Orange County Clerk's Index No.EF002460/2024

New York Supreme Court

APPELLATE DIVISION – SECOND DEPARTMENT

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

v.

TOWN OF NEWBURGH and
TOWN BOARD OF THE TOWN OF NEWBURGH,
DEFENDANTS-RESPONDENTS,

NEW YORK STATE OFFICE OF
THE ATTORNEY GENERAL,
INTERVENOR-APPELLANT.

Docket No.
2024-11753

NOTICE OF MOTION OF DEFENDANTS-RESPONDENTS FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS AND TO REFRAIN FROM ISSUING REMITTITUR

TROUTMAN PEPPER LOCKE LLP
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Of Counsel:

Misha Tseytlin

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Misha Tseytlin, dated February 18, 2025; the Opinion and Order of the Appellate Division, Second Department, dated January 30, 2025, and entered in the Office of the Clerk on January 30, 2025 (the "Decision"), attached as Exhibit A thereto; the additional Exhibits attached thereto; the accompanying Memorandum of Law in Support of Town of Newburgh and Town Board of the Town of Newburgh's (collectively, the "Town") Motion For Leave To Appeal To The New York State Court Of Appeals And To Refrain From Issuing Remittitur filed herewith; and upon all the pleadings, papers and proceedings heretofore in this action, the Town will move this Court, at the Courthouse located at 45 Monroe Place, Brooklyn, New York 11201, on Monday, March 3, 2025, at 10:00AM, or as soon thereafter as counsel may be heard, *see* CPLR 5516, for an Order:

a. Pursuant to CPLR 5602(b)(1), and/or 5713, as well as 22 NYCRR § 1250.16(d), granting the Town leave to appeal to the Court of Appeals from the Decision on the grounds that the Questions Presented are significant questions of statewide importance that the Court of Appeals has not previously addressed;

b. Pursuant to 22 NYCRR § 1250.16(c) and/or this Court's inherent authority, withhold this Court's remittitur from the Decision to the Orange County Supreme Court pending this Court's disposition of the Town's Motion For Leave To Appeal To The Court Of Appeals and any review of this appeal by the Court of Appeals; and

c. Granting such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE, that answering papers, if any, are required to be served not later than the return date of this motion in accordance with CPLR 2214(b).

Dated: February 18, 2025

Respectfully submitted,

TROUTMAN PEPPER LOCKE LLP

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Orange County Clerk's Index No.EF002460/2024

New York Supreme Court

APPELLATE DIVISION – SECOND DEPARTMENT

ORAL CLAKE, ROMANCE REED, GRACE PEREZ,
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NEW YORK STATE OFFICE OF
THE ATTORNEY GENERAL,
INTERVENOR-APPELLANT.

Docket No.
2024-11753

AFFIRMATION OF MISHA TSEYTLIN IN SUPPORT OF MOTION OF DEFENDANTS-RESPONDENTS FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS AND TO REFRAIN FROM ISSUING REMITTITUR

TROUTMAN PEPPER LOCKE LLP
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Of Counsel:
Misha Tseytlin

MISHA TSEYTLIN, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms, under penalty of perjury, as follows:

1. I am a member of Troutman Pepper Locke, LLP, attorneys for Defendants-Respondents Town of Newburgh and Town Board of the Town of Newburgh (collectively, the "Town").

2. I submit this affirmation in support of the Town's Motion For Leave To Appeal To The New York State Court Of Appeals And To Refrain From Issuing Remittitur under CPLR 5602(b)(1) and/or 5713, as well as 22 NYCRR § 1250.16(d).

3. The Town seeks permission to appeal from the Opinion and Order of the Appellate Division, Second Department, dated January 30, 2025, and entered in the Office of the Clerk on January 30, 2025 (the "Decision"), which does not finally determine this action. A true and correct copy of the Decision is attached hereto as Exhibit A.

4. The Town was served the Notice of Entry of the Decision by Appellants on January 30, 2025, a true and correct copy of which is attached hereto as Exhibit B.

5. The Court's Decision reversed the Decision and Order of Hon. Maria S. Vazquez-Doles, J.S.C. of the Supreme Court of the State of New York, Orange County ("the Supreme Court"), dated November 7, 2024, and entered in the office of the Orange County Clerk ("Clerk") on November 8, 2024, in Index No.EF002460/2024, wherein the Supreme Court granted the Town's Motion For Summary Judgment, dismissed the Complaint, and ordered that the John R. Lewis Voting Rights Act of New York (the "NYVRA") is stricken in its entirety from further enforcement and application to the Town and to any other political subdivision in New York, is attached hereto with notice of entry as Exhibit C (the "Order").

6. As the Town explains more fully in the accompanying Memorandum of Law in Support of Motion For Leave To Appeal To The New York State Court Of Appeals And To Refrain From Issuing Remittitur filed herewith, the questions of law to be reviewed by the Court of Appeals are as follows, 22 NYCRR § 1250.16(d):

a. Whether the vote-dilution provisions of the NYVRA violate the Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution and the New York Constitution, and what implicit elements of the NYVRA inform that conclusion.

b. Whether municipalities and their officers have capacity to challenge the NYVRA's vote-dilution provisions, when those provisions require them to violate the U.S. Constitution and the New York Constitution.

7. Further, and again as explained more fully in the accompanying Memorandum of Law, the Questions Presented should be reviewed by the Court of Appeals because they present significant legal questions of statewide importance. 22 NYCRR § 1250.16(d).

WHEREFORE the Town respectfully requests that the Court:

a. Grant the Town permission to appeal to the Court of Appeals the Opinion and Order of the Appellate Division, Second Department, dated January 30, 2025, and entered in the Office of the Clerk on January 30, 2025, pursuant to CPLR 5602(b)(1) and/or 5713, as well as 22 NYCRR § 1250.16(d); and

b. Grant such other and further relief as the Court deems just and proper.

Dated: February 18, 2025

Respectfully submitted,

TROUTMAN PEPPER LOCKE LLP

MISHA TSEYTLIN
111 S. Wacker Dr., Suite 4100
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Attorneys for Defendants-Respondents

EXHIBIT A

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D76388
E/htr

_____AD3d_____ Argued - December 18, 2024

HECTOR D. LASALLE, P.J.
CHERYL E. CHAMBERS
JANICE A. TAYLOR
DONNA-MARIE E. GOLIA, JJ.

2024-11753 OPINION & ORDER

Oral Clarke, et al., plaintiffs-appellants,
v Town of Newburgh, et al., respondents;
Letitia James, etc., intervenor-appellant.

(Index No. 2460/24)

APPEALS, in an action pursuant to Election Law § 17-206, from an order of the Supreme Court (Maria S. Vazquez-Doles, J.), dated November 7, 2024, and entered in Orange County. The order granted the defendants' motion for summary judgment dismissing the complaint and directed that the John R. Lewis Voting Rights Act of New York was stricken in its entirety from further enforcement and application to the defendants and to any other political subdivision in New York State.

Abrams Fensterman, LLP, White Plains, NY (Robert A. Spolzino, Jeffrey A. Cohen, David Imamura, Steven Still, and Election Law Clinic at Harvard Law School [Ruth Greenwood, Nicholas O. Stephanopoulos, Daniel Hessel, and Samuel Jacob Davis, pro hac vice], of counsel), for plaintiffs-appellants.

Letitia James, Attorney General, New York, NY (Barbara D. Underwood, Judith Vale, Andrea Trento, Beezly J. Kiernan, Sandra Park, Lindsay McKenzie, and Derek Borchardt of counsel), intervenor-appellant pro se.

Troutman Pepper Hamilton Sanders LLP, New York, NY (Misha Tseytlin and Bennet J. Moskowitz of counsel), for respondents.

Campaign Legal Center, Washington, DC (Robert Brent Ferguson of counsel),

amicus curiae pro se and for amici curiae American Civil Liberties Union of Southern California and American Civil Liberties Union of Northern California.

NAACP Legal Defense & Educational Fund, Inc., New York, NY (Adam Lioz, Samuel Spital, Stuart Naifeh, Michael Pernick, and Maia Cole of counsel), amicus curiae pro se.

Baker & Hostetler, LLP, New York, NY (Ariana Dindiyal, Robert J. Tucker, Erika D. Prouty, Rebecca Schrote, and E. Mark Braden of counsel), for amici curiae Town of Mount Pleasant and Town Board of the Town of Mount Pleasant.

Holtzman Vogel Baran Torchinsky & Josefiak, PLLC, Buffalo, NY (Joseph Burns of counsel), for amicus curiae Town of Cheektowaga.

LASALLE, P.J.

I. Introduction

In addition to setting out the powers of the branches of our government, the constitutions of the United States and New York State contain provisions protecting the rights of minorities from the "tyranny of the majority" (John Adams, A Defence of the Constitutions of Government of the United States of America, Vol. 3, 291 [1788]; *see also* James Madison, Federalist No. 10), including provisions guaranteeing citizens equal protection of the laws (*see* US Const, 14th Am, § 1; NY Const, art I, § 11). On this appeal we are asked to decide whether the vote dilution provisions of the John R. Lewis Voting Rights Act of New York (L 2022, ch 226; hereinafter NYVRA), intended to ensure that a numerical minority's voice is not removed from local government, facially violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (hereinafter the Equal Protection Clause).[1] The defendants in this case, the Town of Newburgh and the Town Board of the Town of Newburgh (hereinafter the Town Board), lack the capacity to challenge the constitutionality of the NYVRA except to the extent that it forces them to

[1] The defendants contend that the NYVRA also violates the New York State Constitution, which the Court of Appeals has stated "provides for equivalent equal protection safeguards" (*People v Aviles*, 28 NY3d 497, 502; *see* NY Const, art I, § 11). As the parties do not contend that equal protection claims under the New York State Constitution should be analyzed differently than the equal protection claims under the Fourteenth Amendment, the equal protection claim set forth by the defendants will be analyzed with reference to the Fourteenth Amendment, bearing in mind that the rationale would also be dispositive of the defendants' equal protection claim under the New York State Constitution.

violate the Equal Protection Clause. Since, on this record, the defendants failed to show as a matter of law that compliance with the NYVRA would force them to violate the Equal Protection Clause, we reverse the order of the Supreme Court.

II. The Federal Voting Rights Act

Sixty years ago, Congress enacted the Voting Rights Act of 1965 (hereinafter the FVRA), pursuant to its authority to enforce the Fifteenth Amendment to the United States Constitution (*see Allen v Milligan*, 599 US 1, 41). Section 5 of the FVRA, which initially was set to expire after five years, provided that no change in voting procedures in certain jurisdictions defined by a "coverage formula" set out in section 4 of the FVRA could take effect until it was approved by the United States Attorney General or a court of three judges (*Shelby County v Holder*, 570 US 529, 537-538). Although these sections of the FVRA were repeatedly reauthorized by Congress, in 2013, the United States Supreme Court struck down section 4 because the coverage formula was based on data that was more than 40 years old and no longer responsive to current needs and thus an impermissible burden on the principles of federalism and the equal sovereignty among the states (*see id.* at 535, 543-544, 550-557). Accordingly, section 5 has been rendered unenforceable until Congress drafts a new coverage formula, which it has not done (*see id.* at 557).

However, section 2 of the FVRA, which applies throughout the United States and concerns vote dilution, remains in effect (*see id.*). "In its original form, § 2 closely tracked the language of the [Fifteenth] Amendment and, as a result, had little independent force. [The] leading case on § 2 at the time was *City of Mobile v Bolden* [(446 US 55)], which involved a claim by black voters that the City's at-large election system effectively excluded them from participating in the election of city commissioners. The commission had three seats, black voters comprised one-third of the City's population, but no black-preferred candidate had ever won election" (*Allen v Milligan*, 599 US at 10-11 [citations, footnote, and internal quotation marks omitted]). The Court in *City of Mobile* ruled against the plaintiffs, concluding that the Fifteenth Amendment, and thus section 2, did not "prohibit laws that [were] discriminatory only in effect" (*id.* at 11; *see City of Mobile v Bolden,* 446 US at 61-65).

"Almost immediately after it was decided, *Mobile* produced an avalanche of criticism, both in the media and within the civil rights community" (*Allen v Milligan*, 599 US at 11 [internal quotation marks omitted]). "By focusing on discriminatory intent and ignoring disparate effect,

critics argued, the Court had abrogated the standard used by the courts to determine whether [racial] discrimination existed" (*id.* at 12 [internal quotation marks omitted]). On the other hand, "mandating racial proportionality in elections was regarded by many as intolerable" (*id.*). In 1982, the impasse was resolved "when Senator Bob Dole proposed a compromise. Section 2 would include the effects test that many desired but also a robust disclaimer against proportionality" (*id.* at 13 [citation omitted]).

As amended by Congress in 1982, section 2 provides that the section is violated "if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial] class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population" (52 USC § 10301[b]).

A violation of section 2 occurs "where an 'electoral structure operates to minimize or cancel out' minority voters' 'ability to elect their preferred candidates.' Such a risk is greatest 'where minority and majority voters consistently prefer different candidates' and where minority voters are submerged in a majority voting population that 'regularly defeat[s]' their choices" (*Allen v Milligan*, 599 US at 17-18, quoting *Thornburg v Gingles*, 478 US 30, 48). In interpreting section 2, the United States Supreme Court developed the *Gingles* test for deciding section 2 claims. The *Gingles* test "focuses . . . on vote dilution accomplished through cracking or packing, *i.e.*, 'the dispersal of [a protected class of voters] into districts in which they constitute an ineffective minority of voters or from the concentration of [those voters] into districts where they constitute an excessive majority'" (*Abbott v Perez*, 585 US 579, 627 n 2 [Sotomoyor, J., dissenting], quoting *Thornburg v Gingles*, 478 US at 46 n 11).

"To succeed in proving a § 2 violation under *Gingles*, plaintiffs must satisfy three preconditions. First, the minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district. A district will be reasonably configured . . . if it comports with traditional districting criteria, such as being contiguous and reasonably

compact. 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. Finally, a plaintiff who demonstrates the three preconditions must also show, under the totality of the circumstances, that the political process is not equally open to minority voters" (*Allen v Milligan*, 599 US at 18 [citations and internal quotation marks omitted]). Factors relevant to this last determination include: "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; . . . the extent to which voting in the elections of the state or political subdivision is racially polarized; . . . the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; . . . if there is a candidate slating process, whether the members of the minority group have been denied access to that process; . . . the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; . . . whether political campaigns have been characterized by overt or subtle racial appeals; . . . the extent to which members of the minority group have been elected to public office in the jurisdiction . . . whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[; and] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous" (*Thornburg v Gingles*, 478 US at 36-37 [internal quotation marks omitted]). In the 39 years that has followed *Gingles*, courts have required the creation of majority-minority districts all over the country (*see Allen v Milligan*, 599 US at 19).

In *Voinovich v Quilter* (507 US 146), the United States Supreme Court first considered an "influence-dilution" claim, in which the "complaint . . . is not that black voters have been deprived of the ability to constitute a *majority*, but of the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over voters from the white majority" (*id.* at 158). In doing so, the court stated that "[o]f course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim. For example, the first *Gingles*

precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume, *arguendo*, to be actionable today" (*id.*).

However, in *Bartlett v Strickland* (556 US 1), the United States Supreme Court reached the issue and held that section 2 could not be invoked to require the creation of such influence or crossover districts (*see id*. at 6). Nevertheless, the controlling opinion in *Bartlett* noted that "[o]ur holding that § 2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion" and that "[s]tates that wish to draw crossover districts are free to do so where no other prohibition exists" (*id.* at 23-24 [Kennedy, J.]).

Federal Circuit Courts of Appeal are split as to whether "coalition claims" are permitted under section 2 of the FVRA, where members of different races or language-minority groups claim that they are politically cohesive and that their combined voting strength would constitute a majority in a reasonably compact district (*see Growe v Emison*, 507 US 25, 41 [assuming without deciding that it was permissible for the District Court to combine distinct ethnic and language minority groups for purposes of assessing compliance with section 2 of the FVRA]; *Petteway v Galveston County*, 111 F4th 596, 599 [5th Cir] [overruling a prior decision and holding that section 2 of the FVRA does not authorize coalitions of racial and language minorities to claim vote dilution in legislative redistricting]; *Clerveaux v East Ramapo Centr. Sch. Dist.*, 984 F3d 213, 323-233 [2d Cir] [finding that the second and third *Gingles* preconditions were met based on evidence "that black and Latino residents were politically cohesive and that white residents voted as a bloc"]).

Recently, the United States Supreme Court rejected arguments made by the State of Alabama that section 2 of the FVRA "as applied to redistricting is unconstitutional under the Fifteenth Amendment" and that "the Fifteenth Amendment does not authorize race-based redistricting as a remedy for § 2 violations" (*Allen v Milligan*, 599 US at 41). The Court explained that "we held over 40 years ago 'that, even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2 [of the Fifteenth Amendment] outlaw voting practices that are discriminatory in effect,'" and that the VRA's "'ban on electoral changes that are discriminatory in effect . . . is an appropriate method of promoting the purposes of the Fifteenth Amendment'" (*id.*,

quoting *City of Rome v United States*, 446 US 156, 173, 177). The Court further explained that "for the last four decades, this Court and the lower federal courts have repeatedly applied the effects test of § 2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as a remedy for state districting maps that violate § 2. In light of that precedent . . . , we are not persuaded by Alabama's arguments that § 2 as interpreted in *Gingles* exceeds the remedial authority of Congress" (*id.* [citations omitted]).

III. The NYVRA

In 2022, the Legislature enacted the NYVRA in order to "[e]ncourage participation in the elective franchise by all eligible voters to the maximum extent" (Election Law § 17-200[1]) and to "[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, and especially to exercise the elective franchise" (*id.* § 17-200[2]). According to the Governor's Approval Memorandum, the act "ensures that the state continues to move toward being a national leader in voting rights. As the federal government fails to fulfill its duty to uphold voting rights across the nation, it is now incumbent upon states to step-up and step-in" (Governor's Approval Mem, Bill Jacket, L 2022, ch 226 at 5). In response to *Shelby County v Holder* and Congress's failure to update the coverage formula, the NYVRA mandates that certain changes in voting laws in certain covered jurisdictions be precleared by the Civil Rights Bureau of the Office of the New York State Attorney General or by a designated court (*see* Election Law §§ 17-204[8]; 17-210). Among other things, the NYVRA also contains sections prohibiting voter suppression, intimidation, deception, and obstruction (*see id.* §§ 17-206[1]; 17-212).

As relevant to this action, similar to section 2 of the FVRA, and modeled after very similar laws enacted in California and Washington (*see* Cal Elec Code § 14025 *et seq.*; Wash. Rev. Code 29A.92.005 *et seq.*), the NYVRA contains a "[p]rohibition against vote dilution," which provides that no political subdivision "shall use any method of election, having the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution" (Election Law § 17-206[2][a]).[2] A "protected

[2] For the purposes of demonstrating that vote dilution has occurred, the NYVRA provides that "evidence shall be weighed and considered as follows: (i) elections conducted prior to the filing of an action pursuant to this subdivision are more probative than elections conducted after the filing of the action; (ii) evidence concerning elections for members of the governing body of the political

class" is defined 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 NYVRA provides that a violation of the vote dilution provision "shall be established upon a showing that a political subdivision" used "an at-large method of election" and either "voting patterns of members of the protected class within the political subdivision are racially polarized,"[3] or "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][A]-[B]).[4] The NYVRA also

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subdivision are more probative than evidence concerning other elections; (iii) statistical evidence is more probative than non-statistical evidence; (iv) where there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision, members of each of those protected classes may be combined; (v) evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class is not required; (vi) evidence that voting patterns and election outcomes could be explained by factors other than racially polarized voting, including but not limited to partisanship, shall not be considered; (vii) evidence that sub-groups within a protected class have different voting patterns shall not be considered; (viii) evidence concerning whether members of a protected class are geographically compact or concentrated shall not be considered, but may be a factor in determining an appropriate remedy; and (ix) evidence concerning projected changes in population or demographics shall not be considered, but may be a factor, in determining an appropriate remedy" (Election Law § 206[2][c]).

[3] "Racially polarized voting" is defined as "voting in which there is a divergence in the candidate, political preferences, or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate" (Election Law § 17-204[6]).

[4] In making a "totality of the circumstances" determination, "factors that may be considered shall include, but not be limited to: (a) the history of discrimination in or affecting the political subdivision; (b) the extent to which members of the protected class have been elected to office in the political subdivision; (c) the use of any voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy that may enhance the dilutive effects of the election scheme; (d) denying eligible voters or candidates who are members of the protected class to processes determining which groups of candidates receive access to the ballot, financial support, or other support in a given election; (e) the extent to which members of the protected class contribute to political campaigns at lower rates; (f) the extent to which members of a protected class in the state or political subdivision vote at lower rates than other members of the electorate; (g) the extent to which members of the protected class are disadvantaged in areas including but not limited to education, employment, health, criminal justice, housing, land use, or environmental protection; (h) the extent to which members of the protected class are disadvantaged in other areas which may hinder their ability to participate effectively in the political process; (i) the use of overt or subtle racial appeals in political campaigns; (j) a significant lack of responsiveness on the part of elected

provides that a violation of the vote dilution provision "shall be established upon a showing that a political subdivision" "used a district-based or alternative method of election and that candidates or electoral choices preferred by members of the protected class would usually be defeated, and either: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; or (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired" (*id.* § 17-206[2][b][ii]).

"Any aggrieved person" may file an action against a political subdivision pursuant to Election Law § 17-206(4), and upon a finding of a violation of the vote dilution prohibition, a court "shall implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process . . . , which may include (i) a district-based method of election; (ii) an alternative method of election ; (iii) new or revised districting or redistricting plans; (iv) elimination of staggered elections so that all members of the governing body are elected on the same date; [or] (v) reasonably increasing the size of the governing body" (*id.* § 17-206[5][a][i]-[v]). "Alternative method of election" is defined as "a method of electing members to the governing body of a political subdivision using a method other than at-large or district-based, including, but not limited to, ranked-choice voting[5], cumulative voting[6], and limited voting[7]" (*id.* § 17-204[3]). "Coalition claims [are] permitted," in that "[m]embers 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

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officials to the particularized needs of members of the protected class; and (k) whether the political subdivision has a compelling policy justification that is substantiated and supported by evidence for adopting or maintaining the method of election or the voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy. Nothing in this subdivision shall preclude any additional factors from being considered, nor shall any specified number of factors be required in establishing that such a violation has occurred" (*id.* § 17-206[3]).

[5] Ranked-choice voting is "where a voter ranks candidates in order of preference, and votes are transferred to lower-ranked candidates who are not elected on first-place votes if a majority is not reached" (*Portugal v Franklin County*, 1 Wash 3d 629, 640, 530 P3d 994, 1002).

[6] Cumulative voting is "where a voter receives as many votes as there are candidates to elect, but may cast multiple votes for a single candidate" (*id.*).

[7] Limited voting is "where a voter receives fewer votes than there are candidates to elect" (*id.*).

polarized against the rest of the electorate" (*id.* § 17-206[8]).

Thus, the major differences between the vote dilution provisions of the FVRA and the NYVRA are that the NYVRA, like the California and Washington statutes, permits "influence" claims, and does not require the first *Gingles* precondition, i.e., that the minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district (*see* Cal Elec Code §§ 14027, 14028[c]; Wash. Rev. Code 29A.92.030[5]; *Pico Neighborhood Assn. v City of Santa Monica*, 15 Cal 5th 292, 316, 534 P3d 54, 65-66, 312 Cal Rptr 3d 319, 332; *Portugal v Franklin County*, 1 Wash 3d at 638-640, 530 P3d at 1001-1004). The NYVRA, like the California and Washington statutes, also allows for non-district based remedies, such as ranked-choice voting, cumulative voting, limited voting, and the elimination of staggered terms (*see* Election Law §§ 17-204[3]; 17-206[5][a][ii], [iv]; *Pico Neighborhood Assn. v City of Santa Monica*, 15 Cal 5th at 317, 534 P3d at 66, 312 Cal Rptr at 333; *Portugal v Franklin County*, 1 Wash 3d at 640, 530 P3d at 1002). While the text of Election Law § 17-206(2)(b)(i) suggests that a vote dilution claim shall be established simply upon a showing that a political subdivision used an at-large method of election and the voting patterns are racially polarized, the California Supreme Court, in interpreting a nearly identical provision, concluded that it should not be so-construed, explaining:

> "In plaintiffs' view, proof of racially polarized voting, in itself, establishes 'dilution' within the meaning of the CVRA [California Voting Rights Act]. They rely on the 'plain language' of Elections Code section 14028, subdivision (a), which provides, "A violation of Section 14027 *is established* if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision . . . ." (Italics added.) According to plaintiffs, 'Section 14028 expressly states how a violation of Section 14027 is shown'—i.e., simply by demonstrating the existence of racially polarized voting in an at-large jurisdiction.
>
> "When considered in isolation, this single sentence might arguably be susceptible to plaintiffs' reading. However, a court construing a statute does not view a fragment in isolation, but considers the statute as a whole, in context with related provisions and the overall statutory structure, so that it may best identify and effectuate the scheme's underlying purpose. As plaintiffs concede, and as the legislative history reveals, the CVRA is in many ways very similar to the VRA. When we construe 'dilution' under the CVRA, we must therefore be mindful that it is a term of art with a settled meaning under section 2 of the VRA: 'The phrase vote dilution itself suggests a norm with respect to which the fact of dilution may be ascertained.' (*Holder*

> *v. Hall* (1994) 512 U.S. 874, 880 [129 L. Ed. 2d 687, 114 S. Ct. 2581] (plur. opn. of Kennedy, J.).) To establish vote dilution under the VRA, 'a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice.' (*Holder*, at p. 880 . . . (plur. opn. of Kennedy, J.); *id.* at p. 887 . . . (conc. opn. of O'Connor, J.) ['On this, there is general agreement']; *id.* at p. 951 . . . (dis. opn. of Blackmun, J.) ['There is widespread agreement'].) So while the existence of racially polarized voting 'is relevant to a vote dilution claim' under the VRA (*Gingles*, supra, 478 U.S. at p. 55)—and is indeed 'a key element' (*ibid.*)—it is not in itself sufficient.
>
> "We find, for several reasons, the same is true under the CVRA. The similarities between the two schemes strongly suggest that 'dilution' requires not only a showing that racially polarized voting exists, but also that the protected class thereby has less ability to elect its preferred candidate or influence the election's outcome than it would have if the at-large system had not been adopted. . . . Although the legislative history materials can be read in different ways, one committee analysis recognized that the CVRA targets racially polarized voting in at-large elections only if it Impairs the Right of Protected Groups to elect their preferred candidates or influence the outcome of an election. After all, 'the very concept of vote dilution implies—and, indeed, necessitates—the existence of an "undiluted" practice against which the fact of dilution may be measured.' (*Reno v. Bossier Parish School Bd.* (1997) 520 U.S. 471, 480 [137 L. Ed. 2d 730, 117 S. Ct. 1491].)
>
> "Plaintiffs' construction would allow a party to prevail based solely on proof of racially polarized voting that could not be remedied or ameliorated by any other electoral system. Moreover, such a construction would render the word 'dilution' in Elections Code section 14027 surplusage. Accordingly, we agree with the Court of Appeal that dilution is a separate element under the CVRA. To establish the dilution element, a plaintiff in a CVRA action must identify a reasonable alternative voting practice to the existing at-large electoral system that will 'serve as the benchmark "undiluted" voting practice.' (*Reno v. Bossier Parish School Bd.*, supra, 520 U.S. at p. 480)" (*Pico Neighborhood Assn. v City of Santa Monica*, 15 Cal 5th at 314-315, 534 P3d at 64-65, 312 Cal Rptr 3d at 330-331 [citations and internal quotation marks omitted]).

The plaintiffs in this case interpret the NYVRA as similarly requiring plaintiffs to demonstrate a reasonable alternative practice before obtaining relief.

IV. This Action

The Town of Newburgh is a political subdivision in Orange County with a population of about 32,000. The Town Board is the Town's legislative and policy-making authority, and the

five members of the Town Board[8] are chosen through at-large elections, meaning that every registered voter residing within the Town is eligible to vote for each Town Board member position.

In March 2024, the plaintiffs commenced this action against the Town and the Town Board alleging vote dilution in violation of Election Law § 17-206 and seeking a judgment ordering the implementation of a new method of election for the Town Board that includes either a districting plan or an alternative method of election. The complaint alleges that Black and Hispanic communities comprise approximately 25 percent and 15 percent, respectively, of the Town's population, yet every person ever elected to the Town Board has been white. The defendants moved for summary judgment dismissing the complaint, arguing that the NYVRA's vote dilution provisions violate the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and the New York Constitution or, in the alternative, that the Town's at-large voting system complied with the NYVRA . In opposition, the plaintiff contended, inter alia, that the defendants lacked the capacity to challenge the constitutionality of the NYVRA.

The Supreme Court granted the defendants' motion, concluding that the NYVRA was facially unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The court also directed that the NYVRA was "stricken in its entirety from further enforcement and application to these Defendants and to any other political subdivision in the State of New York." The plaintiffs appeal. The Attorney General of the State of New York (hereinafter the AG) has also intervened as an appellant (*see* Executive Law § 71; 22 NYCRR 1250.9[i]).

V. Capacity

The plaintiffs and the AG contend that the defendants lack the capacity to challenge the constitutionality of the NYVRA's vote dilution provisions.

"Capacity '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, quoting *Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155). "[T]he traditional principle throughout the United States has been that municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation. . . . Constitutionally as well as a matter of historical fact, municipal corporate bodies . . . are merely subdivisions of the State, created by the State for the

[8] The Town Board consists of a Town Supervisor and four other members.

convenient carrying out of the State's governmental powers and responsibilities as its agents. Viewed, therefore, by the courts as purely creatures or agents of the State, it follow[s] that municipal corporate bodies cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants" (*City of New York v State of New York*, 86 NY2d 286, 289-290). This rule has been applied to municipal entities raising a constitutional challenge in defense of a lawsuit (*see Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d at 393; *In re World Trade Center Lower Manhattan Disaster Site Litigation*, 892 F3d 108, 109-111 [2d Cir]).

However, as the Court of Appeals has stated, "[t]he capacity rule is not absolute. . . . [T]he assertion of some constitutional rights may, by their nature, present special circumstances to which the general rule must yield. To date, we have identified a limited number of situations presenting such special circumstances, such as . . . where a public entity asserts that if it is obligated to comply with a statute it 'will by that very compliance be forced to violate a constitutional proscription'" (*Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d at 386, quoting *City of New York v State of New York*, 86 NY2d at 292 [citations and internal quotation marks omitted]). "[T]he exceptions we have recognized to date are narrow. Under the general rule, we have barred public entities from challenging a wide variety of state actions, such as, e.g., the allocation of state funds amongst various localities, the modification of a village-operated hospital's operating certificate, the closure of a local jail by the State, special exemptions from local real estate tax assessments, state land use regulations, and state laws requiring electric voting systems to be installed at polling places in lieu of lever-operated machines" (*id.* at 387 [citations omitted]).

The only exception to the general rule that the defendants invoke is for circumstances where a municipality's compliance with a state statute would force it to violate a constitutional proscription. Accordingly, to succeed on their constitutional argument, the defendants must establish that compliance with the NYVRA would force them to violate the Equal Protection Clause (*see Board of Educ. of Mt. Sinai Union Free Sch. Dist. v New York State Teachers Retirement Sys.*, 60 F3d 106, 112 [2d Cir]; *Blakeman v James*, 2024 WL 3201671, *14, 2024 US Dist LEXIS 115441, *36-38 [ED NY, No. 2:24-cv-1655 (NJC) (LGD)]; *Merola v Cuomo*, 427 F Supp 3d 286, 293 [ND NY]). For the reasons discussed below, it cannot be said as a matter of law on this record that compliance with the NYVRA would force the defendants to violate the Equal Protection Clause.

VI. The Equal Protection Clause

"A statute enjoy[s] a strong presumption of constitutionality. To rebut that presumption, the party attempting to strike down a statute as facially unconstitutional bears the heavy burden of proving beyond a reasonable doubt that the statute is in conflict with the Constitution" (*People v Viviani*, 36 NY3d 564, 576 [citations and internal quotation marks omitted]). Courts strike statutes down "only as a last unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible" (*White v Cuomo*, 38 NY3d 209, 216 [citation and internal quotation marks omitted]). A party making a facial challenge must "demonstrate that 'in any degree and in every conceivable application,' the law suffers wholesale constitutional impairment" (*Cohen v State of New York*, 94 NY2d 1, 8, quoting *McGowan v Burstein*, 71 NY2d 729, 733). "A successful facial challenge means that the law is 'invalid *in toto*——and therefore incapable of any valid application'" (*People v Stuart*, 100 NY2d 412, 421, quoting *Hoffman Estates v Flipside, Hoffman Estates, Inc.*, 455 US 489, 494 n 5). "Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. [Courts] must keep in mind that [a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people" (*Washington State Grange v Washington State Republican Party*, 552 US 442, 450-451 [citations and internal quotation marks omitted]).

While Congress has the authority to enact anti-discrimination laws under section 5 of the Fourteenth Amendment of the United States Constitution and section 2 of the Fifteenth Amendment of the United States Constitution, the New York State Legislature has the authority to enact statutes that protect against racial discrimination pursuant to its general police power (*see* Executive Law § 290[2]; *Roberts v United States Jaycees*, 468 US 609, 624; *Matter of Holland v Edwards*, 282 App Div 353, 357, *affd* 307 NY 38), and has "'broad powers to determine the

conditions under which the right of suffrage may be exercised'" (*Shelby County v Holder*, 570 US at 543, quoting *Carrington v Rash*, 380 US 89, 91). However, in exercising that authority, the New York State Legislature must comply with the Equal Protection Clause of the Fourteenth Amendment.

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws" (US Const, 14th Amend, § 1). "Alleged equal protection violations are primarily evaluated using either a 'strict scrutiny' or 'rational basis' standard of review" (*People v Aviles*, 28 NY3d at 502). "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 Community Schools v Seattle School Dist. No. 1*, 551 US 701, 720). "'*[A]ll* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny'" (*Johnson v California*, 543 US 499, 505, quoting *Adarand Constructors, Inc. v Peña*, 515 US 200, 227). "'[R]acial classifications receive close scrutiny even when they may be said to burden or benefit the races equally'" (*Johnson v California*, 543 US at 506, quoting *Shaw v Reno*, 509 US 630, 651; *see Brown v Board of Education*, 347 US 483). The United States Supreme Court has "insisted on strict scrutiny in every context, even for so-called benign racial classifications, such as race-conscious university admissions policies, race-based preferences in governmental contracts, and race-based districting intended to improve minority representation" (*Johnson v California*, 543 US at 505 [citations and internal quotation marks omitted]).

Strict scrutiny "ask[s], first, whether the racial classification is used to further compelling governmental interests" and "[s]econd, . . . whether the government's use of race is narrowly tailored —meaning necessary— to achieve that interest" (*Students for Fair Admissions, Inc. v President and Fellows of Harvard College*, 600 US 181, 206-207 [citation and internal quotation marks omitted]). If there is no basis for imposing a heightened level of scrutiny, "then the provision may be sustained if there is a rational basis for its enactment," meaning that the governmental action must be "rationally related to [a] legitimate State interest" (*Golden v Clark*, 76 NY2d 618, 624).

Here, the defendants contend that any change of its at-large electoral system to comply with the NYVRA would violate the Equal Protection Clause because it would be done with the express purpose of giving citizens statutorily grouped together by race greater electoral success than its at-large system, and that the NYVRA, unlike the FVRA, is not narrowly tailored to achieve

a compelling governmental interest.

Initially, we agree with the plaintiffs and the AG that strict scrutiny does not apply to all applications of the vote dilution provisions of the NYVRA. The statute gives rights to "members of a race, color, or language-minority group" (Election Law § 17-204[5]; *see id.* § 17-206[2]) in order 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]). "[I]t is familiar law that a statute should be construed so as to avoid doubts concerning its constitutionality" (*Matter of Lorie C.*, 49 NY2d 161, 171). Bearing this maxim in mind, we agree with the plaintiffs and the AG that the statute should be construed as allowing members of all racial groups, including white voters, to bring vote dilution claims, including when white voters constitute a minority in a political subdivision, as is the case in certain jurisdictions in New York (*see Portugal v Franklin County*, 1 Wash 3d at 648, 530 P3d at 1006 [stating that the Washington Voting Rights Act, which similarly allows "voters who are members of a race, color, or language minority group in the state of Washington, as this class is referenced and defined in the [FVRA]" (Wash. Rev. Code § 29A.92.010[6]) to bring vote dilution claims, "on its face, . . . requires equal opportunit[ies] for voters of all races, colors, and language minority groups" (internal quotation marks omitted)]; *Sanchez v City of Modesto*, 145 Cal App 4th 660, 666, 51 Cal Rptr 3d 821, 826 [stating that the CVRA, which similarly allows "voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act of 1965" (Cal Elec Code § 14026[d]) to bring vote dilution claims, "gives a cause of action to members of *any* racial or ethnic group that can establish that its members' votes are diluted through the combination of racially polarized voting and an at-large election system" and that "*any* racial group can experience the kind of vote dilution the CVRA was designed to combat, including Whites. Just as non-Whites in majority-White cities may have a cause of action under the CVRA, so may Whites in majority-non-White Cities. Both demographic situations exist in California . . ., and the CVRA applies to each in exactly the same way"]; *see also United States v Brown*, 494 F Supp 2d 440, 444 [SD Miss] ["Section 2 [of the FVRA] provides no less protection to white voters than any other class of voters"], *affd* 561 F3d 420 [5th Cir]).

In upholding the California and Washington vote dilution statutes, courts have held that they were neither subject to strict scrutiny nor facially in violation of the Equal Protection Clause. In *Sanchez v City of Modesto* (145 Cal App 4th at 666, 51 Cal Rptr 3d at 826), the

California Court of Appeal for the Fifth Appellate District explained: "The CVRA is race neutral. It does not favor any race over others or allocate burdens or benefits to any groups on the basis of race. It simply gives a cause of action to members of *any* racial or ethnic group that can establish that its members' votes are diluted through the combination of racially polarized voting and an at-large election system . . . . In this respect, it is similar to other long-standing statutes that create causes of action for racial discrimination, such as the federal Civil Rights Act or California's Fair Employment and Housing Act." The court further noted that the defendants' argument "collapses as soon as it is applied to the FVRA. . . . [S]ection 2 of the FVRA does not require a showing of intentional discrimination. No court has ever suggested, to our knowledge, that strict scrutiny applies to section 2 of the FVRA and that it would fail for this reason" (*Sanchez* 145 Cal App 4th at 682, 51 Cal Rptr 3d at 839). Similarly, in *Higginson v Becerra* (786 Fed Appx 705), the United States Court of Appeals for the Ninth Circuit affirmed the dismissal of a complaint brought by a resident of the City of Poway who alleged that he resided in a racially gerrymandered electoral district because of the CVRA, explaining that the complaint "does not allege that the City or the CVRA distribute[d] burdens or benefits on the basis of individual racial classifications. Although a finding of racially polarized voting triggers the application of the CVRA, it is well settled that governments may adopt measures designed 'to eliminate racial disparities through race-neutral means'" (*id.* at 706-707, quoting *Texas Dept. of Housing and Comunity Affairs v Inclusive Communities Project, Inc.*, 576 US 519, 545 [citation and internal quotation marks omitted]). The United States Supreme Court denied certiorari (*see Higginson v Becerra*, 140 S Ct 2807). Finally, in *Portugal v Franklin County* (Wash 3d at 658, 530 P3d at 1011), the Supreme Court of Washington held that the Washington Voting Rights Act (hereinafter WVRA) "on its face does not classify voters on the basis of race, nor does it deprive anyone of the fundamental right to vote. Instead, the WVRA mandates *equal* voting opportunities for members of every race, color, and language minority group," thus triggering rational basis review and not strict scrutiny (*see Coads v Nassau County, __ Misc 3d __*, 2024 NY Slip Op 24314 [Sup Ct, Nassau County] [concluding that the vote dilution provisions of the NYVRA do not facially violate the Equal Protection Clause]).

It is true that "[u]nder the Equal Protection Clause, districting maps that sort voters on the basis of race are by their very nature odious" and "cannot be upheld unless they are narrowly tailored to achieving a compelling state interest" (*Wisconsin Legislature v Wisconsin Elections Comm'n*, 595 US 398, 401 [internal quotation marks omitted]). "'Racial gerrymandering, even for

remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire'" (*Bartlett v Strickland*, 556 US at 21, quoting *Shaw v Reno*, 509 US at 657). "When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls'" (*Miller v Johnson*, 515 US 900, 911-912, quoting *Shaw v Reno*, 509 US at 647). "The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole" (*Shaw v Reno*, 509 US at 648). The United States Supreme Court has "assumed" that complying with section 2 of the FVRA is a compelling interest, but also held that "when a State invokes § 2 to justify race-based districting, 'it must show (to meet the narrow tailoring requirement) that it had a strong basis in evidence for concluding that the statute required its action'" (*Wisconsin Legislature v Wisconsin Elections Comm'n*, 595 US at 402 [internal quotation marks omitted], quoting *Cooper v Harris*, 581 US 285, 292; *see Bush v Vera*, 517 US 952, 979-982; *Shaw v Hunt*, 517 US 899, 908-918; *Miller v Johnson*, 515 US at 921).

However, race-based districting is only one of the possible remedies under the NYVRA; the NYVRA also contemplates remedies that do not sort voters based on race, such as ranked-choice voting, cumulative voting, limited voting, and the elimination of staggered terms (*see* Election Law §§ 17-204[3]; 17-206[5][a][ii],[iv]; *Collins v City of Norfolk, Va.*, 883 F2d 1232, 1236 [4th Cir] [noting that the potential for vote dilution in an at-large system "may be enhanced by staggered terms"]; Theodore S. Arrington & Gerald L. Ingalls, *The limited vote alternative to affirmative districting*, 17 Political Geography 6, 701-728 [August 1998] [presenting evidence that the number of minority candidates and their chance of winning increased when limited voting replaced simple at-large systems]). Even if a district-based system is used as a remedy, strict scrutiny would only apply if race is the "'predominant factor in drawing district lines'" (*Allen v Milligan*, 599 US at 31 [Opinion of Roberts, C.J., joined by Justices Sotomayor, Kagan, and Jackson] [concluding that a remedial map drawn to remedy a violation of section 2 of the FVRA was not subject to strict scrutiny because the plaintiffs' expert mapmaker testified that although race was

a consideration, it did not predominate over other factors in drawing district lines], quoting *Cooper v Harris*, 581 US at 291; *see Bethune-Hill v Virginia State Bd. of Elections*, 580 US 178, 189-190 [race may predominate even when a reapportionment plan respects traditional districting principles if race-neutral considerations came into play only after the race-based decision had been made, or if race for its own sake is the overriding reason for choosing one map over others]; *Miller v Johnson*, 515 US at 916 [although redistricting legislatures will almost always be aware of racial demographics, it does not follow from that that race predominates in the redistricting process]; *Pico Neighborhood Assn. v City of Santa Monica*, 15 Cal 5th at 323, 534 P3d at 70, 312 Cal Rptr 3d at 337 [rejecting a contention that a majority-minority requirement—or something close to it in the form of a near-majority requirement—was necessary to avoid difficult constitutional questions under the Equal Protection Clause, and noting that "nothing in the CVRA requires a municipality or a court to select a district-based remedy or, even if it chooses to do so, to draw district lines, as the City contends, based 'principally on race'" rather than other statutorily-prescribed redistricting factors]).

As the California Court of Appeal for the Fifth Appellate District explained in rejecting a facial challenge to the CVRA: "The city may . . . use similar arguments to attempt to show *as-applied* invalidity later if liability is proven and a specific application or remedy is considered that warrants the attempt. For example, if the court entertains a remedy that uses race, such as a district-based election system in which race is a factor in establishing district boundaries, defendants may again assert the meaty constitutional issues they have raised here. In doing so, at that time they can ask the court to decide whether the particular application or remedy is discriminatory" (*Sanchez v City of Modesto*, 145 Cal App 4th at 665, 51 Cal Rptr 3d at 825-826). The State of Washington's highest court has made a similar determination (*see Portugal v Franklin County*, 1 Wash 3d at 659, 530 P3d at 1012 ["Without a doubt, the WVRA could be applied in an unconstitutional manner, and it is subject to as-applied challenges. However, . . . the WVRA, on its face, does not require unconstitutional actions"]).

Further, we conclude that the NYVRA need not contain the first *Gingles* precondition, that the "minority group . . . be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district" (*Allen v Milligan*, 599 US at 18 [internal quotation marks omitted]), to survive a facial challenge to its constitutionality under the Equal Protection Clause. The United States Supreme Court has never said that the *Gingles* test was required by the constitution, as opposed to resulting from a statutory interpretation of section 2 of

the FVRA (*see Portugal v Franklin County*, 1 Wash 3d at 659, 530 P3d at 1011-1012). The only time the Fourteenth Amendment is mentioned in the majority opinion in *Gingles* is in the background section where the court noted that the plaintiffs' lawsuit challenged the subject districts as violating the Fourteenth and Fifteenth Amendments in addition to violating section 2 of the FVRA (*see Thornburg v Gingles*, 478 US at 35). The reason that the United States Supreme Court included the first *Gingles* precondition was because of its conclusion that if the minority group were unable to demonstrate that it was sufficiently large and geographically compact to constitute a majority in a single-member district, "the *multi-member form* of the district [could not] be responsible for minority voters' inability to elect its candidates" (*id.* at 50). *Gingles* was not contemplating influence districts or remedies such as ranked-choice voting, cumulative voting, limited voting, or the elimination of staggered terms. As the United States Supreme Court noted in *Voinovich v Quilter (507 US at 158)*,"[o]f course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." Since the NYVRA specifically allows for remedies that might allow for minorities to elect their candidates of choice or influence the outcome of elections without their constituting a majority in a single-member district, it was rational for the New York Legislature to not include the first *Gingles* precondition as a precondition to liability under the NYVRA (*see Portugal v Franklin County*, 1 Wash 3d at 640-641, 530 P3d at 1003 ["Because the WVRA contemplates a broader range of remedies than Section 2, a WVRA plaintiff can state a redressable injury under a broader range of circumstances than a Section 2 plaintiff."]; *Pico Neighborhood Assn. v City of Santa Monica*, 15 Cal 5th at 317, 534 P3d at 66, 312 Cal Rptr 3d at 332 ["It would make little sense to require CVRA plaintiffs to show that the protected class could constitute a majority of a hypothetical district, given that the CVRA is not limited to ability-to-elect claims nor are its remedies limited to district elections."]; *Sanchez v City of Modesto*, 145 Cal App 4th at 670, 51 Cal Rptr 3d at 829).

Further, while the text of the NYVRA is unlike the FVRA in that it does not require the plaintiff in every vote dilution case to show that "under the 'totality of the circumstances,'. . . the political process is not 'equally open' to minority voters" (*Allen v Milligan*, 599 US at 18, quoting *Thornburg v Gingles*, 478 US at 45-46; *see* 52 USC § 10301), in order to obtain a remedy under the NYVRA, a plaintiff still must show that "vote dilution" has occurred (Election Law § 17-206[2][a]), and that there is an alternative practice that would allow the minority group to "have equitable access to fully participate in the electoral process" (*id.* § 17-206[5][a]; *see Pico Neighborhood Assn. v City*

of Santa Monica, 15 Cal 5th at 314-315, 534 P3d at 64-65, 312 Cal Rptr 3d at 330-331). Thus, the NYVRA does not significantly differ from the FVRA in this respect.

Finally, even if it were unconstitutional to apply the NYVRA in situations where the *Gingles* test has not been satisfied, the NYVRA could still be constitutionally applied in situations where the *Gingles* test has been satisfied. All parties agree that the FVRA as interpreted by *Gingles* is constitutional (*see Allen v Milligan*, 599 US at 41). Here, the plaintiffs contend that the evidence they submitted in opposition to the defendants' motion demonstrates that each element of the *Gingles* test has been satisfied.

Accordingly, the defendants failed to establish as a matter of law that compliance with the vote dilution provisions of the NYVRA would force them to violate the Equal Protection Clause.

VII. The Provisions of the NYVRA Other Than the Vote Dilution Provisions

Although the parties in this case only made arguments regarding the vote dilution provisions of the NYVRA, the Supreme Court's order directed that the NYVRA was "stricken in its entirety from further enforcement and application to these Defendants and to any other political subdivision in the State of New York." As noted above, the NYVRA contains other provisions, not at issue in this action, mandating preclearance of certain changes in voting laws and prohibiting voter suppression, intimidation, deception, and obstruction (*see* Election Law §§ 17-206[1]; 17-210; 17-212). The NYVRA also contains a severability clause stating that "[i]f any provision of this title or its application to any person, political subdivision, or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this title which can be given effect without the invalid provision or application" (*id.* § 17-222; *see Town of Islip v Caviglia*, 141 AD2d 148, 167-168). As the defendants do not dispute, even if the vote dilution provisions of the NYVRA did violate the Equal Protection Clause, the Supreme Court had no authority to invalidate the remaining portions of the NYVRA (*see T.D. New York State Off. of Mental Health*, 91 NY2d 860, 862; *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713). The Supreme Court also had no authority to bind entities that are not parties to this action or to bind courts in other judicial districts deciding actions brought pursuant to the NYVRA (*see D'Alessandro v Carro*, 123 AD3d 1, 6; *Riverside Capital Advisors, Inc. v First Secured Capital Corp.*, 28 AD3d 457, 460).

VIII. The Defendants' Alternative Ground for Summary Judgment

In the Supreme Court, the defendants alternatively argued that they were entitled to summary judgment on the ground that the Town's at-large voting system complied with the

NYVRA. However, on appeal, the defendants do not mention this argument or advance it as an alternative ground for affirmance (*cf. Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546; *Olden Group, LLC v 2890 Review Equity, LLC*, 209 AD3d 748, 750).

IX. Conclusion

Accordingly, the order is reversed, on the law, and the defendants' motion for summary judgment dismissing the complaint is denied.

CHAMBERS, TAYLOR and GOLIA, JJ., concur.

ORDERED that the order is reversed, on the law, with one bill of costs payable by the defendants to the plaintiffs, and the defendants' motion for summary judgment dismissing the complaint is denied.

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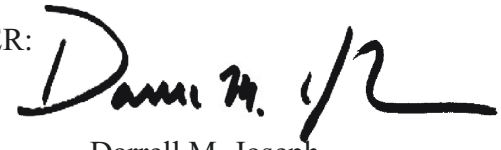

Darrell M. Joseph
Clerk of the Court

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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

Plaintiffs,

– against –

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

Defendants.

Index No. EF002460-2024

NOTICE OF ENTRY

PLEASE TAKE NOTICE that annexed hereto is a true and correct copy of an Opinion and Order of the Supreme Court of the State of New York, Appellate Division, Second Department, decided January 30, 2025 under Appellate Division Docket Number 2024-11753, and entered in the Office of the Clerk of the Appellate Division, Second Department on January 30, 2025.

Dated: White Plains, New York
January 30, 2025

ABRAMS FENSTERMAN, LLP

By: _____

Robert. A. Spolzino
81 Main Street, Suite 400
White Plains, New York
914-607-7010

To: All counsel of record via NYSCEF

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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E/htr

_____AD3d_____ Argued - December 18, 2024

HECTOR D. LASALLE, P.J.
CHERYL E. CHAMBERS
JANICE A. TAYLOR
DONNA-MARIE E. GOLIA, JJ.

2024-11753 OPINION & ORDER

Oral Clarke, et al., plaintiffs-appellants,
v Town of Newburgh, et al., respondents;
Letitia James, etc., intervenor-appellant.

(Index No. 2460/24)

APPEALS, in an action pursuant to Election Law § 17-206, from an order of the Supreme Court (Maria S. Vazquez-Doles, J.), dated November 7, 2024, and entered in Orange County. The order granted the defendants' motion for summary judgment dismissing the complaint and directed that the John R. Lewis Voting Rights Act of New York was stricken in its entirety from further enforcement and application to the defendants and to any other political subdivision in New York State.

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Letitia James, Attorney General, New York, NY (Barbara D. Underwood, Judith Vale, Andrea Trento, Beezly J. Kiernan, Sandra Park, Lindsay McKenzie, and Derek Borchardt of counsel), intervenor-appellant pro se.

Troutman Pepper Hamilton Sanders LLP, New York, NY (Misha Tseytlin and Bennet J. Moskowitz of counsel), for respondents.

Campaign Legal Center, Washington, DC (Robert Brent Ferguson of counsel),

amicus curiae pro se and for amici curiae American Civil Liberties Union of Southern California and American Civil Liberties Union of Northern California.

NAACP Legal Defense & Educational Fund, Inc., New York, NY (Adam Lioz, Samuel Spital, Stuart Naifeh, Michael Pernick, and Maia Cole of counsel), amicus curiae pro se.

Baker & Hostetler, LLP, New York, NY (Ariana Dindiyal, Robert J. Tucker, Erika D. Prouty, Rebecca Schrote, and E. Mark Braden of counsel), for amici curiae Town of Mount Pleasant and Town Board of the Town of Mount Pleasant.

Holtzman Vogel Baran Torchinsky & Josefiak, PLLC, Buffalo, NY (Joseph Burns of counsel), for amicus curiae Town of Cheektowaga.

LASALLE, P.J.

I. Introduction

In addition to setting out the powers of the branches of our government, the constitutions of the United States and New York State contain provisions protecting the rights of minorities from the "tyranny of the majority" (John Adams, A Defence of the Constitutions of Government of the United States of America, Vol. 3, 291 [1788]; *see also* James Madison, Federalist No. 10), including provisions guaranteeing citizens equal protection of the laws (*see* US Const, 14th Am, § 1; NY Const, art I, § 11). On this appeal we are asked to decide whether the vote dilution provisions of the John R. Lewis Voting Rights Act of New York (L 2022, ch 226; hereinafter NYVRA), intended to ensure that a numerical minority's voice is not removed from local government, facially violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (hereinafter the Equal Protection Clause).[1] The defendants in this case, the Town of Newburgh and the Town Board of the Town of Newburgh (hereinafter the Town Board), lack the capacity to challenge the constitutionality of the NYVRA except to the extent that it forces them to

[1] The defendants contend that the NYVRA also violates the New York State Constitution, which the Court of Appeals has stated "provides for equivalent equal protection safeguards" (*People v Aviles*, 28 NY3d 497, 502; *see* NY Const, art I, § 11). As the parties do not contend that equal protection claims under the New York State Constitution should be analyzed differently than the equal protection claims under the Fourteenth Amendment, the equal protection claim set forth by the defendants will be analyzed with reference to the Fourteenth Amendment, bearing in mind that the rationale would also be dispositive of the defendants' equal protection claim under the New York State Constitution.

violate the Equal Protection Clause. Since, on this record, the defendants failed to show as a matter of law that compliance with the NYVRA would force them to violate the Equal Protection Clause, we reverse the order of the Supreme Court.

II. The Federal Voting Rights Act

Sixty years ago, Congress enacted the Voting Rights Act of 1965 (hereinafter the FVRA), pursuant to its authority to enforce the Fifteenth Amendment to the United States Constitution (*see Allen v Milligan*, 599 US 1, 41). Section 5 of the FVRA, which initially was set to expire after five years, provided that no change in voting procedures in certain jurisdictions defined by a "coverage formula" set out in section 4 of the FVRA could take effect until it was approved by the United States Attorney General or a court of three judges (*Shelby County v Holder*, 570 US 529, 537-538). Although these sections of the FVRA were repeatedly reauthorized by Congress, in 2013, the United States Supreme Court struck down section 4 because the coverage formula was based on data that was more than 40 years old and no longer responsive to current needs and thus an impermissible burden on the principles of federalism and the equal sovereignty among the states (*see id.* at 535, 543-544, 550-557). Accordingly, section 5 has been rendered unenforceable until Congress drafts a new coverage formula, which it has not done (*see id.* at 557).

However, section 2 of the FVRA, which applies throughout the United States and concerns vote dilution, remains in effect (*see id.*). "In its original form, § 2 closely tracked the language of the [Fifteenth] Amendment and, as a result, had little independent force. [The] leading case on § 2 at the time was *City of Mobile v Bolden* [(446 US 55)], which involved a claim by black voters that the City's at-large election system effectively excluded them from participating in the election of city commissioners. The commission had three seats, black voters comprised one-third of the City's population, but no black-preferred candidate had ever won election" (*Allen v Milligan*, 599 US at 10-11 [citations, footnote, and internal quotation marks omitted]). The Court in *City of Mobile* ruled against the plaintiffs, concluding that the Fifteenth Amendment, and thus section 2, did not "prohibit laws that [were] discriminatory only in effect" (*id.* at 11; *see City of Mobile v Bolden,* 446 US at 61-65).

"Almost immediately after it was decided, *Mobile* produced an avalanche of criticism, both in the media and within the civil rights community" (*Allen v Milligan*, 599 US at 11 [internal quotation marks omitted]). "By focusing on discriminatory intent and ignoring disparate effect,

critics argued, the Court had abrogated the standard used by the courts to determine whether [racial] discrimination existed" (*id.* at 12 [internal quotation marks omitted]). On the other hand, "mandating racial proportionality in elections was regarded by many as intolerable" (*id.*). In 1982, the impasse was resolved "when Senator Bob Dole proposed a compromise. Section 2 would include the effects test that many desired but also a robust disclaimer against proportionality" (*id.* at 13 [citation omitted]).

As amended by Congress in 1982, section 2 provides that the section is violated "if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial] class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population" (52 USC § 10301[b]).

A violation of section 2 occurs "where an 'electoral structure operates to minimize or cancel out' minority voters' 'ability to elect their preferred candidates.' Such a risk is greatest 'where minority and majority voters consistently prefer different candidates' and where minority voters are submerged in a majority voting population that 'regularly defeat[s]' their choices" (*Allen v Milligan*, 599 US at 17-18, quoting *Thornburg v Gingles*, 478 US 30, 48). In interpreting section 2, the United States Supreme Court developed the *Gingles* test for deciding section 2 claims. The *Gingles* test "focuses . . . on vote dilution accomplished through cracking or packing, *i.e.*, 'the dispersal of [a protected class of voters] into districts in which they constitute an ineffective minority of voters or from the concentration of [those voters] into districts where they constitute an excessive majority'" (*Abbott v Perez*, 585 US 579, 627 n 2 [Sotomoyor, J., dissenting], quoting *Thornburg v Gingles*, 478 US at 46 n 11).

"To succeed in proving a § 2 violation under *Gingles*, plaintiffs must satisfy three preconditions. First, the minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district. A district will be reasonably configured . . . if it comports with traditional districting criteria, such as being contiguous and reasonably

compact. 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. Finally, a plaintiff who demonstrates the three preconditions must also show, under the totality of the circumstances, that the political process is not equally open to minority voters" (*Allen v Milligan*, 599 US at 18 [citations and internal quotation marks omitted]). Factors relevant to this last determination include: "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; . . . the extent to which voting in the elections of the state or political subdivision is racially polarized; . . . the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; . . . if there is a candidate slating process, whether the members of the minority group have been denied access to that process; . . . the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; . . . whether political campaigns have been characterized by overt or subtle racial appeals; . . . the extent to which members of the minority group have been elected to public office in the jurisdiction . . . whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[; and] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous" (*Thornburg v Gingles*, 478 US at 36-37 [internal quotation marks omitted]). In the 39 years that has followed *Gingles*, courts have required the creation of majority-minority districts all over the country (*see Allen v Milligan*, 599 US at 19).

In *Voinovich v Quilter* (507 US 146), the United States Supreme Court first considered an "influence-dilution" claim, in which the "complaint . . . is not that black voters have been deprived of the ability to constitute a *majority*, but of the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over voters from the white majority" (*id.* at 158). In doing so, the court stated that "[o]f course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim. For example, the first *Gingles*

precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume, *arguendo*, to be actionable today" (*id.*).

However, in *Bartlett v Strickland* (556 US 1), the United States Supreme Court reached the issue and held that section 2 could not be invoked to require the creation of such influence or crossover districts (*see id*. at 6). Nevertheless, the controlling opinion in *Bartlett* noted that "[o]ur holding that § 2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion" and that "[s]tates that wish to draw crossover districts are free to do so where no other prohibition exists" (*id.* at 23-24 [Kennedy, J.]).

Federal Circuit Courts of Appeal are split as to whether "coalition claims" are permitted under section 2 of the FVRA, where members of different races or language-minority groups claim that they are politically cohesive and that their combined voting strength would constitute a majority in a reasonably compact district (*see Growe v Emison*, 507 US 25, 41 [assuming without deciding that it was permissible for the District Court to combine distinct ethnic and language minority groups for purposes of assessing compliance with section 2 of the FVRA]; *Petteway v Galveston County*, 111 F4th 596, 599 [5th Cir] [overruling a prior decision and holding that section 2 of the FVRA does not authorize coalitions of racial and language minorities to claim vote dilution in legislative redistricting]; *Clerveaux v East Ramapo Centr. Sch. Dist.*, 984 F3d 213, 323-233 [2d Cir] [finding that the second and third *Gingles* preconditions were met based on evidence "that black and Latino residents were politically cohesive and that white residents voted as a bloc"]).

Recently, the United States Supreme Court rejected arguments made by the State of Alabama that section 2 of the FVRA "as applied to redistricting is unconstitutional under the Fifteenth Amendment" and that "the Fifteenth Amendment does not authorize race-based redistricting as a remedy for § 2 violations" (*Allen v Milligan*, 599 US at 41). The Court explained that "we held over 40 years ago 'that, even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2 [of the Fifteenth Amendment] outlaw voting practices that are discriminatory in effect,'" and that the VRA's "'ban on electoral changes that are discriminatory in effect . . . is an appropriate method of promoting the purposes of the Fifteenth Amendment'" (*id.*,

quoting *City of Rome v United States*, 446 US 156, 173, 177). The Court further explained that "for the last four decades, this Court and the lower federal courts have repeatedly applied the effects test of § 2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as a remedy for state districting maps that violate § 2. In light of that precedent . . . , we are not persuaded by Alabama's arguments that § 2 as interpreted in *Gingles* exceeds the remedial authority of Congress" (*id.* [citations omitted]).

III. The NYVRA

In 2022, the Legislature enacted the NYVRA in order to "[e]ncourage participation in the elective franchise by all eligible voters to the maximum extent" (Election Law § 17-200[1]) and to "[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, and especially to exercise the elective franchise" (*id.* § 17-200[2]). According to the Governor's Approval Memorandum, the act "ensures that the state continues to move toward being a national leader in voting rights. As the federal government fails to fulfill its duty to uphold voting rights across the nation, it is now incumbent upon states to step-up and step-in" (Governor's Approval Mem, Bill Jacket, L 2022, ch 226 at 5). In response to *Shelby County v Holder* and Congress's failure to update the coverage formula, the NYVRA mandates that certain changes in voting laws in certain covered jurisdictions be precleared by the Civil Rights Bureau of the Office of the New York State Attorney General or by a designated court (*see* Election Law §§ 17-204[8]; 17-210). Among other things, the NYVRA also contains sections prohibiting voter suppression, intimidation, deception, and obstruction (*see id.* §§ 17-206[1]; 17-212).

As relevant to this action, similar to section 2 of the FVRA, and modeled after very similar laws enacted in California and Washington (*see* Cal Elec Code § 14025 *et seq.*; Wash. Rev. Code 29A.92.005 *et seq.*), the NYVRA contains a "[p]rohibition against vote dilution," which provides that no political subdivision "shall use any method of election, having the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution" (Election Law § 17-206[2][a]).[2] A "protected

[2] For the purposes of demonstrating that vote dilution has occurred, the NYVRA provides that "evidence shall be weighed and considered as follows: (i) elections conducted prior to the filing of an action pursuant to this subdivision are more probative than elections conducted after the filing of the action; (ii) evidence concerning elections for members of the governing body of the political

class" is defined 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 NYVRA provides that a violation of the vote dilution provision "shall be established upon a showing that a political subdivision" used "an at-large method of election" and either "voting patterns of members of the protected class within the political subdivision are racially polarized,"[3] or "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][A]-[B]).[4] The NYVRA also

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subdivision are more probative than evidence concerning other elections; (iii) statistical evidence is more probative than non-statistical evidence; (iv) where there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision, members of each of those protected classes may be combined; (v) evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class is not required; (vi) evidence that voting patterns and election outcomes could be explained by factors other than racially polarized voting, including but not limited to partisanship, shall not be considered; (vii) evidence that sub-groups within a protected class have different voting patterns shall not be considered; (viii) evidence concerning whether members of a protected class are geographically compact or concentrated shall not be considered, but may be a factor in determining an appropriate remedy; and (ix) evidence concerning projected changes in population or demographics shall not be considered, but may be a factor, in determining an appropriate remedy" (Election Law § 206[2][c]).

[3] "Racially polarized voting" is defined as "voting in which there is a divergence in the candidate, political preferences, or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate" (Election Law § 17-204[6]).

[4] In making a "totality of the circumstances" determination, "factors that may be considered shall include, but not be limited to: (a) the history of discrimination in or affecting the political subdivision; (b) the extent to which members of the protected class have been elected to office in the political subdivision; (c) the use of any voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy that may enhance the dilutive effects of the election scheme; (d) denying eligible voters or candidates who are members of the protected class to processes determining which groups of candidates receive access to the ballot, financial support, or other support in a given election; (e) the extent to which members of the protected class contribute to political campaigns at lower rates; (f) the extent to which members of a protected class in the state or political subdivision vote at lower rates than other members of the electorate; (g) the extent to which members of the protected class are disadvantaged in areas including but not limited to education, employment, health, criminal justice, housing, land use, or environmental protection; (h) the extent to which members of the protected class are disadvantaged in other areas which may hinder their ability to participate effectively in the political process; (i) the use of overt or subtle racial appeals in political campaigns; (j) a significant lack of responsiveness on the part of elected

provides that a violation of the vote dilution provision "shall be established upon a showing that a political subdivision" "used a district-based or alternative method of election and that candidates or electoral choices preferred by members of the protected class would usually be defeated, and either: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; or (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired" (*id.* § 17-206[2][b][ii]).

"Any aggrieved person" may file an action against a political subdivision pursuant to Election Law § 17-206(4), and upon a finding of a violation of the vote dilution prohibition, a court "shall implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process . . . , which may include (i) a district-based method of election; (ii) an alternative method of election ; (iii) new or revised districting or redistricting plans; (iv) elimination of staggered elections so that all members of the governing body are elected on the same date; [or] (v) reasonably increasing the size of the governing body" (*id.* § 17-206[5][a][i]-[v]). "Alternative method of election" is defined as "a method of electing members to the governing body of a political subdivision using a method other than at-large or district-based, including, but not limited to, ranked-choice voting[5], cumulative voting[6], and limited voting[7]" (*id.* § 17-204[3]). "Coalition claims [are] permitted," in that "[m]embers 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

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officials to the particularized needs of members of the protected class; and (k) whether the political subdivision has a compelling policy justification that is substantiated and supported by evidence for adopting or maintaining the method of election or the voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy. Nothing in this subdivision shall preclude any additional factors from being considered, nor shall any specified number of factors be required in establishing that such a violation has occurred" (*id.* § 17-206[3]).

[5] Ranked-choice voting is "where a voter ranks candidates in order of preference, and votes are transferred to lower-ranked candidates who are not elected on first-place votes if a majority is not reached" (*Portugal v Franklin County*, 1 Wash 3d 629, 640, 530 P3d 994, 1002).

[6] Cumulative voting is "where a voter receives as many votes as there are candidates to elect, but may cast multiple votes for a single candidate" (*id.*).

[7] Limited voting is "where a voter receives fewer votes than there are candidates to elect" (*id.*).

polarized against the rest of the electorate" (*id.* § 17-206[8]).

Thus, the major differences between the vote dilution provisions of the FVRA and the NYVRA are that the NYVRA, like the California and Washington statutes, permits "influence" claims, and does not require the first *Gingles* precondition, i.e., that the minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district (*see* Cal Elec Code §§ 14027, 14028[c]; Wash. Rev. Code 29A.92.030[5]; *Pico Neighborhood Assn. v City of Santa Monica*, 15 Cal 5th 292, 316, 534 P3d 54, 65-66, 312 Cal Rptr 3d 319, 332; *Portugal v Franklin County*, 1 Wash 3d at 638-640, 530 P3d at 1001-1004). The NYVRA, like the California and Washington statutes, also allows for non-district based remedies, such as ranked-choice voting, cumulative voting, limited voting, and the elimination of staggered terms (*see* Election Law §§ 17-204[3]; 17-206[5][a][ii], [iv]; *Pico Neighborhood Assn. v City of Santa Monica*, 15 Cal 5th at 317, 534 P3d at 66, 312 Cal Rptr at 333; *Portugal v Franklin County*, 1 Wash 3d at 640, 530 P3d at 1002). While the text of Election Law § 17-206(2)(b)(i) suggests that a vote dilution claim shall be established simply upon a showing that a political subdivision used an at-large method of election and the voting patterns are racially polarized, the California Supreme Court, in interpreting a nearly identical provision, concluded that it should not be so-construed, explaining:

> "In plaintiffs' view, proof of racially polarized voting, in itself, establishes 'dilution' within the meaning of the CVRA [California Voting Rights Act]. They rely on the 'plain language' of Elections Code section 14028, subdivision (a), which provides, "A violation of Section 14027 *is established* if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision . . . ." (Italics added.) According to plaintiffs, 'Section 14028 expressly states how a violation of Section 14027 is shown'—i.e., simply by demonstrating the existence of racially polarized voting in an at-large jurisdiction.
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> "When considered in isolation, this single sentence might arguably be susceptible to plaintiffs' reading. However, a court construing a statute does not view a fragment in isolation, but considers the statute as a whole, in context with related provisions and the overall statutory structure, so that it may best identify and effectuate the scheme's underlying purpose. As plaintiffs concede, and as the legislative history reveals, the CVRA is in many ways very similar to the VRA. When we construe 'dilution' under the CVRA, we must therefore be mindful that it is a term of art with a settled meaning under section 2 of the VRA: 'The phrase vote dilution itself suggests a norm with respect to which the fact of dilution may be ascertained.' (*Holder*

> *v. Hall* (1994) 512 U.S. 874, 880 [129 L. Ed. 2d 687, 114 S. Ct. 2581] (plur. opn. of Kennedy, J.).) To establish vote dilution under the VRA, 'a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice.' (*Holder*, at p. 880 . . . (plur. opn. of Kennedy, J.); *id.* at p. 887 . . . (conc. opn. of O'Connor, J.) ['On this, there is general agreement']; *id.* at p. 951 . . . (dis. opn. of Blackmun, J.) ['There is widespread agreement'].) So while the existence of racially polarized voting 'is relevant to a vote dilution claim' under the VRA (*Gingles*, supra, 478 U.S. at p. 55)—and is indeed 'a key element' (*ibid.*)—it is not in itself sufficient.
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> "We find, for several reasons, the same is true under the CVRA. The similarities between the two schemes strongly suggest that 'dilution' requires not only a showing that racially polarized voting exists, but also that the protected class thereby has less ability to elect its preferred candidate or influence the election's outcome than it would have if the at-large system had not been adopted. . . . Although the legislative history materials can be read in different ways, one committee analysis recognized that the CVRA targets racially polarized voting in at-large elections only if it Impairs the Right of Protected Groups to elect their preferred candidates or influence the outcome of an election. After all, 'the very concept of vote dilution implies—and, indeed, necessitates—the existence of an "undiluted" practice against which the fact of dilution may be measured.' (*Reno v. Bossier Parish School Bd.* (1997) 520 U.S. 471, 480 [137 L. Ed. 2d 730, 117 S. Ct. 1491].)
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> "Plaintiffs' construction would allow a party to prevail based solely on proof of racially polarized voting that could not be remedied or ameliorated by any other electoral system. Moreover, such a construction would render the word 'dilution' in Elections Code section 14027 surplusage. Accordingly, we agree with the Court of Appeal that dilution is a separate element under the CVRA. To establish the dilution element, a plaintiff in a CVRA action must identify a reasonable alternative voting practice to the existing at-large electoral system that will 'serve as the benchmark "undiluted" voting practice.' (*Reno v. Bossier Parish School Bd.*, supra, 520 U.S. at p. 480)" (*Pico Neighborhood Assn. v City of Santa Monica*, 15 Cal 5th at 314-315, 534 P3d at 64-65, 312 Cal Rptr 3d at 330-331 [citations and internal quotation marks omitted]).

The plaintiffs in this case interpret the NYVRA as similarly requiring plaintiffs to demonstrate a reasonable alternative practice before obtaining relief.

IV. <u>This Action</u>

The Town of Newburgh is a political subdivision in Orange County with a population of about 32,000. The Town Board is the Town's legislative and policy-making authority, and the

five members of the Town Board[8] are chosen through at-large elections, meaning that every registered voter residing within the Town is eligible to vote for each Town Board member position.

In March 2024, the plaintiffs commenced this action against the Town and the Town Board alleging vote dilution in violation of Election Law § 17-206 and seeking a judgment ordering the implementation of a new method of election for the Town Board that includes either a districting plan or an alternative method of election. The complaint alleges that Black and Hispanic communities comprise approximately 25 percent and 15 percent, respectively, of the Town's population, yet every person ever elected to the Town Board has been white. The defendants moved for summary judgment dismissing the complaint, arguing that the NYVRA's vote dilution provisions violate the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and the New York Constitution or, in the alternative, that the Town's at-large voting system complied with the NYVRA . In opposition, the plaintiff contended, inter alia, that the defendants lacked the capacity to challenge the constitutionality of the NYVRA.

The Supreme Court granted the defendants' motion, concluding that the NYVRA was facially unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The court also directed that the NYVRA was "stricken in its entirety from further enforcement and application to these Defendants and to any other political subdivision in the State of New York." The plaintiffs appeal. The Attorney General of the State of New York (hereinafter the AG) has also intervened as an appellant (*see* Executive Law § 71; 22 NYCRR 1250.9[i]).

V. Capacity

The plaintiffs and the AG contend that the defendants lack the capacity to challenge the constitutionality of the NYVRA's vote dilution provisions.

"Capacity '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, quoting *Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155). "[T]he traditional principle throughout the United States has been that municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation. . . . Constitutionally as well as a matter of historical fact, municipal corporate bodies . . . are merely subdivisions of the State, created by the State for the

[8] The Town Board consists of a Town Supervisor and four other members.

convenient carrying out of the State's governmental powers and responsibilities as its agents. Viewed, therefore, by the courts as purely creatures or agents of the State, it follow[s] that municipal corporate bodies cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants" (*City of New York v State of New York*, 86 NY2d 286, 289-290). This rule has been applied to municipal entities raising a constitutional challenge in defense of a lawsuit (*see Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d at 393; *In re World Trade Center Lower Manhattan Disaster Site Litigation*, 892 F3d 108, 109-111 [2d Cir]).

However, as the Court of Appeals has stated, "[t]he capacity rule is not absolute. . . . [T]he assertion of some constitutional rights may, by their nature, present special circumstances to which the general rule must yield. To date, we have identified a limited number of situations presenting such special circumstances, such as . . . where a public entity asserts that if it is obligated to comply with a statute it 'will by that very compliance be forced to violate a constitutional proscription'" (*Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d at 386, quoting *City of New York v State of New York*, 86 NY2d at 292 [citations and internal quotation marks omitted]). "[T]he exceptions we have recognized to date are narrow. Under the general rule, we have barred public entities from challenging a wide variety of state actions, such as, e.g., the allocation of state funds amongst various localities, the modification of a village-operated hospital's operating certificate, the closure of a local jail by the State, special exemptions from local real estate tax assessments, state land use regulations, and state laws requiring electric voting systems to be installed at polling places in lieu of lever-operated machines" (*id.* at 387 [citations omitted]).

The only exception to the general rule that the defendants invoke is for circumstances where a municipality's compliance with a state statute would force it to violate a constitutional proscription. Accordingly, to succeed on their constitutional argument, the defendants must establish that compliance with the NYVRA would force them to violate the Equal Protection Clause (*see Board of Educ. of Mt. Sinai Union Free Sch. Dist. v New York State Teachers Retirement Sys.*, 60 F3d 106, 112 [2d Cir]; *Blakeman v James*, 2024 WL 3201671, *14, 2024 US Dist LEXIS 115441, *36-38 [ED NY, No. 2:24-cv-1655 (NJC) (LGD)]; *Merola v Cuomo*, 427 F Supp 3d 286, 293 [ND NY]). For the reasons discussed below, it cannot be said as a matter of law on this record that compliance with the NYVRA would force the defendants to violate the Equal Protection Clause.

VI. The Equal Protection Clause

"A statute enjoy[s] a strong presumption of constitutionality. To rebut that presumption, the party attempting to strike down a statute as facially unconstitutional bears the heavy burden of proving beyond a reasonable doubt that the statute is in conflict with the Constitution" (*People v Viviani*, 36 NY3d 564, 576 [citations and internal quotation marks omitted]). Courts strike statutes down "only as a last unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible" (*White v Cuomo*, 38 NY3d 209, 216 [citation and internal quotation marks omitted]). A party making a facial challenge must "demonstrate that 'in any degree and in every conceivable application,' the law suffers wholesale constitutional impairment" (*Cohen v State of New York*, 94 NY2d 1, 8, quoting *McGowan v Burstein*, 71 NY2d 729, 733). "A successful facial challenge means that the law is 'invalid *in toto*——and therefore incapable of any valid application'" (*People v Stuart*, 100 NY2d 412, 421, quoting *Hoffman Estates v Flipside, Hoffman Estates, Inc.*, 455 US 489, 494 n 5). "Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. [Courts] must keep in mind that [a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people" (*Washington State Grange v Washington State Republican Party*, 552 US 442, 450-451 [citations and internal quotation marks omitted]).

While Congress has the authority to enact anti-discrimination laws under section 5 of the Fourteenth Amendment of the United States Constitution and section 2 of the Fifteenth Amendment of the United States Constitution, the New York State Legislature has the authority to enact statutes that protect against racial discrimination pursuant to its general police power (*see* Executive Law § 290[2]; *Roberts v United States Jaycees*, 468 US 609, 624; *Matter of Holland v Edwards*, 282 App Div 353, 357, *affd* 307 NY 38), and has "'broad powers to determine the

conditions under which the right of suffrage may be exercised'" (*Shelby County v Holder*, 570 US at 543, quoting *Carrington v Rash*, 380 US 89, 91). However, in exercising that authority, the New York State Legislature must comply with the Equal Protection Clause of the Fourteenth Amendment.

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws" (US Const, 14th Amend, § 1). "Alleged equal protection violations are primarily evaluated using either a 'strict scrutiny' or 'rational basis' standard of review" (*People v Aviles*, 28 NY3d at 502). "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 Community Schools v Seattle School Dist. No. 1*, 551 US 701, 720). "'*[A]ll* racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny'" (*Johnson v California*, 543 US 499, 505, quoting *Adarand Constructors, Inc. v Peña*, 515 US 200, 227). "'[R]acial classifications receive close scrutiny even when they may be said to burden or benefit the races equally'" (*Johnson v California*, 543 US at 506, quoting *Shaw v Reno*, 509 US 630, 651; *see Brown v Board of Education*, 347 US 483). The United States Supreme Court has "insisted on strict scrutiny in every context, even for so-called benign racial classifications, such as race-conscious university admissions policies, race-based preferences in governmental contracts, and race-based districting intended to improve minority representation" (*Johnson v California*, 543 US at 505 [citations and internal quotation marks omitted]).

Strict scrutiny "ask[s], first, whether the racial classification is used to further compelling governmental interests" and "[s]econd, . . . whether the government's use of race is narrowly tailored —meaning necessary— to achieve that interest" (*Students for Fair Admissions, Inc. v President and Fellows of Harvard College*, 600 US 181, 206-207 [citation and internal quotation marks omitted]). If there is no basis for imposing a heightened level of scrutiny, "then the provision may be sustained if there is a rational basis for its enactment," meaning that the governmental action must be "rationally related to [a] legitimate State interest" (*Golden v Clark*, 76 NY2d 618, 624).

Here, the defendants contend that any change of its at-large electoral system to comply with the NYVRA would violate the Equal Protection Clause because it would be done with the express purpose of giving citizens statutorily grouped together by race greater electoral success than its at-large system, and that the NYVRA, unlike the FVRA, is not narrowly tailored to achieve

a compelling governmental interest.

Initially, we agree with the plaintiffs and the AG that strict scrutiny does not apply to all applications of the vote dilution provisions of the NYVRA. The statute gives rights to "members of a race, color, or language-minority group" (Election Law § 17-204[5]; *see id.* § 17-206[2]) in order 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]). "[I]t is familiar law that a statute should be construed so as to avoid doubts concerning its constitutionality" (*Matter of Lorie C.*, 49 NY2d 161, 171). Bearing this maxim in mind, we agree with the plaintiffs and the AG that the statute should be construed as allowing members of all racial groups, including white voters, to bring vote dilution claims, including when white voters constitute a minority in a political subdivision, as is the case in certain jurisdictions in New York (*see Portugal v Franklin County*, 1 Wash 3d at 648, 530 P3d at 1006 [stating that the Washington Voting Rights Act, which similarly allows "voters who are members of a race, color, or language minority group in the state of Washington, as this class is referenced and defined in the [FVRA]" (Wash. Rev. Code § 29A.92.010[6]) to bring vote dilution claims, "on its face, . . . requires equal opportunit[ies] for voters of all races, colors, and language minority groups" (internal quotation marks omitted)]; *Sanchez v City of Modesto*, 145 Cal App 4th 660, 666, 51 Cal Rptr 3d 821, 826 [stating that the CVRA, which similarly allows "voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act of 1965" (Cal Elec Code § 14026[d]) to bring vote dilution claims, "gives a cause of action to members of *any* racial or ethnic group that can establish that its members' votes are diluted through the combination of racially polarized voting and an at-large election system" and that "*any* racial group can experience the kind of vote dilution the CVRA was designed to combat, including Whites. Just as non-Whites in majority-White cities may have a cause of action under the CVRA, so may Whites in majority-non-White Cities. Both demographic situations exist in California . . ., and the CVRA applies to each in exactly the same way"]; *see also United States v Brown*, 494 F Supp 2d 440, 444 [SD Miss] ["Section 2 [of the FVRA] provides no less protection to white voters than any other class of voters"], *affd* 561 F3d 420 [5th Cir]).

In upholding the California and Washington vote dilution statutes, courts have held that they were neither subject to strict scrutiny nor facially in violation of the Equal Protection Clause. In *Sanchez v City of Modesto* (145 Cal App 4th at 666, 51 Cal Rptr 3d at 826), the

California Court of Appeal for the Fifth Appellate District explained: "The CVRA is race neutral. It does not favor any race over others or allocate burdens or benefits to any groups on the basis of race. It simply gives a cause of action to members of *any* racial or ethnic group that can establish that its members' votes are diluted through the combination of racially polarized voting and an at-large election system . . . . In this respect, it is similar to other long-standing statutes that create causes of action for racial discrimination, such as the federal Civil Rights Act or California's Fair Employment and Housing Act." The court further noted that the defendants' argument "collapses as soon as it is applied to the FVRA. . . . [S]ection 2 of the FVRA does not require a showing of intentional discrimination. No court has ever suggested, to our knowledge, that strict scrutiny applies to section 2 of the FVRA and that it would fail for this reason" (*Sanchez* 145 Cal App 4th at 682, 51 Cal Rptr 3d at 839). Similarly, in *Higginson v Becerra* (786 Fed Appx 705), the United States Court of Appeals for the Ninth Circuit affirmed the dismissal of a complaint brought by a resident of the City of Poway who alleged that he resided in a racially gerrymandered electoral district because of the CVRA, explaining that the complaint "does not allege that the City or the CVRA distribute[d] burdens or benefits on the basis of individual racial classifications. Although a finding of racially polarized voting triggers the application of the CVRA, it is well settled that governments may adopt measures designed 'to eliminate racial disparities through race-neutral means'" (*id.* at 706-707, quoting *Texas Dept. of Housing and Comunity Affairs v Inclusive Communities Project, Inc.*, 576 US 519, 545 [citation and internal quotation marks omitted]). The United States Supreme Court denied certiorari (*see Higginson v Becerra*, 140 S Ct 2807). Finally, in *Portugal v Franklin County* (Wash 3d at 658, 530 P3d at 1011), the Supreme Court of Washington held that the Washington Voting Rights Act (hereinafter WVRA) "on its face does not classify voters on the basis of race, nor does it deprive anyone of the fundamental right to vote. Instead, the WVRA mandates *equal* voting opportunities for members of every race, color, and language minority group," thus triggering rational basis review and not strict scrutiny (*see Coads v Nassau County, __ Misc 3d __*, 2024 NY Slip Op 24314 [Sup Ct, Nassau County] [concluding that the vote dilution provisions of the NYVRA do not facially violate the Equal Protection Clause]).

It is true that "[u]nder the Equal Protection Clause, districting maps that sort voters on the basis of race are by their very nature odious" and "cannot be upheld unless they are narrowly tailored to achieving a compelling state interest" (*Wisconsin Legislature v Wisconsin Elections Comm'n*, 595 US 398, 401 [internal quotation marks omitted]). "'Racial gerrymandering, even for

remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire'" (*Bartlett v Strickland*, 556 US at 21, quoting *Shaw v Reno*, 509 US at 657). "When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls'" (*Miller v Johnson*, 515 US 900, 911-912, quoting *Shaw v Reno*, 509 US at 647). "The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole" (*Shaw v Reno*, 509 US at 648). The United States Supreme Court has "assumed" that complying with section 2 of the FVRA is a compelling interest, but also held that "when a State invokes § 2 to justify race-based districting, 'it must show (to meet the narrow tailoring requirement) that it had a strong basis in evidence for concluding that the statute required its action'" (*Wisconsin Legislature v Wisconsin Elections Comm'n*, 595 US at 402 [internal quotation marks omitted], quoting *Cooper v Harris*, 581 US 285, 292; *see Bush v Vera*, 517 US 952, 979-982; *Shaw v Hunt*, 517 US 899, 908-918; *Miller v Johnson*, 515 US at 921).

However, race-based districting is only one of the possible remedies under the NYVRA; the NYVRA also contemplates remedies that do not sort voters based on race, such as such as ranked-choice voting, cumulative voting, limited voting, and the elimination of staggered terms (*see* Election Law §§ 17-204[3]; 17-206[5][a][ii],[iv]; *Collins v City of Norfolk, Va.*, 883 F2d 1232, 1236 [4th Cir] [noting that the potential for vote dilution in an at-large system "may be enhanced by staggered terms"]; Theodore S. Arrington & Gerald L. Ingalls, *The limited vote alternative to affirmative districting*, 17 Political Geography 6, 701-728 [August 1998] [presenting evidence that the number of minority candidates and their chance of winning increased when limited voting replaced simple at-large systems]). Even if a district-based system is used as a remedy, strict scrutiny would only apply if race is the "'predominant factor in drawing district lines'" (*Allen v Milligan*, 599 US at 31 [Opinion of Roberts, C.J., joined by Justices Sotomayor, Kagan, and Jackson] [concluding that a remedial map drawn to remedy a violation of section 2 of the FVRA was not subject to strict scrutiny because the plaintiffs' expert mapmaker testified that although race was

a consideration, it did not predominate over other factors in drawing district lines], quoting *Cooper v Harris*, 581 US at 291; *see Bethune-Hill v Virginia State Bd. of Elections*, 580 US 178, 189-190 [race may predominate even when a reapportionment plan respects traditional districting principles if race-neutral considerations came into play only after the race-based decision had been made, or if race for its own sake is the overriding reason for choosing one map over others]; *Miller v Johnson*, 515 US at 916 [although redistricting legislatures will almost always be aware of racial demographics, it does not follow from that that race predominates in the redistricting process]; *Pico Neighborhood Assn. v City of Santa Monica*, 15 Cal 5th at 323, 534 P3d at 70, 312 Cal Rptr 3d at 337 [rejecting a contention that a majority-minority requirement—or something close to it in the form of a near-majority requirement—was necessary to avoid difficult constitutional questions under the Equal Protection Clause, and noting that "nothing in the CVRA requires a municipality or a court to select a district-based remedy or, even if it chooses to do so, to draw district lines, as the City contends, based 'principally on race'" rather than other statutorily-prescribed redistricting factors]).

As the California Court of Appeal for the Fifth Appellate District explained in rejecting a facial challenge to the CVRA: "The city may . . . use similar arguments to attempt to show *as-applied* invalidity later if liability is proven and a specific application or remedy is considered that warrants the attempt. For example, if the court entertains a remedy that uses race, such as a district-based election system in which race is a factor in establishing district boundaries, defendants may again assert the meaty constitutional issues they have raised here. In doing so, at that time they can ask the court to decide whether the particular application or remedy is discriminatory" (*Sanchez v City of Modesto*, 145 Cal App 4th at 665, 51 Cal Rptr 3d at 825-826). The State of Washington's highest court has made a similar determination (*see Portugal v Franklin County*, 1 Wash 3d at 659, 530 P3d at 1012 ["Without a doubt, the WVRA could be applied in an unconstitutional manner, and it is subject to as-applied challenges. However, . . . the WVRA, on its face, does not require unconstitutional actions"]).

Further, we conclude that the NYVRA need not contain the first *Gingles* precondition, that the "minority group . . . be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district" (*Allen v Milligan*, 599 US at 18 [internal quotation marks omitted]), to survive a facial challenge to its constitutionality under the Equal Protection Clause. The United States Supreme Court has never said that the *Gingles* test was required by the constitution, as opposed to resulting from a statutory interpretation of section 2 of

the FVRA (*see Portugal v Franklin County*, 1 Wash 3d at 659, 530 P3d at 1011-1012). The only time the Fourteenth Amendment is mentioned in the majority opinion in *Gingles* is in the background section where the court noted that the plaintiffs' lawsuit challenged the subject districts as violating the Fourteenth and Fifteenth Amendments in addition to violating section 2 of the FVRA (*see Thornburg v Gingles*, 478 US at 35). The reason that the United States Supreme Court included the first *Gingles* precondition was because of its conclusion that if the minority group were unable to demonstrate that it was sufficiently large and geographically compact to constitute a majority in a single-member district, "the *multi-member form* of the district [could not] be responsible for minority voters' inability to elect its candidates" (*id.* at 50). *Gingles* was not contemplating influence districts or remedies such as ranked-choice voting, cumulative voting, limited voting, or the elimination of staggered terms. As the United States Supreme Court noted in *Voinovich v Quilter (507 US at 158)*,"[o]f course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." Since the NYVRA specifically allows for remedies that might allow for minorities to elect their candidates of choice or influence the outcome of elections without their constituting a majority in a single-member district, it was rational for the New York Legislature to not include the first *Gingles* precondition as a precondition to liability under the NYVRA (*see Portugal v Franklin County*, 1 Wash 3d at 640-641, 530 P3d at 1003 ["Because the WVRA contemplates a broader range of remedies than Section 2, a WVRA plaintiff can state a redressable injury under a broader range of circumstances than a Section 2 plaintiff."]; *Pico Neighborhood Assn. v City of Santa Monica*, 15 Cal 5th at 317, 534 P3d at 66, 312 Cal Rptr 3d at 332 ["It would make little sense to require CVRA plaintiffs to show that the protected class could constitute a majority of a hypothetical district, given that the CVRA is not limited to ability-to-elect claims nor are its remedies limited to district elections."]; *Sanchez v City of Modesto*, 145 Cal App 4th at 670, 51 Cal Rptr 3d at 829).

Further, while the text of the NYVRA is unlike the FVRA in that it does not require the plaintiff in every vote dilution case to show that "under the 'totality of the circumstances,'. . . the political process is not 'equally open' to minority voters" (*Allen v Milligan*, 599 US at 18, quoting *Thornburg v Gingles*, 478 US at 45-46; *see* 52 USC § 10301), in order to obtain a remedy under the NYVRA, a plaintiff still must show that "vote dilution" has occurred (Election Law § 17-206[2][a]), and that there is an alternative practice that would allow the minority group to "have equitable access to fully participate in the electoral process" (*id.* § 17-206[5][a]; *see Pico Neighborhood Assn. v City*

of Santa Monica, 15 Cal 5th at 314-315, 534 P3d at 64-65, 312 Cal Rptr 3d at 330-331). Thus, the NYVRA does not significantly differ from the FVRA in this respect.

Finally, even if it were unconstitutional to apply the NYVRA in situations where the *Gingles* test has not been satisfied, the NYVRA could still be constitutionally applied in situations where the *Gingles* test has been satisfied. All parties agree that the FVRA as interpreted by *Gingles* is constitutional (*see Allen v Milligan*, 599 US at 41). Here, the plaintiffs contend that the evidence they submitted in opposition to the defendants' motion demonstrates that each element of the *Gingles* test has been satisfied.

Accordingly, the defendants failed to establish as a matter of law that compliance with the vote dilution provisions of the NYVRA would force them to violate the Equal Protection Clause.

VII. The Provisions of the NYVRA Other Than the Vote Dilution Provisions

Although the parties in this case only made arguments regarding the vote dilution provisions of the NYVRA, the Supreme Court's order directed that the NYVRA was "stricken in its entirety from further enforcement and application to these Defendants and to any other political subdivision in the State of New York." As noted above, the NYVRA contains other provisions, not at issue in this action, mandating preclearance of certain changes in voting laws and prohibiting voter suppression, intimidation, deception, and obstruction (*see* Election Law §§ 17-206[1]; 17-210; 17-212). The NYVRA also contains a severability clause stating that "[i]f any provision of this title or its application to any person, political subdivision, or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this title which can be given effect without the invalid provision or application" (*id.* § 17-222; *see Town of Islip v Caviglia*, 141 AD2d 148, 167-168). As the defendants do not dispute, even if the vote dilution provisions of the NYVRA did violate the Equal Protection Clause, the Supreme Court had no authority to invalidate the remaining portions of the NYVRA (*see T.D. New York State Off. of Mental Health*, 91 NY2d 860, 862; *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713). The Supreme Court also had no authority to bind entities that are not parties to this action or to bind courts in other judicial districts deciding actions brought pursuant to the NYVRA (*see D'Alessandro v Carro*, 123 AD3d 1, 6; *Riverside Capital Advisors, Inc. v First Secured Capital Corp.*, 28 AD3d 457, 460).

VIII. The Defendants' Alternative Ground for Summary Judgment

In the Supreme Court, the defendants alternatively argued that they were entitled to summary judgment on the ground that the Town's at-large voting system complied with the

NYVRA. However, on appeal, the defendants do not mention this argument or advance it an alternative ground for affirmance (*cf. Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546; *Olden Group, LLC v 2890 Review Equity, LLC*, 209 AD3d 748, 750).

IX. Conclusion

Accordingly, the order is reversed, on the law, and the defendants' motion for summary judgment dismissing the complaint is denied.

CHAMBERS, TAYLOR and GOLIA, JJ., concur.

ORDERED that the order is reversed, on the law, with one bill of costs payable by the defendants to the plaintiffs, and the defendants' motion for summary judgment dismissing the complaint is denied.

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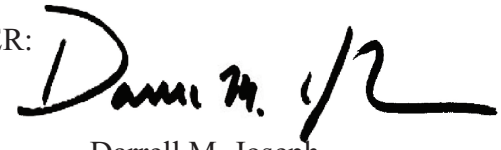

Darrell M. Joseph
Clerk of the Court

EXHIBIT C

At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange located at 285 Main Street, Goshen, New York 10924 on the 7th day of November 2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

ORAL CLARKE et al.,

Plaintiffs,

-against-

TOWN OF NEWBURGH et al.,

Defendants.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

DECISION & ORDER
Index No.: EF002460-2024
Motion date: 10/18/2024
Motion Seq. No.: 5

VAZQUEZ-DOLES, J.S.C.

The following papers were read on this motion by Defendants for summary judgement pursuant to CPLR §3212:

Notice of Motion/Memo of Law/Affirmations/Ex. A-J.....1-14
Opposition Affirmation/Memo of Law/Statement Material Facts/Ex. A-DD.....15-47
Amicus Brief of the ACLU et al.....48
Reply Memo of Law/Response to Material Facts/Affirmation/Ex. K-L.....49-53

I. SUMMARY OF THE DECISION

Defendants assert that no issue of fact exists as to whether the John Lewis Voting Rights Act of New York ("the NYVRA"), pled as the basis for the claims in the Complaint, violates the Equal Protection Clause of the 14th Amendment to the United States Constitution. Where race or national origin is the basis for unequal treatment by the State, as here, the NYVRA must satisfy strict scrutiny, i.e. it must both serve a compelling state interest and be narrowly tailored. The NYVRA does not satisfy either part of that exacting standard.

Defendants have capacity to assert this challenge herein on the basis that compliance with the NYVRA will force them to violate the constitutional proscription against unequal protection under the law. Under the requisite strict scrutiny analysis, no compelling interest of the State in this instance justifies the use of extremely broad race and national origin-based legislation, which opens the door to an overhaul of the electoral system of Defendant Town of Newburgh ("Defendant Town") that could be imposed by the Court. Additionally, there is no compelling State interest in allowing multiple protected classes (here, Black and Spanish heritage) to aggregate as a single group for purposes of determining whether voter dilution exists in the Defendant Town.

Moreover the process for reaching a determination of voter dilution is not narrowly tailored and can rest on the slightest of impairments in Plaintiffs' ability to influence an election. The explicit and intentional omission from the NYVRA of a requirement of past discrimination against the putative protected class(es), and of the guardrails created by the US Supreme Court when determining the permissible scope of the bases for reform when using race in voting rights cases, cannot be reconciled with US Supreme Court precedent. This Court must adhere to that precedent on issues of potential federal constitutional violations.

For these many reasons, the NYVRA is violative of the Equal Protection Clause of the 14th Amendment to the US Constitution, which is supreme to any law of New York. Therefore, the NYVRA is hereby STRICKEN in its entirety from further enforcement and application to these Defendants and to any other political subdivision in the State of New York. Defendants' motion for summary judgment is GRANTED and the Complaint is DISMISSED.

II. PROCEDURAL HISTORY

Plaintiffs sent a letter to Defendant Town and Defendant Town Board of Town of Newburgh ("Defendant Board") on January 26, 2024. The letter notified the Defendants of Plaintiffs' intention to file a lawsuit for violations of the NYVRA. Defendant Board passed a resolution concerning the letter from Plaintiffs on March 15, 2024 ("the Board Resolution") in which Defendant Town included a plan to investigate whether a violation of the Act is ongoing there. After the Board Resolution was enacted, less than 90 days passed before Plaintiffs filed the instant lawsuit.

Plaintiffs commenced the instant lawsuit by filing a Summons and Complaint on March 26, 2024. The Complaint asserts facts as to the composition of the population in Defendant Town, voting history and trends, community issues that have established a pattern of alleged racially motivated behavior by the Defendants, and other data related to the alleged disenfranchisement. The Complaint pleads two causes of action that allege illegal "vote dilution" in Defendant Town. The first cause of action asserts that racially polarized voting ("RPV") has caused vote dilution. The second cause of action asserts that under a totality of the circumstances, the ability of Plaintiffs to elect candidates of their choice "or" to influence the outcome of elections is impaired[1], regardless of proof of RPV.

Defendants filed a motion to dismiss (Seq. #1) in lieu of an Answer. The sole predicate for the motion was that Plaintiffs allegedly were prohibited by the NYVRA from filing this

[1] Notably, Count Two is pled in the disjunctive, an apparent recitation of the statutory wording. Neither the Complaint nor the Opposition to the instant motion clarify whether Plaintiffs assert that, under the totality standard, their votes were diluted on both bases for impairment (election of chosen candidate *and* ability to influence election). For purposes of the instant summary judgment motion, viewing the facts in the light most favorable to the non-movant, the Court addresses the Complaint as having pled both.

lawsuit until the expiration of the 90 day "safe harbor" provision, NY Election Law 17-206(7). The Court denied the motion on May 17, 2024. Defendants filed an Answer on May 28, 2024.

The NYVRA requires that "actions brought pursuant to this title shall be subject to expedited pretrial and trial proceedings and receive an automatic calendar preference". NY Election Law 17-216. A Preliminary Conference Order was entered on May 10, 2024 that required Plaintiffs to disclose expert reports by June 28, 2024 and Defendants to do so by July 2, 2024.

The parties each disclosed two experts, whose reports and depositions are appended as exhibits to the instant motion. In sum, Plaintiff's experts assert the two protected classes of Black and Hispanic voters can – in the aggregate – be configured within four or five newly created single-member districts that will render likely the election of one or two chosen candidates. The experts assert that RPV exists in Defendant Town based on a statistical analysis of voting trends. They also assert that the ability of voters in the two protected classes to influence the elections and elect their candidate of choice has been impaired by the current at-large system.

Defendants' experts contest these findings. They assert that the statistical analysis has a significant margin of error due to its reliance on numerous vaguely defined variables, such as whether voters with particular surnames or who live on a particular residential block are actually Black or Hispanic. They contest whether RPV does exist and also whether the creation of districts would have an effect on the alleged impairment of the protected classes.

A briefing schedule for the instant motion was set in an Order docketed on September 24, 2024 (letter endorsed by the Court). The Court had set this trial to begin on October 31, 2024 but that date was adjourned sine die in the Decision and Order on Motion Seq. #7.[2]

III. FACTS UNDERLYING THE COMPLAINT

Plaintiffs are six residents of Defendant Town. Defendant Town is a political subdivision of the State of New York. Three of the Plaintiffs assert that they identify as Black and three other Plaintiffs assert that they identify as Hispanic. The Complaint asserts that as of 2020, Defendant Town was comprised of a population that was 15% "black", 25% "Hispanic" and 61% "white". On the instant motion, Plaintiff slightly changed their position to assert that as of 2022, 15.4% identified as "non-Hispanic Black" and 25.2% as "Hispanic". *Compare* Complaint at Par. 32 *with* Plaintiff Statement of Facts at Par. 39. Defendants do not contest that the 2022 data Plaintiff rely upon provides these percentages.

Defendant Town holds elections on a periodic basis for voters to choose members of Defendant Board. The election process provides that voters living anywhere in Defendant Town may vote for each of the open seats in a given election ("at-large voting"). Defendant Board has four elected positions, with four years terms, that are voted upon in staggered two years intervals. A fifth member, the Town Supervisor, is not elected.

[2] Motion Seq. #7 concerned whether the untimely disclosure of an addendum by one of Plaintiff's experts should cause the exclusion of that document and his related testimony at trial. Motion Seq. #7 was not directed to the consideration of the expert addendum on the instant Motion Seq. #5.

IV. ANALYSIS

A. Summary Judgment Standard

CPLR §3212(b) states, in pertinent part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Section §3212(b) further states that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." "Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact" *Anyanwu v Johnson*, 276 A.D.2d 572 (2nd Dept. 2000). Issue finding, not issue determination, is the key to summary judgment. *Krupp v Aetna Casualty Co.*, 103 A.D.2d 252 (2nd Dept. 1984). In deciding the motion, the court must view the evidence in the light most favorable to the non-moving party. *Kutkiewicz v Horton*, 83 A.D.3d 904 (2nd Dept. 2011).

The facts at issue regarding RPV and diminished ability of the protected classes at issue to influence an election outcome are not material to the legal issue of whether the NYVRA violates the Equal Protection Clause. Those few facts that *are* material to a review of the NYVRA for constitutionality are not contested: Defendant Town is a political subdivision with at-large voting; Plaintiffs are members of two different protected classes; Plaintiffs have claimed RPV against them and/or impairment of their influence on election outcomes; and the Court is authorized to impose certain remedies in the NYVRA, including a mandate for new single-member districts, if Plaintiffs were to prevail at a trial.

Thus, viewing the facts most favorably for Plaintiffs, and assuming arguendo that the aforementioned factual disputes would be resolved in their favor at trial, remedies imposed

pursuant to the NYVRA could nonetheless require Defendants to violate the Equal Protection Clause. For that reason, the Court proceeds to review Defendants' challenge to the NYVRA.

B. Purpose of the NYVRA

The New York State Senate proposed Senate Bill 2021-S1046 in the 2021-2022 session. The bill was amended five times, passed by both the Senate and Assembly, and signed into law as version S1046E by the Governor in 2022 as NY Election Law 17-200 et seq.

The NYVRA states that its purposes are:

> 1. Encourage participation in the elective franchise by all eligible voters to the maximum extent; and
> 2. Ensure 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, and especially to exercise the elective franchise.

NY Election Law 17-200.

The legislative history of the NYVRA corroborates this intention of the NYVRA, as well as states the justification for the breadth of the legislation:

> PURPOSE:
>
> The purpose of the NYVRA is to encourage participation in the elective franchise by all eligible voters to the maximum extent, to ensure that eligible voters who are members of racial, ethnic, and language-minority groups shall have an equal opportunity to participate in the political processes of the State of New York, and especially to exercise the elective franchise; to improve the quality and availability of demographic and election data; and to protect eligible voters against intimidation and deceptive practices.
>
> JUSTIFICATION
>
> . . . But both the Washington and California state voting rights NYVRAs are limited to addressing vote dilution in at-large elections. The New York Voting rights NYVRA builds upon the demonstrated track record of success in California and Washington, as well as the historic success of the federal voting rights NYVRA by offering the most comprehensive state law protections for the right to vote in the United States. The law will

> address both a wide variety of long-overlooked infringements on the right to vote and also make New York a robust national leader in voting rights at a time when too many other states are trying to restrict access to the franchise.

Senate Bill 2021-S1046E, Sponsor (Myrie) Memorandum (Version E – final) within Ex. G to the Opposition.

The Governor signed a memorandum on June 20, 2022 that states in no uncertain terms that the NYVRA is intended to extend beyond the FVRA and provide greater protections:

> As the federal government fails to fulfill its duty to uphold voting rights across the nation, it is now incumbent upon states to step-up and step-in, and this legislation ensures voting rights will be protected in New York . . . . It also builds upon the federal Voting Rights act's vital preclearance scheme, which was gutted by the U.S Supreme Court in Shelby County v. Holder.

Governor's Bill Jacket (Ex. G to the Opposition).

C. Prohibitions and Remedies Created by the NYVRA

The NYVRA prohibits certain actions, or the effects of such actions, in the voting process within a "political subdivision". NY Election Law 17-206(1). "Political subdivision" is defined to include any town in New York. NY Election Law 17-204(4). Defendant Town is a "political subdivision" encompassed by the NYVRA.

The NYVRA makes it unlawful for Defendant Town to "use any method of election, having the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution" (hereafter collectively, "Unlawful Vote Dilution"). NY Election Law 17-206(2)(a). A "protected class" (singular) is defined as "members of a race, color or language-minority group". NY Election

Law 17-204 (5). The use of "race, color or language-minority[3]" as the statutory definition of "protected class", and thus the universe of people who can claim "vote dilution", encompasses literally every person in the State of New York - because every person is a member of some race or is of some color.

The NYVRA refers to 'protected class' repeatedly in the singular in Section 17-206(2) with respect to prohibited practices. However, the NYVRA later allows the aggregation of an unlimited number of protected classes, in two instances. First, aggregation is allowed where "there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision." NY Election Law 17-206(2)(c)(vi). Later in the same subsection 17-206, aggregation is allowed for a different reason, to wit, "in the event that they demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate." NY Election Law 17-206(8). There is no explanatory wording in the NYVRA to address i) why protections extend to only a single class but are subsequently extended to multiple classes, and ii) if aggregation is authorized, whether both requirements (i.e., 206(2)(c)(vi) and 206(8)) must be satisfied.

The NYVRA provides that Unlawful Vote Dilution exists where a town: "(i) used[4] an at-large method of election and either: (A) voting patterns of members of the protected class within[5]

[3] The definition of "language-minorities" is the same as set forth in federal law, to wit, "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage". 52 USC § 10310(c)(3). Three of the Plaintiffs have described themselves as "Hispanic."

[4] The legislation provides no explanation for why the voting system is assessed retrospectively but RPV and impairment of ability are reviewed in real time. Thus, it is unclear whether *past* RPV or *past* impairment of the protected class is a basis for relief.

[5] The legislation does not clarify why a polarization of members of the protected class *from each other* is a criteria for relief, versus polarization of that class from the rest of the electorate.

the political subdivision are racially polarized; or[6] (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired; . . . ." NY Election Law 17-206(2)(b). "At-large" method of election includes "a method of electing members to the governing body of a political subdivision: (a) in which all of the voters of the entire political subdivision elect each of the members to the governing body; . . . ." NY Election Law 17-204(1). There is no issue of fact herein that Defendant Town employs "at-large" voting.

"Racially polarized voting" means voting in which "there is a divergence in the candidate, political preferences[7], or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate." NY Election Law 17-204(6). However, the descriptive wording of subsection 17-206(2)(b) ("racially polarized") does not employ that three word definition of RPV as a noun. Moreover, subsection 17-206(2)(b) refers to racial polarization *among* the protected class, not in comparison to the majority.

The NYVRA lists 11 factors that a court *may* consider when deciding whether Unlawful Vote Dilution has occurred. NY Election Law 17-206(3)(a)-(k). This list is not exclusive. Id. The NYVRA specifies nine ways in which a reviewing court must weigh and consider evidence of Unlawful Vote Dilution. NY Election Law 17-206(2)(c)(i)-(ix).

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[6] Notably, in each of the Senate sponsor memoranda that accompanied the earlier versions (Original and A-D) of the Senate Bill, the word "and" appeared between subsections (A) and (B). Had the final bill used "and", then the NYVRA would have required RPV for any violation. But the final bill (and perhaps some or all of the earlier bills, the text of which are not available) used "or", thereby making proof of RPV merely optional. As discussed infra, this significant change of removing the RPV requirement, in comparison to RPV being required by the FVRA (as well as the California and Washington legislation), is one of the reasons why the NYVRA does not satisfy the strict scrutiny standard.

[7] The legislation does not explain how "political preferences" can be a factor for comparison when it is listed only in respect to the protected class but not for the rest of the electorate.

A court that finds in favor of a Plaintiff has extremely broad authority to change in virtually every respect how elections are conducted in the affected political subdivision. A court "shall implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process, which may include, but shall not be limited to:

(i) a district-based method of election;

(ii) an alternative method of election;

(iii) new or revised districting or redistricting plans; . . . .

NY Election Law 17-206(5).

D. Capacity of Defendants to Seek Summary Judgment

Plaintiffs oppose the motion initially on the basis that Defendants do not have capacity to challenge the NYVRA on the basis of its constitutionality, because Defendants are part of the very government that enacted the NYVRA. They also assert that the time for such a challenge comes only after the Court has adjudicated the case on the merits and imposed a remedy that Defendants must implement. Plaintiffs summarize the general rule but do not accurately capture the scope and application of the exceptions.

"[P]olitical power conferred by the Legislature confers no vested right as against the government itself." *City of New York v State of New York,* 86 NY2d 286 (1995). "The concept of the supreme power of the Legislature over its creatures has been respected and followed in many decisions . . . counties are mere political subdivisions of the State, created by the State Legislature and possessing no more power save that deputed to them by that body." *Id.* The Court of Appeals has extended the doctrine of no capacity to sue by municipal corporate bodies

to a wide variety of challenges based as well upon claimed violations of the State Constitution, not just the federal Constitution. *Id.* However, this rule is not without exceptions.

Four distinct instances have been defined by the Court of Appeals for when a municipality may challenge the constitutionality of a law that it is required to enforce. Those exceptions are as follows:

> (1) an express statutory authorization to bring such a suit *(County of Albany v Hooker,* 204 NY, at 9, *supra);* (2) where the State legislation adversely affects a municipality's proprietary interest in a specific fund of moneys *(County of Rensselaer v Regan,* 173 AD2d 37, *affd* 80 NY2d 988; *Matter of Town of Moreau v County of Saratoga,* 142 AD2d 864); (3) where the State statute impinges upon "Home Rule" powers of a municipality constitutionally guaranteed under article IX of the State Constitution *(Town of Black Brook v State of New York,* 41 NY2d 486); and (4) where "the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription" *(Matter of Jeter v Ellenville Cent. School Dist.,* 41 NY2d 283, 287 [citing *Board of Educ. v Allen,* 20 NY2d 109, *affd* 392 US 236]).

City of New York, 86 NY2d at 291-292.

Here, Defendants rely upon and fall squarely within the ambit of the fourth of these exceptions, namely that compliance with the NYVRA will force them to violate the constitutional proscription against unequal protection under the law. The Court of Appeals in *Matter of Jeter* held that certain parties lacked capacity because they did not assert that "***if*** they are obliged to comply with the State statute," said compliance would violate the constitution. 41 NY2d at 287 (emphasis added). The wording of the decision in the future tense ("if they are") confirms that an actual mandated violation is not a perquisite to a challenge. Here, Defendants assert that if they are required to comply with the NYVRA, through a mandate of this Court that

alters their electoral system, it will require them to violate the Equal Protection Clause. Under these circumstances, Defendants have capacity to assert their constitutional challenge of the NYVRA now, in the instant motion, which is ripe for review.

E. The Equal Protection Clause

In the wake of the Civil War, Congress proposed and the States ratified 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." US Constitution, Amend. XIV, Sec. 1. The last clause of Section 1 is commonly referred to as the "Equal Protection Clause." It is this provision of law that is the basis for the constitutional challenge of the Defendants.

The US Supreme Court summarized the monumental passage of this amendment in *Students for Fair Admissions, Inc. v President and Fellows of Harvard College*, 600 US 181, 201-202 (2023):

> To its proponents, the Equal Protection Clause represented a 'foundation[al] principle'—the absolute equality of all citizens of the United States politically and civilly before their own laws . . . . The Constitution, they were determined, should not permit any distinctions of law based on race or color . . . because any "law which operates upon one man [should] operate *equally* upon all . . . . . As soon-to-be President James Garfield observed, the Fourteenth Amendment would hold 'over every American citizen, without regard to color, the protecting shield of law."

Id. (citations omitted).

The New York Constitution includes a provision with similar wording: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person

shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." NY Constitution, Art. 1, Sec. 11. Defendants also rely upon that state authority for their challenge to the NYVRA.

The US Constitution provides that it and all federal law is the supreme law of the United States. US Constitution, Art. VI. While no state can pass and enforce legislation that limits the rights of citizens in contravention of federal law, there is no bar to a state passing a law that provides enhanced rights to its citizens that exceeds the protections of federal law. For that reason, the Court reviews the instant motion for its compliance with the potentially narrower protections afforded Defendants by the US Constitution. To the extent that the NYVRA unlawfully exceeds the limits of the Equal Protection Clause, *a fortiori* it will also exceed the potentially more generous protections afforded by the New York Constitution.

F. <u>Strict Scrutiny Standard</u>

The US Supreme Court issued its first majority decision requiring "strict scrutiny" in *Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989). *See Adarand Constructors v Pena*, 515 US 200 (1995) (recounting the history of the heightened standard of review). In *Croson*, it considered whether a city's determination that 30% of its contracting work should go to minority-owned businesses was constitutional. *Croson* held that "the single standard of review for racial classifications should be "strict scrutiny." *Id.,* at 493–494. That standard has not changed since 1989 with regard to the review of a state or federal law that classifies the rights of differing people on the basis of race or national origin.

Notably, the Supreme Court has repeatedly held that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Adarand, 515 US.* at 273. "Racial classifications of any sort must be subjected to 'strict scrutiny." *Id.* at 285. The Court in *Croson* affirmed its adherence to requiring strict scrutiny in *all* instances of race-based legislation, regardless of the demographics in the protected class or the majority group: "The standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification". *Croson* at 493-494.

Thirty-five years later, the Supreme Court reaffirmed its precedent of requiring that the Equal Protection Clause prohibits discrimination against all people, not just those classes who have experienced historic discrimination or who experienced such morally repugnant treatment to a degree greater than other people:

> Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." *Yick Wo*, 118 U.S. at 369, 6 S.Ct. 1064. For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–290, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). "If both are not accorded the same protection, then it is not equal." *Id.*, at 290.

Students for Fair Admissions, 600 US at 206. *See Johnson v California,* 543 US 499, 505-506 (2005) ("We therefore apply strict scrutiny to *all* racial classifications to 'smoke out' illegitimate uses of race . . . .").

Here, the text of the NYVRA, on its face, classifies people according to their race, color and national origin. These 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. Instead classification based on race, color and national origin is the *sine qua non* for relief under the NYVRA. A person can only seek relief on the basis of their race, color or national origin and remedies are likewise created based upon those classifications. For Plaintiffs to suggest that the NYVRA is not a race-based (or national origin-based) statute is simply to deny the obvious.

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent." *Affiliated Brookhaven Civic Org. v Planning Board of Town of Brookhaven*, 209 AD3d 854 (2d Dept. 2022) (citations omitted). "[T]he clearest indicator of legislative intent is the statutory text". Id. "It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.' " *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

That being said, the inclusion of a race-based criteria does not, in and of itself, foreclose the possibility for enforcement of the NYVRA. Whether statutes are violative of the Equal Protection Clause can only be determined after the analysis required by US Supreme Court precedent. Thus, the strict scrutiny standard will be the basis upon which this Court will decide whether the NYVRA's prohibitions and remedies can satisfy the bar that the US Supreme Court has established for such state action.

G. Compelling Interest and Narrowly Tailored Legislation

i. Compelling Interest

The NYVRA must satisfy one of the very few identifiable bases for race-based government action. *See Students for Fair Admissions,* 600 US at 203 (e.g. education, housing covenants, buses, golf courses, remediating specific, identified instances of past discrimination that violated the Constitution or a statute). Yet, the Court is unable to find within its text any of those enumerated justifications. In voting rights cases, past discrimination against the protected class has been the justification for race-based statutes, such as the FVRA.

Yet, the wording of the NYVRA is devoid of any requirement of proving past discrimination by a protected class. Section 17-206, as discussed in detail supra, includes no such requirement. Voter dilution can be established simply by a showing that a protected class has an impaired ability to influence an election. Moreover, "protected class" is not defined by reference to historic discrimination. Instead, persons of any "race, color or language minority" have standing to seek redress. Thus, a minority (or even a majority) in a political subdivision comprised of persons who identify as White can seek electoral changes if they establish any impairment of their ability to affect an election, *absent any evidence of historic discrimination against people of that color* in that political subdivision.

The only wording related to the NYVRA with regard to past discrimination is in the Senate Sponsor Memorandum, which is not part of the NYVRA. Moreover, that wording does not even go as far as stating that the NYVRA was enacted to remedy historic discrimination, only mentioning discrimination. *See* Senate Bill 2021-S1046E, Sponsor (Myrie) Memorandum (Version E – final) within Ex. G to the Opposition.

More importantly, the NYVRA lists discrimination among the factors that a Court *may, but need not necessarily,* consider when deciding if voter dilution has occurred. See NY Election law 17-206(3)(a) ("the history of discrimination in or affecting the political subdivision; . . . ."). A Court can grant relief pursuant to the NYVRA absent a history of *any* discrimination against the "protected class". This intent to exclude historic discrimination from the NYVRA requirements is also manifest in its omission of requiring RPV. Unlike the Washington and California voting rights acts that Plaintiffs rely upon so heavily to support their position, those acts do require RPV to prove vote dilution. Cal. Election Code 14028(a) ("A violation of Section 14027 is established if it is shown that racially polarized voting occurs . . ."); Wash. Elections Stat. Ann. 29A.92.030(1) (proof of a violation when it is shown that: "(a) Elections in the political subdivision exhibit polarized voting; ***and*** (b) Members of a protected class or classes do not have an equal opportunity to elect candidates of their choice . . . .") (emphasis added). As noted supra, fn. 6, the passage of the NYVRA used "or" to join RPV with other means of

proving vote dilution, resulting in RPV being merely optional in New York to prove a violation.

As a result, the NYVRA fails to satisfy the first part of the strict scrutiny standard. No compelling interest -as that term has been defined by the US Supreme Court's interpretation of the Equal Protection Clause – exists in protecting the voting rights of any group that has historically never been discriminated against in a political subdivision. Here, while Plaintiffs' Opposition discusses alleged past discrimination against persons who are Black and of Spanish Heritage in Defendant Town, that is not a requirement for their cause of action. They can decline to offer such proof at trial. If they do offer such proof, there is no standard for this Court

to use in determining the sufficiency of that evidence because proof of discrimination is not required *to any degree* by the NYVRA. While the two groups herein might establish some impairment of their ability to influence an election, the US Supreme Court has held that such impairment – without a history of discrimination - is not sufficiently compelling to justify a state mandate based on race or national origin.

Additionally, no compelling interest exists in allowing multiple protected classes to aggregate for purposes of proving vote dilution. Aggregation is raised by the instant motion because the Complaint asserts that each group of Plaintiffs (Black and Spanish heritage) comprise less than a majority of the population of Defendant Town but cannot independently form a majority in a reasonably configured district. Therefore they seek to aggregate the two groups into a single group for purposes of proving vote dilution.

Even if such aggregation were permissible as a compelling interest, its boundaries must be defined. Here, the NYVRA states aggregation is allowed where "there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision." NY Election Law 17-206(2)(c)(vi). But in the same subsection 17-206, aggregation is allowed for a different reason, to wit, "in the event that they demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate." NY Election Law 17-206(8).

ii. Narrowly Tailored

Even if the Court assumes, arguendo, that the NYVRA does serve a compelling interest, Plaintiffs must also prove that the prohibitions and remedies are narrowly tailored. "Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it." *Grutter v*

Bollinger, 593 US 306, 26 (2003). "When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." Id. *See Parents Involved v Seattle School District No. 1*, 551 US 701, 704 (2007) ("Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives").

Here, 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. The NYVRA sets no minimum bar on the extent of any such impairment of voter ability to influence an election and does not require RPV or impairment of the ability of a protected class to elect a candidate of choice.

Moreover, the review standard is lax to the point of explicitly allowing a court to find voter dilution exists without citing any basis. The NYVRA allows a finding of vote dilution based upon a "totality of circumstances", which lacks any defined criteria because the NYVRA lists 11 factors that *may* be considered. Thus, a court is free to find voter dilution based on *any* criteria that the court itself creates, or no criteria at all. NY Election Law 17-206(3)("Nothing in this subdivision shall preclude any additional factors from being considered, ***nor shall any specified number of factors be required*** in establishing that such a violation has occurred.").

Plaintiffs are quick to compare the NYVRA to the FVRA when it suits their purposes. However, that is not entirely, but is largely a two way street. Attempts to extend the FVRA to the degree that Plaintiffs assert here have been soundly rejected. In *LULAC v. Perry*, 548 U.S. 399 (2006), the Supreme Court held that Section 2 of the FVRA does not require the creation of

"influence districts, " where a minority group cannot elect the candidate of its choice because of its sub-majority numbers but the group may still play an influential role in the electoral process. The Court held that the ability of members of a minority group to influence an election in a district was insufficient to state a claim for vote dilution. "The opportunity 'to elect representatives of their choice,' ***requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice.***" *Id.*

H. Precedent for Judicial Review of Voting Rights Legislation

In the context of voting rights, the Equal Protection Clause forbids "racial gerrymandering," that is, intentionally assigning citizens to a district on the basis of race without sufficient justification. *Abbott v Perez*, 585 US 579, 585 (2018), *citing Shaw v. Reno,* 509 U.S. 630, 641 (1993). "At the same time that the Equal Protection Clause restricts the consideration of race in the districting process, compliance with the [Federal] Voting Rights Act of 1965 . . . pulls in the opposite direction: it often insists that districts be created precisely because of race." *Id.* "Since the Equal Protection Clause restricts consideration of race and the [F]VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to " 'competing hazards of liability.' " *Id.* at 587, citing *Bush v. Vera,* 517 U.S. 952, 977 (1996) (plurality opinion).

As a result of this tension between the Equal Protection Clause and the FVRA, a significant body of law developed over the past 60 years whereby the FVRA could be applied as intended by Congress, but not without limitation. Plaintiffs on this score turn away from the FVRA and urge this Court to disregard that precedent, holding that the NYVRA is constitutional, despite its explicit rejection of certain guardrails so firmly created over decades to prevent undue

infringement on the Equal Protection Clause. The Court declines this invitation to ignore binding US Supreme Court precedent and apply the NYVRA in a manner by which it would become supreme over the guarantees provided by the US Constitution.

Thornburg v. Gingles, 478 U.S. 30 (1986) created the framework for analyzing vote dilution claims under the FVRA. *Gingles* specified three preconditions that a minority group must prove to succeed on a vote dilution claim: the minority group is i) sufficiently large and geographically compact to constitute a majority in a [reasonably configured] single-member district; ii) politically cohesive, and iii) able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... to defeat the minority's preferred candidate." *Id.* If these three preconditions are established, the minority group must then show that, "based on the totality of circumstances," the electoral process is not "equally open" to its members. This final step of the analysis entails considering several factors, often called 'the Senate factors' because they originated from the Senate Judiciary Committee Report accompanying the 1982 Amendments. *Id.* at 36-37.

That process has been followed in an unbroken line of Supreme Court decisions over four decades, regardless of the composition of that Court and the philosophies of its members. In some unusual instances, principles of law ring so true, and are established over time with repeated confirmation, that the doctrine of stare decisis overcomes the inclination of any member or faction of a court to disturb decades of precedent. The *Gingles* preconditions have been one of those rare examples.

The NYVRA mandates that a reviewing court *not* consider the first of the *Gingles* preconditions in determining a vote dilution claim. NY Election Law 17-206(c) "For the

purposes of demonstrating that a violation of paragraph (a) of this subdivision has occurred, evidence shall be weighed and considered as follows: . . . (viii) evidence concerning whether members of a protected class are geographically compact or concentrated ***shall not be considered***, but may be a factor in determining an appropriate remedy . . . ." Plaintiffs urge this Court to cast aside 40 years of jurisprudence and decline to apply *Gingles* to the analysis of the NYVRA, with no legal authority.

The Court is mindful that *Gingles* determines claims under the FVRA and this case presents a claim under the NYVRA. However, the analysis of *Gingles* is one by which the Supreme Court created a balance of the aforementioned tension between the Equal Protection Clause and voting rights legislation. Assuming arguendo that New York has authority equal to Congress to pass voting rights legislation that is race-based, a principle that is itself controversial, the NYVRA still must satisfy judicial precedent that permits a rare state-sanctioned infringement on the rights of persons not in the protected class. The Court is not aware of, and no party has provided upon its request, any case from the Supreme Court or any other federal court that determined that the first precondition of *Gingles* is not applicable to the issue of whether a state voting rights act is violative of the US Constitution.

The NYVRA's elimination of the first *Gingles* factor effectively creates a right to proportional representation. Where one class cannot establish that it can elect a candidate of choice - even if new districts are created -- then the aggregation of many such classes into one will result in a de jure mandate of representation in proportion to these innumerable classes, each of which has no minimum percentage of voting population. When the FVRA was amended, the Senate included wording to explicitly *reject* such a requirement. 52 USC 10301(b) ("nothing in

this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population").

In *Bartlett v State Board of Elections*, 556 US 1, 15 (2009), the Supreme Court rejected Plaintiff's argument herein, declining to hold that the FVRA "grants special protection to a minority group's right to form political coalitions." *Bartlett* rejected the argument that 'opportunity' under the FVRA includes the opportunity to form a majority with other voters—whether those other voters are other racial minorities, whites, or both. *Id.* When a minority group cannot constitute a majority in a single-member district without combining with members of another minority group, the FVRA does not provide protection because there neither has been a wrong nor can there be a remedy. *Growe v Emison*, 507 U.S. 25, 41 (1993); *see Allen v. Milligan*, 599 U.S. 1, 28 (2023) ("Forcing proportional representation is unlawful and inconsistent with this Court's approach to implementing § 2 [of the FVRA].").

A similar argument was recently raised and rejected in a federal appellate case, *Pettway v Galveston County*, 11 F4th 596 (5th Cir 2024) (en banc). In *Pettway*, the protected class asked for new "crossover districts" in which they could elect the candidate of their choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate. The court rejected the proposal because when "a minority group constitutes less than a majority of the citizen voting-age population in a reasonably configured district, it has no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength." Id. at 610.

Coalition claims pose the same practical problems as crossover claims in determining the existence of the *Gingles* preconditions, especially whether the distinct minority groups are

politically cohesive. *Pettway*, 11 F4th at 610-611. Coalition claims create questions of "judicially unmanageable complexity". *Id.* "[C]ontemporary demographics suggest there is no stopping point if minority coalitions may be formed out of any minority racial or language groups. Id. The factual complexity of coalition claims only increases as the number of minority groups within the coalition increases. Id.

Based on this history of cases rejecting the coalition claim that Plaintiffs herein plead as their basis for sweeping electoral reform in Defendant Town, this Court holds that such claims do not satisfy the clear standards set forth in *Gingles* and its progeny. For that additional reason, the NYVRA is in violation of federal law and therefore cannot stand.

Conclusion

For all the foregoing reasons, it is hereby

ORDERED that Defendants' Motion Seq. #5 for summary judgment is **GRANTED** and it is further

ORDERED that the Complaint is **DISMISSED**, and it is further

ORDERED that the NYVRA is hereby **STRICKEN** in its entirety from further enforcement and application to these Defendants and to any other political subdivision in the State of New York.

The foregoing constitutes the Decision and Order of this Court.

Dated: November 7, 2024
Goshen, New York

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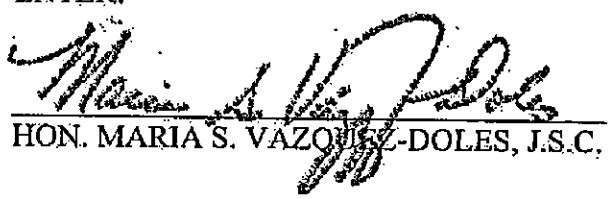

HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

25

Orange County Clerk's Index No.EF002460/2024

New York Supreme Court

APPELLATE DIVISION – SECOND DEPARTMENT

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

v.

TOWN OF NEWBURGH and
TOWN BOARD OF THE TOWN OF NEWBURGH,
DEFENDANTS-RESPONDENTS,

NEW YORK STATE OFFICE OF
THE ATTORNEY GENERAL,
INTERVENOR-APPELLANT.

Docket No.
2024-11753

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF DEFENDANTS-RESPONDENTS FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS AND TO REFRAIN FROM ISSUING REMITTITUR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Rules

Other Authorities

QUESTIONS PRESENTED

1. Whether the vote-dilution provisions of the John R. Lewis Voting Rights Act of New York ("NYVRA") violate the Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution and the New York Constitution, and what implicit elements of the NYVRA inform that conclusion.

Respectfully, this Court erred in answering this question of law in the negative and failed to articulate clearly what implicit elements the NYVRA's vote-dilution provisions inform that conclusion, and the Court should grant leave to appeal so that the Court of Appeals can answer this significant legal question of statewide importance.

2. Whether municipalities and their officers have capacity to challenge the NYVRA's vote-dilution provisions, when those provisions require them to violate the U.S. Constitution and the New York Constitution.

Respectfully, this Court erred in answering this question of law in the negative, and the Court should grant leave to appeal so that the Court of Appeals can answer this significant legal question of statewide importance.

Defendants-Respondents Town of Newburgh and Town Board of the Town of Newburgh (collectively, the "Town"), by their attorneys, Troutman Pepper Locke LLP, respectfully submit this Memorandum Of Law In Support Of Motion For Leave To Appeal To The New York State Court Of Appeals And To Refrain From Issuing Remittitur, pursuant to CPLR 5602(b) and 22 NYCRR § 1250.16, for leave to appeal to the Court of Appeals from this Court's January 30, 2025, Decision.

PRELIMINARY STATEMENT

The Town respectfully moves this Court for leave to appeal this Court's Decision, dated January 30, 2025, to the Court of Appeals, which Decision held that the John R. Lewis Voting Rights Act of New York (the "NYVRA") is constitutional and discussed certain related principles. The Town submits that, in reversing the Order of the Supreme Court below, this Court's Decision resolved significant and unsettled legal questions of statewide importance that are worthy of review by the Court of Appeals.

The NYVRA is a newly enacted statute that is currently the basis for at least three ongoing cases in this State as to its vote-dilution provisions. Below, the Supreme Court held the NYVRA's vote-dilution provisions are unconstitutional because they require political

subdivisions to make redistricting decisions based on race, without satisfying strict scrutiny. This Court then reversed the Supreme Court's judgment in its Decision here, while also recognizing at least one implicit element for an NYVRA vote-dilution claim not in the statutory text to inform that constitutional analysis.

The Court of Appeals should review now the constitutionality of the NYVRA's vote-dilution provisions, in order to "authoritatively declare and settle the law uniformly throughout the state." *People v. Hawkins*, 11 N.Y.3d 484, 493 (2008) (citation omitted). Courts and litigants that are actively considering NYVRA vote-dilution claims across the State need definitive guidance from the Court of Appeals over these "legal issues of statewide significance." *Id.* These courts and litigants need to know with certainty whether the NYVRA's vote-dilution provisions are unconstitutional—and, if not, what implicit elements not in the text of the NYVRA must be shown to establish a vote-dilution claim—*before* their cases go to trial.

Notably, the Court of Appeals' review of these issues here would be "as of right" under CPLR 5601(b) once these pending cases reach final judgment. It would make far more sense for judicial and litigant economy

for the Court of Appeals to provide guidance now, before these costly and time-consuming NYVRA trials take place under legal uncertainty.

This Court should grant the Town leave to appeal to the Court of Appeals and refrain from issuing the remittitur.

PROCEDURAL HISTORY AND TIMELINESS

A. Supreme Court Proceedings

This appeal involves a lawsuit challenging the Town's at-large election method for members of its Town Board. NYSCEF No.1 ("Compl.").[1] In March 2024, Plaintiffs-Appellants ("Plaintiffs") filed their Complaint in the Orange County Supreme Court, alleging that the Town's election method for its Town Board violates the vote-dilution provisions of the NYVRA. Compl. ¶¶ 157–60. Plaintiffs sought an order requiring the Town to abandon its at-large election method for its Town Board in favor of either a "district-based" or "alternative method of election." Compl. ¶ 133. The Town moved to dismiss the Complaint, arguing that Plaintiffs had prematurely filed their lawsuit under the NYVRA's "safe-harbor provisions." NYSCEF No.9 (citing Election Law

[1] All citations of documents from the New York State Courts Electronic Filing System refer to filings in *Clarke v. Town of Newburgh*, Index No.EF002460/2024 (N.Y. Sup. Ct. Orange Cnty.), unless otherwise stated.

§ 17-206(7)(b)). The Supreme Court denied the Town's motion to dismiss. NYSCEF No.31.[2] After an expedited discovery period, the Town moved for summary judgment, arguing, as relevant here, that the NYVRA's vote-dilution provisions are unconstitutional because they require political subdivisions to make race-based decisions in their administration of elections without satisfying strict scrutiny. NYSCEF No.70. On November 7, 2024, the Supreme Court granted the Town's motion for summary judgment and dismissed the Complaint, concluding that the NYVRA violates both the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and the "potentially more generous protections afforded by the New York Constitution." NYSCEF No.147 at 2, 14. Thus, the Supreme Court struck the NYVRA in its entirety from further enforcement or application to the Town and all other political subdivisions in New York. *Id.* at 2.

B. The Appellate Division Decision

Plaintiffs then timely appealed the Supreme Court's order granting the Town's motion for summary judgment and striking the NYVRA in its

[2] The Town appealed the Supreme Court's denial of the Town's motion to dismiss to this Court, and the Court affirmed the Supreme Court's decision on January 30, 2025. *See* NYSCEF No.154.

entirety. NYSCEF No.151. On January 30, 2025, this Court issued its Decision reversing the Supreme Court's order. NYSCEF No.155. The Town now moves this Court for leave to appeal to the Court of Appeals. *See* CPLR 5602(b), 5713; 22 NYCRR § 1250.16.

C. The Timeliness Of This Motion

This Motion For Leave To Appeal is timely. Plaintiffs filed written notice of entry of this Court's January 30, 2025, Decision on January 30, 2025. NYSCEF No.155. The Town filed this Motion on Tuesday, February 18, 2025, which is within 30 days of January 30, 2025, per CPLR 5513(b), and General Construction Law § 25-a.

JURISDICTION

This Court has jurisdiction over this Motion, *see* N.Y. Const. art. VI, § 3(b)(4); CPLR 5602(b), 5713, and the Court of Appeals will have jurisdiction over the proposed appeal at issue here because it seeks review of a decision from this Court that "does not finally determine an action," CPLR 5602(b)(1).

STATEMENT OF FACTS

A. As relevant here, the NYVRA prohibits any "board of elections or political subdivision" from engaging in "vote dilution." Election Law

§ 17-206(2)(a). The NYVRA's vote-dilution provisions prevent political subdivisions from, among other things, using at-large elections where either the "voting patterns of members of [a] protected class within the political subdivision are racially polarized," or, "under the totality of the circumstances, the ability of members of [a] protected class to elect candidates of their choice or influence the outcome of elections is impaired." *Id.* § 17-206(2)(b)(i). The NYVRA 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. If a court finds a political subdivision in violation of this provision, it must order "appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process." *Id.* § 17-206(5)(a). Such remedies may include ordering the political subdivision to replace a race-neutral, at-large election system with "a district-based" or "an alternative" election system to ensure that citizens categorized by race have a greater chance to elect more candidates of their choice. *Id.*

The NYVRA provides various rules for what "evidence shall be weighed and considered" to determine whether a political subdivision is liable for vote dilution. *Id.* § 17-206(2)(c). For instance, where "more than one protected class of eligible voters are politically cohesive in the political subdivision, members of each of those protected classes may be combined" for purposes of establishing vote dilution. *Id.* § 17-206(2)(c)(iv). Further, vote dilution under the NYVRA does not require any "evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class." *Id.* § 17-206(2)(c)(v). Nor may a court consider "evidence that voting patterns and election outcomes could be explained by factors other than racially polarized voting, including but not limited to partisanship," or "evidence that sub-groups within a protected class have different voting patterns." *Id.* § 17-206(2)(c)(vi), (vii). And a court cannot consider "evidence concerning whether members of a protected class are geographically compact or concentrated," although it may factor such evidence into "determining an appropriate remedy." *Id.* § 17-206(2)(c)(viii).

The NYVRA also provides a non-exhaustive list of factors that a court may consider in deciding whether, "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), (3). These factors include "the extent to which members of the protected class have been elected to office in the political subdivision," *id.* § 17-206(3)(b), and "the extent to which members of the protected class are disadvantaged in," for example, "education, employment, health, criminal justice, housing, land use, or environmental protection," *id.* § 17-206(3)(g). Courts may also consider "any additional factors" and no "specified number of factors [is] required" to establish a vote-dilution violation. *Id.* § 17-206(3)(k).

B. The Town is a political subdivision of New York and home to just over 30,000 residents. NYSCEF No.60 at 11–12. Since at least 1865, the Town's voters have selected their Town Supervisor and the members of their Town Board in at-large elections. NYSCEF No.61 at 132:15–17. It is undisputed that the Town did not adopt this at-large system for any racially discriminatory reasons. *See* NYSCEF No.70 at 2.

In March 2024, Plaintiffs filed this lawsuit alleging that the Town's at-large elections violated the NYVRA. Compl. ¶¶ 157–60. Plaintiffs sought an order requiring the Town to abandon its at-large system in favor of a district-based or alternative system. Compl. ¶ 133.

C. On September 25, 2024, the Town moved for summary judgment. NYSCEF No.70, which the Supreme Court granted on November 7, 2024. NYSCEF No.147 (the "Order"). The Supreme Court first determined that "Defendants have capacity to assert this challenge" because "compliance with the NYVRA will force them to violate the constitutional proscription against unequal protection under the law." *Id.* at 2. Then, turning to the constitutionality of the NYVRA's vote-dilution provisions, the Supreme Court concluded that strict scrutiny applied because "the text of the NYVRA, on its face, classifies people according to their race, color, and national origin," requiring the Town to make redistricting decisions based upon its residents' racial classifications. *Id.* at 16. The NYVRA's vote-dilution provisions failed strict-scrutiny review because they do not serve a compelling state interest and are not narrowly tailored to achieving any such interest. *Id.* at 14–21. As to "compelling state interest," the court explained that, while "past discrimination against the

protected class . . . justifi[es] [ ] race-based statutes" like the federal Voting Rights Act ("VRA"), "the NYVRA is devoid of any requirement of proving past discrimination by a protected class." *Id.* at 17. The NYVRA's vote-dilution provisions are not narrowly tailored to achieving any compelling interest either. *Id.* at 19–21. "The NYVRA sets no minimum bar on the extent of any [ ] impairment of voter ability to influence an election," and "the review standard is lax to the point of explicitly allowing a court to find voter dilution exists without citing any basis." *Id.* at 20. The Supreme Court struck the NYVRA "in its entirety from further enforcement and application to these Defendants and to any other political subdivision in the State of New York." *Id.* at 2.

E. Plaintiffs appealed, and, on January 30, 2025, this Court issued its Decision reversing the Supreme Court's Order. *See* NYSCEF No.160 (the "Decision"). This Court addressed the constitutionality of the NYVRA's vote-dilution provisions as part-and-parcel of a capacity to sue, explaining that the Town only has "capacity to challenge the constitutionality of the NYVRA" if "it forces them to violate the Equal Protection Clause." *Id.* at 2–3. The Court then proceeded to explain that, in its view, the Town "failed to show as a matter of law that compliance

with the NYVRA would force [it] to violate the Equal Protection Clause." *Id.* at 3. This Court reasoned that the NYVRA vote-dilutions provisions do not trigger "strict scrutiny" in "all applications" because the provisions allow "members of all racial groups, including white voters, to bring vote dilution claims." *Id.* at 16–17. This Court noted that while the NYVRA does provide for "race-based districting [as] one of the possible remedies under the NYVRA," this is only one possible remedy, so the Town's constitutional arguments could only be raised if the Court "entertains [such] a remedy." *Id.* at 18–19. This Court also relied several times on comparisons between the NYVRA and state voting rights acts in California and Washington, which had survived constitutional challenges. *See id.* at 16–20.

This Court explained that, in its view, the NYVRA did not need to incorporate the federal Voting Rights Act's ("VRA"), 52 U.S.C. § 10301, so-called *Gingles* test, from *Thornburg v. Gingles*, 478 U.S. 30 (1986), in order to pass constitutional muster. Instead, the Court concluded that the *Gingles* preconditions are an outgrowth of the U.S. Supreme Court's statutory interpretation of Section 2 of the VRA and not mandated by the U.S. Constitution. Decision at 19–20. This Court similarly found that it

was not necessary for the NYVRA to "require the plaintiff in every vote dilution case" to satisfy *Gingles*' totality-of-the-circumstances inquiry and that the NYVRA did "not significantly differ from the [federal Voting Rights Act] in this respect." *Id.* at 20–21. The Court again analogized the NYVRA to the California and Washington voting rights acts, observing that those statutes also do not incorporate all of *Gingles*' requirements. *See id.* at 19–20. This Court also reasoned that, "even if it were unconstitutional to apply the NYVRA in situations where the *Gingles* test has not been satisfied, the NYVRA could still be constitutionally applied in situations where the *Gingles* test has been satisfied." *Id.* at 21.

Finally, this Court's Decision adopted at least one implicit element for vote-dilution liability under the NYVRA, and that conclusion will bind parties in the multiple NYVRA cases currently being litigated throughout the State, *see infra* pp.15–16—including this case on remand. This Court explained that a NYVRA plaintiff must show that "an alternative practice" exists "that would allow the minority group to have equitable access to fully participate in the electoral process." Decision at 20 (citations omitted). The Decision did not define its "equitable

access" implied element. *See generally id*. Nor did it address the differently-worded implied element that Plaintiffs and the Town had agreed was required to make out an NYVRA vote-dilution claim: that a plaintiff must also show that "the protected class would *be better represented*" under an alternative system. NYSCEF No.73 at 12 (emphasis added); *see* NYSCEF No.70 at 21–24. Finally, the Decision did not explain whether it was concluding that "vote dilution" as used in the NYVRA required the plaintiff to making some additional, implicit showing beyond proving "racially polarized voting" *or* satisfying the totality-of-the-circumstances analysis. *See* Election Law § 17-204.

F. The Court of Appeals has not yet considered the NYVRA, which the State enacted the NYVRA in 2022, *see* Gov. Kathy Hochul, *Governor Hochul Signs Landmark John R. Lewis Voting Rights Act of New York Into Law* (June 20, 2022).[3] Multiple cases involving allegations that towns have violated the NYVRA's vote-dilution provisions are currently underway. *See Clarke v. Town of Newburgh*, Index No.EF002460/2024 (Sup. Ct. Orange Cnty.); *Young v. Town of Cheektowaga*, Index

[3] Available at https://www.governor.ny.gov/news/governor-hochul-signs-landmark-john-r-lewis-voting-rights-act-new-york-law.

No.803989/2024 (Sup. Ct. Erie Cnty.); *Serratto v. Town of Mount Pleasant*, Index No.55442/2024 (Sup. Ct. Westchester Cnty.). As in this case, the plaintiffs in both *Young*, Index No.803989/2024, and *Serratto*, Index No.55442/2024, raise NYVRA vote-dilution challenges against the at-large election methods that certain New York political subdivisions use to elect members of their town boards. *See Young*, Index No.803989/2024, NYSCEF No.1 at ¶¶ 43–87 (Mar. 18, 2024); *Serratto*, Index No.55442/2024, NYSCEF No.1 at ¶¶ 174–87 (Jan. 9, 2024). And like the Town here, the government-entity-defendants in both of those cases have raised constitutional challenges to the NYVRA's vote-dilution provisions. *See Young*, Index No.803989/2024, NYSCEF No.68 at 25–35 (Sept. 3, 2024); *Serratto*, Index No.55442/2024, NYSCEF No.118 at 10–26 (Aug. 13, 2024). While both *Young* and *Serratto* have been stayed pending this Court's review of the Supreme Court's summary-judgment order, *Young*, Index No.803989/2024, NYSCEF No.154 (Nov. 21, 2024); *Serratto*, Index No.55442/2024, NYSCEF No.175 (Nov. 21, 2024), both cases could now proceed to trial after this Court declared the NYVRA facially constitutional, *see Young*, Index

No.803989/2024, NYSCEF No.157 (Jan. 30, 2025); *Serratto*, Index No.55442/2024, NYSCEF No.179 (Jan. 30, 2025).

REASONS FOR GRANTING LEAVE TO APPEAL

This Court considers the same standards as the Court of Appeals when determining whether to grant a motion for leave to appeal. *See* 22 NYCRR § 500.22(b)(4). An appeal may be worthy of the Court of Appeals' review where the appeal presents "issues [that] are novel or of public importance." *Id.* That is because the role of the Court of Appeals includes "address[ing] important legal [i]ssues" by, for example, "develop[ing] emerging areas" of law and "[c]onstru[ing] statutes in developing areas of regulation." N.Y. Court of Appeals, *The New York Court Of Appeals Civil Jurisdiction And Practice Outline* 17 (July 2023);[4] *accord Hawkins*, 11 N.Y.3d at 493 ("authoritatively declare and settle the law uniformly throughout the state" regarding "legal issues of statewide significance"); *Babigian v. Wachtler*, 69 N.Y.2d 1012, 1014 (1987) ("issues of law of particular significance . . . that merit[ ]the attention of [the Court of Appeals]"); *Corbett v. Scott*, 243 N.Y. 66, 67 (1926) ("a question of law" that the Court of Appeals has not yet "passed on"); *United Paperboard*

[4] Available at https://www.nycourts.gov/ctapps/forms/civiloutline.pdf.

Co. v. Iroquois Pulp & Paper Co., 217 N.Y.S. 762, 763 (4th Dep't 1926) (same). Relatedly, an appeal may be worthy of the Court of Appeals' review where an Appellate Division "writing" has made an "incorrect statement[ ] of the law" regarding "important legal issues." N.Y. Court of Appeals, *supra*, at 17. The Questions Presented here meet these standards, and thus this Court should grant this Motion for leave to appeal to the Court of Appeals.

I. Whether The NYVRA's Vote-Dilution Provisions Are Constitutional—Including What Implicit Elements In The Statute Inform That Conclusion—Is An Unsettled And Significant Question Of Statewide Importance That The Court Of Appeals Should Address

A. Whether the NYVRA Violates The Federal Or State Equal Protection Clause Is An Unsettled And Important Constitutional Question That The Court Of Appeals Has Not Yet Addressed

1. The federal and state constitutions' Equal Protection Clauses require laws to "operate *equally* upon all." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 201–02 (2023) ("*SFFA*") (citations omitted; brackets omitted); *see People v. Aviles*, 28 N.Y.3d 497, 502 (2016) (New York's Constitution "provides for equivalent equal protection safeguards"). Accordingly, any law that makes "racial classification[s]" violates the Equal Protection Clause unless it satisfies

"daunting . . . strict scrutiny" review, *SFFA*, 600 U.S. at 206–07 (citations omitted)—even laws that "burden or benefit the races equally," *Johnson v. California*, 543 U.S. 499, 505–06 (2005) (citations omitted); *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995); *accord Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (distributing "benefits" and "burdens" based on "racial classifications" triggers strict scrutiny).

To survive strict scrutiny under the Equal Protection Clause, a law must be "narrowly tailored to achieving a compelling state interest." *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 401 (2022) (per curiam) (quoting *Miller v. Johnson*, 515 U.S. 900, 904 (1995)). As relevant here, States have a compelling interest in "remediating specific, identified instances of past discrimination that violated the Constitution or a statute," *SFFA*, 600 U.S. at 207; *Shaw v. Hunt*, 517 U.S. 899, 909 (1996) (citations omitted), and the U.S. Supreme Court has "long assumed" that compliance with Section 2 of the VRA is a "compelling interest" that could justify drawing race-based district lines, *Cooper v. Harris*, 581 U.S. 285, 292 (2017); *see also Wis. Legislature*, 595 U.S. at 401–02. Further, the U.S. Supreme Court has explained that Section

2 itself satisfies strict scrutiny only because it contains "exacting requirements," *Allen v. Milligan*, 599 U.S. 1, 30 (2023)—the *Gingles* test, *Wis. Legislature*, 595 U.S. at 402—that narrowly tailor its application, *Allen*, 599 U.S. at 30; *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion); *see generally* 52 U.S.C. § 10301.

2. The Town respectfully submits that it has presented a substantial argument that the NYVRA's vote-dilution provisions are unconstitutional, justifying the Court of Appeals' review.

The NYVRA's vote-dilution provisions trigger strict-scrutiny review because they mandate that political subdivisions like the Town group their citizens according to racial classifications, *see* Election Law § 17-206(2)(c)(iv), and then take "official conduct discriminating on the basis of race," *SFFA*, 600 U.S. at 206 (citations omitted).

For political subdivisions like the Town that use "an at-large method of election," Election Law § 17-206(2)(b)(i), the NYVRA requires them to abandon that system and adopt one that gives more minority-preferred candidates better chances of winning elections either if there is "racially polarized" voting among the "members of a race, color, or language-minority group" in the jurisdiction, *id*. § 17-204(5), or if the

ability of the members of such groups "to elect candidates of their choice or influence the outcome of elections is impaired" under the NYVRA's totality-of-the-circumstances inquiry, *id.* § 17-206(2)(b)(i). This mandates "distinctions based on race." *SFFA*, 600 U.S. at 204. For example, if there is racially polarized voting in a town, then the political subdivision must alter or abandon its race-neutral at-large method of election so that the preferred candidates of voters grouped together solely by race have greater electoral success. *See* Election Law § 17-206(5). Given the zero-sum nature of elections, this necessarily decreases other racial groups' preferred candidates' chances of electoral success. Thus, the NYVRA mandates distributing "benefits" and "burdens" based on "racial classifications," triggering strict-scrutiny review. *Parents Involved*, 551 U.S. at 720; *see SFFA*, 600 U.S. at 206.

The NYVRA's vote-dilution provisions for jurisdictions with "a district-based or alternative method of election"—which a political subdivision must adopt if it abandons its at-large system to comply with the NYVRA—likewise trigger strict scrutiny. These provisions require a political subdivision using a district-based election method to group their voters based solely on race and then to change that system to ensure it

does not "usually" result in the defeat of a racial-minority-preferred candidate if there is "racially polarized" voting or an impairment of minority groups' ability to determine or influence an election under an amorphous totality-of-the-circumstances inquiry. Election Law § 17-206(2)(b)(ii). Thus, this standard similarly "demands consideration of race," *Abbott v. Perez*, 585 U.S. 579, 587 (2018) (citations omitted), and requires that political subdivisions "distribute[ ] burdens or benefits based on individual racial classifications," *Parents Involved*, 551 U.S. at 702, triggering strict-scrutiny review.

The NYVRA's vote-dilution provisions fail strict scrutiny because they do not further a compelling state interest and are not narrowly tailored to achieving such an interest. First, these provisions do not further a compelling interest because the NYVRA does not seek to "remed[y] specific, identified instances of past discrimination that violated the Constitution or a statute." *SFFA*, 600 U.S. at 207; *Shaw*, 517 U.S. at 909. That is because the NYVRA does not require proof of "past discrimination by a protected class" before a court may require a political subdivision to engage in race-based redistricting, Order at 17; *see* Election Law § 17-206(2)(b)(i). Second, the NYVRA's vote-dilution

provisions are not "narrowly tailored." *SFFA*, 600 U.S. at 206–07 (citation omitted). The NYVRA's vote-dilution provisions eschew the *Gingles* test, *see* Election Law § 17-206(2)(c)(viii) (disclaiming first *Gingles* precondition); *id.* § 17-206(2)(b)(ii), (c)(iv) (allowing plaintiffs to rely on "influence" or "coalition" districts); *see id.* § 17-204(6) (not requiring second *Gingles* precondition); *id.* § 17-206(2)(b)(i)(A), (ii)(A) (not adhering to *Gingles*' second step); *id.* § 17-206(3) (providing that totality-of-the-circumstances analysis is an independent path to race-based districting), meaning that the NYVRA lacks the exacting safeguards that make Section 2 of the VRA narrowly tailored for constitutional purposes.

3. The constitutionality of the NYVRA's vote-dilution provisions is both "a question of law" that the Court of Appeals has not yet "passed on," *Corbett*, 243 N.Y. at 67, and that is "of statewide significance," *Hawkins*, 11 N.Y.3d at 493 (2008), thus this question "merit[s] the attention" of the Court of Appeals, *Babigian*, 69 N.Y.2d at 1014.

The NYVRA is relatively new legislation that the Court of Appeals has not yet considered. The very first attempts to litigate the NYVRA's vote-dilution provisions are currently underway, including the case here,

and are being challenged in New York courts throughout the State. *See Clarke*, Index No.EF002460/2024; *Young*, Index No.803989/2024; *Serratto*, Index No.55442/2024. One Supreme Court has already held that the NYVRA is unconstitutional, *see* Order at 25—and while this Court overturned that order with its Decision, this just highlights that the NYVRA's enforcement constitutes an "emerging area[ ]" of law, N.Y. Court of Appeals, *supra*, at 17, and raises "novel" issues, 22 NYCRR § 500.22(b)(4), that the Court of Appeals has not "directly passed on," *Corbett*, 243 N.Y. at 67. The Court of Appeals deciding the constitutionality of the NYVRA now would "authoritatively declare and settle the law uniformly throughout the state," *Hawkins*, 11 N.Y.3d at 493, for these litigants and the litigants to come who will inevitably bring future NYVRA claims throughout the State. Accordingly, this Court should grant leave for the Court of Appeals to "determine[ ] [this] legal issue[ ] of statewide significance" in this developing legal area, especially given that the NYVRA's constitutionality has already "been considered by both the trial and the intermediate appellate court." *Id.*

While all serious constitutional challenges to state statutes raise important questions of statewide significance, the challenge here is "of

particular significance." *Babigian*, 69 N.Y.2d at 1014. The NYVRA regulates the process by which all political subdivisions within New York conduct elections, meaning that it goes to the heart of democratic self-governance in this State. Election Law § 17-220. "The right to vote, of course, is of the most fundamental significance under our constitutional structure," *Hoehmann v. Town of Clarkstown*, 40 N.Y.3d 1, 6 (2023) (citations omitted), and the NYVRA implicates that right because it directly regulates "all elections for any elected office" throughout the State, Election Law § 17-220. Further, the NYVRA involves racial classifications. "*[A]ll* racial classifications imposed by the government" by law, *Johnson*, 543 U.S. at 505 (emphasis added; citations omitted), are subject to strict scrutiny because of their potentially pernicious nature, regardless of whether they "may be said to burden or benefit the races equally," *id.* at 506 (citations omitted).

It is the Court of Appeals' prerogative and obligation to resolve this significant and unsettled question of statewide importance. The Court of Appeals is "the final arbiter of questions of State law," *Anheuser–Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 334 (1988), including the New York Constitution and has the "duty to say what the law is," thus it would be

"improper[ ] [to] cast[ ] the intermediate appellate court as the arbiter of New York law," *Verneau v. Consol. Edison Co. of N.Y.*, 37 N.Y.3d 387, 396 n.2 (2021) (citations omitted).[5] Further the Court of Appeals' review *now* is justified, as there are currently at least three impending NYVRA trials across the State, including one such trial that falls outside of this Court's Department. *See Clarke*, Index No.EF002460/2024; *Young*, Index No.803989/2024; *Serratto*, Index No.55442/2024.

4. While the Town recognizes that this Court disagreed with its merits arguments regarding the NYVRA's constitutionality, that does not undermine the substantial and unsettled nature of this question. Indeed, the Town respectfully submits that there are several grounds upon which the Court of Appeals could well disagree with this Court's resolution of this significant constitutional issue.

The Court of Appeals may well disagree with this Court's conclusion that the NYVRA's vote-dilution provisions are not subject to strict-scrutiny under the Equal Protection Clause even if that court

[5] Of course, the U.S. Supreme Court is the final arbiter of the meaning of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, but the Court of Appeals is the last word on that constitutional provision so far as New York state courts are concerned.

accepts this Court's conclusion that voters of all races can raise NYVRA claims. *See* Decision at 16–19. The U.S. Supreme Court has explained that "*all* racial classifications, imposed by [a] governmental actor, must be analyzed . . . under strict scrutiny." *Adarand Constructors*, 515 U.S. at 227 (emphasis added). While this Court's analysis on this point relied heavily on state-court decisions upholding the California and Washington voting rights acts, *see Sanchez v. City of Modesto*, 145 Cal. App. 4th 660 (Cal. Ct. App. 2006); *Portugal v. Franklin County*, 530 P.3d 994 (Wash. 2023) (en banc), those nonbinding cases pre-date and conflict with the U.S. Supreme Court's landmark decision in *SFFA*, 600 U.S. 181.

Relatedly, the Court of Appeals may well conclude that this Court did not grapple with those state-court cases' erroneous conclusion that Section 2 of the VRA is not subject to strict scrutiny. *See* Decision at 17. The U.S. Supreme Court has made clear that Section 2 is subject to "strict scrutiny" because it "demands consideration of race" in a State's redistricting process. *Abbott*, 585 U.S. at 587 (citations omitted); *see Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 193–94 (2017); *Cooper*, 581 U.S. at 292–93. And this Court implicitly noted this by recognizing that "districting maps that sort voters on the basis of race"

must be "narrowly tailored to achieving a compelling state interest" and that, "when a State invokes § 2 to justify race-based districting, it must . . . meet the narrow tailoring requirement[.]" Decision at 17–18 (quoting *Wis. Legislature*, 595 U.S. at 401–02).

The Court of Appeals could also reasonably hold that this Court misunderstood the relevant inquiry when it concluded that—unlike Section 2—the NYVRA's vote-dilution provisions are not subject to strict scrutiny because "race-based districting is only one of the possible remedies under the NYVRA." Decision at 18 (citations omitted). While imposing a remedy requiring the Town to engage in "race-based redistricting," Decision at 18, would certainly trigger strict scrutiny, *see Shaw v. Reno*, 509 U.S. 630, 643, 646 (1993), *so would imposing liability on the Town for refusing to replace its race-neutral at-large system with one expressly designed to ensure greater electoral success for the preferred candidates of the Town's minority citizens lumped together by race*, *see supra* pp.20–21; *SFFA*, 600 U.S. at 206. Respectfully, the Court of Appeals could well hold that this Court failed to address whether imposition of NYVRA vote-dilution *liability* itself triggers strict-scrutiny

review, apart from whether a particular remedy under the NYVRA triggers strict scrutiny. *See generally* Decision at 18.

The Town also respectfully submits that the Court of Appeals could find that this Court erred in concluding that the NYVRA is constitutional despite "not requir[ing] the plaintiff in every vote dilution case" to meet *Gingles*' mandatory second step—a showing that the political process is not equally open to minority voters under the totality-of-the-circumstances. *Supra* pp.12–13; *see* Decision at 20–21. The *Gingles* second-step inquiry helps ensure that Section 2 is narrowly tailored by requiring a plaintiff to show that the political process is not equally open to minority voters *in addition to* also satisfying the three necessary *Gingles* preconditions. *Supra* pp.18–19. Without this necessary, second step, NYVRA vote-dilution liability is triggered merely upon a showing of "racially polarized" voting. *See* Election Law § 17-206(2)(b)(i). Yet, racially polarized voting is a common occurrence "in most States" and merely shows a "discernable, non-random relationship[ ] between race and voting." *Cooper*, 581 U.S. at 304 n.5. Notably, the California and Washington voting rights acts (on which the Court relied, *see* Decision at 16–19) require plaintiffs to show vote-dilution as defined in those

statutes *and* satisfy a totality inquiry that is similar to *Gingles*' second step. *See* Wash. Rev. Code § 29A.92.030; Cal. Elec. Code § 14026(e).

Further, the Court of Appeals could well determine that this Court's conclusion "that the NYVRA need not contain the first *Gingles* precondition" to comply with the Equal Protection Clause, Decision at 19, likewise misunderstands relevant precedent and the NYVRA's scope. The Equal Protection Clause demands that a statute requiring race-based redistricting contain safeguards that are at least equivalent with Section 2's safeguards, given that provision's historical pedigree and narrowly tailored design. *See Cooper*, 581 U.S. at 292; *Bartlett*, 556 U.S. at 21 (plurality opinion) (warning that relaxing *any* of the *Gingles* standards would raise "serious constitutional concerns"). This Court held that "it was rational" for New York to exclude the first precondition from the NYVRA because, unlike Section 2, the NYVRA contemplates "influence districts" and "remedies" that do not involve drawing new districts. Decision at 20. However, the U.S. Supreme Court has rejected "influence" districts, explaining that if "[Section] 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions."

League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 445–46 (2006) (citation omitted). And the Town explained that the NYVRA requires municipalities to make decisions based on racial classifications totally apart from its remedies provision. *Supra* pp.10–11.

B. What Implied Elements An NYVRA Plaintiff Must Prove Is An Unsettled And Significant Question Of Statewide Importance That The Court Of Appeals Should Address

Even if the Court of Appeals were to conclude that the NYVRA's vote-dilution provisions could be constitutional, *but see supra* Part I.A, review by the Court of Appeals remains necessary because this Court recognized at least one implicit element of an NYVRA vote-dilution claim as part of its constitutional analysis, and authoritatively resolving the issue of what implicit elements these provisions contain is a significant and unsettled legal question that is part-and-parcel of the constitutional inquiry. As explained above, *supra* pp.15–16, there are at least three NYVRA vote-dilution cases pending throughout the State, and each of the litigants in those cases—including the Town here—have argued that the vote-dilution provisions must include various implicit elements. *See, e.g.*, NYSCEF No.70 at 21–24; *Serratto*, Index No.55442/2024, NYSCEF No.146 at 16–21; *id.*, NYSCEF No.60 at 12; *Young*, Index

No.803989/2024, NYSCEF No.143 at 12. Review by the Court of Appeals is needed now, so these cases do not proceed through trials without knowing the elements of the NYVRA vote-dilution claims at issue.

The present case demonstrates the confusion surrounding the question of whether the NYVRA vote-dilution provisions require certain implicit elements. Below, both the Town and Plaintiffs agreed that, to make out an NYVRA vote-dilution claim, the plaintiff must show that there is an available remedy that would increase the minority group's preferred candidates' chances of winning more seats than under the Town's current at-large system. *See* Index No.2024/11753, NYSCEF No.13 at 15; NYSCEF No.70 at 11, 21–24. This Court adopted a different implicit element than the one that the Town and Plaintiffs agreed upon, while also, perhaps, suggesting that the NYVRA requires still another implicit element based on an NYVRA plaintiff's duty to prove "vote dilution." *See* Decision at 14–21; *supra* pp.13–14.

The implicit element(s) that this Court's Decision adopted differs significantly from the implicit element that the parties agreed upon. This Court concluded that an NYVRA vote-dilution plaintiff must show both "that vote dilution has occurred" and "*that there is an alternative practice*

that would allow the minority group to have equitable access to fully participate in the electoral process." *Id.* at 20 (citations omitted; emphasis added). Requiring a plaintiff to show that an alternative practice would give "the minority group . . . *equitable access* to fully participate in the electoral process," *id.* (emphasis added), is not the same as requiring a plaintiff to show that the alternative practice would *increase* minority-preferred candidates' chances of winning more elections in the jurisdiction—the implicit element the parties agreed upon here, *see* NYSCEF No.70 at 21–24. Under the parties' agreed-upon implicit element, a plaintiff must show that an alternative election system exists under which minority-preferred candidates would perform better than under the extant at-large system. *See id.* Under this Court's implicit element, in contrast, plaintiffs must somehow further define what "equitable access to fully participate in the electoral process" means and then show that an alternative map satisfies this new element—presumably through the use of election results, although that is not clear. *See* Decision at 20. And, perhaps, a plaintiff must also make some additional showing to establish "vote dilution" under this Court's decision—although, again, that is unclear. *See supra* pp.13–14.

The Court of Appeals is the only court that can finally settle the required elements of an NYVRA vote-dilution claim on a statewide basis. *See Verneau,* 37 N.Y.3d at 396 n.2; *Anheuser–Busch, Inc.,* 71 N.Y.2d at 334. While this Court's decision does bind Supreme Courts in other Appellate Departments since it is the only appellate authority on the issues in dispute here, *see, e.g.*, *People v. Turner*, 5 N.Y.3d 476, 482 (2005), it will not bind other Appellate Departments, *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 665 (2d Dep't 1984) (citations omitted). So, here, each of the Supreme Courts with pending NYVRA vote-dilution trials must decide those cases consistent with this Court's Decision, *Turner*, 5 N.Y.3d at 482, but then another Appellate Department may well disagree with this Court's decision on appeal from one of those trials, *Mountain View Coach Lines*, 102 A.D.2d at 665. The Court of Appeals could, of course, overrule all of these Appellate Division and Supreme Court decisions, *see, e.g.*, *Verneau,* 37 N.Y.3d at 396 n.2, perhaps requiring all new trials in these cases. The Court of Appeals resolving this issue now will provide much-needed guidance in these now-pending NYVRA cases across the State, especially because these litigants

are headed to trial without clearly knowing what elements they must prove or disprove. *See supra* pp.15–16.

Notably, the Court of Appeals is practically certain to review the constitutionality of the NYVRA's vote-dilution provisions, including whether these provisions include certain implied elements, once one of these three pending NYVRA cases reach final judgment. A party can appeal to the Court of Appeals "as of right" from an Appellate Division order that finally determines an action that "directly involve[s] the construction of the constitution of the state or of the United States." CPLR 5601(b)(1). A party can also appeal to the Court of Appeals "as of right" from a final judgment in the Supreme Court "where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States." CPLR 5601(b)(2). Further, a party can appeal a final judgment in the Supreme Court to the Court of Appeals "as of right . . . where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment, . . . and which satisfies the requirements of [CPLR 5601(b)] except that of finality." CPLR 5601(d). Thus, once any Supreme Court in the pending NYVRA vote-dilution

cases enters final judgment after trial—and perhaps all three—aggrieved parties may appeal as of right to the Court of Appeals (either before or, at the very least, after, intermediate appeals). It would be a waste of judicial and litigant resources—including the resources of the government-party defendants in each of these cases—to postpone the Court of Appeals' inevitable review on this core issue.

II. The Court Should Also Grant Leave As To Whether The Town Has Capacity To Challenge The Constitutionality Of The NYVRA's Vote-Dilution Provisions When Sued Under Them, As That Question Is Inextricably Tied To The Question Of The Constitutionality Of Those Provisions

A. There is an exception to the general rule that municipalities "lack capacity to mount constitutional challenges to acts of . . . State legislation," *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 383 (2017) (citation omitted), which exception allows municipalities to mount such challenges if they assert that, "if they are obliged to comply" with the statute, "they will by that very compliance be forced to violate a constitutional proscription," *Matter of Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287 (1977). Accordingly, a municipality has capacity to sue to challenge a statute's constitutionality if it could be "held accountable [ ] under the Equal

Protection Clause . . . by reason of" its compliance with a state statute. *City of New York v. State*, 86 N.Y.2d 286, 295 (1995).

B. Here, this Court held that the Town did not have capacity to challenge the NYVRA's constitutionality for the sole reason that this Court concluded that the Town had not established "that compliance with the NYVRA would force [it] to violate the Equal Protection Clause." Decision at 13. That is, to resolve the question of the Town's capacity, this Court had to decide the very constitutional question at the heart of the Town's challenge to the NYVRA. Indeed, the Court stated that the Town had "to succeed on [its] constitutional argument" in order to show that it had capacity to challenge the NYVRA, and the Court held that the Town lacked such capacity expressly "[f]or the reasons discussed below" in the Court's Equal Protection Clause analysis. Decision at 13.

C. Given the interwoven nature of the Questions Presented regarding the Town's capacity to challenge the constitutionality of the NYVRA's vote-dilution provisions and whether those provisions violate the Equal Protection Clause, this Court should grant the Town leave to appeal on the capacity question if it grants leave to appeal on the underlying constitutionality question. Similar lack-of-capacity

arguments are currently being litigated in other NYVRA cases pending throughout the State, *see, e.g.*, *Serratto*, Index No.55442/2024, NYSCEF No.146 at 9–10, and granting this Motion now would allow the Court of Appeals to "settle the law uniformly throughout the state" on this important legal issue, *Hawkins*, 11 N.Y.3d at 493. Further, granting leave to appeal on the capacity question would give the Court of Appeals the opportunity to address the novel legal question—which the Town raised and this Court did not address—of whether the "capacity to *sue*" limitation, CPLR 3211(a)(3) (emphasis added), is even applicable when a municipality has not sued anyone and merely asserts the unconstitutionality of a statute as a defense when sued under it, *see* Index No.2024-11753, NYSCEF No.24 at 15. That question is "of statewide significance," *Hawkins*, 11 N.Y.3d at 493, because its resolution would impact the defenses available to all New York political subdivisions when sued under state law.

III. This Court Should Refrain From Issuing The Remittitur To The Supreme Court Pending Its Decision On Whether To Grant This Motion And Any Review Of The Court Of Appeals

This Court should refrain from issuing its remittitur to the Supreme Court pending its disposition of this Motion and any review of

this appeal by the Court of Appeals, including in the interests of judicial and litigant economy.

A. Once this Court renders a decision that allows for further proceedings in the Supreme Court, the Supreme Court does not reacquire the jurisdiction necessary to conduct those further proceedings until this Court issues remittitur. CPLR 5524(b); 22 NYCRR § 1250.16(c); *Fry v. Vill. of Tarrytown*, 671 N.Y.S.2d 633, 634 (Sup. Ct. Westchester Cnty. 1998). As CPLR 5524(b) expressly provides, "[t]he entry of [the remittitur] shall be authority for any further proceedings." CPLR 5524(b); *see also* Richard C. Reilly, *Practice Commentaries*, McKinney's Cons. Laws of N.Y., CPLR C5524:2 ("If further proceedings are needed in the lower court, the entry there of the appellate remittitur is the authority for the further proceedings."). This remittitur rule allows a case that has been appealed to proceed in an orderly fashion after the disposition of that case, as it ensures that only one court has jurisdiction over the relevant proceedings at a time. *See, e.g., Fry*, 671 N.Y.S.2d at 634; *Malnati v. Metro. Life Ins. Co.*, 300 N.Y.S. 1313, 1317 (Sup. Ct. Queens Cnty. 1937), *aff'd*, 254 A.D. 681 (2d Dep't 1938).

B. Here, this Court should stay any further proceedings below by not issuing its remittitur pending its disposition of the Town's Motion and any review of this appeal by the Court of Appeals. As shown above, the Town's Motion presents significant issues of statewide importance that merit review by the Court of Appeals. *Supra* Parts I–II. That review would either dispose of this case, should the Court of Appeals reverse this Court and affirm the Supreme Court, or provide much needed clarity on the essential elements of Plaintiffs' NYVRA claim. Such guidance is crucial for the trial called for by this Court's Decision.

CONCLUSION

The Court should grant the Town leave to appeal to the Court of Appeals and refrain from issuing the remittitur.

Dated: February 18, 2025

Respectfully submitted,

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