Orange County Index No. EF002460-2024
Appellate Division: Second Department Docket No. 2024-11753

# Supreme Court of the State of New York

ORAL CLARKE, ROMANCE REED, GRACE PEREZ, PETER RAMON, ERNEST TIRADO, and DOROTHY FLOURNOY,
*Plaintiffs-Appellants*,

-and-

LETITIA JAMES, Attorney General of the State of New York,
*Intervenor-Appellant*,

-against-

TOWN OF NEWBURGH and TOWN BOARD OF THE TOWN OF NEWBURGH,
*Defendants-Respondents*.

## BRIEF OF AMICI CURIAE TOWN OF MOUNT PLEASANT AND TOWN BOARD OF THE TOWN OF MOUNT PLEASANT IN SUPPORT OF DEFENDANTS-RESPONDENTS

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## PRELIMINARY STATEMENT

The John R. Lewis Voting Rights Act of New York ("NYVRA") creates an expansive race-based set-aside program, applicable to local elections, that goes well beyond any other voting rights statute in the nation. Its prohibition against "vote dilution" is triggered any time political views diverge along racial or ethnic lines in a locality that conducts at-large elections. This unremarkable phenomenon, in turn, activates a requirement that localities (or state courts) restructure local election systems to meet a racial goal: members of the plaintiff's racial group must elect their preferred candidates to more seats than under the at-large system. But that rule can be satisfied only if members of other racial groups fail to elect their preferred candidates to more seats than under the at-large system. Nothing about this regime is "modest" (Brief for Plaintiffs-Appellants ["Brief"] at 8). No different from race-based set-aside programs in college admissions or public contracting, the NYVRA "distributes burdens or benefits to individuals on the basis of their race" (*id.* at 6). Strict scrutiny therefore applies.

The NYVRA fails that daunting test. It does not prevent "racial discrimination in voting," as Plaintiffs-Appellants ("Plaintiffs") allege (*id.* at 7). A plaintiff need not prove racial discrimination to prevail, and Plaintiffs here and elsewhere, including in amici curiae's case, do not allege discrimination. They challenge a race-neutral, at-large voting system under a theory of "vote dilution." But New York lacks

any compelling state interest in preventing unintentional vote dilution. When Congress enacts laws like Section 2 of the Voting Rights Act, it acts to enforce the Fourteenth and Fifteenth Amendments, and the Supreme Court has deemed this power sufficiently compelling to justify prophylactic race-based measures. But states lack a similar power to demand race-based action to deter their own race-based discrimination. Further, even if preventing vote dilution were a compelling interest, the NYVRA would not be narrowly tailored to that end. The statute twists the concept of dilution beyond recognition, including by eliminating the standard requirement of proof that a majority voting bloc regularly defeats candidates preferred by a geographically compact and cohesive minority. Because it fails strict scrutiny, the NYVRA is unconstitutional.

Yet Plaintiffs here and elsewhere invite the Court to apply the statute despite its constitutional infirmities. The Court should decline that invitation. No rule of law permits a state court to declare itself a federal-Constitution-free zone. The Supremacy Clause creates a rule of decision that demands New York courts apply the Equal Protection Clause in cases properly before them, and it overrides any state requirement that treats "capacity" or "standing" as a gateway to constitutional defenses. Nor does New York law prohibit constitutional challenges to be raised defensively where localities plausibly contend the NYVRA will compel infringements of constitutional rights.

Because the Supreme Court properly applied these principles, its judgment should be affirmed.

## INTEREST OF AMICI CURIAE

The Town of Mount Pleasant ("Town") is a New York political subdivision subject to the NYVRA (*see* Elec. Law § 17-204). The Town Board of Mount Pleasant ("Board") is the Town's legislative, appropriating, governing and policy-determining body (the Town and Board collectively, "Mount Pleasant"). Like Defendant-Respondent Town of Newburgh, the Town has conducted elections to its Board at-large. In January 2024, four residents sued Mount Pleasant, claiming that the Town's at-large method of voting violates the NYVRA based upon past and expected racial voting behavior in the Town (*Serratto v Town of Mount Pleasant*, Sup Ct, Westchester County, Everett, J., Index No. 55442/2024, Jan. 9, 2024, Complaint). Like Plaintiffs here, the residents in Mount Pleasant's case seek a system designed to enable members of their racial group to prevail in more elections than they do under the at-large system. The same counsel representing Plaintiffs here represents the challengers in Mount Pleasant's case, and some of the amici supporting Plaintiffs also filed briefs supporting the challengers in Mount Pleasant's case.

Mount Pleasant moved for summary judgment, asserting among other things that the NYVRA violates the equal protection guarantees of the United States and New York Constitutions. But the court below ruled in this case before any ruling

was issued in Mount Pleasant's case. Accordingly, adjudication of Mount Pleasant's summary-judgment motion is stayed by consent of the parties pending this Court's forthcoming decision in this appeal. Depending on the scope of its ruling, this Court may bind the parties in Mount Pleasant's case on at least some questions presented in that case (*see Maple Med., LLP v Scott*, 191 AD3d 81, 90 [2d Dept 2020] ["[T]he Supreme Court is bound to apply the law as promulgated by the Appellate Division in its own Department"]). By consequence, Mount Pleasant has a clear interest in stating its arguments in this appeal. It would be unfair for those challenging Mount Pleasant's at-large system to obtain *de facto* representation by their lawyers in this case, and for the Court to accept amicus briefs further advancing their positions, unless Mount Pleasant also has an opportunity to state and defend its position. That approach would be especially unfair where Plaintiffs contend that no locality may raise constitutional defenses in NYVRA cases (*see infra* § III).

The importance of this matter, not only to the parties to this matter, but to all political subdivisions in New York, including most especially those like Mount Pleasant that are already threatened with pending litigation under the NYVRA, cannot be understated. This may be Mount Pleasant's only opportunity to address the constitutional issues presented by the NYVRA before a ruling by this Court that may significantly impact, if not resolve, Mount Pleasant's case. The Court should accept and consider this brief.

## ARGUMENT

The NYVRA is unprecedented and unconstitutional. By enabling a plaintiff's racial group to obtain a new election system designed to ensure members of that group elect their preferred candidates, and that members of other racial groups fail in that endeavor, it distributes benefits and burdens on the basis of race in every application. Just like race-based set-aside programs in other settings, this one triggers strict scrutiny—and fails. This Court is duty-bound to apply the Equal Protection Clause, and not the NYVRA, where (as here) the two conflict. The judgment below should therefore be affirmed.

### I. The NYVRA Warrants Strict Scrutiny.

Because it confers benefits and imposes burdens on the basis of race, the NYVRA merits strict scrutiny under governing U.S. Supreme Court precedent.

**A.** "It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny" (*Parents Involved in Cmty. Schs. v Seattle Sch. Dist. No. 1*, 551 US 701, 720 [2007]). This rule applies to "*all* racial classifications imposed by the government" (*Johnson v California*, 543 US 499, 505 [2005] [emphasis added]). The clearest case of this is "an express racial classification" (*id.* at 509), which is "explicit" in a statute (*Hunt v Cromartie*, 526 US 541, 546 [1999]). Such classifications are "inherently suspect" on their face and require no further inquiry into motive

(*Washington v Seattle Sch. Dist. No. 1*, 458 US 457, 485 [1982]; *see also Adarand Constructors, Inc. v Pena*, 515 US 200, 213 [1995] [distinguishing easier cases where "classifications [are] based explicitly on race" from "difficult[]" cases where "facially race neutral" laws "are motivated by a racially discriminatory purpose"]).

This is a strict scrutiny case. Under the NYVRA, liability lies against an at-large system when "voting patterns of members of the protected class within the political subdivision are racially polarized" (Elec. Law § 17-206[2][b][i][A]). Racial polarization exists under the statute when "there is a divergence in the candidate, political preferences, or electoral choice of members" of different racial groups (*id.* § 17-204[6]). Independently, liability arises if, "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]). Both bases of liability hinge on the phrase "protected class," which "means a class of individuals who are members of a race, color, or language-minority group" (*id.* § 17-204[5]). A finding of liability in turn mandates "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]).

Through these interlacing provisions, the NYVRA "distributes burdens or benefits on the basis of individual racial classifications" (*Parents Involved*, 551 US at 720) that are "explicit" on the face of a statute (*Hunt*, 526 US at 546). Liability

under the NYVRA is explicitly race-based, and it affords special race-based remedies: in at least some elections, candidates preferred by some racial groups (i.e., the plaintiffs) should win and those preferred by others (i.e., not the plaintiffs) should lose (*see* Elec. Law §§ 17-204[5]-[6], 17-206[5]). And it sets the standard so low that mere political differences between members of different racial and ethnic groups give rise to a state-imposed race-based election system (*id.* § 17-206[5]). This is a race-based set-aside program where local election systems must—by law—be configured to help groups based solely on their race or ethnicity (*see City of Richmond v J.A. Croson Co.*, 488 US 469, 505-06 [1989]).

**B.** Plaintiffs and their amici resist this basic point by recharacterizing the NYVRA as a law "that merely *refer[s]* to race" (Brief 30; *see also* Brief for Amicus Curiae NAACP ["NAACP Brief"] at 4-5; Brief for Intervenor-Appellant Attorney General ["AG Brief"] at 25). That view defies their own description of this (and every) NYVRA suit. Plaintiffs complain that "no Black or Latino individual has *ever* been elected to the Town Board" and insist this "underrepresentation" is "easily rectifiable" if the Town would "switch to any number of other electoral systems" (Brief at 3-4). The relief Plaintiffs want does not merely *refer* to race; it demands a system that "would provide Black and Hispanic voters with a reasonable opportunity to elect candidates of their choice" (*id.* at 11).

Divvying electoral benefits and burdens on the basis of race is no less injurious than race-based admissions burdens (*Students for Fair Admissions, Inc. v President & Fellows of Harvard Coll.*, 600 US 181, 194 [2023] [*SFFA*]) and contracting burdens (*J.A. Croson*, 488 US at 505-06), and such injuries are well-recognized in precedent (*see e.g. Gomillion v Lightfoot*, 364 US 339 [1960]. An explicit command that members of some groups see an increased opportunity to elect their candidates of choice carries a concomitant, implicit command that members of other groups see a diminishment of that opportunity.[1] It is no different from a command that members of some racial groups obtain an enhanced opportunity for admission to a college and its implicit command that members of other racial groups suffer a diminishment of that opportunity. Plaintiffs are thus wrong to call "the affirmative action context … so far removed from this one" (Brief at 41). By comparison, a state law demanding that localities redesign election systems to ensure that white voters prevail over minority voters in electing their preferred candidates would plainly impose racial classifications. That the NYVRA will typically operate in reverse does nothing to alter

[1] It does not matter whether the NYVRA guarantees minority-preferred candidate success; even a state-imposed thumb on the scales is a racial "preference" (*Adarand Constructors*, 515 US at 219; *see id.* at 204-25 [applying strict scrutiny to race-based "incentive"]); *SFFA*, 600 US at 194 [same for process that takes "race into account"]).

the equal-protection analysis[2] (*see e.g. J.A. Croson*, 488 US at 493 [plurality opinion]; *Adarand Constructors*, 515 US at 227).

Plaintiffs do not meaningfully address this hole in their reasoning and instead focus on peripherals and word games. They first claim that no race-based burdens or benefits exist in the statute (Brief at 31). But the NYVRA explicitly demands "appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process" (Elec. Law § 17-206[5][a]), and Plaintiffs construe that to require a system where some racial groups prevail more often than under the challenged at-large system. Because the plaintiff's group is defined by race and receives set-asides in the electoral system as "voters of race, color, and language-minority groups" (*id*.), the statute imposes "*racial classifications*," as even Plaintiffs understand that term (Brief at 31).

Second, Plaintiffs advance several iterations of the theme that NYVRA relief does not "depend on anyone's race per se" (*id.* at 32; *see also* NAACP Brief at 6 [similar]). This is difficult to understand. Their brief repeatedly cites the NYVRA as the basis for their race-based demand that "Black and Latino residents of Newburgh" elect their candidates of choice (Brief at 3) in an "alternative" election method "that would improve their representation relative to the status quo" (*id.* at 9). The NYVRA

[2] In contending that white voters may bring NYVRA suits, Plaintiffs only confirm the problem with race-based election favoritism (Brief at 32, 37).

does not assist violin players or construction workers in electoral opportunity at the expense of piano players or chefs. It benefits and burdens groups defined by race and thus does, in the strictest sense, depend on race "per se." Meanwhile, Plaintiffs' suggestion that racial classifications are no problem so long as race is not used "alone" (Brief at 37) is simply wrong. Race-based state action is no less race-based because it depends on other factors as well (*see e.g. Hunter v Underwood*, 471 US 222, 233 [1985] [rejecting voting ban that "was motivated by a desire to discriminate against blacks on account of race," even though it made felon status the operative factor]).

Third, Plaintiffs are also incorrect in their assertion that "jurisdictions do *not* need to classify by race to comply with the NYVRA" (Brief at 35). Their next sentence admits the NYVRA requires jurisdictions to "make changes to their electoral system to prevent or remedy the violation" (*id.*). Where the alleged "violation" is that too many white-preferred candidates win and too many Black- or Latino-preferred candidates lose (or some other variation on that scenario), jurisdictions *must* classify by race to *remedy* that situation. Here, Newburgh must design systems to help Black- or Latino-preferred candidates win and ensure white-preferred candidates lose. Plaintiffs' assertion fares no better than the defense of a race-based college admissions system on the ground that schools need not divvy benefits and

burdens on the basis of race, but merely make changes to their admissions systems to remedy a violation defined as an insufficient number of minority admissions.

Fourth, Plaintiffs advance the troubling argument that the NYVRA poses no problem because it "distributes no benefits or burdens to *individuals*," but only imposes burdens on "*political subdivisions*" (*id.* at 40). The NYVRA is a state law that commands that race-based remedies be implemented by state courts or political subdivisions. Plaintiffs' suggestion that New York can bypass constitutional constraints by commanding discrimination by instrumentalities and intermediaries is as poorly reasoned as would be a contention that New York may require that school boards impose racially segregated school systems (*see Cooper v Aaron*, 358 US 1, 9 [1958]).

Fifth, Plaintiffs point to the U.S. Supreme Court's racial-gerrymandering precedents and suggest no racial classifications arise from the NYVRA because racial gerrymandering is not needed to provide a remedy and "a court-ordered district should not zig and zag to take" in members of certain racial groups (Brief at 5). But regularly shaped districts do not excuse racial classifications that otherwise exist, and racial-gerrymandering precedents do not identify the sole means by which states may deny equal protection. Far from it, they present a unique application of the Equal Protection Clause based on the race-based placement of voters "within or without a particular district" (*Bethune-Hill v Virginia State Bd. of Elections*, 580 US

178, 182 [2017] [citation omitted]), regardless of electoral harm (*see Shaw v Reno*, 509 US 630, 652 [1993]). Here, the NYVRA imposes race-based electoral benefits and burdens that racial-gerrymandering precedents do not purport to justify. Besides, even under racial-gerrymandering precedents, regularly shaped districts demand strict scrutiny so long as race "is the legislature's predominant motive for the design of the district as a whole" (*Bethune-Hill*, 580 US at 192). That is because "[t]he Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications" (*id.* at 189).

Sixth, though not express, a point lurking in Plaintiffs' brief is that strict scrutiny is not implicated because minority voters and candidates deserve to prevail more than they do (*see* Brief at 11). Plaintiffs presumably do not make this point plainly because it is properly directed to the strict-scrutiny test, not to the threshold question of whether strict scrutiny applies. "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics" (*J.A. Croson*, 488 US at 493 [plurality opinion]; *Adarand Constructors*, 515 US at 227 [same]). "It is therefore irrelevant that a system of racial preferences … may seem benign. Any racial classification must meet strict scrutiny" where "government decisions 'touch upon an individual's race or ethnic background'" (*Fisher v Univ. of*

*Tex. at Austin*, 570 US 297, 307 [2013] [citation omitted]; *see also Parents Involved*, 551 US at 720). Just as a race-based college-admissions program would not escape strict scrutiny on the ground that, through it, "Black and Latino [applicants] would, for the first time," gain admission (Brief at 4), a race-based electoral system does not escape strict scrutiny on the ground that the Legislature deems it beneficial.

**C.** Plaintiffs and amici also defend the NYVRA by comparison to various laws, state and federal, that prohibit discrimination (*see* Brief at 32-33, 36-37; AG Brief at 26-27; NAACP Brief at 4-5, 7). But anti-discrimination statutes forbid regulated persons from taking action on the basis of a protected category (*see e.g. Bostock v Clayton County*, 590 US 644, 655 [2020] [discussing Title VII]). They do not *require* state action on the basis of protected categories. The NYVRA's vote-dilution prohibition neither prohibits discrimination in voting nor employs race-neutral tools. It requires race-based electoral systems in every application.

Plaintiffs and the Attorney General also analogize the NYVRA to VRA Section 2, but that analogy is misplaced. The U.S. Supreme Court has expressly acknowledged that Section 2 requires "race-based" remedies (*Allen v Milligan*, 599 US 1, 41 [2023]), a point Plaintiffs oddly emphasize (*see* Brief at 26) before asserting Section 2 is somehow race-neutral (*see id.* at 35). Amici Campaign Legal Center and the American Civil Liberties Union make a similar point (*see* Amici Curiae Brief for CLC and ACLU at 14). But contrary to Plaintiffs' and amici's briefing, *Milligan* was

clear in finding Section 2 to be a race-based statute and, in fact, the Court rejected an assertion that only a "race-neutral benchmark" can satisfy Section 2 (599 US at 23-30).

The appellants in *Milligan* argued that Section 2 would not be constitutional if read "to deploy racial preferences in redistricting, or for any voting practice" (Brief for Appellants in *Milligan*, 599 US 1, available at 2022 WL 1276146, at *73). In response, the U.S. Supreme Court did *not* employ Plaintiffs' preferred rationale that Section 2 is race-neutral (*see* Brief at 35). Rather, the Court upheld the statute, not because it avoided strict scrutiny, but because Congress' power to enforce the Fourteenth and Fifteenth Amendments "authorize[s]" it to command "race-based" remedies that are properly tailored to its enforcement power (*Milligan*, 599 US at 41). *Milligan* made clear that Section 2 passes constitutional muster because it is narrowly tailored to a compelling interest (that Congress possess), not because it bypasses strict scrutiny in the first instance. The NYVRA must likewise satisfy strict scrutiny or be deemed unconstitutional.

**D.** Plaintiffs cite decisions of other state courts applying rational-basis review, not strict scrutiny, to state voting rights acts. These decisions are not informative here.

To begin, the NYVRA is far more expansive in creating the predicates for race-based election systems than the Washington and California statutes upheld in

the precedents Plaintiffs cite. For example, the Washington and California statutes expressly incorporate case law applying VRA Section 2, including the requirement that minority-preferred candidates usually lose (*see* Wash. Rev. Code § 29A.92.010[3]; Cal. Elec. Code § 14026[e]). But the NYVRA defines polarization as any "divergence" in political views (Elec. Law § 17-204[6]) and expressly abrogates the traditional requirement that minority-preferred candidates usually lose (*see infra* § II.B). Additionally, the Washington and California statutes require proof of vote dilution in addition to various factors establishing continued effects of past discrimination (Wash. Rev. Code § 29A.92.030; Cal. Elec. Code § 14028), whereas the NYVRA imposes liability in cases where neither vote dilution nor continued effects of past discrimination are proven (Elec. Law § 17-206[2]). Precedents considering fundamentally different laws are not persuasive authority here.

Moreover, none of those cases addressed the fundamental problem of the NYVRA: that it commands state courts or subdivisions to design their election systems to favor some racial groups and harm others. The court in *Sanchez v City of Modesto* (145 Cal App 4th 660 [2006]) considered an argument that strict scrutiny "applies to any statute that refers to race or calls for any sort of race-conscious remedy or other action, even if it does not affect different races in different ways" (*id.* at 680). The challengers did not argue that the California Voting Rights Act compels electoral systems to distribute electoral benefits or burdens on the basis of race,

however, so no such proposition was decided (*see Murphy v City of Alameda*, 11 Cal App 4th 906, 914 [1992] ["It is fundamental that cases are not authority for propositions not considered and decided."]).

Likewise, *Portugal v Franklin County* (530 P3d 994 [Wash. 2023 en banc]) rejected an assertion that the Washington Voting Rights Act creates racial classifications by protecting only minority (not white) voters (*id*. at 1007-08, 1011). The Washington Supreme Court avoided that problem by reading the law to protect white voters (*id*). The court, too, did not address the argument presented here, that strict scrutiny must apply to state action demanding race-based electoral set-asides. Nor did the court in *Higginson v Becerra* (786 Fed Appx 705 [9th Cir 2019]), where "[t]he operative complaint does not allege that" the California Voting Rights Act "distribute[d] burdens or benefits on the basis of individual racial classifications" (*id*. at 706 [citation omitted]). Even U.S. Supreme Court decisions do not stand for propositions they do not decide (*see e.g. New Ga. Project v Raffensperger*, 976 F3d 1278, 1282-83 [11th Cir 2020]), so non-binding decisions of other jurisdictions cannot be persuasive on points they do not address.

Indeed, Plaintiffs' reliance on these decisions affords them no limiting principle. Their contention that strict scrutiny does not reach statutes that compel rigging elections to ensure members of some racial groups win (and members of others lose) elections would equally exonerate a statute with no preconditions. A state could

enact a blanket requirement that all localities redesign their systems to improve electoral prospects of some racial groups at the expense of others, and rational-basis review would apply, according to Plaintiffs' rationale. That cannot be correct.

## II. The NYVRA Fails Strict Scrutiny.

This is not among the rare cases where a racial classification can satisfy strict scrutiny. To pass, a suspect state action must "survive a daunting two-step examination" (*SFFA*, 600 US at 206). First, the classification must be "used to 'further compelling governmental interests'" (*id*. at 207 [citation omitted]). Second, it must be "narrowly tailored," i.e., "necessary," "to achieve that interest" (*id*. [citation omitted]). The NYVRA fails at both steps.

### A. No compelling interest justifies the NYVRA's racial classifications.

The NYVRA fails the compelling-interest test. Outside the college-admission and safety settings, U.S. Supreme Court precedents recognize only an interest in "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" (*id*.). But a state actor invoking such an interest must "identify that discrimination, public or private, with some specificity before they may use race-conscious relief" (*Shaw v Hunt*, 517 US 899, 909 [1996] [citation omitted]). The actor must also have a "'strong basis in evidence' to conclude that remedial action was necessary, '*before* it embarks on an affirmative-action program'" (*id*. at

910 [citation omitted]). The NYVRA's statement of purpose makes no pretense to satisfy this standard (*see* Elec. Law § 17-200).

**1.** Plaintiffs rely principally on an interest in "preventing and remedying racial discrimination in voting" (Brief at 42). But this argument is a bait-and-switch. Even if "[n]o one disputes that this is a vital goal" (*id*.), the NYVRA's ban on "vote dilution" has nothing to do with it. At-large electoral systems employed for race-neutral reasons are not discriminatory. Thus, a requirement that race-based systems replace race-neutral systems is not tailored—even rationally—to the goal of prohibiting racial discrimination.

Its statement of purpose does not indicate the NYVRA is designed to remedy any discrimination. Rather, it points to much broader and ill-defined purposes, such as to "[e]ncourage participation in the elective franchise by all eligible voters" and "[e]nsure that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York" (Elec. Law § 17-200). As this text shows, the Legislature did not view the interests in play as myopically as Plaintiffs view them (*see* Brief at 42-43). But, "[a]lthough these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny" (*SFFA*, 600 US at 214). They are simply too "amorphous" to justify race-based intervention in the electoral process (*id*. [citation omitted]). Aside from the fact that they do not identify any specific instances of past

discrimination in voting that must be remedied, they fail to provide a system that is "sufficiently measurable to permit judicial review under the rubric of strict scrutiny" (*SFFA*, 600 US at 214 [quotation and alteration marks and citation omitted]). Plaintiffs' contentions likewise are much too vague to satisfy this standard (*see* Brief at 43-44).

**2.** Plaintiffs' repeated assertion that the NYVRA prevents "vote dilution" (*id*. at 2) also does not work. The U.S. Supreme Court has never held that preventing unintentional vote dilution is a compelling interest that justifies state-imposed racial classifications (*see SFFA*, 600 U.S. at 206-07).

The U.S. Supreme Court *has* found race-based remedies by Congress justified under Congress' power to enforce the Civil War Amendments (*Milligan*, 599 US at 41). Plaintiffs attempt to invoke that same power on behalf of New York under "the Fifteenth Amendment" and cite precedents upholding VRA provisions as within Congress' enforcement power (Brief at 42). But they overlook that only Congress has unique authority to require race-conscious remedial action "pursuant to § 2 of the Fifteenth Amendment" (*Milligan*, 599 US at 41, quoting *City of Rome v United States*, 446 US 156, 173 [1980] [alterations accepted]). The states do not.

By consequence, Congress may require "race-based" action "as a remedy" (*id.*). Congress has authority under the Civil War Amendments "to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent"

(*Tennessee v Lane*, 541 US 509, 520 [2004]). Thus, Congress may "prohibit practices that in and of themselves do not violate" the Civil War Amendments, "so long as the prohibitions attacking racial discrimination in voting are 'appropriate'"[3] (*City of Rome*, 446 US at 177 [citation omitted]; *see also Katzenbach v Morgan*, 384 US 641, 651 [1966] ["Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."]). It is this power alone that justifies Congress passing race-based legislation prohibiting more than just purposeful, identified discrimination, including by prohibiting unintentional vote dilution (*Milligan*, 599 US at 41).

But states do not stand in the same posture (*see J.A. Croson*, 488 US at 490-91 [plurality opinion]; *see also id.* at 521-22 [Scalia, J., concurring in the judgment]). The Fourteenth and Fifteenth Amendments "embody significant *limitations* on state authority" (*Fitzpatrick v Bitzer*, 427 US 445, 456 [1976] [emphasis added]). They do not imbue states with such authority. Thus, New York cannot claim the power of Congress to require race-based remedial efforts as prophylactic means to prevent violations of the Civil War Amendments (*see Milligan*, 599 US at 41 [locating

[3] This is significant because the Supreme Court has "never held that vote dilution violates the Fifteenth Amendment" (*Reno v Bossier Par. Sch. Bd.*, 528 US 320, 334 n 3 [2000]), so a ban on "vote dilution" would not serve a compelling interest under the Fifteenth Amendment, absent the prerogative for prophylactic prevention.

Congress' right to "authorize race-based redistricting as a remedy for § 2 violations" in its "remedial authority" under the Fifteenth Amendment]). Just this year, the U.S. Supreme Court confirmed that "[t]he terms of the [Fourteenth] Amendment speak only to enforcement by Congress, which enjoys power to enforce the Amendment through legislation pursuant to Section 5" (*Trump v Anderson*, 601 US 100, 112 [2024]). Put simply, because states are subject to the Civil War Amendments, they cannot justify presumptive violations of those Amendments by claiming a right to prophylactically enforce them against themselves and their political subdivisions.

**B. The NYVRA is not narrowly tailored to vote-dilution prevention.**

Even if preventing vote dilution were among New York's compelling interests, the NYVRA is not narrowly tailored to advance it because it is "plainly overbroad" and otherwise "imprecise" (*SFFA*, 600 US at 216). The NYVRA demands race-based remedies where there is no vote dilution by any coherent standard. In *Milligan*, the U.S. Supreme Court explained that the "exacting requirements" of VRA Section 2 "limit judicial intervention" to rare circumstances and thereby satisfy the tailoring requirement (599 US at 30, 41-42). The NYVRA rejects virtually all those exacting requirements in ways that are unprecedented and nonsensical.

**1.** Begin with the entirely logical requirement under VRA Section 2 that "a white majority votes sufficiently as a bloc usually to defeat the candidates chosen by" minority voters (*Thornburg v Gingles*, 478 US 30, 63 [1986]). Without that

requirement (known as the third *Gingles* precondition), liability would arise merely where "there are discernible, non-random relationships between race and voting," which occurs "in most States" and are "to no one's great surprise" (*Cooper v Harris*, 581 US 285, 304 n 5 [2017]). Put simply, a group that elects its preferred candidates obviously does not suffer vote dilution, so the third precondition ensures a tight fit between means and ends.

The NYVRA, however, rejects that requirement in cases like this one. It differentiates two types of vote-dilution challenges, one against at-large systems and one against single-member-district or other alternative systems (Elec. Law § 17-206[2][b]). For challenges to non-at-large systems, a plaintiff must first show (1) "that candidates or electoral choices preferred by members of the protected class would usually be defeated," and next that (2) either (A) "voting patterns … are racially polarized," or (B) "the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired" under "the totality of the circumstances" (*id.* § 17-206[2][b][ii]). But in challenges to at-large systems, that first element is nixed: a plaintiff must only show either (A) polarized voting or (B) impairment under "the totality of circumstances," but *need not show that candidates of the plaintiff's group usually lose* (*id.* § 17-206[2][b][i]).

In this way, the NYVRA defines vote dilution as existing anywhere there are non-random relationships between political preferences and race (i.e., practically

everywhere). Worse, by negating the requirement that candidates preferred by the plaintiff's group usually lose, it defines *every* voter in the jurisdiction as a victim of vote dilution and gives all a claim based on the *same* evidence. A white voter whose candidates of choice usually win is a "member[] of a race … group" and thus a "[p]rotected class" (Elec. Law § 17-204[5]) and can show liability with evidence that "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 only basis for Plaintiffs' entitlement to relief here is they happened to sue. Setting aside the narrow-tailoring standard, this system is so absurd as to lack any rational basis.[4]

**2.** Continuing the *Gingles* wrecking-ball theme, the NYVRA also targets and eliminates the logical requirement (the first precondition) that the plaintiff's racial group be "sufficiently large and geographically compact to constitute a majority in a single-member district" (*Gingles*, 478 U.S. at 50). The U.S. Supreme Court has explained that a minority group that does not show this first precondition "cannot

[4] Resisting the NYVRA's text, Plaintiffs repeatedly assert that it requires proof of an alternative election system "that would improve the protected class's representation" (Brief at 15). But they do not square that requirement with the Legislature's clear rejection of any required showing (in at-large cases) that the protected class's preferred candidates regularly lose. Their citation to California precedent (*see id.*) ignores that California's vote-dilution standard incorporates the *Gingles* requirements, including the third precondition (*see supra* § I.D).

claim to have been injured by" an at-large system—i.e., *does not suffer vote dilution* (*id*. at 50 n 17). This, too, is an essential tailoring element.

Disagreeing with that judgment, the Legislature negated the first precondition for *all* vote-dilution suits, including against single-member districts: "evidence concerning whether members of a protected class are geographically compact or concentrated shall not be considered" (Elec. Law § 17-206[2][c][viii]). In this second way, the NYVRA is grossly overinclusive by demanding race-based remedies where vote dilution does not exist. While Plaintiffs defend the rejection of the first precondition on the ground that "alternative methods of election" (i.e., other than single-member districts) may remedy NYVRA violations (Brief at 55), this puts the cart before the horse. No remedy is tailored to curing vote dilution where vote dilution does not exist—as is the case where a non-compact group challenges an at-large system that does not cause its inability to elect.

Next, the NYVRA goes a step further and eliminates (for all vote-dilution claims) any required showing of vote dilution, even as the NYVRA itself defines it. As noted, the NYVRA creates liability on proof of either "racially polarized" voting patterns *or* satisfaction of a "totality of the circumstances" test (Elec. Law § 17-206[2][b]). This again rejects Congress' judgment that a showing of impairment under "the totality of circumstances" (52 USC § 10301[b]) is required in ***all*** cases. Accordingly, the U.S. Supreme Court inferred that the preconditions are *part of* the

totality of circumstances inquiry, that "some … factors are more important … than others," and that unequal opportunity can never be shown in the absence of the three "necessary preconditions," which establish that "a bloc voting majority [is] *usually* … able to defeat candidates supported by a politically cohesive, geographically insular minority group" (*Gingles*, 478 US at 48-50, 48 n 15). Unless the *Gingles* preconditions "are established, there neither has been a wrong nor can be a remedy" (*Growe v Emison*, 507 US 25, 40-41 [1993]). A totality test without the preconditions, in short, demands remedies in the absence of vote dilution.

But the NYVRA demands just that. And it does so in a manner that is too indeterminate to create manageable standards of any kind (*see Alexander v City of Milwaukee*, 474 F3d 437, 445-46 [7th Cir 2007] ["A race-conscious promotion system with no identifiable standards to narrowly tailor it to the specific, identifiable, compelling needs of the municipal department in question cannot pass constitutional scrutiny."]). The statute provides eleven factors "that may be considered" for a totality analysis, plus "any additional factors" that are unnamed (Elec. Law § 17-206[3]). The circumstances of injury are unclear, and just about any fact relating to a jurisdiction could, in the hands of one jurist, lead to liability and, in another's, foreclose liability. That is about as far from narrowly tailored as a statute can be.

## III. New York Courts Must Respect Federal Supremacy in Cases Properly Before Them.

The NYVRA's constitutional infirmities may explain Plaintiffs' startling argument that this Court must apply the statute even if it violates the Constitution (Brief at 19-28). But the "Constitution … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby" (US Const, art VI). The Supremacy Clause "creates a rule of decision" that courts "must not give effect to state laws that conflict with federal laws" (*Armstrong v Exceptional Child Ctr., Inc.*, 575 US 320, 324 [2015]). A state court "cannot refuse to enforce" federal law in cases properly before it (*Testa v Katt*, 330 US 386, 393 [1947] [quotation marks omitted]), including by "employ[ing] a jurisdictional rule 'to dissociate itself from federal law'" (*Haywood v Drown*, 556 US 729, 736 [2009] [alteration marks and citation omitted]).

Plaintiffs insist that Newburgh lacks capacity and standing to assert the NYVRA is unconstitutional. But a party requires "capacity to *sue*" (CPLR 3211[a][3] [emphasis added]), and standing "concerns a litigant's power to appear and bring its grievance before the court" (*Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d 377, 384 [2017] [citation omitted]). "[S]tanding … relates to whether a party has suffered an 'injury in fact' conferring a 'concrete interest in *prosecuting* the action'" (*id*. [emphasis added] [citation omitted]). These doctrines do not liberate courts from the Supremacy Clause's "rule of decision"

(*Armstrong*, 575 US at 324) in cases properly before them. Newburgh's constitutional arguments are species of preemption defense, and "[o]rdinarily … pre-emption is raised as a defense to the allegations in a plaintiff's complaint" (*Caterpillar Inc. v Williams*, 482 US 386, 392 [1987]). Any state doctrine forbidding consideration of such defenses would itself be preempted. "[D]eciding a case in ignorance of a properly raised federal defense would be a violation of the simplest command of the Supremacy Clause to not enter judgment on a state law ground when it would be barred by federal law" (Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 Wis L Rev 39, 174 n 374 [1995]).

The Court should reject Plaintiffs' request for "resistance" to the Fourteenth Amendment (*see e.g. Harrison v NAACP*, 360 US 167, 175 [1959] [describing the "general plan of massive resistance to the integration of schools"] [citation omitted]). Their view has no limiting principle. As they would have it, if a suit sought to enforce state-law dictates of racial discrimination, voter disenfranchisement, free-speech suppression, etc., defendant municipalities, counties, and school boards—and the adjudicating courts—would have no choice but to acquiesce. State school-segregation laws would displace *Brown v Board of Education* (347 US 483 [1954]) in such cases. This is no hypothetical: state-court suits have sought this type of relief (*see e.g. Pike v Sch. Dist. No. 11 in El Paso Cnty.*, 474 P2d 162 [Colo. 1970] [school

board followed U.S. Constitution over state constitution, was sued, raised constitutional defense, and won]).

Besides, Plaintiffs have misconstrued New York law holding that local governments lack capacity "to *mount* constitutional challenges to acts of the State and State legislation" (*World Trade Ctr.*, 30 NY3d at 384 [emphasis added]). The cases find "lack of capacity" or "lack of standing" (*id*.), but do not purport to liberate New York Courts from the Supremacy Clause. The doctrine is typically applied to suits *by* local governments (*see City of New York v State of New York*, 86 NY2d 286, 291 [1995]; *Matter of County of Chautauqua v Shah*, 126 AD3d 1317, 1321 [4th Dept 2015], *affd sub nom. Matter of County of Chemung v Shah*, 28 NY3d 244 [2016]; *see also Williams v Mayor & City Council of Baltimore*, 289 US 36, 40 [1933]; *City of Newark v State of New Jersey*, 262 US 192, 196 [1923]; *City of New York v Richardson*, 473 F2d 923, 929 [2d Cir 1973]; *City of New Rochelle v Town of Mamaroneck*, 111 F Supp 2d 353, 364 [SD NY 2000]). Because there are no "practical concerns about judicial overreach" in deciding constitutional questions raised defensively (*World Trade Ctr.*, 30 NY3d at 388), these decisions are not on point.

Separately, some decisions in this space reflect "a substantive determination that the state acts complained of were not unconstitutional at all" (*id.* at 384). That further explains *Williams*, where Baltimore and Annapolis (as plaintiffs) claimed a state tax exclusion violated their rights under the Privileges and Immunities Clause,

which failed on the merits because "[a] municipal corporation … has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator" (*Williams*, 289 US at 40; *see also City of Newark*, 262 US at 196). That doctrine also explains the one case Plaintiffs cite (Brief at 19), where a constitutional argument appears to have been raised defensively: the political subdivisions lacked constitutional rights against the State (*see Matter of Jeter v Ellenville Cent. Sch. Dist.*, 41 NY2d 283, 287 [1977]).

Here, Newburgh is not claiming the State has violated its own constitutional rights, but that the NYVRA's application would require racial discrimination on tens of thousands of its residents in violation of the Equal Protection Clause. New York law is clear that a political subdivision may contend that it "will by that very compliance" with state law "be forced to violate a constitutional proscription" (*World Trade Ctr.*, 30 NY3d at 386), as is the case here (*see Clarke v Town of Newburgh*, Sup Ct, Orange County, Vazquez-Doles, J., Index No. EF002460-2024, Mar. 26, 2024, Complaint at 29, ¶ b [requesting judgment "ordering the implementation" of a racially discriminatory system]). This Court is "entrusted with" deciding the questions raised under the Constitution and must not fail (*Haywood*, 556 US at 735).

## CONCLUSION

For all these reasons, the Court should affirm the judgment below.

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Dated: December 5, 2024
New York, New York

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## PROOF OF SERVICE

I certify that on December 5, 2024, this brief was electronically filed with the Clerk of the Court for the Appellate Division using the New York State Courts Electronic Filing system, which will automatically send email notification of such filing to all counsel of record.

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## PRINTING SPECIFICATIONS STATEMENT

I certify that on December 5, 2024, pursuant to 22 NYCRR 1250.8(j), this brief was prepared on a computer using a proportionally spaced typeface, as follows:

Typeface name: Times New Roman
Point size: 14
Line spacing: Double

The total number of words in this brief, including point headings and footnotes and excluding the table of contents, table of citations, proof of service, printing specifications statement, and any authorized addendum is 6,982 words, which is under this Court's limitation of 7,000 words for a brief of amici curiae pursuant to 22 NYCRR 1250.8(f)(2).

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