APL-2025-00110

State of New York
Court of Appeals

ORAL CLARKE, ROMANCE REED, GRACE PEREZ, PETER RAMON, ERNEST TIRADO, AND DOROTHY FLOURNOY,
Plaintiffs-Respondents,

against

TOWN OF NEWBURGH AND TOWN BOARD OF THE TOWN OF NEWBURGH,
Defendants-Appellants,

and

LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Intervenor-Respondent.

BRIEF FOR *AMICUS CURIAE* CAMPAIGN LEGAL CENTER IN SUPPORT OF PLAINTIFFS-RESPONDENTS

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On Certified Question from the Appellate Division – Second Department
Docket No. 24-11753

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August 22, 2025

Respectfully submitted,

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INTRODUCTION

In 2022, New York enacted the John R. Lewis Voting Rights Act of New York ("NYVRA") to guarantee New York voters equal access to the political process and to eliminate discriminatory local election systems. In doing so, New York joined several states that have adopted similar state voting rights acts ("state VRAs") that build upon the protections of the federal Voting Rights Act of 1965 ("federal VRA") and confront modern forms of voting discrimination.

The NYVRA shares key provisions with the California Voting Rights Act ("CVRA") and the Washington Voting Rights Act ("WVRA"), including a ban on discriminatory vote dilution in local election systems. *See* N.Y. Elec. Law § 17-206(2). Plaintiffs-Respondents allege that the at-large election system maintained by Defendants-Appellants Town of Newburgh and its Town Board (collectively, "the Town") violates this prohibition by diluting the voting strength of Black and Latino citizens. Rather than defend that system on the merits, the Town asks this Court to strike down the NYVRA's vote dilution ban on its face under federal and state equal protection principles.

This Court should reject that invitation. As the Appellate Division recognized, the Town lacks capacity to raise such a defense. *See* Resp.-Br. at 24-42; Br. for Int. Att'y Gen. at 22-26. But if the Court nevertheless reaches the question, it should follow the reasoning of other state and federal courts, which have uniformly upheld

similar provisions of the CVRA and WVRA against identical constitutional challenges. Those decisions confirm that the NYVRA's vote dilution ban is a race-neutral anti-discrimination law to which strict scrutiny does not apply; it aligns with other anti-discrimination laws that prohibit discriminatory state action; and the Town cannot satisfy the extraordinary showing required to invalidate the ban on its face.

ARGUMENT

I. The NYVRA aligns with other state VRAs, all of which have consistently withstood similar equal protection challenges.

The NYVRA's close mirroring of the CVRA and WVRA reinforces the validity of its design and operation, as both of those laws have been repeatedly upheld against constitutional challenges.

A. Like the CVRA and WVRA, the NYVRA is not a racial classification subject to strict scrutiny.

As the Appellate Division concluded, Defendants' challenges to the NYVRA under the Equal Protection Clause of the U.S. Constitution and the New York Constitution fail because the NYVRA is a race-neutral anti-discrimination law to which strict scrutiny does not apply, as it does not classify voters based on race. *Clarke v. Town of Newburgh*, 226 N.Y.S.3d 310, 330 (2d Dep't 2025).

The touchstone of whether a statute classifies based on race is whether it "distributes burdens or benefits on the basis of individual racial classifications."

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (citations omitted). Like the CVRA and WVRA, the NYVRA does no such thing.

Like Section 2 of the federal VRA and other state VRAs, the NYVRA remedies election systems that "hav[e] 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." N.Y. Elec. Law § 17-206(2)(a); *see also* 52 U.S.C. § 10301(a); Wash. Rev. Code § 29A.92.030(1)(b); Cal. Elec. Code § 14027; 2025 Colo. Sess. Laws 750-51 (Colo. Rev. Stat. § 1-47-106(1)) (effective Jan. 1, 2026); Minn. Stat. § 200.54(2); Conn. Gen. Stat. § 9-368j(b); Or. Rev. Stat. § 255.405(1)(a); Va. Code Ann. § 24.2-126(A). A protected class includes members of any "race, color, or language-minority group." N.Y. Elec. Law § 17-204(5). After finding a violation of the NYVRA, courts "shall implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process." *Id.* § 17-206(5)(a).

In other words, when a local election system denies *any* racial group an equal opportunity to elect their preferred candidates or influence elections, the NYVRA is available to remedy the disparity. *See Clarke*, 226 N.Y.S.3d at 326 (The NYVRA "should be construed as allowing members of all racial groups, including white voters, to bring vote dilution claims[.]") (citations omitted). Because the NYVRA's guarantee of equal opportunity extends to voters of any race, the law does not

distribute benefits or burdens based on race and thus does not trigger strict scrutiny. *See Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 547 (3d Cir. 2011) ("A racial classification occurs only when an action 'distributes burdens or benefits on the basis of' race.") (quoting *Parents Involved*, 551 U.S. at 720).

State and federal courts, like the Appellate Division with the NYVRA, have applied this reasoning to uphold the CVRA and WVRA against similar equal protection challenges. *See Higginson v. Becerra*, 786 F. App'x 705, 706-07 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2807 (2020); *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 681 (2006); *Portugal v. Franklin Cnty.*, 530 P.3d 994, 1006 (Wash. 2023), *cert. denied*, 144 S. Ct. 1343 (2024). These courts have declined to apply strict scrutiny because those laws, like the NYVRA, do not have the touchstone element of a racial classification: They do not "allocate benefits or burdens on the basis of race." *Sanchez*, 145 Cal. App. 4th at 680; *Higginson*, 786 F. App'x at 706-07 (citing *Parents Involved*, 551 U.S. at 720); *Portugal*, 530 P.3d at 1011.

As these courts have recognized, these laws protect the rights of *all* voters because any voter who can prove the threshold elements to establish vote dilution under a state VRA is entitled to its protection. *See Sanchez*, 145 Cal. App. 4th at 666; *Portugal*, 530 P.3d at 1009 ("All . . . voters are protected from discrimination on the basis of race, color, or language minority group."). In California, courts reviewing the CVRA have further reasoned that predicating liability on the existence

of racially polarized voting ("RPV") "do[es] not introduce a racial classification" to the statute. *Sanchez*, 145 Cal. App. 4th at 666, 680, 686 (rejecting argument to apply strict scrutiny to CVRA); *see also id.* at 687-88 (rejecting argument that differences between the CVRA and federal VRA render the CVRA unconstitutional); *Higginson*, 786 F. App'x at 706-07 (finding that plaintiff failed to allege that the CVRA distributes burdens or benefits based on race). And in Washington, the state supreme court likewise held that the WVRA's requisite considerations of both RPV and a lack of equal opportunity "do[] not compel local governments to do anything based on race." *Portugal*, 530 P.3d at 1010.

Far from distributing benefits or burdens to individuals based on race, state VRAs impose liability on local jurisdictions for vote dilution based on a protected class' experience of racial discrimination,[1] as demonstrated by RPV and/or other circumstances. *See id.*; *Sanchez*, 145 Cal. App. 4th at 680. In New York, the legislature has determined that racially discriminatory impairment may be reflected in either RPV or the totality of circumstances. *See* N.Y. Elec. Law § 17-206(2)(b)(i).

This was a reasonable choice. The totality-of-the-circumstances inquiry, of course, expressly incorporates consideration of past and present racial discrimination

[1] The NYVRA, like Section 2 of the federal VRA, does not require a direct showing of *intentional* discrimination. N.Y. Elec. Law § 17-206(2)(c)(v); *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) ("[A] violation of § 2 could be proved by showing discriminatory effect alone," rather than having to show "a discriminatory purpose.").

bearing on the ability of individuals to participate in the political process. *See* N.Y. Elec. Law § 17-206(3). The same is true of RPV, implicitly, because the circumstances that cause RPV are often "attributable to past or present racial discrimination." *Thornburg v. Gingles*, 478 U.S. 30, 65 (1986) (plurality). When a large share of minority voters in a jurisdiction consistently supports the same candidates (contra a majority that consistently votes down those candidates), that extraordinary racial cohesion and divergence in electoral preferences is itself likely evidence of previous or ongoing racial discrimination in the jurisdiction—not mere happenstance. As the *Gingles* plurality recognized, it is improbable that such deep, persistent divisions in electoral preferences would exist absent the influence of race and a shared history of discrimination that shapes those preferences—often manifested in, among other things, shared socioeconomic disadvantages and a lack of government responsiveness to minority voters' concerns. *See id.* 64-65. High levels of RPV are thus a strong indicator of the presence of past and ongoing discrimination in a jurisdiction. The U.S. Supreme Court has also "long recognized" that maintaining an at-large election system amid high levels of RPV creates a grave risk of minority vote dilution. *Id.* at 47; *see also Ala. State Conf. of NAACP v. Alabama*, 612 F. Supp. 3d 1232, 1270 (M.D. Ala. 2020) ("Racial bloc voting, also termed racially polarized voting, is the linchpin of a § 2 vote dilution claim."). The

legislature here was well within its reasonable judgment to predicate vote dilution liability on the existence of RPV or the totality of the circumstances.

Further, as the Appellate Division rightly recognized—contrary to the Town's repeated insistence, App.-Br. at 1, 27-28, 58-59—the NYVRA does not impose liability based on the existence of RPV or any one circumstance alone. Like the CVRA and WVRA, the NYVRA also requires proof that a challenged practice impairs a protected class' electoral opportunity "as a result of vote dilution," which in turn requires showing that a reasonable alternative election system would avoid the dilutive effect. N.Y. Elec. Law §§ 17-206(2)(a)-(b); *see Clarke*, 226 N.Y.S.3d at 330; *Pico Neighborhood Ass'n v. City of Santa Monica*, 534 P.3d 54, 64-65 (Cal. 2023), as modified (Sept. 20, 2023) (citing Cal. Elec. Code §§ 14027, 14028(a)); *Portugal*, 530 P.3d at 1003.

The Supreme Court of California emphasized this point in *Pico* when it rejected the argument that a CVRA plaintiff had to show RPV, and nothing more, to establish liability. *Pico*, 534 P.3d at 64. The Court instead held that a plaintiff must also prove a "real world effect" by identifying an alternative system or map against which the challenged system can be measured, because "dilution" is a "term of art" that presupposes such a benchmark and otherwise would be rendered surplusage. *Id.* at 64-65, 70.

Similarly, under the NYVRA's vote dilution ban, plaintiffs may establish discriminatory impairment either through evidence of RPV or under the totality of the circumstances, but they must always pair that showing with proof that an alternative system would not produce the same dilutive effect. *See* N.Y. Elec. Law §§ 17- 206(2)(a)-(b); *Pico*, 534 P.3d at 68 ("Determining whether the protected class has the potential to elect its preferred candidate under some alternative system requires a functional analysis of the political process in that locality and a searching practical evaluation of the past and present reality.") (citing *Gingles*, 478 U.S. at 62-63) (internal quotation marks omitted). Thus, the NYVRA requires not merely the presence of RPV, but also proof that such voting patterns translate to an impairment of a protected class' electoral opportunity.[2]

In any event, the fact that the NYVRA—and virtually every other anti-discrimination statute—requires consideration of race to identify racial discrimination does not subject the law to strict scrutiny under the Equal Protection

[2] Also contrary to the Town's assertion, *see* App.-Br. at 51-52, the NYVRA does not eliminate *Gingles*' second precondition of political cohesion. The statute defines RPV 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." N.Y. Elec. Law § 17-204(6). This definition necessarily encompasses the cohesion element: Protected-class members must consistently support certain candidates, while other groups consistently support different candidates, with a gap separating the preferences of these two groups. In other words, the NYVRA's RPV element implicitly encompasses both intra-group cohesion and inter-group divergence—the very dynamic recognized in federal law, where proof of racially polarized voting "merges the second and third *Gingles* preconditions." *Coads v. Nassau Cnty.*, 86 Misc. 3d 627, 652 (Sup. Ct. Nassau County 2024); *see also Portugal*, 530 P.3d at 1003 (noting that the WVRA's polarized voting "requirement corresponds to the second and third *Gingles* factors.").

Clause. *See Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 545 (2015) ("[R]ace may be considered in certain circumstances and in a proper fashion."). Likewise, the NYVRA's reference to race-related concepts does not amount to classifying voters based on race because the U.S. Supreme Court "has never suggested that mere reference to [a suspect classification] is sufficient to trigger heightened scrutiny." *United States v. Skrmetti*, 605 U.S. __, 145 S. Ct. 1816, 1820 (2025). For this reason, the NYVRA's requirement that plaintiffs present evidence of vote dilution does not change the fact that the law is facially race-neutral.

In sum, California, Washington, and federal courts have repeatedly held that the CVRA and WVRA are facially race-neutral, that strict scrutiny therefore does not apply to the state VRAs, and that those state VRAs are constitutional, thereby rejecting arguments that are nearly identical to those made by the Town challenging the NYVRA. *Pico*, 534 P.3d at 70; *Higginson*, 786 F. App'x at 706-07; *Sanchez*, 145 Cal. App. 4th at 666, 678-83; *Portugal*, 530 P.3d at 1006. If this Court reaches the merits of the Town's constitutional defense, it too should hold that the NYVRA is race-neutral on its face and that strict scrutiny thus does not apply. And, because "[c]uring vote dilution is a legitimate government interest" and the NYVRA is rationally related to that interest, the law easily passes rational basis review just as the CVRA and WVRA did. *Sanchez*, 145 Cal. App. 4th at 680; *Portugal*, 530 P.3d at 648.

B. The differences between state VRAs and Section 2 of the federal VRA are constitutionally permissible.

State VRAs may differ from Section 2 of the federal VRA without violating constitutional principles. These statutes, like the NYVRA, are designed to address vote dilution in ways tailored to each state's unique organization of political subdivisions and electoral conditions. Such differences, including variations in evidentiary standards and analytical frameworks, are well within states' authority to consider in fashioning anti-discrimination rules.

i. The NYVRA's omission of Gingles *I to prove liability is constitutionally permissible.*

Like the CVRA and WVRA, the NYVRA does not incorporate the federal VRA's first *Gingles* precondition ("*Gingles* I") as a requirement for liability. *See* N.Y. Elec. Law § 17-206(2)(c); Cal. Elec. Code § 14028(c); Wash. Rev. Code § 29A.92.030(5). Under Section 2 of the federal VRA, *Gingles* I requires a plaintiff to show that the protected group is "sufficiently large and geographically compact" to constitute a voting majority in a hypothetical single-member district. *Gingles*, 478 U.S. at 50.

The absence of *Gingles* I from the liability determination under the NYVRA does not render the Act unconstitutional. The *Gingles* preconditions, including *Gingles* I, are not conditions on Section 2's constitutionality but rather elements the U.S. Supreme Court has held are required by the federal VRA's text. *See Gingles*,

478 U.S. at 50 & n.17 (viewing its three preconditions as required by Section 2's text); *see also Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) ("[T]he Gingles requirements are preconditions, *consistent with the text and purpose of § 2*, to help courts determine which claims could meet the totality-of-the-circumstances standard *for a § 2 violation*.") (emphases added); *Johnson v. De Grandy*, 512 U.S. 997, 1010 (1994) (noting that the *Gingles* preconditions provided "structure to the statute's 'totality of circumstances' test"). Nothing in the U.S. Constitution sets a majority-minority district or geographic compactness requirement for identifying and remedying vote dilution. This Court, like the courts interpreting the CVRA and WVRA, should resist the Town's effort to constitutionalize Section 2's statutory requirements. *See, e.g.*, *Portugal*, 530 P.3d at 1003.

State VRAs exclude *Gingles* I at the liability stage for good reason. It is often unhelpful in detecting vote dilution, especially in states like California, Washington, and New York where localities may be less residentially segregated and where remedies are not limited to single-member district elections. *See Pico*, 534 P.3d at 65-68; *Portugal*, 530 P.3d at 1003. Indeed, the NYVRA expressly authorizes alternative remedies like cumulative voting and ranked-choice voting, which enable minority groups to elect candidates of their choice without drawing district lines at all. *See* N.Y. Elec. Law §§ 17-206(2)(a)-(c), 17-206(5). Because such non-district-based remedies do not depend on the protected minority groups being geographically

compact, *Gingles* I is unnecessary at the liability stage. *See Pico*, 534 P.3d at 65-68. This is why the NYVRA, like the CVRA and WVRA, omits *Gingles* I from the liability inquiry but allows for its consideration at the remedial stage to evaluate potential single-member district remedies. N.Y. Elec. Law § 17-206(2)(c).

Even if *Gingles* I had constitutional significance—it does not—the NYVRA also incorporates a safeguard serving the same function: Plaintiffs must prove that an alternative election system exists under which the protected class would have undiluted electoral opportunity. *See supra* Sec. I.A. This requirement supplies the same kind of benchmark that *Gingles* I was designed to provide under Section 2. *See Pico*, 534 P.3d at 64-65; *Gingles*, 478 U.S. at 50 n.17 (reasoning that *Gingles* I is necessary to determine the "potential to elect representatives in the absence of the challenged structure or practice" but considering only single-member districts as a possible benchmark).

Thus, the NYVRA's omission of *Gingles* I from the liability determination does not undermine its constitutionality and instead provides a better-tailored framework for assessing modern vote dilution in light of the full range of available remedies.

ii. The lack of a totality-of-circumstances requirement is constitutionally permissible.

Nor does the NYVRA's omission of a mandatory totality-of-the-circumstances inquiry render it unconstitutional. Like the *Gingles* preconditions, Section 2's totality-of-the-circumstances test is a statutory construct—not a constitutional mandate. *See, e.g.*, 52 U.S.C. § 10301(b); *Gingles*, 478 U.S. at 44-45 (grounding Section 2's totality-of-the-circumstances analysis in a set of factors identified by Congress in its 1982 Senate Report). States are therefore under no constitutional obligation to impose Congress' requirement that plaintiffs prove vote dilution violations through a particular totality-of-the-circumstances analysis. *See Smith v. Robbins*, 528 U.S. 259, 273 (2000) ("[O]ur established practice, rooted in federalism, [is to] allow[] the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy.").

The Town takes issue with the flexibility of the NYVRA's standard, but it merely reflects different ways statutes define the fact-specific inquiry that vote dilution claims require. Whether plaintiffs show electoral impairment through RPV or the totality of the circumstances, the NYVRA requires the same "intensely local appraisal" and demonstration of ongoing "intensive racial politics where the excessive role of race in the electoral process denies minority voters equal opportunity to participate" that other courts have deemed essential to the dilution

inquiry. *See Pico*, 534 P.3d at 60 (citing *Gingles*, 478 U.S. at 79; *Allen v. Milligan*, 599 U.S. 1, 60, 75 (2023)); *Milligan*, 599 U.S. at 30.

Indeed, both the CVRA and WVRA validly dispense with Section 2's totality-of-the-circumstances requirement. Despite the Town's claim, neither the CVRA nor the WVRA "require. . . a showing that . . . the totality of the circumstances abridges the ability of protected class members to elect candidates of their choice." App.-Br. at 35. The CVRA and WVRA make "[o]ther factors" related to historical and ongoing discrimination "probative, *but not necessary*" to "establish a violation." Cal. Elec. Code § 14028(e) (emphasis added); Wash. Rev. Code § 29A.92.030(7) (emphasis added).[3] And as noted above, both the CVRA and WVRA have been repeatedly upheld by state appellate and federal courts. *See, e.g.*, *Higginson*, 786 F. App'x. at 706-07; *Sanchez*, 145 Cal. App. 4th at 688; *Portugal*, 530 P.3d at 1012; *Pico*, 534 P.3d at 71. These decisions affirm that a totality-of-the-circumstances inquiry is not constitutionally mandated for state laws seeking to remedy racial discrimination in voting. Thus, the NYVRA's lack of a mandatory totality-of-the-circumstances inquiry is constitutionally permissible.

[3] Like the NYVRA, several other state VRAs make the totality of the circumstances an alternative pathway to establishing a vote dilution violation. *See* 2025 Colo. Sess. Laws 750-51 (§1-47-106(2)(a)(II)); Conn. Gen. Stat. §§9-368j(b)(2)(i), (ii); Minn. Stat. §200.54(2)(b)(1)(ii).

II. The NYVRA is in line with other anti-discrimination statutes, which prohibit—not require—discriminatory state action.

The Town's constitutional challenge reflects a more fundamental error: It conflates laws that assign liability on the basis of *race* with ones that do so on the basis of proven *racial discrimination*. Contrary to the Town's characterization, the NYVRA does the latter. Its liability regime operates on the basis of *demonstrated vote dilution*—that is, on the basis of proven discriminatory outcomes. While both race-based triggers and discrimination-based triggers concern race, only the former have ever been constitutionally suspect. The Town's contrary view would apply the same exacting scrutiny applicable to laws that *require* discrimination to those that *prohibit* it. The Town compounds this category error by conflating government policies that classify individuals with state VRAs, like the NYVRA, which simply erect an anti-discrimination guardrail on how states organize their own subdivisions, a task states have sovereign authority to undertake.

A. Like other anti-discrimination laws, the NYVRA orders remedies on the basis of racial discrimination, not race itself.

The NYVRA's vote dilution ban is, at its core, an anti-discrimination law, akin to landmark civil rights laws enacted at the federal level, including the Civil Rights Act of 1964, the Fair Housing Act, and the federal VRA, and parallel state protections in the New York State and City Human Rights Laws and the New York

Equal Pay Act, which guard against racial discrimination in employment, public accommodations, healthcare, and other spheres of life.

Anti-discrimination laws do not entail racial classifications subject to strict scrutiny. Liability under an anti-discrimination law, even disparate-impact liability, is based on an individualized showing of discriminatory treatment or effect. Race is a predicate to the underlying discrimination that anti-discrimination laws address, but it is the victim's *experience of discrimination*—not their race itself—that determines liability. *Rothe Dev., Inc. v. U.S. Dep't of Def.*, 836 F.3d 57, 64 (D.C. Cir. 2016). Discrimination can be experienced by members of any racial group, as well as by some members of a racial group and not others. *Id.* ("Many individuals—of all races—have experienced discrimination on account of their race or ethnicity, and victims of discrimination do not comprise a racial or ethnic group."). As a result, these laws do "not provide for preferential treatment based on [an individual's] race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited . . . but rather on an individual['s] [] experience of discrimination." *Id.* (internal citation and quotation marks omitted). For this reason, anti-discrimination laws have never been held to classify individuals on the basis of race. *See Schuette v. BAMN*, 572 U.S. 291, 318 (2014) (Scalia, J., concurring) ("[A] law directing state actors to provide equal protection is (to say the least) facially neutral, and cannot violate the Constitution.").

The same is true of the NYVRA. Like the federal VRA, the NYVRA's vote-dilution ban establishes liability on the basis of demonstrated discriminatory effect. It creates liability for a jurisdiction only when a "method of election" 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, as a result of vote dilution." N.Y. Elec. Law § 17-206(2)(a). Liability under the NYVRA, then, is based not on race "but rather on [a protected class'] experience of discrimination"—regardless of race. *Rothe Dev., Inc.*, 836 F.3d at 64. That is, when faced with vote dilution on the basis of race, members of *any* racial group are entitled to the NYVRA's protections. There is no vote dilution experienced by members of one race that is not also prohibited by the NYVRA if experienced by members of another race. *See Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974) (finding no sex classification in an insurance program when "[t]here is no risk from which men are protected and women are not," and vice versa). Thus, the NYVRA does not entail a racial classification subject to strict scrutiny.

The three cases on which the Town's contrary argument relies—*Johnson*, *Powers*, and *SFFA*, *see* App.-Br. at 30-34—simply underscore the fundamental differences between policies the U.S. Supreme Court has deemed racial classifications subject to strict scrutiny and anti-discrimination laws like the NYVRA.

In *Johnson v. California* and *Powers v. Ohio*, a person's race itself was determinative of how they were treated under the challenged policy. Under the policy in *Johnson*, California prisons required that "inmates be housed only with other inmates of the same race"—so a new inmate's race alone, without other "individualized consideration," dictated whether to sort them into one prison cell instead of another. 543 U.S. 499, 507, 509 (2005) (citation omitted). And under the policy in *Powers*, prosecutors struck jurors "solely by reason of their race," using "the raw fact of skin color," rather than their "objectivity or qualifications," to determine jury service. 499 U.S. 400, 409-10 (1991). In other words, knowing a person's race told you something—indeed, everything—about how those policies would apply. Under the NYVRA, by contrast, knowing a person's race does not tell you anything about whether or how the law's vote-dilution provisions will apply to their jurisdiction. A Black resident of the Town of Newburgh may have a claim under the NYVRA that a Black resident of a neighboring town does not share if only the Newburgh resident is experiencing racial vote dilution. Liability under the NYVRA turns not on race, which is the same for both residents, but rather on the demonstrated, localized experience of discrimination, which differs for the two residents. And individuals of any race have a claim under the NYVRA if they meet the statutory elements of vote dilution. So unlike in *Johnson* and *Powers*, where treatment turned exclusively on the "raw fact of skin color," *Powers*, 499 U.S. at

410, liability under the NYVRA does not turn on race itself at all—only on the existence of demonstrated racial discrimination.[4]

The Town's reliance on *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* ("*SFFA*") is also misplaced. There, the U.S. Supreme Court found that a college admissions program's use of race and racial stereotypes was subject to, and did not satisfy, strict scrutiny. 600 U.S. 181, 202 (2023). As in *Johnson* and *Powers*, the Court found that the challenged admissions policy used "race *qua* race" as an input, *SFFA*, 600 U.S. at 220, and "race [wa]s determinative for at least some—if not many—of the students they admit," *id.* at 219. But again, under the NYVRA, a person's race itself is *never* determinative of whether there is a vote-dilution violation, only their experience of racial discrimination in the form of vote dilution, which people of any race can experience. *See Rothe Dev., Inc.*, 836 F.3d at 64. The NYVRA is fundamentally different in another way too: It does not give a preference to, or otherwise treat differently, anyone on account of their race. Like all anti-discrimination laws, it simply asks whether the person seeking relief has been *denied* equal treatment (namely, suffered vote dilution) because of their race—regardless of what particular race that is—and allows courts to fashion

[4] Also relevant in *Johnson* was the fact that the challenged policy mandated racial separation. 543 U.S. at 506. In that context, which the NYVRA does not remotely implicate, the Court doubted that such a policy was "neutral" in any sense given the Court's "reject[ion of] the notion that separate can ever be equal—or 'neutral'—50 years ago in *Brown v. Board of Education*." *Id.*

remedies to *provide* equal treatment. *See supra* Section I.A. To be sure, enough people in the jurisdiction must suffer the same individual, racially discriminatory injury for a vote dilution plaintiff to state a *redressable* harm, but that does not convert the injury into a racial classification rather than a personally-inflicted discriminatory harm—exactly what equal protection principles seek to *avoid*.

In short, the Town's attempts to shoehorn the NYVRA into the racial classification bucket are not only wrong on their own terms, *see supra* Section I.A, but also represent a category mistake. Laws that universally prohibit racial discrimination and that predicate liability on the basis of discriminatory treatment or effect—and not race itself—simply cannot be racial classifications subject to strict scrutiny. Any other result would make little sense: The Equal Protection Clause is not a self-defeating instrument that prohibits states from enacting anti-discrimination laws that breathe life into the Clause's equal protection guarantee.

B. States have sovereign authority to organize their own subdivisions, including by comprehensively rooting out discrimination.

States have authority to enact anti-discrimination laws like the NYVRA under the powers reserved to them under the U.S. Constitution and their own state constitutions. *See Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) ("States do not derive their [] authority [over election systems] from the Voting Rights Act, but rather from independent provisions of state and federal law"); *Higginson*, 786 F.

App'x at 707 ("'[I]t is well settled that governments may adopt measures designed to 'eliminate racial disparities through race-neutral means.'") (quoting *Tex. Dep't of Hous. & Cmty. Affs.*, 576 U.S. at 545).

The NYVRA's vote dilution ban in particular relies on a state's most fundamental reserved power: its authority to organize its own political subdivisions and organs. *See Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907). "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). As a consequence of that sovereignty, "[h]ow power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937). That includes the regulation of local elections, as well. *Gregory*, 501 U.S. at 461-62.

The State of New York delegates much of this work to localities. *See, e.g.*, N.Y. Const. art. IX § 2; N.Y. Mun. Home Rule Law § 10. But localities remain "merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers," *City of New York v. State*, 86 N.Y.2d 286, 290 (1995). Accordingly, the State has also placed limits on the ability of local governments to organize themselves. *See, e.g.*, N.Y. Mun. Home Rule Law § 10(ii)(a)(13). The NYVRA is one such limit: It prohibits localities from adopting or maintaining election systems that result in racial vote dilution, an anti-discrimination

backstop implemented through a combination of a State-enforced preclearance regime and a privately enforced pre-suit notice and litigation process. Put another way, the NYVRA is best understood not as the state imposing liability on other constitutionally distinct entities (like the federal VRA, Title VII, or the Fair Housing Act), but rather as the state making a policy choice about how to organize itself. The obligations the State imposes through the NYVRA attach only to the State's own organs.

While states do not have the reserved constitutional power to design their state and local governments in a way that is racially discriminatory, they do have the reserved power, consistent with the Reconstruction Amendments, to "remedy[] the effects of past or present racial discrimination." *Shaw v. Hunt*, 517 U.S. 899, 909 (1996). That compelling interest extends not only to discrimination for which the State is directly responsible, *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 317 (2013), but also to discrimination in which it was a "passive participant," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989). Because New York's political subdivisions are creatures of the State, the State is both responsible for and a passive participant in any discriminatory policies adopted by those subdivisions. *See Hunter*, 207 U.S. at 179 ("The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."). And because the State's interest is in rooting out discrimination across all its subdivisions,

the constitutional analysis requires a statewide lens. The relevant question is not whether the NYVRA's liability standard requires proof of past official discrimination by the political subdivision itself, but whether the State's choice in regulating its subdivisions is justified by past instances of discrimination arising from their organization statewide.

The NYVRA's legislative record reflects these concerns. As the Introducer's Memorandum explained, despite recent progress, there remains "a persistent gap between white and non-white New Yorkers in political participation and elected representation." *Bill Jacket*, S.1046-E/A.6678-E, 245th Leg. (N.Y. 2022), at 9. And, as one legislator put it, "despite the importance of the Federal Voting Rights Act [. . .], voters of color still lacked an opportunity, an equal opportunity, an equitable opportunity to participate fully in the political process and elect candidates of their choice." *New York Assembly June 2, 2022 Session*, 2022 Leg., 245th Sess. (N.Y. 2022), at 24 (statement of Asm. Latrice Walker). And it was "for this reason, and in the footsteps of states like California, Oregon, Washington and Virginia," that the NYVRA was enacted to "build on those foundations of Federal law" and "to confront evolving barriers to effective participation and to root out longstanding discriminatory practices more effectively here in the State of New York." *Id.*

The evidence supports this legislative judgment, as courts have repeatedly found ongoing voting-related discrimination in New York's political subdivisions.

See, e.g., *Pope v. Cnty. of Albany*, 94 F. Supp. 3d 302, 341 (N.D.N.Y. 2015) ("Albany County has a fairly recent history of attempting to interfere with minority voters' opportunity to participate in the political process."); *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 443 (S.D.N.Y. 2010) ("[T]here is some history of official discrimination in Port Chester that continues to touch the rights of Hispanics to participate in the political process."); *New Rochelle Voter Def. Fund v. City of New Rochelle*, 308 F. Supp. 2d 152, 159-60 (S.D.N.Y. 2003) ("The regrettable history of discrimination in employment, housing and education in the Westchester County area is too well known to require extended comment by this Court."); *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany*, 281 F. Supp. 2d 436, 452 (N.D.N.Y. 2003) ("[T]he history of the County thus demonstrates that except for elections in majority/minority districts, minorities have been effectively excluded from meaningful participation in County elections and governance.") (internal quotation marks omitted).

In enacting the NYVRA, New York exercised its sovereign authority to remedy this discrimination where it is occurring—in its own political subdivisions—by barring racial vote dilution and expressly providing for remedies the federal VRA's liability standard does not contemplate.

III. Facial invalidation is inappropriate.

Beyond their failure to identify any equal-protection infirmity in the NYVRA's vote dilution ban, the Town cannot satisfy the extraordinary showing required to invalidate the law on its face.

Facial challenges are "disfavored" because they require a court to examine statutory text "on a cold page and without reference to the [complaining party's] conduct" and to conclude the law is impermissible "in all of its applications." *In re Indep. Ins. Agents & Brokers of N.Y., Inc. v. N.Y. State Dep't of Fin. Servs.*, 39 N.Y.3d 56, 64-65 (2022). This involves "speculation" about how the law *might* be applied in each case, "rais[ing] the risk of 'premature interpretation of statutes on the basis of factually barebones records.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (internal citation omitted).

As such, a party raising a facial constitutional challenge bears an "extraordinary burden . . . of proving beyond a reasonable doubt that the challenged provision 'suffers wholesale constitutional impairment.'" *In re Owner Operator Indep. Drivers Ass'n v. N.Y. State Dep't of Transp.*, 40 N.Y.3d 55, 61 (2023) (quoting *Brightonian Nursing Home v. Daines*, 21 N.Y.3d 570, 577 (2013)). "In other words, the challenger must establish that *no set of circumstances* exists under which the Act would be valid." *Id.* (emphasis added) (internal quotation omitted).

The Town cannot meet this heavy burden. The summary judgment record confirms that this case is within the "set of circumstances" in which application of the NYVRA's vote-dilution provisions is constitutional—even on the Town's own theory of the law. For example, the Town concedes that it is permissible to "remedy[] a dynamic in which certain racial groups are denied a reasonable opportunity to elect candidates of their choice" in light of "identified discrimination by the political subdivision." App.-Br. at 60. That is precisely the discriminatory dynamic Respondents seek to remedy here. They have alleged—with supporting evidence—that Black and Hispanic voters in Newburgh are denied a reasonable opportunity to elect candidates of their choice under the Town's at-large election system, NYSCEF-Doc-72 ¶¶ 60-64, 74-79, and have identified instances of discrimination by the Town against these communities, *id.* ¶¶ 86-90, 104-10. Likewise, even if the Town were correct that the absence of the *Gingles* I requirement renders the NYVRA suspect (it does not), *see supra* Sec. I.B.i, the summary judgment record shows that a reasonably configured majority-minority district can be drawn and, at minimum, establishes a triable issue of fact. *See* NYSCEF-Doc-92. And, even if Appellants were correct that a violation must be premised on both racially polarized voting and an impairment under the totality of circumstances (it need not), *see supra* Sec. I.B.ii, both are alleged here. NYSCEF-Doc-01 ¶¶ 145-60; NYSCEF-Doc-72 ¶¶ 48-73, 80-

118. The evidence presented in *this case* shows that the NYVRA's vote dilution ban is not unconstitutional in *all* its applications.

Other courts have rejected similar facial challenges for similar reasons. The Supreme Court of Washington, for example, recognized that the WVRA "*could* be applied in an unconstitutional manner" and would, in those instances, be subject to an as-applied challenge, but the Court rejected the challenger's facial challenge because the act, "on its face, does not *require* unconstitutional actions" in all its applications. *Portugal*, 530 P.3d at 1011-12 (emphasis added). So too in California. *Sanchez*, 145 Cal. App. 4th at 688.

In asking this Court to invalidate the NYVRA's vote dilution ban wholesale, the Town invites it to defy the "'fundamental principle of judicial restraint' that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Wash. State Grange*, 552 U.S. at 450 (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring)). Like the courts of Washington and California, this Court should decline the invitation.

Finally, this Court need not consider any as-applied constitutional challenge because the Town failed to raise one below. "[A]n appellate court should not, and will not, consider different legal theories or new questions of fact" not presented in

the trial court. *In re Cohn*, 849 N.Y.S.2d 271, 273 (2007). Appellants have argued only that the statute is facially invalid. *See* NYSCEF-Doc-70 at 10, 21; NYSCEF-Doc-147 at 1; App.-Br. at 32. Having waived any as-applied constitutional challenge, they cannot pursue one here. *See Portugal*, 530 P.3d at 1012. This Court therefore has no need to reach any constitutional question in this appeal.

CONCLUSION

The Court should affirm the order of the Appellate Division.

August 22, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 1250.8(j), on this 22th day of August, 2025, *Amicus Curiae* provides this printing specifications statement that the brief was prepared on a computer in Times New Roman, a proportionally spaced typeface, with 14-point font size and 2.0 line spacing. Pursuant to 22 NYCRR § 1250.8(f)(2), the length of this brief is 6,258 words, which does not exceed this Court's limitation of 7,000 words for a brief of amicus curiae.

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