The COVID-19 pandemic has been a stress test for New Yorker's elections. The results should give government officials all the requisite motivation to make the changes that will ensure New Yorkers do not see a repeat of the primary season's failures this fall, or any time in the future.

To be clear, these failures were not the result of fraud or malfeasance—and the people who claim otherwise are only trying to undermine democracy out of fear that letting people vote will result in their unemployment. Instead, we should recognize the pandemic's very serious challenges for our elections and the very serious solutions required by the legislature to address them successfully.

The pandemic forced an immediate transition from a system of elections built to accommodate over 90% of New Yorkers voting in person on Election Day and to a system in which most New Yorkers were



casting absentee ballots for the first time. The pandemic required new protocols to protect public health by enabling social distancing and regular disinfecting. The pandemic caused a significant number of experienced poll workers—a group that includes an outsized number of senior citizens—to withdraw from the elections, forcing the closure of poll sites that could not be adequately staffed. The pandemic made poll worker training much more difficult in an election where there was a greater-than-usual need for training due to the consolidation of the Presidential primary (and, for some counties, a congressional special election).

The pandemic also left some boards of elections short-staffed and less equipped to deal with the crush of absentee ballot applications. While some boards of elections performed well, there is absolutely no doubt that others could have performed much better. The June election also leaves no doubt that there is a long-term need to build a more professional and more accountable election system in New York that is better prepared to deal with crises like these. But it would be unfair not to recognize the historically challenging conditions that boards of elections operated under during the primary season as we diagnose the failures in our election infrastructure and consider solutions for the immediate, intermediate, and long-term.

During the primary season, we saw serious failures at every stage of the election process.

### ***Voter Registration***

Voter registration rates have been and continue to be alarmingly low across the state in 2020. During the first ten weeks of the year, before the pandemic hit, voter registration in New York was up significantly compared to 2016, which is no surprise given the increased voter interest and enthusiasm for this election. However, once the pandemic hit, in-person voter registration came to a halt. The pace of New Yorkers cycling through government offices where they might encounter opportunities for voter registration slowed to a crawl. Public health directives against large gatherings effectively ended voter registration drives by non-government organizations.

Even though many campaigns were able to transition successfully from in-person operations to digital organizing, there was no meaningful way to organize digital registration drives without an online voter registration system—even though an online registration system was authorized, paid, built, and remains ready to go. Finally, when there was an opportunity for voter registration during the protests for racial justice and police accountability after the murder of George Floyd, New



York’s ridiculous 25-day voter registration cutoff prevented almost everyone who was able to register during that time from voting in the June primary and deterred others who wanted to vote in the June primary from registering at all.

If the 25-day cutoff continues into this fall, it will prevent tens of thousands more eligible New Yorkers from casting a ballot in the general election. While 21 states and the District of Columbia have same-day registration available, no state in the union has a voter registration cutoff that is longer than 30 days before an election. Unfortunately, right now, New York is part of the outlying edge of the latter group—which includes voter suppression luminaries in Georgia, Kentucky, and Texas—rather than the former group. While passage of automatic voter registration to take effect in 2023 will (if signed by the governor) provide a long-term solution, two sets of bills pending in the state legislature would alleviate these problems right now:

- (1) The 25-day voter registration cutoff, which was set in May 1991 (before the advent of the Internet, cell phones, and laptop computers) could be reduced to the New York state constitutional minimum of 10 days by S.2311 (Kavanagh) / A.116 (Buchwald). The bill, which has already passed the Senate, sets a 15-day cutoff for voter registration forms to be mailed, but allows for in-person registration to occur up to 10 days before an election—effectively permitting one “golden day” where same-day registration is available. That is, on the first day of early voting, voters could submit affidavit ballots that serve as both registration and ballot, which would substantially increase turnout within the existing framework of the boards of elections affidavit ballot process.
- (2) Many New Yorkers could have an online voter registration option right now, when we need one the most, if the legislature passes S.6463 (Myrie) / A.8473 (Blake). An online voter registration system has been authorized and paid for by the New York City Council. The New York City Campaign Finance Board built and demonstrated it to the New York City Board of Elections. The NYCCFB system meets the standards for photostatic signatures that allows the Department of Motor Vehicles to transmit voter registration information electronically. Moreover, the system could be easily and quickly adapted to provide registration forms to any county board of elections. At a time when there’s a desperate need for remote voter registration, leaving a system that’s already paid for on the shelf is a tremendous waste of taxpayer resources and a lost civic engagement opportunity.

## *Absentee Voting*

New York's absentee ballots process needs substantial work. Too many voters received their absentee ballots too late or not at all, and those who were able to receive and submit absentee ballots had their ballots rejected at unconscionably high rates. According to bi-annual reports from the U.S. Election Assistance Commission, New York typically ranks in the top three states for absentee ballot rejection rates.<sup>1</sup> And yet, in the June primary, some Assembly districts this year saw absentee ballot rejection rates that vastly exceed our nation's worst absentee rejection rates in recent years.



It's a problem when New York has an absentee ballot rejection rate of 5%-10% and only 5% of voters are casting absentee ballots; it risks undermining confidence in elections when the proportion of voters casting absentee ballots increases by an order of magnitude and the rejection rate also increases substantially. To the legislature's credit, several bills have already been passed addressing problems that will solve the crisis in absentee ballots—and the chairs of the Assembly and the Senate Elections Committees are owed much credit for aiding the passage of bills that (a) moved the postmark deadline for absentee ballots and permitted some ballots received by mail with no postmark to be counted; (b) expanding the channels for applying for absentee ballots; (c) providing a notice and cure procedure, so that voters who make correctible errors have an opportunity to ensure that their absentee ballots are counted; and (d) ensuring that all voters will have an opportunity to apply early for absentee ballots during the pandemic, which should reduce the number of absentee ballots received late. However, more needs to be done to ensure that a substantial number voters are able to cast their ballots by mail, which will help keep voters, poll workers, election officials and their families safe by reducing traffic at the polls on Election Day.

- (1) New Yorkers need to know the status of their absentee ballots so they know when they need to make arrangements to either (a) send a new request; (b) get a notarized letter designating someone

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<sup>1</sup> See U.S. Election Assistance Commission, *The Election Administration and Voting Survey 2018 Comprehensive Report: A Report to the 116<sup>th</sup> Congress*, at 30, Overview Table 2, June 2019; U.S. Election Assistance Commission, *The Election Administration and Voting Survey 2016 Comprehensive Report: A Report to the 115<sup>th</sup> Congress*, at 24-25, Overview Table 2, June 2017.; U.S. Election Assistance Commission, *The 2014 EAC Election Administration and Voting Survey Comprehensive Report: A Report to the 114<sup>th</sup> Congress*, at 23-25, Overview Table 2, June 2015. All of the above reports are available at <https://www.eac.gov/research-and-data/studies-and-reports>.

pick up their ballot from the board of elections in person; or (c) make arrangements to vote early. New York already provides real-time absentee ballot tracking to military and overseas voters. That system should be made available to every New Yorker, and S.2768 (Comrie) / A.10724 (Quart) would make that possible.

(2) The United States Postal Service is a storied institution that provides an invaluable and irreplaceable service; however, the pandemic and intentional inference the Trump Administration have diminished the reliability of the USPS and public confidence that the U.S. mail will deliver their absentee ballots on time and/or with a postmark. The state legislature can take several measures to mitigate concerns about the USPS:

- a. Provide voters with secure dropboxes as an alternative to delivering absentee ballots to polling places or the board of elections offices. Dropboxes offer voters an opportunity to personally deliver their ballots while maintaining social distancing and without risking failure on the part of the USPS in picking up their ballot, postmarking their ballot, or delivering their ballots on time. Senator Hoylman has recently introduced a bill to authorize this practice.<sup>2</sup>
- b. Expand the window for boards of elections to accept absentee ballots without postmarks. The legislature has already moved the postmark deadline from the day before Election Day to Election Day itself and, more recently, moved to require boards of elections to count ballots received by mail on the day after the election. However, just last week, a federal judge found that under the circumstances during the June primary, the United States Constitution required the counting of absentee ballots without postmarks received within two days of the election. Moreover, other states provide much larger windows for boards of elections to count absentee ballots received without postmarks. For example, California law ordinarily provides for ballots without postmarks to be counted if received up to 3 days after Election Day and, for November 2020, is expanding that window to 17 days. Because conditions with mail service are unlikely to improve before



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<sup>2</sup> See, e.g., N.Y. Daily News, Secure absentee ballot drop boxes for November election: N.Y. Sen. Hoylman (Aug. 7, 2020), [https://www.nydailynews.com/news/politics/ny-hoylman-ballot-drop-boxes-november-election-20200807-voo7lztihbhfhb2yucopmnk3ri-story.html?fbclid=IwAR3eSkam4dWN\\_ouAU84v-pbUIPS1s4SeWFhHt\\_tR6xsvKMwPcU9ApHoruf8](https://www.nydailynews.com/news/politics/ny-hoylman-ballot-drop-boxes-november-election-20200807-voo7lztihbhfhb2yucopmnk3ri-story.html?fbclid=IwAR3eSkam4dWN_ouAU84v-pbUIPS1s4SeWFhHt_tR6xsvKMwPcU9ApHoruf8).

November 2020, the legislature should require boards of elections to count absentee ballots received by mail without postmarks at least three days after Election Day.

### ***Early Voting***

During the pandemic, early voting offers voters a critical opportunity to cast their ballot in a safe way that can alleviate pressure on both Election Day lines and absentee ballot processes. This year, I requested an absentee ballot in May and was told by my local board of elections that my absentee ballot was sent out on May 29. Unfortunately, I never received my absentee ballot. Instead, I made the decision to vote early. My early voting site was relatively accessible, spacious, and not crowded. Poll workers were friendly and helpful. I was in and out in about 5 minutes. We should all be doing more to promote early voting, including making early voting sites more numerous and more accessible, particular to low-income and minority neighborhoods where there are large populations of essential workers who need (and deserve) greater flexibility in their opportunities to cast a ballot. The state legislature should continue expanding access to early voting by increasing the minimum number of sites each county is required to provide; require every early voting site to be a voting center; expanding the number of days for early voting; increasing the flexibility of early voting sites by permitting mobile and pop-up early voting sites.



### ***Election Day Voting***

Most complaints about in-person voting on Election Day during the June 2020 primary related to (a) voters who were supposed to receive two ballots—one for the presidential primary and one for the regular primary—only receiving one ballot; (b) voters whose polling places moved or were closed at the last minute; and (c) long lines at polling places. With the respect to the issue of two ballots, thankfully, that situation is unlikely to be replicated any time soon; however, it speaks to the importance of ensuring a stable supply of well-trained poll workers. The population of poll workers in New York, like in many other states, includes a significant number of senior citizens—a group that is particularly vulnerable to the most virulent symptoms of the novel coronavirus. But even in the absence of the pandemic, building a younger base of poll workers, including high school and college students, would be a boon to New York’s elections and for the civic education of New York’s electorate this year and beyond. Similarly, there must be efforts to ensure a more stable supply of polling places by encouraging collaboration greater between local governments and boards of elections, and also greater enforcement so that the private institution who receive

important government benefits are not able to shirk their civic responsibility to offer their space to the public for a few days out of the year.

***Long Term Solutions: Constitutional Amendments and the John R. Lewis Voting Rights Act.***

Looming over this patchwork of immediate solutions is the need for long-term solutions to prevent the kind of widespread disenfranchisement that occurred in June from happening again. Certainly, constitutional amendments to allow no-excuse absentee voting and Election Day voter registration will be critical to overcoming the obstacle to effective elections that our current system of absentee voting and voter registration imposes. No-excuse absentee balloting will permit the construction of a permanent list of voters seeking to cast their ballots by mail, whose requests can be fulfilled at earliest opportunity each year. Same-day registration and Election Day registration will remove a significant unnecessary hurdle to casting a ballot—the requirement that a voter first register at least twenty-five days before an election before later deciding whether and when to cast a ballot. Instead, with same-day and Election Day registration, the voter need only go through one combined transaction at the polls to both register and vote.



However, without the John R. Lewis Voting Rights Act (“JRLVRA”),<sup>3</sup> voters—particularly minority voters—will not receive the full benefits of either the potential measures proposed here or the positive steps to modernize elections that the legislature has taken since the start of 2019.

The JRLVRA builds on the granite bedrock of the federal Voting Rights Act of 1965 to confront evolving barriers to effective minority participation and to root out longstanding discriminatory practices more effectively. The JRLVRA also takes affirmative steps to make our democracy more inclusive and robust by creating a fulsome and transparent basis for data-driven evaluation of our election practices. The JRLVRA provides a means of better ensuring that all voters are able to cast a meaningful ballot, but especially helps to accelerate the participation of those minority voters who have been historically denied an equal opportunity to participate in the political process.

The NYCLU has been working closely with other civil rights groups, community partners, and scholars to help make the JRLVRA the most comprehensive and effective state voting rights act to date. The

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<sup>3</sup> S.7528A (Myrie) / A.10841 (Walker).

NYCLU enthusiastically supports the JRLVRA and urges its passage without delay.

### ***The Need for a Comprehensive State Voting Rights Act***

New York has an extensive history of discrimination against racial, ethnic, and language minority groups in voting.<sup>4</sup> The result is a persistent gap between white and non-white New Yorkers in political participation and elected representation. According to data from the U.S. Census Bureau, registration and turnout rates for non-Hispanic white New Yorkers led Black, Hispanic, and Asian New Yorkers—the latter two groups by particularly wide margins.<sup>5</sup> New York’s poor record has been the source of nationwide derision as states with a flagrant history of discrimination, including Ohio and North Carolina, have tried to justify exclusionary tactics by pointing to New York’s lack of early voting, no-excuse absentee balloting, same-day or Election Day registration, and criminal justice-related disenfranchisement—among other shortcomings.<sup>6</sup> New York made strides to improve access to the franchise by enacting a slate of election reforms in 2019, but many discriminatory practices remain in place and opportunities for discrimination remain widely available.

The scale and multiple levels of New York’s election system makes meaningful investigation and prosecution of voting rights violations a daunting task.<sup>7</sup> With 62 counties, 62 cities, 932 towns, 551 villages,<sup>8</sup> and 1,863 special purpose (e.g., school, water, fire, sewer, etc.) districts, each of these more than 3,400 jurisdictions holds elections for public offices, tax levies, and/or capital bonds; most provide primary services that New Yorkers rely upon every day, including public education, sanitation, policing, fire protection, water, parks, and libraries, to name a few. Troublingly, there are numerous opportunities for discriminatory practices throughout the electoral



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<sup>4</sup> See, e.g., Erika Wood, et al., *Jim Crow in New York*, Brennan Ctr. For Justice 5 (2010), <https://bit.ly/336vnys>; Juan Cartagena, *Voting Rights in New York City: 1982-2006*, 17 S. Cal. L. & Social Justice 501, 502 (2008)

<sup>5</sup> U.S. Census Bureau, Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2018, available at: <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-583.html>

<sup>6</sup> Jeffrey Toobin, *The Problem with Voting Rights in New York*, THE NEW YORKER, Oct. 11, 2016, <https://www.newyorker.com/news/daily-comment/the-problem-with-voting-rights-in-new-york>

<sup>7</sup> See *Number of Local Governments by State*, GOVERNING, <http://www.governing.com/gov-data/number-of-governments-by-state.html> (last visited December 5, 2019)

<sup>8</sup> N.Y. Department of State, Division of Local Government Services, “What Do Local Governments Do,” <https://www.dos.ny.gov/lg/localgovs.html>



process in any of these jurisdictions—from redistricting plans to polling place changes, to failures of adequate language assistance, to voter intimidation and voter deception. This situation is untenable. Minority voters must have equal opportunities to participate in the political process, but have often been left on disadvantageous footing by election laws and practices that are discriminatory in nature or as applied.

***New Yorkers Face Both Longstanding and Newly-Evolved Threats to Voting Rights.***

While voter suppression is an evil that has been closely associated in the public mind with the Jim Crow South, New York State has its own shameful history of voter suppression. Starting in the late 18<sup>th</sup> Century and continuing over the next two centuries, New York adopted a series of restrictive voting laws designed to disenfranchise minority and immigrant voters.<sup>9</sup> That history of discrimination is too voluminous to recount here, but its effects still loom large today in the relative disadvantage that minority and immigrant voters experience.

New York’s low registration and turnout rates testify to this: In the November 2016 and 2018 elections, New York ranked among the bottom ten states on both measures. One example of a common practice that results in voter suppression and is especially difficult to remedy in a timely fashion through affirmative litigation are designations of polling places that are inconvenient for minority voters. Generally, polling places are announced within 45 days of an election or, at best, a few months prior. However, properly investigating whether a polling place change will negatively impact minority voters can take expert analysis and significant time, making it difficult to bring successful remedial litigation before an election.

For example, in 2019, Rensselaer County designed an early voting plan that virtually made early voting impossible for the overwhelming majority of the county’s minority voters.<sup>10</sup> The Board of Elections designated only two early voting sites—the bare minimum for a county with over 100,000 registered voters. Neither of them was located in the City of Troy, the largest municipality in Rensselaer County, and home to approximately 82 percent of its Black population

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<sup>9</sup> Daniel Brook, *New York Should Hate the Voting Rights Act*, SLATE, Feb. 21, 2013, <https://bit.ly/2Ptx1WN>.

<sup>10</sup> See July 22, 2019 Letter from Melanie Trimble et al. to Commissioners, Rensselaer County Board of Elections.



and over 70 percent of its non-white population overall.<sup>11</sup> Instead, the two chosen sites were located in areas that are not densely populated, and not meaningfully accessible by public transportation or located along prevailing commuting routes for Troy residents. In spite of advocacy groups' efforts, and calls from the City of Troy to use a site convenient to minority voters, Rensselaer County and the Rensselaer County Board of Elections refused to make early voting accessible to the citizens of Troy. The time and resources required to bring litigation to challenge this early voting plan would have been considerable and, ultimately, no case was filed.

In June 2020, there were so many polling places moved or closed at the last minute that there was barely time to evaluate the changes and inform voters, let alone seek to stop any discriminatory changes.

Instead of requiring minority voters to play the role of watchdog against their own disenfranchisement, local governments and boards of elections should bear the burden of ensuring that their plans provide equitable access to poll sites for minority voters. This burden-shifting was the primary virtue of preclearance under VRA Section 5, and it gives jurisdictions more incentive to address infringements on minority voting rights prophylactically in administering elections.

Providing adequate election assistance to language minority voters has also been a problem in New York—a state that enjoys enviable language diversity among its residents. Federal law “covers those localities where there are more than 10,000 or over 5 percent of the total voting age citizens in a single political subdivision . . . who are members of a single language minority group, have depressed literacy rates, and do not speak English very well.” Currently, seven counties in New York—and all of the political subdivisions (e.g., cities, school districts) in those counties—must provide assistance to Spanish-speaking voters.<sup>12</sup> Kings, Queens, and New York Counties must also offer assistance to some Chinese-speaking voters. Only Queens County has any further language assistance obligations under federal law, and those are limited to speakers of Korean and certain Indian languages. Nonetheless, some of these jurisdictions have failed to meet these limited federal obligations,<sup>13</sup> and many likely still do. But various

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<sup>11</sup> U.S. Dep't of Justice, Language Minority Citizens, <https://www.justice.gov/crt/language-minority-citizens>.

<sup>12</sup> The seven counties are Bronx, Kings, Nassau, New York, Queens, Suffolk, and Westchester. Voting Rights Act Amendments of 2006, Determinations Under Section 203 (Dec. 5, 2016) <https://www.govinfo.gov/content/pkg/FR-2016-12-05/pdf/2016-28969.pdf>.

<sup>13</sup> John Hildebrand, *Most Long Island School Districts Will Have Bilingual Ballots*, NEWSDAY, March 24, 2019, <https://www.newsday.com/long-island/education/school->



other language minority groups do not currently even have a right to language assistance in voting. As other states and localities (including California and New York City) have done, New York State could provide language assistance well above the federal law minimum.

Even under the expanded language assistance scheme recently proposed in the New York City Council,<sup>14</sup> no assistance would be guaranteed to over 10,000 Punjabi-speaking residents or over 50,000 Tagalog speakers. Nor would any language assistance reach significant populations of African immigrants in the Bronx; Indian, Chinese, Filipino, and Greek immigrants in Queens; Italian and Albanian immigrants in the Bronx, Brooklyn, and Staten Island. Outside of New York City, no language minority (other than Spanish speakers in a few counties<sup>15</sup>) have any guarantee of receiving language assistance in elections. The failure of boards of elections and/or local governments to provide adequate language assistance outside of New York City (and even the New York City board of elections has been resistant to providing adequate language assistance<sup>16</sup>) is especially concerning because those areas are homes to fastest growing communities of immigrant and racial groups.<sup>17</sup> These groups also happen to be among the poorest, or comprised of refugee resettlement groups whose ethnicities and national origins have not traditionally settled in the United States in significant numbers.

Currently, it is very difficult to receive critical election data from county boards of elections or from jurisdictions that administer their

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[districts-voting-english-spanish-ballots-1.28832270](#) (“For the first time, most of Long Island’s 124 public school districts plan to provide ballots in both English and Spanish for the May budget and board vote, a response to demographic shifts and legal pressures”).

<sup>14</sup> New York City Council, Int. 1282-2018, A Local Law to amend the New York city charter, in relation to the voter assistance advisory committee providing poll site interpreters in all designated citywide languages (Nov. 28, 2018), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3763667&GUID=C6C1C4F8-BE3D-4755-B131-EFA3D7B28DB2&Options=&Search=>

<sup>15</sup> See, e.g., *In Matter of Rockland County Board of Elections*, Memorandum of Agreement (MOA) Concerning Minority Language Access, N.Y. Atty. Gen. Civ. Rights Bureau, Sept. 12, 2012,

[https://ag.ny.gov/sites/default/files/pdfs/bureaus/civil\\_rights/votingrights/Rockland%20County%20Final%20MOA%20signed%20by%20all%20parties.pdf](https://ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/votingrights/Rockland%20County%20Final%20MOA%20signed%20by%20all%20parties.pdf); *United States v. Orange County*, 12 Civ. 3071 (ER) (S.D.N.Y. Apr. 12, 2012), [https://www.justice.gov/sites/default/files/crt/legacy/2012/04/20/orange\\_cd\\_ny.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2012/04/20/orange_cd_ny.pdf).

<sup>16</sup> Daily News Editorial Board, *Lost By Translators*, N.Y. Daily News, Sept. 23, 2019 [nydailynews.com/opinion/ny-edit-tranloaots-20190923-22mami2tdfgidpebhxz6ugcu44-story.html](http://nydailynews.com/opinion/ny-edit-tranloaots-20190923-22mami2tdfgidpebhxz6ugcu44-story.html).

<sup>17</sup> Asian American Federation, Jo-Ann Yoo, Howard Shih, “Hidden in Plain Sight: Asian Poverty in New York City,” June, 2018 [http://www.aafny.org/doc/AAF\\_poverty\\_2018.pdf](http://www.aafny.org/doc/AAF_poverty_2018.pdf)



own elections in a timely fashion. Jurisdictions, especially those that administer their own elections separate from their county board of elections, frequently keep records in poor shape and often keep voluminous relevant records in hard copy instead of electronic format. Jurisdictions are slow to respond to FOIL requests and regularly provide incomplete responses. For particularly recalcitrant jurisdictions, the amount of time required to pursue FOIL requests to a judicial resolution may preclude the timely investigation and prosecution of a claim. For example, on May 16, 2019, advocacy groups sent a FOIL request to the Board of Elections in the City of New York (BOENYC) seeking records concerning, among other things, the designation of early voting sites and the decision to assign each voter to a single early voting site instead of permitting voters to cast a ballot at any early voting site in their county of residence.<sup>18</sup> BOENYC failed to produce records within 60-day time period designated by BOENYC. After the advocacy groups filed a constructive denial appeal, BOENYC agreed to produce records, but not until after the close of the November 2019 election. Ensuring that voters, advocates, researchers, and authorities have efficient access to high quality electronic records is critical to expeditious enforcement.

***The JRLVRA Will Eradicate Existing Discriminatory Practices and Prevent Backsliding While Affirmatively Expanding Participation.***

The JRLVA provides an opportunity for this state to provide strong protections for the franchise at a time when voter suppression is on the rise, vote dilution remains prevalent, and the future of the federal Voting Rights Act is uncertain due to a federal judiciary that is increasingly stocked with Trump appointees. New York will not be the first state to pass its own voting rights act. The JRLVRA builds upon the demonstrated track record of success in California and Washington, as well as the historic success of the federal Voting Rights Act by offering the most comprehensive state law protections for the right to vote in the United States. The law will address a wide variety of long-overlooked infringements on the right to vote and also make New York a robust national leader in voting rights at a time when too many other states are trying to restrict access to the franchise.

The NYCLU supports the bill in its entirety. The testimony below focuses on seven sections as particularly important to ensuring equal opportunity for eligible citizens to participate in the political process.

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<sup>18</sup> May 16, 2019 Letter from Perry Grossman, Susan Lerner, and John Powers, to John Wm. Zaccone and Michael J. Ryan, Board of Elections in the City of New York.



**Section One** (proposed Election Law § 17-202) brings New York in line with many other states by providing for a canon of liberal judicial construction of the election laws in “in favor of voter enfranchisement, which could be overcome only by clear statutory language to the contrary or strong competing policy reasons.”<sup>19</sup> In his seminal work on this canon of statutory interpretation—the Democracy Canon—Prof. Rick Hasen writes that the purpose of this “Democracy Canon” is “to give effect to the will of the majority and to prevent the disfranchisement of legal voters . . . .”<sup>20</sup> The canon plays a role in “favoring free and competitive elections . . . “ and serves “to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly to allow voters a choice on Election Day.”<sup>21</sup> In plain terms, this provision will ensure that in any circumstances, the law favors the ability of qualified voters to cast valid, meaningful ballots and have them counted whenever possible. This canon of construction would aid both courts, voters, and boards of elections confronting the consistently high rates of absentee ballot and affidavit rejection in this state, particularly, the alarmingly high rates in the June 2020 primary.

**Section Two** (proposed Election Law §17-206) provides a framework to ferret out vote dilution and voter suppression in a way that is efficient and cost-effective for both voters and jurisdictions. New York jurisdictions have a record of racial vote dilution, including successful federal cases in New York City, the City of New Rochelle, Albany County, the Town of Hempstead, and the Village of Port Chester, as well as ongoing cases in the Town of Islip and the East Ramapo Central School District. Unfortunately, these jurisdictions are not outliers, but extreme examples of a common problem that goes largely uninvestigated. Prosecuting even these few cases has taken years and cost millions of taxpayer dollars as incumbent officials in these jurisdictions use public funds to defend the discriminatory methods of election that keep them in office. Indeed, in the ongoing case in East Ramapo, where Black and Latinx voters prevailed at the trial court, records showed that the school district spent over seven million dollars to defend its discriminatory system while plaintiffs required thousands of hours (amounting to over \$9 million in attorneys’ fees and costs) to prosecute it.<sup>22</sup> With 62 counties, 62 cities,

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<sup>19</sup> See Richard Hasen, *The Democracy Canon*, 62 Stan. L. Rev. 69 (Dec. 2009).

<sup>20</sup> *Id.* at 77

<sup>21</sup> *Id.*

<sup>22</sup> Tom Zambito, *East Ramapo: Superintendent suggests firing teachers to pay \$9 million legal bill*, The Journal News (White Plains, N.Y.), July 29, 2020, available at:



932 towns, 551 villages, and 1,863 special purpose (e.g., school, water, fire, sewer, etc.) districts, the scale of New York’s system of local governments makes meaningful investigation and prosecution of voting rights violations a daunting task.

Section Two of the JRLVRA, patterned on the California Voting Rights Act, provides a more efficient and effective means of prosecuting cases in which at-large elections dilute minority voting strength compared to federal law. The JRLVRA will allow for cases to be investigated and violations remedied more quickly and at much less expense to the taxpayer than existing federal law. Among other provisions, the law requires plaintiffs to notify jurisdictions that their election practices may be in violation of the law prior to running up substantial fees and costs. After receiving notification of a potential violation, the law then offers jurisdictions an opportunity to cure violations without lengthy and expensive litigation. The JRLVRA expands upon both the California Voting Rights Act and the federal VRA by providing a clearer and more efficient framework for prosecuting vote suppression, as well as racial gerrymandering claims—both of which are currently beyond the reach of the CVRA. For example, the JRLVRA will be an effective tool in ensuring that the Nassau County Legislature is unable to replicate its extreme racial gerrymander in the 2020 redistricting cycle. The JRLVRA will enable voters to hold jurisdictions accountable for discrimination-enhancing election practices, such as early voting plans that disproportionately disfavor minority voters; off-cycle elections dates; and the use of too few polling places in many villages, school districts, and special purpose districts.

**Section 3** of the JRLVRA (proposed Election Law § 17-208) offers New York an opportunity to bring its elections into the 21<sup>st</sup> century by providing a central public repository for election and demographic data with the goal of fostering evidence-based practices in election administration and unprecedented transparency. Developing effective and sustainable solutions for the problems we saw during the June 2020 primary requires comprehensive and detailed data that is timely available.

A critical barrier to analyzing whether and to what extent New Yorkers are able to cast a meaningful ballot is the difficulty of getting election results, voter files, shapefiles, and other key data from election authorities, as well as precinct-level Census data for each jurisdiction.

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<https://www.lohud.com/story/news/education/2020/07/29/east-ramapo-schools-lawsuit-payment/5527859002/>.



In a research project on political participation in school districts that the NYCLU is currently conducting in collaboration with education scholars, sociologists, and political scientists, we have to make requests to each school district individually for voter history data, information about polling places, language assistance for voters, and other key practices. Collecting this data is particularly time consuming because almost every school district in New York state runs their own elections, separate and apart from the county boards of elections, which means they are the sole repository of their voting and elections records. The same is true of many villages and special purpose entities, which often run their own elections, separate from the county boards of elections. Analyzing these data are necessary to making recommendations to improve the abysmal turnout rates in school district elections.

Similar to programs in California and Texas, this provision would create a non-partisan statewide database of information to be available for election administration and voting rights enforcement, including election results, voter files, shapefiles, and other key data from election authorities, as well as precinct-level Census data for each jurisdiction in the state. Making this data easily and publicly available will improve transparency by allowing voters to scrutinize whether the jurisdictions are providing equitable access to the political process. The statewide database will benefit election administrators and local governments as well by maintaining readily available data and offering technical assistance to research and implement best practices. The creation of a statewide database should also reduce the burden on boards of elections and local governments that currently have to deal with a constant stream of FOIL requests for election data and information that can and should be centrally maintained.

*Section 4* of the JRLVRA (proposed Election Law § 17-210) provides New York an opportunity to improve its provision of language assistance to limited English proficient voters by creating a comprehensive statewide database of demographic and election information. New York's language diversity is one of its great strengths, but existing law requires very little language assistance to language-minority voters. For example, federal law only requires minimal language assistance to voters in New York City (except Staten Island), Nassau, Suffolk, and Westchester, a few other counties where jurisdictions are required to provide language assistance as a result of actual or threatened litigation. Federal law requires language assistance be provided only when at least 5% or 10,000 members of a political subdivision's population are (1) citizens of voting age; (2) limited-English proficient; and (3) speak a particular language.



The federal threshold fails to address the needs of many Spanish-speaking voters around the state as well as the fast-growing population of New Yorkers from Asian-American and Pacific Islander heritage who would benefit from language assistance in voting. The JRLVRA lowers those thresholds to 2% and 4,000 CVAP and applies to citizens of voting age population who speak English “less than very well” according to the Census Bureau’s American Community Survey. With a comprehensive repository of demographic and election data, the statewide database can also determine whether, where, and, more precisely, in what languages jurisdictions should be providing assistance to language minority voters. New York’s unique language diversity requires a more tailored approach than federal law. The JRLVRA’s lower threshold for providing language assistance combined with the capabilities of the statewide database provide the means to take a more precise and culturally competent approach to effectively enfranchise more historically marginalized groups of voters.

*Section 5* of the JRLVRA (proposed Election § 17-212) brings the framework of the most effective civil rights law in American history to New York. In passing the Voting Rights Act, Congress recognized that case-by-case litigation alone was inadequate—too slow and too costly—to eradicate discrimination and to prevent its resurgence.<sup>23</sup> The “unusually onerous” nature of voting rights litigation has always been the key reason for the preclearance remedy and litigation has only become more onerous today because modern voting discrimination is “more subtle than the visible methods used in 1965.”<sup>24</sup> Even if minority voters can muster the resources to sue, these new discriminatory practices and procedures can remain in effect for years while litigation is pending. But preclearance relieves minority voters of the substantial burdens of litigation by “shifting the advantage of time and inertia” to minority voters by placing a limited duty on covered jurisdictions to demonstrate that any changes to their election laws have neither the purpose nor effect of making minority voters worse off.<sup>25</sup> Thus, instead of voters having to prove that new election laws and practices are discriminatory, jurisdictions have to show that their new laws and practices will not make minority voters worse off. For example, in New York, preclearance would ensure that instead of requiring voters to sue when a polling site moves to a place less convenient for minority voters, the Board of Elections has justified the change and shown that the change it is not retrogressive.

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<sup>23</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).

<sup>24</sup> H.R. Rep. No. 109-478, at 6.

<sup>25</sup> *Katzenbach*, 383 U.S. at 314.



Preclearance was not only effective at protecting minority voters, some covered counties (including in New York City) appreciated preclearance because the scheme ensured the use of best practices for fostering political participation, particularly among minority groups. Covered jurisdictions have also made clear that they viewed preclearance as a way to prevent expensive and prolonged litigation. As Travis County, Texas wrote concerning its own preclearance obligations in a brief defending the constitutionality of Section 5 of the Voting Rights Act at the U.S. Supreme Court in 2009: “If ever there were a circumstance where an ounce of prevention is worth a pound of cure, it is in the fundamental democratic event of conducting elections free of racially discriminatory actions.”<sup>26</sup> In 2009, the State of New York, in a brief joined by then-Attorney General Andrew Cuomo, also expressed that the minimal burdens of preclearance were outweighed by the legal regime’s substantial benefits:

“In contrast to the minimal burdens of Section 5, the preclearance process affords covered jurisdictions real and substantial benefits. First, the preclearance process encourages covered jurisdictions to consider the views of minority voters early in the process of making an election law change. This involvement has minimized racial friction in those communities. Second, the preclearance process has helped covered jurisdictions in identifying changes that do in fact have a discriminatory effect, thus allowing them to prevent implementation of discriminatory voting changes. Third, preclearance prevents costly litigation under Section 2. Preclearance provides an objective review of a State’s election law changes. That review process tends to diminish litigation challenging election law changes.”<sup>27</sup>

Preclearance under Section 5 of the JRLVRA is patterned on the same law that Attorney General Cuomo defended as having “minimal burdens” compared to “real and substantial benefits.”<sup>28</sup> Similar to the

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<sup>26</sup> See, e.g., Brief of Appellee Travis County, *Northwest Austin Municipal Utility District No. 1 v. Holder*, 08-322 at 11 (2009), available at [https://campaignlegal.org/sites/default/files/FINAL\\_TRAVIS\\_COUNTY\\_BRIEF.pdf](https://campaignlegal.org/sites/default/files/FINAL_TRAVIS_COUNTY_BRIEF.pdf)

<sup>27</sup> Brief for the States of North Carolina, Arizona, California, Louisiana, Mississippi, and New York as Amici Curiae in Support of Eric H. Holder, Jr., et al., *Northwest Austin Municipal Utility District No. 1 v. Holder*, 08-322 at 11 (2009), available at <https://campaignlegal.org/sites/default/files/1996.pdf>.

<sup>28</sup> New York again filed an amicus brief in support of the constitutionality of Section 5 of the Voting Rights Act in the case of *Shelby County v. Holder*, 12-96 (2013), available at <https://www.brennancenter.org/sites/default/files/legal->



federal preclearance program, Section 5 of the JRLVRA places the authority to preclear changes in the Office of the Attorney General or certain supreme courts in each region of the state. Like the federal preclearance program, Section 5 of the JRLVRA also acknowledges the need of covered jurisdictions for timely responses to preclearance submissions in order to administer elections in a consistent and efficient manner with as a little disruption as possible.

Unlike federal preclearance, which mandated review of *all* election law or practice changes by covered jurisdictions, the JRLVRA lowers the burden on covered jurisdictions by specifically enumerating a more limited set of that must be submitted for preclearance. The JRLVRA's preclearance scheme may appear to be a substantial lift in terms of the resources required to initiate the program on the part of both the covered jurisdictions and the Attorney General. However, the law's long effective date and trigger for implementing preclearance ensures that the program will not be in place before all involved parties are prepared to meet their obligations. Importantly, as the preclearance program continues, the covered jurisdictions and the Attorney General will benefit from long-term savings that come with more inclusive, and better-functioning election administration.

In the June 2020 primary, the preclearance provisions of the JRLVRA, combined with the data collection provisions, would have assisted boards of elections in evaluating efficiently whether and to what extent their actions could have negatively impacted minority voters. If, for example, last minute changes to polling places would have had a racially discriminatory effect, the boards of elections would have had an opportunity to work with the Attorney General's office to develop a more equitable plan.

**Section 6** of the JRLVRA (proposed Election Law §17-214) provides New Yorkers with a civil cause of action against voter intimidation that is more important than ever, given the efforts of Donald Trump and his allies to stoke fear in naturalized citizen communities and communities of color. Currently, the only state law protection against voter intimidation is a criminal statute (Election Law 17-150) that has been rarely used in the last 100 years. In the past few years, however, New Yorkers have seen the Trump campaign and its allies exhort their followers to engage in intimidating poll watching and to spread misinformation that is intended to and can be reasonably expected to deter minority voters from registering to vote and voting. In 2019, Rensselaer County attempted to intimidate and

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[work/2013.2.1%20Brief%20for%20NY%20CA%20MS%20and%20NC%20in%20Support%20of%20Respondents.pdf](#).



deceive voters by threatening to send all voter registration forms received from DMV to ICE, citing baseless fearmongering around potential non-citizen voter fraud. This law provides another shield to protect against the rise in voter intimidation and deception that has occurred and is likely to continue as the beneficiaries of voter suppression see increased threats to their power from the ballot box.

*Section 7* of the JRLVRA (proposed Election Law § 17-216) ensures that there are adequate incentives for private attorney generals to protect voting rights in the courts when monetary damages are otherwise unavailable. This provision permits plaintiffs’ recovery of attorneys’ fees under a “catalyst theory,” i.e., fees may be recovered if a plaintiff’s lawsuit was a catalyst motivating defendants to provide the primary relief sought or when plaintiff vindicates an important right by activating defendants to modify their behavior. This provision for the recovery of attorneys’ fees, reasonable expert witness fees, and other reasonable litigation expenses not only encourages enforcement, but also, combined with the notification and safe harbor provisions of Section 2 of the JRLVRA, encourages jurisdictions to settle meritorious cases to avoid waste of taxpayer money.

### *Conclusion*

The June 2020 primary seasons exposed many longstanding and deep faults in New York’s elections infrastructure. The widespread disenfranchisement undermines confidence in New York’s elections. The state legislature should act immediately to ensure that voter registration, absentee voting, early voting, and Election Day voting for the November 2020 elections are all more accessible than for the primary. However, the state legislature should also take steps to improve equitable access to the franchise for the long-term. The John R. Lewis Voting Rights Act of New York will help achieve that goal.