To Be Argued By:
Misha Tseytlin
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Court of Appeals

STATE OF NEW YORK

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

Plaintiffs-Respondents,

against

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

Defendants-Appellants,

and

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

Intervenor-Respondent.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

TROUTMAN PEPPER LOCKE LLP
Attorneys for Defendants-Appellants
875 Third Avenue
New York, New York 10022
212-704-6000
misha.tseytlin@troutman.com

Of Counsel:
Misha Tseytlin

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PRELIMINARY STATEMENT

The NYVRA enshrines an unconstitutional requirement that any town or county whose voters happen to exhibit racially polarized voting—a "discernible, non-random relationship[ ] between race and voting," *Cooper v. Harris*, 581 U.S. 285, 304 n.5 (2017)—must change its election system to increase electoral success based on race. The U.S. Supreme Court, in turn, has long warned that a law forcing jurisdictions to change electoral systems for racial reasons creates a perilous minefield, such that any relaxation of the stringent standards under *Thornburg v. Gingles*, 478 U.S. 30 (1986), would raise grave constitutional concerns. And the Court now seems to be ready to go even further in the wake of *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) ("*SFFA*"), *sua sponte* granting re-argument (to take place the day after the argument in this case) to consider striking down even the application of Section 2 of the federal VRA to redistricting. *Louisiana v. Callais*, 606 U.S. ____, 2025 WL 1773632 (June 27, 2025). The NYVRA's vote-dilution provisions are incompatible with the course that the U.S. Supreme Court has charted, requiring race-based rearranging of election systems while eschewing *Gingles*' safeguards.

Yet, the Appellate Division held that the NYVRA's regime is subject only to minimal rationality review because any racial group can invoke these provisions. As the Town explained in its Opening Brief, that method of analysis is contrary to U.S. Supreme Court precedent.

Plaintiffs and the Attorney General essentially ignore the Appellate Division's any-race-can-invoke rationale, instead offering largely word games and misdirection. These parties assert over (and over and over) again that the NYVRA's mandate to change electoral systems in order to enhance the electoral prospects of voters grouped by race is subject only to rational-basis review because the NYVRA prohibits "racial discrimination," or "racially discriminatory vote dilution," or "disparate impact" discrimination—as if made-for-litigation labels can evade the Equal Protection Clause's core protections. Fatal to all of these arguments, these parties do not even try to explain how a political subdivision's voters exhibiting a "discernible, non-random relationship[ ] between race and voting," *Cooper*, 581 U.S. at 304 n.5, is racial discrimination under any meaning of that phrase.

The weakness of these parties' arguments only underscores that this is a straightforward case under the U.S. Supreme Court's caselaw,

especially after *SFFA*. It should go without saying that a college could not evade *SFFA* by declaring that the fact that the demographics of its admitted class do not mirror the populous at large is actually "racial discrimination," and then adopting policies designed to rebalance the racial outcome of its admission processes as remedying "disparate impact" racial discrimination. There is no constitutional difference between that hypothetical gambit and what Plaintiffs and the Attorney General urge in defense of the NYVRA's vote-dilution provisions here.

In the end, just one *undisputed* proposition resolves this case: the NYVRA's vote-dilution provisions on their face require towns to change their electoral systems to enhance the electoral success of voters grouped together by race, which necessarily means harming the electoral prospects of other voters grouped by their race. Since this racial mandate does not satisfy strict scrutiny, the NYVRA's vote-dilution provisions are unconstitutional on their face. And because there is no way for the Town here to comply with this mandate without violating the Equal Protection Clause, this challenge lies in the heartland of this Court's "dilemma" exception to the municipality-lack-of-capacity rule.

ARGUMENT

I. The Vote-Dilution Provisions Of The NYVRA Violate The Equal Protection Clauses Of The Fourteenth Amendment To The U.S. Constitution And The New York Constitution

A. The NYVRA's Vote-Dilution Provisions Mandate That Towns And Counties Hand Out Burdens And Benefits Based On Race And So Trigger Strict Scrutiny

1. The NYVRA's vote-dilution provisions trigger strict scrutiny because they "distribute[ ] burdens or benefits on the basis of individual racial classifications." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No.1*, 551 U.S. 701, 720 (2007); Br.25–26. These provisions require a political subdivision to abandon a race-neutral method of election whenever the common condition of racially polarized voting within the subdivision exists (or when the amorphous "totality of the circumstances" test is met), with the goal of improving the electoral success of groups of voters lumped together by race. Br.25–30. And, given elections' zero-sum nature, that comes at the expense of harming the electoral success of other groups of voters lumped together by other races. Br.26. When the NYVRA's vote-dilution provisions force a town to abandon its at-large method, that subdivision must then adopt a district-based or alternative method that ensures that candidates supported by voters grouped

together by race would not "usually be defeated." N.Y. Elec. Law § 17-206(2)(b)(ii); *see* Br.29–30. The Appellate Division's attempts to avoid the conclusion that strict scrutiny applies to these race-infused provisions by pointing out that voters of any race can seek electoral benefits for their race under those provisions cannot be reconciled with *Johnson v. California*, 543 U.S. 499 (2005), *Powers v. Ohio*, 499 U.S. 400 (1991), or *SFFA*'s holding that "the time for making distinctions based on race ha[s] passed," 600 U.S. at 204; Br.24, 30–32.

2. In their Response Briefs, Plaintiffs and the Attorney General barely defend the Appellate Division's basis for rejecting the application of strict scrutiny in light of *Johnson* and *Powers*. Only the Attorney General attempts to distinguish *Johnson* and *Powers*, claiming that those decisions are inapt "because the NYVRA does not require political subdivisions to separate, *or distribute benefits or burdens, based on race*," and does not introduce "a racial classification where none existed." AG.Resp.57–58, 59 n.8 (emphasis added). But the NYVRA's vote-dilution provisions very clearly do exactly those things. If a political subdivision's voters happen to exhibit the common condition of racially polarized voting, that town must hand out burdens and benefits (in terms of

electoral success) to groups of its voters statutorily lumped together by race. That is the *only* function of the NYVRA's vote-dilution provisions.

Plaintiffs and the Attorney General base their arguments against the application of strict scrutiny largely on word games, repeatedly asserting that the NYVRA's race-based provisions are subject only to rational-basis review because they are merely "antidiscrimination law[s]" that combat "racially discriminatory vote dilution," "voting discrimination," or "disparate impact" discrimination, and so on. AG.Resp.1, 19, 32–33, 38–39, 47, 49, 61, 66–67, 71; Pls.Resp.8–9, 22–23, 33–34, 36–40, 45, 47–56, 59. But the NYVRA's vote-dilution provisions do not outlaw racial discrimination, such as by prohibiting the political subdivision "from classifying individual[s] . . . on the basis of their race" and then taking some adverse action classification "on that basis." *Parents Involved*, 551 U.S. at 745. A political subdivision whose voters happen to exhibit racially polarized voting has not engaged in discrimination by keeping in place a race-neutral voting system, any more than a university engages in discrimination by keeping in place a race-neutral admission system, regardless of how that impacts the racial demographic composition of the admitted class. *SFFA*, 600 U.S. at 204.

Rather, as the Supreme Court explained in a passage that neither the Attorney General nor Plaintiffs even acknowledge, "racially polarized voting" is nothing more or less than a "discernible, non-random relationship[ ] between race and voting." *Cooper*, 581 U.S. at 304 n.5; *accord Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 9 (2024); *Shelby Cnty. v. Holder*, 570 U.S. 529, 578 (2013) (Ginsburg, J., dissenting) ("[R]acially polarized voting alone does not signal a constitutional violation"). Nor does the unbounded, totality-of-the-circumstances test, N.Y. Elec. Law § 17-206(2)(b)(i)(B), enact an antidiscrimination provision, *contra* AG.Br.34–41, as that test requires a town to change its voting system based upon "any" number of factors—or just one, N.Y. Elec. Law § 17-206(3)—such as social "disadvantage[s]" in "education, employment, health, criminal justice, housing, land use, or environmental protection," *id.* § 17-206(3)(g); *see* Br.11, 27.

Plaintiffs appear to recognize that there is nothing in the NYVRA's vote-dilution provisions' actual text that prohibits any form of discrimination, so they invent for the first time before this Court a new requirement: the racially polarized voting must interact with the political subdivision's voting system, such that "the protected class is not already

adequately (*usually meaning proportionally*) represented." Pls.Resp.7, 22, 43, 46, 64 (emphasis added). This is a nonstarter. The U.S. Supreme Court has made clear that there is no constitutional right to proportional representation for any discrete group of citizens lumped together by race (or by any other criteria, such as political preference, sex, or age), such that denying such a demographic a statistically proportionate electoral outcome could not plausibly be termed "discrimination." "[A] person's right to vote is individual and personal in nature"; it is not a right in any group's "collective representation in the legislature." *Gill v. Whitford*, 585 U.S. 48, 65 (2018) (citations omitted). Any contrary conclusion would "balkanize us into competing racial factions" and "threaten[ ] to carry us further from the goal of a political system in which race no longer matters." *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

Plaintiffs' invocation of caselaw from Section 2 of the federal VRA to prop up their theory badly backfires. While Plaintiffs rely repeatedly on Justice O'Connor's concurrence in *Johnson v. De Grandy*, 512 U.S. 997 (1994), Pls.Resp.22, 43, 53, 65, that one-Justice concurrence stated only that a lack of proportionality was "relevant," but "never itself dispositive," to the multi-step *Gingles* analysis, *De Grandy*, 512 U.S. at

1025 (O'Connor, J., concurring); *accord* 52 U.S.C. § 10301(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

In any event, the Town does not deny (indeed, fully embraces, Br.40–56) that the logical consequence of its position is that Section 2 of the federal VRA is subject to strict scrutiny, as that was already clear from *Abbott v. Perez*, 585 U.S. 579, 587 (2018), and *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion). *See* Br.4, 50–51, 55. "[A] State's consideration of race in making a districting decision is narrowly tailored and thus satisfies strict scrutiny if the State has good reasons for believing that its decision is necessary in order to comply with the VRA." *Abbott*, 585 U.S. at 587 (citations omitted). Whatever the ultimate outcome after re-argument in *Callais*, 2025 WL 1773632, there is no serious possibility that the U.S. Supreme Court will hold that a State need not "satisf[y] strict scrutiny" when "making a districting decision" based upon "consideration of race." *Abbott*, 585 U.S. at 587. Rather, the serious question in the *Callais* re-argument will be whether Section 2 still satisfies strict scrutiny, *see Louisiana v. Callais,* No.24-109, 2025

WL 2180226, at *1 (U.S. Aug. 1, 2025), which the NYVRA's vote-dilution provisions very clearly do not, *see infra* Part I.B.

Plaintiffs' reliance on *Allen v. Milligan*, 599 U.S. 1 (2023)—which, they say, "used the distinctive language of rational-basis review," Pls.Resp.51–52—is unavailing. There, Alabama had argued that Section 2, "as applied to redistricting[,] is unconstitutional under the *Fifteenth Amendment*" (not the Fourteenth Amendment's Equal Protection Clause) because Section 2 covers practices that are "discriminatory in effect." *Allen,* 599 U.S. at 41 (citations omitted). The U.S. Supreme Court rejected that argument, holding that the "[federal] VRA's ban on electoral changes that are discriminatory in effect . . . is an appropriate method of promoting the purposes of the Fifteenth Amendment." *Id.* (citations omitted). The Court's use of "appropriate" clearly refers to Congress' power to enact Section 2 under its Fifteenth Amendment enforcement power, *see* U.S. Const. amend. XV, § 2 ("The Congress shall have power to enforce this article by *appropriate* legislation." (emphasis added)), not to rational-basis caselaw.

Plaintiffs and the Attorney General make much of how many at-large election systems have failed under Section 2, *see* Pls.Resp.39–40;

AG.Resp.10–11, 64–65, but that does not help their arguments either. The plaintiffs in those cases proved all of the Section 2 elements under *Gingles*, and the Supreme Court has long assumed that Section 2 satisfies strict scrutiny. *Abbott*, 585 U.S. at 587. Regardless of whether that assumption will remain the law of the land after *Callais*, the assumption would not save the NYVRA's vote-dilution provisions, given those provisions very clear lack of narrow tailoring. *Infra* pp.24–28.

Plaintiffs and the Attorney General invoke other state VRAs, claiming that they too have not been subjected to strict scrutiny by various reviewing courts. AG.Resp.40–41; Pls.Resp.56–58. But all of those decisions predated the U.S. Supreme Court's landmark decision in *SFFA* and now conflict with that decision. Br.34–36. Plaintiffs' claim that the Town mischaracterized these other state VRAs by stating that they are more narrowly tailored than the NYVRA, *see* Pls.Resp.56–57, is wrong. California's and Washington's VRAs contain additional requirements for vote-dilution claims that the NYVRA is lacking. *See* Br.34–36. Unlike under the NYVRA, a plaintiff asserting a vote-dilution claim under the California VRA must satisfy the second and third *Gingles* preconditions. Cal. Elec. Code § 14026(e); *see Sanchez v. City of*

Modesto, 145 Cal. App. 4th 660, 669–70 (Cal. Ct. App. 2006). And, as Plaintiffs' own counsel explained, the NYVRA permits a finding of liability under the totality of the circumstances "even if racial polarization in voting isn't proven," *see* Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 Emory L.J. 299, 310–11, n.69 (2023) (citing N.Y. Elec. Law § 17-206(2)(b)), unlike the California and Washington VRAs that both provide that "racial polarization in voting[ ] must be satisfied for there to be unlawful racial vote dilution," *id.* at 310–11. While Plaintiffs cite new state VRAs in Colorado, Connecticut, and Minnesota, Pls.Resp.56–57, such laws have not yet faced—let alone withstood—constitutional challenge.

Plaintiffs' arguments that nondiscrimination laws are not subject to strict scrutiny, Pls.Resp.36–42, similarly backfires. The NYVRA's vote-dilution provisions do not "prohibit[ ]" towns "from classifying individuals by race" and then taking some adverse action on that impermissible classification, as nondiscrimination laws do. *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1132 (9th Cir. 2012) (citation omitted). Instead, they *require* political subdivisions to classify citizens by race and then alter their race-neutral election systems to

benefit some groups of citizens lumped together by race at the necessary expense of other groups lumped together by other races. *Supra* pp.4–5.

Plaintiffs' citation of two of the U.S. Supreme Court's *statutory* disparate-impact cases—*Ricci v. DeStefano,* 557 U.S. 557 (2009), and *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015)—does not change this conclusion. Pls.Resp.5–6, 37–39. *Ricci* held that Title VII's disparate-impact provision may allow an employer to take certain actions to ameliorate disparate impact without running afoul of Title VII's statutory disparate-treatment prohibition. 557 U.S. at 582–83. *Inclusive Communities* reached a similar conclusion in the context of the Fair Housing Act. 576 U.S. at 545. Neither case purports to bless efforts to avoid strict scrutiny under the Equal Protection Clause by renaming the doling out of benefits and burdens to achieve racial balancing as outlawing "disparate impact" discrimination, Pls.Resp.37–39—and any such reading would be contrary to *SFFA*. After all, Harvard could not have avoided strict scrutiny by simply relabeling the demographics of its class "disparate impact" discrimination and then claiming that its admissions policies remedies that discrimination. And although the

Attorney General boldly asserts that a college can after *SFFA* purposefully racially balance its admission class by "using different race-neutral criteria," AG.Resp.57, the U.S. Supreme Court foreclosed any such evasion, explaining that "'[t]he Constitution deals with substance, not shadows,' and the prohibition against racial discrimination is 'levelled at the thing, not the name,'" *SFFA*, 600 U.S. at 230 (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)).

While the Attorney General claims that the NYVRA "does not require districts to be drawn using race as a predominant factor" but merely permits "political subdivisions to draw a remedial map based on traditional race-neutral districting criteria," AG.Resp.44; *accord* Pls.Resp.37–38, that is just misdirection. The NYVRA's *liability* provisions (the provisions that the Town facially challenges here) *require* changing race-neutral election systems with the *sole* (not merely just predominant, Br.39–40) goal of giving some citizens grouped together by race more electoral success. Any political subdivision whose citizens happen to exhibit the common, non-discriminatory phenomenon of racially polarized voting and that has an at-large voting system *must* change that system with the sole, statutorily mandated goal of increasing

the chances that citizens grouped together by some race will win more elections. Further, if the political subdivision moves to a system other than an at-large one, it must ensure that those candidates preferred by the relevant racial group are not "usually [ ] defeated" within each new district. N.Y. Elec. Law § 17-206(2)(b)(ii). That is a clear mandate for "distribut[ing] burdens or benefits on the basis of individual racial classifications." *Parents Involved*, 551 U.S. at 720.

Finally, Plaintiffs make a rather bizarre, extended argument based upon *United States v. Skrmetti,* 145 S. Ct. 1816 (2025). Pls.Resp.47–51. *Skrmetti* "consider[ed] whether a Tennessee law banning certain medical care for transgender minors," 145 S. Ct. at 1824, was based on sex, thus triggering "heightened scrutiny under the Equal Protection Clause," *id.* at 1829. The Court held that the law did not rely "on sex-based classifications"—and thus was subject only to rational-basis review—but rather classified "on the basis of age" and "medical use." *Id.* *Skrmetti* does nothing to bless statutes like the NYVRA that specifically dole out benefits and burdens based on race, *supra* pp.4–5, and only confirms that the NYVRA's vote-dilution provisions rest upon racial classifications, triggering strict-scrutiny review. *Skrmetti* explained that if a statute's

"classifications" or its "application" "turns on [a protected characteristic]," then it "trigger[s] heightened scrutiny," while a "mere reference to [the protected characteristic] is [in]sufficient" to do so. 145 S. Ct. at 1829–30. The NYVRA's vote-dilution provisions do not "mere[ly] reference" race in the pursuit of some other aim. *Id.* Rather, they require towns to alter their election system to ensure that voters lumped together by race will experience more electoral success, at the expense of other voters lumped together by other races. *Supra* pp.4–5.

Plaintiffs' attempts to resist this straightforward reasoning are transparent efforts to "circumvent the Equal Protection Clause by writing in abstract terms." *Skrmetti,* 145 S. Ct. at 1831. Plaintiffs claim that the NYVRA's vote-dilution provisions "sort[ ] *political subdivisions* (which have no race), not *people* (who do)." Pls.Resp.49; *see also* Pls.Resp.50–51, 52–56. That is just the type of word play to avoid strict scrutiny that *Skrmetti* does not allow. *Skrmetti* explained that a law could not "shed its race-based classification" by using an abstract term like "*any* person" to prohibit conduct on the basis of race because what matters is whether "[t]he application of that prohibition [ ] turn[s] on [race]." 145 S. Ct. at 1831. And here, the race-based nature of the

NYVRA's application is clear. Under Plaintiffs' logic, a statute requiring public schools to admit students only of certain races would avoid strict-scrutiny review because schools, like political subdivisions, "have no race." Pls.Resp.49. Relatedly, Plaintiffs claim that the NYVRA's vote-dilution provisions "sort[ ] jurisdictions into two categories based on whether *they satisfy the statutory elements of vote dilution*." Pls.Resp.49. Yet, whether a political subdivision has satisfied "the statutory elements of vote dilution," Pls.Resp.49 (emphasis omitted), triggering NYVRA liability, depends entirely upon racial considerations, *supra* pp.4–5.

B. The NYVRA's Vote-Dilution Provisions Very Obviously Fail Strict Scrutiny

1. The NYVRA's vote-dilution provisions do not further any compelling interest and are not even arguably tailored to achieving any such interest. States have a compelling "interest in remedying the effects" of "racial discrimination" if there exists a "strong" evidentiary "basis . . . to conclude that . . . action [is] necessary" to remediate their own prior "identified discrimination." *Shaw v. Hunt,* 517 U.S. 899, 909–10 (1996) ("*Shaw II*") (citation omitted); *see also SFFA*, 600 U.S. at 207; Br.42. The NYVRA's vote-dilution provisions do not advance that interest, as they disclaim any need to show proof of past discriminatory

conduct. Br.42 (citing N.Y. Elec. Law § 17-206(2)(c)(v)). Further, the State cannot defend the NYVRA's vote-dilution provisions as advancing an interest in remedying societal discrimination, which is Congress' purview. Br.43–44 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490–91 (1989)). In any event, the NYVRA's vote-dilution provisions are not even arguably narrowly tailored to remedying any type of discrimination, by anyone, as they merely seek to address the banal, non-discriminatory phenomenon of racially polarizing voting. Br.44–48. The NYVRA's lack of narrow tailoring (or, indeed, lack of *any* tailoring) is also shown by the NYVRA's rejections of the safeguards within Section 2 of the federal VRA articulated in *Gingles*, 478 U.S. 30. Br.48–53.

2. The Attorney General's and Plaintiffs' counterarguments with respect to each prong of the strict-scrutiny analysis fail.

No compelling interest. Plaintiffs and the Attorney General argue that the State has a compelling government interest in "remedying discrimination," AG.Resp.65–66; Pls.Resp.59–60, but the U.S. Supreme Court does not articulate that interest at that high level of generality. A State has a compelling interest in remedying discrimination with race-based legislation only where there is "*strong*" evidence to conclude that

such action is "*necessary*" to remediate its "*identified* discrimination." *Shaw II*, 517 U.S. at 909–10 (citation omitted; emphases added). The NYVRA's vote-dilution provisions do not further that interest, as they target only racially polarized voting, which is not discrimination in any respect. *See supra* pp.6–7. And the NYVRA's totality-of-the-circumstances test does not identify discrimination either, given its unbounded, all-things-considered approach. *See supra* p.7.

Plaintiffs argue that the States' and Congress' power to enact race-based legislation should be coextensive, while claiming that the Supreme Court's decision to the contrary in *City of Richmond* is from "an earlier equal-protection era." Pls.Resp.61. But, of course, the Supreme Court's most recent pronouncement on States' authority to take race-based action—*SFFA*—only further cabined that state power. 600 U.S. at 207.

Not narrowly tailored. Strict scrutiny's narrow-tailoring prong requires that a State defending a statute that is subject to strict scrutiny must carry the extremely heavy burden of showing that such race-based state action is actually "necessary," *SFFA*, 600 U.S. at 206–07, to achieving a compelling state interest. The NYVRA's vote-dilution provisions do not even attempt to remedy discrimination, let alone in a

manner that is so narrowly tailored as to be *necessary* to that end. Br.44. These provisions subject political subdivisions with at-large methods of election to liability based on nothing more than the existence of racially polarized voting, which phenomenon is *not* racial discrimination, as explained above. *Supra* Part I.A. And while Plaintiffs argue that statutes "rarely" require their "ultimate objectives" to "be satisfied" before imposing liability, Pls.Resp.60–61, that does nothing to show how the overbroad NYVRA vote-dilution provisions are *narrowly tailored*—*i.e.*, *necessary*—to achieving any compelling interest. Plaintiffs do not come close to meeting the exceedingly demanding, narrow-tailoring standard, as they cannot show (in their own words) how the NYVRA's vote-dilution provisions are necessary to remedying even "reasonable proxies for" specific instances of past discrimination. Pls.Resp.60.

Plaintiffs argue that the NYVRA's vote-dilution provisions "mirror aspects of Section 2," with only "minor . . . diverge[nces]" that make the NYVRA "more potent." Pls.Resp.62–68; *accord* AG.Resp.59–61. But Plaintiffs just paper over the monumental differences between the NYVRA's vote-dilution provisions and the federal VRA, while also failing

to explain why those deviations are *necessary*, *SFFA*, 600 U.S. at 207, to furthering any compelling interest.

Perhaps the most egregious argument on this score is their claim that the NYVRA's vote-dilution provisions contain an "[i]dentical" totality-of-the-circumstances requirement, while only noting parenthetically the key point: the NYVRA imposes that test solely "(as an *alternative* pathway to liability)." Pls.Resp.64 (emphasis added). In fact, an NYVRA plaintiff need not satisfy that totality-of-the-circumstances test at all, so long as the plaintiff can demonstrate the common, nondiscriminatory phenomenon of racially polarized voting. *Supra* pp.7. And if a plaintiff can satisfy the "totality of the circumstances" inquiry, the plaintiff need not prove *any* of the *Gingles* requirements. *Neither Plaintiffs nor the Attorney General adequately explain why eliminating one half of Gingles or the other is "necessary" to advancing any compelling governmental interest, and this Court can end its strict-scrutiny analysis with that failing*. *SFFA*, 600 U.S. at 206–07.

Even if this Court focused only on purported corollaries between the NYVRA's vote-dilution provisions and the three *Gingles* preconditions, Plaintiffs and the Attorney General fail to show either how the NYVRA

comes close to satisfying those preconditions or why the NYVRA's relaxation of them is *necessary* to furthering any compelling interest.

Plaintiffs falsely claim that the parties' only agreed-upon implicit element in the NYVRA—that the plaintiff show an alternative system would increase the relevant racial group[s]'s electoral success, Pls.Resp.63; *infra* Part II—sufficiently replaces the first *Gingles* factor, Pls.Resp.63. But this implicit factor has nothing do with *Gingles*' first factor. *Gingles*' first factor requires that "the minority group [be] sufficiently large and compact to constitute a majority in a reasonably configured district." *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 402 (2022) (plurality opinion). The NYVRA, on the other hand, permits the aggregation of minorities from the entire political subdivision, while allowing for influence-district claims and coalition-district claims. *Compare* Br.51–52, *with* Pls.Resp.63, 67–68.[1] This

[1] Plaintiffs' insistence that coalition-district claims (to say nothing of influence-district claims) are permitted under Section 2 in the Second Circuit, Pls.Resp.67 n.11, is unavailing. The Second Circuit never reached a reasoned decision on the issue in the cited case—*NAACP Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp.3d 368 (S.D.N.Y. 2020), *aff'd*, 984 F.3d 213 (2d Cir. 2021)—merely noting, in a footnote, that other courts have recognized coalition claims. *Id.* at 379 n.11. By far the most detailed analysis on this issue is in *Petteway v. Galveston Cnty.,* 111 F.4th 596 (5th Cir. 2024) (en banc), which Plaintiffs ignore, where the Fifth Circuit held that "coalition claims do not comport with Section 2's statutory language or with Supreme Court cases interpreting Section 2." *Id.* at 599.

removes multiple of the important guardrails that *Gingles*' first factor puts in place. And, again, the U.S. Supreme Court has made clear that any weakening of Section 2's requirements would raise "serious constitutional concerns under the Equal Protection Clause." *Bartlett*, 556 U.S. at 21 (plurality opinion).

Plaintiffs also assert that the NYVRA's vote-dilution provisions incorporate the second *Gingles* factor, Pls.Resp.63, but that is wrong. The second factor requires that "a significant number" of the minority group's members usually vote for the same "preferred candidate," *Gingles*, 478 U.S. at 51–53, 56; Br.51–52, while the NYVRA's vote-dilution provisions define racial polarization to mean only a mere divergence between the electoral choices of "members in a protected class" from "the rest of the electorate," N.Y. Elec. Law § 17-204(6). The distinction between the NYVRA's and Section 2's formulation of this factor is significant because the NYVRA's definition lowers the level of political cohesion required of the racial group at issue.

Plaintiffs also erroneously assert that the NYVRA's vote-dilution provisions incorporate the third *Gingles* precondition, which requires a showing that the "majority group must vote sufficiently as a bloc to

enable it to usually defeat the minority group's preferred candidate." *Wis. Legislature*, 595 U.S. at 402; Pls.Resp.63. But the NYVRA contains no such statutory requirement, at least with regard to its at-large provisions. Those provisions do not require any showing that the "white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate," such that a "challenged districting [map] thwarts a distinctive minority vote at least plausibly on account of race." *Allen,* 599 U.S. at 18–19 (citation omitted; ellipses in original).

The Attorney General, for her part, argues that the NYVRA's vote-dilution provisions are narrowly tailored in "possible applications," such as where the electoral system violates Section 2 of the federal VRA. AG.Resp.66–68; *accord* Pls.Resp.45–47. But once the Town has shown that the NYVRA's vote-dilution provisions trigger strict-scrutiny review, which the Town has here, *see supra* Part I.A, it becomes the Attorney General's and Plaintiffs' burden to show that these provisions are "necessary" to achieving a compelling interest, *see SFFA*, 600 U.S. at 214. The Attorney General cannot carry that heavy burden by speculating that strict scrutiny *may* be satisfied in "possible" cases. AG.Resp.66. Relatedly, neither the Attorney General nor Plaintiffs attempted to show

below that applying the NYVRA's vote-dilution provisions to a political subdivision would be *necessary* to furthering any compelling government interest where that political subdivision has already violated Section 2. *See* Br.56. n.5. Nor would such a showing appear to be possible, in any event, given that the NYVRA specifically rules out evidence and analysis that *Gingles* mandates, Br.51–53 (collecting examples), and that such an electoral system would presumably already be thrown out under Section 2, making the NYVRA's draconian vote-dilution provisions decidedly not "necessary" for any purpose, *SFFA*, 600 U.S. at 206–07.

II. If The Court Does Not Invalidate The NYVRA's Vote-Dilution Provisions, It Should Define The Additional Elements That These Provisions Require Plaintiffs To Prove

A. If this Court does not hold that the NYVRA's vote-dilution provisions are unconstitutional, *but see supra* Part I, then, under constitutional-avoidance principles, it should blue pencil three implied elements into the NYVRA's text, Br.57–64. First, plaintiffs must show that there exists a reasonable alternative system in which the racial group at issue would have more electoral success than under the current system. Br.58–59. Second, plaintiffs must establish that members of the racial group at issue do not have any reasonable opportunity to elect

candidates of their choice under the current election system. Br.59–60. Third, plaintiffs must prove that the racial group's lack of any reasonable opportunity to elect candidates of its choice is the result of discrimination by the political subdivision. Br.60–61.

B. The Attorney General argues that this Court need not address this argument because the Town failed to preserve it, AG.Resp.69, which is false, *see, e.g.*, *Clarke v. Town of Newburgh*, Index No.EF002460-2024, NYSCEF No.70 at 21–26 (Orange Cnty. Sup. Ct. Sept. 25, 2024); Mem. Of L. In Supp. Of Mot. Of Defs.-Resp'ts For Leave To Appeal at 30–35, *Clarke v. Town of Newburgh*, Index No.2024-11753, NYSCEF No.37 (2d Dep't, Feb. 18, 2025). Plaintiffs agree with the Town that it is important for this Court to address these elements to "provide invaluable guidance" on what is required to establish NYVRA vote-dilution liability. Pls.Resp.42. Plaintiffs also agree with the Town that this Court should recognize the Town's first implicit element. Pls.Resp.43. Plaintiffs' arguments as to the other two implicit elements are wrong.

With respect to the second implicit element, Plaintiffs claim to agree with the Town, while actually offering a very different proposed element not supported by constitutional avoidance. *See* Pls.Resp.43.

Plaintiffs contend that an NYVRA vote-dilution plaintiff must "demonstrat[e] that the protected class is not already adequately (usually meaning proportionally) represented." Pls.Resp.43. Plaintiffs cite nothing in the NYVRA's text that suggests this element, and no principle of constitutional avoidance supports adding it. Far from being "recognized by the U.S. Supreme Court," Pls.Resp.43, this concept has no grounding in U.S. Supreme Court caselaw, *supra* pp.7–8. The Town's second proposed element, in contrast, remedies a dynamic where certain racial groups do not have *any* reasonable chance to elect candidates of their choice, which serves constitutional principles when paired with the Town's third proposed element of proving that this dynamic is the result of the jurisdiction's past discrimination. *See SFFA*, 600 U.S. at 207.

As to that third implicit element—requiring plaintiffs to prove that the racial group's inability to elect candidates of its choice is the result of discrimination by the political subdivision—this element is essential (although, to be clear, not sufficient, *see* Br.61) to any effort to save the NYVRA's vote-dilution provision. That is because "remediating specific, identified instances of past discrimination" by a town is a compelling

interest that can, when narrowly tailored, serve as adequate justification for race-based government action. *SFFA,* 600 U.S. at 207.

While Plaintiffs worry that this element would make the NYVRA's vote-dilution provision "less potent" than Section 2 of the federal VRA, Pls.Resp.44, that misses the mark in two respects. First, the NYVRA lacks *many* of Section 2's explicit safeguards under *Gingles* and—in fact—explicitly rules out those safeguards in its text, Br.51–53 (collecting examples), meaning that these provisions would work together in a complimentary manner, as Section 2 would remain more potent in other respects. Second, and contrary to Plaintiffs' suggestion, the Town is *not* asking plaintiffs to prove that, in adopting the challenged election system, the town had the "intent" to "discriminate against a protected class," as would have been required under the pre-1982 version of Section 2. Pls.Resp.44. Rather, plaintiffs should be required to show that changing the electoral system so that voters of the relevant racial group have any reasonable opportunity to elect candidates of their choice (under the Town's suggested second implicit element) is "necessary" (within the meaning of the U.S. Supreme Court's Equal Protection

Clause caselaw) to remedy discriminatory conditions that the jurisdiction itself previously created. *SFFA*, 600 U.S. at 207 (citation omitted).

III. The Town Has Capacity To Raise Its Facial Challenge To The NYVRA's Vote-Dilution Provisions

A. The Town also has capacity to raise its constitutional defense to the NYVRA's vote-dilution provisions. Br.64–70. Political subdivisions can challenge a statute under the "dilemma" exception when they "assert" that "if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription." *Matter of Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287 (1977); Br.64–65. Because the Town is arguing that compliance with the NYVRA's vote-dilution provisions would require it to act unconstitutionally, *see supra* Part I, it has capacity under the "dilemma" exception, Br.67–68. That said, the municipality-lack-of-capacity rule does not even apply here because the Town has raised its arguments as a defense to Plaintiffs' claims, Br.65–66, and any contrary conclusion prohibiting the New York Courts from following the Equal Protection Clause would violate the Supremacy Clause, Br.66–67.

B. Although Plaintiffs and the Attorney General dispute the Town's capacity to challenge the constitutionality of the NYVRA's vote-dilution

provisions, Pls.Resp.24–41; AG.Resp.22–30, they both quote principles that make clear that this Court *must* decide the merits of the Town's constitutional defense to resolve the capacity issue. Both recognize that the forced-constitutional-violation exception applies when a party's "very compliance with a state statute would require it to 'violate a constitutional proscription.'" AG.Resp.26–27 (quoting *Jeter*, 41 N.Y.2d at 287); Pls.Resp.25 (same). And, as the Appellate Division's decision shows, there is no way for a court to decide whether the Town's compliance with the NYVRA's vote-dilution provisions would require a constitutional violation unless the court first determines whether those provisions facially violate the Equal Protection Clause. *See* A5–6, A15–16. Thus, whether this Court addresses the constitutionality of the NYVRA's vote-dilution provisions in the capacity context (like the Appellate Division did, *see* A5–6, A15–16) or directly after holding that the Town has capacity to lodge its constitutional challenge, the analysis would be functionally identical.

Plaintiffs and the Attorney General contend that the "dilemma" exception does not apply because no NYVRA remedy has yet been ordered. Pls.Resp.35–36; AG.Resp.27–28. This misunderstands the

exception, which simply asks whether the Town's "*compliance*" with the NYVRA's vote-dilution provisions "would require it to 'violate a constitutional proscription.'" AG.Resp.26 (emphasis added) (quoting *Jeter*, 41 N.Y.2d at 287). Here, *any* compliance with the NYVRA's vote-dilution provisions would violate the U.S. Constitution. *See supra* Part I. That is so despite the fact that the Town does not itself "administer Newburgh's elections," Pls.Resp.24, as that is irrelevant to whether the Town's "compliance" with the NYVRA would require it to violate the Constitution. And Plaintiffs' argument that the Town cannot challenge the NYVRA's constitutionality until it has actually been found liable, Pls.Resp.35, is a nonstarter, as that would mean that any political subdivision that has an alternative argument that it complies with the statute at issue could never take advantage of this exception when sued under that law, *contra Jeter*, 41 N.Y.2d at 287 (citing *Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 20 N.Y.2d 109 (1967)).

Plaintiffs and the Attorney General argue that the Town's assertion of a constitutional defense is insufficient to trigger the "dilemma" exception because that would allow the municipality to evade the State's capacity rule by its "mere say-so," Pls.Resp.25–26, or with "conclusory

assertions," AG.Resp.28–29. The Town has not relied upon its say-so or any conclusory assertions, but, instead, developed detailed, powerful constitutional arguments that convinced the Supreme Court. A28–52.

Separately, Plaintiffs and the Attorney General argue that the lack-of-capacity rule can apply even when a political subdivision raises a constitutional defense, as this Court has previously applied the rule to political-subdivision defendants. Pls.Resp.28–29; AG Resp.22–25. But none of their cited cases directly addresses an argument that the rule should not apply in that context. *See, e.g.*, *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377 (2017); *Jeter*, 41 N.Y.2d 283. And this Court's landmark lack-of-capacity case, *City of New York v. State*, 86 N.Y. 2d 286 (1995), articulates the doctrine solely in terms of the municipality bringing an affirmative claim, *id.* at 289.

Plaintiffs and the Attorney General also misconstrue the Town's Supremacy Clause argument. *See* Pls.Resp.30–32; AG.Resp.29–30. They contend that there are no Supremacy Clause issues with barring a political-subdivision-defendant from raising a constitutional defense, arguing that the U.S. Supreme Court has approved this practice. Pls.Resp.30–31 (citing *City of Newark v. New Jersey*, 262 U.S. 192, 196

(1923); *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933)). But these cases do not address the Supremacy Clause at all. Plaintiffs and the Attorney General ignore the Town's actual argument: the Supremacy Clause creates a "rule of decision" for "the Judges in every State" not to "give effect to" the NYVRA's vote-dilution provisions if they conflict with federal law. Br.66–67 (citation modified) (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015); U.S. Const. art. VI, cl.2). Although the Attorney General notes that the Supremacy Clause is "silent regarding *who* may enforce federal laws in court," AG.Resp.29 (quoting *Armstrong*, 575 U.S. at 325); *see* Pls.Resp.31–32, that provision applies as soon as "a case or controversy properly comes before a court," *Armstrong*, 575 U.S. at 326, which unquestionably is the situation here.

Finally, Plaintiffs assert that "it would not matter" whether the Town raised its constitutional argument to this Court now or at the end of the case because, either way, this Court would have to decide the "merits of [the Town's] facial challenge," Pls.Resp.32—either now or after final judgment. But it matters a great deal. If this Court holds that the Town cannot raise its facial-constitutional argument now, that would

lead to a needless waste of party and judicial resources. There would be nothing gained by forcing the parties and the Supreme Court to hold a trial under a statute that is facially unconstitutional under binding U.S. Supreme Court caselaw. Indeed, the entire premise of the Town's motion to seek this Court's review is that litigants and courts—including those in two other ongoing NYVRA lawsuits—need this Court's guidance now on the NYVRA's constitutionality and the elements that may support any such conclusion. Mem. Of L. In Supp. Of Mot. Of Defs.-Resp'ts For Leave To Appeal at 17–35, *Clarke*, Index No.2024-11753, NYSCEF No.37. Both the Appellate Division (by granting the Town's motion) and this Court (by accepting this case thereafter) implicitly agreed that such clarity is needed now.

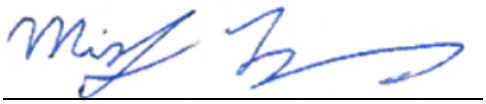
CONCLUSION

This Court should reverse the judgment of the Appellate Division and affirm the relevant portion of the judgment of the Supreme Court by holding that the NYVRA's vote-dilution provisions are unconstitutional.

If, however, this Court does not affirm the Supreme Court, it should remand to the Orange County Supreme Court for further proceedings.[2]

Dated: August 19, 2025 Respectfully submitted,

TROUTMAN PEPPER LOCKE LLP



MISHA TSEYTLIN
BENNET MOSKOWITZ
875 Third Avenue
New York, New York 10022
(212) 704-6000

Attorneys for Defendants-Appellants Town of Newburgh and Town Board of the Town of Newburgh

[2] As the Town explained in its Opening Brief, if this Court does not affirm the Supreme Court, it should remand this case to Orange County to implement this Court's ruling. Br.20 n.3. Although Plaintiffs argue that the issue of venue is not properly before this Court, Pls.Resp.16 n.1, they dispute neither that this Court has the authority to direct its remittitur to Orange County under N.Y. Comp. Codes R. & Regs. tit. 22, § 500.19(a), *see generally* Pls.Resp.16 n.1, nor that they waived the right to invoke N.Y. Election Law § 16-101(1)(b)'s non-jurisdictional venue provision by suing in Orange County and litigating there for a full year before even mentioning this provision, *see* Br.20 & n.3.

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