To Be Argued By:
Misha Tseytlin
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Appellate Division, Second Department Docket No. 2024-11753

Court of Appeals

STATE OF NEW YORK

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

Plaintiffs-Respondents,

against

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

Defendants-Appellants,

and

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

Intervenor-Respondent.

BRIEF FOR DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

The John R. Lewis Voting Rights Act of New York ("NYVRA") classifies as illegal "vote dilution" a town or county simply having racially polarized voting within its jurisdiction. The U.S. Supreme Court has unanimously described racially polarized voting as the common condition ("to no one's great surprise") of "discernible, non-random relationships between race and voting." *Cooper v. Harris*, 581 U.S. 285, 304 n.5 (2017). Similarly, Plaintiffs' own counsel explained in an article that they co-wrote just two years ago that "[r]acial polarization in voting" "continues to exist in most areas" and is "relatively easy to establish." Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 Emory L. J. 299, 312 (2023). Yet, under the NYVRA, any town or county that happens to have this common condition must alter its race-neutral election system to make it easier for some citizens lumped together by race to elect candidates of their choice, at the necessary expense of the electoral power of voters grouped together by other races. *See id.* at 313.

The NYVRA's vote-dilution provisions employ a paradigmatic race-based-classification scheme that triggers—and fails—strict scrutiny under the Equal Protection Clauses of the Fourteenth Amendment to the

U.S. Constitution and the New York Constitution. The NYVRA's vote-dilution provisions trigger strict scrutiny on their face because they demand state action based upon "racial classification[s]"—contrary to the Equal Protection Clauses' fundamental guarantee that "any law which operates upon one man should operate *equally* upon all." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 201–02 (2023) ("*SFFA*") (citation omitted). The NYVRA's vote-dilution provisions "distribute[ ] . . . benefits" (a greater chance of certain racial groups of citizens electing their preferred candidates) and "burdens" (a correspondingly decreased chance of other racial groups of citizens electing their preferred candidates) solely "on the basis of individual racial classifications." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). The NYVRA's vote-dilution provisions do not even attempt to satisfy strict scrutiny's high bar. Although a carefully drawn, remedial, race-based statute could comply with the Equal Protection Clauses if it was narrowly tailored to remedy discriminatory conditions that the relevant jurisdiction created, the NYVRA's vote-dilution provisions are no such statute.

The Appellate Division's contrary conclusion misunderstands controlling equal-protection precedent. The Appellate Division held that strict scrutiny did not apply to the NYVRA's vote-dilution provisions because those provisions could theoretically benefit members of *any race*, if it so happens that—for example—white voters were winning too few elections in a town (whatever that means) with racially polarized voting. The U.S. Supreme Court has repeatedly rejected that very reasoning, concluding again and again that laws that distribute benefits and burdens based on racial classifications—even if applicable to all racial groups—trigger strict scrutiny. *See, e.g.*, *SFFA*, 600 U.S. at 201; *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 401 (2022) (per curiam); *Parents Involved*, 551 U.S. at 720; *Johnson v. California*, 543 U.S. 499, 505–06 (2005). Further, the Appellate Division did not even attempt to analyze whether the NYVRA's vote-dilution provisions satisfy strict scrutiny, instead finding comfort in the California and Washington courts that have upheld those States' Voting Rights Acts ("VRAs"). But the out-of-state decisions that the Appellate Division cited did not apply the U.S. Supreme Court's most recent equal-protection jurisprudence and, in any event, the state laws that those courts considered are more

tailored than the NYVRA in multiple respects, as Plaintiffs' own counsel explained. *See*, Greenwood & Stephanopoulos, *supra*, at 301; (describing the NYVRA as "the most ambitious" state VRA); *see also id.* at 312–13.

Taking a step back, and with all respect to the Appellate Division, its approach is simply irreconcilable with the U.S. Supreme Court's current equal-protection jurisprudence. Even before the U.S. Supreme Court's recent shift towards a more stringent enforcement of the Equal Protection Clause's race-blind guarantees, the Court warned that relaxing the demanding standards of Section 2 of the federal VRA—which also prohibits vote dilution, but far more narrowly defined—would create "serious constitutional concerns under the Equal Protection Clause." *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion). The Court recently issued its landmark decision in *SFFA*, departing from decades of precedent that had given educational institutions leeway to adopt race-based admissions measures. And now, the Court appears poised to cut back (at least to some extent) on its prior position that Section 2 of the VRA complies with the Equal Protection Clause. *See Louisiana v. Callais*, 606 U.S. ____, 2025 WL 1773632 (June 27, 2025) (ordering re-argument for the October 2025 Term in a case dealing with

the intersection of the Equal Protection Clause and Section 2 of the VRA). But whatever the constitutional fate of Section 2 of the VRA before the U.S. Supreme Court, the notion that the Court's current precedent would permit the maximal-race-focused scheme that the NYVRA's vote-dilution provisions enshrine on their face is implausible, to put it generously.

Defendants-Appellants the Town of Newburgh and the Town Board of the Town of Newburgh (hereinafter, collectively, "the Town") respectfully submit that the U.S. Supreme Court would be exceedingly unlikely to permit the NYVRA vote-dilution provisions' clear violation of the Court's modern equal-protection case law to stand. The Court's inevitable review of any decision holding to the contrary would take down not only the NYVRA, but possibly other, more-tailored VRAs in other States along the way. However, if this Court were to invalidate the NYVRA's vote-dilution provisions as unconstitutional, the Legislature would then have an opportunity to enact a law that focuses on actual vote dilution narrowly tailored to discriminatory actions of the relevant political subdivision—rather than to the banal, common condition of racially polarized voting, like the current NYVRA.

This Court should reverse the judgment of the Appellate Division and affirm the relevant portion of the judgment of the Supreme Court by holding that the NYVRA's vote-dilution provisions are unconstitutional. Alternatively, and at minimum, this Court should require plaintiffs in NYVRA vote-dilution cases to make certain additional showings that would bring the NYVRA closer to what U.S. Supreme Court precedent mandates under the Equal Protection Clause.

QUESTIONS PRESENTED

1. 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.

2. What implicit elements the NYVRA vote-dilution provisions require plaintiffs to prove, in order to attempt to save these provisions from unconstitutionality.

3. Whether municipalities and their officers have capacity to challenge the constitutionality of the NYVRA's vote-dilution provisions in court, given that those provisions require them to violate the U.S. Constitution and the New York Constitution.

JURISDICTION

This Court has jurisdiction over this appeal because the Appellate Division, Second Department, granted Defendants-Appellants leave to appeal pursuant to CPLR 5713 on May 23, 2025. A2. The Town presented the issues here both to the Orange County Supreme Court and to the Appellate Division, thus preserving those questions for this Court's review. A365–84; *Clarke v. Town of Newburgh*, Index No.2024-11753 NYSCEF No.24 at 14–54 (2d Dep't, Dec. 5, 2024).

STATEMENT OF THE CASE

A. Legal Background

In 2022, the Legislature enacted the NYVRA. Senate Bill S1046E, N.Y. State Senate.[1] The NYVRA imposes a variety of voting-related rules and prohibitions on political subdivisions throughout New York that are not relevant here. *See, e.g.*, N.Y. Elec. Law §§ 17-206, 17-208, 17-212. For example, the NYVRA addresses voter disenfranchisement, *id.* § 17-206; assistance for certain language-minority groups, *id.* § 17-207; and voter intimidation, *id.* § 17-212; *see generally* A10–12.

[1] Available at https://www.nysenate.gov/legislation/bills/2021/S1046 (all websites last visited July 3, 2025).

At issue here are the NYVRA's vote-dilution provisions, which seek to increase the chances of electoral success of certain citizens grouped together by race, to the necessary detriment of the electoral success of citizens grouped together by other races. *See* N.Y. Elec. Law § 17-206(2)–(8). The NYVRA mandates that a violation of its vote-dilution provisions "shall be established" by one of two "showings," depending upon the "method of election" that the political subdivision at issue has adopted—the "at-large method of election," on the one hand, or "district-based or alternative method of election," on the other. *Id.* § 17-206(2)(b).

For political subdivisions that employ "an at-large method of election" (like the Town here), the NYVRA provides that prohibited vote dilution exists when "either: (A) voting patterns of members of the 'protected class'"—meaning "a class of individuals who are members of a race, color, or language-minority group," *id.* § 17-204(5)—"within the political subdivision are racially polarized," *id.* § 17-206(2)(b)(i)(A); "*or* (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired," *id.* § 17-206(2)(b)(i)(B) (emphasis added). The NYVRA defines "racially polarized voting" as "voting in which there is a

divergence in the . . . choice[s] of members in a protected class from the . . . choice[s] of the rest of the electorate," *id*. § 17-204(6), which is a common condition, *see Cooper*, 581 U.S. at 304 n.5; *accord* Greenwood & Stephanopoulos, *supra*, at 311.

When a political subdivision relies on "a district-based or alternative method of election," the NYVRA provides that prohibited vote dilution occurs when "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." N.Y. Elec. Law § 17-206(2)(b)(ii) (emphasis added).

If the conditions satisfying the NYVRA's definition of "vote dilution" exist in the political subdivision, the NYVRA then mandates that the political subdivision change its election system to ensure that the voters lumped together by race are able to elect more candidates of their choice and, accordingly, that other voters grouped together by other races are less likely to elect the candidates of their choice.

Subsection 17-206(2)(c) of the NYVRA establishes various rules for "weigh[ing] and consider[ing]" evidence regarding whether NYVRA vote dilution has occurred in a political subdivision, requiring the overhaul of that subdivision's election system. *Id.* § 17-206(2)(c). For example, "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." *Id.* § 17-206(2)(c)(viii) (emphasis added). Further, "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" for vote-dilution-claim purposes. *Id.* § 17-206(2)(c)(iv). Additionally, the NYVRA disclaims any need for "evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class" to establish vote-dilution liability. *Id.* § 17-206(2)(c)(v). And the NYVRA provides that a court may not consider for vote-dilution-liability purposes either "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).

Subsection 17-206(3) of the NYVRA, in turn, enumerates a number of non-exhaustive "factors that may be considered" in connection with the "totality of the circumstances" analysis. *Id.* § 17-206(3). These factors include "the history of discrimination in or affecting the political subdivision," *id.* § 17-206(3)(a); "the extent to which members of the protected class have been elected to office in the political subdivision," *id.* § 17-206(3)(b); "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," *id.* § 17-206(3)(f); "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); and "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," *id.* § 17-206(3)(h). Additionally, Subsection 17-206(3) authorizes courts to consider "any additional factors," while also providing that no

"specified number of factors [is] required in establishing that [a vote-dilution] violation has occurred." *Id.* § 17-206(3)(k).

Finally, the NYVRA imposes a mandatory notification requirement on potential plaintiffs before they may assert NYVRA claims against a given political subdivision. A potential plaintiff must send a "NYVRA notification letter" to the governing body of the political subdivision at issue "asserting that the political subdivision may be in violation of" the NYVRA, "[b]efore commencing a judicial action." *Id.* § 17-206(7). Then, the potential plaintiff may not file suit "within fifty days" of sending the NYVRA notification letter. *Id.* § 17-206(7)(b). If, during those 50 days, the political subdivision passes an "NYVRA Resolution" that affirms its intent to alter its election system, provides the steps that the political subdivision will take, and states the schedule for taking those steps, the NYVRA entitles the political subdivision to a 90-day "safe harbor" period, "during which a prospective plaintiff shall not commence an action." *Id.*

B. Factual And Procedural Background

1. Chartered in 1788, the Town of Newburgh is one of the oldest political subdivisions of New York and is now home to just over 30,000 residents. A67–68. The Town's population is 61% White, 15.4% Black,

10.7% mixed race, and 25.2% Hispanic. A68. The Town has historically been a farming community but, today, many of its residents work in the surrounding metropolitan areas, while choosing to live in the Town for its "affordability" and "rural setting." A67–68. Among other things, the Town prioritizes "inclusion and diversity" and ensuring that "elected officials [be] representative of the entire community." A67.

The Town Board is the Town's legislative and policymaking authority, and it includes the Town Supervisor and four Town Councilmembers. *See* A14–15. The people of the Town elect the Town Supervisor and the four Town Councilmembers through at-large elections, administered by the Orange County Board of Elections. A14–15. The Town has used an at-large system since at least 1865, A242—over 150 years ago—and it is undisputed that the Town did not adopt its at-large system for racially discriminatory reasons, A360.

2. In March 2024, Plaintiffs—a coalition of individual voters in the Town—filed this lawsuit against the Town in the Orange County Supreme Court, alleging that the Town's at-large election method for Town Supervisor and the four Town Councilmembers violates the NYVRA's vote-dilution provisions. A282–314. Specifically, Plaintiffs

asserted that the Town's at-large election method dilutes the voting power of Black and Hispanic voters, contrary to the NYVRA's vote-dilution provisions. A284–86. Plaintiffs sought an order requiring the Town to replace its at-large system with either a district-based or alternative system. A304, A307–08. Nowhere in their Complaint did Plaintiffs allege that the Town adopted its at-large election system for racially discriminatory reasons or that the alleged vote dilution here was due to any discrimination by the Town. *See generally* A282–314.

3. After it unsuccessfully moved to dismiss the complaint on procedural grounds related to the NYVRA's safe-harbor, *see Clarke v. Town of Newburgh*, 237 A.D.3d 1, 3 (2d Dep't 2025), the Town moved for summary judgment. As relevant here, the Town primarily argued that the NYVRA's vote-dilution provisions were unconstitutional under the Equal Protection Clauses of the U.S. Constitution and New York Constitution. A367–74. Plaintiffs opposed the Town's motion. A386–416.

4. The Supreme Court granted the Town's summary-judgment motion and declared the entirety of the NYVRA unconstitutional and

enjoined its enforcement statewide—including the vote-dilution provisions that the Town had challenged. A28–52.

The Supreme Court first rejected Plaintiffs' threshold argument that the Town lacked capacity to challenge the constitutionality of the NYVRA's vote-dilution provisions. A38–40. The Town did have such capacity, the Supreme Court held, because it had argued that compliance with the NYVRA's vote-dilution provisions would "force it to violate a constitutional proscription." A39 (citation omitted).

The Supreme Court then concluded that the NYVRA's vote-dilution provisions were unconstitutional. It first explained that those provisions trigger strict scrutiny because "classification based on race, color and national origin is the *sine qua non* for relief under the NYVRA." A41–43. The Supreme Court then held that those provisions failed strict scrutiny's daunting two-prong test: they did not further any compelling state interest, unlike statutes aimed at remedying past discrimination, nor were they narrowly tailored because they impose a "breadth of remedies" to address even "the most minimal of impairments of a class of voters' ability to influence an election." A47. The Supreme Court also analyzed the NYVRA's vote-dilution provisions in light of the *Thornburg*

v. Gingles, 478 U.S. 30 (1986), framework applicable to vote-dilution claims brought under Section 2 of the federal VRA, concluding that the NYVRA's vote-dilution provisions also failed narrow tailoring because they reject certain of the *Gingles* safeguards for Section 2. A49–50.

5. Plaintiffs appealed, A4–A5, and the Appellate Division reversed the Supreme Court's order, A3–25.

The Appellate Division held that the Town lacked capacity to raise its constitutional argument here because, in its view, the NYVRA's vote-dilution provisions were not facially unconstitutional. A5–6, A15–16. To reach that conclusion, the Appellate Division first held that strict scrutiny did not apply because "members of *all* racial groups, including white voters, [may] bring vote dilution claims, including when white voters constitute a minority in a political subdivision." A19 (emphasis added). Further, while the NYVRA authorizes "race-based districting" as a possible remedy for "vote dilution," A21–22, that is only "one of the possible remedies," A21. The Appellate Division also concluded that the NYVRA's vote-dilution provisions need not satisfy the *Gingles* framework for Section 2 of the federal VRA because the U.S. Supreme Court "has never said that the *Gingles* test was required by the constitution." A22–

24. Throughout its opinion, the Appellate Division compared the NYVRA to California's and Washington's VRAs and precedent from the courts of those States upholding those provisions. A21–22.

The Appellate Division also concluded that the vote-dilution provisions incorporate at least one implicit element for a finding of liability—although, with respect, the Appellate Division was unclear on this point. Specifically, the Appellate Division explained that, "to obtain a remedy under the NYVRA, a plaintiff must show 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." A23–24 (citation omitted). The Appellate Division did not define what "equitable access" means, or how a political subdivision would know if it was lacking. *See generally* A23–24.

6. The Appellate Division then granted the Town's motion for leave to appeal to this Court. A2. In its motion for leave to appeal, the Town had explained that this Court's review was necessary due to the significant and unsettled questions of statewide importance—namely, whether the NYVRA's vote-dilution provisions are constitutional and, if so, what implicit elements support their constitutionality. *Clarke v.*

Town of Newburgh, Index No.2024-11753, NYSCEF No.37 at 17–35 (2d Dep't, Feb. 18, 2025). The Town also explained that whether the Town has capacity to raise its equal-protection defense was inextricably tied to those unsettled issues. *Id.* In granting the Town's motion, the Appellate Division certified the following question to this Court: "Was the opinion and order of this Court dated January 30, 2025, properly made?" A2. In that same order, the Appellate Division stayed all trial-court proceedings pending the disposition of this appeal. A2.

7. While the Town's motion for leave to appeal to this Court was pending, the case proceeded to trial before the Supreme Court. *Clarke*, Index No.50325/2025, NYSCEF No.167 (Orange Cnty. Apr. 17, 2025).[2] Trial began on May 12, 2025, but then abruptly ended that same day after Plaintiffs' opening statement, when Justice Vazquez-Doles disclosed a decades-old connection between one of the named Plaintiffs and herself—the details of which connection Plaintiffs' counsel corroborated and expanded upon after a short recess. *Clarke*, Index

[2] The Orange County Supreme Court initially assigned this case Index No. 002460-2024. When the case was subsequently transferred (over the Town's objections, *see infra*, pp.19–20) to the Westchester County Supreme Court, it was reassigned Index No.50325/2025. For ease of reference, citations to the Supreme Court docket refer to the Westchester County Supreme Court index number.

No.50325/2025, NYSCEF No.168 (Orange Cnty. Apr. 17, 2025); *Clarke*, Index No.50325/2025, NYSCEF No.184 (Orange Cnty. May 13, 2025). The Town did not anticipate that this connection would pose a risk of prejudice for Justice Vazquez-Doles, and so did not seek her recusal. *See* 22 NY-CRR 100.3(e); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Yet, Plaintiffs refused even to proceed with the trial unless the Town immediately agreed to waive prospectively its appellate rights related to Justice Vazquez-Doles's potential conflicts. The Town declined to waive because it did not know what other potential conflicts Plaintiffs wanted the Town to waive, and Plaintiffs then orally moved for Justice Vazquez-Doles's recusal, which motion the Justice granted immediately from the bench less than two hours after the trial had begun. *Clarke*, Index No.50325/2025, NYSCEF No.181 (Orange Cnty. May 12, 2025).

During a discussion with Justice Vasquez-Doles immediately following her recusal, Plaintiffs raised the possibility of transferring this case away from the Orange County Supreme Court (where Plaintiffs had filed this case and litigated for over a year) to Westchester County pursuant to Election Law § 16-101. After a handful of other recusals, *see*, *e.g.*, *Clarke*, Index No.50325/2025, NYSCEF Nos.185, 186, 188 (Orange

Cnty. May 15, 2025), the case was assigned to Justice Scattaretico-Naber, who did not recuse. The Town explained to Justice Scattaretico-Naber that Plaintiffs very obviously waived the right to invoke Section 16-101(1)(b)'s non-jurisdictional venue provision by litigating this case in Orange County for more than a year without invoking this provision. *See Balbuenas v. N.Y.C. Health and Hosps. Corp.*, 209 A.D.3d 642, 643–44 (2nd Dep't Oct. 5, 2022). Justice Scattaretico-Naber nevertheless transferred the case to Westchester County, without even addressing the fatal error in Plaintiffs' belated, plainly waived request.[3]

STANDARD OF REVIEW

This Court reviews summary-judgment rulings *de novo*, *see JF Cap. Advisors, LLC v. Lightstone Grp., LLC*, 25 N.Y.3d 759, 764 (2015); 4 N.Y. Jur. 2d Appellate Review § 509, asking whether "[t]he proponent of a summary judgment motion [has made] a prima facie showing of

[3] Given Plaintiffs' unambiguous waiver of Section 16-101(1)(b)'s venue provision, *Balbuenas*, 209 A.D.3d at 643–44, if this Court does not reverse the Appellate Division's order, it should remand this case to Orange County for trial, where Plaintiffs themselves sued and litigated for year. Although the Appellate Division denied the Town leave to appeal the transfer decision on the same day that it certified this appeal, *Clarke v. Town of Newburgh*, Index No.2025-05927, NYSCEF No.2 (2d Dep't, May 23, 2025), this Court has broad authority to direct appropriately remittitur for further proceedings, *see* N.Y. Comp. Codes R. & Regs. tit. 22, § 500.19(a) (recognizing that the Court may remit the case "to the clerk of the court of original instance or to the clerk of the court to which the case is remitted, there to be proceeded upon according to law").

entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case," *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). In the context of constitutional challenges to a state statue, this Court affords the challenged statute a presumption of constitutionality. *McGee v. Korman*, 70 N.Y.2d 225, 231 (1987). Nevertheless, this Court must invalidate a legislative enactment when it violates "the plain intent of the Constitution" and demonstrates "a disregard of its spirit and the purpose for which express limitations are included therein." *Harkenrider v. Hochul*, 38 N.Y.3d 494, 509 (2022) (citation omitted).

ARGUMENT

I. 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

Under the Equal Protection Clause of the Fourteenth Amendment, "[n]o State shall make or enforce any law . . . [that] den[ies] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; *see Under 21, Catholic Home Bur. for Dependent*

Children v. City of New York, 65 N.Y.2d 344, 360 (1985).[4] The New York Constitution similarly provides that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof," and that "[n]o person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights . . . by the state or any agency or subdivision of the state." N.Y. Const. art. I, § 11; *see Matter of Esler v. Walters*, 56 N.Y.2d 306, 313 (1982).

The Equal Protection Clause makes unconstitutional any law based upon a "racial classification," unless the law can "survive [the] daunting two-step examination known . . . as 'strict scrutiny.'" *SFFA*, 600 U.S. at 206 (citation omitted). The racial classification in the law at issue must first be "used to further compelling government interests." *Id.* at 206–07 (citation omitted). Then, the law's "use of race" must be "narrowly tailored—meaning necessary—to achieve that interest." *Id.* at 207 (citations omitted); *see Abbott v. Perez*, 585 U.S. 579, 587 (2018).

The NYVRA's vote-dilution provisions require political subdivisions like the Town to change their existing race-neutral election methods in

[4] New York's "constitutional equal protection clause . . . equat[es] with the Federal provision." *Under 21*, 65 N.Y.2d at 360 n.6 (citations omitted).

order to give citizens lumped together by race a greater chance of electing more candidates of their choice. And, given the zero-sum nature of elections, these provisions correspondingly force political subdivisions to alter their election systems to reduce the chance that citizens grouped together by other races will elect candidates of their choice. Because the NYVRA's vote-dilution provisions require political subdivisions to change their election systems on the basis of racial classifications—each time benefiting some races, while harming others, by the provisions' very design—these provisions trigger strict scrutiny under the Equal Protection Clauses, *see infra* Part I.A, yet do not even come close to satisfying such scrutiny, *see infra* Part I.B.

A. Strict Scrutiny Applies To The NYVRA's Vote-Dilution Provisions

1. The Equal Protection Clause "represents a foundational principle" that the Constitution "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." *SFFA*, 600 U.S. at 201–02 (citations omitted; brackets omitted); *see also Seaman v. Fedourich*, 16 N.Y.2d 94, 102 (1965). As the U.S. Supreme Court has recently made explicitly clear, "[t]he time for making distinctions based on race has passed."

SFFA, 600 U.S. at 204; *accord Under 21*, 65 N.Y.2d at 363. Therefore, any law that makes a "racial classification" is unconstitutional and, consequently, invalid, unless the law satisfies strict scrutiny's "daunting" review. *SFFA*, 600 U.S. at 206–07 (citations omitted).

Strict scrutiny applies whenever a law gives "preference[s] based on racial or ethnic criteria," *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 223 (1995) (citation omitted); makes "distinctions of law based on race," *SFFA*, 600 U.S. at 202 (citations omitted); or requires "official conduct discriminating on the basis of race," *id.* at 206. In other words, strict scrutiny broadly applies to "all racial classifications imposed by the government," "even when they may be said to burden or benefit the races equally." *Johnson*, 543 U.S. at 505–06 (citations omitted). An "explicit," statutory racial classification, *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999), is "inherently suspect," regardless of any inquiry into legislative motive, *Washington v. Seattle Sch. Dist. No.1*, 458 U.S. 457, 485 (1982).

The U.S. Supreme Court has recently applied strict scrutiny to analyze—and invalidate—affirmative-action programs for college admissions that, like the NYVRA, make "distinctions of law based on race." *SFFA*, 600 U.S. at 202. In *SFFA*, the Court considered the

constitutionality of two college-admissions regimes that required consideration of a candidate's race alongside other factors, such as extracurricular activities, academic performance, and leadership skills. *Id.* at 193–94. Because the Equal Protection Clause makes such race-based distinctions "by their very nature odious to a free people," *id.* at 208 (citation omitted), the Court applied strict scrutiny and held that the programs' use of race failed that "daunting two-step" review, *id.* at 206. The college and university's stated goals related to their use of race were "not sufficiently coherent," *id.* at 214, nor could they "articulate a meaningful connection between the means they employ and the goals they pursue," *id.* at 215. The Court thus held that both affirmative-action programs violated the Equal Protection Clause. *Id.* at 230.

2. Here, like the college-admissions programs in *SFFA*, the NYVRA's vote-dilution provisions explicitly call for "distinctions of law based on race," *id.* at 202 (citation omitted), and the taking of "official conduct discriminating on the basis of race," *id.* at 206 (citations omitted)—meaning that strict scrutiny applies, *id.* at 208. By requiring political subdivisions to group citizens by race (and even across racial groups, *see* N.Y. Elec. Law § 17-206(2)(c)(iv)) and then to analyze the

voting preferences and anticipated voting patterns of those racial groups, the NYVRA's vote-dilution provisions "demand[ ] consideration of race," *Abbott*, 585 U.S. at 587. Then, these provisions "distribute[ ] burdens or benefits on the basis of individual racial classifications," *Parents Involved*, 551 U.S. at 720, by requiring political subdivisions to alter their race-neutral election methods to give citizens of one (or more) races a greater chance of electing candidates of their choice, thus reducing the chances that citizens of other racial groups can elect their own preferred candidates, N.Y. Elec. Law § 17-206. And as the Supreme Court recognized below, NYVRA vote dilution "can rest on the slightest impairments in [the] ability to influence an election," and the "NYVRA sets no minimum bar on the extent of any such impairment." A29, A47. Strict scrutiny therefore applies to the review of these provisions.

The NYVRA's vote-dilution provisions require race-based distinctions—thus triggering strict scrutiny—when applied both to political subdivisions with at-large methods of election and to political subdivisions with district-based methods of election.

First—and most directly relevant here—the NYVRA's vote-dilution provisions applicable to political subdivisions with "an at-large method

of election," N.Y. Elec. Law § 17-206(2)(b)(i), rely upon "express racial classifications," *Parents Involved*, 551 U.S. at 707. These provisions require the overhaul of at-large election systems in favor of district-based or alternative systems that would result in citizens lumped together by some race(s) being able to elect more candidates of their choice, if either: (i) the "voting patterns of members of [a] protected class"—that is, "members of a race, color, or language-minority group," N.Y. Elec. Law § 17-204(5)—"within the political subdivision are racially polarized"; or (ii) "the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired" under an all-things-considered, totality-of-the-circumstances inquiry. *Id.* § 17-206(2)(b)(i). This compels such political subdivisions to group voters together by race, *see id.* § 17-206(2)(c)(iv), without regard to the geographic compactness, *id.* § 17-206(2)(c)(viii), or whether their voting behavior has anything to do with race, as opposed to politics, *id.* § 17-206(2)(c)(vii). This is a clear race-based classification scheme that necessitates strict-scrutiny review. *See SFFA*, 600 U.S. at 202, 206–07.

Consider these provisions' operation. The NYVRA mandates that any time racially polarized voting exists in a town with an at-large

election system—a phenomenon that occurs "in most states," and "to no one's great surprise," *Cooper*, 581 U.S. at 304 n.5; *see* Greenwood & Stephanopoulos, *supra*, at 311–12—that town must overhaul its election system with the sole purpose of giving some citizens aggregated according to their race a greater chance of electoral success than they have under the existing, race-neutral at-large system, *see* N.Y. Elec. Law § 17-206. A town must also change its election system to achieve this same goal if some undefined factors demonstrate an "impairment"—no matter how slight—of the ability of citizens grouped together on the basis of race to influence elections. *Id.* § 17-206(2)(b)(ii). Given the zero-sum nature of elections, any such change comes at the expense of the electoral preferences of citizens aggregated together on the basis of membership in different racial groups. This is the distribution of "benefits" (a greater likelihood that citizens aggregated together on the basis of some race will achieve success in electing their preferred candidates) and "burdens" (a lower change that citizens aggregated together on the basis of other races will be successful in electing their preferred candidates) "on the basis of individual racial classifications," to which strict scrutiny applies. *See Parents Involved*, 551 U.S. at 720.

Second, the NYVRA's vote-dilution provisions that apply when a town uses "a district-based or alternative method of election," N.Y. Elec. Law § 17-206(2)(b)(ii), likewise rely upon "express racial classifications," *Parents Involved*, 551 U.S. at 707. Like the at-large provisions, these provisions call for political subdivisions to classify voters by race, including across racial demographics, and without regard to geographic concentration. N.Y. Elec. Law §§ 17-206(2)(c)(iv); 17-206(2)(c)(viii). They similarly demand that political subdivisions alter existing, district-based systems whenever candidates preferred by those racial groups "would usually be defeated" and there exists either "racially polarized" voting in the district or, under "the totality of the circumstances," an impairment of "the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections." *Id.* § 17-206(2)(b)(ii). To avoid NYVRA liability, therefore, a town must change its existing election system for the sole purpose of ensuring that citizens lumped together by some race(s) are not "usually" unsuccessful in electing the candidate of their choice, if racially-polarized-voting patterns exist in the subdivision or if the amorphous, totality-of-the-circumstances test demonstrates an impairment of their ability to influence elections. *Id.*

Given the common dynamic of racially polarized voting, *Cooper*, 581 U.S. at 304 n.5; Greenwood & Stephanopoulos, *supra*, at 311; the amorphous nature of the totality-of-the-circumstances inquiry; and the zero-sum nature of elections, the NYVRA's capacious vote-dilution provisions expose political subdivisions across the State to liability based on a statute that makes express racial classifications, *see* Greenwood & Stephanopoulos, *supra*, at 313. Strict scrutiny accordingly applies.

3. The Appellate Division rejected these arguments because, in its view, "strict scrutiny does not apply to all applications of the vote dilution provisions of the NYVRA" because these provisions "allow[ ] members of all racial groups, including white voters, to bring vote dilution claims, including when white voters constitute a minority in a political subdivision." A19.

This method of analysis is very clearly contrary to controlling U.S. Supreme Court precedent. The Court has repeatedly explained that "*all* racial classifications, imposed by [a] governmental actor, must be analyzed . . . under strict scrutiny." *Adarand,* 515 U.S. at 227 (emphasis added); *see also Johnson*, 543 U.S. at 505. That is because the Equal Protection Clause applies to *all* individuals "without regard to any

differences of race, of color, or of nationality." *SFFA*, 600 U.S. at 206 (citation omitted). Accordingly, whenever a law makes "racial classifications"—"even when they may be said to burden or benefit the races equally"—courts must subject that law to strict scrutiny. *Johnson*, 543 U.S. at 499 (citation omitted).

Johnson is particularly instructive. There, the U.S. Supreme Court held that "strict scrutiny" applied to the review of the California Department of Correction's "policy of racially segregating [all] prisoners" for a period of time upon their transfer to a new facility for purposes of "prevent[ing] violence caused by racial gangs" in prison facilities. *Id.* at 502. In so holding, the Court expressly rejected the Department's argument that the policy should be "exempt from [the] categorical rule" that "*all* racial classifications . . . must be analyzed by a reviewing court under strict scrutiny" because it is "neutral" in that it "neither benefits nor burdens one group or individual more than any other group of individual." *Id.* (emphasis added; citation omitted). The Court reiterated that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally," and the government cannot

escape strict-scrutiny review with a race-based policy that "'equally' segregate[s]" individuals of any race. *Id.* (citations omitted).

Similarly, in *Powers v. Ohio*, 499 U.S. 400 (1991), the Court held that an Ohio prosecutor's race-based preemptory strikes of potential jurors violated the Equal Protection Clause and, in so holding, specifically rejected the argument "that race-based peremptory challenges survive equal protection scrutiny because members of all races are subject to like treatment." *Id.* at 410.

Applying these equal-protection principles here, the NYVRA's vote-dilution provisions operate on their face to "members of a protected class," N.Y. Elec. Law § 17-206(2)(a), defined to mean "a class of individuals who are members of a *race*, color, or language-minority group," *id.* § 17-204(5) (emphasis added). The making of such "racial classifications" triggers strict scrutiny, *Johnson*, 543 U.S. at 499 (citation omitted)—even if these provisions could benefit or harm members of various races, depending on the demographic and political performance mix in any particular political subdivision, *see* A19.

Notably, the racial classifications in the NYVRA's vote-dilution provisions are even more explicit than those at issue in the college-

admissions, affirmative-action programs at issue in *SFFA*. There, the college-admissions programs gave candidates of certain racial groups a leg up in admissions, but only as part of a holistic process that included consideration of non-racial factors. *See SFFA*, 600 U.S. at 230. Here, by comparison, the NYVRA distributes its benefits and burdens *solely* because of citizens' inclusion in a particular "class of individuals who are members of a race, color, or language-minority group." N.Y. Elec. Law § 17-204(5); *see id.* § 17-206(2). That singular focus on race even more clearly triggers strict scrutiny, under U.S. Supreme Court precedent.

Further, and fully refuting the Appellate Division's core reasoning, ***the college and university with the affirmative-action programs at issue in* SFFA *could not have escaped strict-scrutiny review by simply changing their race-based admission schemes to give a "plus" factor, 600 U.S. at 196, to applicants of any race that was presently underrepresented at the college or university***, *see id.* at 212–13. Likewise, here, the NYVRA's vote-dilution provisions trigger strict scrutiny although they can theoretically apply to citizens grouped together by any race, if those citizens happen to be electing too few

(whatever that means) candidates of their choice in a political subdivision.

The Appellate Division's reliance on state-court decisions upholding the California and Washington VRAs against equal-protection challenges without invoking strict scrutiny is misplaced. A19–20 (citing *Sanchez v. City of Modesto,* 145 Cal. App. 4th 660 (Cal. Ct. App. 2006); *Higginson v. Becerra*, 786 Fed. App'x 705 (9th Cir. 2019); and *Portugal v. Franklin County*, 530 P.3d 994 (Wash. 2023) (en banc)). To begin, these non-binding cases pre-date, and now conflict with, the U.S. Supreme Court's landmark decision in *SFFA*. In any event, the California and Washington VRAs are substantially narrower than the NYVRA—as Plaintiffs' own counsel explained in their co-authored article, *see* Greenwood & Stephanopoulos, *supra*, at 301 (calling the NYVRA "the most ambitious" state VRA); *id.* at 307 ("Among [state VRAs], only the [NYVRA] and the Connecticut [VRA] address racial vote dilution (let alone exceed the [federal VRA]'s floor in this area.")); *id.* at 320 (California and Washington's VRAs "substantially resemble one another," while the NYVRA "sweep[s] the most broadly" and "[o]nly the NYVRA imposes liability for racially polarized voting alone")—so those

decisions upholding those statutes cannot save the NYVRA's vote-dilution provisions. For example, the California VRA expressly incorporates by its text "case law regarding enforcement of the federal Voting Rights Act." Cal. Elec. Code § 14026(e). In particular, a California VRA plaintiff must satisfy two of the three necessary *Gingles* preconditions, *see id.*—which the NYVRA does not require, *see infra* Section II.B. And the Washington VRA similarly provides that its provisions should be interpreted consistently with "relevant federal case law," Wash. Rev. Code § 29A.92.010, which again is unlike the NYVRA, *see generally* N.Y. Elec. Law §§ 17-200 *et seq*. Further, the California and Washington VRAs require both a showing that racially polarized voting exists and that the totality of the circumstances abridges the ability of protected class members to elect candidates of their choice, *see* Wash. Rev. Code § 29A.92.030(1)(a)-(b); Cal. Elec. Code § 14026(e) (implicitly incorporating this element by defining racially polarized voting in reference to case law interpreting the federal VRA); the NYVRA, in contrast, capaciously expands its scope to cover situations where *either* racially polarized voting exists *or* the totality of the circumstances

impairs the ability of protected classes to elect candidates of their choice, N.Y. Elec. L. § 17-206(2)(b)(i).

The Appellate Division's discussion of a case upholding the California VRA also referred briefly to that statute as an antidiscrimination statute, such as "the federal Civil Rights Act." A20. To the extent that the Appellate Division was suggesting that the NYVRA's vote-dilution provisions also qualify as an antidiscrimination statute that avoids strict scrutiny, that too is wrong. Antidiscrimination statutes "*prohibit*[ ]" the relevant actor "from classifying individuals by race" and then taking some adverse action on that impermissible classification, *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1132 (9th Cir. 2012) (emphasis added), thus ensuring that "all persons are treated with fairness and equal dignity," *Schuette*, 572 U.S. at 312. This means that antidiscrimination statutes consider race in "neutral-fashion" by making race an "*impermissible criteria*" for the conduct at issue; a law that prohibits the relevant actor "from classifying individuals by race . . . *a fortiori* does not classify individuals impermissibly." *Coal. to Defend Affirmative Action*, 674 F.3d at 1132 (emphasis added; citations omitted); *accord Raso v. Lago*, 135 F.3d 11,

16–17 (1st Cir. 1998) (making state funds "available to all applicants on a race-blind basis" is not "a racial classification").

The NYVRA's vote-dilution provisions do the opposite of making race an "impermissible criteria." *Coal. to Defend Affirmative Action*, 674 F.3d at 1132. To the exact contrary, these provisions *require* a political subdivision to "defin[e]" its citizens according to "racial categories" and then to "grant [ ] favored status to persons in some racial categories and not others," *Schuette*, 572 U.S. at 314; *accord Coal. to Defend Affirmative Action*, 674 F.3d at 1132; *Raso*, 135 F.3d at 16–17, thereby "distribut[ing] burdens or benefits on the basis of individual racial classifications," *Parents Involved*, 551 U.S. at 720. Again, these provisions mandate that a political subdivision change its election system so that citizens grouped together by certain races may more often elect their preferred candidates anytime racially polarized voting occurs. As a direct consequence, citizens grouped together by other races will less often elect their own preferred candidates—which is the very same "zero-sum" nature as the college-admission, affirmative-action programs condemned in *SFFA*, 600 U.S. at 218–19.

Finally, the Appellate Division concluded that the NYVRA's vote-dilution provisions did not trigger strict scrutiny because "race-based districting is only one of the possible remedies under the NYVRA." A21. This misunderstands the Town's argument. The Appellate Division is, of course, correct that a court imposing a remedy that requires a jurisdiction to engage in "race-based redistricting," A21, would certainly trigger strict scrutiny, *see Shaw v. Reno*, 509 U.S. 630, 643, 646 (1993). But the Town's argument here is that the NYVRA's vote-dilution *liability* provisions trigger strict scrutiny on their face because they force political subdivisions to change their race neutral election systems whenever the common condition of racially polarized voting exists, such that voters lumped together by their race can elect more candidates of their choice (necessarily at the expense of citizens of other racial groups). *See SFFA*, 600 U.S. at 204–06. In other words, the operation of the NYVRA's vote-dilution provisions always trigger strict scrutiny on their face without regard to what remedy a court adopts at the end of a case where a political subdivision has decide not to violate the Equal Protection Clause as directed by those provisions. Put another way, the NYVRA's vote-dilution provisions are unconstitutional because the Equal Protection

Clause prohibits States from making it illegal for parties to refuse to "distribute burdens or benefits on the basis of individual racial classifications" without satisfying strict scrutiny. *Parents Involved*, 551 U.S. at 720.

So, while the Appellate Division also observed that, "[e]ven 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,'" A21–22 (citations omitted), the Appellate Division missed the point: the NYVRA's vote-dilution provisions *mandate* that political subdivisions change their electoral system for the *express purpose* of ensuring that citizens grouped together by some racial groups achieve more electoral success, at the necessary expense of the electoral power of citizens grouped together by other races. A government taking official action with an express race-based purpose, as the NYVRA's vote-dilution provisions require, even more clearly triggers strict scrutiny under U.S. Supreme Court precedent than other potentially "race-based decisionmaking" by a government. *Miller v. Johnson*, 515 U.S. 900, 915 (1995). The U.S. Supreme Court classifies government action as "motivated" by "racial considerations," such that strict scrutiny applies,

when "race" was merely "the predominant factor motivating the [government]'s decision." *Id.* at 516. Here, in contrast, the NYVRA's vote-dilution provisions make "racial considerations" the sole, express factor for a political subdivision's alteration of its race-neutral election system—a showing that is more race-focused than the race-as-predominant-factor test. *See id.*

B. The NYVRA's Vote-Dilution Provisions Are Not Narrowly Tailored To Achieve A Compelling Interest

1. A law that distributes benefits or burdens on the basis of race violates the Equal Protection Clause unless it is "narrowly tailored to achieving a compelling state interest," such that it passes strict scrutiny. *Wis. Legislature*, 595 U.S. at 401 (quoting *Miller*, 515 U.S. at 904).

A compelling state interest exists in "remediating specific, identified instances of past discrimination that violated the Constitution or a statute." *SFFA*, 600 U.S. at 207. For a State to invoke that interest as justification for race-based legislation, it must "identify that discrimination, public or private, with some specificity before [it] may use race-conscious relief." *Shaw v. Hunt*, 517 U.S. 899, 909 (1996) ("*Shaw II*") (citations omitted). Further, in the context of redistricting, the U.S. Supreme Court has "long assumed" that "one compelling

interest" that could justify the government's drawing of district lines with predominately racial motives is that government's attempted compliance with Section 2 of the federal VRA. *Cooper*, 581 U.S. at 292; *see also Abbott*, 585 U.S. at 587; *Wis. Legislature*, 595 U.S. at 401–02. The U.S. Supreme Court has previously held that Section 2 of the VRA is the type of rare race-based law that does satisfy strict scrutiny because it contains several "exacting requirements" and safeguards that narrowly tailor its application, *Allen v. Milligan*, 599 U.S. 1, 30 (2023), although the Court appears poised to consider cutting back on even that holding to some extent, *see Louisiana*, 606 U.S. ____, 2025 WL 1773632.

A law that "use[s] race" is "narrowly tailored" for purposes of strict scrutiny if its "use of race" is "*necessary*" to "achieving [the law's] interest." *SFFA*, 600 U.S. at 206–07 (citations omitted; emphasis added). This exceedingly high standard requires that "the means chosen to accomplish the government's asserted purpose [ ] be *specifically and narrowly framed* to accomplish that purpose." *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013) (emphasis added).

2. The NYVRA's vote-dilution provisions do not further a compelling state interest and are not narrowly tailored to achieve any

such compelling interest. These provisions thus fail the strict-scrutiny test—and thus are unconstitutional—in two independent respects.

a. *No Compelling State Interest*. The NYVRA's vote-dilution provisions do not further a compelling state interest and therefore fail the first step of strict scrutiny. A State may claim a compelling government "interest in remedying the effects of . . . racial discrimination" if there exists a "strong" evidentiary "basis . . . to conclude that . . . action [is] necessary" to remediate "*identified* discrimination." *Shaw II*, 517 U.S. at 909–10 (emphasis added; citation omitted). But the NYVRA does not advance that interest, as it imposes liability without requiring any proof of "specific, identified instances of past discrimination that violated the Constitution or a statute." *SFFA*, 600 U.S. at 207 (citing *Shaw II*, 517 U.S. at 909–10); *see* N.Y. Elec. Law § 17-206(2)(c)(v) ("[E]vidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class is not required."). In the absence of a requirement that liability hinge upon a showing of past discrimination, *contra SFFA*, 600 U.S. at 207, the only interest that the NYVRA arguably advances is to avoid the common condition of racially polarized voting, *Cooper*, 581 U.S.

at 304 n.5; Greenwood & Stephanopoulos, *supra*, at 311. That is not a compelling state interest sufficient to satisfy strict scrutiny's high bar, given the U.S. Supreme Court's clear instruction that only remedying past discrimination meets this standard. *SFFA*, 600 U.S. at 207.

Further demonstrating that the NYVRA serves no compelling *state* interest, the States lack Congress' constitutional prerogatives to use voting-rights laws to remedy societal discrimination. The Fourteenth Amendment "explicit[ly] constrain[s]" the *States'* power by prohibiting them from using "race as a criterion for legislative action." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490–91 (1989). This prohibition applies equally to allegedly "benign racial classifications," *id.* at 495 (citation omitted)—classifications made "without regard to any differences of race, of color, or of nationality," *SFFA*, 600 U.S. at 206 (citation omitted)—so as to prohibit comprehensively the States from engaging in the "odious" practice of "pick[ing] winners and losers based on the color of their skin," *id.* at 208, 229 (citation omitted). In other words, while "Congress may identify and redress the effects of society-wide discrimination[, this] does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are

appropriate," *City of Richmond*, 488 U.S. at 490; *accord Trump v. Anderson*, 601 U.S. 100, 112 (2024), such as by enacting a law like the NYVRA's vote-dilution provisions.

b. *No Narrow Tailoring*. Even if the NYVRA's vote-dilution provisions served a compelling state interest in "remediating specific, identified instances of past discrimination," those provisions would still be unconstitutional because they are not even arguably "narrowly tailored—meaning *necessary*—to" alleviating demonstrated past discrimination by the political subdivision. *SFFA*, 600 U.S. at 206–07 (citation omitted; emphasis added); *Fisher*, 570 U.S. at 312.

i. The NYVRA's vote-dilution provisions lack *any* tailoring, let alone "specific[ ] and narrow[]" tailoring, *Fisher*, 570 U.S. at 311, to the remediation of past instances of racial discrimination. That is because the NYVRA's vote-dilution provisions do not even attempt to tie a political subdivision's liability to showing that the political subdivision has engaged in any racially discriminatory conduct in the past, or the existence of ongoing consequences of such conduct. *See supra*, p.42. For example, all that an NYVRA vote-dilution plaintiff need show to establish that a political subdivision with an at-large method of election

(like the Town here) has engaged in impermissible "vote dilution" is the presence of racially polarized voting in that jurisdiction. N.Y. Elec. Law § 17-206(2)(b)(i)(A). Such a showing is "relatively easy to establish," Greenwood & Stephanopoulos, *supra*, at 311, and a common occurrence "in most states," "to no one's great surprise," *Cooper*, 581 U.S. at 304 n.5. The upshot is that the NYVRA vote-dilution provisions broadly subject political subdivisions to liability far beyond what could even possibly be necessary to alleviate any demonstrated past discrimination by the political subdivision.

The NYVRA's vote dilution provisions' inclusion of the alternative, "totality of the circumstances" pathway to establishing vote-dilution liability for a political subdivision using an at-large method of election, N.Y. Elec. Law § 17-206(2)(b)(i)(B), does nothing to show that these provisions are "specifically and narrowly framed" to achieve any compelling government interest, *Fisher*, 570 U.S. at 311 (citation omitted). This alternative pathway lacks any requirement that, in order to find a political subdivision liable for vote dilution, the court must conclude that the political subdivision engaged in intentional discrimination in the past. *See* N.Y. Elec. Law § 17-206(2)(b)(i)(B). And,

again, strict scrutiny's narrow-tailoring requirement mandates that the state action—here, a forced alteration of an election system for race-based reasons—be actually "*necessary*," *SFFA*, 600 U.S. at 207 (emphasis added; citations omitted), to achieving a compelling state interest—here, the remediation of past discrimination by the subdivision. Far from requiring any evidence of such necessity, and as the Supreme Court correctly explained below, the "totality of circumstances" pathway "lacks any defined criteria because the NYVRA lists 11 factors that may be considered"—meaning that "a court is free to find voter dilution based on any criteria that the court itself creates, or no criteria at all," A47. A finding of "voter dilution" under this alternative pathway "can rest on the slightest impairments of [the] ability to influence an election," A29, with the "NYVRA set[ting] no minimum bar on the extent of any such impairment," A47. Such standardless "means chosen" by the NYVRA's vote-dilution provisions cannot possibly be "specifically and narrowly framed" to accomplish any compelling interest. *Fisher*, 570 U.S. at 311.

That the NYVRA requires race-based conduct that is not "necessary," *SFFA*, 600 U.S. at 207 (citation omitted), to further a compelling state goal is also evident from multiple subsections of the

vote-dilution provisions that expressly disclaim efforts to condition vote-dilution liability on a showing that the political subdivision has engaged in specific instances of discrimination. The NYVRA rejects any need for the submission of "evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class" in order to establish a political subdivision's vote-dilution liability. N.Y. Elec. Law § 17-206(2)(c)(v). Additionally, the NYVRA prohibits a court from even considering at the liability stage evidence that "voting patterns and election outcomes could be explained by factors other than racially polarized voting," such as partisanship, *id.* § 17-206(2)(c)(vi); "evidence that subgroups-within a protected class have different voting patterns," *id.* § 17-206(2)(c)(vii), "evidence concerning whether members of a protected class are geographically compact or concentrated," *id.* § 17-206(2)(c)(viii); and "evidence concerning projected changes in population or demographics," *id.* § 17-206(2)(c)(ix). Each of those categories of evidence would tend to show that any racially polarized voting within a political subdivision was not due to purposeful racial discrimination by that political subdivision. Nevertheless, the NYVRA's vote-dilution provisions either fail to require or specifically

prohibit consideration of that evidence, further defeating any possible argument that these provisions are "specifically and narrowly framed." *Fisher*, 570 U.S. at 311.

ii. The absence of any tailoring within the NYVRA's vote-dilution provisions is also demonstrated by their systematic shedding of the safeguards within Section 2 of the federal VRA. *See* Greenwood & Stephanopoulos, *supra*, at 303, 310, 311 n.69, 313–14.

The U.S. Supreme Court has articulated a two-step "framework" for the adjudication of vote-dilution claims under Section 2 of the federal VRA. *Wis. Legislature*, 595 U.S. at 402 (citing *Gingles*, 478 U.S. at 50–51); *see Bartlett*, 556 U.S. at 21 (plurality opinion). Under step one of this so-called *Gingles* framework, a plaintiff must establish three "necessary preconditions" to make out a *prima facie* case of vote-dilution under Section 2. *Gingles*, 478 U.S. at 50. And, taken together, these three preconditions "establish[ ] that the challenged [map] thwarts a distinctive minority vote at least plausibly on account of race." *Allen*, 599 U.S. at 19 (citation omitted).

For the first precondition, "[t]he minority group must be sufficiently large and compact to constitute a majority in a reasonably configured

district." *Wis. Legislature*, 595 U.S. at 402 (citation omitted). A plaintiff cannot satisfy this first precondition by submitting evidence that it is possible to create an "influence district" with minority voters, in which district the "minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 446 (2006) ("*LULAC*") (plurality opinion) (citation omitted). Nor, under this first precondition, can a plaintiff aggregate minority groups together in a so-called "coalition" district. *See Petteway v. Galveston Cnty.*, 111 F.4th 596, 599 (5th Cir. 2024) (en banc); *but see Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990).

For the second precondition, "the minority group must be politically cohesive," meaning that members of the minority group tend to vote for the same candidates. *Wis. Legislature*, 595 U.S. at 402. This requirement is necessary because, "[i]f the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests." *Gingles*, 478 U.S. at 51 (citation omitted).

And finally, for the third precondition, "a majority group must vote sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate." *Wis. Legislature*, 595 U.S. at 402.

Once a plaintiff has satisfied the three preconditions required by *Gingles* step one, the analysis proceeds to *Gingles* step two, which "considers the totality of circumstances to determine 'whether the political process is equally open to minority voters.'" *Id.* (quoting *Gingles*, 478 U.S. at 79). The factors relevant to this inquiry include the political subdivision's "history of voting-related discrimination," *Gingles*, 478 U.S. at 45, "recogniz[ing] that application of the *Gingles* factors is peculiarly dependent upon the facts of each case," *Allen*, 599 U.S. at 19 (citation omitted).

Importantly, a plaintiff must satisfy *each* of these exacting standards in *Gingles*—that is, all three *Gingles* step-one preconditions and step two's equally-open-to-all analysis—to establish a violation of Section 2's vote-dilution protections, before a court may order a jurisdiction to draw new district lines that account for racial considerations to remedy that impermissible vote dilution. *See Shaw II*, 517 U.S. at 911. The relaxing of *any* of the *Gingles* standards would

implicate "serious constitutional concerns under the Equal Protection Clause." *Bartlett*, 556 U.S. at 21 (plurality opinion).

The NYVRA's vote-dilution provisions—by their very design—eschew the vast majority of the safeguards in Section 2. As the Supreme Court correctly noted below, the NYVRA's vote-dilution provisions "mandate that a reviewing court *not* consider the first of the *Gingles* preconditions in determining a vote dilution claim" at the liability stage, A49, and instead permits the imposition of liability on a subdivision without showing that a minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," *Gingles*, 478 U.S. at 50; *see* N.Y. Elec. Law § 17-206(2)(c)(viii); Greenwood & Stephanopoulos, *supra*, at 310. The NYVRA goes even further by applying even where a minority group only "*influence*[s] the outcome of elections," N.Y. Elec. Law § 17-206(2)(b)(ii) (emphasis added), rather than playing a "decisive[ ] role," *LULAC*, 548 U.S. at 445–46 (plurality opinion); Greenwood & Stephanopoulos, *supra*, at 314, and by allowing liability to hinge on the voting patterns of coalition groups, N.Y. Elec. Law § 17-206(2)(c)(iv); Greenwood & Stephanopoulos, *supra*, at 314. The NYVRA also ignores the second *Gingles* precondition by

permitting liability to exist without a showing that a minority group is "politically cohesive." *Wis. Legislature*, 595 U.S. at 402. Indeed, the statute broadly defines "racially polarized" to mean "voting in which there is a divergence in the . . . choice[s] of members in a protected class from the . . . choice[s] of the rest of the electorate," N.Y. Elec. Law § 17-204(6), rather than voting in which "a significant number" of the minority group's members usually vote for the same "preferred candidate," *Gingles*, 478 U.S. at 51–53, 56; *see* Greenwood & Stephanopoulos, *supra*, at 313.

The NYVRA's lack of narrow tailoring is also demonstrated by its failure to *require* a totality-of-the-circumstances inquiry, which inquiry is intended to ensure that the challenged voting is in fact not equally open to minority voters. *See supra*, p.50. Instead, as explained above, the NYVRA's vague, totality-of-the-circumstances analysis creates an alternative path for a plaintiff to obtain race-based redistricting without requiring any proof that the "political process is [not] equally open to minority voters," *Wis. Legislature*, 595 U.S. at 402 (citations omitted). The NYVRA contains no such tailoring; it permits a court to find liability on the basis of factors as amorphous as "disadvantage[s] in" "education,

employment, health, criminal justice, housing, land use, or environmental protection," N.Y. Elec. Law § 17-206(3)(g), without calling for any particular showing on any particular factor, *see id.* § 17-206(3). And the NYVRA's failure to mandate such a totality-of-the-circumstances showing applies both to political subdivisions using at-large elections and those using district-based elections. *See* N.Y. Elec. Law § 17-206(2)(b)(i)(B); *id.* § 17-206(2)(b)(ii)(B).

3. The Appellate Division largely failed to address whether the NYVRA's vote-dilution provisions would flunk strict scrutiny, given its incorrect holding that strict scrutiny did not apply. *See supra*, Part I.A.3. That said, the Appellate Division did conclude "that the NYVRA need not contain the first *Gingles* precondition" to comply with "the Equal Protection Clause," A22–23, while also recognizing that the NYVRA "does not require the plaintiff in every vote dilution case" to meet *Gingles'* mandatory second step, A23–24. The Appellate Division's limited treatment of the narrow-tailoring requirement below is unpersuasive, including because it never considered whether the NYVRA's vote-dilution provisions were "*necessary*" to achieving any compelling government interest. *SFFA*, 600 U.S. at 207 (citation omitted; emphasis added).

To begin, even if the Appellate Division's treatment of *Gingles* were correct, the lack of narrow tailoring within the NYVRA's vote-dilution provisions is apparent from these provisions' plain text alone. As explained, the NYVRA's vote-dilution provisions do not even attempt to tie vote-dilution liability to a showing that the political subdivision has engaged in any racially discriminatory conduct in the past or to fixing the effects of any such discrimination, *supra*, pp.40–44, and they expressly preclude any efforts to condition a political subdivision's vote-dilution liability on such a showing, *supra*, p.10. Without these important limitations, the NYVRA's vote-dilution scheme and the race-based state action it mandates are obviously not "necessary" to achieve a compelling state interest, as strict scrutiny's narrow-tailoring prong requires. *SFFA*, 600 U.S. at 207 (citation omitted).

In any event, the Appellate Division was wrong to hold that the NYVRA's vote-dilution provisions need not adopt safeguards comparable to *Gingles* to satisfy the narrow-tailoring requirement. The Appellate Division, like Plaintiffs' counsel here, rightly recognized that that the NYVRA's vote-dilution provisions do not contain safeguards comparable to Section 2. A22–23; Greenwood & Stephanopoulos, *supra*, at 303, 310,

311 n.69, 313–14. But the Appellate Division then mistakenly concluded that the NYVRA's vote-dilution provisions need not incorporate safeguards comparable to Section 2 because, in its view, *Gingles* was simply the "result[ ]" of "a statutory interpretation of section 2 of the FVRA" rather than being "required by the constitution," A22–23. That rationalization ignores U.S. Supreme Court precedent. As explained above, the U.S. Supreme Court has subjected Section 2 to "strict scrutiny" because it "demands consideration of race" in a State's redistricting process, and concluded that Section 2 satisfies that exacting scrutiny because of its narrow tailoring. *See Abbott*, 585 U.S. at 587 (citations omitted); *see also Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 194 (2017); *Cooper*, 581 U.S. at 292–93. This is why the Court has noted that relaxing the *Gingles* standards would present "serious constitutional concerns [for Section 2] under the Equal Protection Clause." *Bartlett*, 556 U.S. at 21 (plurality opinion). And this is why the Court has long "assumed that complying with the VRA" means that a State's "consideration of race" in a redistricting plan "satisfies strict scrutiny." *Abbott*, 585 U.S. at 587. So, because the NYVRA's vote-dilution

provisions eschew safeguards comparable to *Gingles*, this further demonstrates that they cannot possibly satisfy strict scrutiny.

Finally, the Appellate Division also explained that "it was rational" for the NYVRA's vote-dilution provisions to exclude the first *Gingles* precondition because, unlike Section 2, the NYVRA contemplates "influence districts" and "remedies" that do not involve drawing new districts. A23–24. But whether there is a "rational" basis for the NYVRA's vote-dilution provisions to exclude this aspect of the *Gingles* framework is irrelevant, given that strict scrutiny applies here. Under the applicable strict-scrutiny standard, a statute like the NYVRA must include the *Gingles* safeguards (or an equivalent), so as to carefully limit the use of racial considerations in the redistricting process. *Supra,* pp.48–50. Notably, the U.S. Supreme Court has rejected "influence" districts on these grounds, because "[i]f [Section] 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *LULAC*, 548 U.S. at 446 (plurality opinion) (citation omitted).[5]

[5] The Appellate Division also held 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

II. Alternatively, This Court Should Hold That The NYVRA's Vote-Dilution Provisions Require The Plaintiff To Prove Additional, Implicit Elements Derived From U.S. Supreme Court Equal Protection Caselaw

A. Under the doctrine of constitutional avoidance, this Court must "construe[ ]" a statute in a manner that "sustain[s] its constitutionality . . . if possible." *Loretto v. Teleprompter Manhattan CATV Corp.*, 58 N.Y.2d 143, 149 (1983) (citation omitted); *see also Overstock.com, Inc. v. N.Y. State Dep't of Tax'n & Fin.*, 20 N.Y.3d 586, 593 (2013); *Matter of Jacob*, 86 N.Y.2d 651, 668 n. 5 (1995). That said, the Court is "not at liberty to save a statute" under the constitutional-avoidance canon "by, in effect, rewriting it in a manner that contravenes its plain wording as well as its unambiguously articulated legislative purpose." *Wood v. Irving*, 85 N.Y.2d 238, 245 (1995).

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constitutionally applied in situations where the *Gingles* test has been satisfied. A24. But Plaintiffs waived any argument below that the NYVRA is constitutional as applied to situations that satisfy Section 2 of the VRA, as they did not raise that argument in the Supreme Court, *see Clarke*, Index No.50325-2025, NYSCEF No.73 (Orange Cnty. Sup. Ct. Oct. 10, 2024), and only developed it before the Appellate Division in a single paragraph in their opening brief, *Clarke*, Index No.2024-11753, NYSCEF No.13 at 57 (2d Dep't, Nov. 26, 2024). Accordingly, the Appellate Division should not have opined on this waived argument. *See here V.R.W., Inc. v. Klein*, 68 N.Y.2d 560, 568 (1986); *Wallace v. Env't Control Bd.*, 778 N.Y.S.2d 477, 478 (N.Y. App. Div. 2004). In any event, the U.S. Supreme Court now appears poised to cut back on precedent upholding Section 2 of the VRA under strict scrutiny, at least to some extent. *See Louisiana*, 606 U.S. ____, 2025 WL 1773632.

B. Here, the Town has explained that the NYVRA's vote-dilution provisions are unconstitutional because they mandate changes to election systems on the basis of racial classifications without satisfying strict scrutiny. *Supra,* Part I. But if this Court does not reach that holding for some reason, it should at the very least make clear—as a matter of constitutional avoidance—what implied elements the NYVRA's vote-dilution provisions incorporate in order to avoid as much as possible the serious constitutional issues that the Town has raised. *See supra*, Part I. Specifically, if the Court does not declare these provisions unconstitutional, the Court should adopt three implied NYVRA vote-dilution elements that attempt to track—at least to some extent—the U.S. Supreme Court's equal-protection case law.

As for the first implicit element, the parties in this case agree that the NYVRA's vote-dilution provisions should be read to require an NYVRA plaintiff to show that there exists a reasonable *alternative* system in which the protected class at issue would have more electoral success than they would under the existing voting system. This implicit element is not found in the statutory text, but is absolutely essential for the NYVRA's vote-dilution provisions not to be absurd. *See Lubonty v.*

U.S. Bank Nat'l Ass'n, 34 N.Y.3d 250, 255 (2019). Without this implicit element, a political subdivision would have to change its electoral system to avoid NYVRA liability whenever there exists the common condition of racially polarized voting. *Cooper*, 581 U.S. at 304 n.5; Greenwood & Stephanopoulos, *supra*, at 311. But if no system exists where the relevant race does better than under the extant system, there would be nothing achieved by making the change, rendering the NYVRA's vote-dilution provisions an absurdity. *See Lubonty*, 34 N.Y.3d at 255. And requiring that political subdivisions change their electoral systems based upon racial classifications, where the change would achieve nothing at all, would not advance any compelling government interest, let alone in a manner that is narrowly tailored. *See SFFA*, 600 U.S. at 206–07.

As for the second implicit element, this Court should require that an NYVRA vote-dilution plaintiff establish that members of the protected class at issue do not have a reasonable opportunity to elect candidates of their choice under the current election system. This implied element would ensure that the NYVRA's vote-dilution provisions do not force a political subdivision to alter or abandon an existing election system that already provides the protected class with a reasonable opportunity to

elect candidates of its choice. Notably, remedying a dynamic in which certain racial groups are denied a reasonable opportunity to elect candidates of their choice would arguably achieve a compelling interest, at least where that dynamic was the result of identified discrimination by the political subdivision. *See SFFA*, 600 U.S. at 207.

As for the third implicit element, this Court should require an NYVRA vote-dilution plaintiff to prove that the protected class's inability to elect candidates of its choice is the result of discrimination by the political subdivision. This requirement flows from the U.S. Supreme Court's equal-protection precedent, as the Court has identified as a compelling state interest in this context "remediating specific, identified instances of past discrimination that violated the Constitution or a statute." *Id.*; *supra*, pp.40–41. Further, plaintiffs should bear the burden to prove affirmatively this requirement, given the Court's direction that the party seeking to enforce the race-based law at issue must "identify th[e] discrimination, public or private, with some specificity." *Shaw II*, 517 U.S. at 909 (citation omitted). Thus, a plaintiff could not satisfy this third implied element either with "generalized assertion[s] of past discrimination" in the political subdivision itself or the State as a whole,

or by invoking "the effects of societal discrimination." *Id.* at 909–10. In this way, and like the previous two implicit elements, this third implicit element would help to tailor the NYVRA's vote-dilution provisions by conditioning a political subdivision's liability upon specific actions the political subdivision has taken itself—namely, discriminatory conduct towards a protected class. *See SFFA*, 600 U.S. at 207.

All that said, while interpreting the NYVRA's vote-dilution provisions as requiring the satisfaction of these three implicit elements would address some of the constitutional problems inherent in the NYVRA's race-based regime, even that would not be sufficient. *Compare Loretto*, 58 N.Y.2d at 149 (explaining that the constitutional avoidance canon should be invoked where it would "sustain" a statute's "constitutionality"). That is because, no matter how determined this Court is to save the NYVRA's vote-dilution provisions, the plain statutory text gives these provisions an unconstitutionally broad scope that could only be narrowed with an impermissible, judicial "rewrit[e]" or erasure of the words of the statute. *Wood*, 85 N.Y.2d at 245.

Multiple parts of the NYVRA's vote-dilution provisions cause these provisions to fail strict scrutiny's compelling-government-interest prong

or narrow-tailoring prong, or both—notwithstanding even aggressive attempts to adopt savings constructions of the statute. For example, the statutory text explicitly disclaims any need for the plaintiff to submit evidence of intentional discrimination against a protected class by the political subdivision in order to establish vote-dilution liability. N.Y. Elec. Law § 17-206(2)(c)(v). The text strictly prohibits consideration of evidence that alleged vote-dilution in the political subdivision is due to non-race-based factors. *See id.* § 17-206(c)(vii), (viii). And the text expressly blesses the practice of combining members of different protected classes for the purposes of the racially polarized voting analysis under certain circumstances. *Id.* § 17-206(c)(3). No legitimate savings construction could eliminate these express statutory provisions from the NYVRA, so as to contain this expansive statute within constitutional limits. *See Wood*, 85 N.Y.2d at 245.

C. With respect, the Appellate Division's analysis was unclear about what implied elements it would require a plaintiff to show to establish a political subdivision's liability under the NYVRA's vote-dilution provisions, or how a plaintiff must prove such elements.

To begin, the Appellate Division did not clearly define the implicit elements it would require for an NYVRA vote-dilution claim. The Appellate Division held that an NYVRA vote-dilution plaintiff must show *both* "that vote dilution has occurred" *and* that "an alternative practice" exists "that would allow the minority group to have *equitable access to fully participate in the electoral process*." A23 (citations omitted; emphasis added). The statute provides that "vote dilution" exists whenever a political subdivision experiences racially polarized voting or the totality of the circumstances demonstrates an impairment of minority voter's ability to influence elections, N.Y. Elec. Law § 17-206(2)(b), so the Appellate Division's formulation suggests that a showing beyond *statutorily-defined* "vote dilution" is necessary to establish liability.

The Appellate Division's focus on the existence of an alternative system that would provide "equitable access" to racial groups, A23, is particularly unclear as a way to establish NYVRA liability. For one thing, the Appellate Division did not even attempt to define what "equitable access" means for liability purposes—let alone articulate what kind of evidence is required to prove this element. *See generally* A23.

Adopting this "equitable access" element, therefore, would not provide political subdivisions with any guidance regarding how they must address claims that they are in violation of the NYVRA or how they can avoid NYVRA liability in the future.

III. The Town Also Has Capacity To Challenge The NYVRA's Vote-Dilution Provisions As Unconstitutional, Although The Capacity Question Does Not Affect This Court's Ability To Decide The Constitutional Issues Here

A. Under Civil Practice Law And Rule § 3211(a)(3), a litigant must have "capacity to sue" to "assert[ ]" a "cause of action" in court. CPLR 3211(a)(3). Typically, "municipalities . . . and their officers 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). But this capacity rule is "not absolute," *id.* at 386, as political subdivisions do have capacity to raise constitutional challenges when they "*assert*" *in court* 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. Sch. Dist.*, 41 N.Y.2d 283, 287 (1977) (emphasis added); *see Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 20 N.Y.2d 109, 117 (1967). Under those "special circumstances . . . the general [lack-of-

capacity] rule must yield" to this forced-constitutional violation exception. *Matter of World Trade Ctr.*, 30 N.Y.3d at 386. Accordingly, for example, this Court has held that a municipality has capacity to challenge a state statute in court on equal-protection grounds when the municipality could be "held accountable [ ] under the Equal Protection Clause . . . by reason of" its compliance with that state statute. *See, e.g.*, *City of New York v. State*, 86 N.Y.2d 286, 295 (1995).

B. Here, the Town can challenge the constitutionality of the NYVRA's vote-dilution provisions in court on equal-protection grounds, as a defense to Plaintiffs' claims in this case.

As a threshold matter, the capacity-to-sue limitation discussed above does not apply here because the Town is a *defendant*, A282, and so has not "*sue*[*d*]" anyone in relation to the NYVRA's enforcement, CPLR 3211(a)(3) (emphasis added). By its very terms, the capacity-to-sue limitation found in CPLR 3211(a)(3) only gives *a defendant* a mechanism to "move for judgment dismissing" a "cause[ ] of action *asserted against him*," where "the party asserting the cause of action [*e.g.*, a plaintiff] has not legal capacity to sue." *Id.* (emphasis added). So, for a political subdivision in particular, the limitation is "concern[ed]" with

"a litigant's power to appear and bring its grievance before the court" and "whether the legislature invested that party with authority to seek relief in court." *Matter of World Trade Ctr.*, 30 N.Y.3d at 384 (citation omitted). Here, the Town has *not* "assert[ed]" any "cause[ ] of action" against Plaintiffs claiming that the NYVRA's vote-dilution provisions are unconstitutional, CPLR 3211(a)(3), or brought a "grievance before the court," *Matter of World Trade Ctr.*, 30 N.Y.3d at 384 (citation omitted), so there is no "cause[ ] of action" to dismiss under CPLR 3211(a)(3)'s capacity-to-sue limitation, CPLR 3211(a)(3). Thus, the capacity-to-*sue* limitation is inapplicable here by its own terms. *See id.*

Any contrary conclusion prohibiting the Town from raising its Equal Protection Clause defense to Plaintiffs' NYVRA vote-dilution claims here would violate the U.S. Constitution's Supremacy Clause. U.S. Const. art. VI, cl.2. The Supremacy Clause provides, in relevant part, that "the Constitution . . . shall be the supreme Law of the Land; and *the Judges in every State* shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.* (emphasis added). This creates "a rule of decision" for the courts in this case: "[t]hey must not give effect to" the NYVRA's vote-dilution provisions

if, as the Town has argued, they "conflict[ ] with" the Equal Protection Clause. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015) (emphasis added); *see also Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965). Nor may the courts in this case invoke a state law limitation to avoid the Supremacy Clause's command to disregard the NYVRA's vote-dilution provisions if they conflict with the Equal Protection Clause. "[O]nce a case or controversy properly comes before a court"—as this case undoubtedly has, at Plaintiffs' initiative—"*judges are bound by federal law*." *Armstrong*, 575 U.S. at 326 (emphasis added).

But even if the Town did need "capacity" to raise its constitutional defense to the enforcement of the NYVRA vote-dilution provisions here, the Town would satisfy the forced-constitutional-violation exception and so have capacity. *See, e.g.*, *Jeter*, 41 N.Y.2d at 287; *Allen*, 20 N.Y.2d at 117; *Matter of World Trade Ctr.*, 30 N.Y.3d at 386; *City of New York*, 86 N.Y.2d at 295. As the Town has explained, if the Supreme Court imposes any liability on the Town for violating the NYVRA's vote-dilution provisions under Plaintiffs' theory, this would *require* the Town to change its election system expressly so that citizens lumped together by some race(s) are able to elect more candidates of their choice, at the expenses

of the electoral success of citizens lumped together by other races. *See supra*, Part I. Yet, the Town's imposition of any such race-focused electoral changes—which, again, would be required after any finding of NYVRA vote-dilution liability, *see supra*, Part I—violates the Equal Protection Clauses of the U.S. Constitution and New York Constitution, meaning that the Town has the capacity to raise this constitutional defense against the NYVRA vote-dilution provisions here, *Jeter*, 41 N.Y.2d at 287; *Allen*, 20 N.Y.2d at 117; *Matter of World Trade Ctr.*, 30 N.Y.3d at 386; *City of New York*, 86 N.Y.2d at 295. To reiterate, the Town's position is that *any* alteration of its race-neutral, at-large election system in order to comply with the NYVRA's vote-dilution provisions would be unconstitutional. *See supra*, Part I. While this Court must adjudicate the Town's constitutional argument and may, perhaps, disagree with it, the Town has the capacity to raise it. *See Jeter*, 41 N.Y.2d at 287; *Allen*, 20 N.Y.2d at 117; *Matter of World Trade Ctr.*, 30 N.Y.3d at 386; *City of New York*, 86 N.Y.2d at 295.

C. The Appellate Division, respectfully, misunderstood the proper way to analyze the Town's capacity to challenge the constitutionality of the NYVRA's vote-dilution provisions.

As an initial matter, the Appellate Division failed to recognize that the lack-of-capacity rule applies only when a political subdivision *sues* to affirmatively challenge a State statute, *compare* CPLR 3211(a)(3), *with* A15–16—but not when it *defends* itself against such statute on constitutional grounds, as the Town does here.

In any event, the Appellate Division adopted an erroneous, circular understanding of the forced-constitutional-violation exception when it concluded that the Town failed to satisfy that exception here. A16. In the Appellate Division's view, the Town could only have capacity to challenge the constitutionality of the NYVRA's vote-dilution provisions if the Town *proved* that "compliance with the NYVRA would force them to violate the Equal Protection Clause." A16. That is, the Town had to *prevail* on its constitutional challenge to even have capacity to raise that challenge in the first place. *See* A16. This Court has rightly rejected this circular reasoning, as it has defined the forced-constitutional-violation-exception as providing political subdivisions with the capacity to challenge the constitutionality of a state statute upon their "*assert*[*ing*] that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription." *Jeter*,

41 N.Y.2d at 287 (emphasis added); *accord* A39 (Supreme Court correctly applying this rule). This exception applies to the Town, which has simply "assert[ed] that "*if* [it is] obliged to comply with" the challenged provisions, it will "be forced to violate a constitutional proscription." *Jeter*, 41 N.Y.2d at 287 (emphasis added).

All that said, the Appellate Division's misunderstanding of the forced-constitutional-violation analysis is ultimately irrelevant, because this Court must still address the Town's constitutional arguments even if the Court adopts the Appellate Division's erroneous approach to the forced-constitutional violation analysis to dispose of this case. Again, the Appellate Division concluded that it had to first decide the merits of the Town's constitutional challenge in order to then determine whether the Town had the capacity to raise that same challenge to begin with. A16. So, even if this Court were to endorse that cart-before-the-horse approach, it still must resolve the merits of the Town's constitutional challenges to the NYVRA's vote-dilution provisions, *see supra*, Part.I–II—just within the capacity-to-sue framework, *see* A16.

CONCLUSION

This Court should reverse the judgment of the Appellate Division and affirm the relevant portion of the judgment of the Supreme Court by holding that the NYVRA's vote-dilution provisions are unconstitutional.

Dated: July 7, 2025

Respectfully submitted,

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