

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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

Plaintiffs-Appellants,

– against –

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

Defendants-Respondents,

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

Intervenor.

Docket No. 2024-11753

Orange County

Index No. EF002460-2024

**Affirmation in
Opposition to Motion
for Leave to Appeal**

Beezly J. Kiernan, an attorney duly admitted to the bar of this State, affirms the truth of the following under penalty of perjury:

1. I am an Assistant Solicitor General in the Office of Letitia James, Attorney General of the State of New York. The Attorney General intervened in this appeal to defend the constitutionality of New York’s John R. Lewis Voting Rights Act (NYVRA).

2. I submit this affirmation in opposition to defendants’ motion for leave to appeal the unanimous Opinion & Order of this Court

concluding that defendants, the Town of Newburgh and its Town Board, lack capacity to raise their facial constitutional challenge to the NYVRA's vote dilution provision. Defendants fail to demonstrate any issue meriting review by the Court of Appeals. Accordingly, this Court should deny leave to appeal.

BACKGROUND

3. The NYVRA, enacted in 2022, is designed to ensure that members of all racial groups “have an equal opportunity to participate in the political processes of the state of New York.” Election Law § 17-200. The statute's vote-dilution provision prohibits “any method of election” that 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.” *Id.* § 17-206(2)(a). This prohibition is modeled after Section 2 of the federal Voting Rights Act (VRA), *see* 52 U.S.C. § 10301, as well as analogous provisions of the California Voting Rights Act, *see* Cal. Elec. Code §§ 14027–14028, and the Washington Voting Rights Act, *see* Wash. Rev. Code §§ 29A.92.020–.030.

4. Vote dilution under the NYVRA may be shown in various ways. For political subdivisions using an at-large election method, vote

dilution exists when either (A) “voting patterns of members of the protected class within the political subdivision are racially polarized,” or (B) “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). “Racially polarized voting” is defined as “voting in which there is a divergence in the candidate, political preferences, or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate.” *Id.* § 17-204(6).

5. The NYVRA authorizes any aggrieved person to file an action against a political subdivision to enforce the statute’s prohibition against vote dilution. *See id.* § 17-206(4). If a court finds that a political subdivision’s method of election has the effect of diluting the voting power of a protected class, then the court must “implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process.” *Id.* § 17-206(5)(a). The statute lists various potential remedies, including a district-based method of election, an alternative method of election (like

ranked-choice voting or cumulative voting), or revised redistricting plans.

See id.

6. Plaintiffs, six voters who reside in Newburgh, commenced this lawsuit in Supreme Court, Orange County, against Newburgh and its Town Board, alleging that Newburgh's at-large system for electing Town Board members dilutes the voting power of Black and Hispanic residents. Plaintiffs seek a declaration that the Town's use of an at-large election system unlawfully dilutes their votes in violation of § 17-206(2)(b)(i) and an injunction ordering the Town to implement either a districting plan or an alternative method of election for the 2025 Town Board election.

7. While discovery was ongoing, defendants moved for summary judgment, arguing that the NYVRA's vote-dilution provision is unconstitutional on its face because it violates the Equal Protection Clauses of the United States and New York Constitutions.

8. Supreme Court (Vazquez-Doles, J.) granted defendants' motion and struck down the NYVRA on its face. The court did not address whether Newburgh's at-large elections violate the NYVRA, nor whether there is any appropriate remedy for the alleged vote dilution.

9. On appeal, this Court unanimously reversed. The Court concluded that defendants, as political subdivisions of the State, lacked capacity to bring their sweeping facial challenge to the NYVRA because they had failed to establish that compliance with the NYVRA would always require them to violate the Equal Protection Clause. (*See Op.* at 12-13, 21.) In so ruling, the Court explained that the NYVRA equally protects “members of all racial groups” from racially discriminatory vote dilution. (*Op.* at 16.) The Court rejected defendants’ argument that the vote-dilution provision triggers strict scrutiny on its face merely because it requires political subdivisions to remedy racial discrimination. As the Court explained, “governments may adopt measures designed to eliminate racial disparities through race-neutral means.” (*Op.* at 17 (quotation marks omitted).)

10. Next, the Court observed that while districting in which racial considerations predominate triggers strict scrutiny, “the NYVRA also contemplates remedies that do not sort voters based on race,” like ranked-choice voting and cumulative voting. (*Op.* at 18.) Accordingly, the Court determined, whether a specific remedy triggers strict scrutiny is

grounds for an *as-applied* challenge, not a facial challenge. (See Op. at 19.)

11. Defendants now seek leave to appeal to the Court of Appeals. For the reasons explained below, leave to appeal should be denied.¹

ARGUMENT

THIS COURT SHOULD DENY LEAVE TO APPEAL

12. Leave to appeal should be denied because this Court's decision does not conflict with any authority from the Court of Appeals or other departments of the Appellate Division. Nor does it raise an issue of statewide importance that warrants review at this juncture. See 22 N.Y.C.R.R. § 500.22(b)(4). In any event, this Court's opinion correctly held that defendants lack capacity to challenge the constitutionality of the NYVRA because they failed to show that every application of its vote-dilution provision requires municipalities to classify voters based on race.

¹ Denial of defendants' motion for leave will render their request for a stay of further proceedings in Supreme Court pending appeal moot.

Leave Is Not Warranted to Review this Court's Application of Settled Law to the Specific Circumstances Here.

13. This Court's opinion applies well-settled law in holding that defendants lack capacity to assert their broad facial challenge to the NYVRA. It is well established that municipalities lack capacity to challenge state legislation, *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 383 (2017), and that a narrow exception to that rule exists for a municipality's claim that its very compliance with a statute would "violate a constitutional proscription," *Matter of Jeter v. Ellenville Cent. School Dist.*, 41 N.Y.2d 283, 287 (1977). And because defendants raised a facial challenge, which is strongly disfavored, the Court properly applied these precedents in requiring that, to have capacity, defendants needed to establish beyond a reasonable doubt that every conceivable application of the NYVRA would compel municipalities like the Town to violate the Equal Protection Clause. *See White v. Cuomo*, 38 N.Y.3d 209, 216 (2022); *Matter of Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003). The Court's application of established law to the particular facial challenge the Town raised here does not warrant further review.

14. Moreover, leave is not warranted because the Court also correctly applied established precedent in concluding (Op. at 21) that defendants failed to demonstrate the NYVRA's facial unconstitutionality. As the Court correctly recognized, States are free to use race-neutral means to remedy the discriminatory effects of existing government policies. See *Texas Dept. of Hous. & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 544-45 (2015). And in the voting rights context in particular, the U.S. Supreme Court has made clear that awareness of racial considerations in remedying vote dilution "is permissible." *Allen v. Milligan*, 599 U.S. 1, 30. This Court correctly applied these settled precedents in concluding that the NYVRA properly provides race-neutral means "that do not sort voters based on race," like ranked-choice voting and cumulative voting, to remedy discriminatory vote dilution. (Op. at 18.) Thus, contrary to defendants' argument, the NYVRA's vote-dilution provision does not impose an express racial classification and is not subject to strict scrutiny on its face.

15. Defendants point to no authority—let alone authority from the Court of Appeals or another Appellate Division Department—that conflicts with this Court's decision here. To the contrary, this Court's

opinion is consistent with every appellate decision addressing a similar facial equal protection challenge to a state voting rights act. Each of those decisions upheld the statute at issue without applying strict scrutiny. See *Higginson v. Becerra*, 786 F. App'x 705 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2807 (2020); *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660 (2006), *cert. denied*, 552 U.S. 974 (2007); *Portugal v. Franklin County*, 1 Wash. 3d 629 (2023), *cert. denied sub nom. Gimenez v. Franklin County*, 144 S. Ct. 1343 (2024). Likewise, as this Court correctly observed (Op. at 17), courts have declined to apply strict scrutiny to other antidiscrimination statutes outside the voting rights context. See, e.g., *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014); *Hayden v. County of Nassau*, 180 F.3d 42, 49 (2d Cir. 1999); *Raso v. Lago*, 135 F.3d 11, 16 (1st Cir. 1998); *Cohen v. Brown Univ.*, 101 F.3d 155, 170-72 (1st Cir. 1996).

16. Defendants misplace their reliance on several U.S. Supreme Court cases (Br. at 25-30) that are inapposite and do not conflict with the decision here. First, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (“SFFA”), 600 U.S. 181 (2023), struck down university affirmative action policies that expressly classified students

based on race—not a race-neutral antidiscrimination statute like the NYVRA. This Court’s opinion does not conflict with *SFFA*.

17. Second, contrary to defendants’ assertion (at 26), the U.S. Supreme Court has not subjected Section 2 of the federal VRA to strict scrutiny. Rather, the Court has held that strict scrutiny is triggered only by a specific remedy under Section 2, namely, a redistricting plan in which race is “the predominant factor in drawing district lines.” *Allen*, 599 U.S. at 31 (citation omitted); *see also Abbott v. Perez*, 585 U.S. 579, 585 (2018); *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 181-82 (2017). But the NYVRA contemplates race-neutral remedies like a districting plan in which race does not predominate, ranked-choice voting, and cumulative voting—none of which are subject to scrutiny. (See Op. at 18.) And no remedy has been ordered here, where the trial court has yet to determine whether the Town violated the NYVRA’s vote dilution provision. Thus, just as Section 2 is not subject to strict scrutiny on its face, neither is the NYVRA’s vote dilution provision.

18. Third, defendants’ reliance on purported differences between the NYVRA and Section 2 of the federal VRA (Br. at 28-29) is unavailing. As this Court correctly explained, the U.S. Supreme Court has not

treated the elements of a Section 2 claim as constitutionally required. Rather, the Supreme Court derived the *Gingles* preconditions and totality-of-the-circumstances test from the federal VRA's language and legislative history. *See Thornburg v. Gingles*, 478 U.S. 30, 48-51 (1986).

19. In sum, this Court's opinion is consistent with settled authority, and defendants fail to show otherwise. Moreover, the opinion does not raise issues of statewide importance because the Court ultimately concluded that the facial nature of defendants' arguments meant that they lacked capacity to challenge the constitutionality of the statute. Newburgh can raise its constitutional arguments again in an as-applied challenge if Supreme Court finds that the Town violated the NYVRA. After final judgment, the Court of Appeals would be able to review the constitutionality of the statute on a full record—including whether any remedy ordered by Supreme Court triggers strict scrutiny. Such review by the Court of Appeals at the conclusion of this case would give lower courts the “definitive guidance” defendants say they need. (Br. at 3.) At this juncture, however, review by the Court of Appeals is unwarranted and premature.

Leave Is Not Warranted to Review the Elements of a NYVRA Claim.

20. Further appellate review is also not warranted to consider whether the NYVRA incorporates any “implicit elements” (*contra* Br. at 30). Contrary to defendants’ assertion (at 31), the text of the NYVRA is clear about the elements of a vote-dilution claim. Vote dilution in a political subdivision using at-large elections exists when either (A) “voting patterns of members of the protected class within the political subdivision are racially polarized,” or (B) “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). Upon finding vote dilution, a court must “implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process.” *Id.* § 17-206(5)(a).

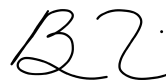
21. As this Court correctly concluded, the statute’s remedial provision makes clear that a plaintiff may obtain relief only if there is “an alternative practice that would allow the minority group to ‘have equitable access to fully participate in the electoral process.’” (Op. at 20.) Whether that means plaintiffs here “must show that there is an available

remedy that would increase the minority group's preferred candidates' chances of winning more seats," as defendants argue (at 31), is not an issue warranting review by the Court of Appeals. Indeed, no court has yet applied the NYVRA's remedial provision, nor any supposedly "implicit element" of a NYVRA claim. The Court of Appeals should not review the elements of a NYVRA claim in the abstract, before any lower court has had the opportunity to apply those elements to the facts of a specific case.

WHEREFORE, this Court should deny defendants' motion for leave to appeal.

Dated: February 28, 2025
Albany, New York

I affirm under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.



BEEZLY J. KIERNAN
Assistant Solicitor General