APL-2025-00110

To be Argued by:
Nicholas Stephanopoulos
(Time Requested: 15 Minutes)

State of New York
Court of Appeals

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

-against-

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

-and-

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

PLAINTIFFS-RESPONDENTS' BRIEF

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DISCLOSURE STATEMENT

No disclosure statement is required. Respondents are not corporations.

STATEMENT OF RELATED LITIGATION

There is no related litigation.

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PRELIMINARY STATEMENT

Named for the civil rights icon and former Georgia congressman, the John R. Lewis Voting Rights Act of New York ("NYVRA") is a landmark law that was adopted to prevent "the denial or abridgment of the voting rights of members of" all racial groups. Election Law §17-200. To this end, the NYVRA forbids voter suppression, vote dilution, and voter intimidation, *id.* §§17-206, 17-212, institutes a system of preclearance, *id.* §17-210, and directs that electoral rules be construed broadly to protect the franchise, *id.* §17-202. The NYVRA is one of a growing number of state voting rights acts ("state VRAs") enacted across the country. These laws provide safeguards for voting rights beyond those supplied by the federal VRA.

Some defendants have challenged the constitutionality of both the NYVRA and other state VRAs. These attacks have uniformly failed. *See, e.g.*, *Coads v. Nassau Cnty.*, ___ N.Y.S.3d ___, 2024 WL 5063929 (Sup. Ct., Nassau Cnty. [Paul I. Marx, J.] 2024) (NYVRA); *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660 (Cal. Ct. App. 2006) (California VRA); *Portugal v. Franklin Cnty.*, 530 P.3d 994 (Wash. 2023) (Washington VRA). Courts have explained that state VRAs neither classify by race nor require unlawful racial gerrymandering. But these measures do further the vital state interest in

stopping racial discrimination in voting, thus surviving rational-basis review. In its decision below, the Appellate Division respected this consensus, denying the summary-judgment motion of Appellants the Town of Newburgh ("the Town" or "Newburgh") and the Town Board of the Town of Newburgh ("the Town Board") on the ground that they lack capacity to dispute the NYVRA's constitutionality at this juncture. A3-25.

This case involves the NYVRA's prohibition of vote dilution. Election Law §17-206(2). While Appellants' assertion that this provision is unconstitutional is extraordinary, the case is otherwise conventional. For decades, minority voters have challenged at-large electoral systems under the federal Constitution and the federal VRA because of their tendency to dilute minority representation. Numerous state VRAs now authorize plaintiffs to bring analogous actions under state law. When these suits succeed, federal and state courts routinely order jurisdictions to replace at-large electoral systems with single-member districts or alternative methods of election. *See, e.g.*, *Allen v. Milligan*, 599 U.S. 1, 19 (2023) (courts have applied this doctrine "in one … case after another, to different kinds of electoral systems and to different jurisdictions in States all over the country").

Invoking the NYVRA's vote-dilution ban, Respondents—Black and Latino residents of Newburgh—objected to the Town's at-large system for electing the Town Board. Under this system, no Black or Latino candidate of choice has *ever* been elected to the Town Board, even though more than *forty percent* of the Town's population is Black or Latino. RA45. The reason the Town's electoral system produces such glaring underrepresentation is that voting in the Town is highly racially-polarized. Members of the White majority vote cohesively for certain Town Board candidates (who generally prevail), while Black and Latino voters jointly prefer other Town Board candidates (who universally lose). RA154-227. But this vote dilution is readily rectifiable. If the Town were to switch to any number of other electoral systems, Black and Latino voters would, for the first time, have a genuine opportunity to be represented on the Town Board. *Id.*; *see also* RA228-37.

This Court should affirm the Appellate Division's sole holding: that Appellants lack capacity to attack the NYVRA's constitutionality at this early stage in the litigation—prior to any finding of liability, let alone the imposition of any remedy. This, of course, is the general rule. Municipalities and their governing bodies, as creatures of the State, usually may not dispute

the State's own laws. The Appellate Division also rightly concluded that the "dilemma exception" to this rule, which applies when a political subdivision will likely be forced to violate a clear constitutional proscription, is inapposite here. This exception is triggered only when a constitutional violation is, at least, probable. It is *not* triggered when a municipality will likely need to do nothing at all if found liable, and when its claim that it can comply with state law only by offending the federal Constitution is highly implausible.

The general rule also does not depend on the litigation status of a political subdivision. Whether a municipality is a plaintiff suing, or a defendant being sued, it typically lacks capacity to challenge state legislation. Nor does this doctrine raise any federal Supremacy Clause issues. It has been blessed by the U.S. Supreme Court on several occasions, and leaves open many routes for federal constitutional questions to be answered.

Importantly, the applicability of the dilemma exception is distinct from Appellants' underlying argument that the NYVRA's vote-dilution prohibition is unconstitutional. To determine whether the exception is triggered here, this Court must analyze Appellants' "position … that *any*

alteration of [Newburgh's] race-neutral, at-large election system in order to comply with the NYVRA's vote-dilution provisions would be unconstitutional." App.-Br. 68. This analysis requires the Court to decide whether any race-conscious effort to avoid or cure a violation of an antidiscrimination law is inherently unconstitutional. This analysis does *not* require the Court to assess the validity of any part of the NYVRA itself.

Given precedent and practice, this analysis also has only one possible conclusion: considering race to prevent or remedy a breach of an antidiscrimination law is perfectly permissible. In the voting rights context, the U.S. Supreme Court said so just two years ago. "[F]or the last four decades, this Court and the lower federal courts … *have authorized race-based redistricting* as a remedy for state districting maps that violate § 2 [of the federal VRA]." *Milligan*, 599 U.S. at 41 (emphasis added). In the employment field, the Court has similarly allowed remedial "actions that are themselves based on race" if there is "a strong basis in evidence of disparate-impact liability" under Title VII of the Civil Rights Act. *Ricci v. DeStefano*, 557 U.S. 557, 582-83 (2009). In the housing arena, too, "mere awareness of race in attempting to solve [disparate-impact] problems … does not doom that endeavor at the outset." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmties.*

Project, Inc., 576 U.S. 519, 545 (2015).

Past practice confirms that these cases mean what they say. Over the years, hundreds of jurisdictions have taken race-conscious steps to avoid or cure violations of the federal VRA and state VRAs. Countless more public and private entities have considered race to comply with the disparate-impact bans of Title VII, the Fair Housing Act ("FHA"), and New York's own Human Rights Law. No court has ever suggested that all these "alteration[s] of … race-neutral … system[s]" were unconstitutional. App.-Br. 68. But that is the untenable implication of Appellants' stance: that the country's and New York's civil rights laws have led to unconstitutional conduct on a massive scale for more than half a century.

This Court should therefore hold that Appellants lack capacity, at present, to attack the NYVRA's constitutionality. Like the Appellate Division, the Court should *not* address the facial validity of the NYVRA. This distinct issue was not squarely resolved by the Appellate Division, which ruled only on Appellants' capacity. Consequently, the NYVRA's facial validity is not implicated by the question certified by the Appellate Division, which is whether the "opinion and order of [that] Court … [was] properly made." A2.

If the Court touches on any topic beyond Appellants' capacity, it should endorse the Appellate Division's view that, to prove vote dilution under the NYVRA, plaintiffs must demonstrate the existence of a reasonable alternative policy under which the protected class would be better represented than under the status quo. Only if such a policy or system is available can "a plaintiff … show that 'vote dilution' has occurred." A23. Respondents also agree with Appellants that the concept of vote dilution implies that the protected class must not already be adequately (usually meaning proportionally) represented. The U.S. Supreme Court has recognized the extent of a group's existing representation as a probative factor in federal VRA litigation. *See Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994). Appellants concede that the same acknowledgement under New York law would "achieve a compelling [state] interest." App.-Br. 60.

To reiterate, this Court should not opine on the NYVRA's facial validity. If the Court does so, however, it should hold that the statute does not classify by race and thus is subject only to rational-basis review. In a decision earlier this summer that Appellants oddly overlook, the U.S. Supreme Court extensively discussed when a law classifies on a suspect basis. "[M]ere reference to [a suspect classification] is [in]sufficient to trigger

heightened scrutiny." *United States v. Skrmetti*, 605 U.S. __, 145 S. Ct. 1816, 1829 (2025). Rather, "a law classifies based on [a suspect ground] for equal protection purposes when it prescribes one rule for [one group], and another for [a different group defined by the same classification]." *Id.* at 1856-57 (Alito, J., concurring in part and concurring in the judgment) (internal quotation marks and alterations omitted).

Under these principles, the NYVRA's vote-dilution prohibition plainly does not classify by race. It does not set forth one rule for members of one racial group, and another for members of a different racial group. To the contrary, as the Appellate Division noted, "members of all racial groups, including white voters, [may] bring vote dilution claims." A19. Of course, this part of the statute mentions race-related concepts. But the whole point of *Skrmetti* is that a mere reference to a suspect classification does not trigger heightened scrutiny. The only basis on which the NYVRA's vote-dilution prohibition *does* classify is satisfaction of the statutory elements of liability (racially-polarized voting or impairment under the totality of the circumstances, the existence of a reasonable alternative policy, and the lack of adequate existing representation). Municipalities—not individuals—are sorted into groups based on whether they meet these criteria. This may be a

complex statutory classification. But it is not a racial classification.

Even if the NYVRA's vote-dilution prohibition were somehow subject to strict scrutiny, it would still pass muster. The provision furthers an indisputably compelling state interest: stopping racial discrimination in voting. *See* Election Law §17-200 (the NYVRA aims to halt "the denial or abridgement of the voting rights of [protected-class] members"). The provision is also more narrowly tailored to thwarting vote dilution than is the federal VRA. The most salient difference between the NYVRA and the federal VRA is that the former allows geographically-noncompact protected-class members to proceed with their claims. *See id.* §17-206(2)(c)(viii). Spatially-dispersed protected-class members are often victims of vote dilution. The federal VRA closes the courthouse door to these individuals; the NYVRA gives them the chance to remedy their injuries.

QUESTIONS PRESENTED

1. Whether Appellants lack capacity to challenge the NYVRA's constitutionality at this early stage in the litigation because compliance with the NYVRA would not likely force them to violate the federal Constitution?

2. Whether vote-dilution plaintiffs under the NYVRA must satisfy additional implicit elements required by the statutory reference to the concept of vote dilution?

3. If the Court holds that Appellants have capacity, whether the NYVRA's prohibition of vote dilution is consistent with the federal and state Equal Protection Clauses because it does not classify by race and is rationally related to the vital state interest in ending racial discrimination in voting?

STATEMENT OF THE CASE

Factual and Procedural Background

Respondents are residents of, and registered voters in, Newburgh. RA41-43. Oral Clarke, Romance Reed, and Dorothy Flournoy are Black; Grace Perez, Peter Ramon, and Ernest Tirado are Latino. *Id.* The Town is a political subdivision of the State of New York. RA43. Its governing authority is the Town Board, whose current members are Town Supervisor Gil Piaquadio and Board members Anthony LoBiondo, Scott Manley, Jim Politi, and Paul Ruggiero. *Id.* Board members (including the Town Supervisor) are elected through at-large elections. *Id.*

Newburgh's Black and Hispanic populations have grown significantly in recent decades. Combined, they comprised only 6.6% of the Town's total

population in 1980; today, 15.4% of the Town's residents identify as Black and 25.2% as Hispanic. RA44-45. The Town's government has not adapted to reflect Newburgh's changing demographics. For instance, there has never been a Black or Hispanic member of the Town Board. RA46.

There is extensive evidence that Newburgh's at-large electoral system dilutes the electoral influence of Black and Hispanic voters. Respondents' expert, Professor Matt Barreto, analyzed dozens of elections using techniques that have been routinely accepted in vote-dilution cases and reported a "clear, consistent, and statistically significant finding of racially polarized voting in the Town of Newburgh." RA161-62. Specifically, he found that "Latino and Black voters are cohesive in local elections for Town [Board]," but that these voters' preferred candidates "typically receive very low rates of support from white voters, who effectively block [them] from winning office." *Id*.

Professor Barreto also opined that several alternative electoral systems would provide Black and Hispanic voters with a reasonable opportunity to elect candidates of their choice. RA169-71; 228-33. He identified multiple viable district plans that would improve Black and Hispanic voters' likelihood of being represented by their preferred candidates. *Id*. He further

found that Black and Hispanic voters would probably be able to elect candidates of their choice under proportional ranked-choice voting or cumulative voting. *Id*. Appellants' rebuttal expert, Professor Brad Lockerbie, did not dispute Professor Barreto's analysis and reached no conclusions regarding racially-polarized voting. RA50.

There is a long history of discrimination in New York, Orange County, and Newburgh affecting Black and Hispanic residents. RA52-54. Black and Hispanic people were excluded from the housing market through restrictive covenants. RA107-08. They were excluded from the political process through English-literacy requirements, racial gerrymandering, a lack of Spanish-language information and interpreters, and other barriers. RA101-07. The consequences of this discrimination are stark: on average, Black and Hispanic residents of the Town experience significantly worse outcomes than White residents across most socioeconomic indicators. RA121-127.

There have been numerous high-profile racial incidents within Newburgh. In 1992, members of the Ku Klux Klan and neo-Nazi groups hosted a rally at a local businessman's property. RA111-12. There was a counterprotest in the neighboring City of Newburgh, but no reported response in or by the Town. *Id.* In 2012, a Black Town employee filed a

lawsuit alleging that his supervisors created a racially hostile work environment. RA234-45. The lawsuit quickly settled, and four years later, one of the employees named in the 2012 complaint was again accused of racial discrimination. *Id.* And after Orange County declared a state of emergency in 2023 due to the arrival of approximately sixty asylum seekers, elected officials promoted a story that these individuals were displacing homeless veterans at a local hotel, even though the story was fabricated (as the hotel's manager confirmed). RA56-57.

Newburgh has been nonresponsive to the needs and interests of its Black and Hispanic residents. The Town does not provide information to residents in Spanish, except for a notice regarding mosquito-borne viruses issued after this litigation commenced. RA45. The Town Supervisor supported expanding a power plant over the opposition of racial-justice advocates who raised concerns about the project's impact on communities of color. RA55, 125-26. And the Town has offered no justification for maintaining its at-large electoral system beyond its assertion that it "has relied on [at-large elections] since at least 1865." RA46.

In January 2024, Respondents sent a letter to the Town Clerk advising that Newburgh's at-large system of elections violated the NYVRA. RA11-15.

In March, the Town Board adopted a resolution to investigate Respondents' allegations. RA16-19. Because the Town Board's response did not satisfy Election Law §17-206(7), it did not trigger the NYVRA's "safe harbor" provision, and Respondents subsequently filed suit. A281. In April, Appellants moved to dismiss Respondents' claims based on the safe harbor provision. RA24-25. The Supreme Court denied this motion in May, RA26-40, and the Appellate Division affirmed in January 2025, RA246-57.

In November 2024, the Supreme Court granted Appellants' motion for summary judgment and purported to strike the NYVRA "in its entirety." A29. The court held that Appellants have capacity to attack the statute's constitutionality simply because they "assert that if they are required to comply with the NYVRA … it will require them to violate the Equal Protection Clause." A39. The court subjected this assertion to no scrutiny whatsoever. Proceeding to the merits of Appellants' constitutional claim, the court declared that "the text of the NYVRA, on its face, classifies people according to their race." A43. The court failed to identify the statutory language that purportedly racially classifies, nor did the court mention the definition of a racial classification. The court then ruled that the NYVRA fails strict scrutiny. The court refused to credit the law's goal of combating racial

discrimination in voting because "the Court [was] unable to find [this interest] within [the statutory] text." A44. The court also ascribed constitutional significance to the framework used to decide vote-dilution claims under the federal VRA, supposing that this framework is how "the [U.S.] Supreme Court created a balance … between the Equal Protection Clause and voting rights legislation." A50.

In January 2025, the Appellate Division unanimously reversed the Supreme Court's order. The Appellate Division's sole holding was that Appellants lack capacity to assert their constitutional claim because "they failed to show … that compliance with the NYVRA would force them to violate the Equal Protection Clause." A24. In reaching this conclusion, the Appellate Division noted that members of all racial groups—not only minority voters—may bring vote-dilution claims under the NYVRA. A19. It also observed that the NYVRA's vote-dilution prohibition is "similar to section 2 of the [federal] VRA, and modeled after very similar laws enacted in California and Washington." A10. The Appellate Division further remarked that NYVRA violations may be cured by not only single-member districts but also policies such as "ranked-choice voting, cumulative voting, [and] limited voting." A21. The availability of these remedies helps explain

why "the NYVRA need not contain the first *Gingles* precondition." A22. Lastly, the Appellate Division agreed that, thanks to the statutory reference to "vote dilution," a plaintiff must prove the existence of "an alternative practice that would allow the minority group to 'have equitable access to fully participate in the electoral process.'" A23 (quoting Election Law §17-206(5)(a)).

On remittitur, the Supreme Court set the case for trial in May 2025. RA258-60. On the first day of trial, Justice Vazquez-Doles recused herself "to avoid the appearance of impropriety as it appears she is personally familiar with one of the Plaintiffs." RA261. Shortly thereafter, the case was reassigned to five other Orange County Justices, all of whom also recused. RA262-67. Ultimately, Justice Scattaretico-Naber transferred the case to the Supreme Court, Westchester County, RA268-69, where trial was scheduled to be heard before Justice Quinn Koba, RA270.[1]

[1] As Appellants acknowledge, "the Appellate Division denied the Town leave to appeal the transfer decision on the same day it certified this appeal," App.-Br. 20 n.3, and the issue of venue was not part of the question certified to this Court, A2. Accordingly, the issue of venue is not properly before the Court. Moreover, a decision to transfer a case is subject to a court's discretion, *see, e.g.*, *In re McKitterlick*, 309 N.Y. 803 (1955), and Justice Scattaretico-Naber did not abuse her discretion in transferring this case to Westchester County—where venue is indisputably proper under Election Law §16-101(1)(b)—given the multiple recusals in Orange County and the statutory mandate for an expedited proceeding under Election Law §17-216.

Before trial could begin, the Appellate Division granted Appellants' motion for leave to appeal to this Court and stayed further Supreme Court proceedings pending this Court's decision. The Appellate Division certified the following question to this Court: "Was the opinion and order of [the Appellate Division] dated January 30, 2025, properly made?"

Legal Background

Enacted in 2022, the NYVRA aims to fight the "insidious and pervasive evil" of racial discrimination in voting more vigorously than does the federal VRA. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966). As the legislative committee report on the law makes clear, its adoption was motivated by New York's "extensive history of discrimination against racial, ethnic, and language minority groups in voting." N.Y. Comm. Rpt. on S. 1046D (N.Y. May 20, 2022). The NYVRA "address[es] these pervasive problems," "confront[s] evolving barriers to effective participation," and "root[s] out longstanding discriminatory practices more effectively." NYCLU & LDF, John R. Lewis Voting Rights Act of New York 2 (2022), https://www.naacpldf.org/ wpcontent/uploads/NYVRA-White-Paper-NYCLU-LDF-March-2022.pdf.

At issue here is the NYVRA's prohibition of vote dilution. The

"essence" of vote dilution, the U.S. Supreme Court remarked in *Thornburg v. Gingles*, 478 U.S. 30 (1986), "is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [voters of different races or ethnicities] to elect their preferred representatives." *Id.* at 47. Racially-polarized voting is the "most important" of these "social and historical conditions" that raise the risk of vote dilution. *Id.* at 48 n.15. Racially-polarized voting threatens to "deprive minority voters of their preferred representative[s]," while "allow[ing] those elected to ignore minority interests without fear of political consequences." *Id.* at 48 n.14 (internal quotation marks and alterations omitted). Racially-polarized voting is often "attributable to past or present racial discrimination." *Id.* at 65. Because vote dilution is a "functional" concept involving the representation actually provided to different groups of voters, however, federal VRA plaintiffs need not prove intentional discrimination to prevail. *Id.* at 73. "Focusing on … discriminatory intent … asks the wrong question." *Id.*

Consistent with these principles, the NYVRA authorizes two kinds of vote-dilution claims when a municipality (like Newburgh) uses an at-large electoral system. *First*, a plaintiff may show that the "voting patterns of

members of the protected class within the political subdivision are racially polarized" from the voting patterns of other members of the electorate. Election Law §17-206(2)(b)(i)(A). Social scientists rely on several techniques to measure racial polarization in voting, including King's ecological inference and ecological inference RxC. RA157-61. Federal and state courts have widely approved these methods, which generate estimates of the proportion of each racial group that supported a given candidate in a given election. When members of the protected class vote cohesively for certain candidates, while other members of the electorate vote cohesively for other candidates, voting is racially-polarized. *See, e.g.*, *Gingles*, 478 U.S. at 52-74.

Second, instead or in addition, a plaintiff may show that, "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." Election Law §17-206(2)(b)(i)(B). The "factors that may be considered," specified in the next subsection, emphasize past and present racial discrimination both within and outside the political process. *Id.* §17-206(3). This list closely resembles both the one used in vote-dilution litigation under the federal Constitution, *see*, *e.g.*, *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973), and the one set forth by the U.S. Senate in the

crucial report that accompanied the federal VRA's revision in 1982, *see* S. Rep. No. 97-417, at 28-29 (1982).

Under either theory, a plaintiff must *also* prove that one or more reasonable alternative policies exist that would improve the protected class's representation relative to the status quo. The Appellate Division recognized this requirement, A23, as do Appellants and Respondents. App.-Br. 58-59. This element follows from the NYVRA's description of the "[p]rohibition against vote dilution." Election Law §17-206(2). A challenged practice only "*ha[s] the effect*" of "*impairing*" a protected class's electoral influence "*as a result of vote dilution*" if, under some other reasonable policy, the protected class would be better represented than it currently is. *Id.* §17-206(2)(a) (emphasis added). Construing the highly-similar language of the California VRA, the California Supreme Court held that a plaintiff "must identify a reasonable alternative voting practice to the existing … system that will serve as the benchmark 'undiluted' voting practice." *Pico Neighborhood Ass'n. v. City of Santa Monica*, 534 P.3d 54, 65 (2023) (internal quotation marks omitted). This element, the court ruled, was required by the statute's use of the terms "impairs" and "dilution." *Id.* at 63-65. These terms are also part of—and pivotal to—the NYVRA.

The NYVRA's reasonable-alternative-policy requirement plays the same role as *Gingles*'s first prong. That prong asks whether the protected class is "sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50. If so, then that hypothetical district is one plausible remedy for the protected class's dilution. Likewise, if the NYVRA's reasonable-alternative-policy requirement is satisfied, then at least one viable vote-dilution remedy exists. Unlike *Gingles*'s first prong, the NYVRA's reasonable-alternative-policy requirement *itself* does not mention compactness. But another provision states that "an appropriate remedy" should consider "whether members of a protected class are geographically compact or concentrated." Election Law §17-206(2)(c)(viii). Like *Gingles*'s first prong, this clause discourages the remedial use of oddly-shaped districts that bring together far-flung protected-class members.

Appellants and Respondents further agree that a plaintiff must show that the protected class is not *already* adequately represented. App.-Br. 59-60. This element also stems from the NYVRA's description of "vote dilution." *Id.* §17-206(2). A challenged practice does not "hav[e] the effect" of "impairing" a protected class's electoral influence "as a result of vote

dilution" if the group currently enjoys adequate representation. *Id.* For precisely this reason, the U.S. Supreme Court held in *De Grandy* that vote dilution is typically absent "when the minority group enjoys substantial proportionality" under the status quo. 512 U.S. at 1016. Existing "proportionality … is obviously an indication that minority voters have an equal opportunity" to elect their candidates of choice. *Id.* at 1020. The same logic applies to the NYVRA. Vote dilution may occur when the protected class is not already adequately (usually meaning proportionally) represented. "[B]ut one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast." *Id.* at 1017.

Federal and state courts have consistently held that state VRAs, including the NYVRA, do not facially violate the federal Constitution. *See Serratto v. Town of Mount Pleasant*, 233 N.Y.S.3d 885, 888-90 (Sup. Ct., Westchester Cnty. [David F. Everett, J.] 2025) (NYVRA); *Coads*, 2024 WL 5063929, at *10-14 (same); *Higginson v. Becerra*, 786 F. App'x. 705, 706-07 (9th Cir. 2019) (California VRA); *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-04884, 2011 WL 5025251, at *8 (N.D. Ill. Oct. 21, 2011) (Illinois VRA); *Yumori-Kaku v. City of Santa Clara*, 59 Cal. App. 5th 385, 426-28 (Cal. Ct. App. 2020) (California VRA); *Sanchez*, 145 Cal. App. 4th at 680-90 (same); *Portugal*, 530

P.3d at 1011-12 (Washington VRA). These courts have recognized that state VRAs do not classify by race and so are not subject to strict scrutiny. *See, e.g.*, *Sanchez*, 145 Cal. App. 4th at 680-83. The courts have also ruled that judicially-mandated remedies for vote dilution are constitutional unless they are racially-gerrymandered districts (in which case they may be challenged on an as-applied basis). *See, e.g.*, *id.* at 688-90.

STANDARD OF REVIEW

Whether Appellants have capacity to attack the NYVRA's constitutionality at this juncture is "a question of law, which this Court reviews de novo." *People v. Sin*, No. 40, ___ N.Y.3d ___, 2025 WL 1458088, at *3 (N.Y. May 22, 2025). If the Court reaches the merits of Appellants' claim, "[i]t is well settled that facial constitutional challenges are disfavored." *Overstock.com, Inc. v. N.Y. State Dep't of Tax'n & Fin.*, 20 N.Y.3d 586, 593 (2013). "Legislative enactments enjoy a strong presumption of constitutionality," and "parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt." *LaValle v. Hayden*, 98 N.Y.2d 155, 161 (2002) (internal quotation marks omitted). Indeed, courts may declare a statute facially unconstitutional only after "every reasonable mode of reconciliation of the

statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78 (1992).

ARGUMENT

I

Appellants lack capacity to challenge the NYVRA at this juncture

As the Appellate Division correctly held, Appellants lack capacity to challenge the NYVRA's constitutionality at this early stage in the litigation. To trigger the dilemma exception to the general rule that political subdivisions may not dispute state legislation, it must be likely that Appellants will be forced to violate a clear constitutional proscription. Their mere assertion that a constitutional violation will occur is insufficient. The general no-capacity rule holds whether a municipality is a plaintiff or a defendant in an action. This rule raises no federal Supremacy Clause issues. Nor is Appellants' capacity argument the same as their constitutional claim against the NYVRA.

Appellants' capacity argument fails because, even if found liable, they do not administer Newburgh's elections and so will not be required to take any remedial action. This argument is also incompatible with U.S. Supreme Court precedent establishing that race-conscious measures to comply with

antidiscrimination laws are constitutional. The argument is further precluded by the past practice of hundreds of jurisdictions.

A. The dilemma exception applies only if Appellants will likely be forced to violate a clear constitutional proscription.

As this Court has explained, "the traditional principle throughout the United States" is that "municipalities … and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation." *City of New York v. State*, 86 N.Y.2d 286, 289 (1995). Municipalities are "merely subdivisions of the State," and it would be incongruous for "creatures or agents of the State" to "contest the actions of their principal or creator." *Id.* at 290. Appellants nevertheless contend that the dilemma exception to this general rule applies here. Under the dilemma exception, municipalities do have capacity when they will be "forced to violate a constitutional proscription" if they "comply with the State statute." *Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287 (1977). According to Appellants, the dilemma exception is triggered whenever a municipality *says* it will have to infringe a constitutional provision. App.-Br. 69-70.

But Appellants are wrong. A municipality's assertion of an impending constitutional violation must be *evaluated* for its likelihood, its

persuasiveness, and the clarity of the constitutional command. A municipality's mere say-so fails to trigger the dilemma exception. For example, in *Merola v. Cuomo*, 427 F. Supp. 3d 286 (N.D.N.Y. 2019), a county clerk disputed a law that expanded the forms of identification that could be used to obtain a driver's license. *Id.* at 289. The clerk argued that he had capacity to bring this suit because the law would compel him to contravene New York's "prohibition against disenfranchisement." *Id.* at 293. *If* ineligible voters secured driver's licenses, and *if* they later voted, *then* "watering down the vote with ineligible voters who fraudulently register [would] disenfranchise[] lawful voters." *Id.* at 293 n.7. Contrary to Appellants' position, the court assessed the plausibility of this chain of events and found it too many "steps removed" and overly "speculative" to confer capacity. *Id.* at 293.

Similarly, in *Cnty. of Nassau v. State,* 32 Misc.3d 709 (Sup. Ct., Albany County [Michael C. Lynch, J.] 2011), a county objected to a law that required it to use certain voting machines. *Id.* at 710. The county maintained that this requirement would force it to violate New York's constitution. *Id.* at 712. Again contrary to Appellants' view, the court carefully examined these supposedly looming constitutional infringements. *Id*. Concluding that the

county's case was "not persuasive" and "unconvincing," the Supreme Court ruled that the county lacked capacity and dismissed the petition/complaint. *Id.* at 713. The Appellate Division affirmed. *Cnty. of Nassau v. State*, 100 A.D.3d 1052 (3d Dep't 2012).

In *Blakeman v. James*, No. 2:24-cv-1655, 2024 WL 3201671 (E.D.N.Y. Apr. 4, 2024), as well, a county attacked a directive from the New York Attorney General to rescind a policy that barred transgender women from participating in sporting events on county property. *Id.* at *3. The county averred that it would violate the federal Equal Protection Clause if it had to abandon this policy because the county would then transgress "the constitutional rights of women as a protected class." *Id.* at *14. Once more contradicting Appellants' stance, the court held that only actions that are "expressly forbidden" by a constitutional provision trigger the dilemma exception. *Id.* Reasoning that the Equal Protection Clause does not clearly (or even probably) suggest an infringement in this situation, the court barred the county from continuing its suit. *Id.*

The upshot is that the dilemma exception does not become applicable simply because a municipality says the right words. Rather, the municipality's reason why it will have no choice but to offend the

Constitution must actually be sound. It must, in fact, be likely that the municipality will violate a clear constitutional proscription if it complies with the relevant state law.[2]

B. Municipalities generally lack capacity to challenge state legislation whether they are plaintiffs or defendants.

Perhaps realizing their ineligibility for the dilemma exception, Appellants claim the general no-capacity rule is inoperative when (as here) a municipality is the defendant, not the plaintiff. App.-Br. 65-66. The Appellate Division rightly rebuffed this contention. "This rule *has* been applied to municipal entities raising a constitutional challenge in defense of a lawsuit." A16 (emphasis added). The lone case Appellants cite for their view, *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377 (2017), demonstrates this. The Battery Park City Authority ("BPCA") defended against a series of personal injury claims by arguing that Jimmy Nolan's Law, which had revived those claims after the limitations period

[2] In *Jeter* (the principal case cited by Appellants for their flawed understanding of the dilemma exception), the municipal entities were found *not* to have capacity when they "mount[ed] attacks … under … our State and Federal Constitutions"—precisely because those attacks lacked sufficient "plausibility and relevance." 41 N.Y.S.2d at 287. Appellants also misstate this Court's holding in *City of New York.* App.-Br. 65. The Court held that New York City did *not* have capacity because its equal-protection claim was not "persuasively argued." 86 N.Y.2d at 295.

had passed, violated the Due Process Clause of the State Constitution. *Id.* at 382-83. This Court held that the "general rule" that "state entities lack capacity to challenge the constitutionality of a state statute" *was* "applicable" to the BPCA, even though it was a defendant. *Id.* at 383. The Second Circuit subsequently found that the BPCA "does not qualify for any exception to the general rule," meaning that its "challenge to Jimmy Nolan's Law must therefore be rejected." *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 892 F.3d 108, 112 (2d Cir. 2018).

In *Jeter*, likewise, several municipal defendants maintained that a provision of the Education Law violated "the due process and equal protection clauses of our State and Federal Constitutions." 41 N.Y.2d at 287. Notwithstanding these entities' status as defendants, this Court ruled that "they do not have the substantive right to raise these constitutional challenges." *Id.*; *see also, e.g.*, *Herzog v. Bd. of Educ. of Lawrence Union Free Sch. Dist.*, 171 Misc.2d 22, 26-27 (Sup. Ct., Nassau Cnty. [Marvin E. Segal, J.], 1996) (concluding that a defendant school district "lack[ed] capacity to challenge [a state statute] on the ground that the statute violate[d] the [district's] rights under the Due Process and Equal Protection Clauses of the State Constitution").

C. The no-capacity rule raises no Supremacy Clause issues.

Appellants' fallback position is that, under the federal Supremacy Clause, they *must* have capacity to attack the NYVRA's constitutionality—at this exact juncture. App.-Br. 66-67. It would certainly come as news to the many New York municipalities previously denied capacity to pursue their federal constitutional claims (as both plaintiffs and defendants) that the Supremacy Clause was thereby infringed. Appellants point to no New York case recognizing any Supremacy Clause issue with the no-capacity rule, nor are Respondents aware of any such case.

This absence of relevant precedent is unsurprising. The U.S. Supreme Court has explicitly approved the no-capacity rule—and its implication that municipalities generally may not dispute state laws, even on federal constitutional grounds—for more than a century. "The city [of Newark] cannot invoke the protection of the Fourteenth Amendment against the state [of New Jersey]," the Court held in *City of Newark v. State of New Jersey*, 262 U.S. 192, 196 (1923). "A municipal corporation … has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator," the Court reiterated in *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933). More recently, the Court

favorably quoted this language from *Williams* and confirmed that it remains good law. *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 363 (2009).

To be clear, that *Appellants* lack capacity *at present* to *facially* challenge the NYVRA does not insulate the statute from federal constitutional scrutiny. Down the road, if the Supreme Court finds Appellants liable for vote dilution and orders them to adopt a remedy that is likely unconstitutional (such as a racially-gerrymandered district), they would have capacity to object to this directive. *See, e.g.*, *Sanchez*, 145 Cal. App. 4th at 665 ("The city may … attempt to show *as-applied* invalidity later if liability is proven and a specific application or remedy is considered that warrants the attempt."). The no-capacity rule also applies only to municipalities and their officers. It does not bind other potential litigants, who remain free to attack the NYVRA, facially or as-applied, at the time of their choosing (assuming they satisfy standing, ripeness, and other justiciability requirements). Consequently, "many paths exist to vindicate the supremacy of federal law in this area," *Whole Woman's Health v. Jackson*, 595 U.S. 30, 48 (2021), and the application of the no-capacity rule here portends no "'nullification' of federal law," *id.* at 49.

The two cases Appellants cite in support of their Supremacy Clause

argument fail to help them. In *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015), the U.S. Supreme Court observed that the Supremacy Clause "certainly does not create a cause of action" and "is silent regarding who may enforce federal laws in court, and in what circumstances they may do so." *Id.* at 325. The provision thus supplies no claim that litigants may make nor constrains state doctrines about when federal constitutional questions may be raised. In *Swift & Co. v. Wickham*, 382 U.S. 111 (1965) the Court held that a three-judge district court is not required for a claim that a federal statute preempts state legislation. *Id.* at 126-29. This interpretation of a (now-defunct) law has no bearing here.

D. Appellants' capacity is distinct from the facial validity of the NYVRA.

Appellants further maintain—circularly—that the reason they qualify for the dilemma exception is the same reason the NYVRA's vote-dilution prohibition is unconstitutional. App.-Br. 67-68, 70. If this were true, then it would not matter much whether Appellants have capacity. Either way, this Court would have to decide the merits of Appellants' facial challenge. But it is not true. In fact, Appellants' argument why the dilemma exception applies here is quite distinct from their argument why the NYVRA's vote-dilution

prohibition violates the Constitution. Both involve the Equal Protection Clause—but that is where the similarities end.

Here is Appellants' explanation why they trigger the dilemma exception: "*[A]ny* alteration of [Newburgh's] race-neutral, at-large election system in order to comply with the NYVRA's vote-dilution provisions would be unconstitutional" because it would be "race-focused." App.-Br. 68. To assess this explanation, this Court must consider whether *any* race-conscious effort to prevent or remedy a violation of an antidiscrimination law, like the NYVRA, is inherently unconstitutional. (As the next section shows, the answer is no.) To assess this explanation, the Court need *not* engage with the substance of the NYVRA itself. The NYVRA is simply a placeholder: a stand-in for any antidiscrimination law with which compliance might require race-conscious action.

In contrast, Appellants' constitutional attack on the NYVRA's vote-dilution prohibition is the following: This provision classifies by race, thereby triggering strict scrutiny, App.-Br. 23-40, which the provision cannot survive because it does not require proof of intentional racial discrimination and diverges from the *Gingles* framework for vote-dilution claims under the federal VRA. *Id.* at 40-56. This attack misfires as well, for reasons discussed

below. The key point here, though, is that this attack is very different from Appellants' capacity argument. To adjudicate Appellants' facial challenge, this Court would have to delve deep into the details of the NYVRA. The Court would *not* need to determine whether any race-conscious step to avoid or cure racial discrimination is necessarily unconstitutional.

Precisely because these issues are separate, the Appellate Division had no trouble rejecting Appellants' capacity argument without deciding the facial validity of the NYVRA's vote-dilution prohibition. The first question about this provision's constitutionality is whether it classifies by race. The Appellate Division did not grapple with this question. It had no reason to do so since it did not reach Appellants' facial challenge. Likewise, the second constitutional question is whether the NYVRA's vote-dilution prohibition survives rational-basis review or, if applicable, strict scrutiny. Again, the Appellate Division did not comment on (because they are irrelevant to Appellants' capacity) either the state interest served by this provision or its tailoring to achieve its end. As Appellants admit, the Appellate Division did not examine "whether the NYVRA's vote-dilution provisions would flunk strict scrutiny." App.-Br. 53.

E. Appellants do not trigger the dilemma exception because they likely will not be forced to do anything at all.

Honing in on Appellants' explanation why they trigger the dilemma exception—because they will be forced to make a race-conscious change to Newburgh's at-large electoral system—it fails at the outset because, most likely, Appellants will not be forced to do anything at all. Appellants may be found not liable for vote dilution. Even if they are found liable, the most probable remedial outcome is that the Supreme Court will simply order a switch to single-member districts or an alternative electoral system. *See* Election Law §17-206(5)(a) ("Upon a finding of a violation … the court shall implement appropriate remedies …."). This scenario—the default under the NYVRA—would not require Appellants to lift a finger. This is because *they do not administer the Town's elections*. Instead, the Town's elections are run by the Orange County Board of Elections.[3]

On similar facts in *County of Nassau*, the Appellate Division held that Nassau County lacked capacity to dispute a state statute that required the replacement of certain voting machines. Like Appellants, Nassau County

[3] *See* Orange County Board of Elections, *Election District Maps*, https://www.orangecountygov.com/2219/Election-District-Maps.

did not "play[] any role in the administration of [the statute]." 100 A.D.3d at 1055. Also as in this case, "it [was] the [Nassau County Board of Elections]—not the County—that [was] responsible for the implementation of the requirements of [the statute]." *Id.* The Appellate Division therefore concluded that "the County cannot claim that, by complying with [the statute], *it* will be forced to violate a constitutional prohibition." *Id.* The same result should follow here, where Appellants do not administer the elections they fear may be altered if liability is imposed.

F. Precedent refutes Appellants' position that compliance with the NYVRA is necessarily unconstitutional.

Appellants' lack of involvement in running Newburgh's elections is fatal to their capacity case. But the argument has another fundamental flaw. Over and over, the U.S. Supreme Court has rejected Appellants' position that race-conscious action to comply with an antidiscrimination law is necessarily unconstitutional. Just two years ago, in *Milligan*, Alabama advanced Appellants' exact claim: that the Constitution "does not authorize race-based redistricting as a remedy for § 2 violations." 599 U.S. at 41. The Court emphatically disagreed, responding that "for the last four decades, this Court and the lower federal courts … *have* authorized race-based

redistricting as a remedy for state districting maps that violate § 2." *Id.* (emphasis added).

To be sure, some remedies for federal VRA violations are impermissible. In particular, racially-gerrymandered districts—districts unjustifiably drawn for predominantly racial reasons—are not allowed. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 916 (1995). But as the Court made clear in *Milligan*, Appellants' "contention that mapmakers must be entirely 'blind' to race has no footing in … law." 599 U.S. at 33. "The line [the Court has] long drawn is between [racial] consciousness and [racial] predominance." *Id.* The Court has never embraced Appellants' view that mere race-consciousness in designing districts or choosing an electoral system is forbidden.

Milligan is entirely consistent with the Court's holdings in other areas. For instance, Title VII imposes liability on employers whose practices have a disparate impact on members of a protected class. *See* 42 U.S.C. §2000e-2(k). In *Ricci*, the petitioners (echoing Appellants) argued that "an employer [cannot] take race-based … employment actions in order to avoid disparate-impact liability." 557 U.S. at 580. The Court rebuffed this claim that race-conscious measures to comply with Title VII are prohibited. Such "race-based decisions" are lawful not only "when there is a provable, actual

violation" of Title VII. *Id.* at 583. Rather, they are also valid when there is only "a strong basis in evidence of disparate-impact liability." *Id.*

Likewise, the FHA bans housing practices that have a disparate impact on protected-class members. *See* 42 U.S.C. §§3605-06. Once more, the Court held that "race may be considered" to prevent or remedy proven or suspected FHA violations. *Inclusive Communities Project*, 576 U.S. at 545. The Court added that "mere awareness of race in attempting to solve [disparate-impact] problems … does not doom that endeavor at the outset." *Id.*

Appellants try to evade these decisions by asserting that the NYVRA does not "qualify as an antidiscrimination statute," with which race-conscious compliance is permissible. App.-Br. 36. Of course it qualifies. True, the NYVRA does not forbid *intentional* racial discrimination *alone*. Instead, it is a disparate-impact statute, barring electoral practices that have discriminatory *effects* on protected-class members. Such laws fill the codes of Congress and state legislatures alike. Among their ranks, they include the federal VRA, all state VRAs, Title VII, the FHA, New York's Human Rights Law, and many more. *See, e.g.*, *People v. New York City Transit Auth.*, 59 N.Y.2d 343, 348 (1983) (a practice that causes "a disparate impact upon a protected class of persons violates the Human Rights Law"). Appellants are

entitled to their opinion that some other label should attach to disparate-impact discrimination. But that opinion is shared by neither the political branches nor the courts, which consider "disparate-impact discrimination" to be perfectly cognizable. *Ricci*, 557 U.S. at 578.

G. Past practice refutes Appellants' position that compliance with the NYVRA is necessarily unconstitutional.

There is a good reason for the unbroken wall of precedent approving race-conscious compliance with antidiscrimination (including disparate-impact) laws. Any other stance would mean that, over the years, innumerable remedies for civil rights violations (and even more efforts to avoid committing these violations) must have been unconstitutional. In the voting rights context, hundreds of jurisdictions have been compelled to switch to less dilutive electoral systems under the federal Constitution, the federal VRA, and state VRAs. *See, e.g.*, *White v. Regester*, 412 U.S. 755 (1973); *The Evolution of Section 2: Numbers and Trends*, Michigan Law Voting Rights Initiative (2024), https://voting.law.umich.edu/findings/; Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73

Emory L.J. 299, 329 (2023).[4] The vast majority of these jurisdictions had to abandon either at-large elections (the same dilutive practice used by Newburgh) or specific single-member districts that abridged the electoral influence of protected-class members. *See id.*

Under Appellants' theory, each of these changes to electoral policies must have offended the Constitution. After all, each change was "race-focused" and carried out "to comply with … vote-dilution provisions." App.-Br. 68. Appellants' theory is thus irreconcilable with an enormous body of past practice spanning more than half a century. Either Appellants are right and no jurisdiction should ever have sought to cure or avoid vote dilution. Or Appellants are wrong and race-conscious compliance with vote-dilution law is permissible (which is, in fact, the case).

The *Milligan* Court relied on past practice to reject Alabama's (which is also Appellants') argument. Alabama contended that demonstration maps

[4] Appellants are oddly fixated on this article. But the prevalence of racially-polarized voting is an empirical issue that the piece does not analyze. And, in fact, the extent of racially-polarized voting varies dramatically both nationwide and within New York. It is certainly *not* always present, as Appellants incorrectly assert. *See, e.g.*, Shiro Kuriwaki et al., *The Geography of Racially Polarized Voting: Calibrating Surveys at the District Level*, 118 Am. Pol. Sci. Rev. 922, 930-31, 936-37 (2024). Appellants also misquote the article's discussion of the NYVRA. App.-Br. 34. The NYVRA was the first state VRA to address *voter suppression*. *Every* state VRA addresses *vote dilution*. *See* Greenwood & Stephanopoulos, *supra*, at 307.

offered to satisfy *Gingles*'s first prong must be crafted without considering race. *See* 599 U.S. at 23-24. The Court retorted that, under this approach, "*every single illustrative map ever adduced* at the first step of *Gingles*" must have been unlawful. *Id.* at 33. "For all those maps were created" with the race-conscious aim of "show[ing] … that an additional majority-minority district could be drawn." *Id.* Alabama's position was therefore incompatible with "the whole point of the enterprise," as understood and conducted for decades. *Id.*

Nor do the radical implications of Appellants' theory end with voting rights. In myriad disparate-impact cases under Title VII, the FHA, New York's Human Rights Law, and other statutes, employers, housing providers, and other entities have been obliged to halt or amend their challenged policies. *See, e.g.*, Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. 1566, 1632-36 (2019) (tallying disparate-impact claims under Title VII, the FHA, and other laws). In each of these cases, a defendant had to make a "race-focused" "alteration of its race-neutral" practice "to comply with the" relevant statute. App.-Br. 68. So, according to Appellants, all this voluminous activity must also have been unconstitutional. Without anyone noticing, the Constitution must have been

violated on a vast scale in one domain after another.

Appellants' explanation why they trigger the dilemma exception, then, is not "persuasively argued." *City of New York*, 86 N.Y.2d at 295. Appellants consequently lack capacity to attack the NYVRA's vote-dilution prohibition.

II

This Court should confirm the elements that must be proven to establish vote dilution

While this Court should not reach the NYVRA's facial validity, it should confirm the elements that must be proven to establish vote dilution under the statute. The Appellate Division explicitly addressed these elements, A11-14, 23-24, so they are part of the question certified to this Court. Clarifying these elements would also provide invaluable guidance to both parties litigating under, and political subdivisions subject to, the law. *See, e.g.*, *People v. Brown*, 42 N.Y.3d 270, 280 (2024) (resolving an issue that "both parties … expressly ask[ed] the Court to consider … and provide guidance on its parameters").

On the face of the statute, a vote-dilution plaintiff must prove either that racially-polarized voting exists in the jurisdiction or that, under the totality of the circumstances, the protected class's electoral influence is

impaired. Election Law §17-206(2)(b)(i), (ii). Additionally, as discussed above, Appellants and Respondents agree that the NYVRA's description of vote dilution gives rise to two more elements. One is showing, as Appellants put it, "that there exists a reasonable *alternative* system in which the protected class at issue would have more electoral success than they would under the existing voting system." App.-Br. 58. As the California Supreme Court acknowledged in *Pico*, this element follows from state VRAs' common criterion that an electoral practice *impairs* a protected class's electoral influence through *vote dilution*. *See* 534 P.3d at 63-65.

The other element that stems from the concept of vote dilution was recognized by the U.S. Supreme Court in *De Grandy*: demonstrating that the protected class is not already adequately (usually meaning proportionally) represented. In Justice O'Connor's words, "[l]ack of [existing] proportionality is probative evidence of vote dilution," though, by itself, "proportionality is never dispositive." 512 U.S. at 1025-26 (O'Connor, J., concurring). Appellants concede that, with the addition of this element, the NYVRA's vote-dilution prohibition would "achieve a compelling interest," namely, preventing and remedying racial discrimination in voting that takes the form of vote dilution. App.-Br. 60.

However, this Court should *not* incorporate the final element advocated by Appellants: proof that the protected class's underrepresentation is the result of intentional racial discrimination by the political subdivision. *Id.* at 60-61. This element would cause the NYVRA to be less potent than—and not "track"—the federal VRA. *Id.* at 58. The whole point of the 1982 revision to the federal VRA was to override the U.S. Supreme Court's ruling in *Mobile v. Bolden*, 446 U.S. 55 (1980), that plaintiffs had to show that an electoral practice was "intentionally adopted or maintained … for a discriminatory purpose." *Gingles*, 478 U.S. at 35. As the *Gingles* Court also explained, vote dilution is a "functional" concept focused on the representation actually received by different groups of voters. *Id.* at 48 n.15, 66-67, 73. Inserting "discriminatory intent" into the concept thus "asks the wrong question." *Id.* at 73. In any event, the NYVRA's text bars the adoption of this element, stating that "evidence concerning the intent … to discriminate against a protected class is not required." Election Law §17-206(2)(c)(v).

III

The NYVRA is facially constitutional.

Like the Appellate Division, this Court should not address the

NYVRA's facial validity, which is not implicated by the question certified to the Court. If the Court does reach this issue, it should heed the judicial consensus regarding state VRAs and hold that, like them, the NYVRA is constitutional. Even Appellants admit that the NYVRA has lawful applications—in situations, like here, where the federal VRA is violated as well—which is enough to establish the statute's facial validity.

The NYVRA also does not trigger strict scrutiny by classifying individuals on the basis of their race. To the contrary, it classifies *political subdivisions* based on whether *they satisfy the statutory elements of vote dilution* (none of which is anyone's race per se). And even if the NYVRA were somehow subject to strict scrutiny, it would survive it. The law's differences from the federal VRA are minor and uniformly make it more effective at combating vote dilution.

A. The NYVRA undeniably has lawful applications.

To start, the "facial nullification" of a statute is appropriate only if it "suffers wholesale constitutional impairment" "in every conceivable application." *Cohen v. State*, 94 N.Y.2d 1, 8 (1999) (internal quotation marks omitted); *see also, e.g.*, *McGowan v. Burstein*, 71 N.Y.2d 729, 733 (1988) (to show that a law is "per se violative of the State Constitution," "plaintiffs

must demonstrate that … in every conceivable application [it] would be unconstitutional"). Here, as the Appellate Division observed, "[a]ll parties agree" that "the NYVRA could still be constitutionally applied in situations where the *Gingles* test has been satisfied." A24. Thanks to this agreement alone, the NYVRA's facial invalidation is improper.

Indeed, *this case* is one in which a claim under Section 2 of the federal VRA would be successful. The first *Gingles* prong is satisfied because it is possible to draw at least one reasonably-configured majority-minority Town Board district. RA228-33. The second and third *Gingles* prongs are satisfied by the uncontroverted evidence of highly racially-polarized voting in Newburgh RA161-69. The same evidence that establishes the circumstances specified by the NYVRA, RA52-57, 89-136, shows that Section 2's nearly identical totality-of-circumstances analysis also supports liability. And, under *De Grandy*, Black and Latino voters in the Town are not already proportionally-represented since they have never been able to elect any of their preferred candidates to the Town Board. RA46. Consequently, there is no need to speculate about other fact patterns where the NYVRA might lead to the same result as Section 2—and thus have lawful applications even according to Appellants. This case constitutes one of these valid

applications.

Appellants complain that this argument has been waived. App.-Br. 56-57 n.5. But Respondents developed it below in both their briefs. RA337; 471. So did the Attorney General, who could not have raised it earlier since she did not intervene until this case reached the Appellate Division. RA428-29. Additionally, "a question of law [whose resolution] is apparent on the face of [the] record," like this one, *may* be "raised for the first time on appeal." *U.S. Bank Nat'l Ass'n v. Simmons*, 230 A.D.3d 621, 622 (2d Dep't 2024) (internal quotation marks omitted). And when the case was before the Supreme Court, that court decided sua sponte that the NYVRA should be "stricken in its entirety." A29. Respondents cannot be faulted for not anticipating a facial ruling for which Appellants did not even ask.

B. The NYVRA does not classify individuals by race.

1. The NYVRA classifies political subdivisions by whether they satisfy the statutory elements of vote dilution.

Turning to Appellants' claim that the NYVRA racially classifies and so is subject to strict scrutiny, they fail to acknowledge the U.S. Supreme Court's recent decision in *Skrmetti*. There, the Court examined when a law classifies on a suspect basis in unprecedented detail. One key point is that a

law's "mere reference to [a suspect classification] is [in]sufficient to trigger heightened scrutiny." 145 S. Ct. at 1829; *see also id.* at 1830 ("[T]he mere use of [suspect classification]-based language does not sweep a statute within the reach of heightened scrutiny."). Instead, the right way to determine if a law classifies on a given ground is to ask if the law sorts people into two (or more) groups on that ground and then specifies a different rule for each group for the allocation of burdens or benefits. For example, a law uses a sex-based classification if it "prohibit[s] conduct for one sex that it permits for the other." *Id.* at 1831. In that case, the "law classifies based on sex for equal protection purposes" because "it prescribes one rule for women, and another for men." *Id.* at 1856-57 (Alito, J., concurring in part and concurring in the judgment) (internal quotation marks and alterations omitted).[5]

Under this framework, the NYVRA's vote-dilution prohibition plainly does not classify on the basis of race. Of course, this provision mentions race-related concepts (like racially-polarized voting). But the central teaching of

[5] While *Skrmetti* extensively discussed the meaning of a suspect classification, it did not change the law on this subject. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No.1*, 551 U.S. 701, 720 (2007) ("racial classifications" are used "when the government distributes burdens or benefits on the basis of individual[s' race]"); *Crawford v. Board of Educ. of City of Los Angeles*, 458 U.S. 527, 537 (1982).

Skrmetti is that a mere statutory reference to race is not necessarily a racial classification to which strict scrutiny applies. More fundamentally, the NYVRA's vote-dilution prohibition does not sort people into different racial groups to whom different burdens or benefits are distributed. It does not create one rule for minority voters and another for White voters. Rather, as the Appellate Division confirmed, "members of all racial groups, including white voters, [may] bring vote dilution claims." A19.

Like all statutes, the NYVRA's vote-dilution prohibition does classify on some basis. But this basis is non-racial from top to bottom. First, the provision sorts *political subdivisions* (which have no race), not *people* (who do). No person is regulated by the provision. It applies only to any "board of elections or political subdivision" in New York. Election Law §17-206(2)(a). Second, the NYVRA's vote-dilution prohibition sorts jurisdictions into two categories based on whether *they satisfy the statutory elements of vote dilution*. In one group are jurisdictions where (1) voting is racially-polarized and/or a protected class's electoral influence is impaired under the totality of the circumstances; (2) the protected class would be better represented under a reasonable alternative policy than under the status quo; and (3) the protected class is not already adequately represented. If sued, these jurisdictions are

liable for vote dilution and must remedy their violations. In the other group go jurisdictions where one or more statutory elements cannot be proven. If sued, these jurisdictions are not liable for vote dilution and need not change any of their electoral practices.

On its face, the NYVRA's classificatory basis—whether political subdivisions satisfy the statutory elements of vote-dilution liability—is nonracial. Nor is any of these elements equivalent to anyone's race per se. Take the existence of racially-polarized voting in a jurisdiction. *Id.* §17-206(2)(b)(i), (ii). Racially-polarized *voting* refers to the electoral *choices* of members of different racial groups: their ballot-box *behavior*, not their racial identity. To be a racial classification, this element would have to be established by voters' race alone. It is not. Similarly, most of the "circumstances" bearing on the impairment of a protected class's electoral influence *relate* to race in some way: a jurisdiction's history of racial discrimination, racial disparities in various areas, the use of racial appeals in campaigns, and so on. *Id.* §17-206(3). But none of these factors *just is* anyone's race. None is proven merely by the fact that one or more individuals identify with one race or another. And as for the implicit elements derived from the concept of vote dilution, Appellants *support* these requirements and so can

hardly contend they are racial classifications.

Notably, none of the NYVRA's vote-dilution elements is original to the statute. Each is shared with both Section 2 of the federal VRA and multiple state VRAs. *See, e.g.*, *Gingles*, 478 U.S. at 52-74 (discussing racially-polarized voting; *id.* at 44-45 (discussing the totality of the circumstances); Greenwood & Stephanopoulos, *supra*, at 309-16 (discussing state VRAs' vote-dilution tests). Accordingly, if Appellants are correct that the NYVRA's vote-dilution prohibition classifies by race and so is subject to strict scrutiny, the same must be true for Section 2 and other state VRAs.

Yet no court has ever agreed with this proposition—that all vote-dilution law is presumptively unconstitutional. In *Milligan*, to the contrary, the U.S. Supreme Court used the distinctive language of rational-basis review when it "reject[ed] Alabama's argument that § 2 as applied to [vote dilution] is unconstitutional." 599 U.S. at 41. It sufficed to demonstrate Section 2's validity that it is an "appropriate method of promoting" an end to racial discrimination in voting. *Id.* (internal quotation marks omitted). Likewise, every state appellate court that has considered the question has concluded that state VRAs do not classify by race and thus do not trigger strict scrutiny. *See, e.g.*, *Portugal*, 530 P.3d at 1006 ("No authority supports

[the] position" that "the [Washington VRA] makes 'racial classifications' …."); *Sanchez*, 145 Cal. App. 4th at 680 ("[T]he [California VRA] … does not allocate benefits or burdens on the basis of race" and so "is subject only to rational-basis review ….").

2. Appellants' racial-classification arguments fail.

In the face of this unbroken precedent, Appellants make a number of arguments, all of which are unavailing. Appellants assert that, to comply with the NYVRA's vote-dilution prohibition, political subdivisions must engage in "consideration of race." App.-Br. 26 (internal quotation marks omitted). No, they must not. Instead, to prevent or remedy vote-dilution violations, political subdivisions must consider the statutory elements of liability. As just explained, while these elements may be related to race, none is established by anyone's race as such.[6]

The fallacy of Appellants' logic is exposed by applying it to Section 2 of the federal VRA. Again, racially-polarized voting is a prerequisite for

[6] Appellants similarly raise the specter of political subdivisions "lump[ing]" people by race. App.-Br. 27, 29, 38. However, the NYVRA is far *less* conducive to "lumping" than disparate-impact statutes in other areas (like employment and housing). In those areas, individuals of the same race are *automatically* grouped for analysis. Under the NYVRA, in contrast, voters are grouped only if—and to the extent that—their voting behavior is cohesive.

vote-dilution liability under Section 2. *See Gingles*, 478 U.S. at 52-74. So every municipality in America *already* has to analyze racial voting patterns to evaluate its potential Section 2 liability, without anyone supposing this constitutes racial classification on a national scale. Similarly, the totality of the circumstances is part of a Section 2 claim, *see* 52 U.S.C. §10301(b), as are the existence of a "reasonable alternative voting practice," *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 480 (1997), and the current "proportionality" (or lack thereof) of a protected class's representation, *De Grandy*, 512 U.S. at 1013-22. So every municipality must already scrutinize the NYVRA's other elements, too, yet this has never been thought to be a vast program of racial classification. Indeed, Section 2 requires *more* contemplation of race-related concepts than does the NYVRA, because the first *Gingles* prong obliges municipalities to assess the geographic distribution of protected-class members. *See* 478 U.S. at 50. Under Appellants' reasoning, then, if anything is a "paradigmatic race-based-classification scheme," it is Section 2—but that would come as a surprise to every court in the land. App.-Br. 1.

Appellants also portray the changes in representation that may occur due to the NYVRA as "the distribution of 'benefits' … and 'burdens.'" *Id.* at 28. To reiterate, any such distribution takes place on the nonracial basis of

whether the statutory elements of vote dilution are satisfied. Additionally, the aggregate representation of different *groups* is not a cognizable benefit to, or burden on, *individual* voters. "[I]ndividual voters" have no "interest in the overall composition of the legislature," the U.S. Supreme Court held (in a case litigated by Appellants' counsel). *Gill v. Whitford*, 585 U.S. 48, 68 (2018). "Group political interests"—which the NYVRA may affect—are distinct from "individual legal rights." *Id.* at 72.

Appellants further fault the Appellate Division for remarking that members of all racial groups may bring vote-dilution claims under the NYVRA. App.-Br. 30-32. But Appellants seem to agree with this view since they never argue that eligibility to sue for vote dilution should be racially restricted. *Skrmetti* also shows that Appellants are wrong to think it is irrelevant for racial-classification purposes that members of all racial groups are treated alike by a statute. One of the main reasons the U.S. Supreme Court concluded that the law at issue in *Skrmetti* did not classify by sex was that it applied equally to boys and girls. "Under [the law], *no* minor," of either sex, "may be administered" certain medical treatments for certain purposes. 145 S. Ct. at 1831. Conversely, "minors of *any* sex may be administered [these treatments] for other purposes." *Id.*

Skrmetti further highlights the flaw in Appellants' contention that the NYVRA classifies by race when it refers to a "a class of individuals who are members of a *race*, color, or language-minority group." App.-Br. 32 (internal quotation marks omitted). This is a quintessential statutory "reference to [race]," which is not "sufficient to trigger heightened scrutiny." 145 S. Ct. at 1829. Under *Srkmetti* (and much earlier equal-protection doctrine), a law racially classifies only when it sorts people into racial groups and then treats those groups differently. A law does *not* racially classify simply because it mentions race.

While Appellants are silent about *Skrmetti*, they cite *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023), dozens of times. But affirmative-action cases are irrelevant here because they involve undeniable racial classifications. Unlike the NYVRA, affirmative action advantages minority members *because of their race per se*. Solely because they identify with one race rather than another, certain applicants get a boost in their odds of being admitted to a university or hired by an employer. *See, e.g.*, *id.* at 192-97. Also unlike the NYVRA, affirmative action advantages *individual* minority members. Particular, identifiable people are more likely to be admitted or hired. The benefits accrue to them specifically,

not to groups to which they belong or municipalities where they live. Due to these contrasts, courts have consistently held that affirmative-action cases have no bearing in the very different vote-dilution context. *See, e.g.*, *Robinson v. Ardoin*, 86 F.4th 574, 593 (5th Cir. 2023) ("Drawing a comparison between voting redistricting and affirmative action occurring at Harvard is a tough analogy."); *Singleton v. Allen*, 690 F. Supp. 3d 1226, 1317 (N.D. Ala. 2023) ("[A]ffirmative action cases … are fundamentally unlike this [federal VRA] case."); *Coads*, 2024 WL 5063929, at *10.

While Appellants embrace affirmative-action jurisprudence, they try to distance the NYVRA from other state VRAs. App.-Br. 34-36. But Appellants are mistaken that the California VRA, the Washington VRA—or any other state VRA—requires additional elements to be proven before imposing vote-dilution liability. In particular, Appellants' statement that "the California and Washington VRAs require … a showing that … the totality of the circumstances abridges the ability of protected class members to elect candidates of their choice" is baffling. *Id.* at 35. These statutes both say that "[o]ther factors" pertaining to historical and ongoing discrimination are "probative, but *not* necessary" to "establish a violation." Cal. Election Code §14028(e) (emphasis added); Wash. Rev. Code §29A.92.030(7)

(emphasis added).[7] Other state VRAs that refer explicitly to the "totality of the circumstances"—Colorado's, Connecticut's, and Minnesota's—make it an alternative element to demonstrating racially-polarized voting, just as the NYVRA does. *See* 2025 Colo. Sess. Laws 750-51 (§1-47-106(2)(a)(II)); Conn. Gen. Stat. §9-368j(b)(2)(i), (ii); Minn. Stat. §200.54(2)(b)(1)(ii).

Now, it is correct that "the California and Washington VRAs are substantially narrower than the NYVRA"—but in *other* dimensions *unrelated* to vote dilution. App.-Br. 34. Specifically, those statutes prohibit only vote dilution while the NYVRA also bans voter suppression and voter intimidation, Election Law §§17-206, 17-212, requires preclearance for certain electoral changes, *id.* §17-210, and instructs that laws be construed to protect the franchise, *id.* §17-202. But with respect to vote dilution—the subject of this case—the NYVRA would be the most difficult state VRA in the nation to satisfy if this Court were to recognize the elements endorsed by both Appellants and Respondents. If the NYVRA *still* classified by race, despite all these safeguards, the conclusion is inescapable that so would all

[7] Nor does the California VRA "implicitly incorporate[e]" the totality of the circumstances, App.-Br. 35, by stating that federal case law is relevant to the analysis of the wholly distinct element of racially-polarized voting, *see* Cal. Election Code §14026(e).

other state VRAs.

Lastly, realizing that Section 2 of the federal VRA must trigger strict scrutiny under their theory, Appellants boldly tell the Court that "the U.S. Supreme Court *has* subjected Section 2 to 'strict scrutiny.'" App.-Br. 55 (emphasis added). As the saying goes, this would be big if true. A decision examining whether Section 2 is narrowly tailored to further a compelling interest would be a blockbuster, a case familiar to courts and litigants across the country. In reality, though, there is no such decision. "No court has ever suggested … that strict scrutiny applies to section 2 …." *Sanchez*, 145 Cal. App. 4th at 682. "Section 2 … has not been … required to pass strict scrutiny." *Coads*, 2024 WL 5063929, at *9.

How can Appellants possibly argue to the contrary? They notice that, in the background section of a 2018 case, the U.S. Supreme Court once happened to use "VRA" and "strict scrutiny" in the same sentence. *See Abbott v. Perez*, 585 U.S. 579, 587 (2018). But in that sentence, the Court did not remotely hold that Section 2 is subject to strict scrutiny. The Court actually said close to the opposite: that "complying with the VRA" is presumably "*a compelling state interest*" that can *rescue* a district drawn for a racially predominant reason—*save* it from invalidity—if the district is, in

fact, "necessary in order to comply with the VRA." *Id.* (emphasis added). Appellants cherry-pick the terms "VRA" and "strict scrutiny" and combine them in a way that flips the passage's meaning on its head.

C. The NYVRA is narrowly tailored to preventing and remedying racial discrimination in voting.

1. The NYVRA's objective is indisputably compelling.

If this Court reaches the NYVRA's facial validity, it should therefore hold that the law's vote-dilution prohibition does not classify by race, is subject to rational-basis review, and (like Section 2 of the federal VRA) is an "appropriate method of promoting" an end to racial discrimination in voting. *Milligan*, 599 U.S. at 41 (internal quotation marks omitted). But even if this provision were somehow the first vote-dilution ban ever to trigger strict scrutiny, it would still be constitutional.

To begin with, the state interest served by the provision—preventing and remedying the "denial or abridgement of the voting rights of [protected-class] members," Election Law §17-200—is indisputably compelling. It is the same vital goal that motivates the Fifteenth Amendment itself. The U.S. Supreme Court has also characterized "racial discrimination in voting" as an "insidious and pervasive evil" that may be addressed through "sterner and

more elaborate measures." *South Carolina*, 383 U.S. at 308-09; *see also, e.g.*, *Shelby Cnty. v. Holder*, 570 U.S. 529, 535 (2013) ("strong medicine" is "needed" to fight "entrenched racial discrimination in voting").

Appellants complain that "past discrimination" need not be proven in each vote-dilution suit under the NYVRA. App.-Br. 42. But statutes rarely make their ultimate objectives explicit elements that need to be satisfied before liability may be imposed. Statutes more commonly rely on elements that are reasonable proxies for, and easier to establish than, their ultimate ends. The state interest underpinning a law may not be disregarded simply because the interest does not have to be demonstrated anew in every suit.

To illustrate, neither Section 2 of the federal VRA nor any other state VRA requires a plaintiff to prove past discrimination to prevail on a vote-dilution claim. *See, e.g.*, 52 U.S.C. §10301 (not even mentioning "discrimination"); Cal. Election Code §14028(d). Yet no court has ever doubted that these vote-dilution bans aim to stop racial discrimination in voting. *See, e.g.*, *Shelby Cnty.*, 570 U.S. at 557 (noting the "nationwide ban on racial discrimination in voting found in § 2"). Moreover, historical and ongoing discrimination are the linchpin of the totality of the circumstances specified by the NYVRA. Election Law §17-206(3). So any plaintiff that

pursues liability under the totality of the circumstances—like Respondents here—must indeed show past discrimination.

Appellants also maintain that states are more limited than the federal government in the steps they may take to end discrimination. App.-Br. 43-44. Appellants' only support for this assertion is a dated U.S. Supreme Court decision, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), that described an earlier equal-protection era. For a time, a less stringent test applied to benign federal racial classifications than to comparable state and local classifications. *See id.* at 490-91. Since the 1990s, however, "congruence between the standards applicable to federal and state racial classifications" has been one of the "general propositions" on which equal-protection law is based. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223, 226 (1995). Today, "all racial classifications, imposed by whatever federal, state, or local governmental actor, [are] analyzed" identically. *Id.* at 227.[8]

[8] Additionally, New York's authority to combat discrimination stems from its own constitution, not the Reconstruction Amendments. *See, e.g.*, *Holland v. Edwards*, 282 A.D. 353, 357 (1st Dep't 1953) ("[T]he Legislature [may attack] the practice of discrimination … because of race" through an "exercise of the police power" and "in fulfillment of the guaranty of the [New York] Constitution for civil rights"). Because the Reconstruction Amendments are not the source of the Legislature's authority to enact the NYVRA, the U.S. Supreme Court's eventual decision in *Louisiana v. Callais*, 606 U.S. ___, 2025 WL 1773632 (June 27, 2025), which may be relevant to *Congress's* powers to enforce the Reconstruction Amendments, should have no bearing on this case.

2. The NYVRA's minor divergences from the federal VRA improve its tailoring.

The NYVRA's vote-dilution prohibition not only serves a compelling state interest; it is also narrowly tailored to the furtherance of this goal: avoiding and curing racial discrimination in voting that takes the form of vote dilution. Appellants concede that, if the provision is construed to require proof that the protected class is not already adequately represented, it would "achieve a compelling interest." App.-Br. 60. This concession suffices to dispose of Appellants' narrow-tailoring objection. This concession is also wise. All the NYVRA's vote-dilution elements mirror aspects of Section 2 of the federal VRA and curb vote dilution for the same reasons as their federal analogues. To the minor extent the NYVRA diverges from Section 2, its antidilutive effect is more potent.

To anchor this discussion, the table below lists each element of the Section 2 framework and the corresponding NYVRA element. Three of the five elements are *identical*: protected-class member political cohesion,[9] bloc

[9] Appellants strangely claim that the NYVRA drops this element. App.-Br. 51-52. It does not. "[V]oting patterns … are racially polarized," Election Law §17-206(2)(b)(i)(A), only if protected-class members vote cohesively for certain candidates, other members of the electorate vote cohesively for other candidates, and a large gulf exists between these groups' preferences. *See, e.g.*, *Coads*, 2024 WL 5063929, at *14 ("[T]he requirement of showing racially polarized voting merges the second and third *Gingles* preconditions.").

voting by other members of the electorate, and the adequacy of the protected class's current representation. The totality of the circumstances differs only in that it is an alternative pathway to liability under the NYVRA. And the one element that is more distinct under the NYVRA, its counterpart to the first *Gingles* prong, simply expands the set of reasonable alternative policies that may satisfy this requirement.

Section 2 Element	**Corresponding NYVRA Element**
Gingles prong one: Is an additional, reasonably-configured, majority-minority district available as a remedy?	Is a reasonable alternative policy that would improve the representation of protected-class members available as a remedy?
Gingles prong two: Are protected-class members politically cohesive?	Identical
Gingles prong three: Do other members of the electorate vote as a bloc?	Identical

Totality of the circumstances considering past and present racial discrimination	Identical (as an alternative pathway to liability)
De Grandy: Is the protected class already adequately (usually meaning proportionally) represented?	Identical

The shared element of racially-polarized voting (which exists when the second and third *Gingles* prongs are met) is conceptually necessary for vote dilution to occur. As the U.S. Supreme Court has explained, voting must be racially-polarized for "the challenged districting [to] thwart[] a distinctive minority vote by submerging it in a larger white voting population." *Growe v. Emison*, 507 U.S. 25, 40 (1993). In the absence of racially-polarized voting, "there neither has been a wrong nor can be a remedy." *Id.* at 41; *see also Gingles*, 478 U.S. at 48 n.15 (racially-polarized voting is the "most important" vote-dilution factor). So this element is absolutely essential—even more than narrowly tailored—to establishing vote dilution.

Next, the shared requirement that the protected class not be already

adequately (usually meaning proportionally) represented prevents vote-dilution law from being distorted to maximize a group's representation. As the U.S. Supreme Court put it in *De Grandy*, "defin[ing] dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose." 512 U.S. at 1016-17. So this element is also indispensable to showing that genuine vote dilution (not merely sub-maximal representation) is present.

The last element shared by the NYVRA and Section 2—the totality of the circumstances—is closely tied to vote dilution as well. According to *Gingles*, racially-polarized voting is often "attributable" to the crux of these circumstances, "past or present racial discrimination." 478 U.S. at 65. Such discrimination can also cause "political participation by minorities … to be depressed," *id.* at 69, and minority voters not to be "able to provide the candidates of their choice with the same level of financial support," thereby contributing to "electoral losses by [these] candidates," *id.* at 70.

Appellants note that the totality of the circumstances is one pathway to liability under the NYVRA but need not be proven in every case. App.-Br. 52-53. This is true but legally immaterial. The totality of the circumstances must be considered under Section 2 simply because the statute says so. *See*

52 U.S.C. §10301(b). This is a *statutory* command, not a *constitutional* one. By allowing plaintiffs to proceed based only on a showing of racially-polarized voting, the NYVRA also addresses some vote dilution that Section 2 is unable to target. Notably, the NYVRA's greater efficacy in this regard was implicitly approved by *Gingles* itself. The Court stated that the various factors that comprise the totality of the circumstances "are supportive of, but *not essential to*, a [vote-dilution] claim." 478 U.S. at 48 n.15. Those factors mostly involve historical and ongoing discrimination, but "[f]ocusing on … discriminatory intent … asks the wrong question." *Id.* at 73.[10]

This leaves only the NYVRA's analogue to the first *Gingles* prong, its reasonable-alternative-policy requirement. This element, too, is integral to the incidence of vote dilution. "[T]he very concept of vote dilution implies—and, indeed, necessitates—the existence of …. a reasonable alternative voting practice" "against which the fact of dilution may be measured."

[10] The NYVRA also permits plaintiffs to proceed based only on proof of the totality of the circumstances. This approach is sensible (and more effective than Section 2) because racially-polarized voting is sometimes difficult to measure—for instance, when the number of precincts is small, there are multiple sizable racial groups, or residential patterns are highly-integrated. *See, e.g.*, D. James Greiner, *Ecological Inference in Voting Rights Disputes: Where Are We Now, and Where Do We Want to Be?*, 47 Jurimetrics 115, 120-50 (2007). Under these conditions, racial discrimination is a reasonable proxy for racially-polarized voting that cannot be directly observed.

Bossier Par. Sch. Bd., 520 U.S. at 480.

Appellants flag that this element permits plaintiffs to offer more reasonable alternative policies than authorized by *Gingles*'s first prong. App.-Br. 51, 53-56. But, as the Appellate Division correctly reasoned, the NYVRA's expansion of this policy set is perfectly constitutional. No court "has ever said that [*Gingles*'s first prong] was required by the constitution, as opposed to resulting from statutory interpretation." A22. Indeed, when a plurality of the U.S. Supreme Court ruled that plaintiffs cannot seek the creation of "crossover" districts (in which protected-class members make up less than half the population) under *Gingles*'s first prong, the plurality acknowledged "the permissibility of such districts as a matter of legislative choice or discretion." *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009) (plurality opinion).[11] True, the *Bartlett* plurality also alluded to "constitutional concerns" if odd-looking districts are drawn for predominantly racial reasons. *Id.* at 21. But the NYVRA explicitly deters the adoption of such districts by providing that "whether members of a protected class are

[11] Defendants also mention "coalition" district claims, App.-Br. 49, 51, but they are already permitted under Section 2 in the Second Circuit. *See, e.g.*, *NAACP Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 379 (S.D.N.Y. 2020), *aff'd*, 984 F.3d 213 (2d Cir. 2021).

geographically compact or concentrated … may be a factor in determining an appropriate remedy." Election Law §17-206(2)(c)(viii).

The modest divergence between the NYVRA's reasonable-alternative-policy requirement and *Gingles*'s first prong is not only lawful; it substantially improves the NYVRA's tailoring as well. Geographically-dispersed protected-class members can obviously be the victims of vote dilution. So can be protected-class members around whom a reasonably-configured majority-minority district cannot be drawn. *See, e.g.*, Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv. C.R.-C.L. L. Rev. 173, 199-213 (1989). These individuals are out of luck under *Gingles*'s first prong, which is underinclusive in combating vote dilution. Under the NYVRA, on the other hand, these individuals still have a shot at obtaining relief. If they can show that a reasonable remedy would likely bolster their representation—like a compact crossover district or an electoral system not reliant on districts in the first place—they can satisfy the NYVRA's more flexible requirement.

CONCLUSION

For the foregoing reasons, this Court should affirm the order of the Appellate Division.

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CERTIFICATE OF COMPLIANCE

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