New York Supreme Court

Appellate Division—Second Department

Docket No.: 2024-11753

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 *AMICI CURIAE* THE TOWN OF CHEEKTOWAGA IN SUPPORT OF DEFENDANTS-RESPONDENTS TOWN OF NEWBURGH AND TOWN BOARD OF THE TOWN OF NEWBURGH

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INTERESTS OF *AMICUS CURIAE*

The Town of Cheektowaga submits this brief as *amicus curiae*[1] in support of Defendants-Appellees, the Town of Newburgh, to address the grave constitutional concerns raised by the New York Voting Rights Act ("NYVRA"). As a political subdivision similarly subject to the NYVRA's mandates—and also in similar litigation, *see Kenneth Young v. Town of Cheektowaga*, Index. No. 803989/2024—the Town of Cheektowaga has a significant interest in ensuring the preservation of constitutional safeguards governing elections and protecting the rights of all of its voters under the United States and New York Constitutions.

The NYVRA imposes legal obligations that compel political subdivisions to adopt race-based remedies and classifications without the safeguards that have long been central to federal Voting Rights Act jurisprudence. These requirements place the Town of Cheektowaga and other municipalities in the untenable position of risking violation of federal constitutional mandates while attempting to adhere to the

[1] Pursuant to Rule 500.23[a][4][iii] of the New York Court Rules, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted solely on behalf of the Town of Cheektowaga in support of Defendants-Appellees.

NYVRA's provisions. *Amicus* has an interest in advocating for the proper application of strict scrutiny to race-based governmental decision-making. The Town of Cheektowaga also has an interest ensuring that electoral processes in New York respect the constitutional rights of its residents to equal protection and freedom from race-based discrimination in voting.

By providing this brief, the Town of Cheektowaga seeks to provide the Court with insight into the constitutional conflicts created by the NYVRA and the potential ramifications for municipalities across New York State—beyond just the circumstances faced by the Town of Newburgh. *Amicus* urges this Court to affirm the lower court's ruling, which held that the NYVRA was unconstitutional.

INTRODUCTION

The vote-dilution provision of the New York Voting Rights Act (the "NYVRA") violates the United States and New York State Constitutions. The NYVRA forces political subdivisions, including the Town of Newburgh (the "Town"), to violate several constitutional provisions pertaining to equality among all voters.

Amicus addresses three main points that demonstrate the unconstitutionality of the NYVRA. *First*, the NYVRA is explicitly race-based and creates racial classifications that trigger strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. The NYVRA's text, stated purpose, and practical applications seek to compel race-based outcomes. Contrary to the Attorney General's and the Plaintiffs-Appellants' characterizations, the NYVRA also mandates race-based considerations in its enforcement mechanisms. The NYVRA cannot survive strict scrutiny because it (1) neither serves a compelling State interest nor (2) is it narrowly tailored to any such end.

Second, the NYVRA eliminates the vital constitutional safeguards from *Thornburg v. Gingles*, which prevent the federal Voting Rights Act from running afoul of the Fourteenth and Fifteenth Amendments. 478

U.S. 30, 50 (1986) (To satisfy Section 2 of the federal Voting Rights Act, plaintiffs must demonstrate that a racial group is "sufficiently large and geographically compact to constitute a majority in a single-member district."). In particular, Section 2 of the Voting Rights Act requires plaintiffs to demonstrate geographically compact, cohesive racial groups and relies on the *Gingles* factors to ensure narrowly tailored remedies. *See id.* In stark contrast, the NYVRA intentionally dismantles these vital guardrails and mandates the use of race-based classifications and enforcement in a manner that exceeds what the U.S. and New York Constitutions permit.

Third, the State of New York lacks the constitutional enforcement authority to enact the NYVRA and its race-based remedies. Unlike Congress, which derives enforcement power under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment, the State of New York has no analogous authority. So while the State of New York is (like Congress) bound by the prohibitions on race-based actions of Section 1 in both Amendments, and it lacks Congress's enforcement power to legislate race-based remedies for elections. New York's attempt to mandate *greater* use of race in the NYVRA compared to the federal

Voting Rights Act thus founders on the State's lack of constitutional authority to take such actions.

Accordingly, Supreme Court, Orange County correctly invalidated the challenged provision of the NYVRA. The Town of Cheektowaga urges this Court to affirm that judgment.

ARGUMENT

I. The NYVRA is explicitly race-based and is thus subject to strict scrutiny

Under the well-established Equal Protection Clause framework, the NYVRA is subject to strict scrutiny due to its explicit use of race-based classifications. And because it is neither narrowly tailored nor advances a compelling government interest, the NYVRA cannot survive strict scrutiny.

The NYVRA prohibits vote dilution, which is defined as any method of election that "ha[s] the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections." N.Y. Elec. Law § 17-206(2)(a). The NYVRA then defines "protected class" as "a class of individuals who are members of a race, color, or language-minority group, including individuals who are members of a minimum reporting category that has ever been officially

recognized by the United States census bureau." *Id.* § 17-204(5). The Attorney General and Plaintiffs-Appellants argue that these definitions should apply to all racial groups—rather than just racial minorities. *See* Appellant's Brief, Doc. No. 13, p. 30-31; Attorney General's Brief, Doc. No. 17, p. 22-23.

But this "race neutral" interpretation defies logic. The provision explicitly mandates consideration of race, just as the federal Voting Rights Act does—which has always been understood to trigger constitutional scrutiny as race-based governmental action. *See*, *e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 187 (2017) (holding that the "Equal Protection Clause prohibits a State, without sufficient justification, from 'separating its citizens into different voting districts on the basis of race'" and applying constitutional scrutiny to race-based line-drawing intended to comply with the federal Voting Rights Act (cleaned up)). That makes perfect sense as the Supreme Court has long held that such race-based redistricting inflicts "fundamental injury" to the "individual rights of a person," regardless of whether the racial classification is ultimately upheld. *Shaw v. Hunt*, 517 U.S. 899, 908 (1996).

Indeed, "[t]he racial classification itself is the relevant harm." *Alexander v. S.C. State Conference of the NAACP*, 144 S. Ct. 1221, 1252 (2024). And the NYVRA undeniably requires racial classification to satisfy its mandates. And it does so by resorting to the "sordid business [of] divvying us up by race." *LULAC v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part).

It is further axiomatic that expanding the electoral power of one racial group, color group, or language-minority group inevitably decreased the electoral power of other groups. The NYVRA both explicitly and implicitly provides that voters are treated differently based on their racial identity—a stark contrast with the law in *Crawford v. Bd. of Educ. of City of L.A.*, 458 U.S. 527 (1982), which the Attorney General and Plaintiffs-Appellants rely upon for their arguments. *See* Appellant's Brief, Doc. No. 13, p. 30-31; Attorney General's Brief, Doc. No. 17, p. 22-23.

Unlike in the present case, the law at issue in *Crawford* prohibited the courts from directing school assignment or transportation for students, in the absence of a Fourteenth Amendment violation. *Crawford*, 458 U.S. 527 at 537. In *Crawford*, every racial group received

the benefit of neighborhood schooling, whereas here, one racial group will inevitably become electorally empowered at the expense of all other racial groups.

Since the NYVRA "classif[ies] citizens on the basis of race," the NYVRA is "constitutionally suspect and must be strictly scrutinized." *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (citing *Shaw v. Hunt*, 517 U.S. 899, 904 (1996); *accord Miller v. Johnson*, 515 U.S. 900, 904-05 (1995).

Furthermore, if the NYVRA genuinely applied to all races, then the specification of "protected classes" and the reference to race, color, or language-minority group would be unnecessary. Yet, the New York State Legislature decided to include such references. And in fact, the "Introducer's Memorandum in Support of the Senate Bill resulting in the NYVRA" provides the following justification for the NYVRA:

> Although its record on voting has improved recently, New York has an extensive history of discrimination against racial, ethnic, and language minority groups in voting. The result is a persistent gap between white and non-white New Yorkers in political participation and elected representation.

Based on its plain text and purpose, the NYVRA was intended to create racial classifications and allocate electoral benefits (and corresponding burdens) based on race.

The lower court thus correctly recognized the NYVRA is subject to strict scrutiny because "the text of the NYVRA, *on its face*, classifies people according to their race, color and national origin." *Clarke*, Index. No. EF002460-2024, Doc. No. 147 at 16 (emphasis added). Indeed, "[t]hese are not mere passing references in the legislation. These classes of people are not simply mentioned as part of the justification for its passage, or as part of some broader plan for electoral reform by which these classes might derive some tangential benefit." *Id.* The upshot was that "classification based on race, color and national origin is the sine qua non for relief under the NYVRA." *Id.*

The NYVRA thus compels the Town to engage in race-based classification and line-drawing in a manner that presumptively violates the Fourteenth and Fifteenth Amendments of the U.S. Constitution and Article I, Sections 6, 8, and 11 of the New York Constitution. This alone demonstrates the unconstitutionality of the NYVRA.

In applying strict scrutiny, the lower court correctly determined that the NYVRA does not require any proof of past discrimination by a protected class. *Id.* at 17. Because discrimination is a factor that the Court *may* consider in determining whether vote dilution exists—not a factor it *must* consider—the lower court held that "[n]o compelling interest . . . exists in protecting the voting rights of any group that has historically never been discriminated against in a political subdivision." *Id.* at 18. The lower court also correctly found that the NYVRA was not narrowly tailored because "the breadth of remedies that a Court can impose for the most minimal of impairments of a class of voters' ability to influence an election cannot be described as 'narrow' in any sense of that word." *Id.* at 20. The lower court's rationale and holding are consistent with the text, purpose, and practical effects of the NYVRA.

But even if the Attorney General and Plaintiffs-Appellants were correct in contending that the NYRA was "race neutral," the NYVRA is still subject to strict scrutiny because "*all racial classifications* … must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (emphasis added). Further, "racial classifications receive close scrutiny even when they may

be said to burden or benefit the races equally." *Johnson v. Cal.*, 543 U.S. 499, 499 (citing *Shaw v. Reno*, 509 U.S. 630, 651 (1993)). Indeed, "[a]ccepting [the NYVRA's] approach would do no more than move us from 'separate but equal' to 'unequal but [putatively] benign.'" *Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 742 (2007) (citation omitted).

II. The NYVRA lacks the vital constitutional safeguards of *Thornburg v. Gingles*, which are the guardrails that prevent the federal Voting Rights Act from violating the U.S. Constitution

The NYVRA eliminates the carefully constructed safeguards that prevent the federal Voting Rights Act from mandating a level of race-based decision-making that exceeds with the federal Constitution permits. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the U.S. Supreme Court determined that the presence of racially polarized voting alone was insufficient to establish that an at-large voting system violated Section 2 of the Voting Rights Act. Rather, to satisfy Section 2 of the Voting Rights Act, plaintiffs must demonstrate that a racial group is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50. This requirement serves as a constitutional safeguard, preventing Section 2 from being misinterpreted as a mandate for

achieving the "maximum possible voting strength" for one minority group at the expense of others. Such an interpretation would entangle courts in extensive race-based inquiries and speculative "race-based predictions." *See Bartlett v. Strickland*, 556 U.S. 1, 16, 18 (2009) (plurality opinion). Without this limitation, Section 2 could inject race unnecessarily into nearly every redistricting decision, creating significant constitutional concerns. *Id.* at 21.

In particular, the NYVRA excludes the *Gingles* preconditions, including size and compactness, cohesiveness, and the voting bloc requirement. *See Gingles*, 478 U.S. at 31; *see also Bartlett*, 556 U.S. at 21. Under the NYVRA, plaintiffs are not required to demonstrate these *Gingles* preconditions to establish liability for vote dilution. For example, geographic compactness is simply a factor—rather than a *mandatory* precondition for the federal Voting Rights Act—that *may* be considered at the remedy stage. *See* N.Y. Elec. Law § 17-206(2)(c)(viii). And under the NYVRA, New York courts are prohibited entirely from considering compactness or concentration to determine liability. *Id.; see also Clarke*, Index. No. EF002460-2024, Doc. No. 147 at 22 (stating that the NYVRA requires that courts do not consider the first *Gingles* precondition).

The NYVRA thus sharply departs from the federal Voting Rights Act, which mandates that a racial group be sufficiently large and geographically compact to establish liability. *See Gingles*, 478 U.S. at 31.

The NYVRA's broad definition of "racially polarized voting" also fails to incorporate the narrowly defined second and third *Gingles* preconditions. While the *Gingles* factors require plaintiffs to demonstrate that a minority group is politically cohesive and that the majority votes as a bloc to typically defeat the minority's preferred candidate, the NYVRA instead mandates an undefined pattern of mere divergence in the electoral choices of the minority and the majority. N.Y. Elec. Law § 17-206(6).

The elimination of the *Gingles* factors in the NYVRA enlarges the scope of race-based line-drawing in a way that squarely runs afoul of the narrow-tailoring requirement of strict scrutiny. Even when the federal Voting Rights Act applies—with its *Gingles* safeguards in place—strict scrutiny is *still* applied when race predominates actions taken to comply with the Voting Rights Act. *See, e.g., Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 193 (2017). Thus, struct scrutiny should be

applied to the NYVRA. And after application of strict scrutiny, the NYVRA cannot survive.

Indeed, the U.S. Supreme Court stated in *Bartlett* that even a mere relaxation of the *Gingles* preconditions could present "serious constitutional concerns under the Equal Protection Clause." *Bartlett*, 556 U.S. at 21. And as correctly observed by the lower court, the NYVRA's intentional rejection of all of the *Gingles* preconditions violates the Equal Protection Clause. *Clarke*, Index. No. EF002460-2024, Doc. No. 147 at 7.

The Attorney General's and Plaintiffs-Appellants' attempts to analogize the NYVRA to the Voting Rights Acts in California and Washington are baseless. The NYVRA is a notable—and radical—outlier in its elimination of the *Gingles* preconditions/guardrails. Unlike the NYVRA, the state Voting Rights Acts in California and Washington have incorporated the *Gingles* factors and federal caselaw protections either partially or in their entirety. *See* Cal. Elec. Code § 14026(e); *Sanchez v. Modesto*, 51 Cal. Rptr. 3d 821, 828 (Ct. App. 2006) (observing that the California Voting Rights Act incorporates federal Voting Rights Act enforcement case law and retains all of the *Gingles* requirements except the size and compactness precondition); *Portugal v. Franklin Cnty.*, 530

P.3d 994, 1011 (Wash. 2023) (observing that the Washington Voting Rights Act also incorporates the same *Gingles* factors as the California Voting Rights Act); Wash. Rev. Code § 29A.92.010 (allowing courts to rely on federal case law to interpret the Washington Voting Rights Act and expressly adopting the federal VRA's definition of a "protected class"). But the NYVRA intentionally dismantled these safeguards—thus rendering these comparisons inapposite.

In sum, the *Gingles* preconditions establish specific requirements that must be satisfied to state a claim of vote dilution under the federal Voting Rights Act. These elements ensure that claims of vote dilution are based on concrete evidence of discriminatory voting practices and that any remedies address actual harms rather than speculative or marginal disparities. The NYVRA eliminates these vital constitutional safeguards, thus undermining a key safeguard that prevents race-based districting from exceeding constitutional limitations. As such, the NYVRA is subject to strict scrutiny, fails that scrutiny, and should be invalidated.

III. The State of New York lacks the constitutional enforcement authority to enact the NYVRA

Unlike Congress, which derives enforcement power under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth

Amendment, the State of New York has no analogous authority. Rather, the State of New York is bound by the prohibitions in Section 1 of both Amendments, and it lacks enforcement power to mandate race-based remedies in elections.

Pursuant to Section 1 of the Fourteenth Amendment, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. And pursuant to Section 1 of the Fifteenth Amendment, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. These prohibitions restrict the State of New York's ability to adopt race-based remedies in elections and to legislate on the topics encompassed by the NYVRA.

Furthermore, the New York Legislature lacks the same enforcement authority that Congress maintains under § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment. Indeed, the

voting interests at the center of the NYVRA—race-based voting interests—are at the core of the Fourteenth and Fifteenth Amendments. The protection of these interests is reserved for Congress. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989)); *Allen v. Milligan*, 599 U.S. 1, 10-11 (2023).

For these reasons, Congress *exclusively* possesses enforcement authority under § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment. Thus, the State of New York does not have a compelling governmental interest in enacting legislation to serve the goals of the Fourteenth and Fifteenth Amendments. The State of New York, therefore, lacks a compelling governmental interest in enacting the NYVRA, and the NYVRA cannot withstand strict scrutiny review.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below holding that challenged provision of the NYVRA violates the U.S. and New York Constitutions.

Dated: December 6, 2024

Respectfully submitted,

/s/ Joseph Burns

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 1250.8(j), on this 6th day of December 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 3,143 words, which does not exceed this Court's limitation of 7,000 words for a brief of amicus curiae.

Dated: December 6, 2024

Respectfully submitted,

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