No. APL-2025-00110

State of New York
Court of Appeals

In the Matter of the Application of

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

Plaintiffs-Respondents,

v.

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

Defendants-Appellants,

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

Intervenor-Respondent.

BRIEF FOR INTERVENOR ATTORNEY GENERAL IN RESPONSE TO BRIEF OF *AMICI CURIAE* TOWN OF MOUNT PLEASANT AND TOWN BOARD OF THE TOWN OF MOUNT PLEASANT

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Second Department No. 2024-11753

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ARGUMENT

The Attorney General submits this brief in response to the brief for *amici curiae* Town of Mount Pleasant and Town Board of the Town of Mount Pleasant. *Amici* are defendants in a separate action brought under New York's John R. Lewis Voting Rights Act (NYVRA). The plaintiffs in that separate action allege that Mount Pleasant's at-large method of election for its town board members dilutes the voting power of Hispanic residents in violation of the NYVRA's prohibition against racially discriminatory vote dilution. In response, Mount Pleasant—like Newburgh here—contended that the NYVRA's vote-dilution prohibition is facially unconstitutional under the Equal Protection Clauses of the U.S. and New York State Constitutions. Supreme Court, Westchester County rejected Mount Pleasant's argument, relying on the Appellate Division's opinion under review here. *See Serratto v. Town of Mount Pleasant*, Index No. 55442/2024 (Sup. Ct. Westchester County Apr. 11, 2025).

Mount Pleasant fails to show that the NYVRA's vote-dilution prohibition is facially unconstitutional. For all the reasons explained in the Attorney General's principal brief, the NYVRA does not trigger strict

scrutiny on its face. Far from requiring municipalities to discriminate based on race, the NYVRA prohibits municipalities from using electoral systems that have the racially discriminatory effect of diluting the voting power of members of a protected class. *See* Election Law § 17-206(2). And the statute provides race-neutral means to remedy the racially discriminatory effects of existing electoral systems. *See id.* § 17-206(5)(a). The statute therefore comports with the Equal Protection Clauses of the U.S. and New York State Constitutions.

There is no merit to Mount Pleasant's reliance on affirmative action caselaw. Unlike "a race-based set-aside program" (Mt. Pleasant Br. at 7), the NYVRA applies equally to members of all racial groups. *Cf. Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* ("*SFFA*"), 600 U.S. 181, 209-10 (2023); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 205 (1995). Similarly unavailing is Mount Pleasant's analogy to a hypothetical "state law demanding that localities redesign election systems to ensure that white voters prevail over minority voters" (Mt. Pleasant Br. at 9). The NYVRA does not require localities to give any racial group disproportionately greater political power over any other racial group. Rather, the NYVRA requires municipalities to stop using

electoral systems that discriminatorily dilute the voting power of numerical minority groups of any race, and thus to provide members of all racial groups an equal opportunity to participate in the political process. *See* Election Law § 17-206(5)(a). Because the NYVRA merely mitigates the racially discriminatory effects of existing methods of election, and does so by equally protecting members of all racial groups from such disparate impacts, it is nothing like the affirmative action policies struck down in *SFFA*. And indeed, the courts that have addressed arguments analogizing laws prohibiting vote dilution to affirmative action policies have rejected those arguments. *See Robinson v. Ardoin*, 86 F.4th 574, 593 (5th Cir. 2023); *Singleton v. Allen*, 690 F. Supp. 3d 1226, 1317 (N.D. Ala. 2023) (per curiam) (three-judge panel); *Coads v. Nassau County*, 86 Misc. 3d 627, 645 (Sup. Ct. Nassau County 2024).

Equally meritless is Mount Pleasant's contention that the NYVRA differs from other antidiscrimination laws by "*requir*[*ing*] state action on the basis of protected categories." (Mt. Pleasant Br. at 10.) Preliminarily, the NYVRA does not require municipalities to treat voters differently based on race. Rather, the statute requires municipalities to treat members of all racial groups equally. And the remedies sought both here

and in *Serratto* (the case against Mount Pleasant)—specifically, either a district-based or alternative method of election—are plainly race-neutral. Indeed, many larger municipalities in the State (and across the country) hold district-based elections for their legislative body, or use ranked-choice voting or some other alternative method of election. Requiring localities to use one of these well-established electoral systems does not require them to engage in any racial discrimination.

Moreover, contrary to Mount Pleasant's contention (at 10), the NYVRA resembles other antidiscrimination laws in that it both prohibits discrimination *and* requires defendants to engage in some action to remedy discrimination when liability is found. For example, to remedy a disparate-impact violation under Title VII, courts may order defendants to alter their hiring practices. *See* 42 U.S.C. § 2000e-5(g)(1); *United States v. City of New York*, 717 F.3d 72, 95-97 (2d Cir. 2013); *Hayden v. County of Nassau*, 180 F.3d 42, 46 (2d Cir. 1999). The federal Fair Housing Act likewise authorizes affirmative relief to remedy a disparate-impact violation. *See* 42 U.S.C. § 3613(c)(1); *Texas Dept. of Hous. & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 544-45 (2015). Such antidiscrimination laws have not been subject to strict

scrutiny on their face. Thus, requiring defendants to adopt race-neutral methods of election to remedy the racially disparate impact of their current electoral systems neither distinguishes the NYVRA from other antidiscrimination laws, nor triggers strict scrutiny.

Mount Pleasant also incorrectly argues that Section 2 of the federal Voting Rights Act (VRA) is subject to strict scrutiny on its face. (Mt. Pleasant Br. at 12-13.) The U.S. Supreme Court case on which Mount Pleasant relies, *Allen v. Milligan*, 599 U.S. 1 (2023), does not support that proposition. Neither the Supreme Court nor any other court has ever held that Section 2 is subject to strict scrutiny on its face.[1] Indeed, the two courts that have directly addressed the argument that Section 2 should be subjected to strict scrutiny on its face have rejected that argument. *See Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 681-82 (2006), *cert.*

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[1] Federal courts routinely adjudicate Section 2 claims without any discussion, let alone application, of strict scrutiny. *See, e.g.*, *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 700 F. Supp. 3d 1136 (N.D. Ga. 2023) (Section 2 violation found after bench trial, and Section 2 held to be constitutional, without any discussion of strict scrutiny); *Luna v. County of Kern*, 291 F. Supp. 3d 1088 (E.D. Cal. 2018) (Section 2 violation found after bench trial, without any discussion of strict scrutiny); *Missouri State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006 (E.D. Mo. 2016) (same), *aff'd*, 894 F.3d 924 (8th Cir. 2018).

denied, 552 U.S. 974 (2007); *Coads*, 86 Misc. 3d at 644 ("Section 2 of the VRA has not been . . . required to pass strict scrutiny.").

Far from applying strict scrutiny to Section 2 on its face, *Milligan* explained that one possible remedy under the federal VRA—the drawing of district lines using race as the predominant factor—triggers strict scrutiny. 599 U.S. at 31. The State does not dispute that strict scrutiny would also apply if a court were to order such a remedy under the NYVRA. But the NYVRA authorizes a broad range of facially race-neutral remedies, many of which (such as alternative methods of election) do not involve drawing district lines at all. And even if a district-based remedy is ordered, district lines may be drawn without race as a predominant factor. *See id*. (explaining that "[w]hile the line between racial predominance and racial consciousness can be difficult to discern," it was not breached by Alabama's redistricting plan). Because not every conceivable application of the NYVRA requires municipalities to draw district lines using race as the predominant factor, the NYVRA does not trigger strict scrutiny on its face.

Finally, there is no merit to Mount Pleasant's suggestion that the State lacks the power to pass legislation intended to remedy "practices

that are discriminatory in effect, if not in intent." (Mt. Pleasant Br. at 18 [quoting *Tennessee v. Lane*, 541 U.S. 509, 520 (2004)].) Mount Pleasant notes that the Fourteenth and Fifteenth Amendments of the U.S. Constitution grant Congress the power to enact prophylactic legislation. *See* U.S. Const. amend. XIV, § 5, amend. XV, § 2. But unlike Congress, States do not need an affirmative grant of authority from the federal Constitution to regulate. Instead, States have broad police powers to regulate within their respective jurisdictions, including the power to regulate their own elections, *see Shelby County v. Holder*, 570 U.S. 529, 543 (2013). And, as the U.S. Supreme Court has long recognized, State actors are free to use race-neutral means to remedy the racially disparate impact of existing laws or policies. *See, e.g.*, *Texas Dept. of Hous. & Community Affairs*, 576 U.S. at 545; *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-510 (1989). Mount Pleasant cites no case holding that a State lacks the power to pass a law creating disparate-impact liability, and we are aware of none.[2] Thus, the Legislature acted well within its authority in enacting the NYVRA.

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[2] While the U.S. Supreme Court in *Milligan* upheld Congress' authority under the Fifteenth Amendment to enact Section 2 of the

(*continued on the next page*)

CONCLUSION

The Court should affirm the Appellate Division's order.

Dated: Albany, New York
September 26, 2025

Respectfully submitted,

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federal VRA, *see* 599 U.S. at 41, the Court had no occasion to address state authority to enact vote-dilution laws like the NYVRA, as no such state law was at issue. (*Contra* Mt. Pleasant Br. at 12-13.)

AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Beezly J. Kiernan, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 1,501 words, which complies with the limitations stated in § 500.13(c)(1).

BJK

BEEZLY J. KIERNAN