

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.

AFFIRMATION IN OPPOSITION

Appellate Division Docket No.
2024-11753

Orange County Index No.
EF02460-2024

ROBERT A. SPOLZINO, an attorney duly admitted to practice in the courts of the State of New York, affirms the following to be true under the penalties of perjury.

1. I am a member of the law firm of Abrams Fensterman, LLP, co-counsel with the Election Law Clinic at Harvard Law School to the Plaintiffs-Appellants Oral Clarke, Romance Reed, Grace Perez, Peter Ramon, Ernest Tirado, and Dorothy Flournoy (“Plaintiffs”) in the above-captioned matter. I make this affirmation in opposition to the motion of the Defendants-Respondents the Town of Newburgh and the Town Board of the Town of Newburgh (collectively, “the Town”) seeking an order: (a) pursuant to CPLR 5602(b)(1), and/or 5713, as well as 22 NYCRR § 1250.16(d), granting the Town leave to appeal to the Court of Appeals from this Court’s Opinion and Order (Hector D. LaSalle, P.J.) dated and entered January 30, 2025; and (b) pursuant to 22 NYCRR § 1250.16(c) and/or this Court’s inherent authority, withholding this Court’s remittitur to the Supreme Court, Orange County, pending this Court’s determination of the Town’s motion.

2. For the reasons more fully set forth in the Plaintiffs’ accompanying Memorandum of Law, attached as Exhibit A, the Town’s motion is without merit and should be denied in its entirety.

3. Briefly, it would not be appropriate to grant leave to appeal from the non-final

January 30, 2025 order. Denying leave to appeal at this stage will allow for a more expedient resolution to these proceedings, while allowing for a unified appellate review from a final judgment based on a more developed record. Moreover, despite the Town's efforts to claim otherwise, each part of this Court's order is based on well-settled principles of law. Nor can the Town establish that this Court's order creates ambiguity as to the elements of a vote dilution claim under the New York Voting Rights Act ("NYVRA").

4. The branch of the Town's motion seeking to "withhold" remittitur is entirely frivolous. Initially, this request is moot because the Court already has remitted this matter by transmitting a certified copy of the January 30, 2025 Opinion and Order to the Clerk of the Orange County Supreme Court. But, even assuming this is somehow insufficient, there is no basis to delay proceedings before the Supreme Court when the NYVRA expressly requires that this matter be expedited. *See* Election Law § 17-216.

WHEREFORE, the Plaintiffs respectfully request that the Town's motion be denied in its entirety.

I hereby affirm this 28th day of February, 2025, 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.

Dated: White Plains, New York
February 28, 2025



Robert A. Spolzino

CERTIFICATION OF COMPLIANCE WITH UNIFORM RULE 202.8-B

I, Robert A. Spolzino, an attorney at law licensed to practice in the State of New York, certify that this document contains 457 words, as calculated by the Microsoft Word processing system, inclusive of point headings and footnotes, and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules and regulations, etc.

/s/ Robert Spolzino
Robert Spolzino

Exhibit A

**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,

Docket No.:
2024-11753

Plaintiffs-Appellants,

-against-

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

Defendants-Respondents.

NEW YORK STATE OFFICE OF
THE ATTORNEY GENERAL,

Intervenor-Appellant.

**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS-
RESPONDENTS' MOTION FOR LEAVE TO APPEAL TO THE
NEW YORK STATE COURT OF APPEALS AND TO REFRAIN
FROM ISSUING REMITTITUR**

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Orange County Clerk's Index No.: EF002460-2024

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Preliminary Statement

Plaintiffs-Appellants Oral Clarke, Romance Reed, Grace Perez, Peter Ramon, Ernest Tirado, and Dorothy Flournoy, by their attorneys the Election Law Clinic at Harvard Law School and Abrams Fensterman, LLP, respectfully submit this Memorandum of Law in Opposition to Defendants-Appellants Motion for Leave to Appeal to The New York State Court of Appeals and to Refrain from Issuing Remittitur.

Summary of Argument

On January 30, 2025, this Court issued an opinion correctly holding that under New York’s longstanding capacity rule, the Town of Newburgh lacked capacity to bring a facial challenge to the New York Voting Rights Act (“NYVRA”). *Clarke v. Town of Newburgh*, Orange County Index No. EF002460/24, NYSCEF Doc. No. 160 at 2-3 (2d Dep’t Jan. 30, 2025) (the “Decision”). This Court correctly held that the Town did not satisfy any exception to this general rule because the Town failed to “show as a matter of law that compliance with the NYVRA would force [it] to violate the Equal Protection Clause.” *Id.* at 3.

To arrive at this conclusion, this Court applied settled equal protection principles consistent with the reasoning of numerous decisions issued by sister state and federal courts interpreting highly similar statutes that, like the NYVRA, prohibit racial discrimination in voting. *Id.* at 14-21. This Court also applied other settled

state law doctrines, including the presumption that duly enacted state statutes are constitutional and the rule that proponents of a facial constitutional challenge must demonstrate that a challenged statute is “invalid *in toto*.” *Id.* at 14. Based on this latter principle, the Court correctly reasoned that even if the Town could show that the NYVRA might hypothetically be unconstitutional as applied in some imaginable set of circumstances, the Town’s facial constitutional challenge would fail due to its concession that “the NYVRA could still be constitutionally applied in [some] situations.” *Id.* at 21.

The Town disagrees with this Court’s reasoning and dislikes its conclusions. But the Town’s displeasure with the outcome of this case is no reason to circumvent the ordinary appellate process. Judicial efficiency is not furthered by unnecessary and duplicative appellate proceedings. The Town will have an opportunity to challenge the constitutionality of any remedy imposed by the Supreme Court if it is found liable for vote dilution. It would be profoundly unfair to deprive Plaintiffs of the NYVRA’s protections for an indefinite period so that the Town can pursue an extraordinary appeal based on meritless arguments it lacks the capacity to raise.

This Court’s conclusion that the Town lacks capacity to raise its facial constitutional challenge is undoubtedly correct. The NYVRA might be a new law, but this Court did not tread new ground in reversing the Supreme Court’s indefensible order striking it down. This Court’s well-reasoned opinion does not give

rise to unsettled or novel questions of law which necessitate the extraordinary step of granting immediate leave to appeal under CPLR 5602(b).

The Town's final arguments regarding remittitur are confusing and confused. Nothing more needs to be done to return jurisdiction to the Supreme Court, which can immediately restart proceedings consistent with this Court's mandate. Plaintiffs respectfully ask this Court to deny the Town's motion in full. The law, the appellate rules, and the equities plainly favor allowing Plaintiffs their day in court.

Factual and Procedural Background

Plaintiffs are Black and Latino registered voters in the Town of Newburgh. NYSCEF 72 at ¶¶ 1-18. On January 26, 2024, Plaintiffs sent a letter to the Town Clerk advising that the Town's at-large system of elections violated the NYVRA because it unlawfully diluted the voting power of Black and Latino residents. *Id.* at ¶ 27. On March 15, 2024, the Town Board adopted a resolution to investigate Plaintiffs' allegations. *Id.* at ¶ 29. Because the Town Board's response did not satisfy Election Law §17-206(7), it did not trigger the NYVRA's "safe harbor" provisions, and Plaintiffs subsequently filed suit. NYSCEF 31.

On November 7, 2024, the Supreme Court issued a decision granting the Town's motion for summary judgment, concluding that the NYVRA violates the Equal Protection Clause of the Fourteenth Amendment. NYSCEF 147. On January 30, 2025, this Court issued its Decision reversing the Supreme Court's order on the

grounds that the Town lacked capacity to raise a facial constitutional challenge to the NYVRA because the Town had not demonstrated it was likely to be forced to violate the Equal Protection Clause. NYSCEF 155. The Town filed the instant motion on February 18, 2025, along with a supporting memorandum of law (the “MOL”).

Legal Standard

CPLR 5602(b)(1) provides that “[a]n appeal may be taken to the court of appeals by permission of the appellate division . . . from an order of the appellate division which does not finally determine an action.” Permission for leave to appeal may only be granted if the appellate division “certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals.” N.Y. Const. art. VI, § 3(b)(4).

Argument

The judicial interests in efficiency and fairness counsel against allowing the Town to circumvent the ordinary appellate process to take an immediate appeal of a non-final order. The Town argues that this Court should grant leave to appeal because litigation under the NYVRA is ongoing. New Yorkers, however, need not wait for the Court of Appeals’ blessing to begin invoking the NYVRA’s protections: “The judiciary is not a super-legislature.” *Sweeney v. Cannon*, 23 A.D.2d 1, 5 (2d Dep’t 1965) (internal quotation marks omitted). The Town also argues that the

likelihood of future review under CPLR 5601(b) justifies granting immediate review under CPLR 5602(b). Just the opposite: allowing litigation to proceed before an appeal is taken will avoid the need to decide constitutional issues based on “speculation” and will obviate “the risk of [a] premature interpretation of [the NYVRA] on the basis of [a] factually barebones record[.]” Decision at 14. If the Supreme Court determines that the Town is liable and imposes a remedy, the Town can invoke the “dilemma exception” to the capacity rule by pointing to the *specific actions* it will need to take to comply with the remedial order, and courts can consider the Town’s *as-applied* constitutional claim on an appeal as of right from a final order. This ordinary procedure protects the Town’s interest in avoiding unconstitutional actions *and* allows Plaintiffs a chance to vindicate their rights under a statute enacted by their Legislature almost three years ago.

The Town’s motion should also be denied because there is no unsettled or novel question of law for the Court of Appeals to resolve. The Town again challenges this Court’s conclusion that it lacks capacity to sue. The Town’s motion, however, is predicated on the same set of faulty arguments this Court previously, and correctly, rejected. This Court’s determination that the Town failed to demonstrate it will likely be required to violate the Equal Protection Clause rests on the routine application of settled legal principles that have been applied repeatedly in numerous cases involving similar statutes. This Court simply affirmed that

statutes like the NYVRA that protect *all* people equally are facially neutral anti-discrimination statutes, not racial classifications; that these kinds of statutes, which *account* for race in identifying and remedying racial discrimination, are not subject to strict scrutiny; that the NYVRA, which builds upon the federal VRA, need not precisely mirror the framework for proving racial vote dilution under Section 2 as set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986); and that the U.S. Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (SFFA)*, 600 U.S. 181 (2023), did not overrule decades of vote dilution precedents culminating in *Allen v. Milligan*, 599 U.S. 1 (2023).

The Town's new arguments fare no better. The Town's contention that it is unclear whether the capacity doctrine applies when municipalities raise facial constitutional challenges defensively ignores clear precedent confirming that it does. MOL at 37. The Town's argument regarding the elements of a vote dilution claim under the NYVRA is similarly unpersuasive. MOL at 30-35. The Town has already conceded that the NYVRA's vote dilution provisions contain an implied element requiring plaintiffs to demonstrate that a reasonable alternative electoral system or practice would remedy the alleged dilutive effect of the existing system. This Court agreed. Decision at 20. These questions have been asked and conclusively answered.

Finally, the Town's request to withhold issuing remittitur ignores that this Court has already done everything necessary to send this case back to the Supreme

Court for trial. This Court issued a signed opinion and directed the Clerk to enter copies of its order on NYSCEF in the Supreme Court. *See* NYSCEF 159, 160. At this stage, there is one vehicle for the Town to seek a stay of proceedings: a motion pursuant to CPLR 5519(c). But even if the Town had made that motion, it would not be entitled to a stay because its appeal is meritless and Plaintiffs would be irreparably harmed by the ongoing dilution of their votes. The Town’s gambit to further delay these proceedings threatens to undermine the NYVRA and has no basis in New York law.

I Judicial interests in efficiency and fairness counsel against circumventing the ordinary appellate process.

The Town acknowledges, as it must, that the Supreme Court order from which it appealed is not a final order or judgment and, therefore, is not appealable to the Court of Appeals as of right. *See* MOL at 6. The Town also acknowledges that once the Supreme Court *does* issue a final order or judgment, the Town could appeal that judgment to the Court of Appeals as of right. *Id.* at 34. Nonetheless, the Town seeks immediate leave to appeal, claiming that “[i]t would be a waste of judicial and litigant resources . . . to postpone the Court of Appeals’ inevitable review on” the constitutionality of the NYVRA’s vote dilution provisions. *Id.* at 35. Of course, it is not “inevitable” that the Court of Appeals will be required to resolve the Town’s current constitutional claims – the Town may well prevail on the merits below, or the proceedings may sharply narrow the issues remaining. Taking an immediate

appeal risks the unnecessary adjudication of a constitutional question. *See In re Bailey*, 46 A.D.2d 945, 946 (3d Dep’t 1974) (“[C]onstitutional questions . . . should be avoided except in cases of clear necessity.”) (cleaned up). Regardless, the Town’s argument is misguided in several respects. The interests of judicial economy and efficiency would best be served by declining leave to appeal so that all live issues at the conclusion of this case can be addressed by the Court of Appeals in one fell swoop.

Once a final judgment is entered, an appeal from the final judgment raises for review any interlocutory order that “necessarily affects” that final judgment. CPLR 5501(a)(1). Thus, the Court of Appeals has long disfavored appeals from interlocutory orders or judgments, as any issues raised therein would be reviewable on appeal from a final judgment. *See, e.g., Sontag v. Sontag*, 66 N.Y.2d 554, 555 (1985) (“The motion for leave to appeal should, therefore, be dismissed for nonfinality.”); *Gallagher v. Perot*, 233 N.Y. 603, 603-04 (1922) (granting motion to dismiss appeal from interlocutory judgment “on the ground such appeal is unnecessary, as said judgment may be reviewed on appeal from final judgment”). These same considerations caution against piecemeal appellate review, which prevents a court from addressing all related issues simultaneously. *See, e.g., Matter of Jane PP v. Paul QQ*, 64 N.Y.2d 15, 18 (1984) (declining to review interlocutory order “conserves judicial resources by making piecemeal appeals unnecessary and

does not adversely affect any party”); *Kaufman v. Kaufman*, 189 A.D.3d 31, 53 (2d Dep’t 2020) (“[T]he rendition of piecemeal decisions is inadvisable where the court is prevented, through the cabining of the issues, from assessing the . . . circumstances of the parties as a unified whole”); *Matter of Gunzburg v. Gunzburg*, 74 A.D.2d 636, 637 (2d Dep’t 1980) (emphasizing the importance of “avoiding piecemeal appeals”).

These concerns are particularly salient in the election law context. These proceedings, including cases like this one brought under the NYVRA, must be expedited. *See* Election Law §§ 16-116, 17-216; *Higby v. Mahoney*, 48 N.Y.2d 15, 21 n.3 (1979) (“It is true, of course, that election cases are necessarily expedited; the political calendar and the electoral process demand as much.”). To facilitate an expeditious resolution of these cases and avoid the need for successive appeals, courts strive to resolve *all* issues even when doing so is strictly unnecessary, to ensure that all arguments can be addressed in one appeal. *See, e.g., Matter of Montal v. Town of Ramapo*, 2023 WL 6216264, at *15 (Sup. Ct., Rockland Cnty. [Thomas P. Zugibe, J.] Sept. 14, 2023) (“Although this determination renders the remaining contentions set forth in the initial Petition academic, the Court will address each briefly herein, as is the general practice in determining Election Law matters.”); *Matter of Farrell v. Sunderland*, 173 Misc. 2d 787, 792-93 (Sup. Ct., Westchester Cnty. [Anthony A. Scarpino, Jr., J.] 1997) (“[T]he court recognizes the possibility of appellate review and the necessity of an expeditious resolution of all issues

raised.”). Granting leave to appeal at this stage would frustrate the need for swift resolution of election law proceedings.

This case is trial ready. If trial proceeds expeditiously, as required under the NYVRA, proceedings before the Supreme Court will conclude in a matter of months. They will almost certainly conclude before this appeal would be briefed and decided at the Court of Appeals if the instant motion were granted. The Supreme Court’s issuance of final judgment would terminate the Town’s right to appeal directly from this interlocutory order. *See Matter of Aho*, 39 N.Y.2d 241, 248 (1976) (“[A]ny right of direct appeal from [the interlocutory] order . . . terminated with entry of [the final] judgment.”). Should Plaintiffs prevail, the Town can then raise its constitutional arguments, together with any challenge to the Supreme Court’s merits ruling, in a single appeal. Reducing the number of appeals would reduce costs for the parties, avoid duplicative briefing, and allow for an expedient resolution of this dispute in its entirety.

This appeal is also a poor vehicle for review of the Town’s constitutional arguments. This Court properly rejected the Town’s unsupported and radical argument that essentially *all* possible applications of the NYVRA would require it to violate the Equal Protection Clause. *See* Decision at 14-21; *infra* at 13-19. But this Court, appropriately, left open the possibility that the Town could invoke an exception to the capacity rule if it could demonstrate that implementing a *particular*

remedy would force Town officials to violate the federal or state constitution. However, until the Supreme Court adjudicates liability and (if necessary) imposes a remedy, the record is not sufficiently developed to address the Town's assertion that it has capacity to challenge the NYVRA. At this stage, there is no way to know what (if anything) the Town will ultimately have to do to comply with the NYVRA. This lack of a "factual record sufficient to permit appellate review" is another reason to deny the Town's motion. *People v. Kinchen*, 60 N.Y.2d 772, 773-74 (1983); *see also People v. Hall*, 242 A.D.2d 734, 735 (2d Dep't 1997) ("The defendant has failed to establish a factual record sufficient for appellate review."); *Roberts v. Roberts*, 159 A.D.3d 932, 933 (2d Dep't 2018) ("Appeals that are not based on complete and proper records must be dismissed") (cleaned up). This is precisely why the CPLR specifies which orders are appealable. *See Sholes v. Meagher*, 100 N.Y.2d 333, 335 (2003) (the CPLR "ensures the appeal will be made upon a suitable record"); *Newrez, LLC v. City of Middletown*, 216 A.D.3d 655, 657 (2d Dep't 2023) (same).

The Town also argues that review is proper because, in addition to this litigation, there are two ongoing cases where plaintiffs have raised vote dilution claims under the NYVRA. MOL at 15-16 (citing *Serratto v. Town of Mount Pleasant*, Sup. Ct. Westchester County Index No. 55442/2024; *Young v. Town of*

Cheektowaga, Sup. Ct. Erie County Index No. 803989/2024).¹ The Town contends that granting immediate leave to appeal is necessary to spare those municipalities the expense of a trial should the Court of Appeals ultimately embrace its constitutional arguments. The parties to those proceedings are not presently before this Court. They may raise different arguments in their own respective cases than the arguments the Town advances here. They are free to seek a stay of proceedings in their respective courts pending this Court’s resolution of the instant motion if they so choose. It would be profoundly unfair to Plaintiffs to deny them their day in court based on the hypothetical interests of non-parties in unrelated proceedings.

In any event, appellate review would benefit from allowing overlapping issues of law to percolate across these cases. *See In re Lehman Brothers Holdings Inc.*, 2019 WL 2023723, at *11 (S.D.N.Y. May 8, 2019) (recognizing judicial interest in

¹ The Town does not mention *Coads v. Nassau County* in its recap of NYVRA vote dilution litigation. The omission is surprising, given that the Town’s counsel in this matter was also counsel for the municipal defendant in *Coads*. Notably, the defendant in *Coads* agreed to implement a new redistricting plan that “complies with each of the constitutional and statutory standards applicable to the redistricting of county legislatures in New York, *including all provisions of . . . the NYVRA.*” *See* Consent Judgment and Decree at 4, *Coads v. Nassau County*, No. 602316/2024 (Sup. Ct. Nassau County, Jan 23, 2025) (emphasis added), <https://perma.cc/WPJ6-2KZM>. Apparently (and contrary to counsel’s claims here), compliance with the NYVRA does *not* necessarily offend the Equal Protection Clause.

resolving common questions in consolidated manner). If appeals from orders in other NYVRA cases did raise common questions of law, this Court or the Court of Appeals could consolidate them for disposition to ensure that all arguments concerning the constitutionality of the NYVRA are addressed in a coordinated manner. *See New York Prac., Civil Appellate Practice* § 8:2. For all these reasons, this case is not ripe for immediate review by the Court of Appeals. As the Town recognizes, whatever constitutional questions remain after its liability is adjudicated can be decided on an appeal as of right from the Supreme Court’s final judgment.

II This Court correctly held that the Town lacks capacity to facially challenge the NYVRA because it cannot show it will likely be forced to violate the Equal Protection Clause.

The central holding of this Court’s prior decision was that the Town lacked capacity to sue because the Town could not show “that compliance with the NYVRA would force [it] to violate the Equal Protection Clause.” Decision at 3. Nothing about this holding or its underlying reasoning is novel or unsettled. Rather, this Court’s decision was the only possible outcome given that it is undisputed that the NYVRA would be constitutional if applied coextensively with Section 2 of the federal VRA as interpreted in *Gingles*. Decision at 21. Moreover, this Court’s decision is entirely consistent with the United States Supreme Court’s equal protection jurisprudence and with the reasoned decisions of every other appellate court addressing similar

constitutional challenges to other state VRAs. The Town’s numerous arguments to the contrary are simply wrong, as this Court has recognized.

First, the NYVRA is a facially neutral anti-discrimination statute, not a racial classification subject to strict scrutiny. The Town argues, once again, that the NYVRA “involves racial classifications.” MOL at 24. This argument is still unfounded. As this Court recognized, the NYVRA – like the California VRA – “gives rights to ‘members of a race, color, or language-minority group’” (including white voters) “in order to ‘ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process.’” Decision at 16 (first quoting Election Law § 17-205(5), then quoting *id.* § 17-206(5)(5)(a)). The NYVRA “is race neutral. It does not favor any race over others or allocate burdens or benefits to any groups on the basis of race. It simply gives a cause of action to members of *any* racial or ethnic group that can establish that its members’ votes are diluted” *Id.* at 17 (quoting *Sanchez v. City of Modesto*, 145 Cal App 4th 660, 666, 51 Cal Rptr 3d 821, 826 (2006)). Almost every other court to consider this question – besides the Supreme Court below – has reached the same conclusion. *See, e.g., Coads v. Nassau Cnty.*, 2024 WL 5063929, at *10 (N.Y. Sup. Ct. Dec. 6, 2024) (“The NYVRA does not confer benefits upon any individual and it does not guarantee successful outcomes to any individual or group. Instead, it seeks to provide equal opportunity in voting.”); *Portugal v. Franklin Cnty.*, 1 Wash 3d 629,

647, 530 P.3d 994, 1006 (Wash. 2023), *cert. denied sub nom.* 144 S. Ct. 1343 (2024) (explaining that challenger’s “federal equal protection claim does not trigger strict scrutiny because the [Washington VRA], on its face, does not create racial classifications”).

Second, race-conscious remedies to racial vote dilution do not trigger strict scrutiny merely because they must, by necessity, account for race. The Town maintains that facially neutral anti-discrimination laws like the NYVRA are subject to strict scrutiny because they “demand[] consideration of race.” MOL at 21 (quoting *Abbott v. Perez*, 585 U.S. 579, 587 (2018)). This Court previously rejected this radical proposition, and with good reason: it is the exact argument the United States Supreme Court considered, and forcefully rejected, in *Milligan*. 599 U.S. at 41 (“[F]or the last four decades, this Court and the lower federal courts . . . have authorized *race-based redistricting* as a remedy for state districting maps that violate § 2.”) (emphasis added); *see also Sanchez*, 51 Cal. Rptr. 3d at 826 (rejecting the argument that “the [California VRA] is unconstitutional because it uses ‘race’ to identify the polarized voting that causes vote dilution”). And “it is well settled that governments may adopt measures designed ‘to eliminate racial disparities through race-neutral means,’” *Higginson v. Becerra*, 786 F. App’x 705, 707 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2807 (2020) (quoting *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 545 (2015), even though anti-

discrimination statutes, by necessity, “demand[] consideration of race.” The Town’s argument is foreclosed upon by U.S. Supreme Court precedent and would cast severe doubt on all race-neutral anti-discrimination statutes, including the Fair Housing Act, Title VII, and the New York State Human Rights Law.

Third, Section 2 of the federal VRA is not *itself* subject to strict scrutiny – strict scrutiny applies only to *districts* crafted to comply with the federal VRA if race *predominates* in their drawing. In its motion, the Town repeats the canard that “[t]he U.S. Supreme Court has made clear that Section 2” of the federal VRA “is subject to strict scrutiny.” MOL at 26. As this Court recognized, however, only racially gerrymandered districts are subject to strict scrutiny, not Section 2 itself. Decision at 17-18. In *Milligan*, the United States Supreme Court used the distinctive language of rational basis review when it confirmed the constitutionality of Section 2. 599 U.S. at 41 (deeming Section 2 an “appropriate method of promoting the purposes of the Fifteenth Amendment”). The Town ignores *Milligan* in its motion – as it has throughout these proceedings – and relies instead on *Abbott*, a case involving a challenge to a district drawn to comply with Section 2 where it was undisputed that

race was “the predominant factor in [the district’s] design.” 585 U.S. at 620.² If Section 2 were itself subject to strict scrutiny, there would be no need to assess whether race predominated in the drawing of a district – all districts drawn to comply with Section 2 would already be subject to strict scrutiny. But as the U.S. Supreme Court confirmed in *Milligan*, “[t]he line . . . is between [race] consciousness and predominance.” 599 U.S. at 33.

Fourth, a statute like the NYVRA – which expressly provides for remedies other than single member districts – need not precisely incorporate the *Gingles* framework, which assumes that single-member districts will be the remedy for Section 2 violations. The Town again argues that the NYVRA’s modest departures from *Gingles* somehow render the law constitutionally infirm. MOL at 28-30. But as this Court correctly explained, “the NYVRA need not contain the first *Gingles* precondition” because the *Gingles* prongs stem from the Supreme Court’s statutory

² The other cases the Town relies on also involved claims that *districts* drawn to comply with Section 2 were unconstitutional because race *predominated* in their design. See *Cooper v. Harris*, 581 U.S. 285, 299 (2017) (affirming determination “that race furnished the predominant rationale for [the challenged] district’s redesign”); *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 193 (2017) (“Where a challenger succeeds in establishing racial predominance, the burden shifts to the State to demonstrate that *its districting legislation* is narrowly tailored to achieve a compelling interest.”) (emphasis added) (cleaned up).

interpretation of Section 2, not from constitutional requirements. Decision at 19-20 (citing *Portugal*, 530 P.3d at 1011-12). This Court was also correct in affirming that the federal Constitution does not require NYVRA plaintiffs to show racially polarized voting *and* impairment under the totality of the circumstances. *Id.* at 20-21 (citing *Pico Neighborhood Assn. v. City of Santa Monica*, 15 Cal. 5th 292, 313 (2023)). Even so, the Town is wrong in claiming that the “[t]he NYVRA’s vote-dilution provisions eschew the *Gingles* test” entirely. MOL at 22. Like the *Gingles* framework, the NYVRA contains safeguards to deter unlawful racial gerrymandering. *See, e.g.*, Election Law §17-206(2)(c)(viii) (providing that determination of “appropriate remedy” for vote dilution should take into account whether “members of a protected class are geographically compact or concentrated.”).

Fifth, the United States Supreme Court’s decision in *SFFA*, which addressed the use of affirmative action in university admissions processes, did not *sub silentio* upend decades of racial vote dilution precedents. The Town argues that *SFFA* abrogates decisions like *Sanchez* and *Portugal* that considered the Equal Protection Clause in the context of racial vote dilution – as well as, presumably, *Milligan*, which was issued the same month as *SFFA*. MOL at 26. But *SFFA* did nothing to alter the United States Supreme Court’s longstanding definition of a racial classification. Rather, it involved undisputed racial classifications: affirmative action policies that

advantaged *individual minority applicants* to elite universities *because of their race*. See *SFFA*, 600 U.S. 181, 208. This Court was entirely correct in refusing to credit the Town’s dramatic overreading of *SFFA*, which has been uniformly rejected. See *Robinson v. Ardoin*, 86 F.4th 574, 593 (5th Cir. 2023) (“Drawing a comparison between voting redistricting and affirmative action occurring at Harvard is a tough analogy.”); *Singleton v. Allen*, 690 F. Supp. 3d 1226, 1317 (N.D. Ala. 2023) (“[A]ffirmative action cases . . . are fundamentally unlike this [federal VRA] case.”); *Coads*, 2024 WL 5063929, at *8 (N.Y. Sup. Ct. Dec. 6, 2024) (agreeing that *SFFA* “does not require a different outcome” than *Sanchez and Portugal*).

These arguments do not implicate novel or unsettled legal questions, no matter how often the Town repeats them. The Town’s proposed standard – that litigants are entitled to immediate review of interlocutory orders any time the Appellate Division considers constitutional questions – would obliterate the distinction between CPLR 5601(b) and 5602(b). It would dragoon the Court of Appeals into resolving abstract constitutional questions on underdeveloped records, indefinitely pausing the rights afforded to New Yorkers by their democratically elected legislature. The Town’s rehashed constitutional arguments are no basis for granting its extraordinary motion.

III It is well settled that the capacity doctrine prohibits the Town from defensively raising a facial constitutional challenge to the NVYRA.

Whether municipal defendants have the capacity to facially challenge state legislation is a settled question: they do not. “[M]unicipalities and other local

governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation.” *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 383 (2017) (quoting *City of New York v. State of New York*, 86 N.Y.2d 286, 289 (1995)). Courts have consistently held that this limitation applies whether a constitutional challenge is asserted affirmatively or defensively. *See In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 892 F.3d 108, 110-11 (2d Cir. 2018) (holding that public entity defendant lacked capacity to assert that statute plaintiffs sought to enforce was unconstitutional); *Herzog v. Bd. of Educ. of Lawrence Union Free Sch. Dist.*, 652 N.Y.S.2d 473, 476-77 (Sup. Ct. 1996) (holding that municipal defendant could not challenge statute’s constitutionality unless it could satisfy exception to capacity rule). The Town is wrong in asserting that there is some ambiguity on this point for the Court of Appeals to resolve.

Allowing municipal defendants to facially challenge state laws, offensively or defensively, would contradict the capacity rule’s basic rationale. “Governmental entities . . . [are] artificial creatures of statute,” created by the state. *Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155 (1994). The “political power conferred by the Legislature [on municipal entities] confers no vested right as against the government itself.” *Black River Regulating Dist. v. Adirondack League Club*, 307 N.Y. 475, 488 (1954). Thus, “municipal corporate bodies cannot

have the right to contest the actions of” the state. *City of New York*, 86 N.Y.2d at 287. This rationale applies whether the municipality asserts its challenge as plaintiff or as defendant.

This Court also properly held that the Town could not invoke the “dilemma exception” to the capacity rule. Decision at 13. This exception allows a municipal entity to challenge the application of a state statute where compliance with the law would “force[] [it] to violate a constitutional proscription.” *Matter of Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287 (1977). Here, the Town cannot prove – nor even plausibly assert – that complying with the NYVRA would force it to engage in unconstitutional actions. Indeed, the NYVRA contains explicit statutory safeguards to deter the possibility that courts will impose unconstitutional remedies. *See, e.g.* Election Law §§ 17-206(2)(c)(viii), 17-204(3), 17-206(5)(a)(ii). In the unlikely event that the Supreme Court ignores these safeguards, the Town can raise an as-applied challenge identifying with specificity what unconstitutional actions it would allegedly be forced to undertake. This Court’s routine application of the longstanding capacity rule in no way necessitates further appellate review.

IV This Court correctly identified all the elements of a vote dilution claim under the NYVRA.

The Town invites this Court to grant it leave to appeal to resolve the “unsettled and significant question” of “what implied elements an NYVRA plaintiff must prove.” MOL at 30. The Town’s confusion about the implicit requirements of a vote

dilution claim is entirely feigned. This Court has already determined that, consistent with the position of *both* parties throughout this litigation, Plaintiffs must identify a reasonable alternative electoral system or practice that would likely improve their representation relative to the status quo. *See* NYSCEF 70 at 31-33; NYSCEF 73 at 11; Decision at 10. And nothing in this Court’s decision even hints at the possibility of some additional, unspecified implicit element. MOL at 31-32. The Town’s arguments for further review on this issue are meritless.

First, in previous filings, the Town has repeatedly argued that the NYVRA contains a threshold requirement that plaintiffs put forth a “reasonable alternative practice” that “would give minority voters a greater chance to elect their preferred candidates.” NYSCEF 70 at 22023 (citing *Holder v. Hall*, 512 U.S. 874, 880 (1994) (plurality opinion)); *see also* MOL at 31. So have Plaintiffs. NYSCEF 73 at 11. In its decision, this Court confirmed that the NYVRA contains exactly this implied element. *See* Decision at 20 (quoting Election Law §17-206(5)(a)).³ Nevertheless, the Town now insists that the Court of Appeals must step in to give this element

³ This Court’s reference to “equitable access” in describing the implied element simply incorporates the NYVRA’s language on how to remedy vote dilution—it does not introduce something new or in any way muddle this agreed-upon prerequisite for a vote dilution claim. *See* Election Law §17-206(5)(a).

further clarity. But in making this argument, the Town turns a blind eye to the Court’s detailed explanation of what constitutes a “reasonable alternative practice.” As in the federal Voting Rights Act, the existence of such an alternative is the “benchmark against which to measure the existing voting practice.” Decision at 11 (quoting *Pico*, 534 P.3d at 64-65); *see also* NYSCEF 70 at 22 (citing *Holder*, 512 U.S. at 880). Indeed, as this Court (and both parties) recognized, “the very concept of vote dilution . . . necessitates . . . the existence of an ‘undiluted’ practice against which the fact of dilution may be measured.” Decision at 11 (quoting *Pico*, 534 P.3d at 65); *see also* NYSCEF 70 at 22 (quoting *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 480 (1997)).

In other words, everyone agrees that Plaintiffs must demonstrate that the existing electoral system impairs their protected class’s voting power compared to a reasonable alternative to establish the elements of a vote dilution claim. *See* Election Law §17-206(2)(a). By identifying an alternative practice that improves their protected class’s representation relative to the status quo, Plaintiffs put forth a benchmark against which the court can assess the effects of the challenged practice. As the Town has repeatedly argued, relying on the very same authority that the Court invoked, “without evidence of ‘an undiluted practice against which the fact of dilution may be measured,’ Plaintiffs cannot demonstrate vote dilution.” NYSCEF 70 at 25-26 (quoting *Pico*, 534 P.3d at 65).

The Town also hints at the specter of additional “implicit element(s)” for proving vote dilution that this Court purportedly recognized in its decision. MOL at 13-14, 31-32. The Town claims this added requirement (or requirements) is “unclear.” *Id.* at 32. Beyond this assertion, the Town is unable to identify or explain further what these missing elements may be. *Id.* at 31-32. That is because they do not exist, and nowhere in the Court’s decision is any suggestion that they do. On both fronts, the Town’s attempts to introduce uncertainty about the elements of a vote dilution claim ring hollow.

V This case has already been remitted to the Supreme Court.

This case has already been remitted to the Supreme Court. Pursuant to CPLR § 5524(b), “the entry of [a copy of the Appellate Division’s order] shall be the authority of any further proceedings” in the Supreme Court. *See also Fry v. Vill. Of Tarrytown*, 671 N.Y.S.2d 633, 633 (Sup. Ct. 1998) (holding that jurisdiction had not yet been reacquired where Court of Appeals order did not appear in the County Clerk’s file). Here, it is undisputed that the Clerk of this Court filed a copy of the order determining the appeal with the clerk of the Supreme Court. *See NYSCEF* 160. Thus, the Supreme Court already has jurisdiction to proceed.

Nevertheless, the Town argues that the case has not yet been remitted and urges this Court to continue withholding remittitur until the Court of Appeals rules on its appeal. The proper vehicle for obtaining a stay of proceedings is a motion

pursuant to CPLR § 5519(c). If the Town had filed the proper motion, however, it would not be entitled to a stay because staying proceedings to allow the Town to pursue a meritless appeal would irreparably harm Plaintiffs. *See, e.g., Gur Assocs. LLC v. Convenience on Eight Corp.*, 208 N.Y.S.3d 838 (N.Y. Civ. Ct. 2024) (analyzing stay motion by considering likelihood of success on the merits and balance of equities). Staying proceedings would force plaintiffs to continue voting under an unlawful system that dilutes their votes. *See, e.g., Montano v. Suffolk County Legislature*, 268 F.Supp.2d 243, 261 (E.D.N.Y. 2003) (“A[] . . . dilution of the right to vote constitutes irreparable harm.”)


The NYVRA explicitly recognizes “the severe consequences and irreparable harm of holding elections under unlawful conditions.” Election Law § 17-216. To mitigate this harm, the statute requires that actions brought pursuant to the NYVRA receive “expedited pretrial and trial proceedings” and “an automatic calendar preference.” *Id.* The Town’s procedurally improper attempt to further delay trial proceedings would frustrate the NYVRA’s plain instructions.

Again, this Court has already remitted this case to the Supreme Court. But if any confusion remains, this Court should confirm the Supreme Court’s jurisdiction by issuing an order either stating that the case has already been remitted or issuing another remittitur. This Court should not tolerate the Town’s delay tactics, which are against the equities and inconsistent with the requirements of the NYVRA.

Conclusion

While this case drags on, the Town of Newburgh continues to maintain an electoral system that denies Plaintiffs their right to participate fully and equally in their local democracy. The Town now seeks an unwarranted and unreasonable delay of the litigation process with the express goal of eviscerating the protections afforded to Plaintiffs – and all New Yorkers – in a statute enacted by their democratically elected legislature. CPLR 5602(b), however, does not entitle the Town to take an immediate appeal of an interlocutory order to pursue a meritless facial constitutional challenge the Town lacks the capacity to bring. Plaintiffs respectfully ask this Court to deny the Town’s motion in its entirety.

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Certification of Compliance with Rule 1250.8(J)

I, Ruth Greenwood, an attorney at law licensed to practice in the State of New York, certify that this document was prepared using the proportionally spaced typeface Times New Roman, point size 14, double-spaced lines, and containing 6,221 words as calculated by the Microsoft Word processing system, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of citations, proof of service, certificate of compliance, or any addendum

/s/ Ruth Greenwood