APL-2025-00110
Westchester County Clerk's Index No. 50325/25
Appellate Division–Second Department Docket No. 2024-11753

Court of Appeals
of the
State of New York

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

Plaintiffs-Respondents,

– against –

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

Defendants-Appellants,

– and –

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

Intervenor-Respondent.

BRIEF OF *AMICI CURIAE* TOWN OF MOUNT PLEASANT AND TOWN BOARD OF THE TOWN OF MOUNT PLEASANT IN SUPPORT OF DEFENDANTS-APPELLANTS

BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, NW,
Suite 1100
Washington, DC 20036
Tel.: (202) 861-1500
Fax: (202) 861-1783
mbraden@bakerlaw.com

BAKER & HOSTETLER LLP
45 Rockefeller Plaza, 14th Floor
New York, New York 10111
Tel.: (212) 589-4200
Fax: (212) 589-4201
adindiyal@bakerlaw.com

BAKER & HOSTETLER LLP
200 Civic Center Drive, Suite 1200
Columbus, Ohio 43215
Tel.: (614) 228-1541
Fax: (614) 462-2616
rtucker@bakerlaw.com
eprouty@bakerlaw.com
rschrote@bakerlaw.com

Attorneys for Amici Curiae Town of Mount Pleasant and Town Board of the Town of Mount Pleasant

CP COUNSEL PRESS (800) 4-APPEAL • (384867)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rules 500.1(f) and 500.22(b)(5), Respondents-Appellants Town of Mount Pleasant and Town Board of the Town of Mount Pleasant have no parents, subsidiaries, or affiliates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

New York

Other States

Federal

Rules

Other Authorities

PRELIMINARY STATEMENT

The John R. Lewis Voting Rights Act of New York ("NYVRA") creates an expansive race-based set-aside program, applicable to local elections, that goes well beyond any other voting rights statute in the nation. Its prohibition against "vote dilution" is triggered any time political views diverge along racial or ethnic lines in a locality that conducts at-large elections. This unremarkable phenomenon, in turn, activates a requirement that localities (or state courts) restructure local election systems to meet a racial goal: members of the plaintiff's racial group must elect their preferred candidates to more seats than under the at-large system. But that rule can be satisfied only if members of other racial groups fail to elect their preferred candidates to more seats than under the at-large system. No different from race-based set-aside programs in college admissions or public contracting, the NYVRA distributes burdens or benefits to individuals on the basis of their race. Strict scrutiny therefore applies.

The NYVRA fails that daunting test. It does not prevent "racial discrimination in voting," as Plaintiffs-Appellees ("Plaintiffs") allege (Plaintiffs-Appellees Brief ["Appellees Br."] at 2, 9). A plaintiff need not prove racial discrimination to prevail, and Plaintiffs here and elsewhere, including in amici curiae's case, do not allege discrimination. They challenge a race-neutral, at-large voting system under a theory of "vote dilution." But New York lacks any compelling state interest in preventing

unintentional vote dilution. When Congress enacts laws like Section 2 of the Voting Rights Act, it acts to enforce the Fourteenth and Fifteenth Amendments, and the Supreme Court has deemed this power sufficiently compelling to justify prophylactic race-based measures. But states lack a similar power to demand race-based action to deter their own race-based discrimination. Further, even if preventing vote dilution were a compelling interest, the NYVRA would not be narrowly tailored to that end. The statute twists the concept of dilution beyond recognition, including by eliminating the standard requirement of proof that a majority voting bloc regularly defeats candidates preferred by a geographically compact and cohesive minority. Because it fails strict scrutiny, the NYVRA is unconstitutional.

Yet Plaintiffs here and elsewhere invite the Court to apply the statute despite its constitutional infirmities. The Court should decline that invitation. No rule of law permits a state court to declare itself a federal-Constitution-free zone. The Supremacy Clause creates a rule of decision that demands New York courts apply the Equal Protection Clause in cases properly before them, and it overrides any state requirement that treats "capacity" or "standing" as a gateway to constitutional defenses. Nor does New York law prohibit constitutional challenges to be raised defensively where localities plausibly contend the NYVRA will compel infringements of constitutional rights.

As such, Mount Pleasant suggests that this Court should reverse the decision of the Second Department and affirm the decision of the Orange County Supreme Court holding that the NYVRA's vote dilution provisions are unconstitutional.

QUESTIONS PRESENTED

Amici Curiae adopts the questions presented in Defendants-Appellants' brief, but only addresses the first and third questions in this brief.

INTEREST OF AMICI CURIAE

The Town of Mount Pleasant ("Mount Pleasant") is a New York political subdivision subject to the NYVRA (*see* Elec. Law § 17-204). The Town Board is its legislative, appropriating, governing and policy-determining body. Like Defendant-Appellant Town of Newburgh, Mount Pleasant conducts elections to its Board at-large. In January 2024, five residents sued Mount Pleasant, claiming that the Town's at-large method of voting violates the NYVRA based upon past and expected racial voting behavior in the Town (*Serratto v Town of Mount Pleasant*, Sup Ct, Westchester County, Everett, J., Index No. 55442/2024, Jan. 9, 2024, Complaint). Like Plaintiffs here, the residents in Mount Pleasant's case seek a system designed to enable members of their racial group to prevail in more elections than they do under the at-large system. The same counsel representing Plaintiffs here represents the challengers in Mount Pleasant's case.

Mount Pleasant moved for summary judgment, asserting among other things that the NYVRA violates the equal protection guarantees of the United States and New York Constitutions. In denying Mount Pleasant's motion for summary judgment, the Westchester County Supreme Court relied upon the Second Department's ruling below finding the NYVRA was constitutional (*Serratto, et al. v. Town of Mount Pleasant, et al.*, Sup Ct, Westchester County, Index No. 55442/2024, NYSCEF DOC No. 183 at 4, 5, 7, 8). By consequence, Mount Pleasant has a clear interest in stating its arguments in this appeal. It would be unfair for those challenging Mount Pleasant's at-large system to obtain *de facto* representation by their lawyers in this case unless Mount Pleasant also has an opportunity to state and defend its position. That approach would be especially unfair where Plaintiffs contend that no locality may raise constitutional defenses in NYVRA cases (*see infra* § III).

The importance of this matter to all political subdivisions in New York, including most especially those like Mount Pleasant that are already defending attacks to their current at-large election system under the NYVRA, cannot be understated. This may be Mount Pleasant's only opportunity to address the constitutional issues presented by the NYVRA before a ruling by this Court that will presumably resolve that issue in Mount Pleasant's case, as it will be binding on all state courts in New York.

ARGUMENT

The NYVRA is unprecedented and unconstitutional. By enabling a plaintiff's racial group to obtain a new election system designed to ensure members of that group elect their preferred candidates, and that members of other racial groups fail in that endeavor, it distributes benefits and burdens on the basis of race in every application. It triggers strict scrutiny—and fails.

I. The NYVRA Warrants Strict Scrutiny.

Because it confers benefits and imposes burdens on the basis of race, the NYVRA merits strict scrutiny under governing U.S. Supreme Court precedent.

A. "It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny" (*Parents Involved in Cmty. Schs. v Seattle Sch. Dist. No. 1*, 551 US 701, 720 [2007]). This rule applies to "*all* racial classifications imposed by the government" (*Johnson v California*, 543 US 499, 505 [2005] [emphasis added]). The clearest case of this is "an express racial classification" (*id.* at 509), which is "explicit" in a statute (*Hunt v Cromartie*, 526 US 541, 546 [1999]). Such classifications are "inherently suspect" on their face and require no further inquiry into motive (*Washington v Seattle Sch. Dist. No. 1*, 458 US 457, 485 [1982]; *see also Adarand Constructors, Inc. v Pena*, 515 US 200, 213 [1995] [distinguishing easier cases where "classifications [are] based explicitly on race" from "difficult[]" cases

where "facially race neutral" laws "are motivated by a racially discriminatory purpose"]).

This is a strict scrutiny case. Under the NYVRA, liability lies against an at-large system when "voting patterns of members of the protected class within the political subdivision are racially polarized" (Elec. Law § 17-206[2][b][i][A]). Racial polarization exists under the statute when "there is a divergence in the candidate, political preferences, or electoral choice of members" of different racial groups (*id.* § 17-204[6]). Independently, liability arises 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" (*id.* § 17-206[2][b][i][B]). Both bases of liability hinge on the phrase "protected class," which "means a class of individuals who are members of a race, color, or language-minority group" (*id.* § 17-204[5]). A finding of liability in turn mandates "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]).

Through these interlacing provisions, the NYVRA "distributes burdens or benefits on the basis of individual racial classifications" (*Parents Involved*, 551 US at 720) that are "explicit" on the face of a statute (*Hunt*, 526 US at 546). Liability under the NYVRA is explicitly race-based, and it affords special race-based remedies: in at least some elections, candidates preferred by some racial groups (i.e.,

the plaintiffs) should win and those preferred by others (i.e., not the plaintiffs) should lose (*see* Elec. Law §§ 17-204[5]-[6], 17-206[5]). And it sets the standard so low that mere political differences between members of different racial and ethnic groups give rise to a state-imposed race-based election system (*id.* § 17-206[5]). This is a race-based set-aside program where local election systems must—by law—be configured to help groups based solely on their race or ethnicity (*see City of Richmond v J.A. Croson Co.*, 488 US 469, 505-06 [1989]).

B. Plaintiffs first resist this basic point by recharacterizing the NYVRA as a law that only includes "a mere statutory reference to race" (Appellee Br. at 47-48). Plaintiffs claim that "the NYVRA's vote-dilution prohibition does not sort people into different racial groups to whom different burdens or benefits are distributed" (*id*. at 49). But that view defies their own description of this (and every) NYVRA suit. Plaintiffs complain that "no Black or Latino candidate of choice has *ever* been elected to the Town Board" and insist this "underrepresentation" is "readily rectifiable" if the Town would "switch to any number of other electoral systems" (*id.* at 3.). The relief Plaintiffs want does not merely *refer* to race; it demands a system that "would provide Black and Hispanic voters with a reasonable opportunity to elect candidates of their choice" (*id.* at 11).

For that reason, Plaintiffs' reference to the recent Supreme Court decision in *United States v. Skrmetti*, 145 S Ct 1816 [2025] is inapposite. Contrary to Plaintiffs'

assertion, *Skrmetti* does not "examine[] when a law classifies on a suspect basis in unprecedented detail" (Appellee Br. at 47). Rather, Plaintiffs rely upon *Skrmetti* for the familiar proposition that a mere reference to race does not trigger heightened scrutiny (*id*. at 47-48). That is nothing new. But the NYVRA's vote dilution provisions do not simply refer to race; they require dividing citizens of a political subdivisions into racial groups, evaluating how those racial groups vote, and then, where applicable, deciding that some racial groups should win more than they do, and others should win less. That is entirely different than the Tennessee law at issue in *Skrmetti* that restricted sex transition treatments for minors, which the Court found only classified based upon age and medical use, and neither turned on the sex of the individual (*Skrmetti*, 145 S Ct at 1829).

Divvying electoral benefits and burdens on the basis of race is no less injurious than race-based admissions burdens (*Students for Fair Admissions, Inc. v President & Fellows of Harvard Coll.*, 600 US 181, 194 [2023] [*SFFA*]) and contracting burdens (*J.A. Croson*, 488 US at 505-06), and such injuries are well-recognized in precedent (*see e.g. Gomillion v Lightfoot*, 364 US 339 [1960]). An explicit command that members of some groups see an increased opportunity to elect their candidates of choice carries a concomitant, implicit command that members of

other groups see a diminishment of that opportunity.[1] It is no different from a command that members of some racial groups obtain an enhanced opportunity for admission to a college and its implicit command that members of other racial groups suffer a diminishment of that opportunity.

Plaintiffs are thus wrong to call the affirmative action cases "irrelevant" (Appellee Br. at 55; *see also* AG Br. at 55 [arguing affirmative action cases are not analogous]). Plaintiffs claim that "unlike the NYVRA, affirmative action advantages *individual* minority members. Particular, identifiable people are more likely to be admitted or hired." (Appellee Br. at 55). Yet, Plaintiffs here are *individual* voters, seeking to have *their* preferred candidates more likely to be elected based upon their racial group. By comparison, a state law demanding that localities redesign election systems to ensure that white voters prevail over minority voters in electing their preferred candidates would plainly impose racial classifications. That the NYVRA will typically operate in reverse does nothing to alter the equal-protection analysis (*see e.g. J.A. Croson*, 488 US at 493 [plurality opinion]; *Adarand Constructors*, 515 US at 227).

[1] It does not matter whether the NYVRA guarantees minority-preferred candidate success; even a state-imposed thumb on the scales is a racial "preference" (*Adarand Constructors*, 515 US at 219; *see id.* at 204-25 [applying strict scrutiny to race-based "incentive"]); *SFFA*, 600 US at 194 [same for process that takes "race into account"]).

The Attorney General also attempts to defend the NYVRA by comparison to various laws, state and federal, that prohibit discrimination (*see* AG Br. at 35-39). But anti-discrimination statutes forbid regulated persons from taking action on the basis of a protected category (*see e.g. Bostock v Clayton County*, 590 US 644, 655 [2020] [discussing Title VII]). They do not *require* state action on the basis of protected categories. The NYVRA's vote-dilution prohibition neither prohibits discrimination in voting nor employs race-neutral tools. It requires race-based electoral systems in every application.

Second, Plaintiffs claim that the NYVRA classifies on some basis, just not by race, and instead "sorts *political subdivisions* (which have no race), not *people* (who do)" (Appellee Br. at 49). But to find vote dilution under the NYVRA, the court must analyze the voting preferences of *people* and sort those *people* by their race and their voting preferences. It does not require sorting the voting preferences of political subdivisions that do not vote.

Third, Plaintiffs also advance several iterations of the theme that relief under the NYVRA does not depend on anyone's "race per se" (*Id.* at 45, 50). This is difficult to understand. Their brief repeatedly cites the NYVRA as the basis for their race-based demand that "Black and Latino residents of Newburgh" elect their candidates of choice (*id.* at 3) in an "alternative" election method "that would improve Black and Hispanic voters' likelihood of being represented by their

preferred candidates" (*id.* at 11). The NYVRA does not assist violin players or construction workers in electoral opportunity at the expense of piano players or chefs. It benefits and burdens groups defined by race and thus does, in the strictest sense, depend on race "per se." Meanwhile, Plaintiffs' suggestion that racial classifications are no problem so long as race is not used "alone" is simply wrong (Appellee Br. at 50). Race-based state action is no less race-based because it depends on other factors as well (*see e.g. Hunter v Underwood*, 471 US 222, 233 [1985] [rejecting voting ban that "was motivated by a desire to discriminate against blacks on account of race," even though it made felon status the operative factor]).

Fourth, Plaintiffs advance the troubling argument that the NYVRA poses no problem because "the aggregate representation of different *groups* is not a cognizable benefit to, or burden on*, individual* voters" (Appellee Br. at 54). Again, the relief Plaintiffs seek under the NYVRA is an electoral system that provides them, *individually,* with a better opportunity to elect their preferred candidates, which, in turn, means other individuals are less likely to elect their preferred candidates. While Plaintiffs again attempt to recharacterize the analysis by looking only to groups, they ignore that vote dilution is a claim held by the individual voter (*see Gill v Whitford*, 585 US 48, 65 [2018] ["We have long recognized that a person's right to vote is 'individual and personal in nature.'"] [quoting *Reynolds v Sims*, 377 US 533 [1964]; *Davis v Garcia*, 2008 WL 2229811, at *4 [S.D.N.Y. May 27, 2008] ["The claim of

vote dilution under the Voting Rights Act…belongs to individual persons and not to a minority as a group."]).

Fifth, Plaintiffs also claim that the fallacy of the logic that the NYVRA requires classifications by race "is exposed by applying it to Section 2 of the federal VRA," which has never been found to require racial classifications (Appellee Br. at 52). But the U.S. Supreme Court has expressly acknowledged that Section 2 requires "race-based" remedies (*Allen v Milligan*, 599 US 1, 41 [2023]). Contrary to Plaintiffs' assertion, *Milligan* was clear in finding Section 2 to be a race-based statute and, in fact, the Court rejected an assertion that only a "race-neutral benchmark" can satisfy Section 2 (599 US at 23-30).

The appellants in *Milligan* argued that Section 2 would not be constitutional if read "to deploy racial preferences in redistricting, or for any voting practice" (Appellants Br., *Milligan*, 599 US 1, available at 2022 WL 1276146, at *73). In response, the U.S. Supreme Court did *not* employ Plaintiffs' preferred rationale that Section 2 is race-neutral (*see* Appellee Br. at 53). Rather, the Court upheld the statute, not because it avoided strict scrutiny, but because Congress' power to enforce the Fourteenth and Fifteenth Amendments "authorize[s]" it to command "race-based" remedies that are properly tailored to its enforcement power (*Milligan*, 599 US at 41). *Milligan* made clear that Section 2 passes constitutional muster

because it is narrowly tailored to a compelling interest (that Congress possess), not because it bypasses strict scrutiny in the first instance.

Therefore, the Attorney General's argument that the *differences* between the NYVRA and the VRA do not trigger strict scrutiny is both odd and misplaced (AG Br. at 59-63). The NYVRA certainly cannot avoid strict scrutiny because it is *less* tailored to combat the alleged goal of remedying "racially discriminatory effects of vote dilution" (AG Br. at 59). The NYVRA must likewise satisfy strict scrutiny or be deemed unconstitutional.

Finally, Plaintiffs again cite other state VRAs and attempt to analogize them to the NYVRA (Appellee Br. at 56-58). But the NYVRA is far more expansive in creating the predicates for race-based election systems than the Washington and California statutes upheld in those states. Indeed, even Plaintiffs admit that the California and Washington VRAs are substantially narrower than the NYVRA (*Id*. at 57).

For example, the Washington and California statutes expressly incorporate case law applying VRA Section 2, including the requirement that minority-preferred candidates usually lose (*see* Wash. Rev. Code § 29A.92.010[3]; Cal. Elec. Code § 14026[e]). But the NYVRA does not. Additionally, the Washington and California statutes require proof of vote dilution in addition to various factors establishing continued effects of past discrimination (Wash. Rev. Code § 29A.92.030; Cal. Elec.

Code § 14028), whereas the NYVRA imposes liability in cases where neither vote dilution nor continued effects of past discrimination are proven (Elec. Law § 17-206[2]). Precedents considering fundamentally different laws are not persuasive authority here.

Moreover, none of the state cases upholding these statutes addressed the fundamental problem of the NYVRA: that it commands state courts or subdivisions to design their election systems to favor some racial groups and harm others (*See Sanchez v City of Modesto*, 145 Cal App 4th 660, 680 [2006] [considering an argument that strict scrutiny "applies to any statute that refers to race or calls for any sort of race-conscious remedy or other action, even if it does not affect different races in different ways"]; *Portugal v Franklin County,* 530 P3d 994, 1007-1011 [Wash. 2023 en banc] [rejecting an assertion that the Washington VRA creates racial classifications by protecting only minority (not white) voters by reading the law to protect white voters]; *Higginson v Becerra*, 786 Fed Appx 705, 706 [9th Cir 2019] ["[t]he operative complaint does not allege that" the California VRA "distribute[d] burdens or benefits on the basis of individual racial classifications"]). Even U.S. Supreme Court decisions do not stand for propositions they do not decide (*see e.g. New Ga. Project v Raffensperger*, 976 F3d 1278, 1282-83 [11th Cir 2020]), so non-binding decisions of other jurisdictions cannot be persuasive on points they do not address.

Plaintiffs' contention that strict scrutiny does not reach statutes that compel rigging elections to ensure members of some racial groups win elections (and members of others lose them) would equally exonerate a statute with no preconditions. A state could enact a blanket requirement that all localities redesign their systems to improve electoral prospects of some racial groups at the expense of others, and rational-basis review would apply, according to Plaintiffs' rationale. That cannot be correct.

II. The NYVRA Fails Strict Scrutiny.

This is not among the rare cases where a racial classification can satisfy strict scrutiny. The Legislature both lacked any compelling interest and failed to narrowly tailor the NYVRA to that interest.

A. No compelling interest justifies the NYVRA's racial classifications.

Outside the college-admission and safety settings, U.S. Supreme Court precedents recognize only an interest in "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" (*SFFA,* 600 US at 206.). But a state actor invoking such an interest must "identify that discrimination, public or private, with some specificity before they may use race-conscious relief" (*Shaw v. Hunt*, 517 US 899, 909 [1996] [citation omitted]). The actor must also have a "'strong basis in evidence' to conclude that remedial action was necessary, '*before* it embarks on an affirmative-action program'" (*id*. at 910 [citation omitted]). The

NYVRA's statement of purpose makes no pretense to satisfy this standard (*see* Elec. Law § 17-200).

1. Plaintiffs repeatedly rely on an interest in preventing and remedying "racial discrimination in voting" (Appellee Br. at 2, 9, 14-15, 17, 43, 59). But this argument is a bait-and-switch. Even if no one disputes that this is a "vital goal" (*id*. at 59), the NYVRA's ban on "vote dilution" has nothing to do with it. At-large electoral systems employed for race-neutral reasons are not discriminatory. Thus, a requirement that race-based systems replace race-neutral systems is not tailored—even rationally—to the goal of prohibiting racial discrimination.

The NYVRA's statement of purpose does not indicate it is designed to remedy any discrimination. Rather, it points to much broader and ill-defined purposes, such as to "[e]ncourage participation in the elective franchise by all eligible voters" and "[e]nsure that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York" (Elec. Law § 17-200). As this text shows, the Legislature did not view the interests in play as myopically as Plaintiffs view them (*see* Appellee Br. at 59-60). But, "[a]lthough these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny" (*SFFA*, 600 US at 214). They are simply too "amorphous" to justify race-based intervention in the electoral process (*id*. [citation omitted]). Aside from the fact that they do not identify any

specific instances of past discrimination in voting that must be remedied, they fail to provide a system that is "sufficiently measurable to permit judicial review under the rubric of strict scrutiny" (*SFFA*, 600 US at 214 [quotation and alteration marks and citation omitted]). Plaintiffs' contentions likewise are much too vague to satisfy this standard.

Moreover, Plaintiffs' assertion that "historical and ongoing discrimination are the linchpin of the totality of the circumstances specified by the NYVRA" (Appellee Br. at 60) ignores that a plaintiff need not even prove under the totality of the circumstances they are less likely to elect their preferred candidate to demonstrate vote dilution under the NYVRA. Rather, a plaintiff need only show a difference between the voting patterns of that plaintiff's racial group and other voters, and would be entitled to relief *without* any showing of historical discrimination in voting in the political subdivision.

2. Plaintiffs' assertion that the NYVRA prevents "vote dilution" (*see* Appellee Br. at 62) also does not work. The U.S. Supreme Court has never held that preventing unintentional vote dilution is a compelling interest that justifies state-imposed racial classifications (*see SFFA*, 600 US at 206-07).

The U.S. Supreme Court *has* found race-based remedies by Congress justified under Congress' power to enforce the Civil War Amendments (*Milligan*, 599 US at 41). Plaintiffs attempt to invoke that same power on behalf of New York under "the

Fifteenth Amendment" (*see* Appellee Br. at 59, 61). But they overlook that only Congress has unique authority to require race-conscious remedial action "pursuant to § 2 of the Fifteenth Amendment" (*Milligan*, 599 US at 41 [quoting *City of Rome v United States*, 446 US 156, 173 [1980]] [alterations accepted]). Congress thus has authority under the Civil War Amendments "to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent" (*Tennessee v Lane*, 541 US 509, 520 [2004]). It may therefore "prohibit practices that in and of themselves do not violate" the Civil War Amendments, "so long as the prohibitions attacking racial discrimination in voting are 'appropriate'"[2] (*City of Rome v U.S.*, 446 US 156, 177 [1980] [citation omitted]; *see also Katzenbach v Morgan*, 384 US 641, 651 [1966] ["Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."]). It is this power alone that justifies Congress passing race-based legislation prohibiting more than just purposeful, identified discrimination, including by prohibiting unintentional vote dilution (*Milligan*, 599 US at 41).

[2] This is significant because the Supreme Court has "never held that vote dilution violates the Fifteenth Amendment" (*Reno v Bossier Par. Sch. Bd.*, 528 US 320, 334 n 3 [2000]), so a ban on "vote dilution" would not serve a compelling interest under the Fifteenth Amendment, absent the prerogative for prophylactic prevention.

But states do not stand in the same posture (*see J.A. Croson*, 488 US at 490-91 [plurality opinion]; *see also id.* at 521-22 [Scalia, J., concurring in the judgment]). The Fourteenth and Fifteenth Amendments "embody significant *limitations* on state authority" (*Fitzpatrick v Bitzer*, 427 US 445, 456 [1976] [emphasis added]). They do not imbue states with such authority. Thus, New York cannot claim the power of Congress to require race-based remedial efforts as prophylactic means to prevent violations of the Civil War Amendments (*see Milligan*, 599 US at 41 [locating Congress' right to "authorize race-based redistricting as a remedy for § 2 violations" in its "remedial authority" under the Fifteenth Amendment]). Just last year, the U.S. Supreme Court confirmed that "[t]he terms of the [Fourteenth] Amendment speak only to enforcement by Congress, which enjoys power to enforce the Amendment through legislation pursuant to Section 5" (*Trump v Anderson*, 601 US 100, 112 [2024]). Put simply, because states are subject to the Civil War Amendments, they cannot justify presumptive violations of those Amendments by claiming a right to prophylactically enforce them against themselves and their political subdivisions.

Plaintiffs self-proclaim that the U.S. Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 US 469 [1989], is "dated," (Appellee Br. at 61), yet that decision was cited and relied upon numerous times just two years ago in *SFFA*, 600 US at 185, 211, 224, 226-27. The decision in *Croson* is not dated, at least as to its application here. *Adarand* simply clarified that action by the federal

government that classifies by race is subject to strict scrutiny the same as state action (*Adarand*, 15 US at 227). It does nothing to undermine, let alone overrule, the principle from *Croson* that "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment" (*J.A. Croson*, 488 US at 490). In other words, the federal government may have different compelling interests that satisfy strict scrutiny than the states. Thus, the federal government is empowered to take action, like the VRA, to prevent states from discriminating. The states lack the same interest.

For all these reasons, the NYVRA serves no compelling interest that permits the state to engage in raced-based remedial action.

B. The NYVRA is not narrowly tailored to vote-dilution prevention.

Even if preventing vote dilution were among New York's compelling interests, the NYVRA is not narrowly tailored to advance it because it is "plainly overbroad" and otherwise "imprecise" (*SFFA*, 600 US at 216). The NYVRA demands race-based remedies where there is no vote dilution by any coherent standard. In *Milligan*, the U.S. Supreme Court explained that the "exacting requirements" of VRA Section 2 "limit judicial intervention" to rare circumstances and thereby satisfy the tailoring requirement (599 US at 30, 41-42). The NYVRA rejects virtually all those exacting requirements in ways that are unprecedented and nonsensical.

1. Begin with the logical requirement under VRA Section 2 that "a white majority votes sufficiently as a bloc usually to defeat the candidates chosen by" minority voters (*Thornburg v Gingles*, 478 US 30, 63 [1986]). Without that requirement (the third *Gingles* precondition), liability would arise merely where "there are discernible, non-random relationships between race and voting," which occurs "in most States" and are "to no one's great surprise" (*Cooper v Harris*, 581 US 285, 304 n 5 [2017]). Put simply, a group that elects its preferred candidates obviously does not suffer vote dilution, so the third precondition ensures a tight fit between means and ends.

The NYVRA, however, rejects that requirement in cases like this one. It differentiates two types of vote-dilution challenges, one against at-large systems and one against single-member-district or other alternative systems (Elec. Law § 17-206[2][b]). For challenges to non-at-large systems, a plaintiff must first show (1) "that candidates or electoral choices preferred by members of the protected class would usually be defeated," and next that (2) either (A) "voting patterns … are racially polarized," or (B) "the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired" under "the totality of the circumstances" (*id.* § 17-206[2][b][ii]). But in challenges to at-large systems, that first element is nixed: a plaintiff must only show either (A)

polarized voting or (B) impairment under "the totality of circumstances," but *need not show that candidates of the plaintiff's group usually lose* (*id.* § 17-206[2][b][i]).

In this way, the NYVRA defines vote dilution as existing anywhere there are non-random relationships between political preferences and race (i.e., practically everywhere). Worse, by negating the requirement that candidates preferred by the plaintiff's group usually lose, it defines *every* voter in the jurisdiction as a victim of vote dilution and gives all a claim based on the *same* evidence. A white voter whose candidates of choice usually win is a "member[] of a race … group" and thus a "[p]rotected class" (Elec. Law § 17-204[5]) and can show liability with evidence that "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 only basis for Plaintiffs' entitlement to relief here is they happened to sue. Setting aside the narrow-tailoring standard, this system is so absurd as to lack any rational basis.

Perhaps that is why Plaintiffs asked both the Second Department and this Court to infer that requirement from the statute's general prohibition on "vote dilution" (Appellee Br. at 64; Appellant's Brief, Supreme Court of New York, Appellate Division, Second Dept Dkt No. 2024-11753, NYSCEF DOC. NO. 13 at 54). But it is not the job of the courts to re-write statutes (*Xiang Fu He v Troon Mgmt., Inc.*, 34 NY3d 167, 172 [2019] [*quoting Matter of New York Civ. Liberties*

Union v New York City Police Dept., 32 NY3d 556, 567 [2018]]). Resisting the NYVRA's text, Plaintiffs assert that proving vote dilution requires proof of an alternative election system "that would improve the protected class's representation" (Appellee Br. at 20). But they do not square that requirement with the Legislature's clear rejection of any required showing (in at-large cases) that the protected class's preferred candidates regularly lose.

2. Continuing the *Gingles* wrecking-ball theme, the NYVRA also targets and eliminates the logical requirement (the first precondition) that the plaintiff's racial group be "sufficiently large and geographically compact to constitute a majority in a single-member district" (*Gingles*, 478 US at 50). The U.S. Supreme Court has explained that a minority group that does not show this first precondition "cannot claim to have been injured by" an at-large system—i.e., *does not suffer vote dilution* (*id*. at 50 n 17). This, too, is an essential tailoring element.

Disagreeing with that judgment, the Legislature negated the first precondition for *all* vote-dilution suits, including against single-member districts: "evidence concerning whether members of a protected class are geographically compact or concentrated shall not be considered" (Elec. Law § 17-206[2][c][viii]). In this second way, the NYVRA is grossly overinclusive by demanding race-based remedies where vote dilution does not exist. Plaintiffs defend the rejection of the first precondition on the ground that the NYVRA's "reasonable-alternative-policy

requirement" (a requirement notably found nowhere in the text) is the "analogue" (Appellee Br. at 66). This puts the cart before the horse. No remedy is tailored to curing vote dilution where vote dilution does not exist—as is the case where a non-compact group challenges an at-large system that does not cause its inability to elect.

3. Next, the NYVRA goes a step further and eliminates (for all vote-dilution claims) any required showing of vote dilution, even as the NYVRA itself defines it. As noted, the NYVRA creates liability on proof of either "racially polarized" voting patterns *or* satisfaction of a "totality of the circumstances" test (Elec. Law § 17-206[2][b]). This again rejects Congress' judgment that a showing of impairment under "the totality of circumstances" (52 USC § 10301[b]) is required in ***all*** cases. Oddly, Plaintiff argue that this is a "*statutory* command, not a *constitutional* one" (Appellee Br. at 66). Correct, but it is this statutory command that narrowly tailors the federal VRA to permit its raced-based action. The U.S. Supreme Court inferred that the preconditions are *part of* the totality of circumstances inquiry, that "some … factors are more important … than others," and that unequal opportunity can never be shown in the absence of the three "necessary preconditions," which establish that "a bloc voting majority [is] *usually* … able to defeat candidates supported by a politically cohesive, geographically insular minority group" (*Gingles*, 478 US at 48-50, 48 n 15). Unless the *Gingles* preconditions "are established, there neither has been a wrong nor can be a remedy"

(*Growe v Emison*, 507 US 25, 40-41 [1993]). A totality test without the preconditions, in short, demands remedies in the absence of vote dilution.

But the NYVRA demands just that. And it does so in a manner that is too indeterminate to create manageable standards of any kind (*see Alexander v City of Milwaukee*, 474 F3d 437, 445-46 [7th Cir 2007] ["A race-conscious promotion system with no identifiable standards to narrowly tailor it to the specific, identifiable, compelling needs of the municipal department in question cannot pass constitutional scrutiny."]). The statute provides eleven factors "that may be considered" for a totality analysis, plus "any additional factors" that are unnamed (Elec. Law § 17-206[3]). The circumstances of injury are unclear, and just about any fact relating to a jurisdiction could, in the hands of one jurist, lead to liability and, in another's, foreclose liability. That is about as far from narrowly tailored as a statute can be.

III. New York Courts Must Respect Federal Supremacy in Cases Properly Before Them.

The NYVRA's constitutional infirmities may explain Plaintiffs' argument that this Court must apply the statute even if it violates the Constitution (Appellee Br. at 30-32). But the "Constitution … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby" (US Const, art VI). The Supremacy Clause "creates a rule of decision" that courts "must not give effect to state laws that conflict with federal laws" (*Armstrong v Exceptional Child Ctr., Inc.*, 575 US 320, 324 [2015]). A state court "cannot refuse to enforce" federal law in cases properly

before it (*Testa v Katt*, 330 US 386, 393 [1947] [quotation marks omitted]), including by "employ[ing] a jurisdictional rule 'to dissociate itself from federal law'" (*Haywood v Drown*, 556 US 729, 736 [2009] [alteration marks and citation omitted]).

Plaintiffs and the Attorney General insist that Newburgh lacks capacity and standing to assert the NYVRA is unconstitutional at this stage. But a party requires "capacity to *sue*" (CPLR 3211[a][3] [emphasis added]), and standing "concerns a litigant's power to appear and bring its grievance before the court" (*Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d 377, 384 [2017] [citation omitted]). "[S]tanding … relates to whether a party has suffered an 'injury in fact' conferring a 'concrete interest in *prosecuting* the action'" (*id*. [emphasis added] [citation omitted]). These doctrines do not liberate courts from the Supremacy Clause's "rule of decision" (*Armstrong*, 575 US at 324) in cases properly before them. Newburgh's constitutional arguments are species of preemption defense, and "[o]rdinarily … pre-emption is raised as a defense to the allegations in a plaintiff's complaint" (*Caterpillar Inc. v Williams*, 482 US 386, 392 [1987]). Any state doctrine forbidding consideration of such defenses would itself be preempted. "[D]eciding a case in ignorance of a properly raised federal defense would be a violation of the simplest command of the Supremacy Clause to not enter judgment on a state law ground when it would be barred by federal law" (Michael G. Collins, *Article III*

Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis L Rev 39, 174 n 374 [1995]).

The Court should reject Plaintiffs' request for "resistance" to the Fourteenth Amendment (*see e.g. Harrison v NAACP*, 360 US 167, 175 [1959]). Their view has no limiting principle. As they would have it, if a suit sought to enforce state-law dictates of racial discrimination, voter disenfranchisement, free-speech suppression, etc., defendant municipalities, counties, and school boards—and the adjudicating courts—would have no choice but to acquiesce. State school-segregation laws would displace *Brown v Board of Education* (347 US 483 [1954]) in such cases. This is no hypothetical: state-court suits have sought this type of relief (*see e.g. Pike v Sch. Dist. No. 11 in El Paso Cnty.*, 474 P2d 162 [Colo. 1970] [school board followed U.S. Constitution over state constitution, was sued, raised constitutional defense, and won]).

Besides, Plaintiffs and the Attorney General have misconstrued New York law holding that local governments lack capacity "to *mount* constitutional challenges to acts of the State and State legislation" (*World Trade Ctr.*, 30 NY3d at 384 [emphasis added]). The cases find "lack of capacity" or "lack of standing" (*id*.), but do not purport to liberate New York Courts from the Supremacy Clause. The doctrine is typically applied to suits *by* local governments (*see City of New York v State of New York*, 86 NY2d 286, 291 [1995]; *Matter of County of Chautauqua v*

Shah, 126 AD3d 1317, 1321 [4th Dept 2015], *affd sub nom. Matter of County of Chemung v Shah*, 28 NY3d 244 [2016]; *see also Williams v Mayor & City Council of Baltimore*, 289 US 36, 40 [1933]; *City of Newark v State of New Jersey*, 262 US 192, 196 [1923]; *City of New York v Richardson*, 473 F2d 923, 929 [2d Cir 1973]; *City of New Rochelle v Town of Mamaroneck*, 111 F Supp 2d 353, 364 [SD NY 2000]; *see also Herzog v Board of Educ.*, 171 Misc2d 22, 26 [1996] [respondent's motion for order dismissing the complaint deemed an action for declaratory judgement]). Because there are no "practical concerns about judicial overreach" in deciding constitutional questions raised defensively (*World Trade Ctr.*, 30 NY3d at 388), these decisions are not on point.

Separately, some decisions in this space reflect "a substantive determination that the state acts complained of were not unconstitutional at all" (*id.* at 384). That further explains *Williams*, where Baltimore and Annapolis (as plaintiffs) claimed a state tax exclusion violated their rights under the Privileges and Immunities Clause, which failed on the merits because "[a] municipal corporation … has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator" (*Williams*, 289 US at 40; *see also City of Newark*, 262 US at 196). That doctrine also explains the remaining case Plaintiffs cite (Appellee Br. at 25, 29), where a constitutional argument appears to have been raised defensively:

the political subdivisions lacked constitutional rights against the State (*see Matter of Jeter v Ellenville Cent. Sch. Dist.*, 41 NY2d 283, 287 [1977]).

Here, Newburgh is not claiming the State has violated its own constitutional rights, but that the NYVRA's application would require racial discrimination on tens of thousands of its residents in violation of the Equal Protection Clause. New York law is clear that a political subdivision may contend that it "will by that very compliance" with state law "be forced to violate a constitutional proscription" (*World Trade Ctr.*, 30 NY3d at 386), as is the case here (*see Clarke v Town of Newburgh*, Sup Ct, Orange County, Vazquez-Doles, J., Index No. EF002460-2024, Mar. 26, 2024, Complaint at 29, ¶ b [requesting judgment "ordering the implementation" of a racially discriminatory system]). This Court is "entrusted with" deciding the questions raised under the Constitution and must not fail (*Haywood*, 556 US at 735).

Finally, Plaintiffs argue that the "dilemma exception" only applies if Newburgh will likely be forced to violate a clear constitutional prescription (Appellee Br. at 25-28.) According to Plaintiffs, the possibility that "down the road" Newburgh *might* be liable if they are forced to adopt a racially gerrymandered plan does not give them capacity to challenge the constitutionality of the NYVRA now (*id*. at 31.) That position, however, misses the point. The fact the Newburgh would be forced to adopt *any* other electoral system to favor one racial group over another

offends the Fourteenth Amendment. It is illogical to conclude that Plaintiffs can sue a political subdivision, require that political subdivision to change its electoral process under a state statute purely to favor one racial group over another, but then claim that the political subdivision does not have capacity to challenge the enforcement of that statute against it under the federal Constitution. The Court should reject Plaintiffs' attempt to re-frame the issue to avoid the statute's constitutional infirmities.

CONCLUSION

For all these reasons, the Court should reverse the decision of the Second Department and affirm the judgment from the Orange County Supreme Court holding that the NYVRA is unconstitutional.

Dated: September 15, 2025
New York, New York

BAKER & HOSTETLER LLP

By: Ariana Dindiyal
Ariana Dindiyal, Esq.
45 Rockefeller Plaza, 14th Floor
New York, NY 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201
Email: adindiyal@bakerlaw.com

Robert J. Tucker, Esq.
Erika D. Prouty, Esq.
Rebecca Schrote, Esq.
200 Civic Center Drive, Suite 1200
Columbus, OH 43215
Telephone: (614) 228-1541
Email: rtucker@bakerlaw.com
Email: eprouty@bakerlaw.com

Email: rschrote@bakerlaw.com

E. Mark Braden, Esq.
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 861-1500
Email: mbraden@bakerlaw.com

Counsel for Amici Curiae
Town of Mount Pleasant and Town
Board of the Town of Mount Pleasant

PRINTING SPECIFICATIONS STATEMENT

I certify that on September 15, 2025, pursuant to 22 NYCRR 1250.8(j), this brief was prepared on a computer using a proportionally spaced typeface, as follows:

Typeface name: Times New Roman
Point size: 14
Line spacing: Double

The total number of words in this brief, including point headings and footnotes and excluding the table of contents, table of citations, proof of service, printing specifications statement, and any authorized addendum is 6,997 words, which is under this Court's limitation of 7,000 words for a brief of amici curiae pursuant to 22 NYCRR 1250.8(f)(2).

Ariana Dindiyal

Ariana Dindiyal, Esq.
Counsel for Amici Curiae

STATE OF NEW YORK
COURT OF APPEALS

----------X

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

Case No. APL-2025-00110

Plaintiffs-Respondents,

-against-

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

Defendants-Appellants,

AFFIDAVIT OF SERVICE

and

LETITA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Respondent.

----------X

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

Ramon Cabrera, being duly sworn, deposes and says:

I am over 18 years of age, not a party to this proceeding and am employed by the law firm of Baker & Hostetler LLP, located at 45 Rockefeller Plaza, New York, New York 10111.

On September 15, 2025, I served the foregoing ***Brief of Amici Curiae Town of Mount Pleasant and Town Board of the Town of Mount Pleasant in Support of Defendants-Appellants*** upon the following via Overnight Courier Service (FedEx):

Misha Tseytlin
Bennet J. Moskowitz
TROUTMAN PEPPER LOCKE LLP
875 Third Avenue
New York, New York 10022
Telephone: (212) 704-6000

Ruth Greenwood
Nicholas O. Stephanopoulos
Daniel Hessel
Samuel Jacob Davis
ELECTION LAW CLINIC AT HARVARD LAW SCHOOL
Wasserstein Hall, Suite 4105
6 Everett Street
Cambridge, MA 02138
Telephone: (617) 998-1010

Robert A. Spolzino
Jeffrey A. Cohen
David Imamura
Steven Still
ABRAMS FENSTERMAN, LLP
81 Main Street, Suite 400
White Plains, New York 10601
Telephone: (914) 607-7010

Beezly J. Kiernan
OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL
The Capitol
Albany, New York, 12224-0341
Telephone: (518) 776-2023

Ramon Cabrera

Sworn to before me this
15th day of September 2025.

Notary Public

THERESA BLABER
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01BL6122229
Qualified in Queens County
Commission Expires February 07, 2029