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Supreme Court of the State of New York

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.

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS

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The John R. Lewis Voting Rights Act of New York, also referred to as the New York Voting Rights Act or NYVRA, is a comprehensive statute designed to safeguard the right to vote and ensure that all voters have a fair and equal opportunity to participate in the democratic process. The lower court's decision to strike down the NYVRA in its entirety is manifestly wrong; it misinterprets federal constitutional law and federal voting rights law while ignoring controlling New York law. This amicus brief addresses fundamental errors in the lower court's reasoning and demonstrates why this decision cannot stand.

First, the NYVRA is not a racial classification, and it is therefore not subject to strict scrutiny. It does not sort individuals or subject them to differential treatment based on their race—the touchstone element of any racial classification. On the contrary, like the Equal Protection Clause itself, the NYVRA *prohibits* discrimination on the basis of race. And, like other civil rights laws, the NYVRA authorizes remedies that take race into account because doing so is often necessary to address race-based harms. The need to consider race in crafting a remedy for racial vote dilution does not mean that a law prohibiting such dilution is itself a racial classification subject to strict scrutiny. On its face, the NYVRA is race neutral, and strict scrutiny therefore does not apply.

Second, state legislatures seeking to enshrine state-level protections against racial vote dilution are not limited to the legal framework courts apply to claims under Section 2 of the federal Voting Rights Act ("Section 2"). The lower court wrongly assumes that Section 2, as construed by the U.S. Supreme Court in *Thornburg v Gingles*, defines the only constitutionally permissible approach to identifying and addressing racial vote dilution. This is a fundamental misunderstanding: The *Gingles* framework is primarily a judicially crafted interpretation of a federal statute, not a constitutional straitjacket. Indeed, the U.S. Supreme Court has consistently treated the *Gingles* framework as but one constitutional method of addressing vote dilution—not as the exclusive or constitutionally required approach. By insisting that the NYVRA must mirror the *Gingles* framework, the lower court improperly elevated federal statutory standards to the level of constitutional doctrine.

Third, even if there were constitutional doubts about the NYVRA (and there are not), the lower court's decision violates basic principles of constitutional avoidance and severability, including the explicit severability provision in the NYVRA itself. When confronted with potential constitutional issues, New York courts must construe statutes in a manner that renders them constitutional, provided the statutory language permits such an interpretation. If any provisions are ultimately invalid, courts must sever just those provisions, if possible, rather than invalidate an

entire statute. The lower court ignored these principles, taking the extraordinary step of striking down the entirety of the NYVRA—including numerous provisions not at issue in this litigation—without analysis or justification.

This Court should reverse the lower court's decision. Affirming the constitutionality of the NYVRA is essential to preserving voting rights in New York and reinforces the authority of state legislatures across the country, including the New York State Legislature, to adopt appropriate and effective measures to protect the fundamental right to vote.

I. THE NYVRA IS NOT A RACIAL CLASSIFICATION AND IS NOT SUBJECT TO STRICT SCRUTINY.

The NYVRA does not create a racial classification. It neither imposes burdens nor distributes benefits based on race, color, or language-minority status. Instead, like the Equal Protection Clause of the Fourteenth Amendment, the Fifteenth Amendment, and other antidiscrimination laws, the NYVRA *prohibits* racial discrimination in a facially neutral manner. The lower court therefore erred in subjecting the NYVRA to strict scrutiny.

Courts reserve strict scrutiny for government actions that subject individuals "to unequal treatment" based on a "racial classification" (*Adarand Constructors, Inc. v Pena*, 515 US 200, 224 [1995]). In other words, a policy triggers strict scrutiny when the government expressly classifies individuals based on their race and uses those classifications to "distribute[] burdens or benefits" (*Parents Involved in Cmty.*

Schs. v Seattle Sch. Dist. No. 1, 551 US 701, 720 [2007]). Illustrating this principle, the Supreme Court has applied strict scrutiny to school district plans that assigned students to different schools based on their race without any prior determination that the district had engaged in racial discrimination, *id.* at 709-710, 720, to laws that required government contractors to hire minority-owned businesses or gave financial bonuses for doing so, *City of Richmond v J.A. Croson Co.*, 488 US 469, 493 [1989] (plurality opinion); *Adarand*, 515 US at 204, 224, and to university policies where some "admission decisions . . . turn[ed] on an applicant's race" (*Students for Fair Admissions, Inc. v Presidents & Fellows of Harvard Coll.*, 600 US 181, 208 [2023]). The common concern animating these cases is that in each, a policy classified individuals by race and then provided benefits or burdens to those individuals based on that racial classification. Further, in none of them was the consideration of race necessary to remedy a judicial finding of racial discrimination.

The lower court misreads the NYVRA's reference to race, color, and language-minority status as a racial classification. But the mere use of the term "race" does not transform the law into a racial classification. The law references race, color, and language-minority status because of the harms it targets—race-based voter suppression and racial vote dilution—regardless of which racial group it affects. As with all antidiscrimination laws, it would be impossible for the NYVRA to prohibit or remedy such race-based harms without using the term "race" in the

text of the statute (*see e.g.* US Const, 15th Amend, § 1; 42 USC § 3604 [Fair Housing Act]; 42 USC § 2000e-2 [Title VII]). The NYVRA references race not to require race-based classifications, as the lower court suggests, but to prohibit race-based voter suppression and vote dilution.

Far from requiring political subdivisions to treat individuals differently based on their race, color, or language-minority status, the NYVRA imposes liability on political subdivisions that dilute the voting power of members of any "protected class" (*see* Election Law § 17-206[2][a]). The term "protected class" includes members of any racial group, as it is defined as "a class of individuals who are members of a race, color, or language-minority group" (§ 17-204[5]). That is, contrary to the lower court's presumption, the NYVRA does not protect some racial groups to the exclusion of others. It is therefore facially race neutral.

By the same token, the NYVRA creates a cause of action for race-based voter suppression and racial vote dilution that is available to members of *any* race, color, or language-minority group (*see* § 17-206[4]). The creation of a general cause of action for vote dilution does not confer any benefits or impose any burdens based on a racial classification (*see Sanchez v City of Modesto*, 145 Cal App 4th 660, 681 [2006] [addressing a similar challenge to California's VRA]; *Portugal v Franklin County*, 530 P3d 994, 1006 [Wash 2023] *cert denied*, 144 S Ct 1343 [2024] [same

for Washington's VRA]). Because the law does not distribute benefits or burdens to individuals based on their race, it does not create a racial classification.

The lower court's conclusion that the law is a racial classification because "[a] person can only seek relief on the basis of their race, color or [language-minority status]" is wrong (NY St Cts Elec Filing [NYSCEF] Doc No. 147, decision at 16, in *Clarke v Town of Newburgh*, Sup Ct, Orange County 2024, index No. EF002460 ["Decision"]). The NYVRA prohibits election methods that differentially affect individuals on account of their race, color, or language-minority status. For individuals to prove that they have been harmed by such an election method and obtain relief under the NYVRA, they must establish their membership in a protected class, as they would with any antidiscrimination claim *(see McDonnell Douglas Corp. v Green*, 411 US 792, 802 [1973] [holding that to establish a *prima facie* case of employment discrimination, plaintiff must establish that she is a member of a protected class]).

Of course, upon a finding that a political subdivision violated the law by engaging in racial vote dilution, the NYVRA authorizes remedies that may involve consideration of race, such as the drawing of single-member districts in a manner designed to remedy the vote dilution (*see* § 17-206[5][a]). But the lower court's concern that the NYVRA's remedies will necessarily be "created based on [racial] classifications," Decision at 16, is baseless. A race-neutral law that protects all voters

from vote dilution on account of race does not constitute a racial classification simply because the remedy for racial vote dilution once it is identified requires an awareness of race.

Indeed, the U.S. Supreme Court has long recognized that race-neutral antidiscrimination laws may necessitate the consideration of race in developing remedies for racial discrimination, and while those remedies may need to pass muster under strict scrutiny, the Court has never suggested that the laws themselves are therefore subject to strict scrutiny (*see e.g. Texas Dept. of Hous. & Cmty. Affairs v Inclusive Cmtys. Project*, 576 US 519, 545 [2015] [approving of efforts to "combat racial isolation" that involve the "awareness of race"]).

To be sure, the U.S. Supreme Court has also recognized that constitutional questions may arise when race predominates in the districting process, for example through the creation of a majority-minority district that is not compact and disregards traditional redistricting principles (*see Shaw v Reno*, 509 US 630, 647 [1993]). But even then, the Court has assumed that compliance with provisions of the Voting Rights Act justifies such racial predominance (*see e.g. Cooper v Harris*, 581 US 285, 292, 301 [2017]). And, regardless, Plaintiffs' proposed remedies do not implicate this principle. They seek either a single-member districting plan, with compact districts that adhere to traditional redistricting principles, or cumulative or ranked-choice voting (*see* NYSCEF Doc No. 1 at ¶¶ 134-35; *see also Allen v*

Milligan, 599 US 1, 30-32 [2023] [opinion of Roberts, C.J.] [recognizing that race does not predominate in districting so long as new districts comply with traditional redistricting principles]). The lower court therefore would have had no basis to conclude that even the specific remedies sought in this case would trigger strict scrutiny, much less that the entire statute constitutes a racial classification and should be invalidated.

Adopting the lower court's reasoning would pervert the Equal Protection Clause, using it as a tool to stymie antidiscrimination laws. Far from creating a racial classification, the NYVRA operates to identify and remedy race-based voter suppression and vote dilution. The lower court therefore erred in holding that the NYVRA is subject to strict scrutiny.

II. THE LEGAL TEST UNDER SECTION 2 OF THE FEDERAL VRA DOES NOT REPRESENT THE ONLY CONSTITUTIONALLY PERMISSIBLE WAY TO ADDRESS RACIAL VOTE DILUTION.

The legal test for racial vote dilution under Section 2 comes from the text of Section 2 itself and the Senate Report that accompanied the 1982 amendments to Section 2 (the "1982 Senate Report").[1] It does not represent the only constitutionally permissible way to address racial vote dilution, and the lower court erred in concluding otherwise.

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[1] S Rep 97-417, 97th Cong, 2d Sess at 111. The 1982 Senate Report "elaborates on the nature of § 2 violations and on the proof required to establish these violations." *Thornburg v Gingles*, 478 US 30, 43 (1986).

The U.S. Supreme Court in *Thornburg v Gingles*, 478 US 30 [1986], explained that to succeed on a Section 2 challenge to an at-large election scheme, plaintiffs must first satisfy three preconditions,[2] and then must show, under the totality of circumstances, that the challenged act or practice is not equally open to minority voters (*see generally Gingles*, 478 US 30). Subsequent cases have applied the standard in challenges to redistricting plans composed of single- or multi-member districts (*e.g. Growe v Emison*, 507 US 25 [1993]). Although this framework has been widely applied in federal courts, it does not represent the only constitutionally permissible approach; indeed, for over two decades, numerous state legislatures have successfully applied constitutional alternatives to the *Gingles* framework to address and remedy racial vote dilution.[3]

The *Gingles* test was not derived from the U.S. Constitution. Rather, the U.S. Supreme Court crafted the three preconditions in *Gingles* to effectuate Section 2's *statutory* mandate that violations must be predicated upon a showing that protected class members "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" (*see*

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[2] *See e.g. Milligan*, 599 US at 1 ("First, the minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district. Second, the minority group must be able to show that it is politically cohesive. And third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate." [citations and quotations omitted]).

[3] *See e.g. Higginson v. Becerra*, 786 Fed Appx 705, 706 (9th Cir 2019) (affirming the constitutionality of the California Voting Rights Act, adopted in 2002).

Section 2, codified at 52 USC § 10301[b]; *Gingles*, 478 US at 49-51). Likewise, the totality of circumstances standard derives from the text of Section 2 (*see* § 10301[b]), and the factors courts consider in applying that standard come verbatim from the 1982 Senate Report (*see Gingles*, 478 US at 36; *see also Milligan*, 599 US at 18 ["[A] plaintiff who demonstrates the three preconditions must also show, under the 'totality of circumstances,' that the political process is not 'equally open' to minority voters." (citing to *Gingles* listing the factors enumerated in the 1982 Senate Report)]).

In the decades since *Gingles*, the U.S. Supreme Court has consistently characterized the *Gingles* framework as an application of Section 2 rather than a constitutional mandate (*see e.g. Wisconsin Legislature v Wisconsin Elections Commn.*, 595 US 398, 402 [2022] ["We have construed § 2 to prohibit the distribution of minority voters into districts in a way that dilutes their voting power."]; *Bartlett v Strickland*, 556 US 1, 6 [2009] ["This case requires us to interpret § 2 of the Voting Rights Act of 1965."]). Indeed, because the Section 2 framework is not constitutionally compelled, the Court has specifically recognized that Congress has the authority to change it (*see Milligan*, 599 US at 17 [declining to revisit *Gingles* because "[Congress] can change [Section 2] if it likes. But until and unless it does, statutory *stare decisis* counsels our staying the course."]; *id.* at 42 ["Unlike with constitutional precedents, Congress and the President may enact new

legislation to alter statutory precedents such as *Gingles*." (Kavanaugh, J., concurring)]).

Moreover, New York is one of seven states to codify legal tests for racial vote dilution that differ from the *Gingles* framework,[4] and every constitutional challenge to those tests has been rejected (*see Higginson v. Becerra*, 786 Fed Appx 705, 706 [9th Cir. 2019], *cert. denied*, 140 S. Ct. 2807 [2020] [rejecting a constitutional challenge to vote dilution protections adopted under the California Voting Rights Act]; *Sanchez*, 145 Cal App 4th at 660 [same]; *Portugal*, 530 P3d at 994 [rejecting a constitutional challenge to vote dilution protections adopted under the Washington Voting Rights Act]).

The lower court's opinion is premised on the incorrect assumption that *Gingles* and its progeny represent the only constitutionally permissible framework for addressing racial vote dilution. Furthermore, it incorrectly interprets federal law regarding the scope of Section 2 with respect to coalition claims and influence-district claims to impose constitutional restrictions on states' ability to prohibit discrimination that affects a cohesive minority made up of members of more than one racial group. Although there are important constitutional constraints that apply

[4] *See* Cal Election Code § 14027; Or Rev Stat Ann § 255.405(1); Wash Rev Code Ann § 29A.92.030(1); Va Code Ann § 24.2-130(A); Election Law § 17-206(2); Conn Gen Stat § 9-368j(b)(1); Minn Stat § 200.54(2)(a).

to both the federal VRA and the NYVRA as discussed in section I *supra*, those constraints are not implicated in this case and are not violated by the NYVRA.

A. The lower court's opinion mistakenly characterizes *Thornburg v Gingles* and its progeny as the only constitutionally permissible way to address racial vote dilution.

The lower court identifies several provisions in the NYVRA that, it contends, differ from the protections under Section 2. The lower court claims that these differences somehow render the NYVRA unconstitutional, incorrectly concluding that the NYVRA "must satisfy judicial precedent [under Section 2]" and must "satisfy the clear standards set forth in *Gingles* and its progeny" (Decision at 23, 25). For the reasons explained in section II *supra*, this is clearly false.

First, the lower court improperly suggests that the NYVRA is invalid because it permits claims to proceed without inclusion of the first *Gingles* precondition, which requires plaintiffs to demonstrate that the minority community "is sufficiently large and geographically compact to constitute a majority in a single-member district" (*Gingles*, 478 US at 50). Nothing in the Equal Protection Clause suggests that states must rely on an illustrative single-member district plan to identify racial vote dilution.[5] Rather, the first *Gingles* precondition's requirement that plaintiffs introduce an illustrative single-member district plan is driven by the fact that non-

[5] *Compare Milligan*, 599 US at 18-19 (explaining the Section 2 vote dilution inquiry without reference to the Equal Protection Clause) *with id.* at 27 (describing the constitutional limits on redistricting derived from the Equal Protection Clause), *with Shaw*, 509 US at 647-49 (similar).

dilutive single-member districts are the typical remedy in Section 2 cases (*see e.g. Growe*, 507 US at 40 [the purpose of the first *Gingles* precondition is to confirm "that the minority has the potential to elect a representative of its own choice in some *single-member district*" (emphasis added)]; *Citizens for Good Govt v City of Quitman*, 148 F3d 472, 476 [5th Cir 1998] [there is a "longstanding general rule that single-member districts are to be used in judicially crafted redistricting plans"]).

In contrast, the NYVRA offers remedies other than single-member districts,[6] and it therefore makes no sense to require plaintiffs to introduce an illustrative single-member district plan when that remedy is not sought. This flexibility allows minority voters to obtain relief where the minority population is geographically dispersed but nevertheless has distinctive voting preferences that are rarely or never transformed into representation. Indeed, one important reason every state voting rights act omits or replaces the first *Gingles* precondition is to enable remedies besides single-member districts. States including New York have made a policy choice to break from the preference under federal law for single-member district remedies to vote dilution. The lower court inappropriately converts the federal policy choice into a constitutional mandate, and then uses it as a basis to invalidate New York's more flexible approach. The lower court's reasoning would therefore upend

[6] *See* Election Law § 17-206(5)(a)(ii).

statutes in seven states that have existed for up to 20 years and have never been held constitutionally void.[7]

Second, the lower court claims—without explaining its rationale—that because the NYVRA provides an optional pathway for plaintiffs to prove liability based solely on the "totality of circumstances" without requiring proof of "racially polarized voting," the NYVRA "fails to satisfy the first part of the strict scrutiny standard" (Decision at 18; § 17-206 [2][b][1]). Again, this conclusion is plainly incorrect: The Equal Protection Clause does not demand any specific analyses to identify racial vote dilution (*see supra* n 5).

The flexibility under the NYVRA to allow claims to proceed based on the "totality of the circumstances" factors serves an important purpose: Statistical racially polarized voting analyses often require complex and costly expert studies that may not be possible in small jurisdictions and are not necessary in all cases, especially where dilution is obvious based on the totality of circumstances inquiry. But Plaintiffs must still demonstrate that the protected class actually has candidates of choice and that those candidates are not being elected under the challenged method of election, in order to satisfy the NYVRA's requirement that the challenged method of election has "the effect of impairing the ability of members of a protected class to elect candidates of their choice" (*see* § 17-206 [2][a]). In other words,

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[7] *See supra* n 4.

dispensing with a method of proving harm that is costly and not always suited to the harms the NYVRA aims to address does not relieve NYVRA plaintiffs of the need to prove harm at all. It is simply one way the drafters of the NYVRA sought to tailor the statute to its goal of eliminating racial vote dilution at the local level.

Finally, the lower court faults the NYVRA for granting courts flexibility to consider factors including "the history of discrimination in or affecting the political subdivision," in contrast to *Gingles* and its progeny which, the lower court suggests, always and inflexibly requires proof of historical discrimination (Decision at 18). Setting aside the fact that the Equal Protection Clause does not mandate consideration of specific factors, *see supra* n 5, here, the lower court is simply incorrect in its suggestion that the NYVRA differs from Section 2. The flexible analysis demanded by the NYVRA is consistent with the framework for analyzing the "totality of circumstances" factors under Section 2 (*Johnson v De Grandy*, 512 US 997, 1018 [1994] ["An inflexible rule would run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.'"]; *Westwego Citizens for Better Govt v City of Westwego*, 946 F2d 1109, 1120 [5th Cir 1991] ["No one of the factors is dispositive; the plaintiffs need not prove a majority of them; other factors may be relevant."]).

In sum, the lower court is plainly incorrect in its suggestion that any state statute that fails to align precisely with the *Gingles* framework is unconstitutional.

Gingles does not define the only constitutionally permissible test for vote dilution, nor does it set a ceiling on what policies state legislatures can adopt to combat racial vote dilution (*see supra* section II). By the lower court's logic, all state voting rights acts would be facially invalid merely because they provide alternatives to the *Gingles* framework. Yet every other court that has faced this question directly has decided exactly the opposite (*see supra* section II).

B. The lower court's reliance on federal precedent concerning coalition claims is misplaced.

The lower court references a "history of cases rejecting . . . coalition claim[s]," Decision at 23, and opines that the NYVRA is necessarily unconstitutional because it codifies the ability of a coalition of voters of more than one minority group to collectively vindicate their right to be free from vote dilution and other forms of voting discrimination.[8] Despite its allusion to a "history of cases," the lower court cites only to *Petteway v Galveston County*, 111 F4th 596 (5th Cir 2024 en banc), for the proposition that the NYVRA's authorization of coalition claims is "in violation of federal law and cannot stand" (Decision at 25).

The lower court's reliance on *Galveston* is misguided for two reasons. *First*, *Galveston* does not hold that coalition claims are *prohibited* by the U.S. Constitution;

[8] *See* Election Law § 17-206(8) ("Coalition claims permitted. Members of different protected classes may file an action jointly pursuant to this title in the event that they demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate.").

it holds they are not *authorized* by Section 2 (*Galveston*, 111 F4th at 599 [analyzing whether "Section 2 of the Voting Rights Act authorizes coalition[]" claims]). Indeed, the *Galveston* opinion was based purely on the Fifth Circuit's textual analysis of Section 2, concluding that "[t]he text of Section 2 does not authorize coalition claims, either expressly or by implication" (*id.* at 604). The Fifth Circuit in *Galveston* did not engage in any analysis or inquiry regarding the constitutionality of coalition claims (*id*.).

Second, even if federal court constructions of the text of Section 2 were somehow relevant to the constitutionality of the NYVRA, the lower court fails to acknowledge that there is currently a federal circuit split concerning whether Section 2 permits coalition claims. Aside from *Galveston*, only one other federal circuit court has ever held that coalition claims are not permitted under Section 2.[9] In contrast, several federal circuit courts, including the Second Circuit, have held that coalition claims *are* permitted under Section 2.[10]

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[9] *See Nixon v Kent County*, 76 F3d 1381 (6th Cir 1996) (finding that plaintiffs may not bring coalition claims under § 2).

[10] *See e.g. Concerned Citizens of Hardee County v Hardee County Bd. of Commrs.*, 906 F2d 524, 526 (11th Cir 1990) (finding that "[t]wo minority groups . . . may be a single section 2 minority if they can establish that they behave in a politically cohesive manner."); *Bridgeport Coalition for Fair Representation v City of Bridgeport*, 26 F3d 271, 279 (2d Cir 1994) (same), *vacated on other grounds by Johnson v De Grandy*, 512 US 997 (1994); *Badillo v City of Stockton*, 956 F2d 884 (9th Cir 1992) (same).

C. The lower court's reliance on federal precedent concerning influence districts is misplaced.

The lower court further argues that the NYVRA's acceptance of "influence claims" is unconstitutional.[11] Specifically, the lower court argues that "[a]ttempts to extend the [federal] VRA to the degree that Plaintiffs assert here have been soundly rejected," citing to the U.S. Supreme Court in *LULAC v Perry*, 548 US 399 (2006), which declined to hold that Section 2 permits plaintiffs to assert influence claims. As with other federal opinions cited by the lower court, the Supreme Court's opinion in *LULAC* was based expressly on its interpretation of the text Section 2, not the U.S. Constitution (*see LULAC*, 548 U.S. at 445 [explaining that the text of Section 2 "requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice"]). That is, *LULAC* construed Section 2's protection of the minority group's ability to elect "representatives of their choice" (52 USC § 10301 [b]), to preclude claims seeking districts that would not provide them with that ability. This construction was based on the words of the statute, not on federal constitutional law. There is no basis in *LULAC*—or any other U.S. Supreme Court opinion—to support the lower court's contention that the U.S. Constitution prohibits states from proscribing voting rules or devices that limit a minority group's ability to influence election outcomes or that the Equal Protection

[11] *See* Election Law § 17-206(2)(a) (prohibiting any method of election that impairs the ability of members of a protected class to "influence the outcome of elections, as a result of vote dilution.").

Clause demands that a minority group show that it is able to dictate election outcomes before it is entitled to be free from discrimination.

Indeed, the lower court's suggestion that influence claims are unconstitutional is belied by the Supreme Court's opinion in *LULAC* itself, which explains that the presence or absence of influence districts is relevant to the analysis of compliance with Section 5 of the federal Voting Rights Act, even though influence district claims are not authorized under the text of Section 2 (*see LULAC*, 548 US at 446 ["[W]hile the presence of districts where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process is relevant to the § 5 analysis, the lack of such districts cannot establish a § 2 violation." (citations omitted)]). Implicit in the Supreme Court's reasoning is the recognition that the creation of influence districts to comply with federal civil rights laws is consistent with constitutional principles.

III. THE LOWER COURT'S OPINION VIOLATES BASIC PRINCIPLES OF CONSTITUTIONAL AVOIDANCE AND SEVERABILITY.

The New York Court of Appeals has long held that courts must construe a statute in a way that will bring it into harmony with the constitution if the statutory language permits, enabling courts to avoid deciding constitutional questions unnecessarily (*Seitz v Drogheo*, 21 NY2d 181, 186 [1967] [courts must construe "legislative enactment[s] so as to preserve their constitutionality and continuing vitality"]; *People v Mancuso*, 255 NY 463 [1931] [courts must "save the challenged

statute unless, in saving it, they pervert it"]; *Matter of Syquia v Bd. of Educ. of Harpursville Cent. Sch. Dist.*, 80 NY2d 531, 535 [1992] ["[C]ourts should not address constitutional issues when a decision can be reached on other grounds."]; *Peters v New York City Hous. Auth.*, 307 NY 519, 528 [1954] ["[C]ourts must refrain . . . from passing on the constitutional issues" when the "record reveals . . . nonconstitutional grounds upon which the case might be disposed of[.]"]).

Similarly, if a court concludes that a portion of a statute is unconstitutional, it is a "fundamental rule that . . . if the invalid part is severable from the rest, the portion that is constitutional may stand" (20 NY Jur 2d Constitutional Law § 93; *CWM Chem. Services, L.L.C. v Roth*, 6 NY3d 410, 423 [2006]). Application of severability is "a question of legislative intent, namely whether the legislature, if partial invalidity of the statute had been foreseen, would have wished the statute to be enforced with the valid part exscinded, or rejected altogether" (*People v Viviani*, 36 NY3d 564, 583 [2021]).

Moreover, "courts of original jurisdiction should refrain from determining the constitutionality of statutes except where the invalidity of the act is apparent on its face" (20 NY Jur 2d Constitutional Law § 44; *see also People v Wright*, 173 NYS2d 160, 163 [1958]; *Cohen v Cuomo*, 35 Misc 3d 478 [Sup Ct 2012], *affd*, 19 NY3d 196 [2012]).

The lower court's decision fails to adhere to these principles. Indeed, the lower court made no effort whatsoever to construe the statute in a manner consistent with constitutional principles. And the lower court ignored New York's strong severability rule, as well as the severability provision in the NYVRA itself, which requires severing invalid provisions to preserve the statute, rather than invalidation of any entire section of the NYVRA or the NYVRA as a whole.[12]

A. It is possible to enforce § 17-206[2][b][i] in a manner that comports with constitutional requirements.

Even if the lower court identified legitimate constitutional issues with NYVRA's prohibition on racially discriminatory at-large elections—which as explained above, it did not—it must construe these provisions "as to preserve their constitutionality" to the extent possible, or in the alternative, sever any unconstitutional provisions while leaving the rest of the statute intact, rather than declaring the statute unconstitutional as a whole (*see Seitz*, 21 NY2d at 186). The lower court made no effort to preserve the constitutionality of the challenged provisions even though simple steps were available to do so.

For example, the lower court claims that "the NYVRA fails to satisfy the first part of the strict scrutiny standard" because the statute deviates from the *Gingles*

[12] *See* Election Law § 17-222 ("If 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, and to this end the provisions of this title are severable.").

framework by allowing plaintiffs to bring claims based on evidence of the "totality of circumstances" without having to prove that racially polarized voting exists (Decision at 18). As explained above (*see supra* section II.A), this legal conclusion is incorrect, but even if it were true, the lower court never should have reached this question. Plaintiffs in this case did, in fact, demonstrate the existence of racially polarized voting.[13] It was therefore improper for the court to reach the hypothetical question of whether the statute could be applied without such evidence (*see e.g. Seitz*, 21 NY2d at 186). Moreover, even if the lower court concluded that it had to reach the question, it could have easily construed the statute in a manner that avoids a constitutional question: In particular, § 17-206[3], which governs the totality of circumstances inquiry under the NYVRA, grants courts discretion to consider not only the factors listed in the statute, but any other evidence that is relevant to the question of whether a violation has occurred, and weigh such evidence as it sees fit. The statute is therefore susceptible of a construction in which the totality of circumstances inquiry also requires evidence of racially polarized voting, and the lower court could and should have applied that construction if it concluded that doing so was necessary to avoid a constitutional question.

[13] *See* NYSCEF Doc No. 72 at 64 (Oct. 10, 2024) ("Dr. Barreto found a 'clear, consistent, and statistically significant finding of racially polarized voting in the Town of Newburgh.'").

Similarly, as discussed in sections II.B, II.C *supra*, the lower court incorrectly concludes that the NYVRA's provisions permitting coalition claims and influence claims render the statute unconstitutional because they deviate from federal case law interpreting Section 2. But even if the lower court were correct, there were obvious steps it could have taken to nonetheless preserve the statute. For instance, the lower court could have severed § 17-206[8], which codifies a right to coalition claims, without impacting the remainder of the statute. Or the lower court could have severed the phrase "or influence the outcome of elections" from § 17-206[1][a] without impacting the rest of the statute (*Mancuso*, 255 NY at 473 ["Severance . . . does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment. [It] is not a principle of form. It is a principle of function." (citations and quotations omitted)]). The lower court made no effort to consider these options, jumping immediately to the extreme and disfavored position of rendering the statute unconstitutional in its entirety.

B. The lower court took the extraordinary step of invalidating the entirety of the NYVRA without any justification or explanation.

The lower court held that "the NYVRA is in violation of federal law and therefore cannot stand" and ordered that "the NYVRA is hereby stricken *in its entirety*," Decision at 25 (emphasis added), notwithstanding the fact that this case pertains only to one narrow provision of the NYVRA: the prohibition on racially discriminatory at-large elections contained in § 17-206[2][b][i]. The NYVRA

contains a comprehensive set of policies to "ensure that all voters have an equal opportunity to elect candidates of their choice," codified in thirteen sections of New York's Election Law.[14] Given the staggering implications of the lower court's order, and the fact that the decision makes no reference to any provision of the NYVRA other than its prohibition on racially discriminatory at-large elections, Plaintiffs invited the lower court to clarify the scope of its opinion, but the lower court declined to offer clarification.[15]

The NYVRA includes at least six substantive provisions that are wholly distinct from its prohibition on racially discriminatory at-large elections contained in § 17-206[2][b][i], about which the lower court offered no analysis. Indeed, it made no direct reference to them whatsoever.

First, the NYVRA prohibits racial vote dilution in redistricting (*see* § 17-206[2][b][ii]). NYVRA claims challenging redistricting plans are governed by a separate provision under a separate legal standard than claims challenging at-large elections (*compare* § 17-206[2][b][i] [authorizing claims against at-large elections], *with* § 17-206[2][b][ii] [authorizing claims against district-based elections]).

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[14] The John R. Lewis Voting Rights Act of New York includes 13 distinct sections (*see* 2021 Reg Sess NY Senate Bill 1046E [2022], codifying Election Law §§ 17-200-222).

[15] Plaintiffs sent a letter to the lower court inviting it to offer clarification, noting that its opinion "could be read either to strike the entirety of the [NYVRA]; or to strike just NY Elec. § 17-206(2)(b)(i), the provision at issue in this case" (NYSCEF Doc No. 149; *see also* NYSCEF Doc No. 150). The lower court responded that it "will not issue any substantive response to any issues, etc. that might have been raised in the aforementioned letter(s)" (NYSCEF Doc No. 152).

Second, the NYVRA prohibits voter suppression through discriminatory application of election rules or procedures (*see* § 17-206[2][a]). Again, this provision addresses distinct harms and is governed by a distinct legal standard from the provision at issue in this case.

Third, the NYVRA establishes the first-ever state level preclearance program (*see* § 17-210). Modeled on Section 5 of the federal Voting Rights Act, the NYVRA's preclearance provision requires that political subdivisions with a history of racial discrimination or other indicia that protected class members may be vulnerable to such discrimination "preclear" with the New York Attorney General's office or a designated court changes to certain enumerated voting rules or practices before they can take effect (*id.*).

Fourth, the NYVRA prohibits any person from engaging in acts of voter intimidation, deception, or obstruction, and codifies a new private right of action to allow those who have been the target of such actions to bring civil claims to enforce these prohibitions (*see* § 17-212).

Fifth, the NYVRA requires language assistance for limited English proficient voters in an expanded number of jurisdictions and languages, such as Arabic, in addition to assistance already required under Section 203 of the federal Voting Rights Act (*see* § 17-208).

Finally, the NYVRA codifies the "democracy canon" into New York law, a canon of judicial construction of election laws ensuring that ambiguous statutes are construed to favor the meaningful ability of qualified voters, regardless of race, to cast ballots and have them counted whenever possible (*see* § 17-202). Unlike many other states, in which the canon is well-established in case law or statute,[16] § 17-202 provides the primary authority for the democracy canon in New York.

The lower court's order striking down the NYVRA in its entirety eliminates each of these crucial protections for New York voters designed to ensure fair and equal access to the ballot box, without even a modicum of analysis to suggest that they are constitutionally infirm. In addition, it uproots a milestone achievement in New York's civil rights history while undercutting key protections that state and local officials have been actively implementing and upon which voters have come to rely.

Eliminating the NYVRA's prohibition on racially discriminatory redistricting plans will create confusion and disruption for local governments that have relied on these provisions to ensure their citizens are able to participate meaningfully in the democratic process. During the most recent round of redistricting, many local

[16] *See generally* Richard L. Hasen, *The Democracy Canon*, 62 Stanford L Rev 69 (2009).

governments across the state ensured that their redistricting plans complied with the new prohibition on racial vote dilution in redistricting under § 17-206[2][b][ii].[17]

Eliminating the preclearance program will squander substantial taxpayer-funded efforts to implement a groundbreaking protection against discriminatory voting changes and eliminate a crucial safeguard that voters and local governments alike have come to rely upon to ensure their voting rules are fair and their elections equally open to all. The NYVRA creates the first state-level preclearance program in the nation and has provided a model for other states across the country.[18] The New York Attorney General's Office has already devoted substantial resources to implementing this program, including promulgating detailed regulations, establishing a robust administrative framework, and hiring new staff dedicated to its enforcement.[19] Its removal will leave marginalized communities vulnerable to the very harms the program was designed to prevent, reversing hard-won progress in combating racial discrimination in voting.

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[17] *See e.g.* NY City Districting Commn 2022-2023 Final Agency Report, 17 n 11 [Jan. 17, 2023], available at https://www.nyc.gov/assets/districting/downloads/pdf/Final-Agency-Report.pdf; Albany County Majority Minority Dist. Redistricting Subcomm Report, 26 [Sept. 1, 2022], available at https://www.albanycountyny.gov/home/showpublisheddocument/22215/637992850032230000.

[18] A preclearance program similar to the program in the NYVRA was adopted in Connecticut in 2023 (Conn Gen Stat § 9-368[m]). Proposals to adopt similar programs have been introduced in recent years in state legislatures in New Jersey, Maryland, Florida, and Alabama (2025 Ala Assembly Bill HB60, Ala Senate Bill SB7 § 6; 2024 Fla Senate Bill SB1522, Assembly Bill HB1035 § 97.0296; 2024 Md Senate Bill SB0660, Md Assembly Bill HB0800 § 15.5-401; 2024 NJ Assembly Bill A4554, NJ Senate Bill S2997 § 12).

[19] *See* 13 NYCRR 500.

Voters have likewise come to rely upon the protections of the NYVRA. For example, prior to the recent national election, a coalition of civil rights organizations including LDF distributed materials to voters across the state to provide education on the protections offered by NYVRA—especially the protection against voter suppression and the tools to combat intimidation, deception, and obstruction.[20] Voters who have come to rely on the NYVRA's protections may feel disempowered or disenfranchised, potentially leading to decreased voter participation and trust in the democratic process.

The sweeping scope of the lower court's order is especially unsound given that it failed to mention any of these provisions, let alone undertake any analysis of their constitutionality or engage in the rigorous severability analysis demanded by controlling precedent (*see e.g. Viviani*, 36 NY3d at 583). If the lower court had undertaken such an analysis, it would have reached the inescapable conclusion that these provisions are wholly distinct from the narrow provision at issue in this case and would be unaffected if § 17-206[2][b][i] were severed from the statute. Given the NYVRA's statutory severability provision, *see supra* n 12, and binding precedent, the lower court's decision to invalidate the entire NYVRA "in its

[20] Press Release from NAACP Legal Defense & Educ. Fund, Inc. [Oct. 15, 2024], available at https://www.naacpldf.org/press-release/52835/.

entirety" on the basis of its concerns regarding a single narrow provision represents a fundamental legal error.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's decision in its entirety and hold that the New York Voting Rights Act is constitutional.

Dated: November 27, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 22 NYCRR § 1250.4(a)(2), on this 27th day of November, 2024, amicus curiae provides this proof of service to accompany their brief of amicus curiae.

Dated: November 27, 2024

Respectfully submitted,

/s/ Maia Cole

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 1250.8(j), on this 27th day of November, 2024, amicus curiae provides this printing specifications statement that the brief was prepared on a computer in Times New Roman, a proportionally spaced typeface, with 14-point font size and 2.0 line spacing. Pursuant to 22 NYCRR § 1250.8(f)(2), the length of this brief is 6,959 words, which does not exceed this Court's limitation of 7,000 words for a brief of amicus curiae.

Dated: November 27, 2024

Respectfully submitted,

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