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John R. Lewis Voting Rights Act

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The John R. Lewis Voting Rights Act of New York (the “NYVRA”)

The New York State Legislature passed the John R. Lewis Voting Rights Act in both houses. This legislation creates new legal protections against denying or abridging the right of minority New Yorkers to vote by establishing and maintaining a statewide database of voting and election data, providing assistance to language-minority groups, requiring certain political subdivisions to receive preclearance for potential violations of the NYVRA, and by creating civil liability for voter intimidation. This bill is an important step to protect and promote voting rights.

Discriminatory voting laws present a major challenge to our American democracy.¹ Despite the success of Section 5 of the Voting Right Act that stopped discriminatory voting laws before they could go into effect, Section 5’s preclearance provision was rendered ineffective after the Voting Rights Act’s Section 4 jurisdictional coverage formula was held to be unconstitutional by the Supreme Court’s 2013 *Shelby County v. Holder* decision.² Since then, states have enacted a plethora of restrictive voting laws that burden the fundamental right to vote.³ In 2021 alone, 19 states enacted 33 laws that make it harder for Americans to exercise their right to vote.⁴

In 1962, Justice William Brennan stated, “the right to vote is too important to be stripped of judicial protection.”⁵ The freedom to vote is one of America’s most important rights.⁶ Education, healthcare, immigration, infrastructure, the economy, and social rights are all affected by our right to vote.⁷ While New York has made some progress to protect the right to vote, crucial gaps remain in the law. The John Lewis Voting Rights Act of New York (the “NYVRA”) is a critical opportunity for New York to increase its protection of voting rights within the state. The NYVRA aims to combat New York’s history of voting discrimination and aims to restore some of what was lost of the federal Voting Rights Act in *Shelby County*. The law is key to the advancement of voting protections in the state, and more specifically for the protection of voting rights of New Yorkers of color and language-minorities.

What the Legislation Covers

¹ Brennan Center for Justice, *New Voting Restrictions in America* (2019), <https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america>.

² See *Shelby Cnty., Ala. V. Holder*, 570 U.S. 529 (2013).

³ Brennan Center for Justice, *supra* note 1.

⁴ Brennan Center for Justice, *Voting Laws Roundup: October 2021*, (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021>.

⁵ *Baker v. Carr*, 369 U.S. 186 (1962) (holding that the relief sought under the Equal Protection Clause was not diminished by the fact that the discrimination related to political rights).

⁶ Sean McElwee, *Why Voting Matters: Large Disparities in Turnout Benefit the Donor Class*, DEMOS (2015).

⁷ AACT Now, *Why Should You Vote?* (last visited Nov. 5, 2021), <https://aactnow.org/why-vote/>.

The NYVRA amends the state's election law by creating rights of action for denying or abridging the right of any member of a protected class the right to vote, by establishing and maintaining a statewide database of voting and election data, provide assistance to language-minority groups, by requiring certain political subdivisions to receive preclearance for potential violations of the NYVRA, and by creating civil liability for voter intimidation. The bill covers a protected class which is a class of eligible voters who are members of a race, color, or language-minority group. Language minority means a person or group of people who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage.

The NYVRA would amend the election law by adding a new Title 2. The purpose of the bill is to recognize the right to vote provided by the New York State Constitution. It would establish the state's public policy to (1) encourage participation in the elective franchise to the fullest extent possible and (2) ensure that eligible voters who are members of racial, color, and language-minority groups have an equal opportunity to participate in the political process in New York.

The bill would establish rights of action for denying or abridging the right to vote. The first right of action created by section 17-206(1) is the right of action against voter suppression. No voting qualification, prerequisite, law, ordinance, standard, practice, procedure, regulation, or policy shall be enacted or implemented by any board of elections or subdivision that results in a denial or abridgment of the right of members of the protected class to vote. A violation of the NYVRA would be established if, based on the totality of the circumstances, members of the protected class have less opportunity than the rest of the electorate to elect candidates of their choice.

This section shall take effect one year after it shall become a law.

The second right of action created by section 17-206(2) is the right against vote dilution. Vote dilution occurs when voting practices or redistricting plans minimize or cancel out the voting strength of minority groups. No board of elections or political subdivision shall use any method of election, having the effect of impairing the ability of members of a protected class to elect candidates of their choice or to influence the outcome of elections, as a result of vote dilution.

Violations are established based on the specific voting system. At-large methods provide for electing members to the governing body where all of the voters elect each of the members. A violation would be established if a political subdivision uses an at-large method of election and it is demonstrated that either (a) voting patterns of members of the protected class within the political subdivision are racially polarized or (b) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcomes of elections is impaired.

District-based methods elect members to legislative bodies using a districting plan where each member resides within a district and only members of that specific district elect their member of the legislative body. An alternative means one other than an at-large or district method. A violation would be established if a political subdivision uses a district-based or alternative method of election and it is shown that candidates or electoral choices preferred by members of the protected class would usually be defeated and either (a) voting is racially polarized or (b) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence elections is impaired. Lastly, a violation is presumptively established if it is shown that the political subdivision used race, color, or language-minority group, for the purposes of districting or redistricting. A political subdivision may refute this by demonstrating that these characteristics were used to the extent necessary to comply with this law, the federal voting rights act, the New York State Constitution, or the Constitution of the United States.

For the purposes of demonstrating that a violation has occurred, evidence shall be weighed and considered as follows: elections conducted prior to the filing of an action are more probative than elections conducted after the filing of the action; evidence concerning elections for members of the governing body of the political subdivision are more probative than evidence concerning other elections; statistical evidence is more probative than non-statistical evidence; where there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision, members of each of those protected classes may be combined; evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class is not required; evidence that voting patterns and election outcomes could not be explained by factors other than racially polarized voting, including but not limited to partisanship, shall not be considered; evidence concerning whether members of a protected class are geographically compact or concentrated shall not be considered, but may be a factor in determining the appropriate remedy; and evidence concerning projected changes in population or demographics shall not be considered, but may be a factor in determining the appropriate remedy.

When assessing possible violations, a “totality of the circumstances” test is used that considers the following factors: (a) the history of discrimination in the political subdivision, geographic region, or the state; (b) the extent to which members of the protected class have been elected to office in the political subdivision; (c) the use of any voting law or procedure that may enhance the dilutive effects of the current elective scheme; (d) the denial of access of voters or candidates of the protected group to the ballot; (e) the extent to which members of the protected groups contribute to political campaigns at lower rates; (f) the extent to which members of the protected class vote at lower rates; (g) the extent to which members of the protective class are disadvantaged in areas including but not limited to education, employment, health, criminal justice, housing, land use, and environmental protection; (h) the extent to which members of the

protected class are disadvantaged in other areas which might hinder their ability to participate in the political process; (i) the use of overt or subtle racial appeals in political campaigns; (j) a significant lack of response by political officials to the needs of the protected class; and (k) whether the political subdivision has a compelling justification for the particular adoption. No one factor is dispositive or necessary to establish a violation. Evidence of these factors concerning the state, private actors, or other political subdivisions may be considered but is less relevant than that concerning the subdivision itself.

Any voter who was negatively impacted, any organization whose membership includes or is likely to include those negatively impacted, any organization whose mission would be frustrated by a violation of this law, any organization that would expend resources in order to fulfill its mission as a result of a violation of this law, or the attorney general may file an action described above. The action must be filed in the supreme court of the county in which the political subdivision is located. Before commencing a judicial action against a subdivision, written notice or the “NYVRA notification letter” must be given.

The court may institute a remedy upon a finding of a violation. Remedies for a violation may include but are not limited to a district-based method of election, an alternative method of election, new or revised districting or redistricting plans, elimination of staggered elections, increasing the size of the governing body, moving the dates of election to concurrent with the primary or general election dates for the state, county or, city office, transferring authority for conducting political subdivision's elections to the board of elections for the county in which the political subdivision is located, additional voting hours or days, additional polling locations, additional means of voting such as by mail, ordering of special elections, requiring expanded opportunities for voter registration, requiring additional voter education, modifying the election calendar, the restoration or addition of persons to registration lists, or retaining jurisdiction for such period of time on a given matter as the court may deem appropriate, during which no redistricting plan shall be enforced unless and until the court finds that such plan does not have the purpose of diluting the right to vote on the basis of protected class membership or in contravention of the voting guarantees set forth in the law. The court can only adopt a remedy that will not diminish the ability of minority groups to participate in the election or elect their candidates of choice.

This section of the law also outlines procedures for implementing new or revised districting or redistricting plans. Before drawing a draft plan, the political subdivision must hold at least two public hearings over a period of no more than 30 days. The political subdivision shall publish at least one draft plan. The political subdivision shall also hold at least two additional hearings over a period of no more than 45 days to allow the public to provide input regarding the content of the draft plan.

This section shall take effect one year after it shall become a law.

Section 17-208 requires political subdivisions to provide language assistance for language-minority groups, as defined above, if (a) more than 2 percent, but in no instance fewer than 300 individuals, of the citizens of voting age of a political subdivision are members of a single language-minority group and are limited English proficient, (b) more than four thousand of the citizens of voting age are members of a single language-minority group and are limited English proficient, or (c) in the case of a political subdivision that contains all or any part of a Native American reservation, more than two percent of Native American citizens of voting age within the Native American reservation are members of a single language-minority group and are limited English proficient. The law outlines the various language assistance that is to be provided including but not limited to voting materials, registration notices, ballots, and instructions.

This section shall take effect three years after this becomes law.

Section 17-210 outlines preclearance coverage to ensure that the right to vote is not denied or abridged on account of race, color, or language-minority group as a result of the enactment or implementation of a covered policy by a covered entity. A covered policy includes and new or modified voting qualification, a prerequisite to voting, law, ordinance, standard, practice procedure, regulation, or policy concerning any of the following: method of election, form of government, annexation of a political subdivision, incorporation of a political subdivision, consolidation or division of political subdivisions, removal of voters from enrollment lists or other list maintenance activities, number, location, or hours of any election day or early voting poll site, dates of elections and the election calendar except with respect to special elections, registration of voters, assignment of election districts to election day or early voting poll sites, assistance offered to members of language-minority group, and any additional topics the civil rights bureau may designate.

A covered entity as defined by the law has a certain history of discriminatory voting practices. This includes (a) any political subdivision subject to a court order or government enforcement for violation of this law, the federal voting rights act, the 15th Amendment, of a voting related violation of the 14th Amendment in the last 25 years, (b) any political subdivision that has become subject to at least three court orders for a finding of a violation of any state or federal civil rights law or the 14th Amendment for discrimination against a protected group in the last 25 years, (c) any county where the felony arrest rate of members of a protected class exceeds that of the citizen voting age population of the county as a whole by at least twenty percent at any point in the last 10 years, however, members of a protected class must equal ten thousand voting age citizen or ten percent of the citizen voting age population, (d) any political subdivision the dissimilarity index of any protected class consisting of at least twenty-five thousand citizens of voting age or whose members comprise at least ten percent of the citizen voting age population

of the political subdivision, is in excess of fifty with respect to non-Hispanic white citizens of voting age within the political subdivision at any point within the previous ten years. If any covered entity is a political subdivision in which a board of elections has been established, that board of elections is also deemed a covered entity.

A covered entity may obtain preclearance for a covered policy by submitting the covered policy in writing to the civil rights bureau of the office of the attorney general. If the covered entity is a county or city board of elections, it must contemporaneously provide a copy of the covered policy to the state board of elections. A covered entity may obtain preclearance for a covered policy from a court by submitting the policy in writing to the court in the judicial department as designated by the law.

This section shall take effect one year after the attorney general certifies that the office of the attorney general is prepared to execute the duties assigned to it. If after the expiration of one year the attorney general requires more time to certify that the office is prepared, the attorney general may for good cause apply to the governor for an extension of up to one year. The governor has the discretion to grant this extension.

Section 17-212 outlines a right of action against voter intimidation, deception, or obstruction that affects the right of voters to access the elective franchise. This right of action must be against a state actor and not a private citizen. A violation is established if a person uses or threatens to use any force, violence, restraint, abduction or duress, or inflict or threatens to inflict injury, damage, harm, or loss. A violation is also established if a person uses any deceptive, fraudulent device, or communication that impedes, prevents, or interferes with the free exercise of elective franchise. Additionally, a violation is established if a person obstructs, impedes, or otherwise interferes with access to any polling place or elective office that will reasonably cause delay in voting or its processing. The court may implement appropriate remedies including but not limited to additional time to cast a ballot or damages.

Conclusion

The NYVRA takes critical steps to restore voting protections that were stripped at the federal level after the *Shelby County* decision. New York stands to become a leader in protecting the right to vote, especially for historically marginalized groups. The NYVRA provides a critical opportunity for New York to promote equity in the political franchise. As other states roll back voter protections, New York can move forward through the enactment of this important legislation.