To be argued
By: BEEZLY J. KIERNAN
15 minutes requested

Supreme Court of the State of New York
Appellate Division – Second Department

No. 2024-11753

ORAL CLARKE, ROMANCE REED, GRACE PEREZ, PETER RAMON, ERNEST TIRADO, and DOROTHY FLOURNOY,

Plaintiffs-Appellants,

v.

TOWN OF NEWBURGH and TOWN BOARD OF THE TOWN OF NEWBURGH,

Defendants-Respondents,

LETITIA JAMES, Attorney General of the State of New York,

Intervenor.

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Dated: November 26, 2024

Supreme Court, Orange County – Index No. EF002460-2024

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PRELIMINARY STATEMENT

In this lawsuit, six individual voters sued defendant Town of Newburgh and its Town Board, alleging that Newburgh's at-large election system caused racially discriminatory vote dilution in violation of New York's John R. Lewis Voting Rights Act (NYVRA). Defendants moved for summary judgment, arguing that the NYVRA's vote-dilution provision violated the Equal Protection Clauses of the United States and New York Constitutions. Supreme Court, Orange County (Vazquez-Doles, J.), struck down the entire NYVRA on its face.

The Attorney General has intervened as of right to defend the constitutionality of the NYVRA. This Court should reverse for either of two reasons. First, the Town lacks capacity to challenge the NYVRA on its face.

Second, the NYVRA's vote-dilution provision comports with the federal and state Equal Protection Clauses. The vote-dilution provision ensures that all voters—regardless of their race—have an equal opportunity to participate in the political processes of the State and its subdivisions. In this way, the vote-dilution provision prohibits racial discrimination in voting.

Supreme Court's decision rests on the fundamentally incorrect premise that the NYVRA's antidiscrimination provisions are themselves discriminatory, and therefore trigger strict scrutiny on their face. Strict scrutiny does not apply, however, because the Town has failed to show that every conceivable application of the statute requires political subdivisions to discriminate based on race. To the contrary, the NYVRA equally protects voters of any race from discriminatory vote dilution.

Moreover, the statute provides many race-neutral means to remedy any discriminatory vote dilution found by a court, including not only district-based elections but also alternative election systems, additional polling locations and times, additional voter education, and more. The use of such race-neutral means to combat racial discrimination in voting does not trigger strict scrutiny. Thus, the statute is subject only to rational basis review, which it readily satisfies because it is reasonably tied to promoting the State's legitimate interest in ending discriminatory methods of election.

Accordingly, the Court should reverse the decision below. Even if the Court disagrees, however, Supreme Court made two additional, independent errors in issuing sweeping relief that it had no authority to

provide. Specifically, Supreme Court's order purported to strike down the entire NYVRA, including many provisions—like prohibitions on voter intimidation and suppression as well as provisions governing preclearance for certain voting- or election-related changes—which were not at issue in this case. And Supreme Court's order purported to enjoin enforcement of the NYVRA against all political subdivisions, rather than against solely the defendants here. Supreme Court lacked authority to reach issues and parties not before it. Accordingly, if the Court does not reverse the order below in its entirety, the Court should modify the order to cover only those parties and issues that were properly before it.

QUESTIONS PRESENTED

1. Whether the Town lacks capacity to challenge the NYVRA on its face.

Supreme Court answered this question in the negative.

2. Whether the NYVRA's prohibition against racially discriminatory vote dilution comports with the Equal Protection Clauses of the United States and New York Constitutions.

Supreme Court answered this question in the negative.

3. Whether Supreme Court erred in issuing an order that purports to bind parties not before it and to strike down provisions of the NYVRA not at issue in this case.

Supreme Court did not address this question.

STATEMENT OF THE CASE

A. The New York Voting Rights Act (NYVRA)

The Legislature enacted the NYVRA in 2022 to ensure that members of all racial groups "have an equal opportunity to participate in the political processes of the state of New York." Election Law § 17-200. New York's statute is modeled in part after the federal Voting Rights Act (VRA), *see* 52 U.S.C. § 10101 et seq. In the wake of U.S. Supreme Court decisions weakening the federal VRA's protections, *see, e.g.*, *Shelby County v. Holder*, 570 U.S. 529 (2013), the NYVRA was designed to offer additional protections against discrimination in voting that are not available under the federal VRA. *See* Governor's Mem., in Bill Jacket for Ch. 226 (2022), at 5. The NYVRA was also modeled after analogous laws enacted in California and Washington. *See* Cal. Elec. Code §§ 14025-14032; Wash. Rev. Code §§ 29A.92.005–.900. Section 17-206(2) of the NYVRA prohibits vote dilution. Election Law § 17-206(2). As discussed

further below, different sections of the NYVRA prohibit other harmful practices, such as voter suppression, intimidation, deception, and obstruction. *Id.* §§ 17-206(1), 17-212.

1. Vote dilution under the NYVRA

The NYVRA defines vote dilution as "any method of election" that has "the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections." Election Law § 17-206(2)(a). A "protected class" is "a class of individuals who are members of a race, color, or language-minority group, including individuals who are members of a minimum reporting category that has ever been officially recognized by the United States census bureau." *Id.* § 17-204(5). "Language-minority group" is defined as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." *Id.* § 17-204(5-a).

Vote dilution may be shown in various ways. Plaintiffs' claims here concern only a political subdivision that uses an at-large method of election. *See id.* § 17-204(1) (defining "at-large"). For subdivisions using an at-large election method, vote dilution exists when:

(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 outcome of elections is impaired.

Id. § 17-206(2)(b)(i).[1] "Racially polarized voting" is defined as "voting in which there is a divergence in the candidate, political preferences, or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate." *Id.* § 17-204(6).

The NYVRA instructs how certain evidence should be weighed in determining whether vote dilution has occurred. For instance, elections conducted prior to the filing of an action under the NYVRA are "more probative" than elections conducted afterward. *Id.* § 17-206(2)(c)(i). And "statistical evidence" showing a pattern of racially polarized voting "is more probative than non-statistical evidence." *Id.* § 17-206(2)(c)(iii). The statute further provides that "evidence concerning whether members of

[1] If a political subdivision uses "a district-based or alternative method of election," then vote dilution may be shown if one of the above two elements is established *and* "candidates or electoral choices preferred by members of the protected class would usually be defeated." Election Law § 17-206(2)(b)(ii). This provision should not have been at issue here, however, because defendant Newburgh uses an at-large election method. See *infra* at 11.

a protected class are geographically compact or concentrated shall not be considered, but may be a factor in determining an appropriate remedy." *Id.* § 17-206(2)(c)(viii). The statute also lists factors for courts to consider in conducting a totality-of-the-circumstances inquiry, including "the history of discrimination in or affecting the political subdivision." *Id.* § 17-206(3)(a).

The NYVRA authorizes any aggrieved person to file an action against a political subdivision to enforce, among other things, the statute's prohibition against vote dilution. *Id.* § 17-206(4). The statute creates a 50-day safe harbor from litigation by requiring a prospective plaintiff, at least 50 days before filing suit, to notify the political subdivision that it may be in violation of the NYVRA. *Id.* § 17-206(7)(a). In response to a NYVRA notification letter, a political subdivision may obtain an additional 90-day safe harbor from litigation by passing a NYVRA resolution affirming its "intention to enact and implement a remedy for a potential violation of this title"; specific steps it will undertake to facilitate approval and implementation of such a remedy; and a schedule for doing so. *Id.* § 17-206(7)(b). During this additional 90-day period, the political subdivision may either "enact and implement such remedy" unilaterally,

or in certain circumstances—for example, if the political subdivision lacks authority to unilaterally impose the remedy—the political subdivision may submit a proposed remedy to the Civil Rights Bureau of the Office of the New York State Attorney General, which can then approve the remedy and order it into effect. *Id.* § 17-206(7)(b)-(c).

If a political subdivision does not pass a NYVRA resolution or fails to implement a remedy, the plaintiff may bring suit. *See id.* § 17-206(4). The plaintiff also may bring suit if the petitioning period for the next regular election has begun or is scheduled to begin within 30 days, or if the political subdivision is scheduled to conduct an election within the next 120 days. *Id.* § 17-206(7)(i). The action is subject to expedited proceedings and a calendar preference. *Id.* § 17-216.

If a court finds based on the particular evidence presented that vote dilution has occurred in violation of the NYVRA, then it must "implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process." *Id.* § 17-206(5)(a). The statute lists 16 potential remedies, including a district-based method of election, an alternative method of

election (such as ranked-choice voting or cumulative voting),[2] new or revised districting or redistricting plans, a reasonable increase in the size of the governing body, and additional polling times and locations. *Id.* If the remedy requires new or revised districting plans, the statute provides certain procedures that must be followed, such as publicly releasing the plans and holding public hearings before and after the plans are released. *Id.* § 17-206(6)(a)-(b). The statute does not say how the district lines must be drawn, however.

2. Other provisions of the NYVRA

The NYVRA contains many other provisions distinct from the provision prohibiting vote dilution by political subdivisions using an at-large voting method. None of these other provisions should have been addressed by the court below here because plaintiffs' claims did not

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[2] In ranked-choice voting, each voter ranks their choice for a position. If no candidate receives more than 50 percent of voters' first choices, then the candidate with the fewest votes is eliminated. This process continues until one candidate receives a majority of voters' highest choices.

In cumulative voting, each voter is afforded multiple votes, which they may allocate among multiple candidates as they wish, including by casting multiple votes for one candidate. The candidates with the most votes win.

concern any of these other provisions. For example, § 17-212(1)(a) prohibits any person from "engag[ing] in acts of intimidation, deception, or obstruction that affects the right of voters to access the elective franchise." A different provision, § 17-208, takes effect in June 2025, and will require certain political subdivisions with sufficient language-minority populations to provide language assistance in voting and elections. And separate provisions require covered political subdivisions making certain voting- or election-related changes to seek prior approval of such changes, known as "preclearance." *See* Election Law § 17-210. The preclearance provisions came into effect on September 22, 2024. The Attorney General has promulgated rules implementing these preclearance provisions. *See* 13 N.Y.C.R.R. pt. 501.

The Attorney General also has statutory authority to enforce the NYVRA, including by filing actions to remedy vote dilution. *See* Election Law §§ 17-206(4), 17-214. The statute includes an express severability provision stating that "[i]f any provision of this title or its application to any person, political subdivision, or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this title

which can be given effect without the invalid provision or application." *Id.* § 17-222.

B. Procedural History

Plaintiffs—six individual voters who reside in the Town of Newburgh—commenced this NYVRA action against the Town and its Town Board in Supreme Court, Orange County, on March 26, 2024. (Compl. at 1, 7 (Mar. 26, 2024), NYSCEF Doc. No. 1.) Plaintiffs' complaint asserts that the Town's at-large system for electing the Town Board members dilutes the voting power of Black and Hispanic residents in violation of § 17-206(2)(b)(i). (*Id.* at 2-3.) Plaintiffs alleged both that (1) voting patterns in the Town are racially polarized and (2) under the totality of the circumstances, the at-large election system impairs the ability of Black and Hispanic voters to elect candidates of their choice or otherwise influence the outcome of elections. (*Id.* at 26-28.) By way of relief, plaintiffs seek a declaration that the Town's use of an at-large election system violates § 17-206(2)(b)(i) and an injunction ordering the Town to implement either a districting plan or an alternative method of election for the 2025 Town Board election. (*Id.* at 29.)

Defendants moved to dismiss the action on the ground that a March 15, 2024 resolution passed by the Town Board triggered the 90-day safe harbor under § 17-206(7)(b). (Mem. of Law in Support of Mot. to Dismiss at 9 (Apr. 16, 2024), NYSCEF Doc. No. 9.) Supreme Court (Vazquez-Doles, J.) denied the motion (Decision & Order (May 17, 2024), NYSCEF Doc. No. 31), and defendants appealed (Notice of Appeal (May 24, 2024), NYSCEF Doc. No. 33). That appeal is now pending before this Court. (Docket No. 2024-04378.) Defendants later answered (Answer (May 28, 2024), NYSCEF Doc. No. 34) and notified the Office of the Attorney General of their challenge to the constitutionality of § 17-206 (Notice of Constitutional Question (May 23, 2024), NYSCEF Doc. No. 35).

Defendants subsequently moved for summary judgment. They argued that the NYVRA's vote-dilution provision is unconstitutional on its face because it violates the Equal Protection Clauses of the United States and New York Constitutions. (Mem. of Law in Support of Mot. for Summary Judgment at 10 (Sept. 25, 2024), NYSCEF Doc. No. 70.) Defendants further argued that the Town's at-large elections comply with the NYVRA. (*Id.* at 24.) Plaintiffs opposed the motion. (Mem. of Law

in Opp'n to Mot. for Summary Judgment (Oct. 10, 2024), NYSCEF Doc. No. 73.)

The court granted defendants' summary judgment motion in a Decision and Order dated November 7, 2024 ("Order"). (NYSCEF Doc. No. 147.) Supreme Court first held that even though municipalities generally lack capacity to challenge the constitutionality of state laws, defendants had capacity here because they claimed that their compliance with the NYVRA would itself violate the Constitution. (Order at 12.) The court then held that the NYVRA is unconstitutional on its face. The court concluded that strict scrutiny applies, reasoning that "the text of the NYVRA, on its face, classifies people according to their race, color and national origin." (*Id.* at 16.) The court reasoned that "classification based on race, color and national origin is the *sine qua non* for relief under the NYVRA" because "[a] person can only seek relief on the basis of their race, color or national origin." (*Id.*) And according to the court, the statute's remedies "are created based upon those classifications." (*Id.*) The court then determined that the statute on its face could not satisfy strict scrutiny. (*Id.* at 17-21.)

In reaching these conclusions, the court focused on differences between the NYVRA and the federal VRA. For example, the court found that unlike the federal VRA, the NYVRA requires proportional representation—even though no provision of the NYVRA imposes any such requirement. (*Id.* at 23.)

Based on these conclusions, the court granted defendants' summary judgment motion and dismissed the complaint. The court also purported to provide sweeping additional relief. In a decretal paragraph, the court "ORDERED that the NYVRA is hereby STRICKEN in its entirety from further enforcement and application to these Defendants and to any other political subdivision in the State of New York." (*Id.* at 25.) The court issued this order even though neither plaintiffs' claims nor defendants' constitutional arguments addressed any provision of the NYVRA other than the provisions concerning vote dilution by political subdivisions using an at-large election method. Moreover, defendants had not sought any injunctive relief, let alone a statewide injunction.

Plaintiffs appealed. (Notice of Appeal (Nov. 11, 2024), NYSCEF Doc. No. 151.) By letter dated November 14, 2024, this Office informed the Court that the Attorney General intended to intervene as of right

under Executive Law § 71(1) to defend the constitutionality of the NYVRA. (NYSCEF Doc. No. 153.)

ARGUMENT

POINT I

THE TOWN LACKS CAPACITY TO CHALLENGE THE NYVRA ON ITS FACE

Defendants lack capacity to challenge the constitutionality of the NYVRA's vote-dilution provision on its face. For this reason alone, Supreme Court's decision striking down the statute as unconstitutional should be reversed.

It is well settled that "'municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation,'" subject to certain exceptions. *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 383 (2017) (quoting *City of New York v. State of New York*, 86 N.Y.2d 286, 289 (1995)). As "creatures or agents of the State," municipalities "cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants." *City of New York*, 86 N.Y.2d

at 290. This lack-of-capacity rule applies both when the municipality affirmatively initiates an action as a plaintiff seeking a declaratory judgment and when, as here, a municipality defensively asserts unconstitutionality in an action where the municipality is named as a defendant. *See In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 892 F.3d 108, 112 (2d Cir. 2018) (public authority lacked capacity to defensively assert unconstitutionality).

In finding that the Town has capacity to assert its constitutional challenge, Supreme Court erroneously relied on the exception to the lack-of-capacity rule for a municipality's claim that its very compliance with a statute would "violate a constitutional proscription." *Matter of Jeter v. Ellenville Cent. School Dist.*, 41 N.Y.2d 283, 287 (1977). To qualify for that exception, a municipality must put forth competent evidence of specific future conduct required by the challenged state law that would cause the municipality to violate the Constitution. *See Blakeman v. James*, No. 2:24-cv-1655, 2024 WL 3201671, at *14 (E.D.N.Y. Apr. 4, 2024) (local government parties lacked capacity to argue that the State's enforcement of the New York Human Rights Law was unconstitutional

because there was no "record evidence" that such enforcement would compel them to violate a constitutional proscription).

Here, defendants failed to put forth sufficient evidence in the summary judgment record showing that their compliance with the statute, in every conceivable application, would violate the Constitution. Defendants cannot meet their burden with generalized contentions that the NYVRA embodies racial classifications. Rather, defendants must point to evidence of specific future conduct that they themselves will be forced to carry out in compliance with the NYVRA but in violation of the Constitution. And because defendants raise a facial challenge, they bear "the substantial burden of demonstrating that in any degree and in every conceivable application," the law requires political subdivisions to violate the Constitution. *Matter of Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003) (quotation marks omitted). Defendants failed to meet this burden. They put forth no record evidence of specific future conduct a political subdivision might carry out in violation of the Constitution in connection with *any* possible remedy, let alone *every* such remedy a court might order. Indeed, although defendants invoked cases involving redistricting that was alleged to have been done in a racially discrim-

inatory manner (Mem. of Law in Support of Mot. for Summary Judgment at 8), many of the potential remedies available under the NYVRA do not involve redistricting at all. See *infra* at 31-33. And defendants have not currently been ordered to do anything, let alone to undertake conduct that might violate the Equal Protection Clause.

If defendants' capacity argument were correct, then a municipality could bring a sweeping facial challenge to strike down an entire state statute without making any particularized showing as to what specific conduct the statute requires but the Constitution prohibits. That would undermine the lack-of-capacity rule itself. And it would disrupt the relationship between the State and its political subdivisions, which are "created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents." *City of New York*, 86 N.Y.2d at 290; *see also Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 327 (2014) (Scalia, J., concurring) (a state has "near-limitless sovereignty . . . to design its governing structure as it sees fit" and is "afforded wide leeway" to allocate power between the state itself and its political subdivisions [quoting *Holt Civic Club v. Tuscaloosa,* 439 U.S. 60, 71 (1978)]).

The exception to the lack-of-capacity rule for a municipality's own purported violation of the Constitution is not so broad as to cover the kind of sweeping facial challenge brought by defendants here. Otherwise, the exception would essentially swallow the rule. This conclusion does not mean that municipalities are without any remedy. To the contrary, if at a later point in the action defendants were ordered to carry out specific conduct to comply with the NYVRA but purportedly in violation of the Constitution, then defendants could bring an as-applied challenge to such application of the statute at that time.

Accordingly, defendants have failed to show they have capacity to challenge the NYVRA on its face. The Court should reverse for this reason alone.

POINT II

THE NYVRA'S VOTE-DILUTION PROVISION COMPORTS WITH THE EQUAL PROTECTION CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS

On the merits, Supreme Court erred in striking down the NYVRA's vote-dilution provision on its face. The NYVRA enjoys "a strong presumption of constitutionality," and the Town "bears the heavy burden of proving beyond a reasonable doubt that the statute is in conflict with the Constitution." *People v. Viviani*, 36 N.Y.3d 564, 576 (2021) (quotation marks omitted). Indeed, striking down a statute is appropriate "only as a last unavoidable result" when reconciliation with the Constitution is impossible. *White v. Cuomo*, 38 N.Y.3d 209, 216 (2022) (quotation marks committed); *see also Stefanik v. Hochul*, 2024 N.Y. Slip Op. 04236, at 3, 2024 WL 3868644, at *3 (Aug. 20, 2024). And, as noted, because the Town raises a facial equal protection challenge, it bears "the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment." *Matter of Moran Towing Corp.*, 99 N.Y.2d at 448 (quotation marks omitted).

Defendants failed to establish beyond a reasonable doubt that every conceivable application of the NYVRA's vote-dilution provision compels

political subdivisions to violate the constitutional equal protection rights of their voters. The NYVRA's vote-dilution provision is a race-neutral antidiscrimination statute that protects all individuals from racially discriminatory vote dilution, no matter their race. Rational basis review thus applies, which the vote-dilution provision easily satisfies.

A. Strict Scrutiny Does Not Apply Because the NYVRA Does Not Create Any Racial Classification

The Fourteenth Amendment of the United States Constitution prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The New York Constitution provides equal protection safeguards equivalent to those provided by the federal Constitution. *See* N.Y. Const. art. I, § 11; *People v. Aviles*, 28 N.Y.3d 497, 502 (2016). To demonstrate a facial equal protection violation, a party must identify "a law or policy that expressly classifies persons on the basis of race."[3] *Brown v. City of Oneonta*, 221

[3] Although an equal protection violation may also be shown by a facially neutral law applied in a discriminatory manner, or a facially neutral law with disparate impact that was motivated by discriminatory animus, *see Brown*, 221 F.3d at 337, the decision below did not engage in any such as-applied reasoning. And Newburgh argued only that the

(*continued on the next page*)

F.3d 329, 337 (2d Cir. 2000) (quotation marks omitted); *cf. Matter of Aliessa v. Novello*, 96 N.Y.2d 418, 436 (2001) (equal protection violation based on alienage). A law that imposes such express racial classifications is subject to strict scrutiny, and survives only if it is narrowly tailored to achieve a compelling government interest. *Aviles*, 28 N.Y.3d at 502; *see also Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* ("*SFFA*"), 600 U.S. 181, 206-07 (2023).

Supreme Court's decision rests on the fundamentally incorrect premise that the NYVRA's vote-dilution prohibition creates an express racial classification and is therefore subject to strict scrutiny. (Order at 16.) An express racial classification exists "when the government distributes burdens or benefits on the basis of individual racial classifications." *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). By contrast, a law that "neither says nor implies that persons are to be treated differently on account of their race" does "not embody a racial classification." *Crawford v. Board of Educ.*, 458 U.S. 527, 537 (1982). Laws that protect *all* people from racial discrimination—

NYVRA's vote-dilution provision is unconstitutional on its face. (Mem. of Law in Support of Mot. for Summary Judgment at 13-16.)

regardless of their particular race, color, or national origin—do not treat people differently on account of their race and therefore do not impose racial classifications. Rather, such race-neutral antidiscrimination laws treat people equally by providing the same legal protections against racial discrimination to everyone.

Here, neither the NYVRA's prohibition against vote dilution nor its remedial provision creates an express racial classification. Supreme Court's contrary ruling is plainly erroneous and should be reversed.

1. The vote-dilution prohibition contains no express racial classification.

The NYVRA's prohibition against vote dilution does not expressly impose any racial classification because it does not treat people differently on account of their race. Rather, Election Law § 17-206 equally protects members of *all* racial groups from discriminatory vote dilution.

The NYVRA's protections against vote dilution may be invoked equally by voters of any race. As noted, the NYVRA prohibits "any method of election" that has "the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution." Election

Law § 17-206(2)(a). The statute defines "protected class" as "members of a race, color, or language-minority group, including individuals who are members of a minimum reporting category that has ever been officially recognized by the United States census bureau." *Id.* § 17-204(5). That broad definition of "protected class" encompasses members of all racial groups.[4] Indeed, Supreme Court acknowledged that the NYVRA protects all races and people from vote dilution, "because every person is a member of some race or is of some color." (Order at 9.) Section 17-206(2)'s equal application to voters of all races means that it should not have been subject to strict scrutiny.

Section 17-206(2) is thus a race-neutral anti-discrimination statute. Far from compelling political subdivisions to engage in racial discrimination, as Supreme Court incorrectly concluded, it protects voters of all races from racially discriminatory vote dilution. As the U.S. Supreme

[4] If there were any ambiguity as to whether these provisions apply equally to all racial groups (which there is not), the canons of construction would require that they be interpreted in such a nondiscriminatory manner to eliminate any doubt as to the statute's constitutionality. *See, e.g.*, *Matter of Lorie C.*, 49 N.Y.2d 161, 171 (1980) ("[I]t is familiar law that a statute should be construed so as to avoid doubts concerning its constitutionality.").

Court recognized decades ago, "the right to vote can be affected by a *dilution* of voting power as well as by an absolute prohibition on casting a ballot." *Shaw v. Reno*, 509 U.S. 630, 640 (1993) (alteration marks omitted) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969)). Vote dilution occurs when "a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [voters of different racial groups] to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). At-large election systems, in particular, may "operate to minimize or cancel out the voting strength of [certain members of] the voting population." *Id.* (quoting *Burns v. Richardson*, 384 U.S. 73, 88 (1966)). It is this discriminatory effect that the NYVRA, like Section 2 of the federal VRA, is designed to remedy.

Supreme Court erred in reasoning that the NYVRA's vote-dilution provision "classifies people according to their race, color and national origin" merely by prohibiting *race-based* discriminatory vote dilution. (Order at 16.) The NYVRA's textual references to race and its consideration of race to remedy racial vote dilution do not transform it into an express racial classification, as that term has long been understood in

equal protection jurisprudence. Rather, consideration of race in finding liability for racial discrimination, or in fashioning relief for such discrimination, does not trigger strict scrutiny so long as the statute equally protects members of all racial groups from discrimination, as the NYVRA does. *See Texas Dept. of Hous. & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 544-45 (2015); *Rothe Dev., Inc. v. United States Department of Def.*, 836 F.3d 57, 72 (D.C. Cir. 2016); *Raso v. Lago*, 135 F.3d 11, 16 (1st Cir. 1998).

Indeed, it is well settled that antidiscrimination statutes that equally protect members of all races comport with the Equal Protection Clause. As federal circuit courts have explained, "[e]very antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflects a concern with race. That does not make such enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause." *Raso*, 135 F.3d at 16; *accord Hayden v. County of Nassau*, 180 F.3d 42, 49 (2d Cir. 1999) (quoting *Raso*). For example, statutes that prohibit racial discrimination in employment or housing are concerned with race in the sense that they prohibit regulated entities from taking certain actions based on a

person's race, color, or national origin. *See, e.g.*, Executive Law § 296(a) (prohibiting employment discrimination based on race, among other protected categories); 42 U.S.C. § 2000e-2(a) (similar federal law prohibition on employment discrimination based on race); 42 U.S.C. §§ 3605-3607 (prohibiting discrimination in housing based on race). And these statutes use terms like "race," "color," or "national origin" in explicitly prohibiting discrimination based on protected categories. *E.g.*, Executive Law § 296(a); 42 U.S.C. §§ 2000e-2, 3605-3607; *see also* 15 U.S.C. § 637(a)(5) ("racial or ethnic prejudice"). But courts routinely uphold such antidiscrimination laws without applying strict scrutiny, because they protect persons of all races equally. *See, e.g.*, *Schuette*, 572 U.S. 291 (upholding Michigan constitutional provision prohibiting discrimination on the basis of race); *Rothe Dev.*, 836 F.3d at 68 (upholding 15 U.S.C. § 637(a)(5) because statutory reference to race-based discrimination "does not amount to a racial classification"); *Cohen v. Brown Univ.*, 101 F.3d 155, 170-72 (1st Cir. 1996) (upholding Title IX (20 U.S.C. §§ 1681–1688), prohibiting discrimination on the basis of sex, against equal protection challenge).

Supreme Court's concern that a voter may seek relief under the NYVRA only "on the basis of their race, color or national origin" (Order at 16) is also misplaced. The statute gives "[a]ny aggrieved person" a cause of action to challenge vote dilution, regardless of their particular race, color, or national origin. Election Law § 17-206(4). This provision reflects a general rule of standing that limits the universe of potential plaintiffs to those who are aggrieved by government action. *See, e.g.*, *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 772-73 (1991). It is not a race-based classification that triggers strict scrutiny. Indeed, any plaintiff that seeks relief under a statute that prohibits racial discrimination must seek relief based on their race (or perceived race).

Supreme Court thus plainly erred in concluding that the NYVRA makes "race or national origin . . . the basis for unequal treatment by the State" (Order at 1). The NYVRA, like antidiscrimination statutes generally, treats all groups equally and uses race to identify and remedy discriminatory conduct. This approach does not constitute "unequal treatment" on the basis of race that triggers strict scrutiny.

Courts applying these equal protection principles have upheld other States' voting rights acts against facial equal protection challenges

without applying strict scrutiny. *See Higginson v. Becerra*, 786 F. App'x 705 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2807 (2020); *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660 (2006), *cert. denied*, 552 U.S. 974 (2007); *Portugal v. Franklin County*, 1 Wash. 3d 629 (2023), *cert. denied sub nom. Gimenez v. Franklin County*, 144 S. Ct. 1343 (2024).

In *Sanchez*, for example, a California appellate court held that strict scrutiny does not apply to antidiscrimination laws like California's Voting Rights Act because "they are not racially discriminatory." 145 Cal. App. 4th at 682. As the court explained, the law "confers on members of any racial group a cause of action to seek redress for a race-based harm, vote dilution." *Id.* at 681. And creating "that kind of liability does not constitute the imposition of a burden or conferral of a benefit on the basis of a racial classification." *Id.* The Ninth Circuit in *Higginson* agreed. The court explained that "it is well settled that governments may adopt measures designed 'to eliminate racial disparities through race-neutral means.'" *Higginson*, 786 F. App'x at 707 (quoting *Texas Dept. of Hous. & Community Affairs*, 576 U.S. at 545). Similarly, the Supreme Court of Washington declined to subject that State's voting rights act to strict scrutiny because the act, on its face, does not create any racial classifica-

tion. *Portugal*, 1 Wash. 3d at 648. Rather, the statute "mandates *equal* voting opportunities for members of every race, color, and language minority group." *Id.* at 658.

These state voting rights acts and the NYVRA differ from laws or policies that expressly discriminate based on race, such as university admission policies struck down in *SFFA*. *See Robinson v. Ardoin*, 86 F.4th 574, 593 (5th Cir. 2023) (rejecting comparison between voting redistricting and affirmative action); *see also Singleton v. Allen*, 690 F. Supp. 3d 1226, 1317 (N.D. Ala. 2023) (per curiam) (three-judge panel). The court below thus erred in relying on *SFFA* here. The university admission policies at issue in *SFFA* expressly classified each individual applicant on the basis of race. And the U.S. Supreme Court found that they distributed benefits—admission to university—to those applicants at least partly on the basis of race, resulting in the exclusion of others partly on the basis of race. Thus, those policies treated applicants differently at least in part based on race and were subject to strict scrutiny for that reason. *SFFA*, 600 U.S. at 213-18. No such race-based differential treatment exists here because the NYVRA's vote-dilution provision protects members of all racial groups equally.

For the same reason, Supreme Court's reliance on *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and its progeny is misplaced. In *Adarand*, the Court noted that an express racial classification is subject to strict scrutiny even if it is designed to benefit historically disadvantaged groups. *Id.* at 220. That principle has no application here, however, because the NYVRA does not treat different racial groups differently. In other words, the statute does not "mean one thing when applied to one individual and something else when applied to a person of another color," as the court below erroneously held. (Order at 15 (quoting *SFFA*, 600 U.S. at 206).) Rather, the NYVRA broadly prohibits racially discriminatory vote dilution, regardless of which racial group's power is diluted.

2. The remedies available to address unlawful vote dilution do not impose any express racial classification.

The NYVRA's remedial provision is also race-neutral, contrary to Supreme Court's mistaken view. As noted, if a court finds vote dilution in an action brought under the NYVRA, then it must "implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral

process." Election Law § 17-206(5)(a). The statute lists numerous different race-neutral remedies, including a district-based method of election, alternative election methods, new or revised districting or redistricting plans, a reasonable increase in the size of the governing body, and additional polling times and locations. *Id.*

On their face, these remedies neither classify voters by race nor require political subdivisions to engage in racial discrimination. A district-based election system, for example, is just as facially neutral as an at-large system, so long as district boundaries have not been unconstitutionally racially gerrymandered. See *infra* at 35. Indeed, while most smaller municipalities in New York hold at-large elections for their governing legislative bodies, wards are common among larger municipalities—including New York City, Yonkers, Poughkeepsie, and several large towns on Long Island and in the Hudson Valley. *See* N.Y. Dep't of State, Legal Mem. LG01, *The Ward System of Town Government* (2006); Town of Bethlehem, Ward Subcommittee, *Governance Study Options: The Ward System?* (June 11, 2012). Alternative election systems are also race-neutral. A cumulative voting system, for example, affords all voters, regardless of their race, multiple votes that they can allocate as they

choose, including by casting multiple votes for the same candidate. *See United States v. Village of Port Chester*, 704 F. Supp. 2d 411, 453 (S.D.N.Y. 2010) (cumulative voting is not racially discriminatory because "every voter is treated exactly the same").

Despite the availability of these many different race-neutral remedies, the court below struck down the NYVRA's vote-dilution provision on its face based on the speculative possibility that in some hypothetical case, a district-based system might be ordered as relief and that system might be implemented in an unlawfully racially discriminatory manner. Specifically, the court relied (Order at 21) on U.S. Supreme Court decisions that used strict scrutiny in as-applied challenges to particular election districts that were alleged to violate the Equal Protection Clause. *See Abbott v. Perez*, 585 U.S. 579, 585 (2018); *Shaw*, 509 U.S. at 641-42, 644. But these decisions and their use of strict scrutiny are irrelevant here, where defendants raised a facial attack to the NYVRA's vote-dilution provision before vote dilution had been found or any remedy ordered.

Defendants' facial challenge should have been rejected because there are ample avenues for relief under the NYVRA's vote-dilution

provision that plainly do not impose racial classifications and thus do not trigger strict scrutiny. First, the court's focus on the potential for relief that involves "racial gerrymandering" (Order at 21) misses the mark. This term refers to consideration of race predominating in the drawing of election district lines. *See Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015). But there are many available remedies under the NYVRA that do not involve drawing election districts at all, let alone racial gerrymandering. *See* Election Law § 17-206(5)(a). Indeed, the plaintiffs here requested as one potential remedy a shift to an alternative election system, which does not usually involve drawing districts. There is no basis to conclude that strict scrutiny would apply to all the NYVRA's many potential race-neutral remedies and thus no way for defendants to establish that the NYVRA is unconstitutional in all its applications.

Second, the fact that some remedies available under the NYVRA involve drawing election districts does not mean that strict scrutiny applies to all such remedies in the abstract, before any redistricting remedy has even been ordered. In the redistricting context, the U.S. Supreme Court has "made clear that there is a difference between being aware of racial considerations and being motivated by them." *Allen v.*

Milligan, 599 U.S. 1, 30 (2023) (quotation marks omitted). "The former is permissible; the latter is usually not." *Id.* A political subdivision "always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw*, 509 U.S. at 646. But that sort of awareness of race in redistricting does not automatically mean that a political subdivision has unconstitutionally classified voters by race. *Id.*

Instead, the Court has concluded that strict scrutiny is triggered only when racial considerations predominate above other redistricting considerations. *See Alexander v. South Carolina State Conference of the NAACP*, 602 U.S. 1, 8 (2024). But no provision of the NYVRA requires districts to be drawn using race as a predominant factor. Instead, the NYVRA allows the development of a remedial map based on traditional, race-neutral districting criteria, such as compactness and contiguity. *See id.* The fact that Newburgh might be ordered to shift from an at-large election system to a district-based system does not mean that every conceivable district map that could be drawn would use racial considerations as the predominant criteria.

At most, a political subdivision like Newburgh could raise an as-applied challenge to specific district boundaries imposed as a remedy in a NYVRA action. *See Alabama Legislative Black Caucus*, 575 U.S. at 262-63. Such claims are routinely litigated in federal redistricting cases, in which the courts analyze whether racial considerations predominated in the drawing of district boundaries and, only if so, apply strict scrutiny. *See, e.g.*, *Wisconsin Legislature v. Wisconsin Elections Commn.*, 595 U.S. 398, 401-03 (2022) (per curiam); *North Carolina v. Covington*, 585 U.S. 969, 975 (2018) (per curiam); *Abbott*, 585 U.S. 579. But no such as-applied challenge was raised here. Nor could such a challenge have been raised at this juncture because the court has not found vote dilution nor ordered any remedy for such vote dilution. Because not every conceivable application of the NYVRA involves racial gerrymandering, the NYVRA on its face is not subject to strict scrutiny.

Nor does any provision of the NYVRA compel proportional representation, as Supreme Court erroneously stated (Order at 23). Nothing in the statute requires political subdivisions to ensure that protected classes are proportionately represented in town boards and other legislative bodies. Instead, the NYVRA's vote-dilution provision

mandates "equitable access to fully participate in the electoral process." Election Law § 17-206(5)(a). An equal opportunity to participate in the political process does not guarantee equal representation in a legislative body. *See, e.g.*, *Allen*, 599 U.S. at 25, 28 (explaining that Section 2 of the federal VRA requires equal opportunity but not proportional representation).

In sum, the NYVRA is race-neutral because it equally protects members of all racial groups from race-based discrimination and provides race-neutral means for remedying that discrimination. There is no precedent for subjecting such a law to strict scrutiny. Indeed, the trial court's ruling here, if affirmed, would upend decades of legal precedent and call into question the constitutionality of "every law . . . that creates liability for race-based harm." *Sanchez*, 145 Cal. App. 4th at 681. Accordingly, this Court should reverse Supreme Court's decision.

3. The Equal Protection Clause does not require the NYVRA to parallel the federal Voting Rights Act.

The court below further erred in reasoning that differences between the NYVRA's vote-dilution provision and the federal VRA's vote-dilution provision render the NYVRA's provision facially unconstitutional. These

differences do not implicate the Equal Protection Clause or trigger strict scrutiny. They instead reflect policy judgments that the Legislature was entitled to make.

As an initial matter, the NYVRA is based in part on the federal VRA even though the statutes differ from one another in some respects. Both statutes combat the racially discriminatory effects of vote dilution. *See Allen*, 599 U.S. at 13 (explaining how Congress amended Section 2 of the federal VRA to create effects-based test for vote dilution). And both statutes look to various factors to analyze whether the challenged election system or practice is causing such racially discriminatory effects and, if so, whether an appropriate remedy is available.

Specifically, in *Gingles*, the U.S. Supreme Court interpreted the federal VRA as requiring plaintiff voters who bring a vote-dilution claim to first establish three preconditions: (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate. *See* 478 U.S. at 50-51. *Gingles* further provides that where these preconditions are met, liability for vote

dilution under the federal VRA requires plaintiff voters to establish that, under the totality of the circumstances, the political process is not equally open to the minority group at issue. *See id.* at 46, 79.

The NYVRA's vote-dilution provision utilizes many of these same factors though in ways that differ from Section 2 of the federal VRA, as the following comparison explains:

VRA – *Gingles* Precondition 1: minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district.

NYVRA – Whether protected class is geographically compact or concentrated may be a factor in determining an appropriate remedy. Election Law § 17-206(2)(c)(viii).

VRA – *Gingles* Precondition 2: minority group must be politically cohesive.

NYVRA – When political subdivision uses at-large election system, vote dilution exists when voting patterns of members of the protected class within the political subdivision are racially polarized. *Id.* § 17-204(2)(b)(i)(A).

Definition of racially polarized voting requires divergence in preferences of members of protected class from preferences of the rest of the electorate. *Id.* § 17-204(6).

VRA – *Gingles* Precondition 3: majority must vote as a bloc to usually defeat minority's preferred candidate.

NYVRA – Definition of racially polarized voting requires divergence in preferences of members of protected class from preferences of the rest of the electorate. *Id.* § 17-204(6).

VRA – If *Gingles* preconditions are met, then the court must analyze the totality of the circumstances to determine whether the political process is equally open to the minority group.

NYVRA – When political subdivision uses at-large election system, vote dilution exists when, under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired. *Id.* § 17-206(2)(b)(i)(B).

Upon finding vote dilution, the court must implement appropriate remedies to ensure that protected classes have

equitable access to fully participate in the electoral process. *Id.* § 17-206(5)(a).

Differences between these state and federal statutes do not implicate the Equal Protection Clause or trigger strict scrutiny for the following reasons. *First*, the Supreme Court derived the *Gingles* preconditions and totality-of-the-circumstances test from the federal VRA's language and legislative history—not from any demands of the Equal Protection Clause. *See Gingles*, 478 U.S. at 48-51; *see also Robinson*, 86 F.4th at 594-95 (rejecting "attempts to equate an Equal Protection racial gerrymandering claim" with a "Section 2 Voting Rights Act claim"). Indeed, no court other than the court below has held that racially polarized voting or compactness of members of the protected group are constitutionally required elements of any vote-dilution claim.[5]

[5] The court stated that it was unaware of any case determining that the *Gingles* compactness requirement is "not applicable to the issue of whether a state voting rights act is violative of the US Constitution." (Order at 23.) But few courts have had the occasion to pass on the constitutionality of state voting rights acts because most of these statutes were enacted relatively recently. In any event, the court overlooked hundreds of cases that discuss *Gingles* but do not suggest that its preconditions are required by the Equal Protection Clause rather than the Supreme Court's interpretation of the federal VRA.

Under bedrock federalism principles, States may exercise their own sovereign police powers to combat racial discrimination and regulate their own elections so long as they do not conflict with federal law. *See Shelby County*, 570 U.S. at 543 ("States have broad powers to determine the conditions under which the right of suffrage may be exercised." [quotation marks omitted]). States are thus free to enact their own race-neutral statutes against racially discriminatory vote dilution, with different criteria for proving discrimination and broader available remedies than the federal VRA. *See Portugal*, 1 Wash. 3d at 641; *Sanchez*, 145 Cal. App. 4th at 687. New York made that legislative choice here by enacting the NYVRA.

Second, none of the differences between the state and federal VRAs result in any express racial classification that could trigger strict scrutiny. For example, the court below observed that the federal VRA requires a plaintiff voter to establish both racially polarized voting *and* that the totality-of-the-circumstances test is satisfied. The court noted that the NYVRA differs by providing that vote dilution exists where a plaintiff voter establishes either racially polarized voting *or* that the totality-of-the-circumstances test is satisfied. (Order at 20.) But requiring proof of

either racially polarized voting or satisfaction of the totality-of-the-circumstances test does not impose any racial classification. Each prong is simply an evidentiary path that voters of any race may take to establish that a political subdivision has engaged in unlawful vote dilution. Put differently, neither prong disadvantages or benefits voters on account of their race when all voters may invoke the statute's protections and try to prove that they have suffered vote dilution. The fact that *Gingles* requires both factors to be satisfied, rather than either one, to establish a federal VRA claim of vote dilution does not render either prong an express racial classification.

In any event, even if the Equal Protection Clause required proof of racially polarized voting to support a vote-dilution claim (which it does not), that requirement would still be an improper basis to rule that the NYVRA's vote-dilution provision is unconstitutional on its face. As noted, it is defendants' burden to demonstrate that the NYVRA's dilution provisions are unconstitutional "in every conceivable application." *Matter of Moran Towing Corp.*, 99 N.Y.2d at 448 (quotation marks omitted). If the dilution provisions are constitutional when supported by evidence of racially polarized voting and unconstitutional when such evidence is

lacking, as the court below believed, then that is a reason to uphold the statute against defendants' facial challenge, not strike it down.

Nor does considering compactness at the remedy phase, as the NYVRA provides, raise any equal protection concerns. This difference merely reflects divergent legislative policy choices about the types of remedies available to address unlawful vote dilution. As Washington's highest court correctly explained in upholding that State's voting rights law, the *Gingles* factors reflect the Supreme Court's understanding that the main remedies for vote dilution available under the federal VRA are requiring a single-member district system or requiring the creation of majority-minority districts within such a system. *See Portugal*, 1 Wash. 3d at 638; *see also Growe v. Emison*, 507 U.S. 25, 40 (1993). Specifically, the Supreme Court concluded that the compactness precondition was needed to ensure that alleged vote dilution could be redressed through these available federal remedies. As the Supreme Court has explained, the *Gingles* compactness precondition shows that members of the plaintiff voters' minority group are numerous and compact enough to have the potential to elect a candidate of their choice if a single-member, majority-minority district is drawn. *See Emison*, 507 U.S. at 40.

Unlike the federal VRA, the NYVRA provides for many remedies to combat racially discriminatory vote dilution that do not involve drawing districts at all, let alone drawing single-member, majority-minority districts. See *supra* at 31-33. It thus makes sense that vote-dilution *liability* under the NYVRA does not always require a showing of compactness. A plaintiff's vote-dilution injuries may be redressed by available state-law remedies—such as alternative election systems—that have nothing to do with the protected group's compactness in a potential single-member district. *See Portugal*, 1 Wash. 3d at 641. And because the NYVRA makes compactness a factor that may be considered in fashioning a *remedy* for vote dilution, this factor remains relevant where a NYVRA plaintiff is seeking state-law remedies that do involve drawing single-member districts.

Third, the court further erred in reasoning that the NYVRA's vote-dilution provisions are unconstitutional in part because they allow coalition claims whereas the court thought that the federal VRA does not permit such claims.[6] (*See* Order at 19, 24-25.) In fact, many federal

[6] Coalition claims are causes of action where voters of multiple protected classes whose electoral preferences are aligned and polarized

(*continued on the next page*)

courts, including courts within the Second Circuit, have allowed coalition claims to be asserted under the federal VRA. *See, e.g.*, *NAACP v. East Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 379 (S.D.N.Y. 2020), *aff'd sub nom.*, *Clerveaux v. East Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021); *Concerned Citizens of Hardee County v. Hardee County Bd. of Commrs.*, 906 F.2d 524, 526 (11th Cir. 1990). But regardless, the federal circuits that have disallowed coalition claims under the federal VRA have done so as a matter of federal statutory interpretation, not constitutional mandate. *See Petteway v. Galveston County*, 111 F.4th 596, 603 (5th Cir. 2024) (en banc); *Nixon v. Kent County*, 76 F.3d 1381, 1386-87 (6th Cir. 1996) (en banc). Such interpretations of the federal statute have no bearing on the constitutionality of the NYVRA.

Finally, contrary to the court's contention (Order at 20), the NYVRA's vote-dilution provisions are not standardless. The NYVRA provides specific standards for finding racially polarized voting by defining that term. Election Law § 17-204(6). The statute also sets forth a host of factors to apply in analyzing whether, under the totality of the circum-

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against the rest of the electorate claim that their collective votes are diluted. *See* Election Law § 17-206(2)(c)(iv), (8).

stances, the ability of members of the protected class to elect candidates or influence election outcomes is impaired. *Id.* § 17-206(3). The Legislature's choice to implement a fact-intensive approach to identifying and remedying vote dilution does not make the law's standards unmanageable. To the contrary, other courts have interpreted and applied similar language. *See, e.g.*, *Pico Neighborhood Assn. v. City of Santa Monica*, 15 Cal. 5th 292, 321 (2023 (as modified)) (interpreting California VRA). Nor does the totality-of-the-circumstances framework authorize NYVRA courts to find dilution "without citing any basis" (Order at 20). These factors are modeled on precedent applying the federal VRA, in which courts have discussed and applied these factors at considerable length in finding vote dilution (or not) on the facts presented.

In any event, to the extent Supreme Court was concerned about a court finding of liability for vote dilution "without citing any basis," or other potential ambiguities in the way the NYVRA might be applied in hypothetical future cases, such concern is misplaced in this facial challenge. Such hypothetical concerns must be resolved in an as-applied challenge contending that a particular application of the statute is unconstitutional. Indeed, courts must construe the NYVRA to avoid

constitutional infirmity where possible, which Supreme Court improperly failed to do here. *See, e.g.*, *Matter of Lorie C.*, 49 N.Y.2d at 171.

B. The NYVRA Satisfies Rational Basis Review.

Because the NYVRA does not impose any express racial classification, it is subject only to rational basis review. *See, e.g.*, *Aviles*, 28 N.Y.3d at 502-03; *Friia v. Pfau*, 121 A.D.3d 750, 752 (2d Dep't 2014). Rational basis review "is a paradigm of judicial restraint." *Affronti v. Croson*, 95 N.Y.2d 713, 719 (2001) (quotation marks omitted). To satisfy this standard, a statute "need only be rationally related to a legitimate governmental purpose." *Aviles*, 28 N.Y.3d at 502. The Town cannot show that the NYVRA fails to meet this minimal standard.

The NYVRA's prohibition against vote dilution rationally advances the Legislature's aim of eliminating discriminatory conditions in elections. As reflected in the NYVRA's legislative history, the Legislature determined that "New York has an extensive history of discrimination . . . in voting" and, further, that "vote dilution remains prevalent." Sponsor's Mem., in Bill Jacket, *supra*, at 8. The public record bears this out. *See, e.g.*, *Clerveaux*, 984 F.3d 213 (affirming trial court decision following bench trial that East Ramapo Central School District's at-large system of

elections unlawfully diluted the votes of Black and Latino residents); *Flores v. Town of Islip*, No. 18-cv-3549, 2020 WL 6060982 (E.D.N.Y. Oct. 14, 2020) (consent decree requiring change of electoral system in case alleging that the Town of Islip's at-large electoral system unlawfully diluted the votes of Hispanic and Latino residents); *Village of Port Chester*, 704 F. Supp. 2d 411 (requiring Village of Port Chester to remedy unlawfully dilutive at-large electoral system).

The NYVRA's prohibition against vote dilution is a rational means of remedying discriminatory methods of election. *See Sanchez*, 145 Cal. App. 4th at 680 (holding that California's voting rights act "readily passes" rational basis review because "[c]uring vote dilution is a legitimate government interest and the creation of a private right of action [to remedy vote dilution] is rationally related to it"); *Portugal*, 1 Wash. 3d at 658 (holding similarly with respect to Washington's voting rights act). Accordingly, the Court should uphold the NYVRA against the Town's facial equal protection challenge.

C. If the Court Holds That Strict Scrutiny Applies, It Should Remand for Further Factual Findings.

If this Court concludes that the NYVRA triggers strict scrutiny, it should remand for factual findings on whether the statute satisfies that standard in this case.[7]

To satisfy strict scrutiny, a statute's use of racial classifications must be narrowly tailored to further a compelling governmental interest. *SFFA*, 600 U.S. at 207. It is well-established that the State has a compelling interest in remedying discrimination. *See United States v. Paradise*, 480 U.S. 149, 167 (1987); *New York State Club Assn. v. City of New York*, 69 N.Y.2d 211, 223 (1987), *aff'd*, 487 U.S. 1 (1988). As noted, the legislative history and the public record reflect New York's history of discriminatory voting practices, which has resulted in "a persistent gap between white and non-white New Yorkers in political participation and elected representation." Sponsor's Mem., in Bill Jacket, *supra*, at 7. The

[7] Because the Attorney General did not participate as an intervenor in the proceedings below, the Attorney General respectfully requests that if the Court reaches the issue and concludes that strict scrutiny is the appropriate standard, the Attorney General be permitted an opportunity to develop a factual record on remand to establish that the statute satisfies that standard here.

legislative record also includes analyses of present-day discriminatory conditions in New York elections as well as the U.S. Senate report in support of the 1982 amendment to Section 2 of the VRA, which documents the lengthy history of discriminatory vote dilution in the United States. *See* Office of Sen. Zellnor Myrie (comp.), *Legislative Record – John R. Lewis Voting Rights Act of New York* (June 2022); Perry Grossman, Leadership Conference on Civ. & Human Rights, *Current Conditions of Voting Rights Discrimination: New York* (Oct. 6, 2021); S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982); *see also Gingles*, 478 U.S. at 43-46 (discussing legislative history behind Section 2 of VRA); *Shaw*, 509 U.S. at 639-41 (same). The NYVRA plainly promotes the State's compelling interest in remedying this history of racially discriminatory vote dilution.

Supreme Court erred in granting defendants' facial challenge based on a hypothetical scenario in which a court *might* conclude that a political subdivision engaged in racially discriminatory vote dilution without basing that conclusion on factual findings that the protected class at issue has experienced a history of racial discrimination in that political subdivision. (*See* Order at 17.) Such a hypothetical application of the statute does not support defendants' facial challenge when other applica-

tions of the statute will clearly be constitutional even under the strict scrutiny standard. For example, the court here might find, based on the facts presented at trial, that black and Hispanic voters in Newburgh have experienced a history of racial discrimination that, along with other evidence regarding the totality of the circumstances, establishes unlawful vote dilution. *See* Election Law § 17-206(3)(a) (listing "history of discrimination in or affecting the political subdivision" as factor that may be considered). Such an application of the statute would serve the State's compelling interest in remedying historical discrimination. Indeed, plaintiffs provided substantial evidence of such historical discrimination (*see* Pls.' Statement of Material Facts at 12-14 (Oct. 10, 2024), NYSCEF Doc. No. 72; Sandoval-Strausz Report (June 2024), NYSCEF Doc. No. 84), which is sufficient to raise triable issues of fact about the existence and extent of historical discrimination.

Moreover, as noted, the NYVRA provides for numerous remedies to address racial discrimination in voting. Whether a specific remedy is narrowly tailored depends on the facts relevant to the political subdivision at issue. Thus, a court should analyze the intensely local conditions in the political subdivision to determine whether a race-based remedy is

necessary to remediate discriminatory conditions. *See Allen*, 599 U.S. at 19. No such analysis occurred here. And, as noted, there is a dispute of fact as to whether discriminatory conditions exist in the Town of Newburgh.

Because striking down a statute is appropriate "only as a last unavoidable result," *White*, 38 N.Y.3d at 216, the court at the very least should have conducted a hearing to determine whether discriminatory conditions exist in the Town and, if so, whether there is an appropriate remedy narrowly tailored to remediate those conditions. Therefore, even if the Court finds that strict scrutiny applies, it should remand for further factual findings rather affirm the judgment below.

POINT III

SUPREME COURT'S ORDER IMPROPERLY STRUCK DOWN PROVISIONS OF THE NYVRA THAT WERE NOT AT ISSUE

For all the reasons explained above, Election Law § 17-206(2) does not violate the Equal Protection Clause and Supreme Court's order should be reversed or at the very least remanded for further factual findings. Even if this Court disagrees, however, the court below made two other, independent errors that require its order to be narrowed. In the decision below, the court "ORDERED that the NYVRA is hereby STRICKEN in its entirety from further enforcement and application to these Defendants and to any other political subdivision in the State of New York." (Order at 25.) But Supreme Court had no authority to issue sweeping relief concerning entities not subject to its jurisdiction or provisions of the NYVRA not at issue in this case. If this Court does not reverse the order in its entirety, the Court should modify the order's decretal language to address only the parties and relief requested in this case.

First, the Court should modify the order insofar as it purports to bind parties not subject to Supreme Court's jurisdiction. "A court has no power to grant relief against an entity not named as a party and not properly summoned before the court." *Riverside Capital Advisors, Inc. v.*

First Secured Capital Corp., 28 A.D.3d 457, 460 (2d Dep't 2006). Here, the only parties were plaintiffs, Newburgh, and Newburgh's Town Board. Other subdivisions are subject to lawsuits in other courts, which are free to disagree with Supreme Court's analysis and uphold the statute. *See Young v. Town of Cheektowaga*, Index No. 803989/2024 (Sup. Ct., Erie County); *Coads v. Nassau County*, Index No. 611872/2023 (Sup. Ct., Nassau County); *Serratto v. Town of Mount Pleasant*, Index No. 55442/24 (Sup. Ct., Westchester County). Thus, Supreme Court lacked jurisdiction to enjoin enforcement of the NYVRA against "any other political subdivision in the State of New York," as the order purports to do.

Supreme Court likewise lacked jurisdiction to enjoin application and enforcement of the statute by the Office of the Attorney General. This Office is charged with implementing the statute's preclearance provisions and enforcing the statute's antidiscrimination provisions. *See* Election Law §§ 17-206(4), 17-210, 17-214. The Court should make clear that Supreme Court's judgment does not bind the Attorney General in the exercise of the Office's statutory authority. Indeed, defendants did not seek an injunction nor any other relief beyond dismissal of the complaint (*see* Mem. of Law in Support of Mot. for Summary Judgment at 26), and

Supreme Court erred by providing injunctive relief sua sponte, *see Northside Studios v. Treccagnoli*, 262 A.D.2d 469, 469 (2d Dep't 1999).

Second, the Court should modify the order to make clear that it applies only to the NYVRA's vote-dilution provision concerning at-large election systems, Election Law § 17-206(2)(b)(i). Supreme Court struck down the statute "in its entirety." But "the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are *actually controverted* in a particular case." *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713 (1980) (emphasis added). Here, plaintiffs brought only a vote-dilution claim against the Town based on its use of an at-large election system. And the Town moved for summary judgment on the ground that the NYVRA's vote-dilution provision is unconstitutional. The Town's notice of its constitutional challenge was also limited to Election Law § 17-206. None of the other provisions of the statute were at issue in this case. Those provisions include the prohibition against voter suppression, Election Law § 17-206(1); the preclearance provision, § 17-210; and the prohibition against voter intimidation, deception, or obstruction, § 17-212.

Moreover, the NYVRA includes an express severability provision, *see* Election Law § 17-222, reflecting the Legislature's intent to preserve as much of the statute as possible, *see Viviani*, 36 N.Y.3d at 583; *see also Matter of New York State Land Title Assn. v. New York State Dept. of Fin. Servs.*, 169 A.D.3d 18, 32-33 (1st Dep't 2019). As this Court has explained, "[a]n express statement by a legislative body that the valid provisions of a statute or ordinance should be enforced, despite a judicial determination that a part is unconstitutional, is generally adhered to by the courts." *Town of Islip v. Caviglia*, 141 A.D.2d 148, 168 (2d Dep't 1988), *aff'd*, 73 N.Y.2d 544 (1989). And it is certainly feasible to sever the vote-dilution provision addressed to at-large elections from the other provisions of the statute, "which can stand on [their] own" even if § 17-206(2)(b)(i) is invalidated. *See id.* at 167.

Thus, even if the Court affirms the grant of summary judgment dismissing plaintiff's claims here, the Court should modify the order to grant summary judgment to defendants and dismiss plaintiffs' complaint, without providing any additional relief.

CONCLUSION

The Court should reverse the judgment below and uphold the NYVRA on its face.

Dated: Albany, New York
November 26, 2024

Respectfully submitted,

LETITIA JAMES
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State of New York
Intervenor

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Uniform Practice Rules of the Appellate Division (22 N.Y.C.R.R.) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, serif typeface was used, as follows:

Typeface: Century Schoolbook
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is **10,940**.

Supreme Court State of New York
Appellate Division, Second Dept.

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ORAL CLARKE, ROMANCE REED, GRACE PEREZ, PETER RAMON, ERNEST TIRADO and DOROTHY FLOURNOY,

Plaintiffs-Appellants,

-against-

TOWN OF NEWBURGH and TOWN BOARD OF THE TOWN OF NEWBURGH,

Defendants-Respondents.

Statement Pursuant to CPLR 5531

Docket No.: 2024-09985

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL,

Intervenor-Appellant.

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1. The Index Number in the trial court was EF-002460-2024.

2. The full names of the parties are set forth above. There have been no changes.

3. The action was commenced in the Supreme Court, Orange County.

4. The summons and verified complaint were filed on March 26, 2024. Issue was joined thereafter by the filing of a verified answer on May 28, 2024.

5. This action is pursuant to Election Law.

6. The appeal is from the Decision and Order of the Supreme Court, Orange County (Hon. Maria S. Vazquez-Doles) dated November 7, 2024 and entered November 8, 2024.

7. The appeal is being perfected on the original record method.