SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SERGIO SERRATTO, ANTHONY AGUIRRE, IDA MICHAEL, and KATHLEEN SIGUENZA,

Plaintiffs,

– against –

TOWN OF MOUNT PLEASANT and TOWN BOARD OF THE TOWN OF MOUNT PLEASANT,

Defendants.

Index No. 55442/2024

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

ABRAMS FENSTERMAN, LLP
81 Main Street, Suite 400
White Plains, New York 10601
Telephone: 914-607-7010

ELECTION LAW CLINIC AT HARVARD LAW SCHOOL
6 Everett Street, Suite 4105
Cambridge, MA 02138
Telephone: 617-998-1010

Attorneys for Plaintiffs

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Rules

PRELIMINARY STATEMENT

Plaintiffs Sergio Serratto, Anthony Aguirre, Ida Michael, and Kathleen Siguenza (collectively "Plaintiffs") submit this memorandum of law in support of their motion for summary judgment granting Plaintiffs' second and third causes of action, which allege that defendants the Town of Mount Pleasant ("the Town" or "Mount Pleasant") and the Town Board of the Town of Mount Pleasant ("the Town Board") (collectively "defendants") unlawfully diluted the voting power of Hispanic voters in violation of the New York John R. Lewis Voting Rights Act ("NYVRA"), Election Law § 17-206(2)(i), and dismissing Defendants' affirmative defenses.

SUMMARY OF ARGUMENT

Plaintiffs are Hispanic residents of, and registered voters in, Mount Pleasant. Despite comprising a substantial and growing portion of the Town's population, Hispanics have been deprived of their right to participate in Town elections on equal terms with non-Hispanic white voters. Both Hispanic and white voters in Mount Pleasant exhibit a striking degree of political cohesion, but the candidates preferred by white voters virtually always prevail in the Town's at-large elections. The Town has made no effort to engage Hispanic residents in its political processes and is largely unresponsive to their needs. No Hispanic resident has served on the Town Board or held Town-wide elected office. Candidates and elected officials have trafficked in racist stereotypes about immigrants that inflame anti-Hispanic sentiment. Due to historical and ongoing discrimination against the Hispanic community, there are substantial disparities between Hispanic and white residents across numerous socioeconomic indicators, including education, employment, and wealth, and in their respective levels of participation in electoral politics.

Plaintiffs, like all citizens residing in New York, possess a fundamental right to vote guaranteed by the federal and state constitutions. *See Friedman v. Cuomo*, 39 N.Y.2d 81, 85

(1976). But the protections afforded under each constitution are not coextensive. As the Legislature has recognized, the State constitution's protections for the right to vote "substantially exceed the [U.S. constitution's] protections." Election Law § 17-200. Drawing on these more expansive state constitutional protections, and reflecting the foundational importance of the right to vote in New York, the legislature enacted the NYVRA to:

> 1. Encourage participation in the elective franchise by all eligible voters to the maximum extent; and
>
> 2. Ensure that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York, and especially to exercise the elective franchise.

Id. The NYVRA achieves these dual purposes by prohibiting practices which deprive voters of an equal opportunity to participate in state political processes including, as relevant here, a prohibition on vote dilution, which the NYVRA defines as "any method of election[] having the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections." Election Law § 17-206 (2).

A plaintiff establishes vote dilution, and thus a violation of Election Law § 17-206(2), by meeting one of the two tests set forth in Election Law § 17-206(2)(b). As detailed below, the undisputed evidence demonstrates that the Town has unlawfully diluted the vote of Hispanic voters in Mount Pleasant. First, the undisputed evidence–including, remarkably, reports prepared by the Town's own, retained experts–conclusively establishes that "voting patterns of members of the protected class within the political subdivision are racially polarized," and that the Town's at-large system diminishes Hispanic voters' ability to elect their preferred candidates relative to alternative systems permitted under the NYVRA (such as a district-based system that comports with traditional districting principles, proportional ranked choice voting, cumulative voting, and limited voting). *Id.* at § 17-206(2)(b)(i)(A). Second, the undisputed evidence establishes that "under the

totality of the circumstances, the ability of members of [the Hispanic community] to elect candidates of their choice or influence the outcome of elections is impaired." *Id.* at § 17-206(2)(b)(i)(B) .

Defendants' affirmative defenses, which include vague and scattershot challenges to the NYVRA's constitutionality, are procedurally improper and substantively meritless. Defendants, a subdivision of the State and its governing board, lack capacity to challenge the NYVRA's constitutionality. Even if they could, their constitutional challenge would be unsuccessful. The NYVRA is not an impermissible racial classification because it does not assign benefits or penalties to individuals based on their race. Laws like the NYVRA which account for race for the purpose of eliminating racial discrimination do not violate equal protection principles. The NYVRA does not require, and Plaintiffs have not proposed, any remedy that would constitute an impermissible racial gerrymander. Defendants' constitutional defenses thus fail for the same reasons that constitutional challenges to other state voting rights acts have uniformly failed. *See, e.g.*, *Portugal v. Franklin Cnty.*, 530 P.3d 994, 1011 (Wash. 2023), *cert. denied sub nom. Gimenez v. Franklin Cnty., Washington*, 144 S. Ct. 1343 (2024); *Higginson v. Becerra*, 786 F. App'x 705, 707 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2807 (2020).

Plaintiffs have met their burden of "mak[ing] a *prima facie* showing of entitlement to judgment as a matter of law, [and] tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Defendants cannot, on this record, raise a triable issue of fact. Accordingly, Plaintiffs respectfully ask this Court to hold the Town liable for unlawful vote dilution and order further proceedings to identify and implement an appropriate remedy.

FACTUAL SUMMARY

A. The Parties

Plaintiffs are Hispanic residents of, and registered voters in, the Town of Mount Pleasant, Westchester County, a political subdivision encompassing various unincorporated hamlets and incorporated villages, including the Village of Sleepy Hollow. SOF ¶¶ 1-10. Mount Pleasant's legislative and policymaking authority is the Town Board, comprised of five members: Town Supervisor Carl Fulgenzi and Board members Mark Saracino, Danielle Zaino, Laurie Rogers-Smalley, and Tom Sialiano. SOF ¶¶ 11-14. Board members are elected through at-large elections. SOF ¶ 48.

On July 13, 2023, Plaintiffs sent a letter to the Town Clerk advising that the Town's at-large system of elections violated the NYVRA (the "notice letter"). SOF ¶ 107. The following month, the Town Board hired two expert consultants, Dr. Lisa Handley and Jeffrey Wice, to investigate plaintiffs' NYVRA claims "and assist the Town Supervisor and Town Attorney in investigating same and complying, to the extent the Town is not already complying, with [the NYVRA] and/or federal law." SOF ¶¶ 109. Dr. Handley concluded that voting patterns in Mount Pleasant were racially polarized, and Mr. Wice concluded that the Town's at-large election system likely violated the NYVRA by unlawfully diluting Hispanic voters' electoral influence. SOF ¶¶ 127-135. After receiving these reports, the Board conducted two special meetings to receive "input from the public regarding any proposed remedy(ies) believed to be necessary and appropriate by the Town." SOF ¶¶ 111-120. The Town also received comments via email. SOF ¶¶ 121-124. Ultimately, the Board declined to remedy the NYVRA violation Plaintiffs had identified. Plaintiffs commenced this lawsuit on January 9, 2024. Dkt. 1.

B. The Hispanic community in Mount Pleasant

Mount Pleasant's Hispanic community has grown substantially since the mid-twentieth century when the Town's population was almost entirely white. Today, Hispanics are the Town's largest minority population, comprising more than 20% of the population. SOF ¶¶ 15-22. The Town's Hispanic community is heavily concentrated in Sleepy Hollow. SOF ¶ 23. A map of Mount Pleasant appearing on the Town's website erroneously shows the Town's boundaries to exclude Sleepy Hollow. SOF ¶ 28. However, residents of Sleepy Hollow are Town residents eligible to vote in elections and represented by Town Board members. SOF ¶¶ 26, 30-33. Sleepy Hollow has a village government, but Mount Pleasant provides services to Sleepy Hollow and retains a percentage of taxes collected from Sleepy Hollow residents. SOF ¶¶ 34-35. No current Town Board member – and no Town official since at least 2010 – has resided in Sleepy Hollow. SOF ¶¶ 40-41.

There is a long history of discrimination against Hispanics in Mount Pleasant, Westchester County, and the State of New York which continues to the present. SOF ¶¶ 190-229. Hispanics were excluded from the housing market through restrictive covenants, leading to intense residential segregation and depriving Hispanic families of the opportunity to build wealth. SOF ¶¶ 191-194. Hispanics were excluded from the political process through English-literacy requirements, gerrymandering, a lack of Spanish-language information and interpreters, disparate eligibility challenges, and other informal stratagems. SOF ¶¶ 195-210. The consequences of this discrimination are stark: Hispanic residents of Mount Pleasant as a group experience significantly worse outcomes than white residents in educational attainment, employment, income, wealth, homeownership, and other socioeconomic indicators. SOF ¶¶ 230-236. Hispanic citizens are significantly less likely to vote or contribute to campaigns. SOF ¶¶ 237-240.

Prior to this lawsuit, the Town and Town Board members were unaware of these disparities and had taken no steps to address them or the Hispanic community's particularized needs. SOF ¶¶ 245-250. They have done nothing since. That is likely because the Town conducts little to no outreach to Hispanic residents even when implementing policies affecting the Hispanic community. SOF ¶¶ 299, 330. Indeed, although the Town recognizes its responsibility for addressing inequities among residents, and Town Board members acknowledge they could take actions to assist the Hispanic community, reducing disparities between Hispanic and white residents is not one of the Board's goals for the coming years. SOF ¶ 252-253, 334.

Town communications and services are offered exclusively in English. SOF ¶ 42. For example, when the Town sought input on its new Master Plan, it conducted public outreach entirely in English, without making any effort to engage Hispanic and Spanish-speaking residents. SOF ¶¶ 327-331. Unsurprisingly, the Master Plan contains numerous goals addressed to the specific needs of some communities, but none to the needs of Hispanic residents. SOF ¶ 343. By contrast, the Board has responded to the needs of other communities, such as senior citizens, by using its leverage to encourage the construction of age-restricted housing. SOF ¶¶ 273-278. The Town has not done anything to encourage construction of more affordable housing that would benefit Hispanic residents. SOF ¶¶ 335-337.

Rather than responding to the Hispanic community's needs, Supervisor Fulgenzi, with the Board's unanimous support, targeted Hispanic residents with an emergency order banning the transportation or housing of migrants and prohibiting a local facility from operating a shelter for migrant children. SOF ¶¶ 282-308. The emergency order is consistent with Supervisor Fulgenzi's practice of denigrating nonwhite immigrants, whom he has distinguished from and compared unfavorably to the "European Christians" like his grandparents who "came to take part in the

American dream." SOF ¶¶ 346-358. Candidates and officials in Mount Pleasant and nearby jurisdictions have made anti-Hispanic animus a central component of their political identities, communicating or endorsing statements depicting nonwhite immigrants, especially those who cross the southern border, as threats. SOF ¶¶ 344-346, 359-373.

The Town's disregard for its Hispanic residents' needs is unsurprising given the insular nature of its politics. Every current member of the Board was approached, vetted, and approved by the Mount Pleasant Republican Committee (the "Republican Committee"), which provides training and campaign support for candidates it selects for its ballot line. SOF ¶¶ 58-105. The Republican Committee also oversees a closed process for filling vacant Town offices – the Town does not conduct interviews or solicit nominations, and officials appointed to fill vacancies almost always retain their seats in subsequent elections. SOF ¶¶ 51-52, 77-89. Candidates for Town office conduct little to no outreach in Spanish or in the Hispanic community. SOF ¶¶ 71-75; 102-105. The Town has done nothing to encourage Hispanic residents to participate in political processes. SOF ¶ 251. As a result, while there have been Hispanic elected officials in Sleepy Hollow's village government, no Hispanic person has ever held Town office. SOF ¶¶ 43-47. No Hispanic resident has even run for Town office in the last decade, in part because Hispanic residents do not think they can win. *Id*. Lacking Spanish-language information about local elections, Hispanic residents forego voting, even while participating in state and national elections. SOF ¶ 254-255.

Town officials' disregard for their community has made Hispanic residents feel "silenced" and "marginalized"–in turn, Hispanic residents avoid bringing issues to the Board because they "d[on't] have much hope of being heard" and "don't think anything [they] say . . . is going to affect" Board members. SOF ¶¶ 256-257. This concern has repeatedly been borne out. When residents from Sleepy Hollow complained about a lakeside development that threatened increased

flooding and pollution, the Town dismissed their concerns as "a false complaint" and did nothing. SOF ¶¶ 258-259. At a hearing to discuss the Notice Letter, Board member Saracino declared that while "minority folks . . . might have issues," vote dilution in Mount Pleasant "is not one of them." He then encouraged Hispanic residents of Sleepy Hollow to secede and form their own town. SOF ¶¶ 118-120. Fulgenzi expressed agreement with public comments describing plaintiffs' NYVRA allegations as "just hurt feelings" and suggested that the real issue was non-citizens voting in Town elections. SOF ¶¶ 123-124.

C. The dilutive effects of at-large elections on Hispanic electoral power in Mount Pleasant

In her report to the Town Board, Dr. Handley assessed whether Hispanic and white voters in Mount Pleasant exhibited patterns of racially polarized voting. SOF ¶ 127. "Racially polarized voting" means 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." Election Law § 17-204(6) .

To estimate candidate support by racial group, Dr. Handley analyzed all contested elections in Mount Pleasant since 2015 utilizing standard statistical techniques. SOF ¶¶ 128-129. Based on this analysis, Dr. Handley concluded that "voting is racially/ethnically polarized [in Mount Pleasant]: Hispanic voters and non-Hispanic white voters consistently support different candidates and the candidates supported by non-Hispanic White voters usually prevail in Mount Pleasant elections." SOF ¶ 130. The Hispanic-preferred candidate prevailed in only one single Town election, and that election was characterized by unusual electoral conditions. SOF ¶¶ 131-132. The Town's other expert, Jeffrey Wice, agreed that voting patterns were racially polarized and concluded that "[t]his pattern [of racially polarized voting] alone . . . is very likely to warrant remedial action" under the NYVRA. SOF ¶¶ 133-135.

After filing this lawsuit, plaintiffs retained Professor Yamil Ricardo Velez to assess whether racially polarized voting exists in Mount Pleasant. SOF ¶ 136. Professor Velez used common statistical tools to estimate precinct-level demographics and turnout in Mount Pleasant. SOF ¶¶ 137-140. He then estimated the vote share candidates received from Hispanic and white residents in eight contested Town elections using the same widely accepted methods as Dr. Handley. SOF ¶¶ 141-142. Based on this analysis, and his analysis of a set of 37 exogenous elections (i.e., elections for offices other than Town offices), Professor Velez concluded that "racially polarized voting emerges in the overwhelming majority of races." SOF ¶¶ 143-145.

Defendants' rebuttal expert, Professor Jeffrey B. Lewis, offered no opinion regarding the existence of racially polarized voting in Mount Pleasant, but instead only asserted that Professor Velez used unreliable methods to aggregate data from census blocks to precincts thereby skewing his demographic estimates. SOF ¶¶ 146-147. However, Professor Lewis's preferred methods have similar limitations, and Professor Velez performed robustness checks on his original estimates by using alternative methods for estimating precinct-level demographics. These alternative methods confirmed the reliability of his initial estimates. SOF ¶ 148-152. Indeed, when Professor Velez re-ran his analysis using various alternative methods – including Professor Lewis's preferred approach, Bayesian Improved Surname Geocoding ("BISG") – he consistently found racially polarized voting patterns in Town elections, as had Dr. Handley. SOF ¶¶ 153-157.

Professor Velez also analyzed what would happen if the Town shifted to a district-based system, using a computer algorithm to randomly generate four districting plans, each containing four districts that respected traditional criteria such as compactness and population parity. SOF ¶ 158. Professor Velez concluded that there would be a district in which the Hispanic-preferred candidate would likely prevail in all four plans, no matter what method for estimating precinct-

level demographics he utilized. SOF ¶¶ 159-162. Professor Lewis's report did not dispute this finding – indeed, Professor Lewis's analysis also produced a simulated district where Hispanic-preferred candidates would likely prevail. SOF ¶¶ 162-164

Plaintiffs retained Professor Daryl DeFord to assess whether the existing at-large system diminishes the electoral influence of Hispanic voters relative to reasonable alternative election systems (i.e., systems using neither single-member districts nor at-large voting). SOF ¶ 165. Using estimates of voting preference from Dr. Handley's report, Professor DeFord estimated the impact of switching to three alternative systems: cumulative voting, limited voting, and proportional ranked choice voting ("PRCV"). SOF ¶¶ 168-170. Professor DeFord generated these estimates by simulating how voters would be expected to vote under different electoral conditions using varying assumptions based on real-world examples where these voting systems were used. SOF ¶¶ 170-176. He concluded that adopting any of these alternatives would increase Hispanic electoral influence as compared to the existing at-large elections, especially when implemented in conjunction with other permissible NYVRA remedies. SOF ¶¶ 177-186.

Defendants' rebuttal expert, Professor Nolan McCarty, asserted that some of Professor DeFord's assumptions about expected voter behavior under alternative election systems were unrealistic. SOF ¶ 187. But Professor McCarty did not account for the real-world example of the shift to cumulative voting in Port Chester, New York, which demonstrated that his theoretical concerns about voter and candidate behavior were overblown. SOF ¶¶ 187-188. Moreover, the simulations Professor McCarty performed using his own assumptions about voter and candidate behavior under alternative systems show that Hispanic electoral influence would improve in most scenarios as compared to the existing at-large system. SOF ¶ 189.

These findings are consistent with extensive scholarship documenting that at-large

elections dilute minority voting power, as summarized by plaintiffs' other expert, Professor A.K. Sandoval-Strausz. Professor Sandoval-Strausz explained that this dilutive effect is a feature of at-large systems, which were designed by prosperous white Americans who believed that districts gave too much power to urban political machines. SOF ¶¶ 53. He further explained that at-large election systems also decrease minority turnout because minority voters who do not think they can elect candidates who represent their interests tend not to vote, especially in places like Mount Pleasant where there is racially polarized voting. SOF ¶¶ 54-56. Shifting away from at-large elections has resulted in the election of more minority-preferred officials and greater responsiveness to minority constituencies in many municipalities. SOF ¶ 57.

PROCEDURAL HISTORY

Plaintiffs "sen[t] by certified mail a written notice to the clerk of the political subdivision . . . against which the action would be brought, asserting that the political subdivision may be in violation of [the NYVRA]." Election Law § 17-206(7); SOF ¶ 107. The Town subsequently passed a resolution availing itself of the NYVRA's "safe harbor" provision, SOF ¶ 110, which provided it with "ninety days . . . to enact and implement [a] remedy [for the alleged NYVRA violation], during which [the] prospective plaintiff[s] shall not commence an action to enforce this section against the political subdivision," Election Law § 17-206(7)(b). However, the Town failed to implement a remedy, and plaintiffs commenced this action. Dkt. 1.

LEGAL STANDARD

Under CPLR 3212(b), "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez*, 68 N.Y.2d at 324. Once the movant meets this burden, "the burden shifts to the [opposing] party . . . to produce evidentiary

proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Id.*

ARGUMENT

"[T]he unfettered right to vote is preservative of all other rights." *City of Mobile v. Bolden*, 446 U.S. 55, 141 (1980) (Marshal, J., dissenting). At the federal level, the right to vote is guaranteed by the U.S. Constitution and the Voting Rights Act of 1965, 52 U.S.C. § 10101 (the "Federal VRA"). In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the U.S. Supreme Court established the standard for vote dilution claims under the Federal VRA. Under *Gingles*, plaintiffs must first demonstrate that their minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," "politically cohesive," and "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 50-51. Then, plaintiffs must show that the political process is not "equally open to minority voters" under the "totality of the circumstances." *Id.* at 79.

The NYVRA builds on *Gingles* but expands protections for the right to vote, consistent with the more expansive protections afforded under the New York constitution. Under the NYVRA, a member of a protected class can establish that a political subdivision has engaged in unlawful vote dilution by proving *either* the existence of racially polarized voting *or* that "under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired." Election Law § 17-206(2)(b)(i)(A)-(B). Under either prong, plaintiffs must also show that the existing system "ha[s] the effect of" impairing their political influence, which they can do by comparing their ability to elect a candidate of choice under the current at-large system to a reasonable alternative system. Election Law § 17-206(2)(a).

Mount Pleasant is a political subdivision of the State of New York. *See* Election Law § 17-204(4); SOF ¶ 9. Plaintiffs are members of a "protected class" under the NYVRA with standing to sue. *See* Election Law § 17-206(4)-(5). Plaintiffs have established their entitlement to judgment under both prongs by proving that voting in the Town is racially polarized, that the existing system impairs Hispanic voters' electoral influence under the totality of the circumstances, and that there are reasonable alternative election systems that would make it possible for Hispanic voters to elect candidates of their choice. Defendants' principal defense, that the NYVRA is unconstitutional, is unavailable to them as a political subdivision of the State and, regardless, is unavailing. Therefore, Plaintiffs' motion for summary judgment should be granted because Plaintiffs have established their entitlement to judgment as a matter of law and Defendants have failed to establish the existence of material issues of fact.

I

Plaintiffs have established that Mount Pleasant's at-large election system violates the NYVRA by diluting their electoral influence relative to reasonable alternative systems.

A. The elements of a vote dilution claim based on racially polarized voting under Election Law § 17-206(2)(b)(i)(A).

A plaintiff challenging an at-large method of election under the NYVRA may establish unlawful vote dilution by demonstrating that "voting patterns of members of the protected class within the political subdivision are racially polarized." Election Law § 17-206(2)(b)(i)(A). The NYVRA defines racially polarized voting 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." Election Law § 17-204(6). This definition is similar to *Gingles* but diverges from the federal model in two important ways.

First, NYVRA plaintiffs need not "demonstrate that [their protected class] is sufficiently

large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 51. Indeed, the NYVRA expressly disclaims this *Gingles* "precondition." *See* Election Law § 17-206(2)(c)(viii) ("For the purposes of demonstrating that [unlawful vote dilution] has occurred . . . evidence concerning whether members of a protected class are geographically compact or concentrated shall not be considered."). This is because the NYVRA, unlike the Federal VRA, expressly contemplates remedies *other* than single-member districts, including "alternative method[s] of election." Election Law § 17-206(5)(a)(ii). The compactness and numerosity requirement, which in the Federal VRA context is "needed to establish that the minority [group] has the potential to elect a representative of its own choice in some single-member district," *Growe v. Emison*, 507 U.S. 25, 40 (1993), serves no purpose where single-member districts need not be imposed.[1]

Second, unlike in Federal VRA cases, NYVRA plaintiffs who establish racially polarized voting need not "also show, under the 'totality of circumstances,' that the political process is not 'equally open' to minority voters." *Allen v. Milligan*, 599 U.S. 1, 18 (2023) (quoting *Gingles*, 478 U.S. at 45-46). Rather, under the NYVRA, plaintiffs may establish unlawful vote dilution by proving *either* the existence of racially polarized voting *or* that "under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired." Election Law § 17-206(2)(b)(i)(A)-(B).

[1] Of course, if a court does order a district-based system as a NYVRA remedy, the resulting districts must comply with federal constitutional requirements, including the prohibition on racially gerrymandered districts that subordinate traditional criteria to race. To that end, the NYVRA specifies that "evidence concerning whether members of a protected class are geographically compact or concentrated . . . may be a factor in determining an appropriate remedy." Election Law § 17-206(2)(c)(viii).

Plaintiffs bringing vote dilution claims (of either kind) under the NYVRA must also identify a reasonable alternative voting system as a benchmark against which the dilutive effects of the existing system can be shown. The need for a benchmark is inherent in the concept of vote dilution. *See, e.g.*, *Holder v. Hall*, 512 U.S. 874, 880 (1994) (plurality opinion) ("The phrase vote dilution itself suggests a norm with respect to which the fact of dilution may be ascertained."). Absent a benchmark requirement, "a party [could] prevail based solely on proof of racially polarized voting that could not be remedied or ameliorated by any other electoral system." *Pico Neighborhood Assn. v. City of Santa Monica*, 15 Cal. 5th 292, 315 (2023). Notably, the Legislature was not concerned with racially polarized voting in the abstract; it was concerned with rooting out "method[s] of election[] *having the effect of* impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections." Election Law § 17-206(2)(a) (emphasis added). If members of a protected class cannot identify a reasonable alternative which could improve their ability to elect a candidate of choice relative to the existing system, then logically they cannot show that *the existing system* "ha[s] the effect of" impairing their political influence, as opposed to demographics or some existing feature of natural or political geography.

Because the NYVRA's definition of racially polarized voting is similar to the definition utilized in Federal VRA cases, NYVRA plaintiffs can and should rely on the same common statistical methodologies widely accepted by federal courts to demonstrate the existence of racially polarized voting. *Cf. People v. Huggins*, 144 Misc.2d. 49, 53 (Sup. Ct. 1989) (finding "federal cases to be very persuasive [where] the federal test . . . is extremely similar to the New York test").

B. Plaintiffs have established unlawful vote dilution based on racially polarized voting.

Plaintiffs have met their burden of establishing unlawful vote dilution based on racially

polarized voting in Mount Pleasant under Election Law § 17-206(2)(b)(i)(A). The undisputed evidence demonstrates that (1) Hispanic and non-Hispanic white voters in Mount Pleasant are politically cohesive; (2) they prefer different candidates and the candidates preferred by white voters almost always prevail in at-large elections; and (3) there are multiple alternative election systems that would likely allow Hispanic voters to elect a candidate of their choice to the Town Board. SOF ¶¶ 125-189. On elements (1) and (2), the experts *retained by the Town* to evaluate Plaintiffs' NYVRA claims and Plaintiffs' experts all agree that voting is racially polarized in contested Town elections. SOF ¶¶ 127-145. Notably, Defendants' litigation experts offered no opinions and reached no conclusions questioning the existence of racially polarized voting in Town elections. SOF ¶ 146-157.

On element (3), the undisputed evidence demonstrates that the existing at-large system impairs Hispanic voters' ability to elect candidates of their choice relative to multiple reasonable alternatives. The NYVRA enumerates a non-exhaustive list of remedies courts may adopt "to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process." Election Law § 17-206(5)(a)(i)-(xvi). Professor Velez and Professor DeFord demonstrated that multiple permissible remedies would improve Hispanic voters' electoral influence relative to the existing at-large system, including a district-based system comporting with traditional districting principles and alternative systems like PRCV, cumulative voting, and limited voting. SOF ¶¶ 158-189. Notwithstanding minor methodological quibbles, Professor Lewis also produced a map including a district where Hispanic-preferred candidates would likely prevail, and Professor McCarty found an improvement in Hispanic electoral influence under alternative systems in most scenarios compared to at-large elections. SOF ¶¶ 163-164, 187-189.

Federal courts considering Federal VRA claims routinely credit expert opinions based on analyses conducted using various common statistical methods of estimating voter demographics, turnout, and candidate preferences. *See, e.g.*, *Nat'l Ass'n for Advancement of Colored People, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 384 (S.D.N.Y. 2020), *aff'd sub nom. Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021) (crediting expert's conclusions based on "King's EI and RxC analyses using BISG data"); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1003 (D.S.D. 2004) ("With regard to EI . . . the court finds that EI is a reliable method of analysis."). Here, the experts who found patterns of racially polarized voting in Mount Pleasant used these same common statistical methods. *Supra* at 8-11. Numerous federal courts have specifically adopted Dr. Handley's conclusions and expressly affirmed the reliability of her methods.[2] Professor Lewis critiqued some methodological choices Professor Velez made in estimating precinct-level demographics in Mount Pleasant,[3] but Professor Velez reached the exact same conclusions when he re-ran his analysis using Professor Lewis's preferred methods (and other alternative methods). SOF ¶¶ 148-156. Defendants have proffered no evidence revealing a

[2] *See, e.g., Mississippi State Conf. of Nat'l Ass'n for Advancement of Colored People v. State Bd. of Election Commissioners*, 2024 WL 3275965, at *26 (S.D. Miss. July 2, 2024) (adopting Dr. Handley's conclusions and agreeing with her assessment that "the ecological inference ('EI RxC') method is the most accurate and reliable for determining credible intervals of racial bloc voting"); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1309 (N.D. Ga. 2022) (adopting Dr. Handley's conclusions and explaining that her analysis "employed . . . commonly used statistical methods that have been widely accepted by courts in voting rights cases" including "ecological regression[] and King's EI"); *United States v. City of Euclid*, 580 F. Supp. 2d 584, 598 (N.D. Ohio 2008) (adopting Dr. Handley's conclusions based on analysis using King's EI).

[3] Professor Lewis did not address Dr. Handley's racially polarized voting findings. The Town may now wish to disclaim Dr. Handley's report, but it has no evidence to support that assertion. SOF ¶¶ 125-126.

material factual dispute on this issue.

Similarly, in Federal VRA cases courts have relied on the kinds of analyses the experts in this case conducted to assess the consequences of transitioning to alternative election systems. *Compare United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 450 (S.D.N.Y. 2010) ("Courts evaluate whether cumulative voting will actually give minorities the opportunity to elect candidates of their choosing using a commonly-accepted and reliable political science concept called the 'threshold of exclusion.'"), *with* SOF ¶ 170 (describing Professor Deford's use of the "threshold of exclusion" concept). Courts have also endorsed analyses which adjust theoretical parameters to account for data from the challenged jurisdiction to better approximate "existing political realities." *Compare United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 763 (N.D. Ohio 2009) ("[A] court considering a limited or cumulative voting proposal must determine whether that proposal provides minorities a meaningful opportunity to participate in the political process by considering a combination of VAP [Voting Age Population] and the existing political realities of the district."), *with* SOF ¶ 171-177 (describing how Professor DeFord adjusted his model's input parameters to account for voter behavior in Mount Pleasant). While the NVYRA may be new, the tools and analyses courts will rely on to adjudicate NYVRA claims are not. Plaintiffs are entitled to summary judgment under Election Law § 17-206(2)(b)(i)(A) based on evidence derived using common, widely accepted methods.

C. Plaintiffs have established that the ability of Hispanic voters to elect candidates of their choice in Mount Pleasant is impaired under the totality of the circumstances.

Plaintiffs are separately entitled to summary judgment because the undisputed evidence demonstrates that "under the totality of the circumstances, the ability of [Hispanic voters] to elect candidates of their choice or influence the outcome of elections is impaired." Election Law § 17-206(2)(b)(i)(B). As under Election Law § 17-206(2)(b)(i)(A), a plaintiff must show the existence

of a reasonable alternative election system as a benchmark to prove that the existing system dilutes their vote under § 17-206(2)(b)(i)(B), a burden Plaintiffs have met here. *Supra* at 17.

The NYVRA enumerates a non-exhaustive list of factors that "may be considered" in the totality of the circumstances analysis. Election Law § 17-206(3). These "NYVRA factors" draw from those enumerated in the Senate Judiciary Committee Report accompanying the bill amending the Federal VRA in 1982 (the "Senate factors"), "which identif[y] the factors typically relevant to a section 2 [vote dilution] claim." *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1289 (11th Cir. 2020). Where the NYVRA factors mirror the Senate factors, Federal VRA case law is instructive. *See Fink v. Lefkowitz*, 47 N.Y.2d 567, 572 n.1 (1979) (where statute's "legislative history . . . indicates that many of its provisions . . . were patterned after the Federal analogue . . . . Federal case law and legislative history on [these provisions] are instructive"). For example, as under the Federal VRA, "evidence concerning the intent on the part of voters, elected officials, or the political subdivision to discriminate against a protected class is not required." Election Law § 17-206(2)(c); *see Allen*, 599 U.S. at 25 (noting that liability under the Federal VRA "turns on the presence of discriminatory effects, not discriminatory intent").

The NYVRA factors must be interpreted in light of the statute's overarching purpose, which is to "offer[] the most comprehensive state law protections for the right to vote in the United States." SOF ¶ 106. The NYVRA provides that "[n]othing . . . shall preclude any additional factors from being considered, nor shall any specified number of factors be required in establishing that such a violation has occurred." Election Law § 17-206(3). Thus, Plaintiffs need not present evidence addressing every enumerated factor to prevail on a vote dilution claim under § 17-206(2)(b)(i)(B), and they may rely on evidence addressing factors beyond those enumerated in § 17-206(3). Here, however, the undisputed evidence on nearly every enumerated factor is

overwhelming. There is no genuine dispute that, under the totality of the circumstances, the ability of Hispanic voters in Mount Pleasant to elect candidates of their choosing is impaired.

1. There is a history of discrimination against Hispanic voters in Mount Pleasant, Westchester County, and New York.

The first NYVRA factor is "[t]he history of discrimination in or affecting the political subdivision." Election Law § 17-206(3)(a). This is similar to the first Senate factor assessed under the Federal VRA. *See Gingles*, 478 U.S. at 36-37. The Hispanic community of Mount Pleasant has experienced pervasive discrimination at the local, state, and national level that continues to the present day. *Supra* at 5-8. Defendants do not dispute these facts. Instead, Defendants rely on a report prepared by a scholar with no experience studying the Hispanic community, Professor Donald Critchlow, who advances three erroneous, irrelevant arguments. SOF ¶ 211.

First, Professor Critchlow asserts that evidence of discrimination against Hispanics is irrelevant because the Hispanic community is not monolithic. SOF ¶ 213. Hispanics, like other ethnic groups, obviously come from different backgrounds and have different life experiences which inform their varied perspectives. But Professor Critchlow's report ignores the comprehensively studied process of pan-ethnic identity formation that has made Hispanic a defining identity for millions of Americans (and organizations, businesses, and governmental entities which serve them). SOF ¶ 215. Professor Critchlow also ignores evidence demonstrating the political cohesiveness of Hispanics in Mount Pleasant. *See supra* at 8-11. Regardless, uniformity is not a requirement for minority groups to be legally cognizable – otherwise, antidiscrimination laws addressed to internally diverse minority communities (as all communities are) would not exist. SOF ¶¶ 216-217.

Second, Professor Critchlow asserts that evidence of discrimination against Hispanics outside Mount Pleasant is irrelevant. SOF ¶ 218-220. But the NYVRA explicitly requires

consideration of discrimination "in *or affecting* the political subdivision." Election Law § 17-206(3)(a) (emphasis added).[4] This reflects the reality of how discrimination affects minority communities which, as scholars recognize, "have not been hermetically sealed off from the outside world" but are instead "affected by laws, people, information, and attitudes that originate elsewhere." SOF ¶¶ 221-224. Regardless, there is ample evidence of discrimination directed specifically at Hispanics in Mount Pleasant. *Supra* at 5-8.

Third, Professor Critchlow contends that the significant progress Hispanics have made in recent years negates the record of historical and ongoing discrimination against Hispanics in Mount Pleasant. SOF ¶ 225. No one disputes that New York has made progress towards racial equity. SOF ¶ 226. But progress does not erase the undisputed record of discrimination against and affecting Mount Pleasant's Hispanic community. *Supra* at 5-8. Moreover, Professor Critchlow cites no examples of the Town remedying discrimination against Hispanic residents. SOF ¶ 227. Professor Critchlow cites only to actions undertaken by Westchester County and New York, some of which the Town has opposed. SOF ¶ 228-229. The Town admits it has done nothing to address socioeconomic disparities between Hispanic and white residents. SOF ¶ 245-250. Professor Critchlow's consideration of evidence from other jurisdictions is proper in assessing this NYVRA factor – where he errs is in his refusal to acknowledge the full picture, good and bad alike.

[4] Courts consider discrimination occurring in other jurisdictions in Federal VRA cases. *See Goosby v. Town Bd. of the Town of Hempstead*, 180 F.3d 476, 488 (2d Cir. 1999) (finding "no history of official discrimination against blacks in the Town" but noting discriminatory county and state voting practices); *Gomez v. City of Watsonville*, 863 F.2d 1407, 1418 (9th Cir. 1988) ("The district court apparently believed that it was required to consider only the existence and effects of discrimination committed *by the City of Watsonville itself*. This conclusion is incorrect").

2. No Hispanic candidates have been elected to the Town Board or other Town office.

The second NYVRA factor is "[t]he extent to which members of the protected class have been elected to office in the political subdivision," Election Law § 17-206(3)(b), mirroring the seventh Senate factor, *see Gingles*, 478 U.S. at 37. As under the Federal VRA, "the election of a few minority candidates does not necessarily foreclose the possibility of dilution of the [minority] vote." *Id.* at 75. Regardless, there is no evidence to suggest that a Hispanic person has ever been elected or appointed to the Town Board or held Town-wide office. SOF ¶¶ 43-44.

3. Other features compound the dilutive effects of Mount Pleasant's at-large election system.

The third NYVRA factor considers "the use of any voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy that may enhance the dilutive effects of the election scheme." Election Law § 17-206(3)(c). This largely mirrors the third Senate factor. *See Gingles*, 478 U.S. at 37. Here, the fact that the Town conducts staggered, off-cycle elections compounds its at-large system's dilutive effects. SOF ¶¶ 175-186; *see also Vill. of Port Chester*, 704 F. Supp. 2d at 444 ("Port Chester's practice of holding local elections 'off-cycle' in March and staggering its Trustee elections combines to enhance the opportunity for discrimination against the Hispanic voting population.").

4. Hispanic voters and candidates lack access to the processes of determining who appears on the ballot in Town elections.

The fourth NYVRA factor considers whether voters and candidates from a protected class are "deni[ed] . . . [access] to processes determining which groups of candidates receive access to the ballot, financial support, or other support in a given election." Election Law § 17-206(3)(d). This builds upon the fourth Senate factor, which considers whether "there is a candidate slating process" and, if so, "whether the members of the minority group have been denied access to that

process." *Gingles*, 478 U.S. at 37 (internal quotation marks omitted). "[A] system that provides only a theoretical avenue for minority or other upstart candidates to get their names on the ballot while for all practical purposes making it extremely difficult for such candidates to have a meaningful opportunity to participate does in fact contribute to a violation." *Vill. of Port Chester*, 704 F. Supp. 2d at 444-45.

In Mount Pleasant, given the Republican Party's dominance of Town elections, SOF ¶ 61, what matters is access to the Republican candidate slate, which provides the only functional path to attaining Town office. *See Pope v. Cnty. of Albany*, 94 F. Supp. 3d 302, 344 (N.D.N.Y. 2015) (considering only access to the Democratic slate in assessing the fourth Senate factor because "the only effective slating process is controlled by the County Democratic Party"). Access to the Republican slate is especially important because "[t]he Party's endorsement conveys numerous benefits on candidates, including money, support, and most often victory." *Id.* at 344; SOF ¶¶ 70-101. Here, the undisputed evidence demonstrates that access to Town office – either by election or vacancy appointment – is limited to those who can navigate an insular process overseen by the Republican Committee, which Supervisor Fulgenzi described as a "club" where "if you didn't fit the mold they didn't want you and they made your life harder." SOF ¶¶ 64-67. This process has excluded Hispanic and Hispanic-preferred candidates from Town office, even as such candidates have run successfully in village elections. *Supra* at 7.

5. Hispanic voters contribute to political campaigns at lower rates than white voters.

The fifth NYVRA factor is "[t]he extent to which members of the protected class contribute to political campaigns at lower rates." Election Law § 17-206(3)(e). These disparities are relevant because political donations are an important means for voters to influence elections and officials. SOF ¶ 238; *see also McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 227 (2014) (plurality

opinion) (explaining that unduly stringent limits on campaign contributions would "compromis[e] the political responsiveness at the heart of the democratic process"). Here, the undisputed evidence reveals dramatic disparities in campaign contributions nationally between white and Hispanic voters. SOF ¶ 237. This trend undoubtedly holds true in Mount Pleasant, where Hispanic voters participate in Town elections at substantially lower rates than white voters, Hispanic households have less income and wealth than white households, and there have been no Hispanic candidates for Town office to galvanize community support. *Supra* at 5-8.

6. Hispanic voters vote at lower rates than other members of the electorate.

The sixth NYVRA factor assesses "the extent to which members of a protected class in the state or political subdivision vote at lower rates than other members of the electorate." Election Law § 17-206(3)(f). The undisputed evidence establishes that eligible Hispanic voters register and turn out to vote at significantly lower rates than white voters in national, state, and local elections. SOF ¶¶ 239-240. In Mount Pleasant, Hispanics typically comprise between 6.9 and 8.5% of voters (as compared to comprising around 19% of the Town's total, and 13.8% of the Town's citizen voting age, population), while white voters typically comprise more than 80% of voters (as compared to comprising 69% of the Town's total, and 74.7% of the Town's citizen voting age, population). *Id*.

7. Hispanic residents are significantly disadvantaged across numerous socioeconomic indicators as compared to white residents.

The seventh NYVRA factor assesses "[t]he extent to which members of the protected class are disadvantaged in areas including but not limited to education, employment, health, criminal justice, housing, land use, or environmental protection." Election Law § 17-206(3)(g). This factor is similar to the fifth Senate factor. *Gingles*, 478 U.S. at 37. In Federal VRA cases, courts have found indicators like the unemployment rate, the distribution of employment across sectors,

educational attainment, the poverty rate, and household income to be probative. *See, e.g.*, *NAACP v. East Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d at 407. Considering these socioeconomic markers is essential because "political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes." *Gingles*, 478 U.S. at 69.

As described above, Hispanic residents of Mount Pleasant are worse off compared to white residents across almost all relevant indicators. *Supra* at 5-6. Compared to white residents, Hispanics in Mount Pleasant earn less; are significantly more likely to be unemployed, rely on food stamps, live in poverty, be arrested and incarcerated, and reside in overcrowded housing; and significantly less likely to own a home, attend a well-resourced high school, and attain a high school or college degree. SOF ¶¶ 230-240.

8. Hispanic voters are disadvantaged in other areas which hinder their ability to participate in the political process.

The eighth NYVRA factor assesses "[t]he extent to which members of the protected class are disadvantaged in other areas which may hinder their ability to participate effectively in the political process." Election Law § 17-206(3)(h). This asks whether there are additional circumstances which inhibit a minority community's participation in political processes. Here, as Defendants admit, the Town does not provide official information in Spanish, and Board members conduct little to no outreach to the Hispanic community. *See* SOF ¶¶ 42, 85, 102, 328. The map on the Town's website communicates to residents of the area with the heaviest concentration of Hispanic residents that they are not part of the Town. SOF ¶ 28. This lack of accessible, accurate information about Town elections hinders Hispanic voters' participation in Town elections. SOF ¶¶ 254-255.

9. Candidates and elected officials have deployed racial appeals reliant on anti-Hispanic stereotypes.

The ninth NYVRA factor considers "the use of overt or subtle racial appeals in political campaigns," Election Law § 17-206(3)(i), mirroring Senate factor six, *see Gingles*, 478 U.S. at 37. "The use of racially-charged campaign issues, such as campaign literature that preys on racial anxiety, is a well-recognized form of racial appeal." *City of Euclid*, 580 F. Supp. 2d at 610. Racial appeals aimed at Hispanics often invoke the "Latino threat narrative," which portrays Hispanic people as invaders coming across the southern border who refuse to integrate and are intent on destroying the American way of life. SOF ¶ 344.

Elected officials in and around Mount Pleasant have made anti-Hispanic appeals central to their campaigns and political identities. SOF ¶ 345. Supervisor Fulgenzi has posted messages denigrating non-white immigrants and deriding efforts to accommodate Americans whose primary language is not English. SOF ¶¶ 346-357. During his most recent campaign, Fulgenzi shared a post calling on the government to "CLOSE OUR BORDERS," with the goal of contrasting modern-day immigrants to immigrants like his grandparents who came to America "in the past." *Id*. During that same campaign, the Republican Committee sent out mailers warning that "[u]nvetted migrants" would be sent to a local shelter and posted a Facebook message accusing their "opponents" of "want[ing] migrant housing in town." SOF ¶¶ 359-362. A flyer for a rally in Town stated "WE NEED YOU To fight the Illegal Alien Invasion" before describing a number of Democratic officials as "PRO ILLEGAL ALIENS." SOF ¶¶ 362-363. Town officials subsequently enacted an order targeting migrants and the Hispanic community, which Supervisor Fulgenzi will maintain until the nation's southern border is "secure" or the early-twentieth-century immigration policies are restored. SOF ¶¶ 301-303.

Mount Pleasant resident and former Westchester County Executive Rob Astorino made

opposition to immigration central to his 2022 gubernatorial campaign, appearing on Fox News segments asserting that officials were "BETRAYING AMERICANS" by allowing migrants across the southern border. Lest anyone miss his point, Astorino claimed that his opponents were "giving everything to non-citizens as goodies," including "dinero." SOF ¶¶ 364-366. State legislators representing Mount Pleasant and nearby areas have characterized laws benefitting immigrants as supporting "terrorists," erroneously asserted that immigration leads to "heightened local crime," and falsely referred to lawfully present refugees as illegal immigrants. SOF ¶¶ 367-373. Representative Mike Lawler, whose district includes Mount Pleasant, circulated a petition claiming that New York City Mayor Eric Adams had "just sent HUNDREDS of illegal adult male migrants into your backyard!" *Id.*

While "illegal immigration is a fair topic for political debate . . . . [i]f candidates are making race an issue on the campaign trail – especially in a way that demonizes the minority community and stokes fear and/or anger in the majority – the possibility of inequality in electoral opportunities increases." *Soto Palmer v. Hobbs*, 686 F. Supp. 3d 1213, 1230 (W.D. Wash. 2023), *cert. denied before judgment sub nom. Trevino v. Palmer*, 144 S. Ct. 873 (2024). There is a difference between good-faith policy arguments and racial dog whistles which "equate 'immigrant' or 'non-citizen' with the derogatory term 'illegal' and then use those terms to describe the entire Latino community without regard to actual facts regarding citizenship and/or immigration status." *Id.* Politicians in Mount Pleasant have frequently resorted to the latter.

10. Elected officials in Mount Pleasant, including members of the Town Board, are unresponsive to the needs of Hispanic voters.

The tenth NYVRA factor asks whether there is "a significant lack of responsiveness on the part of elected officials to the particularized needs of members of the protected class." N.Y. Elec. § 17-206(3)(j). This aligns closely with an "[a]dditional factor[]" considered in Federal VRA cases.

Gingles, 478 U.S. at 37; *see also Goosby*, 956 F. Supp. at 344 ("[E]vidence of tangible efforts of elected officials to respond to the needs of the minority group is relevant."). In Federal VRA cases, examples of unresponsiveness can include officials' "failure to identify concerns of the minority community . . . scarcity of outreach sessions in the minority community . . . and failure to provide bilingual translations of official forms." *NAACP v. East Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d at 413; *see also McDaniels v. Mehfoud*, 702 F. Supp. 588, 595 (E.D. Va. 1988) ("The Court was most struck, however, by the simple fact that when asked, none of the five sitting members of the Henrico Board of Supervisors could identify a single issue of unique concern to the black community").

The Hispanic community in Mount Pleasant has particularized needs in areas like housing, SOF ¶ 245, which the Town Board admittedly has the capacity to address, SOF ¶¶ 275, 335-336. Yet the Board has done nothing to help develop affordable housing for Hispanic residents of Mount Pleasant, even as it has taken concrete steps to address seniors' housing needs. SOF ¶ 337. The Town was unaware of socioeconomic disparities between Hispanic and white residents and has taken no steps to address them. SOF ¶¶ 246-251. The Town has done nothing to include Hispanic residents in policy discussions. SOF ¶¶ 298-300, 327-331. Officials have evinced hostility Hispanic residents' needs, dismissing concerns about their lack of political representation and encouraging secession from the Town. SOF ¶¶ 118-120. The Board has disclaimed responsibility for Hispanic residents in Sleepy Hollow, even though it possesses legal and functional power over their lives, and just raised their taxes by more than 20 percent SOF ¶¶ 30-39, 374.

The only action the Town has identified as responding to Hispanic residents' needs was the Mount Pleasant Industrial Development Agency's ("MPIDA") decision to approve a development in Sleepy Hollow, which allegedly created jobs for Hispanic residents. SOF ¶ 313.

But the MPIDA is an independent agency. SOF ¶ 310. Thus, even if MPIDA-approved projects have benefited Hispanics – which neither the MPIDA nor the Town has any way of knowing, SOF ¶¶ 314-324 – this does not demonstrate that *the Town* has responded to Hispanic residents' needs. Regardless, the Town's belief that development projects benefit Hispanics because "Hispanics . . . have, uhm, been very good in the construction business" and "there's other jobs for maintenance of the buildings" does not negate the Town's consistent neglect for the Hispanic community's needs. *Id.*

11. The Town has no compelling justification for maintaining at-large elections.

The final NYVRA factor asks "whether the political subdivision has a compelling policy justification that is substantiated and supported by evidence for adopting or maintaining the method of election." Election Law § 17-206(k). Defendants have had numerous opportunities throughout discovery to provide a justification for maintaining at-large elections. SOF ¶¶ 49-50. Yet defendants have failed to identify *any* policy justification, let alone one that is "compelling" and "substantiated and supported by evidence." *Id.*

II

The NYVRA is a lawful exercise of the legislature's authority to protect the voting rights of all New York citizens.

Most of Defendants' 16 affirmative defenses are either meaningless or defeated by the evidence. The remainder assert that the NYVRA is unconstitutional (5, 7, 8, 9, 11, 12) or preempted by federal law (6, 13). These defenses all fail.

A. Defendants lack capacity and standing to argue that the NYVRA is unconstitutional.

The Town and Town Board are creatures of the State. SOF ¶ 9. They therefore lack capacity and standing to assert that the NYVRA is unconstitutional. See *City of New York v.*

State of New York, 86 N.Y.2d 286, 291 (1995); *Matter of Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287 (1977); *Cnty. of Chautauqua v. Shah*, 126 A.D.3d 1317, 1321 (4th Dep't 2015), *aff'd sub nom. Cnty. of Chemung v. Shah*, 28 N.Y.3d 244 (2016); see also *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933); *City of Newark v. State of New Jersey*, 262 U.S. 192, 196 (1923); *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973); *City of New Rochelle v. Town of Mamaroneck*, 111 F. Supp. 2d 353, 364 (S.D.N.Y. 2000).

B. The NYVRA is consistent with the federal constitution.

Regardless, the NYVRA is constitutional. Defendants appear to assert the NYVRA is unconstitutional because (1) it impermissibly classifies voters based on race; (2) its underlying objectives are racially discriminatory; and (3) it mandates racial discrimination at the remedial phase. These assertions mischaracterize the scope and operation of the NYVRA and are inconsistent with settled law.

First, the NYVRA is not a racial classification under the Equal Protection Clause. "[W]hen the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 720 (2007). The NYVRA, by contrast, does not grant cognizable benefits (or inflict cognizable harms) on *any individual* for any reason, let alone because of their race – it merely requires a *jurisdiction* to replace a racially dilutive electoral system with one that furthers the state's interest in ensuring that its political processes are equally open to all citizens. *See, e.g.*, *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 837 (Cal. Ct. App. 2006) (holding that the California VRA is not subject to strict scrutiny because it "does not allocate benefits or burdens on the basis of race").

Second, the NYVRA does not reflect an invidious racial intent. To the extent the NYVRA

explicitly refers to race, it does so to further the legislature's permissible goal of remedying discrimination in voting by eliminating racial vote denial and dilution. *See* Election Law § 17-200. Antidiscrimination laws which seek to ameliorate historical and ongoing racial discrimination do not offend equal protection principles merely because they account for race – including, recently, when the Court affirmed the constitutionality of the Federal VRA. *Allen*, 599 U.S. at 41; *see also Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc*., 576 U.S. 519, 545 (2015) ("[M]ere awareness of race in attempting to solve [race-related] problems . . . does not doom that endeavor at the outset."). Likewise, the fact that the NYVRA invites courts to consider race when conducting racially polarized voting analyses does not render the statute subject to strict scrutiny. The same analyses are required under the Federal VRA because of the *Gingles* framework the Court itself set forth. *See Allen*, 599 U.S. at 33 (rejecting the argument that the *Gingles* framework is unconstitutional because it requires "maps [to be] created with an express target in mind" e.g., "to show, as our cases require, that an additional majority-minority district could be drawn").

Third, the NYVRA does not contemplate, let alone require, the drawing of racially gerrymandered districts. In some cases, the NYVRA does not require the drawing of *any* districts; where districts are imposed as remedies, they must comport with the federal constitution and can be challenged under the established framework for adjudicating racial gerrymandering claims. *See, e.g.*, *Portugal*, 530 P.3d at 1006 ("Strict scrutiny could certainly be triggered in an as-applied challenge to districting maps that sort voters on the basis of race." (cleaned up)). The possibility that a NYVRA remedy *could* be a racial gerrymander does not render the NYVRA facially unconstitutional, just as the possibility that Federal VRA remedial districts *could* be racial gerrymanders does not render the Federal VRA facially unconstitutional. *See, e.g.*, *Shaw v. Reno*,

509 U.S. 630, 658 (1993) (recognizing claim that a Federal VRA remedial district violated the Equal Protection Clause without questioning the Act's facial constitutionality).

C. The Federal VRA does not preempt the NYVRA.

Where a federal statute contains no language expressly preempting state law, a state law is preempted only if "compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (cleaned up). There is no conflict between the NYVRA and the Federal VRA. Nothing in the NYVRA requires municipalities to do what federal law forbids. And the NYVRA plainly furthers the Federal VRA's "broad remedial purpose of eliminating racial discrimination in voting." *Luna v. Cnty. of Kern*, 291 F. Supp. 3d 1088, 1098-99 (E.D. Cal. 2018).

CONCLUSION

The undisputed evidence satisfies Plaintiffs' burden of demonstrating that voting is racially polarized in Mount Pleasant, that their ability to participate in the Town's political processes has been impaired under the totality of the circumstances, and that Hispanic voters' electoral influence has been diluted by the Town's at-large system as compared to reasonable alternatives. Plaintiffs respectfully request, therefore, that this Court grant their motion for summary judgment under sections 17-206(2)(b)(i)(A) and 17-206(2)(b)(i)(B)[5] of the NYVRA and, under Election Law § 216, proceed immediately to identify and implement an appropriate remedy.

[5] The Court should address both issues even if one is dispositive. *See Matter of Farrell v. Sunderland*, 173 Misc. 2d 787, 792–93 (Sup. Ct., Westchester Cnty. [Anthony A. Scarpino, Jr., J.] 1997).

Dated: White Plains
August 13, 2024

Respectfully submitted,

Ruth Greenwood
Daniel Hessel
Samuel Davis (*pro hac vice pending*)
6 Everett St, Suite 4105
Cambridge MA 02138
(617) 998-1010

Robert A. Spolzino, Esq.'
David Imamurra
Steven Still
81 Main Street, Suite 400
White Plains, New York 10601
(914) 607-7010
ABRAMS FENSTERMAN, LLP

Counsel for Plaintiffs

To: All counsel of record via NYSCEF

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 9,868 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 A. Spolzino