

1 COURT OF APPEALS

2 STATE OF NEW YORK

3 CLARKE,

4 Respondent,

5 -against-

NO. 84

6 TOWN OF NEWBURGH,

7 Appellant.

20 Eagle Street
Albany, New York
October 14, 2025

8
9 Before:

10 CHIEF JUDGE ROWAN D. WILSON
11 ASSOCIATE JUDGE JENNY RIVERA
12 ASSOCIATE JUDGE MADELINE SINGAS
13 ASSOCIATE JUDGE ANTHONY CANNATARO
14 ASSOCIATE JUDGE SHIRLEY TROUTMAN
15 ASSOCIATE JUSTICE CYNTHIA S. KERN
16 ASSOCIATE JUSTICE TANYA R. KENNEDY

17 Appearances:

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Donna Gould
Official Court Transcriber



1 CHIEF JUDGE WILSON: This is Clarke v. Town of
2 Newburgh.

3 MR. TSEYTLIN: Thank you, Your Honor. Misha
4 Tseytlin for the Town of Newburgh. It's a pleasure to be
5 back before you all again, although some of you are in
6 different seats than the - - - than the last time I was
7 here last month.

8 JUDGE SINGAS: Just keeping you on your toes,
9 that's all.

10 MR. TSEYTLIN: I'd like to reserve three minutes
11 for rebuttal, if I can.

12 CHIEF JUDGE WILSON: Three?

13 MR. TSEYTLIN: Yes.

14 CHIEF JUDGE WILSON: Yes.

15 MR. TSEYTLIN: New - - - the NYVRA's vote
16 dilution provisions do not outlaw discrimination nor do
17 they even outlaw vote dilution as that term is used under
18 Section 2 of - - - of the Federal VRA.

19 JUDGE KERN: Counsel, why shouldn't we first be
20 focusing on the issue of capacity? I know, in your brief,
21 you - - - you talked a lot about the constitutionality
22 without first addressing capacity, but isn't that a
23 threshold issue that we need to be addressing in the first
24 instance?

25 MR. TSEYTLIN: Well, what we have argued here in



1 this case is that every possible step that we, the Town of
2 Newburgh, could take to comply with the NYVRA's vote
3 dilution provisions would violate the U.S. Constitution.
4 Now, the - - -

5 JUDGE KERN: Let me - - - let me ask you, didn't
6 you make an admission at the Second Department that the way
7 it's being applied in this particular case would be
8 consistent with Gingles?

9 MR. TSEYTLIN: No, not at all. Quite the
10 opposite. What we said is that - - -

11 JUDGE KERN: Well, then, why - - - why wouldn't
12 it be? Why wouldn't this particular case comply with the
13 three provisions of Gingles?

14 MR. TSEYTLIN: Well, that issue is entirely
15 waived. They never raised, in the Supreme Court, any
16 notion that they're bringing a Gingles case. It would be a
17 completely different case. In order to bring a Gingles
18 case, you would have to have experts that opine on the
19 three pre-conditions. Their expert didn't even attempt to
20 opine on them. They'd have to have an expert that - - -
21 that does all of - - - different things, and - - -

22 JUDGE KERN: But Counsel, isn't the first issue
23 that has to be decided under the analysis of capacity
24 whether there's any application of the statute that would
25 be constitutional? So if there's any application that be -

1 - - could be constitutional, there would not be standing.
2 So isn't one of the applications that would be
3 constitutional if it could be applied in such a way to be
4 consistent with Gingles?

5 MR. TSEYTLIN: It would be impossible to apply
6 this statute in a way that sort of - - - with Gingles
7 without striking down multiple aspects of the statute
8 because the statute itself takes out aspects of Gingles.
9 So in order to bring a Gingles case, you would have to
10 strike down the aspect of the statute. That gets rid of
11 the first step of Gingles. You'd have to strike down the
12 aspect - - - if I may, you - - -

13 JUDGE KERN: But let's go back to the capacity
14 issue because - - -

15 MR. TSEYTLIN: Yes.

16 JUDGE KERN: - - - there's one thing if you're
17 doing a facial attack on the constitutionality.

18 MR. TSEYTLIN: Um-hum.

19 JUDGE KERN: It's another issue if you have
20 capacity, and to have capacity, you have to establish that
21 there's no possible way to apply this case in a
22 constitutional manner.

23 MR. TSEYTLIN: Yeah, this particular statute,
24 Your Honor.

25 JUDGE KERN: Right.

1 MR. TSEYTLIN: And this statute, on its text,
2 takes out aspects of Gingles, so it's impossible to apply
3 this statute as written under Gingles. You could apply - -
4 - so if the court strikes down - - - I would - - - as a
5 count of five aspects of the statute, then that modified
6 statute, which would, essentially, be Section 2, would then
7 be like Gingles, but that's not the statute.

8 JUDGE KERN: But if there are portions of the
9 statute that could be applied in a way that were consistent
10 with Gingles, wouldn't that mean that you lack capacity?
11 If there's a way to apply portions of the statute in a way
12 that would clearly be consistent with Gingles and be
13 consistent with Allen, wouldn't that take away your
14 capacity?

15 MR. TSEYTLIN: That would be a different statute,
16 Your Honor. This statute that we are officially
17 challenging has multiple provisions that are inconsistent
18 with Gingles. Those provisions are facially
19 unconstitutional.

20 JUDGE KERN: Then how do you know they're going
21 to be applied in this particular case?

22 MR. TSEYTLIN: No, but that's - - - that's the
23 case. If you look at their complaint, they're bringing
24 claims under this statute. They have one claim that says
25 there's racially polarized voting. That's their first

1 count. That's not a Gingles claim. You can't just get a
2 Gingles win through racially polarized voting. Their
3 second claim says, we win because of the all-things-
4 considered inquiry. That's their second claim. That's not
5 a Gingles claim. They don't have a Gingles claim in their
6 case.

7 JUDGE KERN: What about this case is inconsistent
8 with a Gingles claim? You - - - you have - - - even if you
9 separate the two groups, you have a Latino community that's
10 twenty-five percent, and you have five town board members.
11 Why doesn't that fit into the Gingles test?

12 MR. TSEYTLIN: There is - - -

13 JUDGE KERN: And there's a claim that there's
14 racially polarized voting.

15 MR. TSEYTLIN: Your Honor, this is a motion to
16 dismiss - - - this is a motion for summary judgment. They
17 did not attempt to bring a Gingles claim. If you look at
18 their complaint and their evidence, you'll see no attempt
19 to bring a Gingles - - - if they brought a Gingles claim,
20 we could have removed it to Federal Court. The - - - they
21 had brought a specific claim - - -

22 JUDGE KERN: Well, they're not bringing a claim
23 under the federal Voting Rights Act. They're bringing a
24 claim under the New York Voting Rights Act. But if - - -
25 if it could be applied in such a way that's consistent with

1 the Gingles test, then how can it be unconstitutional?

2 MR. TSEYTLIN: It cannot be applied consistent
3 with a Gingles test unless you strike down - - - first
4 strike down multiple aspects of it. Let me just give you
5 an example. There's a provision in the NYV - - - can I
6 just - - -

7 JUDGE KERN: Go ahead.

8 MR. TSEYTLIN: There's a provision in the NYVRA
9 that says that I am not allowed to defend against
10 statistical evidence by saying their attempt to show
11 racially polarized voting can really be explained by
12 politics. In a federal case, I could make that argument.
13 In this - - - under the NYVRA, I'm prohibited from making
14 that argument. So how is this a Gingles claim when there's
15 categories of evidence that I'm not even - - - and
16 argumentation that I'm not even allowed to put before the
17 court?

18 JUDGE KERN: Let's go back, though, to the test.
19 What is the test for capacity? You have to show the
20 dilemma exception - - -

21 MR. TSEYTLIN: Yes.

22 JUDGE KERN: - - - and the dilemma exception is
23 if there's any way that this statute can be
24 constitutionally applied, then you don't have standing. So
25 that's not - - - that's not the way you're arguing it.

1 MR. TSEYTLIN: No.

2 JUDGE KERN: You're arguing it a much broader
3 attack on the statute that there's some possible way it
4 could be unconstitutional, but isn't the test really
5 whether - - - is there some possible way it can be
6 constitutional?

7 MR. TSEYTLIN: Yeah, and our - - - our - - - our
8 only argument is that it is - - - there is no possible way,
9 and the way that the constitutional analysis works under
10 the U.S. Supreme Court case law is a two-step inquiry.
11 Step one, does strict scrutiny apply? I can talk to you
12 all about that, why it does. Step two, if I show that
13 strict scrutiny applies, I think I'm clear it does, then
14 the burden shifts to them - - - so the burden shifts to
15 them to show that strict scrutiny has been satisfied.

16 JUDGE KERN: But Counsel, you're talking in terms
17 of a facial attack on the constitutionality, but that's not
18 what I'm asking you about. I'm asking you about this - - -
19 the capacity issue, which is a much more limited analysis,
20 arguably. Do you not agree that there's some distinction
21 between the way you address the constitutionality when
22 discussing the dilemma exception as opposed to when you're
23 discussing the case in terms of a facial constitutional
24 attack?

25 MR. TSEYTLIN: Not in the way we have framed our

1 theory. If we had brought an as-applied challenge, sure.
2 But this - - - I mean, I'm just going to read this court's
3 decision in Jeter, which both my friends on the other side
4 quote. It says, if - - - the - - - the exception applies
5 if you are, quote, obliged to comply with the statute.
6 That will, by the very nature of compliance, violate the
7 Constitution. That is our entire merits argument. So
8 because we have made our entire merits - - -

9 CHIEF JUDGE WILSON: Well, but the - - - I think
10 the problem is that we don't yet know what will be required
11 by compliance, right, in the way of compliance.

12 MR. TSEYTLIN: Wait. So that - - - this is an
13 important point that I really want to emphasize.

14 CHIEF JUDGE WILSON: Um-hum.

15 MR. TSEYTLIN: Our - - - our understanding of the
16 word compliance is comply with regard to the finding of
17 liability. Whether there'll be some remedy later, that
18 could be a different challenge. Our theory is that any
19 step that we could take to comply - - - because the way the
20 NYVRA works is that if there - - -

21 CHIEF JUDGE WILSON: I'm sorry. You - - - you've
22 - - - you've lost me a little bit.

23 MR. TSEYTLIN: Okay. So let me - - -

24 CHIEF JUDGE WILSON: Comply with a finding of
25 liability?

1 MR. TSEYTLIN: Of - - - yes.

2 CHIEF JUDGE WILSON: A finding of liability
3 doesn't actually require you to do anything. I don't know
4 how you could comply with a finding of liability.

5 MR. TSEYTLIN: So the way that the NYVRA works is
6 that if we get an NYVRA notification letter, which they
7 sent us - - -

8 CHIEF JUDGE WILSON: Um-hum.

9 MR. TSEYTLIN: - - - then we have the option to
10 voluntarily change our voting system - - -

11 CHIEF JUDGE WILSON: Um-hum.

12 MR. TSEYTLIN: - - - in order to come into
13 compliance in - - - with the NYVRA.

14 CHIEF JUDGE WILSON: Um-hum.

15 MR. TSEYTLIN: That's the way it works. That's
16 the - - - that's the primary way the NYVRA req - - -
17 expects us to comply - - -

18 CHIEF JUDGE WILSON: Allows you to.

19 MR. TSEYTLIN: - - - with the statute. And - - -
20 and our submission is that any step that we could take to
21 comply with the NYVRA notification letter - - -

22 JUDGE RIVERA: I thought your position is you
23 don't have to take any step.

24 MR. TSEYTLIN: Because - - -

25 JUDGE RIVERA: I thought your position is you

1 don't have to take any step because you've not violated
2 their rights.

3 MR. TSEYTLIN: We - - -

4 JUDGE RIVERA: That - - - that's the threshold -
5 - -

6 MR. TSEYTLIN: We do have an argument - - -

7 JUDGE RIVERA: - - - argument.

8 MR. TSEYTLIN: - - - that even - - - that we did
9 not violate the NYVRA. That's true. But we are saying - -
10 -

11 JUDGE RIVERA: That has to be a threshold
12 argument.

13 MR. TSEYTLIN: No, but - - - we have two
14 threshold arguments - - -

15 JUDGE RIVERA: Okay.

16 MR. TSEYTLIN: - - - but the one that I'm
17 presenting to the court is that the - - - if - - - the way
18 the judicial review of the constitutional works is if - - -

19 JUDGE RIVERA: Yeah.

20 MR. TSEYTLIN: - - - you've got the state
21 statute, the NYVRA, and you lay down the U.S. Constitution
22 next to it - - -

23 JUDGE RIVERA: Right.

24 MR. TSEYTLIN: - - - you can't give any effect to
25 the NYVRA because it violates the U.S. Constitution. Our

1 position is that every application of the NYVRA violates
2 the U.S. Constitution.

3 CHIEF JUDGE WILSON: Wait. Let's take the - - -
4 the New York VRA allows you to win under the statute. You
5 could, right? In theory.

6 MR. TSEYTLIN: Yes. We do have defenses. That's
7 true.

8 CHIEF JUDGE WILSON: So if - - - that's Judge
9 Rivera's question, I think, which is if that possibility is
10 there, then how can you say - - - how are you fitting under
11 the fourth exemption?

12 MR. TSEYTLIN: Well, it would be, I think, quite
13 an - - - a remarkable expansion or maybe negation of the
14 fourth exception if - - - if the fact that a party might
15 have a merits defense that isn't the constitutional defense
16 - - -

17 CHIEF JUDGE WILSON: Um-hum.

18 MR. TSEYTLIN: - - - means that the court - - -
19 that can't even raise the constitutional defense. I mean,
20 you know - - -

21 CHIEF JUDGE WILSON: Well, that's because - - - I
22 mean, I don't think you dispute the general proposition
23 that political subdivisions of New York State cannot bring
24 an action against the State or challenge the state statute
25 as a general matter.

1 MR. TSEYTLIN: As a general matter, we could not
2 file lawsuits challenging the state statute. That's
3 correct.

4 CHIEF JUDGE WILSON: Or - - - well, right, or
5 even in defense - - -

6 MR. TSEYTLIN: No, I very strongly - - -

7 CHIEF JUDGE WILSON: No?

8 MR. TSEYTLIN: - - - disagree with that, Your
9 Honor.

10 CHIEF JUDGE WILSON: All right. So let's - - -
11 so - - -

12 MR. TSEYTLIN: Because - - - because - - -

13 CHIEF JUDGE WILSON: But that doesn't fit under
14 the fourth exemption particularly, right?

15 MR. TSEYTLIN: Well, our - - - and this - - -
16 this issue has not been adjudicated - - -

17 CHIEF JUDGE WILSON: Right. You're asking for a
18 new - - - fifth one, I think.

19 MR. TSEYTLIN: Well, no, no. It's - - - it's the
20 - - - I - - - my respectful submission is that the fourth
21 exception, as I've articulated, is required by the
22 Supremacy Clause of the U.S. Constitution. That clause - -
23 - with regard to federal constitutional claims, that clause
24 says that the - - - that the U.S. Constitution is the
25 supreme law of the land, and it binds every judge, which

1 includes - - -

2 CHIEF JUDGE WILSON: Um-hum.

3 MR. TSEYTLIN: - - - state court judges. So if
4 the State - - - if there is a case, which they have brought
5 against us - - -

6 CHIEF JUDGE WILSON: Um-hum.

7 MR. TSEYTLIN: - - - and they are laying the - -
8 - the NYVRA down from the judge and saying, hold the Town
9 of Newburgh liable - - - the small town, hold them liable -
10 - -

11 CHIEF JUDGE WILSON: Um-hum.

12 MR. TSEYTLIN: - - - for violating the NYVRA, the
13 - - - and we lay down the U.S. Constitution - - -

14 CHIEF JUDGE WILSON: Um-hum.

15 MR. TSEYTLIN: - - - in front of the Supreme
16 Court - - -

17 CHIEF JUDGE WILSON: Um-hum.

18 MR. TSEYTLIN: - - - the Supreme Court is not
19 allowed, by the Supremacy Clause, not to address - - -

20 CHIEF JUDGE WILSON: So - - -

21 MR. TSEYTLIN: - - - the U.S. Constitution.

22 CHIEF JUDGE WILSON: So can New York State
23 abolish the Town of Newburgh?

24 MR. TSEYTLIN: It could, yes.

25 CHIEF JUDGE WILSON: And the Supremacy Clause has

1 nothing to say about that?

2 MR. TSEYTLIN: That's true, but the - - - you - -
3 - but - - - but, for example, the - - - the - - - the State
4 - - - the State of New York legislature - - -

5 CHIEF JUDGE WILSON: Um-hum.

6 MR. TSEYTLIN: - - - could not enact the
7 following statute: the Town of Newburgh, or any other
8 town, can only let in people of certain races into their
9 schools.

10 CHIEF JUDGE WILSON: Can it divide the Town of
11 Newburgh into five towns?

12 MR. TSEYTLIN: It could, but it could not say
13 that those towns have to racially discriminate.

14 CHIEF JUDGE WILSON: No, but it could divide the
15 town into five towns based on geography that might have the
16 same effect as whatever you might be compelled to do here.

17 MR. TSEYTLIN: You know, Your Honor, I understand
18 what you're getting at.

19 CHIEF JUDGE WILSON: Yeah.

20 MR. TSEYTLIN: Even though it could do all of
21 those things, this is what it cannot do.

22 CHIEF JUDGE WILSON: Well, then I don't
23 understand why the Supremacy Clause matters here.

24 MR. TSEYTLIN: Well - - - well, let me - - - let
25 me - - - let me give you a very extreme hypothetical. And

1 I think, maybe, my friends will disagree, but let me - - -
2 let's say that tomorrow, the State of New York, or any
3 other state, you can take a hypothetical state, says that
4 every town in our state has to not let in people of a
5 certain race into their schools. That's - - - that's
6 provision - - - just let me - - -

7 CHIEF JUDGE WILSON: Okay.

8 MR. TSEYTLIN: No Asians in our schools.

9 CHIEF JUDGE WILSON: Um-hum.

10 MR. TSEYTLIN: And then - - - that's - - - that's
11 Section 1 of the statute.

12 CHIEF JUDGE WILSON: Um-hum.

13 MR. TSEYTLIN: Section 2 of the statute says, no
14 town is allowed to raise, in court, an argument that this
15 makes us violate the U.S. Constitution.

16 CHIEF JUDGE WILSON: Um-hum.

17 MR. TSEYTLIN: I think it would be an easy case
18 that that violates the Supremacy Clause.

19 JUDGE TROUTMAN: But the question here is what
20 constitutional violation is the Voting Rights Act of New
21 York requiring you to violate?

22 MR. TSEYTLIN: Absolutely, Your Honor, and that's
23 why, I think, ultimately, it boils down to the merits. You
24 know, I was going to start with the merits. Judge Kern
25 took me on capacity. But if Your Honors agree with my

1 hypothetical that that kind of extreme statute that says
2 that the towns have to clearly act unconstitutionally - - -

3 JUDGE TROUTMAN: So let's look at this statute -
4 - -

5 MR. TSEYTLIN: Yes. Yeah, so I would love to
6 discuss the merits.

7 JUDGE TROUTMAN: - - - and what it does or does
8 not do - - -

9 MR. TSEYTLIN: Yes.

10 JUDGE TROUTMAN: - - - because I think there is
11 some disagreement about - - -

12 MR. TSEYTLIN: Yeah.

13 JUDGE TROUTMAN: - - - it requiring you to
14 violate - - -

15 MR. TSEYTLIN: Yeah.

16 JUDGE TROUTMAN: - - - the Constitution.

17 MR. TSEYTLIN: So the - - - every application of
18 the NYVRA's vote dilution provisions operates in this way.
19 The - - - a town that happens to have racially polarized
20 voting, which is nothing but the common condition, as the
21 U.S. Supreme Court said, of a discernible nonrandom
22 relationship between race and voting, if a town happens to
23 have that, then they have to look at all of the races - - -
24 races in their - - - in their town, and they have to say,
25 are any of - - - are any of the citizens lumped together by

1 those races - - -

2 JUDGE TROUTMAN: So are you saying they can't
3 even look at race to see if there is something going on
4 with respect to the dilution of the rights of the people
5 that they claim may be affected?

6 MR. TSEYTLIN: Well, if - - -

7 JUDGE TROUTMAN: They can't even consider that?

8 MR. TSEYTLIN: No, no, no. Let me - - - that - -
9 - no, they can look at - - -

10 JUDGE TROUTMAN: No, I ask you a question.

11 MR. TSEYTLIN: No - - - yes, and - - - but - - -
12 no, they can take a look at it. What they can't do is - -
13 - the next thing I was about to say is they can't, after
14 looking at it, say, well, you know, white voters are not
15 winning enough elections, Black voters are not winning
16 enough elections, Asian - - -

17 JUDGE TROUTMAN: Did they do that here?

18 MR. TSEYTLIN: What did you say?

19 JUDGE TROUTMAN: Did they do what you're saying
20 here?

21 MR. TSEYTLIN: That's what they claim the NYVRA
22 forced us to do, and that's what every single - - -

23 JUDGE TROUTMAN: Have they ordered - - - have you
24 been ordered to do any of those things?

25 MR. TSEYTLIN: No. That's - - - that's because

1 we have brought a facial challenge to the statute, which we
2 have a constitutional right to do, and we are saying that
3 any application of the statute - - - it's just like - - -
4 it's just like my - - -

5 JUDGE TROUTMAN: It provides - - -

6 JUDGE KERN: What's the - - - what - - -

7 JUDGE TROUTMAN: The statute provides options,
8 though, correct?

9 MR. TSEYTLIN: And - - - and my - - - and my
10 argument is that every option we could possibly take would
11 violate the U.S. Constitution.

12 CHIEF JUDGE WILSON: So let me - - -

13 JUDGE CANNATARO: And that's because those
14 options all tend towards mitigating racially polarized
15 voting, and that's something that just naturally occurs?

16 MR. TSEYTLIN: It's because all of those options
17 involve the giving out of an important benefit based only
18 on race, which is greater electoral success.

19 JUDGE SINGAS: How does - - - adding poll
20 locations or voter education, how does that implicate it?

21 MR. TSEYTLIN: Well, so if one takes - - - you
22 know, if a - - - if a town takes an action, let's say X
23 action, and it puts, in the legislative findings, we are
24 taking this action only for the exclusive reason of - - -
25 so that white voters will win more elections, that is,

1 under the Arlington Heights framework, racial
2 discrimination.

3 JUDGE CANNATARO: So anything that tends to
4 attempt to remedy this particular type of violation that's
5 laid out in this Voting Rights Act is ipso facto some sort
6 of racially discriminatory effort?

7 MR. TSEYTLIN: It - - - it should restrict
8 scrutiny. It is - - - it is racial classification.
9 Whether it's constitutional or not turns on whether you can
10 satisfy - - -

11 JUDGE RIVERA: What - - - what if it's merely
12 eliminating an advantage that a racial group has?

13 MR. TSEYTLIN: The specific provisions that are
14 at issue here - - -

15 JUDGE RIVERA: Yeah.

16 MR. TSEYTLIN: - - - say that you have to make a
17 change - - -

18 JUDGE RIVERA: Yeah.

19 MR. TSEYTLIN: - - - in order to make it so that
20 whatever racial group will win more if - - -

21 JUDGE TROUTMAN: No. No.

22 JUDGE RIVERA: If, though, it's talking about
23 dilution, and - - -

24 MR. TSEYTLIN: That's just - - -

25 JUDGE RIVERA: Excuse me.

1 MR. TSEYTLIN: Yeah.

2 JUDGE RIVERA: Dilution is referring to the fact
3 that there is a group whose votes are being diluted, which,
4 of course, means other groups' votes are being advantaged.
5 That's the point of a vote dilution claim.

6 MR. TSEYTLIN: And - - - and the - - - vote
7 dilution is a term - - - is a term brought from the - - -

8 JUDGE RIVERA: But yet no one - - - no court has
9 yet found that there's been vote dilution.

10 MR. TSEYTLIN: Vote - - - vote dilution is a term
11 of art from - - - from Gingles. What - - - what the - - -
12 what is being outlined here - - -

13 JUDGE RIVERA: I know Gingles. Thank you.

14 MR. TSEYTLIN: - - - is not - - - is not vote
15 dilution at all. It is a statutorily defined term, which
16 is racially polarized voting. Racially polarized voting is
17 not discrimination in any sense, and it's not even vote
18 dilution in any sense. It's just a statutory definition.

19 JUDGE RIVERA: And no court has interpreted the
20 statute that way, so - - -

21 MR. TSEYTLIN: Well, I mean, I don't - - - the
22 statute says what it says. It says, vote dilution is
23 established by showing racially polarized voting, and then
24 it defines racially polarized voting. It's not a
25 complicated statute. And so the - - - the - - -

1 CHIEF JUDGE WILSON: Well, there's more to it
2 than that, right? It's not just racially polarized voting.
3 It's also and that that group has not had electoral
4 success.

5 MR. TSEYTLIN: That's not in the statute, Your
6 Honor.

7 CHIEF JUDGE WILSON: No?

8 MR. TSEYTLIN: The - - - that's not at all in the
9 statute. The - - - what we have agreed, as a nonstatutory
10 element, is that - - - that the plaintiffs also have to
11 show that there is some - - - some other regime under which
12 they would win more. There's no - - - no - - - nothing in
13 the statute that says that they haven't had lots of - - -

14 JUDGE RIVERA: Or that another group's advantage
15 - - -

16 MR. TSEYTLIN: Well - - - well, that - - -

17 JUDGE RIVERA: - - - would be eliminated it so
18 that everybody's on an equal playing field.

19 MR. TSEYTLIN: That's also not in the statute,
20 Your Honor, and that's not an - - - that would be just
21 coming up with an - - -

22 JUDGE TROUTMAN: So if - - - if that were that
23 it's - - - if - - - if it were so that the law was just
24 such that no one has an advantage, everybody just has the
25 equal opportunity to participate, then that's not a

1 constitutional violation.

2 MR. TSEYTLIN: Yeah, but that wouldn't be the
3 statute. Nothing in the statute - - -

4 JUDGE TROUTMAN: No, but if that were the case,
5 then it wouldn't be a problem, right?

6 MR. TSEYTLIN: I mean, that - - - that's a very
7 kind of high-level principle. If the statute didn't do
8 what it does, then there might be other issues, but the - -
9 - the statute itself requires the giving out of a race-
10 based entitlement, which is that you have more electoral
11 success as a racial group. Now, it's a broadly - - -

12 JUDGE TROUTMAN: More success or more ability to
13 participate without being diluted.

14 MR. TSEYTLIN: More - - - more success. You
15 know, the - - - the - - - the unwrit - - -

16 JUDGE TROUTMAN: It guarantees that one has an
17 outcome that they elect a person?

18 MR. TSEYTLIN: The - - - the - - - the unwritten
19 element that my - - - the plaintiffs and I have agreed upon
20 in order to make the statute not absurd is that the - - -
21 there has to be a showing that under a different regime,
22 the minority group would do better, which means - - -

23 CHIEF JUDGE WILSON: Well, the statute actually
24 does say that they have to show that the ability of that
25 group to obtain electoral representatives is impaired. No?

1 MR. TSEYTLIN: That's - - - that's a - - - a
2 high-level definition of the statute, but if you actually
3 drill down - - -

4 CHIEF JUDGE WILSON: It's - - - it's in the
5 statutory language. No?

6 JUDGE CANNATARO: It is in the statute.

7 MR. TSEYTLIN: No, but if you drill down to the -
8 - -

9 CHIEF JUDGE WILSON: Is it in the statutory
10 language?

11 MR. TSEYTLIN: Not - - -

12 JUDGE RIVERA: It's a yes or no - - -

13 MR. TSEYTLIN: Not in the operative provision
14 here. The - - -

15 CHIEF JUDGE WILSON: Well, is it in the statutory
16 language?

17 MR. TSEYTLIN: There is a definition - - -

18 CHIEF JUDGE WILSON: I don't know what provisions
19 are operative and what you think are not. Is - - - did the
20 legislature write those words into the statute?

21 MR. TSEYTLIN: That is - - - that is in a portion
22 of the statute. That is not the one that they have alleged
23 that we violated here. What they violated - - - they have
24 two counts. One is that there's racially polarized voting.
25 That's their Count 1.

1 CHIEF JUDGE WILSON: Um-hum.

2 MR. TSEYTLIN: Racially polarized voting has
3 nothing to do with what you just said, Your Honor. The
4 other is the - - - is the all-things-considered inquiry,
5 which the court - - - which you can base it on one factor
6 not even listed. So whatever - - - that provision, that's
7 not one of the two counts they have brought here. They
8 brought the racially polarized voting count, which has
9 nothing to do with what you just said.

10 CHIEF JUDGE WILSON: And you're not arguing that
11 they have to satisfy that piece of the statute?

12 MR. TSEYTLIN: No, what I'm arguing is that - - -

13 CHIEF JUDGE WILSON: No, I'm - - - I'm asking.
14 Are you arguing that they have to satisfy that piece of the
15 statute or no?

16 MR. TSEYTLIN: I don't think anyone has argued
17 that, that they have to satisfy that piece of the statute -
18 - - that - - - that piece of the statute because it's not
19 an element of their claim. The only statutory elements,
20 the ones that are in the statutes, are either racially
21 polarized voting - - -

22 CHIEF JUDGE WILSON: Um-hum.

23 MR. TSEYTLIN: - - - or the all-things-considered
24 inquiry. That - - -

25 CHIEF JUDGE WILSON: So this is in the statute

1 for no reason?

2 MR. TSEYTLIN: It's a general statement of
3 purpose, but then when you actually operationalize it - - -

4 CHIEF JUDGE WILSON: Is it - - - is it identified
5 in the front as a statement of purpose, or is it in part of
6 the operative part of the statute?

7 MR. TSEYTLIN: It's not the - - - it's not the
8 operative provision with regard to at-large districts, no.

9 CHIEF JUDGE WILSON: And it's not something you
10 think you can raise as a defense or make them prove - - -

11 MR. TSEYTLIN: No, it's - - -

12 CHIEF JUDGE WILSON: - - - even though it's in
13 the statute?

14 MR. TSEYTLIN: No. The only things that we - - -
15 well, look, if, obviously, this court - - -

16 CHIEF JUDGE WILSON: Is it just that you've
17 chosen not to do that to make your claim better?

18 MR. TSEYTLIN: No. No, Your Honor. The - - -
19 the - - - the statute says, racially - - - it says, vote
20 dilution is illegal. Vote dilution for at-large districts
21 is defined of - - - one of two ways, either racially
22 polarized voting or all-things-considered inquiry. The
23 statute is quite simple in that way.

24 We have, then, agreed with my friends on the
25 other side that there should be an additional element

1 essentially invented by the courts that says that at least
2 they have to prove that there is another voting system
3 under which the relevant minority group would do better.

4 CHIEF JUDGE WILSON: Um-hum.

5 MR. TSEYTLIN: We agreed to that element because
6 otherwise, the statute would be absurd. What's the point
7 of - - -

8 CHIEF JUDGE WILSON: Um-hum.

9 JUDGE RIVERA: You got to have a remedy.

10 MR. TSEYTLIN: - - - what are you guys even
11 trying to - - -

12 CHIEF JUDGE WILSON: Right.

13 JUDGE RIVERA: Your point is you got to have a
14 remedy.

15 MR. TSEYTLIN: Yeah. Yes. And so - - - no, it's
16 you've got to have an undiluted practice on which you're
17 measuring dilution. Yes, the - - -

18 JUDGE RIVERA: But that's the remedy.

19 MR. TSEYTLIN: Yes - - - well, that's not the way
20 the U.S. Supreme Court has talked about it. It's talked
21 about a benchmark to establish liability, but - - - you
22 know, fair enough, Your Honor, but the - - - the point is
23 that that unwritten element still doesn't cure the
24 fundamental constitutional problem in the statute, which is
25 that it is a statutory classification scheme, a race-based

1 entitlement scheme, and a race-based entitlement scheme can
2 only survive under current U.S. Supreme Court - - -

3 JUDGE KERN: Why isn't that also true in Allen v.
4 Milligan, which the Supreme Court recently upheld that type
5 of provision and held it was constitutional? Why is this
6 different? It - - - that was based on a racial
7 classification, also, and the Supreme Court held it was
8 constitutional.

9 MR. TSEYTLIN: Allen v. Milligan did not consider
10 an equal protection claim at all. It was a decision that -
11 - -

12 JUDGE KERN: I know, but it broadly held that
13 those kind of claims have been going forth for four decades
14 throughout the country. They've been upheld consistently
15 throughout the country, including in Allen and Milligan,
16 and that there was nothing unconstitutional about them.

17 MR. TSEYTLIN: That's not the way I read it.
18 Allen - - - and if - - - if that was what Allen meant,
19 there's no way the U.S. Supreme Court, just a couple of
20 months ago, would - - - would have ordered reargument in -
21 - - in the Louisiana case, which is being argued tomorrow.

22 JUDGE KERN: We don't know why they granted
23 certain reargument - - -

24 MR. TSEYTLIN: I - - - Your Honors can look at
25 the briefs in that case. I think everyone recognizes why

1 they did it, which is that they are trying to decide
2 whether strict scrutiny, which clearly applies to Section
3 2, remains satisfied given the conditions.

4 You look at all the briefs in that case, that's
5 what - - - and that's what the argument tomorrow is going
6 to be about. So if - - - if Allen meant what Your Honor
7 said, that wouldn't have been a serious question, but U.S.
8 Supreme Court, in a very unusual step, said, we're going to
9 have reargument on this very issue.

10 Now, look, this court is going to decide what
11 it's going to decide in this case, but ultimately, if even
12 Section 2 of the VRA is - - - the venerable Section 2 that
13 has all three Gingles preconditions and two steps is now
14 being questioned by the U.S. Supreme Court as to whether
15 it's constitutional - - - I mean, imagine what the U.S.
16 Supreme Court would think of this statute, which guts and
17 eliminates two of the three Gingles preconditions, guts the
18 third one, that it - - - it requires influence districts
19 with the U.S. - - - which the U.S. Supreme Court said is
20 not permitted under a Gingles for constitutional avoidance
21 reasons.

22 JUDGE KENNEDY: Counsel, it - - - it seems to me
23 as if you are indicating that the Gingles factors are
24 constitutionally required, but it - - - it seems to me that
25 it's just a judicial interpretation of Section 2 of the

1 VRA. This is just one way to look at it, that it's not
2 constitutionally required. Can you address that?

3 MR. TSEYTLIN: Yeah. If you look - - - Your
4 Honor, if you look at the Supreme Court's decisions where
5 they've been asked to expand or draw the boundaries on - -
6 - on Gingles broader, which is Bartlett, LULAC, what the
7 U.S. Supreme Court has always said is we're not going to go
8 further, and they've always said one of the reasons is - -
9 - for constitutional avoidance purposes is because we go
10 further, then we're going to be running into the Equal
11 Protection Clause, so - - -

12 JUDGE TROUTMAN: So is it an interpretation or a
13 constitutional requirement?

14 MR. TSEYTLIN: It's - - - and it's an
15 interpretation in light of constitutional avoidance
16 principles, and if the U.S. Supreme Court is so nervous
17 about expanding Gingles to include influenced districts and
18 things of that sort, imagine what the U.S. Supreme Court
19 would think of a statute that - - - that eliminates the
20 first and third preconditions, essentially eliminates the
21 mandatory second step, has these evidentiary requirements
22 where you're not even allowed to argue that what's being -
23 - - what's going on here is politics but not race.

24 I mean, look, we got to live in the real world -
25 - - real world, Your Honors. The U.S. - - - this - - -

1 this statute is - - - you couldn't - - - you couldn't
2 design a statute more likely to goad the U.S. Supreme Court
3 into striking down state-level VRAs, just systematically
4 dismantling, step by step, all of the Gingles framework.

5 And you know, it - - - it might be that the
6 Louisiana case will just end this whole vote dilution
7 enterprise and the Supreme Court will say, we're done, but
8 the U.S. Supreme Court might chart a middle ground. I
9 would respectfully submit that to - - - for those who want
10 to see state-level VRAs step into that breach, this
11 essentially limitless regime is the worst-case scenario for
12 that. The - - -

13 CHIEF JUDGE WILSON: Thank you.

14 MR. TSEYTLIN: Thank you, Your Honors.

15 MR. STEPHANOPOULOS: Nick Stephanopoulos for the
16 plaintiffs. May it please the court. I'd like to start
17 with the town's argument as to why it's exempt from the no
18 classification rule that usually applies to political
19 subdivisions.

20 So my friend's argument is that any action
21 Newburgh might take to comply with the NYVRA would be race
22 conscious and, therefore, necessarily unconstitutional, and
23 it's important to realize that that exact theory has been
24 rejected over and over again by the U.S. Supreme Court,
25 including, two years ago, most recently, in Allen v.

1 Milligan.

2 So in Milligan, Alabama made the very same
3 argument the town is pressing now, and the court responded
4 that for four decades, it has authorized race-conscious
5 redistricting to remedy unlawful district maps. And the
6 court's response in Milligan makes perfect sense because
7 most remedies for voting rights violations neither use
8 racial classifications nor have any kind of invidious
9 purpose.

10 The - - - the typical voting rights remedies are
11 things like new district boundaries or alternative
12 electoral systems. These are, facially, race-neutral
13 electoral policies, and they also have the objective of
14 complying with anti-discrimination law and curing vote
15 dilution. And these are not invidious purposes. An
16 invidious - - -

17 JUDGE RIVERA: Can you - - - can you address his
18 description of vote dilution and - - - and your claim?

19 MR. STEPHANOPOULOS: I'm not exactly sure what
20 the town's understanding of dilution is. The NYVRA has the
21 same conception of dilution, as do seven other state Voting
22 Rights Acts - - -

23 JUDGE RIVERA: Um-hum.

24 MR. STEPHANOPOULOS: - - - and - - - as does the
25 U.S. Supreme Court as illustrated by the court's decision

1 in Gingles.

2 So the - - - the essence of vote dilution is that
3 some electoral practice interacts with social and
4 historical conditions to cause a - - - a persistent
5 underrepresentation for some racial or ethnic group.
6 That's exactly what the Gingles framework is trying to
7 capture. It's also exactly what the NYVRA is trying to
8 capture, albeit with somewhat different elements, but it's
9 the same conception - - -

10 JUDGE TROUTMAN: Does it matter if strict
11 scrutiny is applied to the New York statute?

12 MR. STEPHANOPOULOS: I think this court should
13 certainly not be the first court ever to subject any voting
14 rights law or any disparate impact statute district
15 scrutiny. It certainly matters in that the - - - the
16 strict scrutiny test - - -

17 JUDGE TROUTMAN: No. His suggestion is it would
18 not survive.

19 MR. STEPHANOPOULOS: Yeah, we disagree with that
20 suggestion. The - - - the two parts of the strict scrutiny
21 analysis are, first off, is there a compelling state
22 interest being served. Here - - -

23 JUDGE TROUTMAN: What would that interest be
24 here?

25 MR. STEPHANOPOULOS: Yeah. Here, it's the

1 interest in fighting racial discrimination in voting that
2 takes the form of racial vote dilution in particular, and
3 there is a mountain of evidence in the legislative record
4 that corroborates the problem of racial discrimination in
5 voting and vote dilution in New York. So there's no doubt
6 that this interest is substantiated by an enormous
7 legislative record.

8 JUDGE KERN: Counsel, if we address the issue of
9 capacity first and have to make that capacity
10 determination, would we even get to the issue of strict - -
11 - strict scrutiny? Would that come up? And that goes to
12 the issue, how would you analyze this case under the
13 capacity and analyze it in the constitutional issue versus
14 a facial constitutional attack?

15 MR. STEPHANOPOULOS: Thank you, Your Honor. I
16 think it's very important to note that the capacity
17 analysis here is not the same as - - - does not collapse
18 into the ultimate merits analysis.

19 So here are the differences between the capacity
20 analysis and the ultimate merits analysis. For capacity
21 purposes, the relevant actor is the town, not the State.
22 The relevant action is whatever measure the town might take
23 to comply with the NYVRA. And the relevant legal question
24 is whether the town is right in its extreme theory that any
25 race-conscious action to comply with any antidiscrimination

1 law is necessarily unconstitutional. So that's capacity.

2 On the - - - on the merits side, the - - - the
3 relevant actor is the State, not the town. The relevant
4 act is the NYVRA itself, not any remedial action taken by
5 the town. And the relevant legal questions are does the
6 NYVRA classify by race, and if so, does it survive strict
7 scrutiny. So they're completely different analyses - - -

8 JUDGE CANNATARO: So that pretty - - -

9 MR. STEPHANOPOULOS: - - - for capacity and the
10 merits.

11 JUDGE CANNATARO: That pretty conclusively
12 establishes that capacity and the - - - the alleged
13 violation are completely separate, but what is it that the
14 town would - - - in order to - - - to qualify for the
15 exception that they're asking for, it seems as if the town
16 has to, at the very least, allege it, which they did, but I
17 would think you would argue, and the Appellate Division
18 seem to think, that something more than just a mere
19 allegation of being forced into unconstitutional action is
20 required in order to overcome the - - - the general rule.
21 So what - - - what would that be? What - - - what's
22 lacking in what the town put forward here?

23 MR. STEPHANOPOULOS: Yeah. I think this court's
24 own decision in City of New York is clear that a mere
25 assertion that a political subdivision faces the dilemma

1 exception - - -

2 JUDGE CANNATARO: Right.

3 MR. STEPHANOPOULOS: - - - does not suffice.

4 What's required is that the municipality's argument be
5 persuasively argued. That's the language in City of New
6 York. And so to assess the town's capacity argument, this
7 court needs to decide is the town right or is the town
8 wrong that any race-conscious action to comply with the
9 NYVRA is inherently unconstitutional.

10 And Milligan rejects that argument in the voting
11 context. Ricci rejects that argument in the Title VII
12 employment context. Inclusive Communities does so in the
13 fair housing context. And so - - -

14 JUDGE CANNATARO: And get back to Judge Kern's
15 question. Because you're Judge Kern today, right? To - -
16 - to get back to Judge Kern's question, does it even
17 require going into an analysis of strict scrutiny or some
18 other level of review or is that far beyond the panel?

19 MR. STEPHANOPOULOS: That's far beyond the panel.
20 So to be clear, both the capacity analysis and the ultimate
21 merits analysis do involve the Equal Protection Clause, but
22 they implicate very different equal protection questions,
23 right? One is the classification and strict scrutiny
24 question. The - - - the other capacity question is whether
25 - - - the town's theory of any race-conscious remedial

1 action being intrinsically unconstitutional, whether that
2 theory is - - - is right or wrong.

3 CHIEF JUDGE WILSON: So do you know whether - - -
4 it's two parts to this. Do you know whether we have ever
5 had a case in which we have found that a local government
6 satisfied the dilemma exception, and do you know if we've
7 ever found that in a case where the challenge was a facial
8 constitutional challenge?

9 MR. STEPHANOPOULOS: Your Honor, I believe this
10 court has never found the dilemma exception to be
11 satisfied. So in Jeter and in the - - - I guess, the World
12 Trade Center later, but in Jeter, most importantly, the
13 court found that the political subdivision defendants there
14 did not satisfy the - - - did not qualify for the dilemma
15 exception. In City of New York as well, this court held
16 that New York City didn't qualify for the dilemma
17 exception. In the World Trade Center litigation, this
18 court didn't directly address the dilemma exception, but
19 the Second Circuit did and found it not satisfied.

20 CHIEF JUDGE WILSON: At least theoretically, it
21 seems to me, it would be harder to satisfy in an as-applied
22 - - - I'm sorry, in a facial case than in an as-applied
23 case.

24 MR. STEPHANOPOULOS: I think that's right. I
25 think that when the posture of the case is a facial

1 challenge, that then forces the - - - the political - - -
2 the political subdivision to make very grand, sweeping
3 claims as to how any potential application of the statute
4 would necessarily require unconstitutional conduct by the
5 political subdivision. So I don't think that the - - - the
6 divide is always one between facial and as-applied
7 challenges.

8 CHIEF JUDGE WILSON: Um-hum.

9 MR. STEPHANOPOULOS: But to the extent a
10 political subdivision is making a facial challenge, it's
11 especially difficult for the subdivision to - - - to
12 trigger the dilemma exception precisely because we don't
13 know what's going to happen down the road, right? We don't
14 know what remedies, if any, might be imposed. And so the
15 only way to find that there is capacity is if the town's,
16 you know, sweeping categorical theory is correct.

17 CHIEF JUDGE WILSON: Well, put it differently, if
18 - - - once there is something that is an as-applied - - -
19 so we know what's - - - what the remedy that's been applied
20 is. It seems to me then we can - - - it would be easier to
21 say, this is forcing us to do something that is
22 unconstitutional.

23 MR. STEPHANOPOULOS: Yeah. All of this analysis
24 would be much more concrete, much more tractable if we knew
25 what it was the court was being - - - the - - - the town is

1 being ordered to do. You know, if the - - - if the Supreme
2 Court says, here is a racially gerrymandered district that
3 we want the town to adopt, then, I think, the town would
4 have a very strong capacity claim. It would be an as-
5 applied claim, but I think the - - - the town almost
6 certainly would have capacity in that event downstream.

7 The point is right now, we have no idea if the
8 town will be found liable, and we don't know if the remedy
9 will be a new district map or switching to cumulative
10 voting or just having even-year elections, right? There
11 could be any number of remedies.

12 JUDGE TROUTMAN: So your argument is this is
13 premature? They would have to wait until there is a
14 determination and then what is ordered as a remedy if there
15 is a finding of dilution?

16 MR. STEPHANOPOULOS: Exactly, Your Honor. It - -
17 - it's premature to find that the town has capacity at
18 present, but a finding that the town lacks capacity right
19 now doesn't preclude a finding of capacity further
20 downstream in the litigation - - -

21 JUDGE RIVERA: And that - - - and that's, in
22 part, because a race-conscious remedy is not necessarily
23 unconstitutional?

24 MR. STEPHANOPOULOS: Exactly. At this point in
25 the litigation, the only way to find that the town has

1 capacity is if their sweeping theory about any race-
2 conscious action being unconstitutional is correct, and so
3 - - -

4 JUDGE RIVERA: And your point is that that is not
5 correct because the law, as it stands, does permit certain
6 types of race-conscious remedies?

7 MR. STEPHANOPOULOS: Exactly. And we know this
8 from Milligan. We even know it from the case that the town
9 cites more than a dozen times in its brief, from SFFA.
10 Three members of the conservative majority in SFFA wrote
11 separately to acknowledge that if universities adopt race-
12 neutral admissions plans, like the Texas ten percent plan,
13 that are aimed at racially diversifying the student bodies
14 of the colleges, those sorts of policies are permissible.
15 They don't trigger strict scrutiny.

16 JUDGE RIVERA: So give an example of a - - - a
17 possible remedy here given the claims, right, that would
18 not be the kind of race-based remedy that would be
19 unconstitutional.

20 MR. STEPHANOPOULOS: Well, and to be clear,
21 plaintiffs do not want and are not asking for any race-
22 based remedy here. We're - - - we're extremely aware of
23 the U.S. Supreme Court's racial gerrymandering
24 jurisprudence. We don't want any doctrine that we think
25 would remedy - - -

1 JUDGE CANNATARO: Do you think any of the
2 remedies contemplated in the statute are race-based? Like,
3 potentially redistricting, race-conscious redistricting?

4 MR. STEPHANOPOULOS: None of the remedies
5 specified in the statute are necessarily race-based. Now,
6 you know, if a district is drawn for a predominantly racial
7 reason, then that would trigger strict scrutiny, but any
8 district for which race is not the predominant motive, any
9 reasonably configured remedial district - - -

10 JUDGE CANNATARO: Um-hum.

11 MR. STEPHANOPOULOS: - - - would not trigger
12 strict scrutiny.

13 JUDGE CANNATARO: Um-hum.

14 MR. STEPHANOPOULOS: So there - - - there are
15 vast numbers of remedial districts that would not trigger
16 strict scrutiny. Switching to a different electoral
17 system, like ranked choice voting or cumulative voting, no
18 court has ever found any of those policies to be race-
19 based.

20 JUDGE KERN: I mean, that could be a possible
21 remedy in this case, to do ranked voting. That would
22 satisfy the concerns of the plaintiff in this case.

23 MR. STEPHANOPOULOS: Absolutely.

24 JUDGE CANNATARO: A race - - - but that's a race-
25 neutral remedy, right?

1 MR. STEPHANOPOULOS: Absolutely. The only
2 remedies that plaintiffs advocate here are race-neutral
3 remedies or, at most, a remedial district that is race-
4 conscious but for which race is not the predominant motive.

5 JUDGE CANNATARO: So to go back to that question
6 you were asked just a moment ago about whether there are
7 permissible race-conscious remedies that might be available
8 here, your answer, I would think, would be it doesn't
9 really - - - it's beside the point because we're not
10 seeking any race-based remedies here, or is that an
11 incorrect characterization of your argument?

12 MR. STEPHANOPOULOS: No, no, it's completely
13 correct that the - - - the plaintiffs are not asking for
14 any race-based remedies. The - - - the - - - with respect
15 to redistricting in particular, there may be race-conscious
16 districts that would be valid remedies, but the - - - the
17 line that the Supreme Court draws very clearly in Milligan
18 and other cases is between districts that are race-
19 conscious, that's permissible, and districts for which race
20 was the predominant motivation, and that's impermissible.
21 And so you know, the - - - the plaintiffs are disavowing
22 any potential remedies that are districts drawn with a
23 racially predominant purpose.

24 JUDGE KENNEDY: Counsel, can you discuss how the
25 absence of the first Gingles factor would still comply with

1 the Equal Protection Clause? Can you address that?

2 MR. STEPHANOPOULOS: Yeah. And again, Your
3 Honor, this would come into play only if we entered the
4 realm of strict scrutiny, which, I think - - -

5 JUDGE KENNEDY: Um-hum.

6 MR. STEPHANOPOULOS: - - - we shouldn't be in in
7 the first place. So I think it's very clear, if one reads
8 Gingles, that the court's discussion of the framework in
9 Gingles has nothing to do with the Constitution. You know,
10 the court discusses the Gingles framework for twenty-plus
11 pages and never mentions the Constitution.

12 The court's rationale for the first Gingles
13 precondition in particular is only that the court, in 1986,
14 was only contemplating single-member districts as remedies,
15 and so if you're only imagining single-member district
16 remedies, the first Gingles precondition makes sense. It
17 basically asks, is there a reasonable, lawful single-member
18 district that would better represent the plaintiffs and so
19 would cure the vote dilution. But that's a - - - a
20 consideration rooted only in potential remedies. It has
21 nothing to do with the U.S. Constitution.

22 If I can just address Bartlett v. Strickland,
23 which is the - - - the one case the town goes back to as
24 supposedly constitutionalizing the - - - the Gingles
25 framework. Bartlett only involves crossover district

1 claims. It does absolutely not involve any aspect of the
2 rest of the Gingles framework, as the town repeatedly
3 asserts. The NYVRA doesn't even explicitly authorize
4 crossover district claims. And so the - - - the relevance
5 of Bartlett here is highly, highly attenuated.

6 And then the - - - sorry. I lost my train of
7 thought there, and also see that my time is up, but I did
8 have an additional point with the fact - - - which is that
9 in - - - in Bartlett, the court goes out of its way to
10 praise crossover districts, and so even if the NYVRA does
11 authorize crossover district claims, Bartlett says, these
12 districts are models of the kind of interracial cooperation
13 the Voting Rights Act is trying to achieve.

14 And Bartlett says that states are free, at their
15 discretion, to - - - to draw - - - to require the creation
16 of crossover districts. And so it's very clear that
17 Bartlett is not constitutionalizing anything, not even with
18 respect to crossover district claims.

19 And I see my time has expired, and so I'm - - -
20 I'll sit if the court has no further questions.

21 CHIEF JUDGE WILSON: Thank you.

22 MS. VALE: May it please the court, Judith Vale
23 for the State. I'd like to make three or four points on
24 capacity, hopefully additive rather than repetitive, and
25 then turn to the merits if the court were to reach the

1 merits.

2 On capacity, it is important to keep the capacity
3 separate from the merits because that is the point of
4 having a capacity bar. The whole point of the lack of - -
5 - the bar is that a municipality is not allowed, generally
6 speaking, to get a merits ruling that would invalidate a
7 state statute unless they can fit into an exception.

8 Under Newburgh's theory here, any time that a
9 municipality simply invoked - - - just uttered the words,
10 you know, it's unconstitutional, that they could, then, fit
11 within the exception and get a merits - - - and ultimately
12 get a merits ruling if the two overlap. So that would put
13 the cart before the horse, and the court should be very
14 careful to keep those two things separate.

15 I certainly agree with my colleague's description
16 of how those things are separate substantively, and it is
17 important to keep them separate, also, because it goes to -
18 - - it is not just a technicality. It is a threshold issue
19 that goes to the relationship between the State and its
20 subdivisions. This is why it does not matter that Newburgh
21 is raising the facial challenge as a defendant rather than
22 a - - - rather than being in the plaintiff. The status - -
23 -

24 JUDGE SINGAS: So the - - - the Appellate
25 Division was incorrect when it said that we should consider

1 the merits when determining whether or not there's
2 capacity?

3 MS. VALE: I don't think the Appellate Division
4 quite said that. I - - - there is some over - - - I mean,
5 there is, certainly, some overlap between what - - - what
6 one needs to look at to resolve the lack of capacity and
7 what one needs to - - - would look at at the merits, but
8 they are not exactly the same, and is it important to
9 ultimately keep that distinction - - -

10 JUDGE RIVERA: Well, you have to know the nature
11 of their argument.

12 MS. VALE: Yes. And I do agree with the
13 plaintiff's counsel that one of the reasons why there's a
14 substantive separation is because the exception that
15 Newburgh is - - - is invoking focuses on the actual
16 compliance that Newburgh would have to do. It is not just
17 liability in the ether because liability in the ether
18 doesn't require a municipality to do anything. You need to
19 focus on, in every application, every possible application,
20 every possible remedy, would Newburgh be required to
21 violate the Equal Protection Clause, and that's a no.

22 JUDGE RIVERA: So - - - so you agree, should this
23 action go forward, that they could, however, raise this
24 claim if, indeed, there was some remedy ordered or remedy
25 that was being considered that they would assert forces

1 them to take unconstitutional actions?

2 MS. VALE: Yes, we agree that in an as - - -
3 there could be an as-applied situation down the road where
4 it becomes clearer that if that remedy is actually
5 instituted by Newburgh, they have a - - - a colorable
6 argument that that might actually require them to violate
7 Equal Protection Clause, but we are so far away from that
8 here in large part because they are raising this sweeping
9 facial challenge, and - - - and because of that - - -

10 JUDGE RIVERA: They may - - - they may never be -
11 - -

12 MS. VALE: - - - they don't have capacity now,
13 but they might later.

14 JUDGE RIVERA: And they're - - - and plaintiffs
15 may not make out their claims.

16 MS. VALE: That is also a possibility, Your
17 Honor, as well.

18 And I think the - - - the - - - I'd like to just
19 touch on the Supremacy Clause argument that was made. Two
20 - - - two responses to that. First of all, to the extent
21 they're saying that it has to be that someday, somehow,
22 they can - - - they could bring a federal constitutional
23 claim, I think that's where the as-applied challenge comes
24 in. We're not saying that there could never, ever be a
25 situation where Newburgh could ever raise a challenge. In

1 an as-applied situation, they might have capacity.

2 And second of all, my second point is the
3 Supremacy Clause does not give a particular litigant a
4 right to bring a claim. It is - - - it is not about who
5 can bring the claim. It is about when you - - - if you
6 have a proper litigant and you're actually looking at the
7 merits, it's - - - and there's a conflict, then federal law
8 would control.

9 And the Jeter case is one in which the
10 municipality was trying to raise federal constitutional
11 claims and was - - - did not have capacity to do so. And
12 in this respect, lack of capacity is not different from
13 other threshold bars like standing or other - - - there are
14 other types of lack of capacity as well. In all of those
15 instances, the particular litigant is not the proper one to
16 raise the claim. That is - - - the Supremacy Clause
17 doesn't say anything about that. Under - - -

18 CHIEF JUDGE WILSON: An individual voter in
19 Newburgh wouldn't have a capacity bar, presumably.

20 MS. VALE: Correct. Of course, Your Honor. That
21 is - - - that is correct.

22 JUDGE CANNATARO: So the town is not the
23 constitutionally necessary defender of the Supremacy
24 Clause.

25 MS. VALE: And I will note, going back to the

1 sort of exception swallowing the rule problem that I see in
2 Newburgh's arguments, by invoking the Supremacy Clause, if
3 you follow that logic, that would mean that a municipality
4 could always have capacity to bring any federal
5 constitutional or federal statutory claim. It could just
6 skip over the capacity bar and - - - and entirely swallow
7 the rule. And this court was very clear in City of New
8 York, and the Second Circuit said it again in the World
9 Trade Center Litigation, that the exceptions to the
10 capacity rule should not - - - or exceptions to the bar
11 should not swallow the rule.

12 If I could turn to the merits, if the court were
13 to - - - were to get to it, I think the fundamental error
14 in Newburgh's argument is this idea that providing a remedy
15 for racial discrimination, when racial discrimination has
16 been proven, is itself a racial classification that is
17 subject to strict scrutiny. That is simply wrong. It is
18 not correct. If it were correct, it would take down nearly
19 every antidiscrimination statute, certainly the ones that
20 allow for disparate impact, but even ones that allow for
21 disparate treatment claims because nearly every
22 antidiscrimination statute provides a remedy to the victim
23 of discrimination if they prove their claim.

24 And they - - - yes, they give some benefit in - -
25 - in the form of legal relief to the victim. If they

1 didn't, there wouldn't be redress. But that is not itself
2 a racial classification. What is important to look at is
3 is the remedy itself race-neutral or not, and here, there
4 are many, many types of remedies under the statute that are
5 facially race-neutral.

6 As - - - as the plaintiff's counsel described,
7 alternative election systems don't require any districting
8 at all. They are entirely race-neutral. They treat every
9 voter the same. And even instituting a district system on
10 its face is race-neutral. There are many, many
11 jurisdictions all across this country, in New York that use
12 district systems. That in and of itself does not involve
13 race at all, let alone race predominating.

14 CHIEF JUDGE WILSON: Thank you.

15 MR. TSEYTLIN: Thank you, Your Honors. Just
16 three brief points in view of the likely next step in this
17 case, which would be to the U.S. Supreme Court.

18 Point one, when the case - - - when this
19 challenge to the NYVRA goes to the U.S. Supreme Court, I
20 think it would be quite unfortunate if, as part of that,
21 the - - - the argument would be made that the courts of New
22 York are not open to facial challenges to - - - under the
23 U.S. Constitution. I gave an extreme hypothetical earlier
24 that shows the absurd results of that kind of reading of
25 the capacity clause, and I think that it would be much

1 better, Your Honors, if - - - if the court doesn't agree
2 with our facial arguments on the merits, that they be
3 disposed of them - - - of the merits so we don't have to
4 have the Supremacy Clause complication.

5 Two, on the merits, you know, it's - - - it's
6 just - - - you know, you hear these arguments, and you feel
7 like you're living in a parallel universe. If you look at
8 the briefing in the Louisiana case that will be argued
9 tomorrow, none of these arguments are being made because my
10 friends know - - - well, they maybe a couple of amicus
11 briefs, but none of the parties are making them that are
12 defending Section 2 because parties know the U.S. Supreme
13 Court's not taking these arguments seriously.

14 What the arguments are on the Louisiana case is
15 that the venerable Section 2 is so carefully tailored with
16 the three Gingles preconditions and the second step that it
17 satisfies strict scrutiny. All of the arguments that you
18 heard - - - heard are on the merits are not the ones that
19 the U.S. - - - that advocates who are currently trying to
20 convince the U.S. Supreme Court are really taking
21 seriously, giving the modern jurisprudential reality.

22 Step - - - point number three. The - - - the - -
23 - the Appellate Division gave us a stay pending this
24 disposition. As I - - - as I signaled, the next step - - -
25 if - - - if the case goes the way it's - - - it appears to

1 be from the signals from the bench, will be to go to the
2 U.S. Supreme Court, we would respectfully ask to continue
3 the stay that the Appellate Division put on, and we would
4 promptly file - - - any adverse decision, we'd promptly
5 file a sur/petition to the U.S. Supreme Court.

6 The U.S. Supreme Court, candidly, would very
7 likely hold that sur/petition in view of the Louisiana case
8 raising so many of the same issues. The U.S. Supreme Court
9 would then decide that case. It would provide very
10 important guidance to - - - to see if I'm right, if they're
11 right. If they're reading Allen correctly, if - - - if - -
12 - if they're reading the - - - the - - - the current
13 Supreme Court collect - - - including the - - - the
14 landmark SSFA case, the U.S. Supreme Court likely would - -
15 - will GVR any decision, and then this court can have - - -
16 can have that knowledge.

17 I think it would be quite unfortunate if my - - -
18 my clients, which is a small town of 32,000 people, have to
19 go through a full, very expensive trial. Meanwhile, the
20 U.S. Supreme Court is in the process of deciding a lot of
21 the issues that we're disputing here, including if
22 Louisiana - - - if Louisiana wins in that case and Section
23 2 is invalidated or - - - in part or in whole, I think
24 there would be no serious argument that the NYVRA would - -
25 - would survive.

1 And - - - and in light of that reality of where
2 we are in the jurisprudential world - - - jurisprudential
3 world, I would urge the court not to put this small town
4 through a very expensive trial before the U.S. Supreme
5 Court can give us guidance as to what it thinks about these
6 issues.

7 CHIEF JUDGE WILSON: Thank you.

8 (Court is adjourned)



C E R T I F I C A T I O N

I, Donna Gould, certify that the foregoing transcript of proceedings in the Court of Appeals of Clarke v. Town of Newburgh, No. 84 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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