No. APL-2025-00110

To be argued by:
JUDITH VALE
15 minutes requested

State of New York
Court of Appeals

In the Matter of the Application of

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

Plaintiffs-Respondents,

v.

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

Defendants-Appellants,

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

Intervenor-Respondent.

BRIEF FOR INTERVENOR ATTORNEY GENERAL

BARBARA D. UNDERWOOD
Solicitor General
JUDITH VALE
Deputy Solicitor General
BEEZLY KIERNAN
Assistant Solicitor General
SANDRA PARK
Bureau Chief, Civil Rights
LINDSAY MCKENZIE
Section Chief, Voting Rights
DEREK BORCHARDT
Assistant Attorney General of Counsel

LETITIA JAMES
Attorney General
State of New York
The Capitol
Albany, New York 12224
(518) 776-2023
(518) 915-7723 (*f*)
Beezly.Kiernan@ag.ny.gov

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Supreme Court, Westchester County, Index No. 50325/2025
Second Department No. 2024-11753

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PRELIMINARY STATEMENT

The Legislature enacted New York's John R. Lewis Voting Rights Act (NYVRA) in 2022 to protect every citizen's right to vote, regardless of their race. Among other provisions, the NYVRA prohibits electoral practices that have the racially discriminatory effect of impairing the ability of members of a protected class—defined in a way that can potentially include any racial group—to elect candidates of their choice or influence the outcome of elections. If a court finds such racially discriminatory vote dilution, it must order appropriate remedies to ensure that voters of the protected class have equitable access to participate in the political process.

In this lawsuit, six individual voters sued the Town of Newburgh and its Town Board (together, the Town), alleging that the Town's at-large method of election for Town Board members dilutes the voting power of Black and Hispanic voters in violation of the NYVRA. Plaintiffs seek a court order directing the Town to implement either a district-based system or an alternative method of election (such as ranked-choice voting) for Town Board elections. The Town moved for summary judgment, arguing that the NYVRA's vote-dilution prohibition violates the

Equal Protection Clauses of the U.S. and New York State Constitutions. Supreme Court, Orange County (Vazquez-Doles, J.) agreed and struck down the vote-dilution prohibition on its face.

The Appellate Division, Second Department reversed and denied the Town's summary judgment motion. The court held that the NYVRA equally protects members of all racial groups from racially discriminatory vote dilution. And the court held that the NYVRA provides facially race-neutral remedies to redress such discrimination. The court rejected the Town's argument that a political subdivision's use of race-neutral means to remedy vote dilution triggers strict scrutiny.

The Attorney General has intervened as of right to defend the constitutionality of the NYVRA. This Court should affirm for either of two reasons. First, the Town lacks capacity to bring this broad, facial challenge. As a political subdivision of the State, the Town lacks capacity to challenge a state law. And the Town failed at summary judgment to establish that its *facial* challenge fits into the exception to the lack-of-capacity rule available where a municipality's compliance with a state statute would violate a constitutional proscription. The Town failed to provide any evidence to support its conclusory assertions that every

conceivable application of the statute would require a municipality to violate the equal protection rights of its voters. At minimum, there are genuine disputes of fact about that issue because the statute authorizes, and plaintiffs here seek, race-neutral remedies that would plainly not require political subdivisions to classify voters based on race. For this reason alone, the Court should affirm.

Second, if the Court reaches the merits, it should affirm because the Town's facial challenge fails. Far from requiring political subdivisions to discriminate on the basis of race, as the Town contends, the statute prohibits racial discrimination. It does so by affording all voters—regardless of race—a cause of action to redress electoral methods that have racially discriminatory effects on voting. And the remedies contemplated by the statute, including district-based and alternative methods of election, are facially race-neutral. Thus, the statute is subject only to rational basis review, which it readily satisfies.

The Town's counterarguments fail. The use of race-neutral means to address electoral methods that have racially discriminatory effects does not trigger strict scrutiny. The NYVRA's vote-dilution provision is akin to many federal and state antidiscrimination laws that redress

policies or practices (such as employment hiring criteria) that are facially neutral but have racially discriminatory impacts on members of a protected class. If the Town was correct that analyzing whether such racially discriminatory effects exist, or providing race-neutral remedies where they do, triggered strict scrutiny, then many longstanding antidiscrimination statutes would be upended. That is not the law, as extensive precedent makes clear.

Indeed, contrary to the Town's contentions, the Supreme Court's rulings on Section 2 of the federal Voting Rights Act apply strict scrutiny only to race-based remedies like racial gerrymandering. But the NYVRA provides for many race-neutral remedies that do not involve districting at all, let alone districting in which racial considerations predominate. The Town thus fails to establish that the NYVRA would be subject to strict scrutiny in all its conceivable applications. And because the statute equally protects members of all racial groups from racial discrimination, it is categorically unlike affirmative action policies that extend benefits only to members of certain racial groups, or segregation policies that facially separate individuals based on race. The NYVRA's race-neutral antidiscrimination provisions do no such thing. Finally, because the

Town's facial challenge fails, the Court need not and should not consider the Town's request to interpret the statute in ways that are unmoored from its text and purpose.

QUESTIONS PRESENTED

1. Whether the Town lacks capacity to challenge the NYVRA on its face.

2. Whether the NYVRA's prohibition against racially discriminatory vote dilution comports with the Equal Protection Clauses of the U.S. and New York State Constitutions.

3. Whether this Court should decline to construe the NYVRA as imposing certain implicit elements on a plaintiff alleging vote dilution.

STATEMENT OF THE CASE

A. Racial Discrimination in Voting and Section 2 of the Federal Voting Rights Act (VRA)

Elections are the foundation of our democratic government. Voting is how we, as a people, constitute every level of government—federal, state, and local. *See* U.S. Const. art. I, art. II, § 1; N.Y. Const. art. III, § 2, art. IV, § 1, art. IX, § 1(a). Restrictions on the right to vote thus "strike

at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Although our nation's history is marred by racially discriminatory limitations on the right to vote, it also reflects efforts to address such racial discrimination. *See id.* For example, during the antebellum period, most States prohibited any non-white individuals from voting. *See, e.g.*, Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. Cin. L. Rev. 1345, 1348 (Summer 2003). But after the Civil War, the U.S. Constitution was amended to prohibit a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1, and to prohibit both the United States and each State from denying or abridging the right to vote "on account of race, color, or previous condition of servitude," *id.* amend. XV, § 1. As a result, State laws could no longer explicitly prohibit non-white men from voting.

Many States perpetuated racial discrimination in voting, however, "through the use of both subtle and blunt instruments." *Shaw v. Reno*, 509 U.S. 630, 639 (1993). Some States disenfranchised non-white voters through statutes imposing poll taxes or literacy tests to qualify to vote.

Although these laws appeared facially neutral, they were intended to, and had the effect of, disproportionally precluding African Americans and other members of non-white minority groups from voting. *See id.* at 639-40.

In the mid-20th century, civil rights activists—including John Lewis—advocated tirelessly to eliminate such racially discriminatory barriers to voting. Their efforts culminated in the passage of the federal Voting Rights Act (VRA) of 1965. As originally enacted, Section 2 of the VRA prohibited States and political subdivisions from imposing any voting qualification, standard, practice, or procedure "to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973 (1970 ed.). Subsequently, large numbers of African Americans and others who had been discriminated against were able to register to vote and participate in elections across the country. *See Shaw*, 509 U.S. at 640.

However, electoral laws, requirements, or systems persisted that had racially discriminatory effects on the voting power of minorities. As the U.S. Supreme Court recognized decades ago, "the right to vote can be affected by a *dilution* of voting power as well as by an absolute prohibition

on casting a ballot." *Shaw*, 509 U.S. at 640 (quotation and alteration marks omitted). Vote dilution occurs when "a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [voters of different racial groups] to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

Electoral laws, requirements, or systems that appear facially neutral and that are not intentionally discriminatory may nonetheless have such racially discriminatory effects. However, the Supreme Court originally interpreted Section 2 of the VRA to require proof of *intentional* discrimination. *See City of Mobile v. Bolden*, 446 U.S. 55, 60-63 (1980). Congress then overrode this interpretation, amending Section 2 to make clear that "a violation could be proved by showing discriminatory *effect* alone," *Gingles*, 478 U.S. at 35 (emphasis added). Section 2 now prohibits States and political subdivisions from imposing voting qualifications, standards, practices, or procedures "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). Section 2 provides that a violation of this prohibition is established "if, based on the totality of

circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members" of a protected class "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b). As explained *infra* at 62, in *Gingles*, the U.S. Supreme Court interpreted Section 2 to require plaintiffs to establish certain statutory preconditions and elements to bring a vote-dilution claim under Section 2. *See* 478 U.S. at 50-51, 79.

A political subdivision's use of at-large elections under conditions of racially polarized voting is a quintessential example of an electoral system that can cause discriminatory vote dilution, i.e., that has the discriminatory effect of lessening the opportunity of members of a protected group to participate in the political process. When voting patterns are racially polarized, at-large elections may dilute the voting power of a minority group (of whatever race) in the political subdivision. *See Shaw*, 509 U.S. at 640-41; *Gingles*, 478 U.S. at 47-48. That racially discriminatory effect arises because at-large systems "permit[ ] the political majority to elect *all* representatives" of the political subdivision,

whereas members of a protected minority group "may be able to elect several representatives" in a different electoral system, such as a district-based election system. *Rogers v. Lodge*, 458 U.S. 613, 616 (1982).

For example, if all voters in a town are permitted to vote for all members of the town's board, and racial group A, which is 55% of the electorate, supports certain candidates, while racial group B, which is 45% of the electorate, supports other candidates, then group A will be able to elect 100% of the board's members. Group B will fail to elect *any* members despite comprising almost half of the electorate. Thus, as the U.S. Supreme Court has explained, when a politically cohesive minority group's electoral choices diverge from those of the majority group, at-large voting systems "operate to minimize or cancel out the voting strength" of the minority while simultaneously aggrandizing the voting power of the majority. *Gingles*, 478 U.S. at 47. Because of such racially discriminatory impacts, at-large electoral systems have in many places been found to violate Section 2 of the federal VRA, including in some jurisdictions in New York. *See, e.g.*, *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021); *United States v. Village of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010); *see also* Peyton McCrary, *How the*

Voting Rights Act Works: Implementation of a Civil Rights Policy, 1965-2005, 57 S.C. L. Rev. 785, 806, 819-20 (Summer 2006).

B. The New York Voting Rights Act (NYVRA)

The Legislature enacted the NYVRA in 2022 to ensure that members of all racial groups "have an equal opportunity to participate in the political processes of the state of New York." Election Law § 17-200. New York's statute is modeled in part on the federal VRA; for example, like the federal VRA, the NYVRA prohibits certain electoral laws or practices that have racially discriminatory effects, even when they are not intentionally discriminatory. *See generally id.* § 17-206(2)(a), (c)(v). However, in the wake of U.S. Supreme Court decisions weakening some of the federal VRA's protections, *see, e.g.*, *Shelby County v. Holder*, 570 U.S. 529 (2013), the NYVRA was also designed to offer additional protections against racial discrimination in voting that are not available under the federal VRA. *See* Governor's Mem., in Bill Jacket for Ch. 226 (2022), at 5. The NYVRA was also modeled after analogous laws enacted

in California and Washington. *See* Cal. Elec. Code §§ 14025-14032; Wash. Rev. Code §§ 29A.92.005–.900.[1]

Section 17-206(2) of the Election Law prohibits vote dilution.[2] The NYVRA defines vote dilution as "any method of election" that has "the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections." Election Law § 17-206(2)(a). A "protected class" is "a class of individuals who are members of a race, color, or language-minority group, including individuals who are members of a minimum reporting category that has ever been officially recognized by the United States census bureau." *Id.* § 17-204(5).

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[1] Since the NYVRA's enactment, similar laws have been enacted in Colorado, Connecticut, and Minnesota. *See* Colo. Rev. Stat. §§ 1-47-101 to 1-47-302; Conn. Gen. Stat. §§ 9-368i to 9-368q; Minn. Stat. §§ 200.50–.60. Oregon also has a similar law, although it applies only to educational district elections. Or. Rev. Stat. §§ 255.400–.424.

[2] In addition to vote dilution, the statute prohibits various other forms of voter disenfranchisement, such as voter suppression, intimidation, deception, and obstruction. Election Law §§ 17-206(1), 17-212. Separate NYVRA provisions require covered political subdivisions making certain voting- or election-related changes to seek prior approval of such changes, known as "preclearance." *See id.* § 17-210.

Plaintiffs' claims here concern only a political subdivision that uses an at-large method of election. *See id.* § 17-204(1) (defining "at-large"). For subdivisions using an at-large election method, vote dilution exists when:

> (A) voting patterns of members of the protected class within the political subdivision are racially polarized; or
>
> (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired.

Id. § 17-206(2)(b)(i).[3] The statute defines "racially polarized voting" as "voting in which there is a divergence in the candidate, political preferences, or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate." *Id.* § 17-204(6).

The NYVRA instructs how certain evidence should be weighed in determining whether vote dilution has occurred. For instance, elections conducted prior to the filing of an action under the NYVRA are "more

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[3] If a political subdivision uses "a district-based or alternative method of election," then vote dilution may be shown if one of the above two elements is established *and* "candidates or electoral choices preferred by members of the protected class would usually be defeated." *Id.* § 17-206(2)(b)(ii). This provision is not at issue here.

probative" than elections conducted afterward. *Id.* § 17-206(2)(c)(i). And "statistical evidence" showing a pattern of racially polarized voting "is more probative than non-statistical evidence." *Id.* § 17-206(2)(c)(iii). The statute further provides that "evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class is not required." *Id.* § 17-206(2)(c)(v). Similarly, "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).

The statute lists factors for a court to consider "[i]n determining whether, under the totality of the circumstances, a violation of … this section has occurred." *Id.* § 17-206(3). These factors include "the history of discrimination in or affecting the political subdivision" and "the extent to which members of the protected class have been elected to office in the political subdivision." *Id.* § 17-206(3)(a)-(b).

The NYVRA authorizes any aggrieved person to file an action against a political subdivision to enforce the statute's prohibition against vote dilution. *Id.* § 17-206(4). The Attorney General also has statutory authority to enforce the NYVRA, including by filing actions to remedy

vote dilution. *See id.* §§ 17-206(4), 17-214. Before commencing an action, a prospective plaintiff must give notice to the political subdivision, which then has an opportunity to remedy vote dilution outside of litigation. *Id.* § 17-206(7).

If a court finds based on the evidence presented that vote dilution has occurred in violation of the NYVRA, then it must "implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process." *Id.* § 17-206(5)(a). The statute lists sixteen potential remedies, including a district-based method of election; an alternative method of election, such as ranked-choice voting or cumulative voting;[4] new or revised districting or redistricting plans; a reasonable increase in the size of the governing body; and additional polling times and locations. *Id.* If

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[4] In ranked-choice voting, each voter ranks candidates of their choice for elected office. If no candidate receives more than 50% of voters' first choices, then the candidate with the fewest votes is eliminated, and each voter who ranked that candidate first has that first-choice vote redistributed to their second-choice candidate. This process continues until one candidate receives a majority of voters' highest choices.

In cumulative voting, each voter is afforded multiple votes, which they may allocate among multiple candidates, including by casting multiple votes for one candidate. The candidates with the most votes win.

the remedy requires new or revised districting plans, the statute provides certain procedures that must be followed, such as publicly releasing the plans and holding public hearings. *Id.* § 17-206(6)(a)-(b). The statute does not say how the district lines must be drawn.

C. Procedural Background

Plaintiffs—six individual voters who reside in the Town of Newburgh—commenced this NYVRA action against Newburgh and its Town Board in Supreme Court, Orange County, in March 2024. (Compl. (Mar. 26, 2024), NYSCEF Doc. No. 1, at 1, 7.) Plaintiffs' complaint asserts that the Town's at-large system for electing Town Board members dilutes the voting power of Black and Hispanic residents in violation of § 17-206(2). (*Id.* at 2-3, 26-28.) Plaintiffs alleged both that (1) voting patterns in the Town are racially polarized and (2) under the totality of the circumstances, the at-large election system impairs the ability of Black and Hispanic voters to elect candidates of their choice or otherwise influence the outcome of elections. (*Id.* at 26-28.) By way of relief, plaintiffs seek a declaration that the Town's use of an at-large election system violates § 17-206 and an injunction ordering the Town to implement

either a districting plan or an alternative method of election for the 2025 Town Board election. (*Id.* at 29.)

As relevant here, the Town moved for summary judgment. It argued that the NYVRA's vote-dilution provision is unconstitutional on its face because it violates the Equal Protection Clauses of the U.S. and New York Constitutions. (A365-379.) The Town further argued that its at-large elections for Town Board comply with the NYVRA. (A379-384.) Plaintiffs opposed the motion. (A386-414.)

Supreme Court granted the Town's summary judgment motion in November 2024. (A26-52.) First, Supreme Court concluded that even though municipalities generally lack capacity to challenge the constitutionality of state laws, the Town had capacity here merely because it alleged that any compliance with the NYVRA would purportedly require it to violate the Equal Protection Clause. (A39.)

Second, the court held that the NYVRA's vote dilution prohibition is unconstitutional on its face. The court concluded that strict scrutiny applied, reasoning that "the text of the NYVRA, on its face, classifies people according to their race, color and national origin." (A43.) The court stated that the NYVRA facially classifies based on race because "[a]

person can only seek relief on the basis of their race, color or national origin" and because, according to the court, the statute's remedies "are created based upon those classifications." (*Id.*) The court determined that the vote-dilution prohibition could not satisfy strict scrutiny. (A44-48.)

In addition, Supreme Court purported to issue an order striking the entire NYVRA, including its many provisions unrelated to § 17-206(2)(b)(i) (A52)—even though the Town did not challenge any NYVRA provision other than § 17-206(2)(b)(i), and even though the statute contains an express severability provision. *See* Election Law § 17-222.

Plaintiffs appealed. On appeal, the Attorney General intervened as of right under Executive Law § 71(1) to defend the NYVRA's constitutionality.

D. The Appellate Division's Order

The Appellate Division, Second Department reversed Supreme Court's order and denied the Town's motion for summary judgment. (A25.) The court ruled that the Town lacked capacity to challenge the NYVRA unless it could establish that "compliance with the NYVRA would force [it] to violate the Equal Protection Clause." (A16.) The court determined that the Town had failed to carry its burden at summary

judgment, i.e., it had not established "as a matter of law on this record that compliance with the NYVRA would force [it] to violate the Equal Protection Clause." (*Id.*)

On the merits, the Appellate Division rejected the Town's facial equal protection challenge and upheld the NYVRA's vote-dilution provision. First, the court held that strict scrutiny does not apply because the NYVRA's vote-dilution provision contains no express racial classification within the meaning of equal protection jurisprudence. The court explained that, like the California and Washington statutes on which it was based, the NYVRA is a race-neutral antidiscrimination statute that equally protects members of all racial groups from racially discriminatory vote dilution. (A19-20.) The court rejected the Town's argument that the NYVRA protects members of only certain racial groups, ruling that the statute allows "members of all racial groups, including white voters, to bring vote dilution claims," if they constitute a minority in a political subdivision. (A19.) And the court rejected the Town's argument that the vote-dilution provision triggers strict scrutiny on its face merely because it requires political subdivisions to implement a remedy when racially discriminatory vote dilution is proven in a particular case. As the court

explained, "governments may adopt measures designed to eliminate racial disparities through race-neutral means" without triggering strict scrutiny. (A20 [quotation marks omitted].)

Second, the Appellate Division concluded that the Town's facial challenge failed because it was based on the fundamentally incorrect premise that all conceivable applications of the vote dilution provision would require a political subdivision to impermissibly use race-based classifications. The court observed that drawing election districts through a process in which racial considerations predominate would involve racial classifications and thus trigger strict scrutiny. But, the court explained, the NYVRA contemplates many remedies that do not involve any such racial classifications—such as ranked-choice voting, cumulative voting, or drawing districts without allowing racial considerations to predominate. (A21.) Thus, an *as-applied* challenge to a specific remedy might possibly trigger strict scrutiny, but the Town's facial challenge does not. (A22.)

Third, the court rejected the Town's argument that differences between the NYVRA and Section 2 of the federal VRA rendered the NYVRA unconstitutional. As the court explained, the elements of a

Section 2 claim are not constitutionally required. (A22-23.) Additionally, while (unlike Section 2) the NYVRA does not require a totality-of-the-circumstances inquiry in every case, the court noted that a NYVRA plaintiff challenging an electoral practice must demonstrate "that there is an alternative practice that would allow the minority group to 'have equitable access to fully participate in the electoral process.'" (A23 [quoting Election Law § 17-206(5)(a)].) The court further observed that even if Section 2's statutory elements, as set forth by the Supreme Court in *Gingles*, had constitutional significance, the Town's facial challenge still failed because the NYVRA could be constitutionally applied in situations where Section 2's elements would be satisfied. (A24.)

Finally, the Appellate Division ruled that Supreme Court had erred in striking down the many NYVRA provisions unrelated to the vote-dilution prohibition at issue. (*Id.*)

The Appellate Division subsequently granted the Town's motion for leave to appeal. (A2.) Like its leave motion, the Town's opening brief in this Court does not challenge the Appellate Division's determination that Supreme Court lacked authority to strike down the entire NYVRA. Accordingly, only the Appellate Division's ruling rejecting the Town's

facial challenge to the vote-dilution provision is at issue on the appeal to this Court.

ARGUMENT

POINT I

THE TOWN LACKS CAPACITY TO CHALLENGE THE NYVRA'S VOTE-DILUTION PROVISION ON ITS FACE

The Town of Newburgh, as a political subdivision of the State, lacks capacity to challenge the constitutionality of the NYVRA's vote-dilution prohibition on its face. For this reason alone, the Town is not entitled to summary judgment, and the Court should affirm.

A. The Town Is Subject to the Lack-of-Capacity Rule.

Municipalities generally "lack capacity to mount constitutional challenges to acts of the State and State legislation." *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 384 (2017) (quoting *City of New York v. State of New York*, 86 N.Y.2d 286, 289 [1995]). As "creatures or agents of the State," municipalities "cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants." *City of New York*, 86 N.Y.2d at 290. As this Court has explained,

the lack-of-capacity rule is a necessary outgrowth of separation of powers principles because the rule "expresses the extreme reluctance of courts to intrude in the political relationships between the Legislature, the State and its governmental subdivisions." *Id.* at 295-96.

Contrary to the Town's argument (at 65-66), the lack-of-capacity rule applies both when a municipality raises a constitutional challenge to a state statute as a plaintiff bringing a cause of action and when, as here, a municipality raises a constitutional challenge to a state statute as a defendant defending against a cause of action. For example, this Court applied the lack-of-capacity rule to a municipal defendant in *Matter of World Trade Center Lower Manhattan Disaster Site Litigation*, which involved a certified question from the Second Circuit as to whether the defendant in that case—the Battery Park City Authority—was a municipal entity subject to the lack-of-capacity rule. 30 N.Y.3d at 383. This Court held that the Battery Park City Authority was a municipal entity subject to the lack-of-capacity rule. *Id.* at 393. And the Second Circuit later held that this municipal defendant lacked capacity to challenge the constitutionality of a state law and, accordingly, vacated

the grant of summary judgment to the defendant, *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 892 F.3d 108, 112 (2d Cir. 2018).

Likewise, the Town is a municipal entity that lacks capacity to raise a challenge to the constitutionality of a state statute as a defendant. Applying the lack-of-capacity rule to municipal defendants, as well as to municipal plaintiffs, makes sense because the rule is based on the municipality's status as a creature or agent of the State, *see City of New York*, 86 N.Y.2d at 290, not on the municipality's status as a plaintiff or defendant in a particular litigation. *See Matter of Jeter v. Ellenville Cent. School Dist.*, 41 N.Y.2d 283, 287 (1977) (applying lack-of-capacity rule to municipal respondents challenging Education Law provision); *Herzog v. Board of Educ. of Lawrence Union Free School Dist.*, 171 Misc. 2d 22, 26-27 (Sup. Ct. Nassau County 1996) (applying lack-of-capacity rule to municipal defendant challenging state law in motion to dismiss).

There is no merit to the Town's reliance on C.P.L.R. 3211(a)(3), which states that a motion to dismiss may be based on the ground that "the party asserting the cause of action has not legal capacity to sue." The Town argues (at 65-66) that this provision means that the only way that a lack-of-capacity argument can be raised is against the party asserting

a cause of action. But C.P.L.R. 3211(a)(3) merely provides one procedural vehicle—a motion to dismiss—for seeking dismissal of a claim based on lack of capacity. That procedural provision has no bearing on whether a municipality in fact lacks capacity to challenge state law, which "is a question of legislative intent and substantive state law." *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d at 384. Nor does C.P.L.R. 3211(a)(3) preclude other procedural vehicles for raising a lack-of-capacity argument, such as in opposition to another party's summary judgment motion. *See, e.g.*, *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 892 F.3d at 110; *Whelan v. Longo*, 23 A.D.3d 459 (2d Dep't 2005) (denying plaintiff's motion for summary judgment based on capacity defense raised in defendant's summary judgment motion). C.P.L.R. 3211(a)(3) is thus irrelevant here, where plaintiffs raised the Town's lack of capacity in opposition to the Town's motion for summary judgment. (A397-399.)

Accordingly, the lack-of-capacity rule applies unless the Town can demonstrate that its constitutional challenge falls within one of the narrow exceptions to the rule—which the Town fails to do.

B. The Town Fails to Show That Its Challenge to the NYVRA Falls Within an Exception to the Lack-of-Capacity Rule.

This Court has recognized certain narrow exceptions to the lack-of-capacity rule. *See City of New York*, 86 N.Y.2d at 291-92. The Town relies on only one of these exceptions, specifically, an exception for the limited circumstances where a municipality shows that its very compliance with a state statute would require it to "violate a constitutional proscription." *Matter of Jeter*, 41 N.Y.2d at 287. To qualify for that exception, a municipality must put forth competent evidence of specific future conduct required by the challenged state law that would cause the municipality to violate the Constitution. *See Blakeman v. James*, No. 2:24-cv-1655, 2024 WL 3201671, at *14 (E.D.N.Y. Apr. 4, 2024) (local government lacked capacity to challenge constitutionality of state statute because there was no "record evidence" that compliance with statute would compel it to violate a constitutional proscription); *Silver v. Pataki*, 274 A.D.2d 57, 61-66 (1st Dep't 2000), *aff'd*, 96 N.Y.2d 532, 538 (2001) (affirming dismissal of claim by Speaker of Assembly because Speaker provided no evidence of capacity to sue on behalf of Assembly).

Contrary to the Town's contention (at 64), it cannot rely on conclusory assertions, without any evidence, to qualify for the lack-of-capacity exception. *See Santori v. Met Life*, 11 A.D.3d 597, 599 (2d Dep't 2004) (affirming summary judgment against plaintiff because plaintiff failed to adduce evidence demonstrating capacity to sue). Because the Town sought summary judgment here, it bore the burden of establishing that there are no material factual disputes as to whether the Town qualifies for the exception. And because the Town raises only a broad, facial challenge, it must demonstrate that there are no material factual disputes that, "in any degree and in every conceivable application," the NYVRA's vote-dilution provision requires political subdivisions to violate the Equal Protection Clause. *Matter of Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003). Moreover, to meet that burden, the Town had to show that every conceivable remedial action that the Town might be ordered to undertake would be unconstitutional.

The Town patently failed to satisfy this high burden. It failed to put forth any record evidence of specific future unconstitutional conduct that the Town or other political subdivisions might be ordered to carry out as a possible remedy, and it certainly failed to show that *every* remedy a

court might order would require the Town to violate the Equal Protection Clause. The parties' summary judgment papers dispute which remedies, if any, might be appropriate here. (*See* Pls.' Statement of Material Facts (Oct. 10, 2024), NYSCEF No. 72, at 10-12; Defs.' Response to Pls.' Statement of Material Facts (Oct. 17, 2024), NYSCEF No. 128, at 24-29.) And the Town does not claim to plan to institute any change to its at-large election system for Town Board members absent a court order requiring them to do so. Thus, at minimum, there are material disputes of fact about whether every conceivable remedy available under the NYVRA would require political subdivisions to violate the Equal Protection Clause. Accordingly, on this record, the Town failed to establish its entitlement to the lack-of-capacity exception.

Extending the lack-of-capacity exception to the Town's broad facial challenge would essentially allow the exception to swallow the rule. Allowing a municipality to bring a facial challenge to a state statute, based only on conclusory assertions, would disrupt the relationship between the State and its political subdivisions, which are "created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents." *City of New York*, 86 N.Y.2d at

290. Indeed, the Town cites no authority for a municipality bringing such a sweeping facial challenge to strike down an entire state statute without making any particularized showing as to what specific conduct the statute requires but the Constitution prohibits.

The Town's reliance on the Supremacy Clause of the U.S. Constitution (at 66-67) is unavailing. The Town incorrectly argues that, under the Supremacy Clause, raising a federal constitutional challenge to the NYVRA automatically entitles the Town to have the court adjudicate that challenge on the merits. The Supremacy Clause does not create any such automatic entitlement. Like standing and other justiciability doctrines, state-law capacity limitations properly circumscribe the circumstances in which a litigant may raise a claim. Here, the lack-of-capacity rule properly limits when a municipal entity, as a creature of the State, may properly raise a federal or state constitutional challenge to a state law. Indeed, the case on which the Town relies makes clear that the Supremacy Clause "is silent regarding *who* may enforce federal laws in court, and in what circumstances they may do so." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 325 (2015) (emphasis added). Accordingly, the Town is incorrect that the Court must address the

merits of its facial equal protection challenge here. The Court can, and should, conclude that the Town failed at summary judgment to establish its capacity to bring this facial challenge.

Even assuming, as the Town seems to suggest, that the Supremacy Clause requires providing the Town with an avenue to challenge a state statute that requires it to violate the federal Constitution—a claim that is by no means clear—the Town already has such an avenue available in the form of an as-applied challenge to the NYVRA. If at some point the Town is ordered to carry out a specific remedy to comply with the NYVRA, and if the Town contends that complying with that order would require it to violate the equal protection rights of its voters, then the Town could invoke the exception to the lack-of-capacity rule to contest that specific remedy. But the Town lacks capacity to bring the broad facial challenge it asserted in its summary judgment motion here. For this reason alone, the Court should affirm the Appellate Division's order reversing the grant of summary judgment to the Town.

POINT II

THE NYVRA COMPORTS WITH THE EQUAL PROTECTION CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS

If the Court reaches the merits, it should reject the Town's facial equal protection challenge. The Town "bears the heavy burden of proving beyond a reasonable doubt that the statute is in conflict with the Constitution." *People v. Viviani*, 36 N.Y.3d 564, 576 (2021) (quotation marks omitted). The NYVRA enjoys "a strong presumption of constitutionality," *id.*, and striking it down would be appropriate "only as a last unavoidable result" when reconciliation with the Constitution is impossible, *White v. Cuomo*, 38 N.Y.3d 209, 216 (2022) (quotation marks omitted). And, as noted, because the Town raises a *facial* challenge, it bears "the substantial burden of demonstrating that in any degree and in every conceivable application," NYVRA's vote-dilution provision compels political subdivisions to violate the equal protection rights of their voters. *Matter of Moran Towing Corp.*, 99 N.Y.2d at 448 (quotation marks omitted).

The Equal Protection Clauses of the U.S. and New York State Constitutions prohibit state actors from invidious discrimination against individuals based on their race. *See* U.S. Const. amend. XIV, § 1; N.Y. Const. art. I, § 11. To demonstrate a facial equal protection violation, a

party must identify "a law or policy that expressly classifies persons on the basis of race."[5] *Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000) (quotation marks omitted). An express racial classification exists "when the government distributes burdens or benefits on the basis of individual racial classifications." *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). By contrast, a law that "neither says nor implies that persons are to be treated differently on account of their race" does "not embody a racial classification." *Crawford v. Board of Educ.*, 458 U.S. 527, 537 (1982).

A law that imposes an express racial classification is subject to strict scrutiny and survives only if it is narrowly tailored to achieve a compelling government interest. *People v. Aviles*, 28 N.Y.3d 497, 502 (2016). A race-neutral law, however, is subject only to highly deferential rational basis review. *Id.* at 502-03.

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[5] Although an equal protection violation may also be shown by a facially neutral law applied in a discriminatory manner, or a facially neutral law with disparate impact that was motivated by discriminatory animus, *see Brown*, 221 F.3d at 337, the Town does not raise any such as-applied claim and instead relies solely on its assertion that the statute creates an express racial classification (Br. 23-40).

As the Appellate Division correctly held (A19-24), the Town failed to establish that all conceivable applications of the NYVRA would force political subdivisions to discriminate against voters on the basis of race. To the contrary, the statute is a race-neutral antidiscrimination law that *prohibits* political subdivisions from continuing to use electoral systems that cause racially discriminatory effects in voting, and that requires only *race-neutral* remedies when vote dilution is proved. Similar antidiscrimination laws have been repeatedly upheld without being subject to strict scrutiny. Accordingly, the NYVRA is subject only to rational basis review, which it readily satisfies. And even if strict scrutiny applied (which it does not), the Town's facial challenge would fail because there are plainly applications of the statute that would satisfy strict scrutiny.

A. The Town Fails to Establish That the NYVRA's Vote-Dilution Provision Is Subject to Strict Scrutiny.

There is no merit to the Town's unsupported assertions (at 23-40) that the NYVRA's vote-dilution prohibition, in all its conceivable applications, requires political subdivisions to expressly classify voters based on their race. As the Appellate Division correctly explained (A19-24), the NYVRA's vote-dilution prohibition, like many other race-neutral state

and federal antidiscrimination laws that have not been subject to strict scrutiny, provides a cause of action to all aggrieved persons—regardless of their race—to redress racial discrimination. And the remedies available under the statute are facially race-neutral. Thus, the statute is not subject to strict scrutiny on its face.

1. The NYVRA's vote-dilution prohibition is a race-neutral antidiscrimination law that equally protects all voters from the discriminatory effects of vote dilution.

It is well settled that a statute imposing liability for racial discrimination, and authorizing relief to address such discrimination, is not subject to strict scrutiny so long as the statute equally protects members of all racial groups from discrimination. *See Texas Dept. of Hous. & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 544-45 (2015); *Rothe Dev., Inc. v. U.S. Dept. of Defense*, 836 F.3d 57, 72 (D.C. Cir. 2016); *Raso v. Lago*, 135 F.3d 11, 16 (1st Cir. 1998). "[A] law directing state actors to provide equal protection is (to say the least) facially neutral, and cannot violate the Constitution." *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 318 (2014) (Scalia, J., concurring in the judgment). Strict scrutiny does not apply even though

applying such antidiscrimination statutes necessarily reflects concern about, and requires some consideration of, race. As federal circuit courts have explained, "[e]very antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect a concern with race. That does not make such enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause." *Raso*, 135 F.3d at 16; *accord Hayden v. County of Nassau*, 180 F.3d 42, 49 (2d Cir. 1999).

For example, statutes that prohibit racial discrimination in employment or housing are concerned with race in the sense that they prohibit regulated entities from taking certain actions based on a person's race, color, or national origin. *See, e.g.*, Executive Law § 296(a) (prohibiting employment discrimination based on race, among other protected categories); 42 U.S.C. § 2000e-2(a) (similar federal law prohibition on employment discrimination based on race); 42 U.S.C. §§ 3605-3607 (prohibiting discrimination in housing based on race). And these statutes use terms like "race," "color," or "national origin" in explicitly prohibiting discrimination based on protected categories. *E.g.*, Executive Law § 296(a); 42 U.S.C. §§ 2000e-2, 3605-3607; *see also* 15 U.S.C. § 637(a)(5)

("racial or ethnic prejudice"). Courts routinely uphold such antidiscrimination laws without applying strict scrutiny despite their references to, and consideration of, race, because they protect persons of all races equally. *See, e.g.*, *Schuette*, 572 U.S. 291; *Rothe Dev.*, 836 F.3d at 68; *Cohen v. Brown Univ.*, 101 F.3d 155, 170-72 (1st Cir. 1996).

Like these longstanding antidiscrimination laws, the NYVRA's vote-dilution provision equally protects members of all racial groups from racial discrimination. As the Appellate Division correctly explained (A19-20), and as the Town no longer disputes, the NYVRA's protections against vote dilution may be invoked by individuals of any race who constitute a minority in the political subdivision at issue. And the statute's equal application to voters of all races is plain from its definition of "protected class" as "members of a race, color, or language-minority group, including individuals who are members of a minimum reporting category that has ever been officially recognized by the United States census bureau." Election Law § 17-204(5). This broad definition of "protected class" encompasses individuals of any race.[6]

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[6] If there were any ambiguity as to whether these provisions apply equally to all racial groups (which there is not), the canon of

(*continued on the next page*)

Moreover, the vote-dilution prohibition at issue here protects voters—of all races—from racial discrimination by prohibiting at-large election systems that have "the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution." *Id.* § 17-206(2)(a); *see id.* § 17-206(2)(b)(i) (vote dilution exists for at-large election systems where voting patterns of protected class members are racially polarized or totality-of-circumstances test is satisfied).

At-large election systems that result in vote dilution are racially discriminatory because they have disproportionate impacts on the voting power of members of a protected group. As explained *supra* at 9-10, at-large elections under conditions of racially polarized voting tend to have discriminatory effects on the voting power of politically cohesive minority groups. *See Shaw*, 509 U.S. at 640-41; *Gingles*, 478 U.S. at 47. And even when voting patterns are not racially polarized, there may be other circumstances under which at-large election methods have the racially

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constitutional avoidance would require that they be interpreted in such a nondiscriminatory manner to eliminate any doubt as to the statute's constitutionality. *See, e.g.*, *Matter of Lorie C.*, 49 N.Y.2d 161, 171 (1980).

discriminatory effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections.

The Town denies that the NYVRA is an antidiscrimination statute, arguing that antidiscrimination statutes prohibit regulated entities from engaging in racially discriminatory conduct. See Br. 36. But that is precisely what the NYVRA does by prohibiting political subdivisions from using at-large election methods that result in the racially discriminatory effects of vote dilution. In this respect, the NYVRA is akin to numerous race-neutral antidiscrimination statutes that prohibit a regulated entity from using a facially race-neutral system or practice—like a test or other selection criteria in making employment or housing decisions—found to cause racially discriminatory effects (often called "disparate impact claims"). For example, at the federal level, Title VII of the Civil Rights Act, the Fair Housing Act, and the Age Discrimination in Employment Act all authorize such disparate impact claims. *See Texas Dept. of Hous. & Community Affairs*, 576 U.S. 519; *Smith v. City of Jackson*, 544 U.S. 228 (2005); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In this State, both the New York State and City Human Rights Laws authorize

disparate impact claims. *See Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 489 (2001); *People v. New York City Tr. Auth.*, 59 N.Y.2d 343, 348-49 (1983). Courts have not applied strict scrutiny to these race-neutral disparate impact statutes, and the same result should obtain here.

The Town misses the mark in repeatedly emphasizing that its at-large election system is facially neutral and not intentionally discriminatory. See Br. 13, 22, 38. Disparate impact claims routinely do not require a showing of intentional discrimination or that the challenged practice expressly treats people differently based on race. Rather, liability is based on a disproportionately adverse effect on members of a protected class—such as when an employer's selection criteria unjustifiably prevent members of a protected class from an equal opportunity to be hired. *See New York City Tr. Auth.*, 59 N.Y.2d at 348-49. And Section 2 of the federal VRA prohibits electoral practices that, while facially neutral and not intentionally discriminatory, have the discriminatory effect of giving members of a protected class less opportunity than others to participate in the political process and to elect representatives of their choice. See *supra* at 8-9.

The NYVRA's vote-dilution prohibition is not subject to strict scrutiny on its face because, like these well-established, race-neutral antidiscrimination statutes, the NYVRA provides to all voters a cause of action to address the racially discriminatory effects of facially neutral practices. For this same reason, courts have upheld other States' voting rights acts against facial equal protection challenges. For example, in *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660 (2006), *cert. denied*, 552 U.S. 974 (2007), a California appellate court held that strict scrutiny does not apply to antidiscrimination laws like California's voting rights act because "they are not racially discriminatory." *Id.* at 682. As the court explained, the law "confers on members of any racial group a cause of action to seek redress for a race-based harm, vote dilution." *Id.* at 681. And creating "that kind of liability does not constitute the imposition of a burden or conferral of a benefit on the basis of a racial classification." *Id.* Similarly, the Supreme Court of Washington declined to subject that State's voting rights act to strict scrutiny because the act, on its face, does not create any racial classification. *Portugal v. Franklin County*, 1 Wash. 3d 629, 648 (2023), *cert. denied sub nom. Gimenez v. Franklin County*, 144 S. Ct. 1343 (2024). Rather, the statute "mandates equal voting

opportunities for members of every race, color, and language minority group." *Id.* at 658.

2. The remedies available to address unlawful vote dilution are facially neutral.

As the Appellate Division correctly determined, the Town's facial challenge fails for the additional, independent reason that the remedies authorized by the NYVRA are race-neutral and plainly do not require political subdivisions to use racial classifications in implementing any conceivable remedy.

The NYVRA's remedies are race-neutral on their face. If a court finds vote dilution in an action brought under the NYVRA, then it must "implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process." Election Law § 17-206(5)(a). The statute lists numerous different race-neutral remedies, including a district-based method of election, alternative election methods, new or revised districting or redistricting plans, a reasonable increase in the size of the governing body, and additional polling times and locations. *Id.*

On their face, these remedies neither classify voters by race nor require political subdivisions to engage in racial discrimination. A district-based election system, for example, is just as facially neutral as an at-large system, so long as district boundaries have not been unconstitutionally racially gerrymandered. See *infra* at 43. Indeed, districts, or "wards," are common among larger municipalities—including cities and large towns throughout the State. *See* N.Y. Dep't of State, Legal Mem. LG01, *The Ward System of Town Government* (2006); Town of Bethlehem, Ward Subcommittee, *Governance Study Options: The Ward System?* (June 11, 2012).

Alternative election systems are also race-neutral. A cumulative voting system, for example, affords all voters, regardless of their race, multiple votes that they can allocate as they choose, including by casting multiple votes for the same candidate. *See Village of Port Chester*, 704 F. Supp. 2d at 453 (cumulative voting is not racially discriminatory because "every voter is treated exactly the same"). And ranked-choice voting allows each voter to rank their preferences for elected officers, regardless of race. Thus, like the vote-dilution prohibition in § 17-206(2), the remedial provision in § 17-206(5)(a) "neither says nor implies that persons are

to be treated differently on account of their race." *Crawford*, 458 U.S. at 537.

As the Appellate Division explained (A21-22), U.S. Supreme Court precedent confirms that the NYVRA's remedial provision does not trigger strict scrutiny on its face. Contrary to the Town's argument (at 55), the Supreme Court has never held that strict scrutiny applies to Section 2 of the federal VRA on its face. Rather, the Court has "made clear that there is a difference between being aware of racial considerations and being motivated by them." *Allen v. Milligan*, 599 U.S. 1, 30 (2023) (quotation marks omitted). "The former is permissible; the latter is usually not." *Id.* Indeed, a political subdivision "always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw*, 509 U.S. at 646. But that sort of awareness of race in redistricting does not automatically mean that a political subdivision has unconstitutionally classified voters by race. *Id.* Instead, the Court has concluded that strict scrutiny is triggered *only* when racial considerations predominate above other redistricting considerations. *See Alexander v. S. Carolina State Conference of the NAACP*, 602 U.S. 1, 7-8 (2024); *Abbott v. Perez*,

585 U.S. 579, 620 (2018); *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 181-82 (2017); *Cooper v. Harris*, 581 U.S. 285, 292-93 (2017).

The remedial provision of the NYVRA does not require districts to be drawn using race as a predominant factor. In fact, where districting is ordered as a remedy, the statute is silent on where district lines should be drawn, instead setting forth a public hearing process for drawing district lines, *see* Election Law § 17-206(6)(a)-(b). The NYVRA thus allows political subdivisions to draw a remedial map based on traditional, race-neutral districting criteria, such as compactness and contiguity. Accordingly, under the U.S. Supreme Court cases on which the Town relies, political subdivisions like the Town could raise an as-applied challenge to specific district boundaries imposed as a remedy in a NYVRA action. *See Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 262-63 (2015). And in such an as-applied challenge, strict scrutiny would be properly applied only if the court determined that racial considerations predominated in the drawing of district boundaries. *See, e.g.*, *Wisconsin Legislature v. Wisconsin Elections Commn.*, 595 U.S. 398, 401-03 (2022) (per curiam).

No such as-applied challenge was raised here. Nor could such a challenge have been raised at this juncture because the trial court has not found vote dilution nor ordered any remedy for such vote dilution—let alone a remedy involving districting. The Appellate Division properly declined to strike down the statute on its face merely because it could be applied unconstitutionally in a hypothetical as-applied case. *See Sanchez*, 145 Cal. App. 4th at 688; *Portugal*, 1 Wash. 3d at 659.

The Town attempts to elide the Appellate Division's ruling by contending (at 38-39) that its arguments are focused solely on the NYVRA's liability provisions rather than its remedial provisions. But both the Town's constitutional theory and its invocation of the exception to the lack-of-capacity rule depend on the Town establishing that compliance with the statute would cause political subdivisions to act in violation of the constitutional rights of their voters in every conceivable application. And it is only through implementation of a remedy that the NYVRA's vote-dilution provisions require political subdivisions to do anything at all. Where a political subdivision implements a facially race-neutral remedy to cure the discriminatory effects of an electoral scheme, there is no plausible claim that such a remedy constitutes an express

racial classification. Nor does the municipality have any plausible claim that its implementation of such a race-neutral remedy will necessarily require it to classify its voters based on race. The availability of race-neutral remedies is thus, standing alone, fatal to the Town's facial challenge.

3. The Town's contrary arguments lack merit.

The Town raises various arguments seeking to apply strict scrutiny, but each argument fails.

a. Providing race-neutral remedies to redress racial discrimination does not trigger strict scrutiny.

The Town repeatedly argues that the NYVRA triggers strict scrutiny because it purportedly requires political subdivisions "to change their existing race-neutral election methods in order to give citizens lumped together by race a greater chance of electing more candidates of their choice." Br. 22-23, 26-29, 33-34. This argument is fatally flawed in multiple respects.

First, the NYVRA does not require political subdivisions to alter *race-neutral* methods of election because it prohibits only election

methods that have *racially discriminatory effects*. As explained *supra* Point II.A.1, although at-large methods of election are facially neutral, they may nonetheless have a racially discriminatory effect. And § 17-206(2)(b)(i) provides a remedy only when a plaintiff proves that an existing at-large electoral system has a racially discriminatory disparate impact on members of a protected class through vote dilution.

Second, the Town's argument that the NYVRA, in all its conceivable applications, requires political subdivisions to "lump" voters together by race is incorrect. The remedies authorized by the NYVRA are race-neutral and do not require political subdivisions to group voters by race. See *supra* Point II.A.2. To the extent "lumping" is meant to highlight that compliance with the NYVRA's vote-dilution prohibition involves comparing how a system or practice affects members of different racial groups, all laws that address racial discrimination involve consideration of evidence that implicates race. *See Raso*, 135 F.3d at 16. For example, a race-based employment-discrimination claim typically requires either direct evidence of racial animus or comparisons with similarly situated persons of a different race. *See, e.g.*, *Ellison v. Chartis Claims, Inc.*, 178 A.D.3d 665, 669 (2d Dep't 2019). And disparate impact claims

routinely involve grouping together individuals of the same race to determine whether a policy or practice adversely affects members of that race. *See, e.g.*, *Mandala v. NTT Data, Inc.*, 975 F.3d 202, 210 (2d Cir. 2020). Courts have repeatedly held that the consideration of race in this way does not trigger strict scrutiny. See *supra* Point II.A.1.

Third, implementing a race-neutral remedy to correct the racially discriminatory effects of vote dilution does not, as the Town contends, benefit voters of one racial group "at the expense" of voters of another racial group (Br. 38). Where vote dilution is proved, a court must order "appropriate remedies" to ensure only that members of the protected class at issue "have *equitable* access to fully participate in the electoral process." Election Law § 17-206(5)(a) (emphasis added). In other words, the NYVRA requires that political subdivisions give members of a protected class an *equal* opportunity to participate in the political process—not a *greater* opportunity than members of other racial groups.

Using race-neutral means to remedy racial discrimination does not trigger strict scrutiny merely because the relief benefits members of the protected class by removing the racially discriminatory practice and redressing the harms that the practice imposed. Indeed, many

antidiscrimination statutes require defendants to implement race-neutral remedies designed to mitigate the disparate impact of an existing law or policy. *See, e.g.*, 42 U.S.C. § 2000e-5(g)(1) (Title VII); *id.* § 3613(c)(1) (Fair Housing Act). For example, when a court orders a political subdivision to alter its hiring practices because those practices have a demonstrated disparate impact on a protected class, the intent of that remedy is to benefit members of the protected class. *See Hayden*, 180 F.3d at 46 (consent decree under Title VII ordering Nassau County to develop examination that would eliminate or significantly reduce "discriminatory impact on minority and female candidates"); *United States v. City of New York*, 717 F.3d 72, 97 (2d Cir. 2013).

The Town cites no authority for the proposition that such facially neutral remedies trigger strict scrutiny merely because they are intended to mitigate the racially discriminatory effects of an existing system or practice. To the contrary, the federal courts of appeals have repeatedly upheld such remedies against equal protection challenges. For instance, as noted, the First Circuit explained that a race-neutral "enforcement measure taken under [an antidiscrimination] statute" is not "automatically 'suspect' under the Equal Protection Clause." *Raso*, 135 F.3d at 16.

The Second Circuit has held that a change in law or policy motivated by an effort to "lessen the discriminatory impact" of the previous law or policy does not create an express racial classification. *Hayden*, 180 F.3d at 50. And the Ninth Circuit in *Higginson v. Becerra*, 786 F. App'x 705 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2807 (2020), upheld California's voting rights act, explaining that "it is well settled that governments may adopt measures designed 'to eliminate racial disparities through race-neutral means.'" *Id.* at 707 (quoting *Texas Dept. of Hous. & Community Affairs*, 576 U.S. at 545).

Indeed, the Town's argument—if accepted—would upend nearly all antidiscrimination statutes. Taken to its logical conclusion, the Town's theory would apply strict scrutiny to every antidiscrimination law, all of which look to evidence about race to discern if discrimination has been proven and provide remedies that benefit members of a protected class. And the Town's theory would apply strict scrutiny to any government action intended to reduce the racially discriminatory impacts of an existing law or policy. Applying strict scrutiny this broadly would upend decades of legal precedent and call into question the constitutionality of "every law … that creates liability for race-based harm." *Sanchez*,

145 Cal. App. 4th at 681. The Appellate Division correctly rejected the Town's argument.

b. The Town's arguments about racially polarized voting fail.

The Town is not aided by the argument that a municipality may be required to alter its election method based solely on proof of racially polarized voting in the municipality, and that racially polarized voting is a "common condition." See Br. 1, 5, 27-28, 30.

First, the Town is wrong that the NYVRA generally authorizes a vote-dilution remedy based *solely* on proof of racially polarized voting. Only political subdivisions that use *at-large* election methods may be liable for vote dilution where plaintiffs prove either that voting patterns of members of the protected class within the political subdivision are racially polarized or that the totality of circumstances establishes vote dilution. Election Law § 17-206(2)(b)(i). And as the Appellate Division correctly explained, to obtain relief, an NYVRA plaintiff must show "that there is an alternative practice that would allow the minority group to 'have equitable access to fully participate in the electoral process.'" (A23 (quoting Election Law § 17-206(5)(a)).) In other words, a plaintiff must

show the availability of a reasonable alternative practice that would improve the protected class's opportunity to elect candidates of their choice or influence the outcome of elections, compared to the status quo. *See Pico Neighborhood Assn. v. City of Santa Monica*, 15 Cal. 5th 292, 314-15 (2023) (interpreting California VRA).

Second, the Town provides no basis for its contention that allowing liability based on racially polarized voting in political subdivisions with at-large election methods triggers strict scrutiny. As explained, antidiscrimination statutes routinely compare the effects that a challenged practice (here, the use of an at-large electoral scheme) has on members of different racial groups, and courts have made clear that this analysis does not constitute an express racial classification. See *supra* Point II.A.1. This evidentiary pathway makes sense because at-large elections under conditions of racially polarized voting are a quintessential example of vote dilution and its racially discriminatory effects. See *supra* at 9-10.

Third, racially polarized voting is not necessarily "relatively easy to establish" or common (Br. 1). Instead, proving racially polarized voting often involves complex and fact-intensive analyses. For example, because New York and other States do not record the race of individual voters or

how they voted, racially polarized voting is typically proven in federal VRA cases through statistical analysis conducted by experts. Such analyses often compare demographic data about race (such as census data) to available aggregate vote totals in a geographical area, and then draw inferences about how particular racial groups likely voted in particular elections. *See, e.g.*, *Clerveaux*, 984 F.3d at 225-26. Courts considering whether such analyses established racially polarized voting have also considered other factors. For example, they have given more weight to evidence about voting patterns in some elections than others—giving particular weight to elections in the jurisdiction and for the office at issue. *See, e.g.*, *Pope v. County of Albany*, 94 F. Supp. 3d 302, 319, 333 (N.D.N.Y. 2015); *Luna v. County of Kern*, 291 F. Supp. 3d 1088, 1119-20, 1129 (E.D. Cal. 2018); *see also Serratto v. Town of Mount Pleasant*, 233 N.Y.S.3d 885 (Sup. Ct. Westchester County 2025) (denying plaintiffs' cross-motion for summary judgment based on failure to show racially polarized voting as a matter of law).[7]

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[7] Whether the evidence in particular cases will ultimately be sufficient to establish racially polarized voting under the NYVRA, or whether state courts should analyze evidence about racially polarized voting in ways that are similar to, or different from, the ways that federal courts

(*continued on the next page*)

Federal precedent further shows that patterns of racially polarized voting are neither always present nor necessarily easy to prove. *See, e.g.*, *Pierce v. N. Carolina State Bd. of Elections*, 97 F.4th 194, 208, 212-18 (4th Cir. 2024). Especially for local elections in smaller municipalities, it is by no means obvious that a plaintiff would be able to furnish statistical evidence showing racially polarized voting. And defendants may provide evidence to show that racially polarized voting is not present in the municipality at issue. Tellingly, the Town contended below that racially polarized voting is *not present* in the Town. (Defs.' Response to Pls.' Statement of Material Facts, *supra*, at 21-22.)

Ultimately, a court evaluating a vote-dilution claim against a political subdivision with at-large elections will need to consider the evidence, likely weighing competing testimony from both experts and non-experts. The court will need to decide, based on the facts presented, whether vote dilution has been established, based on either racially polarized voting or the totality of the circumstances. The need to engage in that analysis does not trigger strict scrutiny. Indeed, even if the NYVRA allowed a remedy

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analyze such evidence in Section 2 cases, are not matters properly raised in this facial challenge.

based solely on racially polarized voting, and even if that presented constitutional concerns (neither of which is true), the Town's facial challenge would still fail because plaintiffs bringing claims against municipalities with at-large elections may establish vote dilution under the totality of the circumstances.

c. The vote-dilution prohibition is not akin to affirmative action or segregation policies.

The Town errs in analogizing the NYVRA's vote-dilution prohibition to certain affirmative action or segregation policies that have long been subject to strict scrutiny.

First, the vote-dilution prohibition is not analogous to the type of university affirmative action admission policies at issue in cases like *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* ("*SFFA*"), 600 U.S. 181 (2023). *Contra* Br. 25-26, 30-33, 37. The affirmative action policies at issue in *SFFA* were subject to strict scrutiny because they distributed benefits—a "plus" factor in university admission—to members of only certain racial minority groups, and *not* to other racial groups. 600 U.S. at 209-10. The NYVRA, by contrast, does not give members of only certain racial groups a protection or advantage. Instead,

as explained, the NYVRA equally benefits members of *all* racial groups by protecting them from election systems or practices that have racially discriminatory effects. *See Robinson v. Ardoin*, 86 F.4th 574, 593 (5th Cir. 2023) (rejecting comparison between voting redistricting and affirmative action); *see also Singleton v. Allen*, 690 F. Supp. 3d 1226, 1317 (N.D. Ala. 2023) (per curiam) (three-judge panel); *Coads v. Nassau County*, 86 Misc. 3d 627 (Sup. Ct. Nassau County 2024) (NYVRA is not analogous to affirmative action because NYVRA "does not identify any race upon which any preference is conferred").

Moreover, affirmative action policies like the ones at issue in *SFFA* have long been subject to strict scrutiny, *see, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *SFFA* held that the university defendants had not *satisfied* strict scrutiny, 600 U.S. at 213. This holding has no bearing on whether a race-neutral antidiscrimination statute like the NYVRA, which equally protects all voters from racially discriminatory vote dilution, is subject to strict scrutiny in the first place.

The Town also misses the mark in comparing the NYVRA to a hypothesized affirmative action policy that gives a "plus" factor to any university applicant "of any race that was presently underrepresented at

the college." Br. 33. As an initial matter, giving a "plus" factor to members of only one racial group is not a race-neutral remedy, whereas the NYVRA's remedies are race-neutral on their face. And, in any event, this hypothesized scenario improperly assumes away the existence of a discriminatory practice that causes disparate effects on members of one racial group. If a college's existing admissions criteria had a discriminatory effect on members of certain racial groups, *SFFA* would not preclude the college from remedying that effect by using different race-neutral criteria. Put another way, liability under the NYVRA is based on the discriminatory effects of a specific identified electoral practice—not merely a generalized lack of electoral success of a particular racial group.

Second, there is no merit to the Town's reliance on the U.S. Supreme Court's decision in *Johnson v. California*, 543 U.S. 499 (2005), which applied strict scrutiny to a prison policy that segregated incarcerated individuals by race. The Town argues that such segregation policies are akin to the NYVRA on the ground that they too could be said to equally benefit or burden members of all racial groups. See Br. 31-32. But the Court in *Johnson* explained that such segregation policies are subject to strict scrutiny—even if they "equally" segregated incarcerated

individuals—because the Court long ago "rejected the notion that separate can ever be equal—or 'neutral.'" 543 U.S. at 506 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 [1954]).

The anti-segregation principle embraced by *Johnson* has no application here because the NYVRA does not require political subdivisions to separate, or distribute benefits or burdens, based on race. Instead, it provides facially race-neutral remedies to remedy the effects of a discriminatory practice. These remedies do not distribute benefits or burdens based on race because they do not prescribe one rule for members of one racial group and another for a different racial group. *See United States v. Skrmetti*, 145 S. Ct. 1816, 1856-57 (2025) (Alito, J. concurring) (explaining that classifying based on sex means prescribing one rule for women and another for men).

Moreover, segregation policies burden *individuals* based on racial classifications—an incarcerated individual will be housed according to their race. The same cannot be said of the NYVRA because none of the remedies available under the statute treats *individuals* differently based on race or contemplates anything akin to segregation. *See Sanchez*,

145 Cal. App. 4th at 681.[8] Strict scrutiny thus does not apply to the Town's facial challenge.

d. The Equal Protection Clause does not require the NYVRA to parallel the federal VRA.

The Town repeatedly emphasizes that the NYVRA is not the same as Section 2 of the federal VRA (Br. 4-5, 48-53), but the differences between the two statutes do not trigger strict scrutiny or otherwise implicate the Equal Protection Clause.

As an initial matter, the NYVRA is similar to the federal VRA in many ways even though the statutes differ from one another in some respects. Both statutes combat the racially discriminatory effects of vote dilution. *See Allen*, 599 U.S. at 13. And as the following table demonstrates, both statutes look to many of the same factors to analyze whether the challenged election system or practice is causing racially

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[8] The Town's reliance on *Powers v. Ohio*, 499 U.S. 400 (1991), which applied strict scrutiny to race-based peremptory challenges, is similarly misplaced. Using race-based peremptory challenges introduces a racial classification where none existed, and burdens individuals based on their race by striking them from the jury. No such circumstances exist under the NYVRA.

discriminatory effects and, if so, whether an appropriate remedy is available. *See Gingles*, 478 U.S. at 50-51.

Section 2 of VRA	**NYVRA**
Gingles Precondition 1: minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district.	Whether protected class is geographically compact or concentrated may be a factor in determining an appropriate remedy. § 17-206(2)(c)(viii).
Gingles Precondition 2: minority group must be politically cohesive.	When political subdivision uses at-large elections, vote dilution exists when voting patterns of members of the protected class within the political subdivision are racially polarized. § 17-206(2)(b)(i)(A). Definition of racially polarized voting requires divergence in preferences of members of protected class from preferences of the rest of the electorate. § 17-204(6).
Gingles Precondition 3: majority must vote as a bloc to usually defeat minority's preferred candidate.	As above, definition of racially polarized voting requires divergence in preferences of members of protected class from preferences of the rest of the electorate. § 17-204(6).

If *Gingles* preconditions are met, then the court must analyze the totality of the circumstances to determine whether the political process is equally open to the minority group.	When political subdivision uses at-large elections, vote dilution exists if, under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired. § 17-206(2)(b)(i)(B). Upon finding vote dilution, the court must implement appropriate remedies to ensure that protected classes have equitable access to fully participate in the electoral process. § 17-206(5)(a).

To be sure, the two statutes differ in some ways, but those differences do not implicate the Equal Protection Clause. For example, the NYVRA does not require a plaintiff to demonstrate the first *Gingles* precondition—a large and compact minority population. But that *Gingles* factor reflects the fact that the main remedies for vote dilution available under the federal VRA are either instituting a system of single-member districts, or creating majority-minority districts within such a system. *See Portugal*, 1 Wash. 3d at 638; *see also Growe v. Emison*, 507 U.S. 25, 40 (1993). The NYVRA, by contrast, provides for many remedies to combat racially discriminatory vote dilution that do not involve drawing districts at all, let alone drawing single-member, majority-minority

districts. Accordingly, as the Appellate Division correctly observed (A22-23), it makes sense that the NYVRA does not always require a showing of compactness to establish vote-dilution liability and instead allows consideration of compactness where a remedy is sought that does involve drawing single-member districts. The Equal Protection Clause does not require a State to mandate consideration of a factor that would not be relevant to most applications of its state-law ban on vote dilution.

More broadly, and in any event, the differences between the two statutes reflect different legislative policy decisions and do not have constitutional significance. The Supreme Court derived the *Gingles* preconditions and totality-of-the-circumstances test from the VRA's language and legislative history—not from any demands of the Equal Protection Clause. *See Gingles*, 478 U.S. at 48-51; *see also Robinson*, 86 F.4th at 594-95 (rejecting "attempts to equate an Equal Protection racial gerrymandering claim" with a "Section 2 Voting Rights Act claim"). Thus, any differences between the statutes reflect policy choices that the State may legitimately make in the exercise of both its "broad powers to determine the conditions under which the right of suffrage may be exercised," *Shelby County*, 570 U.S. at 543, and its general police power

to address racial discrimination, *see, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984).

The Town's reliance (at 51, 55, 56) on *Bartlett v. Strickland*, 556 U.S. 1 (2009), and *League of United Latin American Citizens v. Perry* ("*LULAC*"), 548 U.S. 399 (2006), is also unavailing. *Bartlett* rejected the suggestion that Section 2 required "crossover districts," where racial minorities comprise less than a majority of a district's electorate but are nonetheless able to elect preferred candidates with the help of white crossover voting, in order to avoid "unnecessarily infus[ing] race into virtually every redistricting, raising serious constitutional questions." 556 U.S. at 21. Earlier, and for the same reason, the plurality opinion in *LULAC* rejected the suggestion that Section 2 required "influence districts," where a minority racial group is not the majority but can exert significant influence over elections. 548 U.S. at 446. The constitutionality of requiring crossover or influence districts is not a question presented here, where neither remedy has been proposed and no particular remedy has been adopted. The rulings in *Bartlett* and *LULAC* have no bearing on the Town's *facial* challenge to the NYVRA, which contemplates

numerous possible race-neutral remedies to redress discriminatory vote dilution.

B. The NYVRA Satisfies Rational Basis Review.

Because the NYVRA does not impose any express racial classification, it is subject only to rational basis review. *See Aviles*, 28 N.Y.3d at 502-03. The Town cannot show that the NYVRA fails to meet this minimal standard.

The NYVRA's prohibition against vote dilution rationally advances the Legislature's aim of eliminating discriminatory conditions in elections. The Legislature determined that "New York has an extensive history of discrimination … in voting" and that "vote dilution remains prevalent." Sponsor's Mem., in Bill Jacket, *supra*, at 8. The public record bears this out. *See, e.g.*, *Clerveaux*, 984 F.3d 213 (East Ramapo Central School District's at-large election system unlawfully diluted votes of Black and Latino residents); *Flores v. Town of Islip*, No. 18-cv-3549, 2020 WL 6060982 (E.D.N.Y. Oct. 14, 2020) (consent decree in case alleging that Town of Islip's at-large electoral system unlawfully diluted votes of Hispanic and Latino residents); *Village of Port Chester*, 704 F. Supp. 2d

411 (requiring Village of Port Chester to remedy unlawfully dilutive at-large electoral system).

The NYVRA's prohibition against vote dilution is a rational means of remedying discriminatory electoral practices. *See Sanchez*, 145 Cal. App. 4th at 680 (California's voting rights act "readily passes" rational basis review); *Portugal*, 1 Wash. 3d at 658 (similar as to Washington's voting rights act). And the Town does not argue otherwise. Accordingly, this Court should affirm the Appellate Division's order upholding the statute against the Town's facial challenge.

C. Even If Strict Scrutiny Applied, the Town's Facial Challenge Would Still Fail.

Even if the Court were to hold that the NYVRA's vote-dilution provision is subject to strict scrutiny, the Town's facial challenge should be rejected, because the Town has not established that every possible application of the provision would fail strict scrutiny.

The Town acknowledges (at 42) that a State has a compelling interest in remedying discrimination. *See New York State Club Assn. v. City of New York*, 69 N.Y.2d 211, 223 (1987), *aff'd*, 487 U.S. 1 (1988). As noted, the legislative history and the public record reflect New York's

history of discriminatory voting practices, which have resulted in "a persistent gap between white and non-white New Yorkers in political participation and elected representation." Sponsor's Mem., in Bill Jacket, *supra*, at 7. The legislative record also includes analyses of present-day discriminatory conditions in some New York elections, and a U.S. Senate report about the 1982 amendment to Section 2 of the federal VRA—which documents the lengthy history of discriminatory vote dilution in the United States. *See* Office of Sen. Zellnor Myrie (comp.), *Legislative Record – John R. Lewis Voting Rights Act of New York* (June 2022); Perry Grossman, Leadership Conference on Civ. & Human Rights, *Current Conditions of Voting Rights Discrimination: New York* (Oct. 6, 2021); S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982). Accordingly, the record supports the State's compelling interest in remedying this history of racially discriminatory vote dilution.

Although the Town argues that the NYVRA is not narrowly tailored on its face, there are possible applications of the statute that are narrowly tailored to remedying the effects of a history of past discrimination. A court's "'intensely local appraisal' of the electoral mechanism at issue" may demonstrate that a particular remedy satisfies strict scrutiny. *Allen*,

599 U.S. at 19. For example, the trial court here could find that Black and Hispanic voters in Newburgh have experienced a history of racial discrimination that, along with other evidence regarding the totality of the circumstances, establishes unlawful vote dilution.[9] *See* Election Law § 17-206(3)(a). And the court could also find that district-based elections or an alternative election method would be a narrowly tailored remedy to redress that history of racial discrimination.

Moreover, as the Appellate Division observed (A24), there is a core of cases in which both the federal VRA and the NYVRA require a political subdivision to remedy racially discriminatory vote dilution, including by implementing a district-based system. The Town does not dispute that the federal VRA is narrowly tailored.[10] And if a plaintiff could show vote

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[9] Plaintiffs provided substantial evidence of such historical discrimination (*see* Pls.' Statement of Material Facts, *supra*, at 12-14; Sandoval-Strausz Report (June 2024), NYSCEF Doc. No. 84), which is sufficient to raise triable issues of fact about the existence and extent of historical discrimination.

[10] The Town's argument that the Supreme Court is "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" (Br. 4) is speculative. It is based on no more than an order restoring certain VRA cases to the calendar for reargument. *See Louisiana v. Callais*, 2025 WL 1773632 (June 27, 2025). Subsequently, the Supreme Court ordered supplemental

(*continued on the next page*)

dilution under the federal VRA, the plaintiff could likely also show vote dilution under the NYVRA. Given this overlap, the Town cannot show "that no set of circumstances exists under which" the NYVRA may be applied constitutionally. *Matter of Moran Towing*, 99 N.Y.2d at 448.

Thus, even if the NYVRA were subject to strict scrutiny on its face—and for all the reasons explained above, it is not—then the Court should still affirm the order below because the Town fails to show that every conceivable application of the statute would fail to satisfy strict scrutiny.

POINT III

THE COURT SHOULD NOT CONSIDER, MUCH LESS GRANT, THE TOWN'S REQUEST TO CONSTRUE THE NYVRA AS REQUIRING PROOF OF ADDITIONAL ELEMENTS

In the alternative, the Town argues that the Court should apply the canon of constitutional avoidance and construe the NYVRA to require a plaintiff to prove three additional elements: (i) that a reasonable remedy

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briefing in those cases concerning whether Louisiana's "intentional creation of a second majority-minority congressional district" was unconstitutional. *See Louisiana v. Callais*, 2025 WL 2180226 (Aug. 1, 2025). The Court should draw no inferences from either order, and should instead base its decision on existing precedent. Moreover, the outcome of *Callais* is irrelevant to this case, which does not involve the drawing of any majority-minority district.

is available that will be less dilutive than the challenged electoral system; (ii) that members of the protected class lack a reasonable opportunity to elect candidates of their choice; and (iii) that vote dilution is the result of discriminatory conduct by the political subdivision. *See* Br. 58-64.

The Court should not consider the Town's argument at all. First, the Town never raised this alternative argument to the trial court or the Appellate Division and thus failed to preserve it for this Court's review. *See Sabine v. State of New York*, 43 N.Y.3d 1015, 1017 (2024). Second, there is no need to apply the canon of constitutional avoidance because the statute is plainly constitutional on its face. See *supra* Point II.

Moreover, for each of the Town's requests, there are additional reasons for the Court to either reject or decline to consider it. As to the Town's first request, there is no need for this Court to clarify the Appellate Division's ruling that the NYVRA requires a plaintiff to establish that there is an alternative practice that would allow members of the protected class to have equitable access to fully participate in the electoral process. (A23.) Plaintiffs, not the Town, suggested this interpretation below, and the Appellate Division correctly adopted it based on the language of the statute. To the extent the Town is arguing that there

must be an appropriate remedy that is less dilutive of the protected class members' voting power than the challenged electoral practice, the parties now agree on this point and the Appellate Division already correctly adopted it. See *supra* at 21, 51. Any further rulings on this score should await an actual application of the statute and an actual ordered remedy.

As to the Town's second and third requests, no party suggested below that the statute should be construed in these ways. As a court of last resort, this Court should not address such unpreserved issues in the first instance. *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 825 (2003). If the Court were to address these requests, the Court should reject them. Neither proposed element has any grounding in the statute. Nor does either proposed element make sense. The Town fails to explain what it would mean to show that members of the protected class "do not have a reasonable opportunity to elect the candidate of their choice" (Br. 59), or how this element would differ from the statute's totality-of-the-circumstances inquiry.

The Town likewise fails to explain what it would mean to require a plaintiff to show that vote dilution "is the result of discrimination by the political subdivision." Br. 60. As explained, the NYVRA already targets

discriminatory conduct by political subdivisions, i.e., their use of electoral practices that cause racially discriminatory effects. If the Town is suggesting that proof of intentional discrimination be required, that is plainly incorrect. Such an element could not plausibly be implied into the NYVRA because the statute explicitly provides that "evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class is not required." Election Law § 17-206(2)(c)(v). And while a violation of the Equal Protection Clause itself requires intent to discriminate, the Clause in no way mandates that States require proof of intent in order to establish statutory liability for racial discrimination. Like many other disparate impact statutes, including Section 2 of the federal VRA—none of which has been subject to strict scrutiny on its face—the NYVRA creates an effects-based test for liability that does not require intentional discrimination. Indeed, Congress amended Section 2 to override the Supreme Court's decision in *City of Mobile*, 446 U.S. at 63, which had interpreted the VRA as requiring proof of purposeful discrimination. The Legislature's decision to use an effects-based test to address racially discriminatory vote dilution does not trigger strict scrutiny.

CONCLUSION

The Court should affirm the Appellate Division's order.

Dated: Albany, New York
August 5, 2025

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York

By: _____
BEEZLY J. KIERNAN
Assistant Solicitor General

The Capitol
Albany, New York 12224
(518) 776-2023
Beezly.Kiernan@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
JUDITH VALE
Deputy Solicitor General
BEEZLY KIERNAN
Assistant Solicitor General
SANDRA PARK
Bureau Chief, Civil Rights
LINDSAY MCKENZIE
Section Chief, Civil Rights
DEREK BORCHARDT
Assistant Attorney General
of Counsel

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Beezly J. Kiernan, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 13,996 words, which complies with the limitations stated in § 500.13(c)(1).

BEEZLY J. KIERNAN