



Current Conditions of Voting Rights Discrimination

New York

A Report Prepared by

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PROTECTING A PRECIOUS, ALMOST SACRED RIGHT: THE JOHN R.
LEWIS VOTING RIGHTS ADVANCEMENT ACT

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Voting Rights in New York State: Recent Enforcement Actions, Continuing Challenges, and the Need for a Revitalized Voting Rights Act

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Table of Contents

I. OVERVIEW	2
II. ENFORCING SECTION 2 OF THE VOTING RIGHTS ACT OF 1965 IN NEW YORK SINCE 1996	13
A. Recent Cases	13
1. <i>National Association for the Advancement of Colored People, Spring Valley Branch v. East Ramapo Central School District</i>	13
2. <i>Flores v. Town of Islip</i>	18
3. <i>Pope v. County of Albany</i>	20
4. <i>United States v. Village of Port Chester</i>	22
5. <i>Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany</i>	24
6. <i>New Rochelle Voter Def. Fund v. City of New Rochelle</i>	26
7. <i>Goosby v. Town Board of the Town of Hempstead</i>	27
B. Challenges of Investigating and Prosecuting the Full Extent of Potential Section 2 Violations in New York State.	30
III. ENFORCING THE LANGUAGE MINORITY PROTECTIONS OF THE VOTING RIGHTS ACT OF 1965 IN NEW YORK	37
A. <i>United States v. Orange County Board of Elections</i>	41
B. <i>United States v. Westchester County, N.Y.</i>	43
C. <i>United States v. Suffolk County</i>	44
D. <i>United States v. Brentwood Union Free School District</i>	46
E. Assignment of Federal Observers	47
F. Department of Justice Information Requests to Nassau and Suffolk County School Districts Reveals Pervasive Failure to Provide Required Language Assistance Under Section 203.	48
G. New York City Board of Elections Interferes with City's Efforts to Provide Assistance to Language Minority Voters.	50
IV. ENFORCING THE PRECLEARANCE PROVISIONS OF SECTION 5 OF THE VOTING RIGHTS ACT OF 1965 IN NEW YORK	53
V. ELECTION ADMINISTRATION	56
VI. CONCLUSION	62
APPENDIX A	64
APPENDIX B	67

Voting Rights in New York State: Recent Enforcement Actions, Continuing Challenges, and the Need for a Revitalized Voting Rights Act

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I. OVERVIEW

Enforcement of the Voting Rights Act of 1965 (VRA) began in New York within months of its enactment. In *United States v. Board of Elections of Monroe County, New York*, the court succinctly articulated a dynamic that remains true today: While the VRA may have been “[b]orn out of civil rights problems currently plaguing the south and the violence flowing from them,” the law “was not designed to remedy deprivations of the franchise in only one section of the country. Rather, it was devised to eliminate second-class citizenship wherever present.”² In the past 56 years, New York has been the site of dozens of successful actions brought under the VRA. In December 2018, the New York Times reported, “[d]espite its reputation for sterling progressivism, New York has some of the most restrictive election laws in the nation.”³ This report describes how New York’s

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² 248 F. Supp. 316, 317 (W.D.N.Y. 1965).

³ Vivian Wang, *Why Deep Blue New York is ‘Voter Suppression Land,’* N.Y. TIMES (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/nyregion/early-voting-reform-laws-ny.html>.

minority voters have required and still require the VRA's full panoply of protections to exercise the franchise.

The dissonance between New York's progressive reputation and regressive voting rights record has made it a frequent target of 'whataboutism' by states seeking to justify renewed voter suppression efforts, or a discriminatory status quo.⁴ Officials in Georgia, Texas, Ohio, and North Carolina have each recently pointed to New York to justify restrictive new voting measures.⁵ To a significant extent, these criticisms are inaccurate, particularly in light of New York's recent measures to modernize its elections laws and practices.⁶ However, these states' comparisons to New York are much more an indictment

⁴ See, e.g., Sean Morales-Doyle and Chisun Lee, *New York's Worst-in-the-Country Voting System*, THE ATLANTIC (Sept. 13, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/new-yorks-worst-in-the-country-voting-system/570223/> ("So long as New York's voting system is such a mess, states like Ohio, North Carolina, and Wisconsin will use it as a reference point to justify their own flawed systems. In fact, they already have.").

⁵ See Jane C. Timm, *Republicans, defending voting restrictions, point finger at blue states with laws they say are worse*, NBC (Apr. 8, 2021), <https://www.nbcnews.com/politics/elections/republicans-defending-voting-restrictions-point-finger-blue-states-laws-they-n1263205> (quoting Texas Lt. Gov. Dan Patrick, "So if, somehow, we're accused of being racist because we want to suppress the vote of the people of color, I guess New York, New Jersey and Delaware are even more racist"); Amy Sherman, *Ask PolitiFact: Are New York's Voter Laws More Restrictive Than Georgia's?*, POLITIFACT (Apr. 8, 2021), <https://www.politifact.com/article/2021/apr/08/ask-politifact-are-new-yorks-voter-laws-more-restr/> (quoting Georgia Gov. Brian Kemp, "It is easier to vote in Georgia than it is in New York"); 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> ("Indeed, New York's voting procedures have become a talking point for Republican-led states in defending their own regression on voting rights. In discussing their limitations on voting rights, North Carolina and Ohio have pointed to the New York rules.")

⁶ See, e.g., Brigid Bergin, *New York Poised to Expand Voting Rights As Other States Suppress Them*, GOTHAMIST (May 21, 2021), <https://gothamist.com/news/new-york-poised-expand-voting-rights-other-states-suppress-them> ("On the same day the New York Assembly took action on [voting rights expansion] legislation, Governor Doug Doucey of Arizona signed a bill that reduced the number of voters permanently eligible for early voting in the state. Analysis by the Brennan Center from March of this year found that 361 bills that would limit voting rights had been introduced in 47 states."); Sean Morales-Doyle, *The Box Score on Voting Rights*, Brennan Ctr. for Justice (Apr. 8, 2021), <https://www.brennancenter.org/our-work/research-reports/box-score-voting-rights> ("The critical difference is that Georgia and New York are headed in opposite directions. Since 2019, New York's legislature has swiftly moved to expand democracy . . . Georgia, on the other hand, is responding to record turnout by making it harder to vote, rolling back the very policies that put it ahead of New York in the first place."); Sherman *supra* note 5, (noting that New York has the longest election day voting hours in the nation and no voter identification requirement for

of New York than an acquittal of their own efforts to suppress and dilute minority voting strength.

This report focuses on New Yorkers’ recent and ongoing struggles with racial vote dilution and suppression, but the state’s current problems have roots in a history of discrimination in voting that can be traced back over two centuries.

The New York State Constitution of 1777 limited the right to vote to any “freeman.”⁷ As New York began a process of gradual emancipation and the free Black population grew, the state imposed onerous requirements for Black people to vote.⁸ An 1811 law, an “Act to Prevent Frauds and Perjuries at Elections,” required Blacks “to obtain a document certifying their freed status from a ‘supreme court justice, mayor, recorder, or . . . court of common pleas,’ pay a fee and present the documentation at the polls” before voting.⁹ These measures effectively suppressed Black voter registration.¹⁰

In 1821, the New York State Constitution included a requirement that denied the franchise to any “man of colour” unless he owned real property valued at over \$250.00 “over and above all debts and incumbrances charged thereon” and had actually paid taxes

absentee ballot applications or the vast majority of in-person voting, as well as more recent efforts to modernize elections and lower barriers to the ballot).

⁷ Erika Wood, et al., JIM CROW IN NEW YORK, Brennan Ctr. for Justice 5 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_JIMCROWNY_2010.pdf citing N.Y. CONST. art. VII (1777).

⁸ See *id.* at 5.

⁹ *Id.*

¹⁰ *Id.*

on that property.¹¹ For Black men,¹² the right to vote was illusory; “[a]lthough free black men were technically allowed to vote, virtually none owned real property at the time and thus Black people effectively were disenfranchised under the state constitution.”¹³ In 1869, a referendum on eliminating the property requirement failed, and the requirement persisted for several years after the 1870 ratification of the 15th Amendment.¹⁴ The property requirement was ultimately replaced by a state constitutional amendment requiring the disenfranchisement of any person convicted of an “infamous crime,”¹⁵ a discriminatory provision of the New York State Constitution that remains in effect today.¹⁶ According to the state Division of Criminal Justice Services, in 2018, Black people represented only 15 percent of the state’s total population, but 48 percent of all people sentenced to prison.¹⁷

¹¹ N.Y. CONST. art. II, § 2 (1821) (repealed 1874); *see* Wood, *supra* note 7 at 6–8.

¹² The New York State Constitution did not protect women’s suffrage until 1917. N.Y. CONST. amend. 1 (Nov. 6, 1917) https://www.nycourts.gov/history/legal-history-new-york/documents/Publications_Votes-Cast-Conventions-Amendments.pdf.

¹³ Wood, *supra* note 7 at 5.. The New York State Legislature actually attempted to rescind the state’s ratification of the 15th Amendment to the United States Constitution; however, Congress did not recognize the attempted rescission. *Id.*

¹⁴ *Id.* at 12. The New York State Legislature actually attempted to rescind the state’s ratification of the 15th Amendment to the United States Constitution; however, Congress did not recognize the attempted rescission. *Id.*

¹⁵ *Id.* at 12–13.

¹⁶ N.Y. CONST. art. II, § 3 (“The legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime.”). In 2021, New York passed a bill that restored the right to vote to people convicted of felonies automatically upon release from incarceration. *See* S.830B, 2021–2022 Leg. Sess. (N.Y. 2021) (enacted). Until that time, people who had been released from prison, but were on parole remained ineligible to register to vote, absent discretionary relief such as a pardon. *Id.* at §§ 2, 13.

¹⁷ N.Y. DEP’T OF CRIM. JUST. SERV.’S, NYS ARRESTS AND PRISON SENTENCES BY RACE/ETHNICITY at 1 (Aug. 27, 2019), <https://www.criminaljustice.ny.gov/crimnet/ojsa/comparison-population-arrests-prison-demographics/2018%20Population%20Arrests%20Prison%20by%20Race.pdf>.

During the 20th century, New York implemented laws that suppressed minority voting strength. In 1921, the New York State Constitution was amended to require that new voters be able to read and write in English.¹⁸ The practice persisted until the Supreme Court's 1966 decision in *Katzenbach v. Morgan*,¹⁹ which held the protections for Puerto Rican voters provided by Section § 4(e) of the VRA to be a proper exercise of Congressional power under §5 of the Fourteenth Amendment, and New York's literacy test to be unenforceable to the extent it conflicted with VRA § 4(e). Indeed, "Section 4(e) was aimed specifically at remedying the discriminatory election practices that prevented Puerto Ricans in New York City from voting because of their inability to pass an English literacy requirement as a prerequisite for voter registration."²⁰ When the VRA was passed in 1965, only 30 percent of Puerto Rican New Yorkers—a community disproportionately disenfranchised by the literacy tests—were registered to vote.²¹ As a result of this discrimination, three counties within New York State—Bronx, Kings, and New York Counties—were covered by the preclearance regime beginning in the 1970s and continuing

¹⁸ N.Y. CONST. amend. 3 (Nov. 8, 1921), https://www.nycourts.gov/history/legal-history-new-york/documents/Publications_Votes-Cast-Conventions-Amendments.pdf.

¹⁹ 384 U.S. 641 (1966).

²⁰ Juan Cartagena, *Voting Rights in New York City, 1982-2006*, 17 S. CAL. L. & SOC. JUST. 501, 518 (2008) citing *Katzenbach*, 384 U.S. at 652.

²¹ See Daniel Brook, *New York Should Hate the Voting Rights Act*, SLATE (Feb. 21, 2013), <https://slate.com/news-and-politics/2013/02/voting-rights-supreme-court-case-why-is-new-york-defending-the-voting-rights-act.html> ("... the people most disenfranchised by the test were not actually immigrants, who were rare after Congress passed the National Origins Act and Asian Exclusion Act in 1924, but internal migrants from Puerto Rico. Born on U.S. soil, Puerto Ricans had voting rights through birthright citizenship. But having been educated in the Spanish-language public schools on the island, they couldn't pass New York's English-language test and subsequently lost their ability to vote when they moved to the city seeking better jobs.")

until the coverage formula was invalidated in *Shelby County* 2013.²² As discussed below, preclearance under Section 5 of the VRA was key to blocking or deterring a numerous potentially retrogressive changes in New York.²³

Voting Rights Act enforcement in New York is not a matter of ancient history. Within the past 25 years, New York has been the site of at least fourteen documented violations of federal voting rights laws.²⁴ Under the coverage formula set forth in the John R. Lewis Voting Rights Advancement Act of 2021, H.R.4,²⁵ at present, New York would be only one violation shy of statewide coverage under preclearance. Two counties—Suffolk and Westchester—have been the site of at least three violations each during the past 25 years, making them likely subject to coverage under H.R.4’s preclearance formula.²⁶ Albany, Orange, and Bronx Counties are each one violation away from

²² U.S. Dep’t Just., Jurisdictions Previously Covered by Section 5 (Sept. 11, 2020), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>.

²³ See Section IV *infra*.

²⁴ *Oversight of the Voting Rights Act: Potential Legislative Reforms: Hearing on H.R. 4 Before the H. Subcomm. on the Const., C.R. and C.L., H. Comm. on the Judiciary*, 117th Cong. H4437 (Aug. 16, 2021) (Testimony of Peyton McCrary, Professorial Lecturer in Law, George Washington University Law School) (hereinafter, McCrary Testimony), <https://www.congress.gov/117/crec/2021/08/24/167/150/CREC-2021-08-24-pt1-PgH4417.pdf> (listing 12 violations in New York State on pp. 21-22). Prof. McCrary did not include two recent violations occurring in school districts from his list of violations in New York State: (1) *Nat’l Ass’n for Advancement of Colored People, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 374 (S.D.N.Y. 2020) (*East Ramapo*), *aff’d sub nom. Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021); and (2) Consent Decree, *United States v. Brentwood Union Free Sch. Dist.*, Civ. No. 03-2775 (E.D.N.Y. June 4, 2003).

²⁵ John R. Lewis Voting Rights Advancement Act of 2021, H.R.4, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/4/related-bills>.

²⁶ Violations in Suffolk County: *Flores v. Islip*, Case No. 18-cv-03549 (GRB) (E.D.N.Y. Oct. 14, 2020) ECF Nos. 223–224; *United States v. Suffolk County, et al.*, Case No. 2:04-cv-02698 (E.D.N.Y. Sept. 27, 2004), ECF No. 10; Consent Decree, *United States v. Brentwood Union Free Sch. Dist.*, Civ. No. 03-2775 (E.D.N.Y. June 4, 2003). Violations in Westchester County: *United States v. Village of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010); *United States v. Westchester County, N.Y.*, Case No. 7:05-cv-00650-CM (S.D.N.Y. Jan. 3, 2008), ECF No. 31; *New Rochelle Voter Defense v. City of New Rochelle*, 308 F. Supp. 2d 152 (S.D.N.Y. 2003).

coverage.²⁷ New York’s voting rights advocates are not surprised at the number of violations, but remain disappointed by how few have been prosecuted, particularly among the state’s thousands of local government entities—counties, cities, towns, villages, school districts, and special purpose districts. Many of these political subdivisions run their own elections without oversight by the state or county boards of elections.²⁸

There are more barriers to minority political participation in New York than are apparent in the state’s Voting Rights Act docket. Available data show significant and persistent disparities in voter turnout rates by race in New York. In the November 2020 election in New York, an estimated 54.9 percent of the citizen voting age population (CVAP) who identify as Hispanic or Latino and 62.7 percent of Black CVAP cast a ballot in November 2020, rates significantly lower than the white non-Hispanic voter turnout rate, 69.0 percent.²⁹ The disparity is even greater between Asian and non-Hispanic white voters. Only 51.9 percent of the Asian CVAP cast a vote in November 2020. Data from the Census Bureau show that racial disparities in turnout in New York have been significant and

²⁷ See McCrary Testimony, *supra* note 24 at 21-22.

²⁸ See NEW YORK STATE BOARD OF ELECTIONS, REPORT CONCERNING RECOMMENDATIONS AND GUIDANCE FOR THE ADMINISTRATION OF ELECTIONS BY VILLAGES, SCHOOL DISTRICTS, FIRE DISTRICTS, LIBRARY DISTRICTS, AND OTHER MUNICIPAL CORPORATIONS REQUIRED TO HOLD ELECTIONS UNDER NEW YORK STATE at 6, (Feb. 4, 2015), <https://www.elections.ny.gov/NYSBOE/news/Chapter273Report020415.pdf> (hereinafter, ADMINISTRATION OF ELECTIONS BY MUNICIPAL CORPORATIONS) (“While the federal, state and local elections are run by the county board of elections, villages for example, have the option of having the county board run their elections, on any day of the year that they choose. With very few exceptions, school district elections are run by the school districts themselves.”).

²⁹ U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2020, TABLE 4B: REPORTED VOTING AND REGISTRATION BY SEX, RACE AND HISPANIC ORIGIN, FOR STATES: NOVEMBER 2020 (Apr. 2021), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html>.

persistent over time, with Black voter turnout during the November 2012 election a notable exception.³⁰

2020 New York Voter Turnout Rate by Race	
<i>Race/Ethnicity</i>	<i>Percent of CVAP who cast a vote</i>
White non-Hispanic alone	69.0%
Black alone	62.7%
Hispanic (of any race)	54.9%
Asian alone	51.9%
Total	64.7%

Those disparities are even more pronounced in local government elections, which have largely escaped the legislature’s recent election reform agenda. As explained in greater detail below, the structure and conditions of school district elections are paradigmatic of the voter suppression and vote dilution that occurs in local elections in New York State. Based on an original analysis of recent school board elections in twenty-five large, diverse school districts in Nassau, Westchester, Suffolk, Rockland, and Oneida Counties conducted by the New York Civil Liberties Union, an estimated 6.3 percent of CVAP voted in school district elections.³¹ The analysis of voter records for the years 2016-2019 shows the racial disparity in school district election turnout rates is large. In all 25 school districts, the turnout rate of voters of color lags behind the white turnout rate. In all

³⁰ See generally U.S. CENSUS BUREAU, VOTING AND REGISTRATION, DATA TABLES <https://www.census.gov/topics/public-sector/voting/data/tables.All.html> (providing data tables by state, including tables on reported voting and registration, by race, Hispanic origin, sex, and age for federal general elections dating back to 1994).

³¹ The 25 school districts included are large, have reasonably diverse electorates, and maintained electronic voting records, a requirement for the analysis. See Appendix A, *infra*. Overall voter turnout rates were calculated using the average turnout rate in election years 2016-2019 and the American Community Survey 5-year estimate of citizens of voting-age residing in each school district. Although voter race is not reported on registration records in New York, a peer-reviewed methodology titled Bayesian Improved Surname Geocoding (“BISG”) can be applied to estimate the race of voting population based on their surnames and addresses. See Kosuke Imai & Kabir Khanna, *Improving Ecological Inference by Predicting Individual Ethnicity from Voter Registration Records*, 24 POLITICAL ANALYSIS 263 (Mar. 17, 2016), <https://imai.fas.harvard.edu/research/files/race.pdf>.

but five districts, the white turnout rate is more than double the turnout rate for voters of color.³² The following table presents the analysis of data aggregated from all 25 school districts and the results of the analysis of turnout rates for each of the individual 25 districts is available at Appendix A.

Analysis of Turnout Rates in 25 School District Elections by Race (2016-2019)	
<i>Race/Ethnicity</i>	<i>Percent of citizens who cast a vote</i>
White	8.0%
Black	3.6%
Hispanic	3.4%
Asian	2.6%
Total	6.3%

New York's low and racially disparate turnout rates are a function of a complex concatenation of the lingering effects of longstanding discrimination; election laws that suppress and dilute minority voting strength, particularly in local contests; and notoriously poor election administration. The persistence of these conditions in New York's decentralized election scheme makes rooting out this discrimination a daunting challenge. The 57 county boards of elections and the Board of Elections in the City of New York conduct federal and state elections; however, New York contains hundreds of villages, and thousands of special purpose districts (*e.g.*, school, water, fire, sewer, districts etc.) that may be conducting elections.³³ There is no centralized repository of voting and elections data for these local government entities, no oversight of their elections by state authorities,

³² See Appendix A, *infra*.

³³ See New York State Board of Elections, ADMINISTRATION OF ELECTIONS BY MUNICIPAL CORPORATIONS, *supra* note 28 at 5–6, (“New York State is a large and complex web of jurisdictions - 62 counties, 62 cities, 932 towns, 343 villages, and 7,658 ‘other’ districts which may be conducting elections (such as school, fire, water, sewer, park, lighting and library)”).

and little media or other public scrutiny applied to their political processes. The difficulty of even investigating vote suppression and vote dilution in these thousands of local elections is a high barrier to diagnosing and prosecuting potential infringements on the right to vote for those important offices.

Another reason that so many potential cases go unprosecuted is that virtually every affirmative case is time-consuming, complex, and expensive. As the Supreme Court observed over fifty years ago, and remains true today, “[v]oting 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”³⁴ Over the last half-century, VRA lawsuits have only become more complex and resource-intensive, often requiring multiple expert witnesses whose substantial fees must be paid out of pocket.³⁵ Meanwhile, incumbents are able to spend taxpayer dollars to defend the discriminatory systems that keep them in office. In one recent successful vote dilution case against a suburban school district, the plaintiffs were awarded nearly \$5 million in attorneys’ fees, nearly \$200,000 in expert witness fees, and over \$400,000 in costs after three years of litigation and many thousands of hours of plaintiffs’ attorneys’ time.³⁶ The school district and its incumbent

³⁴ *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).

³⁵ *Voting Rights Act: The Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 109th Cong. 69 (Nov. 9, 2005), <https://www.congress.gov/109/chrg/CHRG-109hhrg24504/CHRG-109hhrg24504.pdf> (testimony of Laughlin McDonald, Director, ACLU Voting Rights Project). McDonald testified that, in a typical vote dilution case a plaintiff “need[s] probably three experts: a demographer, to draw plans; a statistician, to analyze voting patterns; and a political scientist or historian, to talk about what . . . the present-day impact of race is in a jurisdiction.”)

³⁶ Judgment, *Nat’l Ass’n for Advancement of Colored People, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, Case No. 7:17-cv-08943-CS-JCM (S.D.N.Y. Mar. 30, 2021), at ECF No. 694; Report and Recommendation at 14-15, Case No. 7:17-cv-08943-CS-JCM, (S.D.N.Y. Dec. 29, 2020), at ECF No. 671.

board members also spent well over \$7 million in taxpayer funds to defend the suit.³⁷ The immense commitment required to try these complex cases, where no statutory damages are available and fee and cost recovery are highly uncertain, deters the commencement of meritorious cases.

The stakes may not seem worth the massive resources required to prosecute voting rights cases against school districts, town and village councils, and special purpose districts; however, these entities “have primary agency over matters of daily importance including education, transportation, property taxes, police, fire, and sanitation.”³⁸ Moreover, “[t]hese local offices are important not only because of the critical substantive services they provide to their constituents, but because school boards and city councils also function as a farm system for candidates for higher office,” and “[i]f minority groups are less able to elect candidates to local offices, they are also likely to be less able to develop candidates who compete in elections for state and federal offices.”³⁹

The VRA has been a necessary tool for remedying the entrenched inequities in New York’s political processes, but judicial decisions have eroded the most effective civil rights law in our nation’s history at time when it is still urgently needed.⁴⁰ New York’s example illustrates both the historic success of the VRA and the necessity of revitalizing and

³⁷ See Transcript of Proceedings at 10, *Nat’l Ass’n for Advancement of Colored People, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, Case No. 7:17-cv-08943-CS-JCM, (S.D.N.Y. Mar. 8, 2021) at ECF No. 686.

³⁸ Perry Grossman, *The Case for State Attorney General Enforcement of the Voting Rights Act Against Local Governments*, 50 U. MICH. J.L. REFORM 565, 598 (2017).

³⁹ *Id.* at 598–99.

⁴⁰ See *Brnovicv v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021); *Shelby County v. Holder*, 570 U.S. 529 (2013).

strengthening its protections to continue fulfilling the charge of achieving a democratic process free from the taint of racial discrimination.

II. ENFORCING SECTION 2 OF THE VOTING RIGHTS ACT OF 1965 IN NEW YORK SINCE 1996

In the last 25 years, over a half-dozen Section 2 cases have led to changes in election systems across New York State. Unfortunately, the burdens of diagnosing and prosecuting Section 2 cases present a significant challenge to rooting out the full depth and breadth of voting rights violations in New York efficiently.

A. Recent Cases

1. *National Association for the Advancement of Colored People, Spring Valley Branch v. East Ramapo Central School District*

East Ramapo is a “highly segregated” school district in Rockland County.⁴¹ Black and Latino children constitute over 90% of the district’s public school student population.⁴² White children residing in the district overwhelmingly attend private schools and account for 98% of the students enrolled in the private schools in the district.⁴³ Although Black and Latino citizens account for approximately one-third of the district’s eligible voter population,⁴⁴ no candidate of choice of Black or Latino voters had won a contested election in the decade before the lawsuit was filed in November 2017.⁴⁵ During that time, East Ramapo’s Board of Education exhibited a significant lack of responsiveness to the needs

⁴¹ *East Ramapo*, 462 F. Supp. 3d at 374.

⁴² *East Ramapo*, 462 F. Supp. 3d at 375.

⁴³ *Id.*

⁴⁴ *Id.* at 374 n.5.

⁴⁵ *See id.* at 381.

of the district's Black and Latino communities.⁴⁶ Public school buildings fell into disrepair and the Board “eliminated hundreds of public school teaching, staff, and administrative positions and eliminated classes and programs.”⁴⁷ At the same time, the Board closed two public schools over the opposition of Black and Latino residents and tried to sell one of them to the private schools at a “sweetheart price” but the sale was annulled by the Commissioner of Education.⁴⁸ Graduation rates and test scores declined.⁴⁹ The Board refused state funding that was offered to help restore public school programs because the funding would have required public school parents and teachers to have some input into how the money would be spent.⁵⁰ When parents and students of color tried to bring their complaints to Board meetings, instead of listening, the Board took steps to delay and prevent public comments at their meetings.⁵¹ Despite all of this, the District's at-large method of electing Board members and racially-polarized voting enabled the white majority to control the outcome of elections for every seat on the East Ramapo Board. Every year, the preferred candidates of white voters won election without making any attempt to appeal to Black or Latino voters.

In November 2017, the Spring Valley National Association for Advancement of Colored People (“NAACP”) and seven Black and Latino voters sued the School District,

⁴⁶ *Id.* at 413–16.

⁴⁷ *Id.* at 414.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 415.

⁵¹ *Id.* at 413.

alleging that the District's at-large election structure unlawfully diluted the votes of Black and Latino residents in violation of Section 2 of the Voting Rights Act.⁵² The case went to a bench trial in early 2020.

The Court found that plaintiffs had “convincingly proven their case of vote dilution.”⁵³ Beyond finding that District elections were characterized by high levels of racially-polarized voting where the preferred candidates of white voters invariably defeated the preferred candidates of minority voters, the court found that School District elections involved a variety of discrimination-enhancing practices, including “at-large, staggered, off-cycle elections with numbered posts,” as well fewer and different polling places than in state and federal elections and a lack of adequate language assistance to Spanish and Creole-speaking voters.⁵⁴ The court found that the School District's dominant candidate slating process was not equally open to minority voters and candidates in that “[i]nfluential members of the white, private school community in the District participate in a slating process by which they select, endorse, promote, and secure the election of their preferred candidates, and minorities have no input into this process.”⁵⁵

Although the court noted some minority candidates had been elected to the Board, the court found that “the mere fact that . . . a few [minorities] were elected[] does not carry a lot of weight in light of the evidence that victories were arranged for appearance's sake

⁵² Complaint, *East Ramapo*, No. 17-CV-8943 (CS), ECF No. 1.

⁵³ *East Ramapo*, 462 F. Supp. 3d at 417.

⁵⁴ *Id.* at 401–02.

⁵⁵ *Id.* at 402.

and/or occurred in unusual circumstances”⁵⁶ The court cited “ample evidence” in finding that the Board was unresponsive to the needs of the Black and Latino community.⁵⁷ Finally, the court found that “some Board members had tenuous, if not illegitimate, reasons for wanting to maintain the *status quo*,” noting that “there is evidence that the dominant Board members and the white slating organization have a desire to adhere to the current system despite its discriminatory effect and went to extraordinary lengths to preserve that system to maintain political power.”⁵⁸ Among other things, the court noted that “in the course of this proceeding, Board members outright lied or disingenuously claimed lack of memory; the Board President and others failed to provide the Board’s members of color with complete or accurate information about this lawsuit, including settlement possibilities that could have saved enormous amounts of money; and one leader of the white slating organization went so far as to go into contempt of court.”⁵⁹ The court further noted that “the slating organization appears to have been so desperate to maintain the at-large system that it engineered [a Black candidate’s] 2019 victory for purposes of appearances after Defendant’s counsel suggested it would be ‘good for the case’ to have an additional minority candidate.”⁶⁰

⁵⁶ *Id.* at 412.

⁵⁷ *Id.* at 413.

⁵⁸ *Id.* at 416–17

⁵⁹ *Id.* at 416 (internal citations omitted).

⁶⁰ *Id.* at 417. The Second Circuit was particularly concerned by the District’s counsel’s conduct. “Considering Section 2 case law directs courts to look past such disingenuous ploys, it is bad legal advice. More disturbing, however, is that the advice appears to be directed at aiding the District in flouting the well-established and clear intent of the Voting Rights Act. Such deceptive posturing has no place in the legal profession.” *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213, 242 n.15 (2d Cir. 2021).

The court (a) enjoined the school district from holding any further elections under its at-large system; (b) required the district to propose a district-based remedial plan that fully complies with the VRA; (c) ordered defendants to pay plaintiffs' fees, costs, and expenses; and (d) retained jurisdiction to ensure compliance. The court concluded: "For too long, black and Latino voters in the District have been frustrated in that most fundamental and precious endeavor. They, like their white neighbors, are entitled to have their voices heard."⁶¹ The Second Circuit Court of Appeals affirmed the decision in January 2021.⁶² The first election under the remedial plan was held on February 2, 2021.

The case was time-consuming and expensive, lasting nearly four years from the filing of the complaint in November 2017 to the District's satisfaction of judgment in September 2021. The case was prolonged by tactics that attempted to shield incumbent Board members from disclosing material facts in discovery. For example, three Board members delayed the case for over a year by repeatedly asserting frivolous claims of legislative immunity from discovery to avoid being deposed, including in an interlocutory appeal that was dismissed by the Second Circuit.⁶³ Meanwhile, elections for the Board were held in 2018 and 2019 under a system ultimately held to violate the rights of the District's Black and Latino voters while the litigation was pending. In total, attorneys for the Plaintiffs spent over 20,000 total hours litigating the case.⁶⁴

⁶¹ *East Ramapo*, 462 F. Supp. 3d at 418.

⁶² *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021).

⁶³ See *Nat'l Ass'n for the Advancement of Colored People v. E. Ramapo Cent. Sch. Dist.*, 776 F. App'x 44 (2d Cir. 2019).

⁶⁴ See *Nat'l Ass'n for Advancement of Colored People v. E. Ramapo Cent. Sch. Dist.*, No. 17CIV8943CSJCM, 2020 WL 7706783, at *7–8 (S.D.N.Y. Dec. 29, 2020). Compare Katzenbach, 383

The Board's efforts to prolong the litigation came at the expense of the District's taxpayers, including the Black and Latino voters fighting for a voice in the District. Based on a review of invoices obtained through a public records request, the District paid its attorneys at least \$7.2 million to defend the at-large election system.⁶⁵ The District was also required to pay over \$5.4 million in attorneys' fees and costs to Plaintiffs.⁶⁶

2. *Flores v. Town of Islip*

The Town of Islip, located in Suffolk County in central Long Island, is the third most populous town in the State, with over 330,000 residents, of which approximately one-third are Latino.⁶⁷ The town has long been represented by a five-member Town Board elected at-large, but no Latino candidate has ever held town-wide office.⁶⁸ Between 2005 and 2019, Latino candidates of choice were consistently defeated by candidates preferred by the white voting majority. As a result, Islip's Latino population suffered from a lack of local representation, exemplified by Town officials' roles in the illegal dumping of thousands of tons of toxic construction debris at a public park in the center of Islip's Latino community.⁶⁹

U.S. at 314 (noting in 1966 that voting suits were "unusually onerous," when they sometimes required "as many as 6,000 man-hours spent combing through registration records in preparation for trial.")

⁶⁵ Transcript of Proceedings at 10, *East Ramapo*, 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) (No. 17-CV-8943 (CS)), ECF No. 686.

⁶⁶ Satisfaction of Judgment, *id.*, ECF No. 713.

⁶⁷ *Flores v. Town of Islip*, 382 F. Supp. 3d 197, 208 (E.D.N.Y. 2019).

⁶⁸ *See id.* at 243.

⁶⁹ Sarah Armaghan and Andrew Smith, *2 former Islip Town Employees sentenced in illegal dumping case*, *NEWSDAY* (Oct 21. 2016), <https://www.newsday.com/long-island/crime/2-former-islip-town-employees-sentenced-in-illegal-dumping-case-1.12489109>.

In June 2018, two Latino advocacy organizations and four individual Latino voters in Islip filed suit against the Town of Islip, the Islip Town Board, and the Suffolk County Board of Elections, alleging that the Town’s at-large election structure unlawfully diluted Latino voting strength in violation of Section 2 of the Voting Rights Act. The case went to a bench trial in September 2020, and the Town agreed to a settlement five days into trial.⁷⁰ As set forth in the Joint Settlement Agreement and Consent Order, the court found that Plaintiffs had satisfied the *Gingles* preconditions, and Plaintiffs presented significant evidence that the totality of the circumstances weighed in favor of liability, such as (1) the history of literacy tests in New York and recent local failures to comply with the VRA’s language-based requirements; (2) that Islip’s elections are staggered and held off-cycle in an unusually large at-large district; (3) Latinos lack of access to the dominant local Republican Party’s slating process; (4) that Islip’s Latinos have lower socioeconomic status and political participation than whites; (5) racial appeals in political campaigns, such as associating Latinos with crime; and (6) that no Latino had ever been elected to Town-wide office in Islip. The court found that “the evidence offered during trial demonstrates that there is a factual basis for the assertion that the ‘totality of the circumstances’ . . . warrants relief under the Voting Rights Act.”⁷¹

The Town ultimately entered into a Joint Settlement Agreement and Consent Judgment, which required (a) the Town to permanently transition from at-large to district-

⁷⁰ *Flores v. Town of Islip*, No. 18-CV-3549 (GRB)(ST), 2020 WL 6060982, at *1 (E.D.N.Y. Oct. 14, 2020).

⁷¹ See, e.g., Complaint, *Flores v. Town of Islip*, No. 18-CV-3549 (GRB)(ST), 2020 WL 6060982 (E.D.N.Y. Oct. 14, 2020), ECF No. 1; Expert Report of Dr. Thomas J. Sugrue, *id.*, ECF No. 164-2; Transcript of Record at 480–535, *id.*

based elections, starting with the 2021 election cycle, in which Latinos make up a majority of the citizens of voting age in at least one district; (b) the Town to pay a portion of Plaintiffs' fees, costs, and expenses; and (c) the Court to retain jurisdiction to enforce the provisions of the settlement.⁷² Defendants stipulated that the Town's "at-large system for Islip Town Council elections violates Section 2 of the Voting Rights Act."⁷³ The Court joined in this finding "because, under that system, members of the Hispanic or Latino minority group in Islip have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."⁷⁴

Even with the settlement, the case incurred considerable taxpayer expense. The Town of Islip spent over \$3 million defending its at-large election system before the case had even gone to trial.⁷⁵

3. *Pope v. County of Albany*

Albany County is comprised of 18 cities, town and villages, including the City of Albany, and is governed by a County Executive and a 39-member County Legislature.⁷⁶ As explained in more detail below, in the redistricting cycles occurring after the 1990 Census and the 2000 Census, Black voters filed Section 2 suits arising out of the Albany

⁷² See Joint Settlement Agreement and Consent Order, *Flores*, 2020 WL 6060982 (No. 18-CV-3549 (GRB)(ST)), ECF No. 224.

⁷³ *Id.* at 3.

⁷⁴ See *id.*

⁷⁵ Sophia Chang, *Islip spends nearly \$3M so far to fight voting rights case*, NEWSDAY (Dec. 16, 2019), <https://www.newsday.com/long-island/suffolk/islip-voting-rights-lawsuit-legal-fees-1.39577727>.

⁷⁶ *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany*, 281 F. Supp. 2d 436, 439 (N.D.N.Y. 2003).

County legislature’s failure to draw an adequate number of majority-minority districts.⁷⁷ The suits resulted in consent decrees both times.⁷⁸ The same problem occurred after the 2010 Census. In June 2011, individual black and Latino voters challenged the plan for redistricting of the Albany County Legislature in the Northern District of New York. Plaintiffs alleged that the Voting Rights Act required the creation of an additional majority-minority district following population shifts reflected in the 2010 Census.

In January 2014, the court granted plaintiffs summary judgment on the first *Gingles* precondition.⁷⁹ After an 11-day bench trial in late 2014 and early 2015, the court found that the challenged redistricting plan violated Section 2. The Court found that the preferred candidates of Black voters were usually defeated by the preferred candidates of a cohesive white voting bloc.⁸⁰ African-Americans in Albany County also lagged significantly behind non-Hispanic whites on all socio-economic measures and continued to experience the effects of discrimination in housing and healthcare.⁸¹ The court further found that these socioeconomic disparities existed alongside low Black voter turnout and reduced opportunities for Black political participation, including “voter apathy emanat[ing] from a perception that minority voters are not a meaningful part of the political process.”⁸² The court found that minorities had rarely been elected to office in the County outside of

⁷⁷ See *id.* at 440. The lawsuits stemming from the 1990 Census and 2000 Census are covered in more detail in Section III.A.5.

⁷⁸ *Pope v. Cty. of Albany*, 94 F. Supp. 3d 302, 311–12 (N.D.N.Y. 2015).

⁷⁹ *Id.* at 319.

⁸⁰ *Id.* at 340–41.

⁸¹ *Id.* at 344.

⁸² *Id.* at 344–45

majority-minority districts, and that only one minority candidate had ever been elected to county-wide office.⁸³ The court also found that the County's failure to create an additional majority-minority district in response to demographic shifts and the rationale underlying the challenged map was tenuous, noting that the County ignored draft maps showing that creating an additional majority-minority district was possible.⁸⁴ The Court ultimately ordered the County to draw a remedial redistricting plan and awarded attorneys' fees to Plaintiffs.⁸⁵

4. *United States v. Village of Port Chester*

Between 1990 and 2000, the Latino population of the Village of Port Chester in Westchester County increased by over 70%, making Latinos a plurality of village residents and over one-fifth of the Village's citizen voting age population.⁸⁶ Notwithstanding the significant demographic shift, no Latino had ever been elected to any of the six positions on Port Chester's Board of Trustees.⁸⁷

In December 2006, the U.S. Department of Justice sued Port Chester in the Southern District of New York, alleging that the Village's at-large election structure unlawfully diluted the vote of Black and Latino residents in violation of Section 2 of the

⁸³ *Id.* at 345-47.

⁸⁴ *Id.* at 347-49.

⁸⁵ *Id.* at 351-52.

⁸⁶ *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 419-20 (S.D.N.Y. 2010).

⁸⁷ *Id.* at 446.

Voting Rights Act.⁸⁸ In March 2007, the court preliminarily enjoined the upcoming election cycle, and the case went to a bench trial in summer 2007.⁸⁹

Following trial, the court found that the totality of the circumstances “clearly indicate[d] that Defendant’s method of electing the members of its Board of Trustees violates Section 2 of the Voting Rights Act.”⁹⁰ Plaintiffs had proved that Latinos were sufficiently numerous and compact to form a majority in a single-member district for the village board of trustees, that Latinos were politically cohesive and that their candidates of choice for the Village board were always defeated by a cohesive white voting bloc.⁹¹ The court also found that the Senate Factors weighed in favor of Plaintiffs.

Specifically, the court found that Village elections included electoral practices that enhance opportunities for discrimination such as “off-cycle and staggered Trustee elections contribute to the Hispanic community’s difficulty in electing its candidates of choice.”⁹² The court also found that Latinos lacked access to the candidate slating process, noting that “[w]hile the candidate selection process of Port Chester’s two major political parties formally allows for candidates to have open access to the ballot through the party caucus system, the reality of local politics in this community is that virtually binding decisions are made at closed meetings of the parties’ respective nominating committees, which allow

⁸⁸ *Id.* at 416.

⁸⁹ *Id.* at 416–17.

⁹⁰ *Id.* at 443.

⁹¹ *Id.* at 439–43.

⁹² *Id.* at 444.

limited access to outsiders or upstart candidates.”⁹³ The evidence showed Latinos at a marked disadvantaged compared to non-Hispanic whites with respect to socioeconomic status and levels of political participation.⁹⁴ The court also found that “the most recent election for Mayor of Port Chester was marred by a racial appeal,” indeed, a “blatant racial message . . . [that] emerged in the midst of ongoing proceedings in th[e] case.”⁹⁵ Finally, the court noted that “no member of the Hispanic community in Port Chester has ever been elected to the Board of Trustees,” and that, with the exception of a single school board candidate elected after the issuance of a preliminary injunction in the case, “no other Hispanics have been elected to public office in the Village.”⁹⁶ As a remedy, the Court ultimately approved a cumulative voting scheme.⁹⁷ After implementing the remedial order, the Village elected its first ever Latino trustee.⁹⁸

5. *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany*

Following the 1990 Census, in which Blacks and Hispanics accounted for approximately 10% of Albany County’s total population, the Albany County Legislature enacted a redistricting plan that included only one majority-minority district and several

⁹³ *Id.* at 444.

⁹⁴ *Id.* at 445.

⁹⁵ *Id.* at 446.

⁹⁶ *Id.*

⁹⁷ *See id.* at 447–53,

⁹⁸ Kirk Semple, *First Latino Board Member Is Elected in Port Chester*, N.Y. TIMES (June 16, 2010), <https://www.nytimes.com/2010/06/17/nyregion/17chester.html>.

other districts where minorities were a near majority.⁹⁹ A lawsuit alleging that the redistricting plan violated Section 2 led to the entry of a consent decree vacating the districting plan and mandating the creation of a new plan that included three majority-minority districts.¹⁰⁰ In 2003, following the 2000 Census, the Albany County Legislature enacted a redistricting plan that retained only three majority-minority districts despite the County's Black population increasing by 2.5% and its Hispanic population nearly doubling, in part by only including Blacks in the definition of minority voters.¹⁰¹ Minority voters once again brought suit against the County's latest redistricting, alleging that the Voting Rights Act now required four majority-minority districts and seeking an injunction compelling such a plan.¹⁰²

The Northern District of New York ultimately granted a preliminary injunction against the County's districting plan after finding that plaintiffs had presented sufficient evidence to satisfy the *Gingles* preconditions and "evidence which demonstrated unequal access to the political process for minorities in Albany County."¹⁰³ Specifically, the court noted evidence that "strongly support[ed]" the conclusion that voting in Albany County was polarized along racial lines, that minorities in the County continued to bear the effects of past discrimination, and that no minorities had been elected to County-wide office.¹⁰⁴

⁹⁹ *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany*, 281 F. Supp. 2d 436, 439–40 (N.D.N.Y. 2003).

¹⁰⁰ *See id.*; *Pope v. Cty. of Albany*, 94 F. Supp. 3d 302, 311–12 (N.D.N.Y. 2015).

¹⁰¹ *See Arbor Hill*, 281 F. Supp. 2d at 440.

¹⁰² *Id.* at 440–41.

¹⁰³ *Id.* at 444.

¹⁰⁴ *See id.* at 444–56.

The court enjoined the County from conducting the 2003 election until it adopted a new redistricting plan that created a fourth majority-minority district.¹⁰⁵ The County ultimately entered into another consent decree that included in its definition of minority both Black and Hispanic voters and established four majority-minority districts.¹⁰⁶

6. *New Rochelle Voter Def. Fund v. City of New Rochelle*

Prior to 1993, the City of New Rochelle in Westchester County had elected the members of its City Council at-large and only one Black candidate had ever been elected to the Council in the 1960s and 1970s.¹⁰⁷ In 1991, residents brought suit under the Voting Rights Act, and the City ultimately enacted the relief they were seeking—the establishment of six single-member districts.¹⁰⁸ Following the 2000 Census, however, the City adopted a reapportionment plan in which a majority-minority district was converted into a plurality-minority district. In 2003, minority residents once again brought suit, alleging that the City of New Rochelle had intentionally minimized the number of majority-minority voting districts in the City in violation of Section 2.¹⁰⁹

The Southern District of New York agreed, holding that the City had deliberately diluted Black voting strength. The court “infer[red] that the Defendants intended the probable consequences of their actions,” noting that the City’s redrafting of the district in

¹⁰⁵ *Id.* at 457.

¹⁰⁶ *See Pope v. Cty. of Albany*, 94 F. Supp. 3d 302, 312 (N.D.N.Y. 2015).

¹⁰⁷ *New Rochelle Voter Def. Fund v. City of New Rochelle*, 308 F. Supp. 2d 152, 155 (S.D.N.Y. 2003).

¹⁰⁸ *Id.* at 155–56. Plaintiffs were ultimately awarded attorney fees because the court found that the litigation had motivated the change in election structure. *See Davis v. City of New Rochelle, N.Y.*, 156 F.R.D. 549, 552 (S.D.N.Y. 1994).

¹⁰⁹ *Id.* at 153–54.

question was “done with the awareness of the effect of their work,” because a major, predominately Black housing project and two other Black neighborhoods were transferred in whole or part out of the district.¹¹⁰ Finding the *Gingles* factors satisfied, the court also found that the relevant Senate Factors “generally point[ed] in favor of Plaintiffs’ claims,” noting that the “regrettable history of discrimination in employment, housing and education in the Westchester County area is too well known to require extended comment.”¹¹¹ The court ultimately ordered the City to reconfigure the district in question in order to return it to majority-minority status.¹¹²

7. *Goosby v. Town Board of the Town of Hempstead*

The Town of Hempstead, New York is the most populous town in the United States.¹¹³ In August 1988, Black plaintiffs brought suit against the Town Board and its incumbent board members, alleging that the Town’s at-large election structure unlawfully diluted the vote of Black residents in violation of Section 2 of the Voting Rights Act.¹¹⁴ At that time, all but ten out of 900 towns in the State used at-large elections.¹¹⁵ Between 1907 and 1993, every elected member of the Town Board was a white Republican, although the Town’s Black population had more than tripled as a percentage of the Town’s

¹¹⁰ *Id.* at 157.

¹¹¹ *Id.* at 158–60.

¹¹² *Id.* at 163–64.

¹¹³ *Goosby v. Town Bd. of the Town of Hempstead, N.Y.*, 956 F. Supp. 326, 331 (E.D.N.Y. 1997), *aff’d*, *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476 (2d Cir. 1999).

¹¹⁴ *Id.* at 328–29.

¹¹⁵ *Id.* at 331.

residents from 3.4% in 1960 to 12.1% in 1990.¹¹⁶ The Town Board “exercises substantial authority, both formally and informally, in a wide variety of areas of importance to its residents,” including “controlling Town finances, acquiring and selling real property, maintaining Town property (including its various parks), filling vacancies in Town offices, removing fire and health hazards, awarding and executing Town contracts, cleaning and repairing Town streets and roads, maintaining adequate lighting on Town roads, collecting garbage in certain areas of the Town, and promulgating zoning laws and hearing applications for rezoning areas of the Town.”¹¹⁷ The town budget at the time of the lawsuit was \$290 million and the Town had approximately 2,500 employees.¹¹⁸

In early 1997, the Eastern District of New York determined that Hempstead’s at-large election system violated Section 2 and ordered the implementation of single-member districts.¹¹⁹ The court found that “[r]acially polarized voting in the Town [was] significant and persistent” and that Town Board elections were characterized by electoral mechanisms that enhance discrimination, including the fact that the Town, with “three-quarters of a million residents” was “one of the largest undivided districts in the country,” making “[c]ampaigning [] far more difficult than it would be under a single-member districting system.”¹²⁰ The court found that the dominant candidate slating organization for the Town Board—the Nassau County Republican Party, and more specifically, the party chairman at

¹¹⁶ *Id.* at 331–32.

¹¹⁷ *Id.* at 332.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 329.

¹²⁰ *Id.* at 339, 351.

the time, whose endorsement was a necessity for election—was not “truly open” to Blacks.¹²¹ The court noted that during the pendency of the litigation a Black Republican was appointed to fill a vacant seat and subsequently re-elected; however, based on, *inter alia*, “the testimony of the Town’s prominent Black Republicans regarding their efforts to penetrate the appointment and slating process for Town Board seats,” the court found that the appointment was effort to evade liability under Section 2 “by manipulating the election of a ‘safe’ minority candidate,” a risk acknowledged by the Senate Judiciary Committee in its report on the 1982 amendments to the Voting Rights Act.¹²²

Elections for the Town Board had been characterized by racial appeals, including campaign literature from one Board member that the court found was “perceived, reasonably, as a promise to stem the tide of blacks across the Queens border into Elmont and North Valley Stream” and that the Town Board “used its unofficial influence over the police department to further this goal.”¹²³ The Court further found that the Town Board that had “remained largely unresponsive to the particularized needs of the black communities,” including “[m]ost significantly, . . . indifference and callousness on the part of the Town Board with respect to the issue that probably matters most to blacks: racial intolerance and bigotry in Town government itself.”¹²⁴

The court ordered the adoption of a single-member district plan, after first rejecting the Town’s proposal of a hybrid plan with both single-member and at-large districts as a

¹²¹ *Id.* at 340–41.

¹²² *Id.* at 341, 344 (citing S. Rep. No. 417, 97th Cong., 2d Sess. (1982) at 29, n. 115).

¹²³ *Id.* at 343 (emphasis omitted).

¹²⁴ *See id.* at 346, 352.

violation of the Equal Protection Clause.¹²⁵ The Second Circuit affirmed both the liability and remedial orders.¹²⁶ The total time elapsed from the date the complaint was filed in 1988 to the resolution of the appeal was over a decade.

B. Challenges of Investigating and Prosecuting the Full Extent of Potential Section 2 Violations in New York State.

The scale and multiple levels of New York’s election system make meaningful investigation and prosecution of Section 2 violations a daunting task. New York contains 62 counties, 62 cities, 932 towns, hundreds of villages, and thousands of special purpose (*e.g.*, school, water, fire, sewer, etc.) districts that may be conducting elections.¹²⁷ These thousands of political subdivisions provide primary services that New Yorkers rely upon daily, including public education, sanitation, policing, fire services, water, parks, and libraries. Unfortunately, cases like *East Ramapo* and *Islip* are not unique. They are merely the most noticeable examples of a common problem of minority vote dilution and voter suppression in local elections. Elections in these local levels of government frequently feature practices that suppress turnout overall, but have a significantly disparate impact on minority turnout, as well as conditions that typically contribute to minority vote dilution.

¹²⁵ See *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 981 F. Supp. 751 (E.D.N.Y. 1997), *aff’d*, 180 F.3d 476 (2d Cir. 1999).

¹²⁶ *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476 (2d Cir. 1999).

¹²⁷ Official sources appear to differ significantly in their count of local government entities, particularly villages and special purpose districts. Compare N.Y. Department of State, Division of Local Government Services, “What Do Local Governments Do,” <https://video.dos.ny.gov/lg/localgovs.html> (stating that there are 551 villages in New York State) with New York State Board of Elections, ADMINISTRATION OF ELECTIONS BY MUNICIPAL CORPORATIONS, *supra* note 28, at 5 (listing 343 villages and 7,658 ‘other’ districts); see also Number of Local Governments by State, GOVERNING, <http://www.governing.com/govdata/number-of-governments-by-state.html> (last visited December 5, 2019) (listing New York as having 3,450 “total governmental units,” including 1,587 “general purpose governments” and 1,863 “special purpose districts”) (citing U.S. Census Bureau, 2017 Census of Governments).

- The vast majority of local governments in the state elect their councils using at-large election systems.¹²⁸ Although at-large elections are not illegal *per se*, courts and commentators have long-recognized their susceptibility to racial vote dilution, particularly in the presence of racially-polarized voting.¹²⁹
- Village, school district, and special purpose district elections each take place on unique election days—not concurrent with any federal, state, or other local elections.¹³⁰ For example, state law requires that the vast majority of school district elections take place on the third Tuesday in May.¹³¹ State law sets village elections for March or June.¹³² Fire district elections are held in December.¹³³ “There is little question that the difference between holding an election “off-cycle” in March as opposed to holding it in November alongside

¹²⁸ 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.”)

¹²⁹ See *Hendrix v. McKinney*, 460 F. Supp. 626, 629 (M.D. Ala. 1978) (“The effect of an at-large election system in combination with the minority status of blacks and the social pattern of racially polarized voting is a dilution of black voting strength.”); see, e.g., Benjamin, *supra* note 128, 5 ALB. GOV'T L. REV. at 734 (“The use of at-large elections is suspect under the Federal Voting Rights Act as a procedure highly likely to result in denying members of protected minority groups an effective choice at the polls.”)

¹³⁰ See New York State Board of Elections, *Administration of Elections by Municipal Corporations* at 5–6, (“New York State is a large and complex web of jurisdictions - 62 counties, 62 cities, 932 towns, 343 villages, and 7,658 ‘other’ districts which may be conducting elections (such as school, fire, water, sewer, park, lighting and library). Elections across these jurisdictions are conducted throughout the year, with a majority of the village elections in March, school district elections in May, and some village elections in June. Traditional state and local primary elections are conducted in September and the general election is conducted in November. Fire district elections round out the annual election cycle, as they are conducted in December.”)

¹³¹ N.Y. Education Law § 2002(1).

¹³² N.Y. Election Law § 15-104; .

¹³³ N.Y. Town Law § 175 (1).

major state and national elections can have a significant impact on voter behavior.”¹³⁴

- Polling location plans for local government elections that are not run by the boards of elections often feature too few and/or inconvenient poll sites.¹³⁵ Moreover, New York’s recent adoption of early voting has not applied to school districts, village, and special purpose district elections where elections are run by the jurisdictions themselves and not by the boards of elections.
- Local governments fail to provide adequate language assistance, even when required to do so under federal law.¹³⁶ The failure to provide adequate language assistance is especially harmful to Latino and Asian communities in New York, which are far more likely than non-Hispanic whites to report limited English proficiency.¹³⁷
- New Yorkers of color, particularly Black and Latino New Yorkers, are at persistent and widespread socioeconomic disadvantage compared to non-Hispanic whites. For example, according to the 2015–2019 American

¹³⁴ *Vill. of Port Chester*, 704 F. Supp. 2d at 444 (citing *NAACP v. Hampton County Election Comm.*, 470 U.S. 166, 178 (1985) (noting that in the jurisdiction at issue, “an election in March is likely to draw significantly fewer voters than an election held simultaneously with a general election in November”)).

¹³⁵ *See, e.g., East Ramapo*, 462 F. Supp. 3d at 401 (“State and federal elections have twenty-four polling places, but the District uses only thirteen for the same geographic area, which increases confusion and enhances discrimination.”).

¹³⁶ *See, e.g., John Hildebrand, Most Long Island School Districts Will Have Bilingual Ballots*, *NEWSDAY*, March 24, 2019, <https://www.newsday.com/long-island/education/school-districts-voting-english-spanish-ballots-1.28832270> (“Bilingual ballots have been used for years in federal, state and county elections. Until now, most school districts have used only English forms on the assumption that federal rules covering other jurisdictions did not apply to them.”); *see* Section III *infra*.

¹³⁷ *See* U.S. Census Bureau, 2015–2019 American Community Survey 5-Year Estimates, B16005. Nativity by Language Spoken at Home By Ability to Speak English for the Population 5 Years and Over.

Community Survey, on a statewide basis, Blacks, Latinos, and Asians all lag behind non-Hispanic whites on a variety of measures including family and per capita income, poverty rates, and homeownership rates.¹³⁸ Blacks and Latinos also trail non-Hispanic whites on educational attainment.¹³⁹

- Racially polarized voting persists in the New York state electorate, particularly outside of New York City.¹⁴⁰

Although Section 2 of the Voting Rights Act expressly disclaims an entitlement to proportional descriptive representation, the extent to which minority candidates are elected is probative of whether vote dilution or suppressing may be occurring.¹⁴¹ Candidates of color have had some success in majority-minority political subdivisions and legislative districts, but are still generally underrepresented among elected officials in the state. Since 1777, no person of color has ever been elected governor of New York. No one of Latino or Asian heritage has ever been elected to any statewide office. Only one person of color has been elected to each of the statewide offices of Lieutenant Governor, Attorney General,

¹³⁸ See U.S. Census Bureau, 2015-2019 American Community Survey 5-Year Estimates, Tables B17010, Poverty Status in the Past 12 Months of Families by Family Type by Presence of Related Children Under 18 Years; B17020, Poverty Status in the past 12 Months by Age; B19113, Median Family Income in the Past 12 Months (in 2019 Inflation-Adjusted Dollars); B19301, Per Capita Income in the Past 12 Months (in 2019 Inflation-Adjusted Dollars); B20017, Median Earnings in the Past 12 Months (in 2019 Inflation-Adjusted Dollars) by Sex by Work Experience in the Past 12 Months for the Population 16 Years and Over with Earnings in the Past 12 Months; B22005, Receipt of Food Stamps/SNAP in the Past 12 Months by Race of Householder; B25003, Tenure – Universe: Occupied Housing Units.

¹³⁹ See U.S. Census Bureau, 2015–2019 American Community Survey 5-Year Estimates, C15022, Sex by Educational Attainment for the Population 25 Years and Over.

¹⁴⁰ For example, an ecological inference analysis of the November 2020 general presidential election conducted by the New York Civil Liberties Union shows that in three of the four large suburban counties outside of New York City, more than 55% of white voters preferred Donald Trump, while in all four counties Black voter support for Joe Biden was at or above 90%, Latino voter support for Biden was at or above 70%, and Asian voter support for Biden was at or above 66%. See Appendix B.

¹⁴¹ See 52 U.S.C. § 10301(b).

or Comptroller. To date, outside of Bronx and Kings counties, which are both majority-minority counties, only one person of color has ever been elected to the position of district attorney in the remaining 59 counties of New York State.¹⁴² To date, only one person of color has ever been elected mayor of the City of New York.¹⁴³

One example of this underrepresentation is the well-established lack of diversity among New York's elected judiciary. Although nearly 45% of the State's population was non-white as of 2020, more than three-quarters of its judges were white.¹⁴⁴ The racial disparity between the general population and the bench is especially egregious for Latinos and Asians. In 2020, Latinos made up nearly 18% of the general population, but only 7% of judges, while Asians made up 8.5% of the population, but less than 3% of judges.¹⁴⁵ Research also shows underrepresentation of minorities, particularly Latinos, on municipal councils and school boards, in jurisdictions that use at-large elections.¹⁴⁶

Unfortunately, as noted above, the time consuming and resource-intensive process of investigating and prosecuting even a single Section 2 case is significant barrier to

¹⁴² Dave Lucas, *Albany County DA David Soares, Challenger Matt Toporowski Debate Before June 23 Primary*, WAMC NORTHEAST PUBLIC RADIO, June 5, 2020, <https://www.wamc.org/capital-region-news/2020-06-05/albany-county-da-david-soares-challenger-matt-toporowski-debate-before-june-23-primary>. In 2021, Alvin Bragg, a Black man, won the Democratic Party nomination for District Attorney of New York County. Michael R. Sisak, *Alvin Bragg's Opponent Concedes in Primary for Manhattan DA*, NBC4 NEW YORK, July 2, 2021, <https://www.nbcnewyork.com/news/local/alvin-braggs-opponent-concedes-in-primary-for-manhattan-da/3137640/> (“Alvin Bragg is one step closer to becoming the first Black district attorney for Manhattan after his opponent concedes”)

¹⁴³ In 2021, Eric Adams, a Black man, won the Democratic Party nomination for Mayor of the City of New York. Elizabeth Kim, *“We’ve Been There”: Why A Second Black Mayoralty Is Inspiring A Mix Of Hope And Skepticism*, GOTHAMIST, Aug. 4, 2021, <https://gothamist.com/news/eric-adams-second-black-mayor-nyc-hope-and-skepticism>.

¹⁴⁴ Report from the Special Advisor on Equal Justice in the New York State Courts (Oct. 1, 2020) at 33, available at <http://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf>.

¹⁴⁵ *Id.* at 35.

¹⁴⁶ See Benjamin, *supra* note 128, 5 ALB. GOV'T L. REV. at 734.

scaling-up enforcement. Modern voter suppression and vote dilution have become more subtle but no less effective denying communities of color an equal opportunity to participate in the political process and elect candidates of choice than the first-generation vote denial scheme.¹⁴⁷ The greater subtlety requires increasingly sophisticated methods of analysis applied by costly experts to diagnose and prove Section 2 violations.¹⁴⁸ As such, the House Judiciary Committee unsurprisingly found fifteen years ago that “case-by-case enforcement alone is not enough to combat the efforts of certain States and jurisdictions to discriminate against minority citizens,” and that “Section 2 would be ineffective to protect the rights of minority voters.”¹⁴⁹ The time-consuming and costly nature of building Section 2 cases has, at times, made the law an inadequate vehicle for prosecuting minority voter suppression arising out of more ephemeral practices that can have a profound effect on turnout. For example, the locations of polling places are set shortly before election day and can change from year to year,¹⁵⁰ often leaving too little time to gather the data and conduct the expert analysis required to diagnose, let alone prosecute, a case of racial voter suppression.

Section 2 cases regularly require minority voters and their lawyers to risk six- and seven-figure expenditures for expert witness fees and deposition costs for claims that

¹⁴⁷ See H.R. Rep. No. 109-478 (2006), at 6.

¹⁴⁸ Federal courts have also found voting cases have consumed an increasing number of judicial resources over time and are comparable to antitrust cases as among the most time-consuming and resource-intensive cases. See Perry Grossman, *The Case for State Attorney General Enforcement of the Voting Rights Act Against Local Governments*, 50 U. MICH. J.L. REFORM 565, 593 (2017) (citing Federal Judicial Center studies from 2005 and 2016).

¹⁴⁹ H.R. Rep. No. 109-478 (2006), at 57.

¹⁵⁰ See, e.g., N.Y. Elec. L. § 8-600(4)(e) (designation of early voting site and hours may occur up to 45 days before a primary or special election).

promise no damage awards.¹⁵¹ The recent New York cases in Islip and East Ramapo each demonstrate the exorbitant expense demanded by Section 2 litigation. Compounding the injury, it has remained true as the Supreme Court recognized over fifty years ago that voting rights defendants engage in dilatory tactics to prolong their time in office and evade liability,¹⁵² such as noted above in *East Ramapo*.¹⁵³

Finally, a lack of experienced voting rights attorneys in New York makes enforcement all the more challenging. There are very few lawyers in the state who represent the non-partisan interests of voters. The vast majority election lawyers in New York work as retained counsel for candidates or political parties. Of the small group of public interest voting rights lawyers based in New York, most are employed by national civil rights organizations—such as the NAACP Legal Defense and Education Fund, the American Civil Liberties Union, the Brennan Center for Justice, LatinoJustice PRLDEF, and the Asian American Legal Defense and Education Fund—and divide their practices among multiple states with few resources left to investigate and prosecute cases in New York. Attorneys in private practice are reluctant to take voting rights cases because individual voters and non-profit, non-partisan associations can rarely afford to retain counsel; there are no monetary damages available for voting rights claims; and statutory fee recovery, when available at all, is often uncertain. Voters—especially for low-income

¹⁵¹ See *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. On the Judiciary*, 109th Cong. 7 (2005).

¹⁵² See *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966) (“Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings.”); see also *Voting Rights Act: Section 5 – Preclearance Standards: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 109th Cong. 4–5 (2005).

¹⁵³ See Section II.B.1 *supra*.

voters of color and disabled voters whose voting rights are most often infringed upon—often simply cannot afford the time and effort required to prosecute a case in light of work, family, or other obligations.¹⁵⁴

III. ENFORCING THE LANGUAGE MINORITY PROTECTIONS OF THE VOTING RIGHTS ACT OF 1965 IN NEW YORK

There is a long history of discrimination against language minority groups in voting in New York State.¹⁵⁵ Juan Cartagena, one of the state’s most prominent voting rights lawyers, observed that in New York the “the color of one’s skin, the foreignness of one’s ancestry and the difficulty with which one brokered the English language all worked to deny the franchise to [the state’s] citizens.”¹⁵⁶ New York’s exceptional language diversity is one of the state’s greatest strengths, but also presents a challenge for ensuring inclusive and equitable election administration.¹⁵⁷

The Voting Rights Act of 1965 introduced protections for Puerto Rican voters in Section 4(e), which provided that comprehension of English cannot be a condition to the participation in elections for citizens who were “educated in American-flag schools in which the predominant language was other than English.”¹⁵⁸ The relative success of New York City programs developed in response to litigation to enforce Section 4(e) compliance

¹⁵⁴ See *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 109th Cong. (2006), at 1620.

¹⁵⁵ See, e.g., Cartagena, *supra* note 20 at 507–16, 518–25, 537–39; see also *United States v. Cty. Bd. of Elections of Monroe Cty.*, 248 F. Supp. 316, 317 (W.D.N.Y. 1965).

¹⁵⁶ Cartagena, *supra* note 20 at 502.

¹⁵⁷ In New York City in particular, 59.3% of the population speak a language other than English at home. U.S. Census Bureau, *Language Spoken At Home: 2019 ACS 1-Year Estimates*, available at: <https://data.census.gov/cedsci/table?q=Language%20&tid=ACSST1Y2019.S1601&hidePreview=false>.

¹⁵⁸ 52 U.S.C. § 10303(e).

in reaching close to 913,000 Puerto Ricans as well as many other Spanish-language speakers provided a model for implementing the broader language access requirements of Section 203.¹⁵⁹

Section 203 of the Voting Rights Act applies to four language groups: Alaska Natives, American Indians, Asian Americans, and persons of “Spanish heritage,”¹⁶⁰ “as well as the distinct languages and dialects within each of those groups.”¹⁶¹ A jurisdiction is covered under Section 203 if the Director of the Census determines two criteria are met, using “American Community Survey data in 5-year increments, or comparable census data.”¹⁶² Currently 7 of New York’s 62 counties are separately covered by Section 203 of the Voting Rights Act.¹⁶³ Seven counties are covered for Spanish: Bronx, Kings, Nassau, New York, Queens, Suffolk, and Westchester.¹⁶⁴ Three counties are covered for Chinese (including Taiwanese): Kings, New York, and Queens.¹⁶⁵ Additionally, Queens is covered

¹⁵⁹ See H.R. REP. NO. 94-196, at 24–25 (1975) (Noting that “[t]he provision of bilingual materials is certainly not a radical step. . . . Courts in New York have ordered complete bilingual election assistance, from dissemination of registration information through bilingual media to use of bilingual election inspectors.”); see also Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 NAT’L BLACK L.J. 201, 209–10 (2005); *United States v. Cty. Bd. of Elections of Monroe Cty.*, 248 F. Supp. at 317 and *Torres v. Sachs*, 381 F Supp. 309, 312 (S.D.N.Y. 1974).

¹⁶⁰ 52 U.S.C. §§ 10503(c)(3), 10503(e).

¹⁶¹ James Thomas Tucker, *The Census Bureau’s 2011 Determinations of Coverage under Section 203 of the Voting Rights Act Mandating Bilingual Voting Assistance*, 19 ASIAN AM. L. J. 171 (2012) (citing 121 Cong. Rec. H4716 (daily ed. June 2, 1975) (statement of Rep. Edwards); S. Rep. No. 94-295 at 24 n.14, reprinted in 1975 U.S.C.C.A.N. 790-91 n.14 (quoting Letter from Meyer Zitter, Chief, Population Division, Bureau of the Census, to House Judiciary Committee, Apr. 29, 1975)).

¹⁶² 52 U.S.C. § 10503(b)(2)(A).

¹⁶³ See 81 Fed. Reg. 85732, 87533 (Dec. 5, 2016).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

for Korean and Asian Indian.¹⁶⁶ The next coverage determinations are expected to be made in December, 2021, as required by Section 203(b)(2) of the Voting Rights Act.¹⁶⁷ Other than the addition of Asian Indian to Queens' coverage in 2011, there has not been any change to the covered jurisdictions or language covered within such jurisdictions in the past three coverage determinations.¹⁶⁸

Nonetheless, civil rights groups have had to go to court to ensure compliance with the law and have repeatedly prompted election administrators to resolve litigation through settlement agreements.¹⁶⁹ In addition to the Section 203 and Section 4(e) violations discussed in this Section, before the preclearance scheme Section 5 of the Voting Rights Act was left effectively inoperable by the *Shelby County* decision, proposed election procedures were blocked on several occasions due to failures to give proper ballot access to Chinese-American and Latino citizens.¹⁷⁰

Citizens in need of language assistance often experience intersecting barriers to participation in democracy and elections—for example, they are frequently the targets of discriminatory remarks made by poll workers in covered jurisdictions, misapplied photo

¹⁶⁶ *Id.*

¹⁶⁷ Compare generally *id.* (current coverage determinations issued on December 5, 2016) with 52 U.S.C. § 10503(b)(2)(A) (requiring the coverage determinations to be updated every five years).

¹⁶⁸ Compare 76 Fed. Reg. 63602, 63605 (Dec. 13, 2011) with 67 Fed. Reg. 48871, 48875.

¹⁶⁹ See, e.g., Brief of Amici Curiae National Asian Pacific American Bar Association, Asian American Legal Defense and Education Fund et al. Supporting Respondents, *Department of Commerce v. State of New York*, 2019 WL 1500055 (U.S.), 2 & n.68 (2019) (citing Complaint, *All. of South Asian Am. Labor v. The Bd. of Elections in the City of New York*, No. 1:13-cv-03732 (E.D.N.Y. July 2, 2013), ECF No. 1; Complaint, *Chinatown Voter Education All. v. Ravitz*, No. 1:06-cv-0913 (S.D.N.Y. Feb. 6, 2006, ECF No. 1)).

¹⁷⁰ *Id.* at 507–10.

identification requirements, and errors that threaten their ability to cast valid ballots.¹⁷¹ The recent VRA violations reflected in court actions, DOJ objections, and federal observer accounts are described below, but they only begin to describe the ways in which New York fails its language minority voters. As part of their national election monitoring efforts, the Asian American Legal Defense and Education Fund (AALDEF), has repeatedly and recently documented in New York “racist and poorly trained poll workers,” such as demands for proof of citizenship from Asian American voters, including a poll worker in Chinatown who asked a Chinese American voter “Are you an American?” and demanded that the voter show identification before voting.”¹⁷² AALDEF also documented elections officials’ failure to provide adequate notice of the availability of provisional ballots interpreters,¹⁷³ as well as poll worker interference with interpreters assisting voters;¹⁷⁴ and numerous instances where voters were forced to vote by affidavit ballots due to failures to properly include their names in the poll books.”¹⁷⁵ Language-minority voters in New York

¹⁷¹ See Jocelyn Friedrichs Benson, *One Person, One Vote: Protecting Access to the Franchise Through the Effective Administration of Election Procedures and Protections*, 40 URB. LAW, 269, 295 (2008); see generally *Voting Rights Act: Section 203—Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2d. Session, 12–21 (Mar. 8, 2005) (testimony of Margaret Fung, Executive Director, Asian American Legal Defense and Education Fund) (hereinafter Fung Testimony);

¹⁷² Asian American Legal Defense and Education Fund, *ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2012 ELECTIONS: LOCAL COMPLIANCE WITH THE VOTING RIGHTS ACT AND HELP AMERICA VOTE ACT (HAVA) IN CA, FL, GA, IL, LA, MA, MD, MI, NJ, NV, NY, PA, TX, VA AND DC* at 22-23, 25-26 (2012) (hereinafter, 2012 AALDEF Report), available at aaldef.org/uploads/pdf/Access%20to%20Democracy%20Report%202012.pdf; see also generally Asian American Legal Defense and Education Fund, *ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2014 ELECTIONS: LOCAL COMPLIANCE WITH THE VOTING RIGHTS ACT AND HELP AMERICA VOTE ACT (HAVA) IN CA, FL, GA, IL, LA, MA, MD, MI, NJ, NV, NY, PA, TX, VA AND DC* at 22-23, 25-26 (2014), <https://www.aaldef.org/uploads/pdf/2014AccessToDemocracyReport.pdf>

¹⁷³ See 2012 AALDEF Report *supra* note 172, at 4.

¹⁷⁴ *Id.* at 22.

¹⁷⁵ *Id.* at 23.

need stronger guarantees against discrimination and greater enforcement resources to ensure that their rights are adequately protected.

Failures to provide legally adequate assistance to language-minority voters in New York are not confined to New York City. In recent years, the U.S. Department of Justice has taken action to enforce the VRA's language assistance protections against several political subdivisions, all outside of New York City.

A. *United States v. Orange County Board of Elections*

On April 18, 2012, Orange County Board of Election (“OCBOE”) was sued by the United States pursuant to Section 4(e) of the Voting Rights Act, which protects the voting rights of citizens “educated in American-flag schools in which the predominant language was other than English” by prohibiting jurisdictions from “conditioning the right to vote of such persons on [their] ability to read, write, understand, or interpret any matter in the English language.”¹⁷⁶ The complaint referred to 2000 Census data showing that the total number of people in Orange County who were born in Puerto Rico was 5,671, or 5.6% of the total Orange County population, and which constituted 29.6% of the total Puerto Rican population of the United States according to the 2000 Census figures.¹⁷⁷ By 2010, the Puerto Rican population of Orange County increased to 29,210 people.¹⁷⁸

The complaint sets out multiple violations of the Voting Rights Act, including allegations that during the 2009, 2010, and 2011 Federal, state, and local elections the

¹⁷⁶ 52 U.S.C. § 10303(e).

¹⁷⁷ Complaint at 11–12, *United States v. Orange County Board of Elections*, 12 Civ. 3071 (S.D.N.Y. 2012), available at: <https://www.justice.gov/archive/usao/nys/pressreleases/April12/occ/usvorangecountycomplaint.pdf>.

¹⁷⁸ *Id.* at ¶ 15.

defendants failed to translate election materials into Spanish. This included various ballots, election notices, and election-related information on the OCBOE website.¹⁷⁹ The complaint further alleges that, during those same elections, the defendants failed to “recruit, appoint, train and maintain an adequate number of bilingual poll workers to provide Spanish-language assistance at the polls.”¹⁸⁰ According to the complaint, Defendants also denied multiple requests from Orange County residents to make Spanish-language assistance available at polling places.¹⁸¹

The parties entered into a stipulation which required OCBOE to designate bilingual election program coordinators, undertake a comprehensive program of translating ballots and election materials in Spanish; to ensure that information concerning elections and related services are adequately distributed to the County’s Puerto Rican community through media broadcast and publication, as well as OCBOE’s web site; to provide prominent signage in Spanish at polling places about the availability of Spanish-language assistance; to hire and train bilingual election inspectors and poll workers; and to use Spanish-surname analysis of the County voter registration list to estimate the number of Spanish-speaking voters and to staff those polling places according with bilingual personnel.¹⁸² The consent decree also authorized the appointment of federal election observers “to protect the voting guarantees of the Fourteenth and Fifteenth Amendments

¹⁷⁹ *Id.* at ¶ 16

¹⁸⁰ *Id.* at ¶ 17.

¹⁸¹ *Id.* at ¶ 19–20.

¹⁸² Stipulation, *United States v. Orange County Board of Elections*, 12 Civ. 3071 (S.D.N.Y. 2012), available at: https://www.justice.gov/sites/default/files/crt/legacy/2015/03/10/orange_stip15_ny.pdf.

of the citizens of Orange County”¹⁸³ The stipulation applied to all Federal, State, and local elections administered by the OCBOE, for the period from March 6, 2015 through January 31, 2017.

B. *United States v. Westchester County, N.Y.*

On January 18, 2014, the United States filed an action against Westchester County, Westchester County Board of Elections (“WCBOE”), and the Commissioners of the Board of Elections alleging violations of Section 203 of the Voting Rights Act. Westchester County has been a covered jurisdiction for Spanish speaking language minorities under Section 203 of the Voting Rights Act since 1992, some 22 years before the suit was filed.

The complaint filed alleged several violations of Section 203, including failure to “recruit, appoint, train and maintain an adequate pool of bilingual poll officials capable of providing effective language assistance” to Spanish speaking citizens with limited English proficiency and failure to translate election-related materials into Spanish. Such information included election date announcements, voter registration information, election notices of various election types, candidate lists, and election-related information on County websites, in particular, the WCBOE website.¹⁸⁴

The parties entered into a consent decree, pursuant to which defendants agreed to comply with Section 203 of the Voting Rights Act and provide Spanish language materials, notices, forms, instructions, or assistance to voters, in “all elections and stages of the electoral process” conducted and administered by Westchester County. The consent decree

¹⁸³ *Id.* at 6-7.

¹⁸⁴ Complaint at 11–12, *United States v. Westchester County, N.Y.*, No. 05 CIV. 0650 (S.D.N.Y. 2005), available at: <https://www.justice.gov/crt/jurisdiction-and-venue>.

also provided for provisional ballots and other protections for voters attempting to vote at a polling place other than their assigned polling place.¹⁸⁵

The consent decree also itemized several other requirements defendants were required to comply with, including the translation of election-related materials into Spanish, and processes for managing such translation at local and polling-place level distribution, including Spanish ballots.¹⁸⁶ The dissemination of Spanish-language information in newspapers and other media was also required.¹⁸⁷ The consent decree outlined requirements for coordinators to oversee and manage the bilingual program, including ensuring adequate in-person Spanish language assistance at any place where “election-related transactions” were conducted by Westchester County, and that such personnel were adequately trained.¹⁸⁸ Finally, the consent decree authorized Federal observers to monitor compliance.¹⁸⁹

C. *United States v. Suffolk County*

On June 29, 2004, the United States entered into a consent decree with Suffolk County, Suffolk County Board of Elections (“SCBOE”), and the Commissioners of the SCBOE following the filing of a complaint alleging violations of Section 203 of the Voting

¹⁸⁵ Consent Decree at 1–2, *United States v. Westchester County, N.Y.*, No. 05 CIV. 0650 (S.D.N.Y. 2005), available at: https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/westchester_cd.pdf.

¹⁸⁶ *Id.* at ¶¶ 4–6.

¹⁸⁷ *Id.* at ¶ 7.

¹⁸⁸ *Id.* at ¶¶ 9–15 and 19–28.

¹⁸⁹ *Id.* at ¶¶ 29; 33–26 and 28–40.

Rights Act.¹⁹⁰ As with Westchester County, Suffolk County has been subject to the requirements of Section 203 with respect to Spanish since 1992.

The consent decree required defendants to provide in Spanish all election-related materials, including any notices, announcements, ballots, registration materials and other voting information (including appearing on voting machines), and imposed standards for the accuracy and completeness, and prominent placement of Spanish-language materials at polling places.¹⁹¹ The consent decree required coordinators to oversee the bilingual program, and required meetings between the Commissioners of the SCBOE and/or such coordinators and representatives of the “Hispanic community and other concerned groups” at least one month prior to primary and general elections conducted by the SCBOE to solicit community views.¹⁹² The consent decree also mandated minimum staffing levels and training requirements for bilingual poll workers.¹⁹³

In addition, the consent decree required that the SCBOE provide to the United States Attorney’s Office at least ten days prior to each federal, state or county election held in Suffolk County while the consent decree was effective, a report that included individualized polling place information, including the names each poll worker or interpreter designated to work at each polling place and which of those poll workers or

¹⁹⁰ Consent Decree, *United States v. Suffolk County, N.Y.*, No. CV 04-2698 (E.D.N.Y. June 29, 2004).

¹⁹¹ *Id.* at ¶¶ 1–2, 4 and 6.

¹⁹² *Id.* at ¶¶ 4–5.

¹⁹³ *Id.* at ¶¶ 7–11.

interpreters were bilingual in English and Spanish.¹⁹⁴ Federal observers were also permitted to monitor elections.¹⁹⁵

D. *United States v. Brentwood Union Free School District*

On June 2, 2003, a settlement agreement was filed with the Eastern District of New York after a complaint was filed against the Brentwood Union Free School District in Suffolk County, New York.¹⁹⁶ The complaint alleged violations of Section 203 with respect to provision of election materials and information in Spanish, including failures to translate materials into Spanish, and failures to provide adequate numbers of Spanish-speaking bilingual poll workers at polling places with significant numbers of Spanish-speaking voters.¹⁹⁷ The settlement agreement mandated that the school board appoint a Spanish Language Assistance Coordinator, to ensure that Spanish-speaking citizens receive Spanish language election materials and information regarding voting and election processes, provide adequate numbers of bilingual poll workers, investigate incidents of hostile treatment of Spanish-speaking voters by poll workers and remove any such poll workers from their positions.¹⁹⁸

¹⁹⁴ *Id.* at ¶ 16.

¹⁹⁵ *Id.* at ¶¶ 17 and 19.

¹⁹⁶ Consent Decree, *United States v. Brentwood Union Free Sch. Dist.*, Civ. No. 03-2775 (E.D.N.Y. June 4, 2003).

¹⁹⁷ Press Release, Dept. of Justice, Justice Department Announces Resolution of Voting Law Violations in New York (Jun.4, 2003), https://www.justice.gov/archive/opa/pr/2003/June/03_crt_335.htm (summarizing the consent decree).

¹⁹⁸ *Id.*

E. Assignment of Federal Observers

In addition to the specific cases discussed above, Federal election observers have been assigned to counties within New York State under Section 8 of the Voting Rights Act on numerous occasions to document potential violations of Section 203 and Section 5 (or to prevent or deter such violations).¹⁹⁹ Decisions by the Department to Justice to assign Federal observers to monitor particular elections are not taken lightly, and reflects “evidence of potential voting rights act violations which arise most often in elections pitting minority candidates against white candidates, resulting in increased racial or ethnic tensions”²⁰⁰ Between November 1985 and November 2004, 881 observers or monitors were assigned to New York State, with 353 sent to New York County, 286 sent to Kings County, 175 sent to Bronx County, 55 sent to Suffolk County and 12 sent to Queens/Suffolk Counties.²⁰¹ Since 2004, DOJ press releases note that observers or monitors have been sent to Bronx County (2012), Erie County (2018), Kings County (2008 and 2016), New York County (2008 and 2012), Orange County (2012 and 2016), Queens County (2012 and 2016) and Westchester County (2008 and 2013).²⁰² Limited information

¹⁹⁹ Cartagena, *supra* note 20, at 516–17.

²⁰⁰ *Id.* at 516.

²⁰¹ *Id.* at 517.

²⁰² Press Release, Dept. of Justice, Department of Justice to Monitor Polls in 23 States Across Nation on Election Day (Oct. 30, 2008), <https://www.justice.gov/archive/opa/pr/2008/October/08-crt-973.html>; Press Release, Dept. of Justice, Justice Department to Monitor Elections in New York (Sept. 12, 2012), <https://www.justice.gov/opa/pr/justice-department-monitor-elections-new-york-0>; Press Release, Dept. of Justice, Justice Department to Monitor Polls in 23 States on Election Day (Nov. 2, 2012), <https://www.justice.gov/opa/pr/justice-department-monitor-polls-23-states-election-day>; Press Release, Dept. of Justice, Justice Department to Monitor Polls in 28 States on Election Day (Nov. 7, 2016), <https://www.justice.gov/opa/pr/justice-department-monitor-polls-28-states-election-day>; Press Release, Dept. of Justice, Justice Department to Monitor Compliance with Federal Voting Rights Laws on Election Day (Nov. 5, 2018) <https://www.justice.gov/opa/pr/justice-department-monitor-compliance-federal-voting-rights-laws-election-day> and Justice Department to Monitor Elections in South Carolina and Port Chester,

is available on the findings of the observers; however, available information shows ten occasions where observers were assigned in response to concerns over Section 203 compliance for Chinese language voters, seven occasions for both Chinese and Spanish language voters, and two occasions relating to concerns about the treatment of Korean and Spanish language voters.²⁰³

F. Department of Justice Information Requests to Nassau and Suffolk County School Districts Reveals Pervasive Failure to Provide Required Language Assistance Under Section 203.

Although the boards of elections in New York counties covered by Section 203 are generally aware of their language obligations (even if they often fail to comply with those obligations), the local government entities that run their own elections are not necessarily aware that (a) their county is covered under Section 203 and (b) as a result, they are also obligated to provide language assistance. Under 28 C.F.R. 55.9, when “a political subdivision (e.g., a county) is determined to be subject to . . . section 203(c), all political units that hold elections within that political subdivision (e.g., cities, school districts) are subject to the same requirements as the political subdivision.” The result is that numerous political subdivisions within New York counties covered under Section 203 have been and/or continue to be engaged in violations of the Voting Rights Act.

For example, in March, 2019, for the first time, most of the 124 school districts in Nassau and Suffolk Counties planned to implement measures to comply with Section 203

New York, Dept of Justice, Mar. 18, 2013, available at: <https://www.justice.gov/opa/pr/justice-department-monitor-elections-south-carolina-and-port-chester-new-york>.

²⁰³ Cartagena, *supra* note 20, at 517.

of the Voting Rights Act.²⁰⁴ These plans were announced in response to letters sent by the U.S. Attorney’s Office for the Eastern District of New York requesting information relating to such school district’s compliance with Section 203 of the Voting Rights Act sent in June 2018.²⁰⁵ The letters requested several types of documents relating to the most recently held election, along with information regarding practices for providing assistance at polling places and other election-related meetings and events.²⁰⁶

In announcing their plans to comply with the Section 203, legal counsel for a majority of the relevant school districts noted that the school districts were responding to “demographic shifts and legal pressures.”²⁰⁷ Media reporting noted that the school districts had been using only English ballots on the “assumption that federal rules covering other jurisdictions did not apply to them.”²⁰⁸ Although the importance of language assistance for voters in Nassau and Suffolk counties has increased as the Latino population on Long Island has increased, Suffolk county has been designated as a covered jurisdiction for Spanish since 1992. To date, no comprehensive investigation has been conducted into whether other local government entities that run their own elections within counties under federal obligations to provide language are in compliance with their own language assistance obligations.

²⁰⁴ *Most Long Island School Districts Will Have Bilingual Ballots*, NEWSDAY (Mar. 24, 2019), <https://www.newsday.com/long-island/education/school-districts-voting-english-spanish-ballots-1.28832270>

²⁰⁵ *See, e.g.*, Letter from U.S. Attorney (E.D.N.Y.) to “Superintendent” (Jun. 28, 2018), available at <https://www.bsk.com/uploads/US-Dept-of-Justice-Letter.pdf>.

²⁰⁶ *Id.*

²⁰⁷ *Most Long Island School Districts Will have Bilingual Ballots*, *supra* note 204.

²⁰⁸ *Id.*

For another example, the New York Attorney General’s office has conducted outreach to determine whether jurisdictions which have not been covered under Section 203, but are likely required to provide language assistance under other provisions of the Voting Rights Act come into compliance with those obligations. In 2012, the Rockland County Board of Elections (“Rockland BOE”) entered into a Memorandum of Agreement with the New York Attorney General’s office to ensure that Puerto Rican voters received the language assistance to which they are entitled under Section 4(e).²⁰⁹ The Agreement committed the Rockland BOE to providing “not only. . . . a bilingual ballot, but that all election-related materials, including voter registration details and deadlines, polling place notices, sample ballots, absentee ballot applications and materials, affidavit ballots, and other information disseminated in English are also made available in Spanish.”²¹⁰ The agreement was effective for five years and required the Rockland BOE to make regular reports to the Civil Rights Bureau of the New York Attorney General’s office concerning compliance with the agreement.²¹¹

G. New York City Board of Elections Interferes with City’s Efforts to Provide Assistance to Language Minority Voters.

In 2019, the Board of Elections in the City of New York (BOENYC)—legally, a state agency—attempted to stop a program funded and run by the City of New York to provide translators for speakers of languages not covered by Section 203. The City’s

²⁰⁹ Memorandum of Agreement Concerning Minority Language Access, *In the Matter of Rockland County Board of Elections* (N.Y. Att’y Gen. Sept. 25, 2012), available at https://ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/voting-rights/Rockland%20County%20Final%20MOA%20signed%20by%20all%20parties.pdf.

²¹⁰ *Id.*

²¹¹ *Id.* at 4.

Democracy NYC initiative and the Mayor’s Office of Immigrant Affairs jointly developed a plan to provide interpreters for the top 15 languages spoken by limited English proficient New Yorkers based on data from the U.S. Census Bureau.²¹² In addition to the languages covered by the Voting Rights Act, the City’s expanded language assistance program included Albanian, Arabic, French, Haitian, Creole, Italian, Greek, Polish, Russian, Tagalog, Urdu, and Yiddish—each spoken by thousands of New Yorkers.²¹³ The City provided BOENYC with information concerning how the languages were chosen, at which poll sites interpreters for particular languages would be offered, how interpreters would be trained and supervised, and how they would provide their services.²¹⁴ The City requested permission for the interpreters to be able to wait inside the polling places. BOENYC refused. The City ultimately decided to station the interpreters beyond the area within 100 feet of the entrance to the polling place where electioneering is prohibited, even though the non-partisan interpreters were not engaged in electioneering.

BOENYC sued the City officials responsible for the interpreter program and attempted to invalidate it in its entirety.²¹⁵ BOENYC argued that the non-partisan

²¹² See, e.g., Press Release, City of New York, City Enters Litigation Against Board of Elections to Make Voting Easier for Limited English Proficient New Yorkers (Feb. 25, 2019), <https://www1.nyc.gov/office-of-the-mayor/news/109-19/city-enters-litigation-against-board-elections-make-voting-easier-limited-english>; see also, *Board of Elections in the City of New York v. Mostofi*, 65 Misc. 3d 876 (Cnty. Ct. N.Y. 2019).

²¹³ *Mostofi*, 65 Misc. 3d at 878–79; see New York City Civic Engagement Commission, “Language Access Plan,” available at [https://www1.nyc.gov/site/civicingement/about/language-access-plan.page](https://www1.nyc.gov/site/civicingagement/about/language-access-plan.page) (providing the methodology for calculating where such language assistance will be provided.)

²¹⁴ *Mostofi*, 65 Misc. 3d at 879.

²¹⁵ *Id.* at 879–81.

interpreter program violated a state constitutional provision related to partisan administration of elections and was pre-empted by the Voting Rights Act.²¹⁶

Assemblywoman Rodneyse Bichotte, the first Haitian-American elected to the New York State legislature, criticized BOENYC's attempt to stop the City for providing expanded language access: "Instead of choosing inclusion, the Board has continued to allow language barriers to hinder democracy. The truth is that voting can feel like an impossible feat for people whose first language is not currently represented by the Board of Elections."²¹⁷ Assemblymember Steven Crymbowitz noted that the BOENYC's actions to block the interpreter program were another example of its "long and disturbing pattern of disenfranchising limited English proficiency New Yorkers."²¹⁸ State Senator Zellnor Myrie, Chair of the Elections Committee, said BOENYC's actions were "a direct attack on our immigrants, our communities of color, and our democracy itself."²¹⁹

A state court rejected BOENYC's challenge to the interpreter programing, holding that BOENYC had "'fail[ed] to explain how the elimination of the Interpreter Program would not, in effect, disenfranchise voters."²²⁰ As the Brennan Center for Justice observed, "the agency's efforts prioritized party political interests over the will of city voters, who in

²¹⁶ *Id.* at 880.

²¹⁷ Press Release, City of New York, City Enters Litigation Against Board of Elections to Make Voting Easier for Limited English Proficient New Yorkers (Feb. 25, 2019), <https://www1.nyc.gov/office-of-the-mayor/news/109-19/city-enters-litigation-against-board-elections-make-voting-easier-limited-english>.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Mostofi*, 65 Misc. 3d at 885 (2019).

2018 had approved a ballot question establishing a commission whose duties included expanding language assistance at poll sites.”²²¹

IV. ENFORCING THE PRECLEARANCE PROVISIONS OF SECTION 5 OF THE VOTING RIGHTS ACT OF 1965 IN NEW YORK

Section 5 of the Voting Rights Act of 1965, which required certain states and political subdivisions to receive “pre-clearance” for any proposed changes to election policies or procedures was crucial to the success of the Voting Rights Act in New York and nationwide.²²² At the time of the Court’s 2013 ruling in *Shelby County*, which left the federal preclearance scheme effectively inoperable, three New York counties were covered “political subdivisions” under Section 4(b)’s coverage formula: Kings, Bronx, and New York (collectively, the “Covered Counties”).²²³

Between 1982 and 2005, New York City submitted over four thousand changes to voting policies and procedures for preclearance to the Department of Justice.²²⁴ Those submissions resulted in 14 objection letters and drew 121 “more information requests” (MIR) from the Department of Justice.²²⁵ An MIR is “contained in a formal letter from a

²²¹ JOANNA ZDANYIS ET AL, HOW TO FIX THE NEW YORK CITY BOARD OF ELECTIONS SOLUTIONS TO THE STRUCTURAL FLAWS THAT CAUSE THE AGENCY’S EXCEPTIONAL DYSFUNCTION, *The Brennan Center for Justice* (Sept. 9, 2021), at 10, available at https://www.brennancenter.org/sites/default/files/2021-09/2021_08_NYC_BOE_Reform_Final.pdf.

²²² Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 439.

²²³ U.S. Dep’t Just., Jurisdictions Previously Covered by Section 5 (Sept. 11, 2020), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>.

²²⁴ Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, in *Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power*, 16, Tbl. 3.3 (Ana Henderson ed., 2007), available at http://www.law.berkeley.edu/files/ch_3_fraga_ocampo_3-9-07.pdf; Brief for The City of New York, The Council of the City of New York, et al. as Amici Curiae Supporting Respondents, *Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (No. 12-96), 2013 U.S. S. Ct. Briefs LEXIS 929.

²²⁵ Fraga & Ocampo, *supra* note 224, at 16, Tbl. 3.3.

senior official within the DOJ and sent to the submitting jurisdiction requesting that it provide additional information about a proposed change in voting procedure or practice.”²²⁶ The 121 MIRs sent to New York also resulted in 75 further follow-up requests for more information.²²⁷ An analysis of MIRs issued by DOJ over a 23-year period found that MIRs had a significant deterrent effect on potentially retrogressive changes, especially in more recent years.²²⁸ That deterrent effect was especially strong in New York, which withdrew 51 changes in response to MIRs.²²⁹

The DOJ’s 14 objection letters were issued in response to a wide range of changes to the electoral process ranging from plans to redistrict to ensure incumbent re-election at the cost of minority representation in the State Assembly²³⁰ and refusal to provide translated ballots to Chinese-speaking votes.²³¹ Two of those objection letters were issued within the previous 25 years.

In 1996, the DOJ rejected a proposal to replace one of Bronx County’s elected, nine-person Community School Boards with five trustees appointed by the Chancellor’s office for the New York City Public School System, who would govern until the next

²²⁶ *Id.*, at 49-50 (citing Department of Justice, 28 C.F.R. §51.37, Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended).

²²⁷ *Id.* at 16, Tbl. 3.3.

²²⁸ *Id.* at 65 (noting that between 1999 to 2005, “MIRs deterred 605% more changes than did formal objections).

²²⁹ *Id.* at 16, Tbl. 3.3.

²³⁰ *See* U.S. Dep’t of Just., Div. of Civ. Rts., Voting Determination Letter Submission No. 82-2462 (Jun. 22, 1982).

²³¹ *See* U.S. Dep’t of Just., Div. of Civ. Rts., Voting Determination Letter Submission No. 93-4733 (May 13, 1994).

scheduled election.²³² The DOJ rejected the proposal because the board failed to “jointly seek and select” a superintendent with the Chancellor’s office.²³³ The electorate that had elected the nine board members—comprised of seven Hispanic and two Black members—was collectively 90% Hispanic and Black.²³⁴ In its rejection, the DOJ noted that the proposal effectively substituted the overwhelmingly minority electorate that had elected the board members with the will of the electorate that had elected the Chancellor, resulting in minority voters in the district having “considerably less influence over the selection of [the] board members through the choices of the appointing authority than they have under the direct-election system currently in place.”²³⁵

In 1999, New York State proposed altering the election procedures for community school boards in the Covered Counties.²³⁶ The proposal would have replaced a “single transferable vote method of election (STV) with a form of limited voting whereby voters may cast one vote for each of up to four candidates (LV 4), and the nine candidates receiving the greatest number of votes shall be elected.”²³⁷ The City proposed the changes to increase voter participation in school board elections. Citing a number of court cases finding that voting in New York City is racially polarized, the DOJ found that the information provided in support of the proposal indicated that this polarization is so

²³² See U.S. Dep’t of Just., Div. of Civ. Rts., Voting Determination Letter Submission No. 96-3759 (November 15, 1996).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ U.S. Dep’t of Just., Div. of Civ. Rts., Voting Determination Letter Submission No. 98-3193 (February 4, 1999).

²³⁷ *Id.*

extreme “that the ability of minority voters to elect their candidates of choice [under the proposed plan] will be considerably reduced under the submitted change in voting method.”²³⁸

V. ELECTION ADMINISTRATION

At its best, election administration ensures that every eligible person is able to register to vote and to cast a meaningful ballot. At its worst, election administration generates unnecessary burdens on the right to vote, burdens that invariably fall harder on groups of voters who have been historically marginalized from the democratic process, including voters of color. New York’s election administration has consistently ranked among the worst in the United States.²³⁹

New York only began a process of meaningful reform to its state election laws and practices in 2019. In 2019, New York finally became the thirty-ninth state to offer in-person early voting, part of an effort “to improve New York’s notoriously low voter turnout.”²⁴⁰ However, as noted below, election administrators in some counties have resisted efforts to comply with state law directives to provide “adequate and equitable access” to early voting by making sites disproportionately inconvenient for voters of

²³⁸ *Id.*

²³⁹ New York has an average rank of 49 out of 51 on the Elections Performance Index (“EPI”), a nationwide comparison of election administration policy and performance across the states from one election cycle to the next. See “New York,” ELECTIONS PERFORMANCE INDEX, MASSACHUSETTS INSTITUTE OF TECHNOLOGY ELECTION DATA & SCIENCE LAB (last visited Oct. 1, 2021), <https://elections.mit.edu/#/data/map?view=state-profile&state=NY&year=2018>.

²⁴⁰ Michael Gormley, *What You Need to Know About Early Voting on Long Island*, NEWSDAY, Oct. 23, 2020, <https://www.newsday.com/news/region-state/early-voting-election-long-island-1.50044455>.

color and low-income voters,²⁴¹ failing to respond to hours-long lines at polling sites,²⁴² or failing to furnish voters with information and assistance in the Spanish language.²⁴³

Numerous cases have been filed in recent years in federal and state courts concerning failures of election administration in New York State. These cases have identified issues such as purging of voter rolls without adequate notice or process, abnormally long wait times at early voting sites, and inaccessibility, insufficient numbers, and inequitable geographic distribution of polling sites. These cases highlight systemic inefficiencies and other shortcomings in election administration by county and city boards of elections that have the effect of burdening or entirely disenfranchising New York voters, particularly voters of color.²⁴⁴

Common Cause/New York v. Board of Elections in the City of New York involved a challenge to the New York City Board of Elections' removal of voters from the registration rolls ahead of the presidential primary in the spring of 2016, including more than 117,000 voters in Brooklyn,²⁴⁵ which by some reports disproportionately impacted

²⁴¹ *People by James v. Rensselaer County Board of Elections*, No. EF2021-268959 (N.Y. Sup. Ct. May 7, 2021).

²⁴² *See Spring Valley Branch of the NAACP v. Rockland County Board of Elections*, No. 035092/2020 (N.Y. Sup. Ct. Oct. 29, 2020).

²⁴³ *See United States v. Suffolk County, N.Y.*, No. CV 04-2698 (E.D.N.Y. June 29, 2004).

²⁴⁴ Voters with disabilities also have had to repeatedly go to court to enforce their rights of accessibility to cast a ballot against the boards of elections. *See, e.g., Hernandez v. N. Y. State Bd. of Elections*, 2020 WL 4883889 (S.D.N.Y. Aug. 19, 2020); *Disabled In Action v. Bd. of Elections in the City of New York*, 752 F.3d 189 (2d Cir. 2014).

²⁴⁵ No. 1:16-cv-06122 (E.D.N.Y. Nov 03, 2016).

Latino voters.²⁴⁶ Plaintiffs, an election administration reform group and affected voters, contended the Board violated the National Voter Registration Act (“NVRA”),²⁴⁷ which prohibits election officials from removing registered voters from the voter rolls in federal elections without taking steps to verify that the voter has not moved, responded to a notice, or not voted in the two preceding election cycles. After an emergency hearing, the United States District Court for the Eastern District of New York issued an order requiring city poll workers to provide affidavit ballots to any individual who believed they had been registered to vote but whose name did not appear on the registration rolls. In January 2017, the court granted motions by both the U.S. Department of Justice and the New York Attorney General to intervene in the action. On December 14, 2017, the court issued an order approving a proposed Consent Decree mandating certain reforms, which restored the rights of improperly purged voters and established a comprehensive plan to fix how the Board manages its voter rolls and prohibit wrongful voter purges in future elections.²⁴⁸

In *Spring Valley Branch of the NAACP v. Rockland County Board of Elections*, the Spring Valley and Nyack Branches of the NAACP and several Rockland County voters filed a lawsuit against the Rockland County Board of Elections to address long lines and inadequate accommodations for voters with disabilities during early voting.²⁴⁹ The

²⁴⁶ See “Common Cause New York et al. v. Board of Elections in the City of New York, et al.,” LATINO JUSTICE PRLDEF (E.D.N.Y. Nov 03, 2016), <https://www.latinojustice.org/en/cases/common-cause-new-york-et-al-v-board-elections-city-new-york-et-al>.

²⁴⁷ 52 U.S.C. § 20507.

²⁴⁸ See “City Board of Elections Admits It Broke the Law, Accepts Reforms,” WNYC (Oct. 24, 2017), <https://www.wnyc.org/story/city-board-elections-admits-it-broke-law-accepts-reforms/>; see also “Judge Orders NYC Board of Elections to Protect Purged Voters’ Rights,” WNYC (Nov. 5, 2016), <https://www.wnyc.org/story/judge-orders-nyc-board-elections-protect-rights-purged-voters/>.

²⁴⁹ No. 035092/2020 (N.Y. Sup. Ct. Oct. 29, 2020).

plaintiffs contended that, during the first weekend of early voting, lines in Rockland were particularly long, and voters intending to vote at Rockland County sites were deterred or prevented from voting due to the lengthy wait times and an absence of accommodations. The petition alleged that the issues with early voting had adversely impacted aged and disabled voters, who were less able to wait in long lines to vote. The suit sought the immediate extension of poll site hours for the remainder of early voting and the addition of signage offering accommodations for voters who require them. The lawsuit resulted in a stipulated judgment, with the state court ordering an extension of poll site hours for the remainder of early voting and posting of accessible notices for additional accommodations for disabled voters at all four Rockland County locations.²⁵⁰

In another action brought by voting rights advocacy group Common Cause/New York against the New York City Board of Elections, its co-executive directors, and its commissioners, *Common Cause/New York v. Brehm*, the plaintiffs alleged New York's procedures for placing voters on inactive status, removing inactive voters from official poll books, refusing to maintain inactive voter lists at polling locations, and requiring inactive voters to vote by affidavit ballot violated the Equal Protection Clause of the Fourteenth Amendment and the NVRA.²⁵¹ The challenged practices disproportionately affected

²⁵⁰ See "Spring Valley NAACP v. Rockland County Board Of Elections," NYCLU PRESS RELEASE (Oct. 29, 2020), <https://www.nyclu.org/en/cases/spring-valley-naACP-v-rockland-county-board-elections>; see also "Rockland Early Voting Hours Extended, Accommodations Added, Following Lawsuit," THE JOURNAL-NEWS (Oct. 30, 2020), <https://www.lohud.com/story/news/local/rockland/2020/10/30/rockland-elections-board-sued-over-early-voting-lines-accommodations/6083265002/>.

²⁵¹ 432 F. Supp. 3d 285 (S.D.N.Y. 2020).

voters of color and low-income voters in New York City.²⁵² After a four-day bench trial, the court ruled that the practices of removing the names of inactive voters from poll books and refusing to provide inactive lists at polling locations violated the Equal Protection Clause.²⁵³

The New York Attorney General’s Office filed a state court lawsuit against the Rensselaer County Board of Elections and its commissioners alleging that when the Board and its commissioners selected early voting sites, they ignored statutory criteria designed to ensure “adequate and equitable access” to early voting, particularly for the County’s voters of color, disabled voters, and low-income voters.²⁵⁴ Despite the availability of potential early voting sites in Troy—the most densely populated area of the county—the Board and its commissioners repeatedly refused to select an early voting site that was easily accessible to Troy residents, where the majority of the county’s Black, Hispanic, and lower-income communities reside. The trial court ruled that the Board’s decision not to place a site in a centrally located area within Troy was arbitrary and capricious, and annulled it. The Board appealed, triggering an automatic stay of the judgment for the June 2021 primary election. The Troy Branch of the NAACP and several voters of color residing in Troy moved to intervene on the side of the Attorney General. The appellate court granted the motion to intervene and affirmed the trial court ruling, ordering the

²⁵² Brigid Bergin, “‘Inactive’ NY Voters Shouldn’t Be Removed From Voting List: Lawsuit,” GOTHAMIST (Oct. 15, 2019), <https://gothamist.com/news/inactive-ny-voters-shouldnt-be-removed-from-voting-list-lawsuit>.

²⁵³ 432 F. Supp. 3d at 319. The court also granted a declaratory judgment that the board of elections had “violated Section 8 of the [National Voter Registration Act] by denying eligible voters the right to vote based on a purported change in residence without following the procedures” required by the NVRA. *Id.*

²⁵⁴ *People by James v. Schofield*, No. EF2021-268959 (N.Y. Sup. Ct. May 27, 2021).

Rensselaer County Board of Elections to designate legally compliant early voting sites in Troy by September 3, 2021.²⁵⁵

Sometimes instances of election administration with discriminatory intent or effect have proved too ephemeral for judicial enforcement. For example, after the State of New York passed legislation permitting undocumented immigrants to receive driver's licenses, several elected officials in Rensselaer County, including the County Executive, Chair of the County Legislature, and the County Clerk, as well the Republican Elections Commissioner for the County, issued a press release stating that the Rensselaer County Board of Elections would begin sending all voter registration applications received from the Department of Motor Vehicles to Immigration and Customs Enforcement ("ICE") to check if anyone who registered to vote in the county was in the United States illegally.²⁵⁶ Although the patently discriminatory policy was never enacted due to the refusal of one of the Rensselaer County Board of Elections commissioners to ratify it, these official statements had the unmistakable intent and likely effect of intimidating voters of color, particularly Latino voters and voters in households with mixed immigration status.

²⁵⁵ See *People by James v. Schofield*, No. 533467, Dkt. No. 54, – N.Y.S.3d –, 2021 WL 3774203 (N.Y. App. Div. Aug. 26, 2021) (granting motion to intervene brought by Troy Branch of the NAACP and Black and disabled voters, and otherwise affirming on the merits); see also "Attorney General James Sues Rensselaer County Board of Elections for Denying Communities of Color Access to Early Voting Sites," NEW YORK STATE ATTORNEY GENERAL'S OFFICE PRESS RELEASE (May 27, 2021), <https://ag.ny.gov/press-release/2021/attorney-general-james-sues-reusselaer-county-board-elections-denying-communities>; "Attorney General James Wins Lawsuit Forcing Rensselaer County to Increase Access to Early Voting Sites in Communities of Color," NEW YORK STATE ATTORNEY GENERAL'S OFFICE PRESS RELEASE (June 7, 2021), <https://ag.ny.gov/press-release/2021/attorney-general-james-wins-lawsuit-forcing-reusselaer-county-increase-access>.

²⁵⁶ See "Rensselaer County Board of Elections to Give ICE Voter Registration Information," TIMES UNION (July 18, 2019), <https://www.timesunion.com/news/article/Rensselaer-County-Board-of-Elections-to-give-ICE-14106220.php>.

VI. CONCLUSION

New York has a long way to go to overcome the deep-seated and continuing effects of its history of discrimination and to build an inclusive and equitable democracy in the nation's most diverse polity. The state has recently begun to enact and implement overdue reforms. Those modernizations do not obviate the need for strong federal protections for racial and language-minority voting rights in New York or for robust federal enforcement of those protections. Significant racial disparities in voter turnout persist in elections at all levels. Even more pronounced racial disparities persist in local government elections, which constitute the vast majority of all elections in the state. Those disparities follow from the widespread use of laws and practices whose effect in suppressing minority voting strength and generating conditions ripe for minority dilution is well-established. The Voting Rights Act has provided important tools for beginning the process of finding and rooting out discrimination from all levels of New York's election system. More efficient and effective causes of action against vote suppression and vote dilution are critical to continue that process and scale up enforcement efforts to more meaningful levels. Provisions for preclearance and federal election observers also have been and continue to be necessary in New York to prevent backsliding and to preserve the gains won through affirmative litigation, especially with the latest round of redistricting underway. The federal authorities that have repeatedly brought successful enforcement actions should receive greater resources and a mandate to continue bringing New York jurisdictions into compliance by opening more investigations and prosecuting more cases.

Longstanding discrimination takes an even longer commitment to ensure its undoing. The tools required to dismantle discriminatory structures have to be stronger

and more sophisticated than those used to build them. As Juan Cartagena wrote 15 years ago, and is still true today: “It is hard to imagine what an election in this part of the country would be like without the protections of the Voting Rights Act. But it is easier to imagine a future where its tools would be put to full use to eradicate what is left of a history of exclusion.”²⁵⁷

²⁵⁷ Cartagena, *supra* note 20, at 539.

APPENDIX A

Results of Bayesian Improved Surname Geocoding (“BISG”) Analysis of Recent School District Elections in 25 Diverse and Large School Districts in Suffolk, Nassau, Westchester, Rockland, and Oneida Counties.

	<i>Citizen Voting-Age Population (CVAP) from 2015-2019 5-year ACS</i>					<i>Voter Turnout Estimates (4-year average) from BISG Analysis of Voting Documents</i>				
School District Name	Total	White (%)	Black (%)	Latino (%)	Asian (%)	Total	White (%)	Black (%)	Latino (%)	Asian (%)
Bay Shore Union Free School District	24593	54%	19%	24%	3%	1598	83%	6%	8%	1%
Brentwood Union Free School District	50932	24%	19%	54%	2%	1590	32%	14%	50%	2%
East Meadow Union Free School District	38797	70%	5%	12%	12%	2725	86%	1%	7%	5%
Elmont Union Free School District	38399	24%	45%	17%	11%	1310	38%	37%	14%	8%
Farmingdale Union Free School District	31918	80%	6%	8%	6%	2030	92%	1%	5%	2%
Floral Park- Bellerose Union Free School District	14769	77%	1%	10%	11%	1272	91%	1%	5%	2%
Franklin Square Union Free School District	19170	79%	1%	12%	6%	1011	90%	0%	6%	2%
Freeport Union Free	25396	35%	30%	32%	1%	1070	47%	29%	20%	1%

	<i>Citizen Voting-Age Population (CVAP) from 2015-2019 5-year ACS</i>					<i>Voter Turnout Estimates (4-year average) from BISG Analysis of Voting Documents</i>				
School District Name	Total	White (%)	Black (%)	Latino (%)	Asian (%)	Total	White (%)	Black (%)	Latino (%)	Asian (%)
School District										
Garden City Union Free School District	16497	88%	2%	5%	4%	1416	94%	0%	2%	2%
Hicksville Union Free School District	28934	62%	4%	11%	20%	1521	79%	1%	8%	10%
Longwood Central School District	51059	72%	12%	13%	2%	2506	85%	7%	6%	1%
Massapequa Union Free School District	36606	94%	0%	5%	1%	4367	96%	0%	2%	1%
Middle Country Central School District	45489	79%	4%	11%	5%	2096	89%	2%	6%	2%
Mineola Union Free School District	17090	72%	3%	14%	8%	942	89%	0%	6%	3%
Mount Vernon School District	46397	19%	68%	12%	2%	2073	30%	59%	6%	1%
North Bellmore Union Free School District	20174	84%	2%	9%	4%	1668	92%	1%	4%	2%
Patchogue- Medford Union Free	37752	78%	6%	14%	1%	2268	89%	1%	8%	0%

	<i>Citizen Voting-Age Population (CVAP) from 2015-2019 5-year ACS</i>					<i>Voter Turnout Estimates (4-year average) from BISG Analysis of Voting Documents</i>				
School District Name	Total	White (%)	Black (%)	Latino (%)	Asian (%)	Total	White (%)	Black (%)	Latino (%)	Asian (%)
School District										
Port Chester-Rye Union Free School District	17290	50%	6%	42%	3%	1848	70%	2%	26%	1%
Rockville Centre Union Free School District	16206	81%	7%	10%	2%	2368	94%	1%	3%	1%
Sachem Central School District	62851	81%	3%	10%	4%	4576	92%	1%	5%	2%
Three Village Central School District	32451	74%	4%	7%	13%	2521	92%	1%	2%	4%
Uniondale Union Free School District	27766	24%	51%	21%	2%	1383	32%	48%	16%	1%
Utica City School District	41049	67%	15%	10%	5%	2645	88%	6%	3%	1%
Westbury Union Free School District	15857	24%	41%	28%	5%	1569	28%	44%	23%	2%
William Floyd (Mastic Beach) Union Free School District	35655	77%	5%	14%	1%	1714	84%	3%	9%	1%

APPENDIX B

Results of Racially Polarized Voting (RPV) Analysis of 2020 Presidential General Election in Five New York Counties: Estimated Racial Vote Share Cast in Favor of Joe Biden, Donald Trump, or Other Candidates.

Nassau County 2020 Presidential General Election RPV

Candidate	White	Black	Latino	Asian	Other
Biden	42.74%	97.59%	80.26%	74.57%	71.58%
Trump	56.23%	1.91%	18.01%	23.53%	14.02%
Other	1.03%	0.50%	1.73%	1.89%	14.40%

Suffolk County 2020 Presidential General Election RPV

Candidate	White	Black	Latino	Asian	Other
Biden	42.80%	95.96%	75.44%	68.19%	55.43%
Trump	56.45%	2.96%	22.87%	23.69%	16.24%
Other	0.75%	1.08%	1.69%	8.12%	28.33%

Westchester County 2020 Presidential General Election RPV

Candidate	White	Black	Latino	Asian	Other
Biden	61.48%	97.50%	74.92%	66.56%	80.41%
Trump	37.89%	1.85%	24.10%	25.54%	10.79%
Other	0.63%	0.65%	0.98%	7.89%	8.79%

Rockland County 2020 Presidential General Election RPV

Candidate	White	Black	Latino	Asian	Other
Biden	41.82%	89.56%	71.55%	66.55%	46.39%
Trump	57.72%	9.10%	26.22%	29.05%	37.31%
Other	0.46%	1.35%	2.24%	4.40%	16.30%

Oneida County 2020 Presidential General Election RPV

Candidate	White	Black	Latino	Asian	Other
Biden	38.16%	89.19%	86.73%	84.81%	59.39%
Trump	60.04%	7.86%	9.65%	9.32%	19.24%
Other	1.80%	2.95%	3.63%	5.88%	21.38%