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**SUPREME COURT OF THE STATE OF NEW YORK**
**APPELLATE DIVISION – SECOND DEPARTMENT**

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| Clarke, et al.,<br><br>*Plaintiffs-Appellants*,<br><br>v.<br><br>Town of Newburgh, et al.,<br><br>*Defendants-Appellees*. | Appellate Division<br>Docket No. 2024-11753<br><br>Orange County<br>Index No. EF002460-2024 |

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**BRIEF OF THE CAMPAIGN LEGAL CENTER, THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, AND THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS CLARKE, ET AL.**

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## I. Introduction

The New York Voting Rights Act ("NYVRA"), one of seven state Voting Rights Acts ("state VRAs") nationwide, protects the right of every New York voter to vote for representatives in meaningful elections. The comprehensive legislation provides causes of action against voter suppression, vote dilution, and voter intimidation, makes voting materials more accessible to non-English speakers, creates the first state-level preclearance program, and more. With the NYVRA, New York joined California, Oregon, Washington, and Virginia in building on the federal Voting Rights Act of 1965 to address modern barriers to equal political participation. Connecticut and Minnesota have since modeled their own Voting Rights Acts after the NYVRA, and similar bills are pending in Michigan, Maryland, New Jersey, Alabama, and Florida.

*Amici* address three main points to place the NYVRA and the trial court's order in a national context. First, the NYVRA shares several key provisions with state VRAs, and federal and state courts have adjudicated challenges materially identical to those raised here. Second, every appellate court to consider such challenges has affirmed the constitutionality of vote-dilution provisions similar to the NYVRA's. Like its federal and state counterparts, the NYVRA requires fact-specific inquiries into unequal political opportunity and authorizes judges to order appropriate remedies tailored to the violation. Nothing about that framework triggers

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strict scrutiny or otherwise violates the Equal Protection Clause. Third, even if the trial court's constitutional analysis were correct, its decision was drastically overbroad. Without any explanation, the court held that the NYVRA's vote-dilution provisions were facially invalid and went on to rule the NYVRA "stricken in its entirety," Op. at 25, purporting to invalidate provisions irrelevant to the parties' dispute. The court had no basis to issue such a sweeping opinion.

State and federal courts have upheld the constitutionality of state Voting Rights Acts like the NYVRA time and again. *Amici* urge this Court to reverse the Supreme Court's order.

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## II. Argument

### A. Voting Rights Acts at the federal and state levels uniformly prohibit vote dilution.

Voting in meaningful elections is foundational to our democracy. As the U.S. Supreme Court observed long ago, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). That dilution can occur when voting is racially polarized, as Plaintiffs allege below, such that white voters consistently vote as a bloc against the cohesive voting of Black and Hispanic voters, and a jurisdiction maintains an at-large election system that allows a majority's preferred candidates to usually prevail. Compl. ¶¶ 5–13. When minority racial groups are denied the ability to participate in

meaningful elections, their government ceases to represent them, prioritizing majority voters and communities at their expense. Compl. ¶¶ 15–18.

To combat vote dilution, the federal Voting Rights Act and its state counterparts provide causes of action rooted in fact-specific inquiries as to whether an electoral system provides all citizens in a jurisdiction equal political opportunity. Section 2 of the federal VRA, as amended in 1982, prohibits any voting-related practice that, "based on the totality of circumstances," results in members of any racial group "hav[ing] less opportunity than other members of the electorate to . . . elect representatives of their choice." 52 U.S.C. § 10301(b). To analyze vote-dilution claims, federal courts engage in "'an intensely local appraisal' of the electoral mechanism at issue, as well as a 'searching practical evaluation of the past and present reality.'" *Allen v. Milligan*, 599 U.S. 1, 19 (2023) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986)). In recent years, over a half-dozen states have enacted Voting Rights Acts with their own vote-dilution causes of action.[1] The NYVRA was adopted in 2022 and has served as a model for enacted Voting Rights Acts in Connecticut and Minnesota and pending bills in Michigan, Maryland, New Jersey, Alabama, and Florida.[2]

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[1] Cal. Elec. Code §§ 14027–28; Or. Rev. Stat. § 255.405; Wash. Rev. Code § 29A.92.030; Va. Code Ann. § 24.2-126; N.Y. Elec. Law § 17-206; Conn. Gen. Stat. § 9-368j; Minn. Stat. § 200.54(2).

[2] *See, e.g.*, ACLU Connecticut, Written Testimony Supporting [Connecticut VRA] at 16 (2023), https://www.acluct.org/sites/default/files/field_documents/acluct_2023_written_testimon

The NYVRA shares key provisions with other state VRAs. Indeed, the statute's Bill Jacket explains that the Legislature intended to "build[] upon the demonstrated track record of success [of state voting rights acts] in California and Washington, as well as the historic success of the federal voting rights act." SOF ¶ 26 (alterations in original). The California and Washington Voting Rights Acts ("CVRA" and "WVRA") have withstood constitutional challenge; their similarity to the NYVRA supports the same result here.[3]

*First*, all three statutes define "protected class" similarly. The NYVRA, like the CVRA and WVRA, protects voters who are members of any "race, color, or language-minority group." *Compare* N.Y. Elec. Law § 17-204(5), *with* Cal. Elec. Code § 14026(d), *and* Wash. Rev. Code § 29A.92.010(6).[4] These definitions "confer[] on voters of any race a right to sue for an appropriate alteration in voting

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y_supporting_sb_1226_cvra.pdf ("The bill incorporates practical improvements on federal law, modeled on provisions in similar state-level voting rights acts in New York and California.").

[3] Because the Oregon, Virginia, Connecticut, and Minnesota Voting Rights Acts share similar language with the NYVRA, *see infra* fns 4–5, the trial court's erroneous ruling here could cast doubt on these statutes' validity if left uncorrected. Those statutes have not been subjected to constitutional challenge, however, so this brief focuses on those that have.

[4] *See also* Minn. Stat. § 200.52(7) (defining "protected class" as "a class of citizens who are members of a racial, color, or language minority group, or who are members of a federally recognized Indian Tribe, including a class of two or more such groups"); Conn. Gen. Stat. § 9-368i(a)(9) (defining "protected class" as "a class of citizens who are members of a race, color or language minority group, as referenced in the federal Voting Rights Act"); Or. Rev. Stat. § 255.400(3) (defining "protected class" as "a class of electors who are distinguished by race or color or are members of a language minority group, as the class of electors is referenced and defined in the federal Voting Rights Act of 1965, as amended, or its successors"); Va. Code Ann. § 24.2-125 (defining "protected class" as "a group of citizens protected from discrimination based on race or color or membership in a language minority group").

conditions when racial vote dilution exists." *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 680 (Cal. Ct. App. 2006); *Portugal v. Franklin Cnty.*, 530 P.3d 994, 1007–08 (Wash. 2023).

*Second*, all three statutes define vote dilution similarly, focusing on whether a law impairs the ability of members of a protected class to elect candidates of their choice. A WVRA violation occurs when "[m]embers of a protected class or classes do not have an equal opportunity to elect candidates of their choice as a result of the dilution . . . of the rights of members of that protected class or classes." Wash. Rev. Code § 29A.92.030(1)(b). A CVRA violation occurs when an election system "impairs the ability of a protected class to elect candidates of its choice . . . as a result of [vote] dilution," Cal. Elec. Code § 14027. And an NYVRA violation occurs when an election system has "the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution." N.Y. Elec. Law § 17-206(2)(a).[5]

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[5] *See also* Minn. Stat. § 200.54(2) (a violation occurs when an election system "has the effect of impairing the equal opportunity or ability of members of a protected class to nominate or elect candidates of their choice as a result of diluting the vote of members of that protected class"); Conn. Gen. Stat. § 9-368j(b) (a violation occurs when a method of election "has the effect, or is motivated in part by the intent, of impairing the opportunity or ability of protected class members to participate in the political process and elect candidates of their choice or otherwise influence the outcome of municipal elections as a result of diluting the vote of such protected class members"); Or. Rev. Stat. § 255.405(1)(a) (a violation occurs when an election system "impairs the ability of members of a protected class to have an equal opportunity to elect candidates of their choice or an equal opportunity to influence the outcome of an election as a result of the dilution or abridgment of the rights of electors who are members of that protected class"); Va. Code Ann. § 24.2-126(A) (a violation occurs an election methods "results in a[n] . . . abridgement of the right of any citizen of the United States to vote based on race or color or membership in a language minority group").

*Third*, all three statues share similar elements for establishing that impairment. Like the CVRA and WVRA, the NYVRA allows plaintiffs to present evidence showing the protected group's vote is impaired as a result of racially polarized voting within the challenged election system. N.Y. Elec. Law § 17-206(2)(a)–(b); Cal. Elec. Code §§ 14027, 14028(a)[6] (plaintiff must show racially polarized voting and an impaired ability to elect candidates of choice as a result of dilution); Wash. Rev. Code § 29A.92.030(1) (plaintiff must show racially polarized voting and that members of a protected class lack an equal opportunity to elect candidates of choice as a result of dilution). The NYVRA provides another avenue as well: just like under section 2 of the federal VRA, plaintiffs can demonstrate impairment based on the totality of circumstances.[7] Connecticut and Minnesota have adopted the NYVRA's two-option approach as well. Conn. Gen. Stat. § 9-368j(a)(2)(A); Minn. Stat. § 200.54(2)(b). These statutes offer this alternative route because measuring racially polarized voting often depends on election return data, which is sometimes unavailable, especially in smaller jurisdictions and in places with long histories of

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[6] The Supreme Court of California recently held that vote-dilution plaintiffs must prove "that, under some lawful alternative electoral system, the protected class would have the potential, on its own or with the help of crossover voters, to elect its preferred candidate." *Pico*, 534 P.3d at 60. *See infra* at 10–11.

[7] *Compare* N.Y. Elec. Law § 17-206(2)(b)(i)(B) (imposing liability when "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"), *with* 52 U.S.C. § 10301(b) (imposing liability when "based on the totality of circumstances, it is shown that the political processes . . . in the State or political subdivision are not equally open . . . in that its [protected class] members have less opportunity than other members of the electorate . . . to elect representatives of their choice.")

vote dilution and disenfranchisement where candidates preferred by minority voters simply stop running for office. Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 Emory L. J. 299, 348 (2023) (citing Christopher S. Elmendorf et al., *Racially Polarized Voting*, 83 U. Chi. L. Rev. 587, 682–89 (2016)). Thus, the effect of vote dilution itself means that minority communities will often be hard pressed to find "proof" that racially polarized voting exists in actual election results.

*Fourth*, all three statutes lower the burden on plaintiffs by dispensing with the federal VRA's *Gingles* I requirement[8] as to liability. Like the CVRA and WVRA, the NYVRA prohibits courts from considering "evidence concerning whether members of a protected class are geographically compact or concentrated" for purposes of determining liability, but courts may consider that "factor in determining an appropriate remedy." N.Y. Elec. Law § 17-206(2)(c)(viii); Cal. Elec. Code § 14028(c); Wash. Rev. Code § 29A.92.030(5). In federal VRA litigation, courts routinely apply the three *Gingles* preconditions at the liability phase of a vote dilution claim because plaintiffs seek the creation of one or more majority-minority districts. *See, e.g.*, *Milligan*, 599 U.S. at 18 ("To succeed in *proving* a § 2 violation under *Gingles*, plaintiffs must satisfy three 'preconditions.'") (emphasis added);

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[8] *See Gingles*, 478 U.S. at 49–50 (holding that federal vote-dilution plaintiffs must satisfy three "preconditions," the first being that "the minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district").

*Robinson v. Ardoin*, 86 F.4th 574, 588–92 (5th Cir. 2023); *Soto Palmer v. Hobbs*, 686 F. Supp. 3d 1213, 1223–26 (W.D. Wash. 2023), *cert. denied before judgment sub nom*. *Trevino v. Palmer*, 144 S. Ct. 873 (2024).

By excluding the *Gingles* I requirement at the liability stage, state VRAs allow plaintiffs with valid vote dilution claims to seek relief even when the minority community is not large or geographically compact. Where state VRA plaintiffs seek the creation of a majority-minority district remedy, "they may be required at the remedy stage to show that the minority group is sufficiently geographically compact to constitute a majority in the proposed district—just as a Section 2 plaintiff would need to do at the threshold stage." *Portugal*, 530 P.3d at 1003; *see also Pico Neighborhood Ass'n v. City of Santa Monica* (*Pico*), 534 P.3d 54, 65–68 (Cal. 2023). In contrast, if a state VRA plaintiff seeks the implementation of an alternative method of election such as ranked choice voting, a compactness requirement "would be both irrelevant and unnecessary at any stage." *Id.*

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### B. Federal and state courts have affirmed the constitutionality of the CVRA and WVRA, and the NYVRA is similarly constitutional.

Every appellate court to consider a federal constitutional challenge to a state VRA has upheld the challenged law. When plaintiffs brought the first vote-dilution claims under the CVRA and WVRA, defendant jurisdictions raised the same Equal Protection Clause arguments the trial court credited here. State and federal courts,

including the Supreme Courts of California and Washington, rejected those challenges. Applying traditional principles of statutory interpretation and judicial restraint, those courts concluded that the state VRA before them permissibly expanded the federal Voting Rights Act's protections to provide a constitutional cause of action to remedy vote dilution.

The California Voting Rights Act, the country's first state VRA, demonstrated how states can expand voting rights within constitutional bounds. The CVRA provides plaintiffs a cause of action to challenge at-large voting systems "that impair[] the ability of a protected class to elect candidates of its choice . . . as a result of . . . dilution." Cal. Elec. Code §§ 14027, 14032. To succeed, plaintiffs must show that voting is racially polarized and that their protected class has less ability to elect its preferred candidate than it would under an alternative system. Cal. Elec. Code § 14028(a); *Pico*, 534 P.3d at 64. The CVRA also removed several barriers to voting-rights plaintiffs in federal court, such as the aforementioned *Gingles* I requirement that plaintiffs prove that a racial minority group is geographically concentrated. Cal. Elec. Code § 14028(c). Removing that requirement makes it possible for smaller or more dispersed groups to challenge a dilutive at-large system and to demonstrate an ability to elect a candidate of choice under an alternative system. *Pico*, 534 P.3d at 65–66.

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California courts have upheld the CVRA notwithstanding its departures from the federal VRA. In *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660 (Cal. Ct. App. 2006), Latino residents of Modesto brought a vote-dilution challenge to its at-large election system. The California Court of Appeal for the Fifth District reversed a ruling that the CVRA was facially invalid under the state and federal Equal Protection Clauses. The court rejected the trial court's reading of the CVRA as imposing racial classifications, holding instead that because the CVRA allows members of *any* racial group to establish dilution, it does not discriminate on the basis of race. *Id*. at 685. The *Sanchez* court took pains to clarify that even if the trial court's interpretation "were a *plausible* reading of the statute, it would be both possible and necessary under the constitutional avoidance doctrine to construe it as we have." *Id.*

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Most recently, the Supreme Court of California affirmed the constitutionality of the CVRA's broad reach. In *Pico Neighborhood Association v. City of Santa Monica*, 534 P.3d 54 (Cal. 2023), the Court noted that "the way the voting is structured"—whether candidates are elected at-large or in single-member districts, for instance—"may effectively decide whether a group of voters can have . . . a seat at the table." 534 P.3d at 58. The Court described the CVRA as "an effort to provide greater protections to California voters than those provided by the [federal] VRA," and reversed the Court of Appeal for "misconstru[ing] the CVRA" by importing the

stricter standards federal courts apply under Section 2. *Id.* at 58–59, 65–67. The Court also rejected the argument that such standards are necessary "to avoid difficult constitutional questions under the equal protection clause." *Id.* at 70. The Court reasoned that the CVRA provides for non-district remedies with no reference to race, and any district-based remedy must conform to state and federal constitutional requirements, among them the prohibition on racial gerrymandering. *Id*.

The Ninth Circuit Court of Appeals similarly rejected an Equal Protection challenge to the CVRA. *See Higginson v. Becerra*, 786 F. App'x 705 (9th Cir. 2019). The court declined to apply strict scrutiny to the statute's vote-dilution provisions because they do not have the touchtone element of a racial classification: they do not "distribute[] burdens or benefits on the basis of individual racial classifications." *Id.* at 706–07 (collecting cases holding that race consciousness alone does not trigger strict scrutiny). The U.S. Supreme Court subsequently declined to review the Ninth Circuit's decision. *See Higginson v. Becerra*, 140 S. Ct. 2807 (2020).

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The Washington Voting Rights Act also provides a strong, constitutional vote-dilution cause of action. The WVRA prohibits all dilutive methods of election, provides that "[t]he equal opportunity to elect shall be assessed pragmatically, based on local election conditions," and lists several factors relevant to that inquiry. Wash. Rev. Code § 29A.92.030. Like the CVRA, the WVRA also eschews *Gingles* I. *See* Wash. Rev. Code § 29A.92.030(5).

Last year the Supreme Court of Washington upheld the WVRA against a facial Equal Protection challenge. *See Portugal*, 530 P.3d at 1010–12, *cert. denied sub nom. Gimenez v. Franklin Cnty.*, 144 S. Ct. 1343 (2024). The *Portugal* Court reviewed the WVRA's vote-dilution provisions under rational basis review because the statute "on its face does not classify voters on the basis of race, nor does it deprive anyone of the fundamental right to vote." *Id.* at 1011. Instead, it "mandates equal voting opportunities for members of every race, color, and language minority group." *Id.* The Court reasoned that "[t]he plain statutory language and principles of statutory interpretation show that the WVRA's protections apply to all Washington voters." *Id.* at 1007–08. The U.S. Supreme Court subsequently declined to review the *Portugal* Court's decision. *Gimenez v. Franklin Cnty.*, 144 S. Ct. 1343 (2024).

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Because the NYVRA's vote-dilution provisions are similar to those in the CVRA and WVRA, the opinions discussed above reinforce the NYVRA's constitutionality.

*First*, courts have repeatedly rejected the trial court's ruling that state VRAs create racial classifications. The trial court relied on the NYVRA's definition of "protected class" to hold that the law classifies people based on race because "[a] person can only seek relief on the basis of their race, color or national origin and remedies are likewise created based upon those classifications." Op. at 16. But every appellate court that has considered this question has held that because these

provisions do not distribute benefits or burdens based on race, they are not racial classifications and thus do not trigger strict scrutiny. *Sanchez*, 145 Cal. App. 4th at 681; *Portugal*, 530 P.3d at 1006.

Indeed, the trial court accepted the same premises as other courts yet inexplicably arrived at the opposite conclusion. The trial court acknowledged that the NYVRA "encompasses literally every person in the State of New York - because every person is a member of some race or is of some color," Op. at 9, but then failed to recognize that fact when analyzing whether the statute creates racial classifications, *see* Op. at 15–16. Courts interpreting the CVRA and WVRA read materially identical language as bolstering the statutes' constitutionality. One California appellate court noted that because anyone can bring a dilution claim, the CVRA provides equal protections for all. *Sanchez*, 145 Cal. App. 4th at 666 ("Just as non-Whites in majority-White cities may have a cause of action under the CVRA, so may Whites in majority-non-White cities."). The Supreme Court of Washington reached the same result and concluded that holding otherwise would frustrate the ability to provide everyone an equal opportunity to elect their preferred candidates. *Portugal*, 530 P.3d at 1007 ("Equality would not be possible if the WVRA protected the members of some racial groups and excluded others"). Those courts understood that state VRAs do not discriminate on the basis of race: "Instead, [they] mandate[]

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equal voting opportunities for members of every race, color, and language minority group." *Portugal*, 530 P.3d at 1011; *see also Sanchez*, 145 Cal. App. 4th at 680–86.

*Second*, courts have long recognized vote-dilution claims as race-neutral means of enforcing rather than violating the Equal Protection Clause. Courts have emphasized that the mere awareness of race in these statutes does not trigger strict scrutiny. S*ee, e.g.*, *Higginson*, 786 Fed. App'x at 707 (collecting cases). Liability for vote dilution turns on a fact-bound inquiry into political opportunity among racial groups. *See Milligan*, 599 U.S. at 17 (quoting *Gingles*, 478 U.S. at 47 ("The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters.")). Uncovering that inequality—let alone fashioning a remedy—requires being conscious of how race has shaped those opportunities. *See id*. at 30 ("Section 2 itself demands consideration of race.") (internal citation and quotations omitted). In this way, the NYVRA is similar to "other long-standing statutes that create causes of action for racial discrimination," such as the federal Civil Rights Act and the federal Voting Rights Act. *Sanchez*, 145 Cal. App. 4th at 666, 680.

*Third*, the NYVRA's vote-dilution inquiry mirrors those held constitutional elsewhere. In *Pico*, the Supreme Court of California held that a CVRA plaintiff must prove a "real world effect" by pointing to an alternative voting system to serve as a benchmark against which a group's undiluted vote can be measured. 534 P.3d at 64–

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65, 70. Plaintiffs bringing a claim under the NYVRA's vote-dilution provisions are likewise required to show the necessary "real world effect" by combining evidence of vote dilution—as demonstrated by either the existence of racially polarized voting or evidence that, based on the totality of the circumstances, the protected class's ability to elect preferred candidates is impaired—with evidence that there is an alternative voting system that would not result in vote dilution. *See* N.Y. Elec. Law § 17-206(2)(a)–(b); *Pico*, 534 P.3d at 68 (citing *Gingles*, 478 U.S. at 62–63).

The trial court took issue with this "either-or" component of the NYVRA's standard, Op. at 10, 18, but this merely reflects different ways statutes define the fact-specific inquiry vote-dilution claims require. For instance, the CVRA appears to establish a violation upon only a showing of racially polarized voting, Cal. Elec. Code § 14028(a). But the *Pico* Court treated the *impairment* inquiry as the touchstone of a dilution claim, noting that holding otherwise "would render the word 'dilution' [in the CVRA] surplusage." *Pico*, 534 P.3d at 64 (quoting Cal. Elec. Code § 14027). The NYVRA also requires proof of this same kind of electoral impairment but provides plaintiffs different ways to show it. N.Y. Elec. Law § 17-206(2)(b). Whether plaintiffs do so with either racially polarized voting or the totality of the circumstances, the NYVRA requires the same "intensely local appraisal" that the other courts have deemed essential to the dilution inquiry. *See Pico*, 534 P.3d at 60 (citing *Gingles*, 478 U.S. at 79; *Milligan*, 599 U.S. at 60, 75).

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*Fourth*, the absence of the *Gingles* I compactness requirement under the NYVRA, like the CVRA and WVRA, does not render the law unconstitutional. Federal courts developed the *Gingles* framework, including the compactness requirement, as elements required by the federal Voting Rights Act, not the Equal Protection Clause. *See Gingles*, 478 U.S. at 50 & n.17 (viewing its three preconditions as required by Section 2's text); *see also Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) ("[T]he *Gingles* requirements are preconditions, *consistent with the text and purpose of § 2*, to help courts determine which claims could meet the totality-of-the-circumstances standard *for a § 2 violation*.") (emphases added). The *Gingles* framework is a federal statutory requirement, not a constitutional requirement that state laws combatting voting discrimination must adhere to. Indeed, the Supreme Court of Washington wholly rejected the assertion that the Equal Protection Clause imposes a compactness requirement in every voting discrimination, or even vote-dilution, claim. *See Portugal*, 530 P.3d at 1011–12. The Ninth Circuit Court of Appeals likewise rejected the same arguments about *Gingles* I in a challenge to the CVRA. *See Portugal*, 530 P.3d at 1012 (citing *Higginson*, 786 F. App'x) (noting that "entire pages of [the WVRA challenger's] argument on this point are word-for-word identical to the briefing from" the CVRA challenge rejected by the Ninth Circuit in *Higginson*).

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State courts have recognized that the *Gingles* I inquiry is sometimes a poor fit to assess vote dilution under state VRAs, particularly where localities may be less residentially segregated, a plurality may be sufficient to elect candidates of choice, and remedies are not limited to single-member districts. *See Pico*, 534 P.3d at 65–68 (discussing the CVRA's rejection of *Gingles* I); *Portugal*, 530 P.3d at 1003 (same for WVRA). For instance, a court could order a locality to adopt cumulative voting, in which each voter is allowed as many votes as there are candidates and is free to allocate their votes how they see fit. N.Y. Elec. Law §§ 17-204(3), 17-206(5)(a)(ii). Because voters can "plump" all their votes on a single candidate, cumulative voting allows minority communities to elect candidates of their choice without drawing districts at all. *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 448–53 (S.D.N.Y. 2010) (ordering cumulative voting to remedy a dilutive at-large system under Section 2). Because non-districted voting systems can remedy an impaired ability to elect, a group's capacity to form a majority in its own district is not necessary to establish dilution. *See Pico*, 534 P.3d at 65–68; *see also Gingles*, 478 U.S. at 50 n.17 (reasoning that *Gingles* I is necessary when assessing the "*potential* to elect representatives in the absence of the challenged structure or practice," but considering only single-member districts as a benchmark).

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Thus, the NYVRA's constitutionality is reinforced by its alignment with provisions of the CVRA and WVRA that have been upheld by state and federal courts as consistent with the Equal Protection Clause.

### C. The trial court's order was patently overbroad.

The trial court's sweeping order facially invalidates the NYVRA "in its entirety," running roughshod over legal and prudential limits on the power of courts and the NYVRA's own severability clause. Op. at 25; *see* N.Y. Elec. Law § 17-222. Not only did the court invalidate every application of the law's vote-dilution provisions, including many not at issue in this case, but it also purported to invalidate every provision in the law altogether, including provisions that have no relevance here and whose legality no party disputes. All this before a single NYVRA claim has been fully tried, cutting off parties' development—and courts' consideration—of these nuanced and fact-bound issues. Moreover, the court failed to justify, or even address, why such a broad ruling was appropriate.[9] That approach represents a marked departure from the judicial restraint demonstrated by other courts that have adjudicated state VRA challenges. The trial court's overreach independently merits reversal.

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[9] Invalidating the NYVRA's entire statutory scheme is especially inappropriate where, as here, the Legislature has included a severability clause. *See AmerisourceBergen Drug Corp. v. N.Y. State Dep't of Health*, 227 A.D.3d 1286, 1289 (3d Dept. 2024) (collecting cases). The NYVRA provides: "[i]f any provision of this title . . . is held invalid, the invalidity shall not affect other provisions or applications of this title which can be given effect without the invalid provision or application, and to this end the provisions of this title are severable." N.Y. Elec. Law § 17-222.

*First*, neither the trial court nor Defendants-Appellees showed that facial invalidation was justified. As the New York Court of Appeals has explained, "a party making a facial challenge to a regulation has the 'extraordinary burden . . . of proving beyond a reasonable doubt that the challenged provision suffers wholesale constitutional impairment.'" *Matter of Owner Operator Indep. Drivers Ass'n, Inc. v. N.Y. State Dep't of Transp.*, 40 N.Y.3d 55, 61 (2023) (quoting *Brightonian Nursing Home v. Daines*, 21 N.Y.3d 570, 577 (2013)). "'In other words, the challenger must establish that no set of circumstances exists under which the Act would be valid.'" *Id.* (quoting *Matter of Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 445 (2003)). The trial court's analysis failed to meet—or even mention—that demanding standard. For example, the court never explains why the first *Gingles* precondition, which it recognizes arose and applies in the context of district-based remedies, must apply when plaintiffs seek, or courts order, race-neutral, non-districted remedies, such as implementation of a town-wide ranked-choice-voting system that elects multiple members, cumulative voting, or a system using transferrable votes. *See* Op. at 21 (rooting its concerns in the risk of "intentionally assigning citizens to a district on the basis of race without sufficient justification"); *see also Holder v. Hall*, 512 U.S. 874, 910 (1994) (Thomas, J., concurring) (recognizing that "nothing in our present understanding of the Voting Rights Act places a principled limit on the authority of federal courts that would prevent them from instituting [non-districted remedies]").

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Nor does the court ever explain why features of the NYVRA's vote-dilution provisions render the "entirety" of the Act, including its plethora of unrelated provisions, invalid under the facial-invalidation standard (or any other standard). Op. at 25.

This Court need not consider any as-applied constitutional challenges to the NYVRA because Defendants declined to raise any such arguments below and so have not preserved them here. *Cf. Portugal*, 530 P.3d at 1012 (declining to consider as-applied constitutional challenge because while the WVRA "is subject to as-applied challenges," the intervenor-defendant "did not bring an as-applied challenge"). "An appellate court should not, and will not, consider different legal theories or new questions of fact, if proof might have been offered to refute or overcome them had they been presented in the court of first instance." *In re Cohn*, 849 N.Y.S.2d 271, 273 (2007). Here, Defendants never argued—and the trial court never held—that the law is unconstitutional as applied to a particular set of circumstances, so any as-applied challenge is not properly before this Court. *See* Defs' Mot. Summ. J. at 10 (alleging "the NYVRA's vote-dilution provisions violate the Fourteenth Amendment's Equal Protection Clause" on its face); *id.* at 21 (concluding that "the NYVRA's vote-dilution provisions . . . are unconstitutional" based only on features of the statute); Op. at 16 (applying strict scrutiny based on "the text of the NYVRA, on its face").

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*Second*, prudential considerations counsel strongly against facial invalidation. As the U.S. Supreme Court has cautioned, "[f]acial adjudication carries too much promise of 'premature interpretatio[n] of statutes' on the basis of factually barebones records." *Sabri v. United States*, 541 U.S. 600, 609 (2004) (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)). No trier of fact has ever rendered a final judgment under the NYVRA's vote-dilution provisions, which only became effective last year. The trial court interpreted the NYVRA as wholly unconstitutional before any parties, including Plaintiffs-Appellants, have had the opportunity to fully develop a factual record and present their evidence at trial. Nor did the court honor the "fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (quoting *Ashwander v. TVA*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring)). Instead, the trial court's sweeping opinion reaches many applications of the law that are not at issue here (and for which no factual records exist)—for example, cases where impairment is established on the basis of ability to influence alone, Op. at 19, where no impairment has been shown at all, Op. at 20, where plaintiffs have not demonstrated RPV, Op. at 20, and where plaintiffs have not addressed the "totality of circumstances" factors. Op. at 20. By "passing on the

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validity of a law wholesale," the trial court closed the book on "lessons taught by the particular, to which common law method normally looks." *Sabri*, 541 at 609–10.

*Third*, for these reasons, other courts have taken a markedly different approach to the same issues. For example, even as the Supreme Court of Washington recognized that "the WVRA *could* be applied in an unconstitutional manner, and it is subject to as-applied challenges," it declined to reach those challenges when presented only with the argument that "the WVRA, *on its face*, does not require unconstitutional actions." *Portugal*, 530 P.3d at 1012 (emphases added). The court recognized that because "[t]he WVRA protects voters from all forms of abridgment, not just dilution," "even if the equal protection clause does require a threshold compactness inquiry for a vote dilution claim, that would not make the WVRA facially unconstitutional." *Id.* Even as it acknowledged challengers' complaints about the high bar for facial invalidation, the court reiterated that "that is the standard that applies to a facial constitutional challenge in accordance with this court's controlling precedent." *Id.*

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So too in *Pico*. While the Supreme Court of California recognized that one "circumstance" raised by the intermediate appellate court—where a protected class's "voting share would increase" only "from 0.1 percent to 1.5 percent" from an alternate system—was problematic, it read other provisions in the CVRA as barring liability in that circumstance. *Pico*, 534 P.3d at 69. It declined to do what the court

below did in that case, "judicially engraft[]" the first *Gingles* precondition "onto the CVRA"—and it did not even entertain using the law's lack of a *Gingles* I requirement to invalidate the statute altogether, as the trial court did here. *Id.*; *see* Op. at 21, 25. And like the Supreme Court of Washington, it also declined to reach any constitutional issues that might be presented by a particular remedy before those issues had arisen because "nothing in the CVRA requires a municipality or a court to select a district-based remedy or, even if it chooses to do so, to draw district lines . . . based 'principally on race.'" *Id.* at 70. Finally, the court found it "need not decide the scope of the CVRA's ability-to-influence prong in this case" because plaintiffs had not relied on an influence-based theory of liability. *Id.* at 71.

Rather than follow the approach of these courts, the trial court here reached out to decide issues that have not been presented, bar applications of the law not at issue, rebut theories that have not been raised by plaintiffs, and prohibit remedies that have not been granted. That was error.

## III. Conclusion

The trial court's patently overbroad order interprets the NYVRA in ways that appellate courts considering similar challenges have uniformly rejected. The NYVRA, like its counterparts nationwide, provides comprehensive protections for every voter to participate in meaningful elections. All are constitutional, anti-discrimination statutes that require fact-specific inquiries into local conditions and

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authorize courts to order appropriate remedies. For decades, state and federal courts have upheld similar state VRAs, rebuffing challenges nearly identical to those raised here. And whatever the merits, the trial court erred in purporting to strike the entire NYVRA when only the vote-dilution provisions are at issue, and without considering whether such provisions were severable from the remainder. *Amici* urge this Court to reverse the trial court's order.

November 27, 2024

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I have on this date caused to be electronically filed a copy of the foregoing document with the Clerk of the Court for the Appellate Division using the New York State Courts Electronic Filing system, which will automatically send e-mail notification of such filing to counsel of record.

Dated: November 27, 2024

/s/ *Robert Brent Ferguson*
Robert Brent Ferguson
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## CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 1250.8(j), on this 27th day of November, 2024, amicus curiae provides this printing specifications statement that the brief was prepared on a computer in Times New Roman, a proportionally spaced typeface, with 14-point font size and 2.0 line spacing. Pursuant to 22 NYCRR § 1250.8(f)(2), the length of this brief is 6,095 words, which does not exceed this Court's limitation of 7,000 words for a brief of amicus curiae.

Dated: November 27, 2024

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