SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
HON. PAUL I. MARX, J.S.C.

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HAZEL COADS, STEPHANIE M. CHASE, MARVIN AMAZAN, et al.,

Plaintiffs,

-against-

NASSAU COUNTY, the NASSAU COUNTY LEGISLATURE, et al.,

Defendants.

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Oral Argument Requested

Index No. 611872/2023

ACTION I

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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NEW YORK COMMUNITIES FOR CHANGE, MARIA JORDAN AWALOM, et al.,

Plaintiffs,

v.

COUNTY OF NASSAU, THE NASSAU COUNTY LEGISLATURE, et al.,

Defendants.

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Oral Argument Requested

Index No. 602316/2024

ACTION II

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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Defendants Nassau County, the Nassau County Legislature, Bruce Blakeman, Michael C. Pulitzer, and Howard J. Kopel, by and through their undersigned counsel, respectfully submit this Memorandum Of Law in support of their Motions For Summary Judgment.

PRELIMINARY STATEMENT

Following the decennial census, the Presiding Officer of the Nassau County Legislature proposed a redistricting map for the Legislature's consideration. The Presiding Officer first rejected each of the maps that the Republican and Democratic members of the County's Temporary Districting Advisory Commission ("TDAC") separately proposed as too partisan. He consulted with minority party leadership who praised him for including them in the redistricting process. He then presented a map to the full Legislature for its consideration, along with a memorandum explaining that the map satisfied the partisan fairness metrics used in *Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022), as analyzed by the same expert from that case, Dr. Sean P. Trende. The Presiding Officer then revised the proposed map to accommodate requests from members of the legislative minority, ***making four out of the five significant revisions that they requested***. Again, the minority party praised the Presiding Officer's efforts to include them in the redistricting process and publicly thanked him for each change that he made to the map.

Notwithstanding the Presiding Officer's successful, bipartisan efforts, Plaintiffs here brought a lawsuit claiming that the map is an unlawful partisan gerrymander under the Municipal Home Rule Law and violates the John R. Lewis Voting Rights Act of New York ("NYVRA") because it does not contain enough majority-minority districts. Now that Plaintiffs have had months to develop their evidence, it is clear their claims are without legal merits. As to their partisan gerrymandering claim, Plaintiffs have presented no evidence that would rebut the presumption that legislators act lawfully and consistent with their legal obligations. The Presiding Officer's bipartisan efforts are the opposite of the type of egregious facts that the Court of Appeals

found rebutted the presumption of constitutionality in *Harkenrider*, and the map here falls within the range of nonpartisan maps under the analysis that prevailed in *Harkenrider*. Indeed, under that analysis, the proposed map is not meaningfully different in terms of the *Harkenrider* methodology than the map that Plaintiffs' own expert proposed, which is unsurprising given the Presiding Officer's bipartisan efforts. As for Plaintiffs' NYVRA claim, the NYVRA's district-based provisions are unconstitutional, for the reasons explained in detail below. But even if this Court does not hold that these provisions are unconstitutional, Plaintiffs failed entirely to satisfy their statutory burden to show that minority groups' candidates of choice "would usually be defeated" under the map. It is undisputed that minority-favored candidates will win regularly under the map. Plaintiffs' contrary arguments rely upon legally erroneous submissions that the NYVRA requires a certain number of majority-minority districts, or permits imposing liability based upon focusing on a couple of hand-picked districts.

The Court should grant Defendants' Motions For Summary Judgment.

STANDARD OF REVIEW

To prevail on a motion for summary judgment, the movant must show that, "upon all the papers and proof submitted, the cause of action or defense [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." CPLR § 3212(b). This requires the moving party to first "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 v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Then, "[o]nce this showing has been made, . . . the burden shifts to the party opposing the motion for summary judgment 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.* Once the burden shifts, the parties opposing summary judgment must "lay bare [their] proof" to sufficiently demonstrate the existence of a

triable issue of fact. *Emigrant Funding Corp. v. Agard*, 121 A.D.3d 935, 936 (2d Dep't 2014); *see Hoover v. New Holland, Inc.*, 23 N.Y.3d 41, 56 (2014).

ARGUMENT

I. Defendants Are Entitled To Summary Judgment On The Action I Plaintiffs' Partisan-Gerrymandering Claim Under Section 34 Of The New York State Municipal Home Rule Law

A. Subsection 34(4)(e) of the New York Municipal Home Rule Law prohibits political subdivisions from engaging in partisan gerrymandering: "[d]istricts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." *Id.* § 34(4)(e). Subsection 34(4)(e) of the Municipal Home Rule Law is identically worded as Section 4 of Article III of the New York Constitution. N.Y. Const. art. III, § 4(c)(5). Notably, under the "'presumption of regularity,'" the law "presumes that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything which his official duty requires to be done," and "[s]ubstantial evidence is necessary to overcome that presumption." *People v. Dominique*, 90 N.Y.2d 880, 881 (1997). Thus, county legislators charged with drawing redistricting plans are presumed to have complied with Section 34(4) when doing so—that is, not engaged in partisan gerrymandering—and "substantial evidence" is needed to prove otherwise. *Id.*

The Court of Appeals' decision in *Harkenrider* provides by far the most relevant precedent on the issue. In *Harkenrider*, several "New York voters". . . challeng[ed] the [2022] congressional and senate maps" as "unconstitutionally gerrymandered," 38 N.Y.3d at 505, alleging the map was "enacted by the legislature" with the "impermissible intent or motive . . . to 'discourage competition' or to 'favor[ ] or disfavor[ ] incumbents or other particular candidates or political parties,'" *id.* at 519 (quoting N.Y. Const. art. III, § 4) (alterations in original). The court explained that such claims must overcome "a 'strong presumption of constitutionality'" afforded to

"redistricting plans," which "legislation will be declared unconstitutional by the courts only when it can be shown beyond reasonable doubt that it conflicts with the Constitution after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Id.* at 509 (citation omitted). "Such invidious intent could be demonstrated [either] directly or circumstantially through proof of a partisan process excluding participation by the minority party and evidence of discriminatory results (*i.e.*, lines that impactfully and unduly favor or disfavor a political party or reduce competition)." *Id.* With respect to using expert testimony about a map's discriminatory results, *Harkenrider* specifically relied upon the partisan-outlier analysis conducted by Dr. Trende. *Id.* at 506–08, 519–20. The *Harkenrider* Court ultimately concluded that the state legislature engaged in partisan gerrymandering, overcoming the presumption of constitutionality, a determination that the court grounded in the egregious facts of that case. *Id.* at 520–21. As for the "exclu[sion] [of] the minority party," *id.* at 519, the Court of Appeals noted "the Democrats in the legislature—in control of both the senate and assembly—composed and enacted . . . [the] redistricting maps, undisputedly *without any consultation or participation by the minority Republican Party*." *Id.* at 505 (emphasis added; citations omitted). Then, Dr. Trende's partisan-outlier analysis "revealed that the enacted map was an 'extreme outlier' that likely reduced the number of Republican congressional seats from eight to four"—halving the expected number of Republican seats—"while ensuring there were 'virtually zero competitive districts.'" *Id.* at 506–07.

B. Here no reasonable factfinder could conclude that the Legislature engaged in partisan gerrymandering, in violation of N.Y. Mun. Home Rule Law § 34(4)(e), especially given the presumption of regularity, *Dominique*, 90 N.Y.2d at 881.

The Legislature's redistricting process that culminated in passing Local Law 1 involved the minority political party, including adopting four of five of its major suggestions to revise the Presiding Officer's first proposed map, not a "partisan process [that] exclude[ed] participation by the minority party." *Harkenrider*, 38 N.Y.3d at 519. Upon "completion of the work of [TDAC]," the Presiding Officer invited Minority Leader Abrahams—along with "any Minority delegation member"—"to discuss specific proposals that [the Minority] delegation may have with respect to the new district lines," and stated his "intention . . . to advance to the Rules Committee . . . any [ ] map [the Minority] delegation may offer." Ex.1 at 1.[1] Democratic members of the Legislature recognized the Presiding Officer's willingness to address their concerns "very early on in the [map drawing] process." Ex.2 at 107–09 ("Feb. 16, 2023 Meeting Tr."). After initial meetings with Legislators from across the political spectrum and "mak[ing] efforts as much as possible to incorporate what was said" during those meetings, *id.*at 108; *see* Ex.3 at 11 ("Feb. 27, 2023 Afternoon Meeting Tr."), the Presiding Officer publicly proposed a new redistricting map for the Legislature's consideration.

On February 16, 2023, the Legislature held a meeting to review and discuss all proposed maps it had received. Feb. 16, 2023 Meeting Tr.10–12. The Legislature rejected each of the TDAC proposals, *see id.* at 11; Ex.4 at 179–81 ("Feb. 27, 2023 Evening Meeting Tr."), and offered a number of criticisms and suggestions for the Presiding Officer's proposed map, *see generally* Feb. 16, 2023 Meeting Tr. All members of the Legislature then received a revised memorandum and heard accompanying testimony explaining that the Presiding Officer's proposal complied with "the exact same" analysis—using the same data sources and statistical methodologies, conducted

[1] All exhibits cited herein are attached to the contemporaneously filed Affirmation of Bennet J. Moskowitz.

by the same expert, Dr. Trende—that the Court of Appeals endorsed in *Harkenrider*. Feb. 16, 2023 Meeting Tr.37–38; Ex.5 at 9–10 ("Troutman Feb. 16, 2023 Memo"); *see Harkenrider*, 38 N.Y.3d at 506–08, 519–20. Further, legislators received a detailed explanation of how each district in the proposed map accommodated the County's various communities-of-interests. *See generally* Troutman Feb. 16, 2023 Memo.

Although the Presiding Officer's original proposal complied with *Harkenrider*'s standards, the Presiding Officer nevertheless revised his initial proposal and publicly released an amended version of the proposed map to accommodate various requests of Democratic legislators. Ex.6 at 1–3 ("Troutman Feb. 27, 2023 Memo"); Nassau Cnty., *Redistricting*.[2] ***Specifically, this revised map "incorporate[d]" four of five "significant suggestions" that Democratic legislators (as well as the public) offered in response to the Presiding Officer's first map***. Troutman Feb. 27, 2023 Memo at 2 & n.3. First, the map "combin[ed] Plainview and Old Bethpage into a single district," given the "compelling testimony" of Democratic "Legislator Arnold W. Drucker and members of the public." *Id.* Second, the map "unite[d] the vast majority of Elmont . . . in a single district," because Democratic "Legislator [Carrié] Solages explained[ ] [that] the hamlet [ ] is a community of interest." *Id.* Third, the map "restor[ed] a significant portion of Mill Brook" to the same district as Valley Stream, as Democratic Legislator Solages "testified that . . . these communities have significant connections." *Id.* Fourth, the revised map reduced "the number of times the Village of Hempstead [was] split between districts" to address the criticisms of Minority Leader Abrahams, *see* Feb. 16, 2023 Meeting Tr.13–14, 17, 51–54, 78, 96, and Democratic Legislator Bynoe, *id.* at 106–07. While the proposed revised map was "unable to accommodate" requests to

[2] Available at https://www.nassaucountyny.gov/5455/Redistricting (all webpages last accessed Oct. 21, 2024).

move Lakeview into a different district, the second memorandum explained that this decision was made to ensure that the map "remain[s] consistent with the legal requirements for equal population" and to avoid "splitting multiple other communities of interest." Troutman Feb. 27, 2023 Memo at 2 n.3. Finally, on February 21, 2023, the Presiding Officer publicly released a final proposed map, containing additional revisions in response to feedback from Legislators and the public. *Id.* at 1–3; Feb. 27, 2023 Afternoon Meeting Tr.11–13.; Nassau Cnty., *Redistricting*, *supra*. Thus, the map-drawing process here was the opposite of the "largely one-party process" in *Harkenrider*. 38 N.Y.3d at 519.

The Presiding Officer's repeated, good-faith attempts to reach across the aisle during the redistricting process were successful, as the final map incorporated many proposals from Democratic Legislators. For example, at the February 16, 2023 meeting, Legislator Bynoe thanked the Presiding Officer for amending his initial proposal to ensure the Lakeview community remains in a single district and further recognized that certain parts of another district "ha[d] been put together whole" in line with public comment. Feb. 16, 2023 Meeting Tr.108–09. Similarly, several members of the public lauded the Presiding Officer's proposed map for keeping Uniondale in one district. *See id.* at 286, 292. Then, at the Legislature's February 27, 2023 meeting, Legislator Solages expressed his appreciation for the revisions the Presiding Officer made to address concerns regarding unifying Elmont and Mill Brook in District 3. Feb. 27, 2023 Afternoon Meeting Tr.147. Legislator Bynoe similarly remarked that she was "heartened" by the adjustments made in response to public input and acknowledged that the Presiding Officer had "done a lot" to address the issues her colleagues raised in prior meetings. *Id.* at 138. While some other Democratic Legislators and stakeholders claimed the final map did not sufficiently accommodate their concerns, *see* Feb. 16, 2023 Meeting Tr.126; Feb. 27, 2023 Afternoon Meeting Tr.13, that is

not evidence of the "minority party" being "exclude[ed]" from the map-drawing process, *Harkenrider*, 38 N.Y.3d at 519. That some were dissatisfied with the final map is merely evidence of the inevitable compromises inherent in the legislative process, especially when dealing with "complex" legislation like redistricting plans, *Alexander v. S.C. State Conf. of NAACP*, 602 U.S. 2, 7 (2024). Indeed, the Legislature's bipartisan efforts here sharply contrast with the state cases where courts have determined that a map was enacted with partisan intent. *See, e.g.*, *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 192 N.E.3d 379, 412 (Ohio 2022); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1096 (S.D. Ohio 2019) (citation omitted), *vacated and remanded sub nom. Chabot v. Ohio A. Philip Randolph Inst.*, 140 S. Ct. 102 (2019); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 379–86, 388–89, 392–93 (Fla. 2015); *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 861–64 (M.D.N.C. 2018), *vacated and remanded*, 588 U.S. 684 (2019); *Whitford v. Gill*, 218 F. Supp. 3d 837, 887–98 (W.D. Wis. 2016), *vacated and remanded sub nom. Rucho*, 588 U.S. at 725, 742–43.

Given the significant difference between the facts of this case and *Harkenrider* (not to mention every other case that has found a partisan gerrymander anywhere in the country), Plaintiffs failed to provide the "[s]ubstantial evidence" necessary to rebut the "presumption of regularity," which presumes that the Legislature complied with the law. *Dominique*, 90 N.Y.2d at 881. Plaintiffs have not explained what other map would better honor Nassau's community-of-interest considerations and achieve the partisan outcomes they desire, while remaining in compliance with all relevant legal standards. The *only* alternative map they propose—Dr. Cervas's map, *see generally* Ex.7 ("Cervas Rep.")—scores comparably to Local Law 1 on the *Harkenrider* analysis, *see* Ex.8 at 87–92 ("Trende Rebuttal"). Further, Defendants presented *unrebutted* evidence that Dr. Cervas's map did not adequately account for communities-of-interest. Ex.9 at 246:4–22

("Cervas Dep."); *see generally* Ex.24 ("Alfano Rebuttal"). Regardless, even if Plaintiffs had presented such an alternative map that accounted for the County's communities-of-interest, the mere existence of a legally compliant proposal that better suits Plaintiffs' partisan ends does not, as a matter of law, suffice to overcome the "strong presumption" that the Legislature acted lawfully in adopting the map. *Harkenrider*, 38 N.Y.3d at 509.

Notably, when adopting Local Law 1, the legislators had before them Dr. Trende's expert conclusion explaining that the map they were considering complied with the analysis that Dr. Trende conducted, and the Court of Appeals blessed, in *Harkenrider*. *See generally* Troutman Feb. 27, 2023 Memo. Absent any "substantial evidence" to the contrary, *Dominique*, 90 N.Y.2d at 881—which is completely lacking here—there is no lawful basis to reject the conclusion that the Legislature reasonably credited Dr. Trende's analysis in voting to adopt Local Law 1, *see id.*

That the Legislature had before it an expert opinion of Dr. Magleby that, in his view, Local Law 1 is not fair as a matter of partisanship, is insufficient as a matter of law to rebut the presumption of regularity. *See id.* The Legislature had multiple, good faith bases for not crediting Dr. Magleby's analysis (or the similar analysis that Dr. Stern puts before the Court, which was not even before the Legislature). First, Dr. Magleby analyzed Local Law 1 using an "entirely different approach" from the one endorsed in *Harkenrider*. Troutman Feb. 27, 2023 Memo at 15; *see* Ex.10 at 121:24–122:7 ("Magleby Dep."); Ex.11 at 33–34 ("Magleby Rep."). Indeed, Dr. Magleby's alternative "mean-median metric" approach "would have blessed" "the egregious pro-Democrat gerrymander that the Court of Appeals invalidated in *Harkenrider*." Troutman Feb. 27, 2023 Memo at 16. Second, Dr. Magleby used different elections from those analyzed in *Harkenrider*, completely excluding even-year elections from his analysis. Trende Rebuttal at 28. The Legislature could have reasonably concluded that Dr. Magleby hand-picking elections made his

analysis less credible than Dr. Trende's and that it was "far safer . . . to rely upon the approach that prevailed in *Harkenrider*." Troutman Feb. 27, 2023 Memo at 16. Third, Dr. Magleby programmed the simulations in his analysis to create only maps that include a certain number of majority-minority districts, Trende Rebuttal at 15–16; *see also* Magleby Dep. at 121:24–122:7, which destroys the usefulness of his analysis for purposes of establishing a non-partisan baseline because Legislature did not have the same intent when creating and adopting Local Law 1, *see* Troutman Feb. 16, 2023 Memo at 4; Troutman Feb. 27, 2023 Memo at 7.

More generally, while there could be good-faith disagreement among experts regarding whether Dr. Trende or Dr. Magleby's (or Dr. Stern's) approach is better for determining a redistricting plan's partisan *effect*, the existence of such debate does not qualify as the "substantial evidence [ ] necessary to overcome th[e] presumption," *Dominique*, 90 N.Y.2d at 881, that the Legislature enacted Local Law 1 with the "purpose" of adopting a partisan-neutral map, N.Y. Mun. Home Rule L. § 34(4). After all, the Legislature received confirmation that its map complied with New York's prohibition on partisan gerrymandering from the same expert using "the exact same" analyses blessed by the Court of Appeals in *Harkenrider*, Feb. 16, 2023 Meeting Tr.37–38; *see id.* at 43–44; Troutman Feb. 16, 2023 Memo at 9–10; Troutman Feb. 27, 2023 Memo at 13–14, and even if a court prefers a different expert's approach to partisan fairness, that is not sufficient to establish that any "[d]istricts [were] drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties," N.Y. Mun. Home Rule L. § 34(4)(e), especially given the considerations above, including the Presiding Officer adopting such a large portion of the revisions that minority party Legislators asked him to make in his proposed map.

II. Defendants Are Also Entitled To Summary Judgment On The Action II Plaintiffs' NYVRA District-Based Vote-Dilution Claim

A. The NYVRA's District-Based Provisions Are Unconstitutional

1. A Political Subdivision Cannot Draw District Lines Based Upon Racial Classifications Unless The Subdivision Can Satisfy Strict Scrutiny

a. The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law . . . [that] den[ies] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; *accord* N.Y. Const. Art. I, § 11. These safeguards "represent[ ] a foundational principle" that our Nation "should not permit any distinctions of law based on race or color." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 201–02, 206 (2023) ("*SFFA*") (citations omitted; brackets omitted); *see also Seaman v. Fedourich*, 16 N.Y.2d 94, 102 (1965). After the adoption of the Equal Protection Clause, "[t]he time for making distinctions based on race had passed." *SFFA*, 600 U.S. at 204 (discussing *Brown v. Bd. of Ed. of Topeka*, 349 U.S. 294 (1955)); *accord Under 21 v. City of New York*, 65 N.Y.2d 344, 363 (1985). Thus, where a state law makes a "racial classification," the Equal Protection Clause invalidates that law unless it can survive "daunting . . . strict scrutiny" review. *SFFA*, 600 U.S. at 206–07 (citations omitted).

Strict scrutiny under the Equal Protection Clause applies whenever "the government distributes burdens or benefits on the basis of individual racial classifications." *Parents Involved in Comty. Schs. v Seattle Sch. Dist. No.1*, 551 U.S. 701, 720 (2007). "[A]n express racial classification," *id*. at 707, that is "explicit" in a statute, *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999), is "inherently suspect" without any further inquiry into motive, *Washington v. Seattle Sch. Dist. No.1*, 458 U.S. 457, 485 (1982); *see also SFFA*, 600 U.S. at 213. Thus, strict scrutiny applies whenever a political subdivision alters its extant race-neutral election system, so that candidates favored by citizens of one race are elected more often relative to candidates favored by citizens of

some other race. In such a scenario, the political subdivision has "distribute[d] burdens or benefits on the basis of individual racial classifications." *Parents Involved*, 551 U.S. at 720.

b. Strict scrutiny imposes a "daunting" standard on any law that draws racial classifications, *SFFA*, 600 U.S. at 206–07, and only the most carefully crafted laws—such as Section 2 of the federal Voting Rights Act ("VRA")—could even possibly survive this review. Strict-scrutiny review proceeds in two steps. *Id.* First, the racial classification in the law at issue must be "used to 'further compelling governmental interests.'" *Id*. at 206–07 (citation omitted). Second, the law under review must be "narrowly tailored . . . to achieve that interest." *Id*. at 207 (citation omitted). While strict-scrutiny applies to racial classifications in both federal and State law, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 230 (1995), Congress and the States do not have equal authority to pass laws that satisfy this review, with Congress having greater authority under the Fourteenth and Fifteenth Amendments to "enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent," *Tennessee v. Lane*, 541 U.S. 509, 520 (2004).

Section 2 of the VRA is the rare law that satisfies strict scrutiny because it contains numerous "exacting requirements" and safeguards that narrowly tailor its application. *Allen v. Milligan*, 599 U.S. 1, 30 (2023); *see generally* 52 U.S.C. § 10301. In particular, *Thornburg v. Gingles*, 478 U.S. 30 (1986), provided a two-step "framework" for adjudicating Section 2 vote-dilution claims. *Id.* at 50–51; *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 402 (2022); *see Bartlett v Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion). Under the *Gingles* analysis, a Section 2 plaintiff must establish three "necessary preconditions." *Gingles*, 478 U.S. at 50. First, "[t]he minority group must be sufficiently large and compact to constitute a majority in a reasonably configured district." *Wis. Legislature*, 595 U.S. at 402. A party cannot satisfy this precondition by showing that it is possible to create an "influence district[ ]" where "minority

voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 446 (2006) (citation omitted). Further, the *en banc* Fifth Circuit recently held that Section 2 does not permit lumping minority groups together in a so-called "coalition district." *See Petteway v. Galveston Cnty.*, 111 F.4th 596, 599 (5th Cir. 2024) (en banc); *but see Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990). Under the second precondition, "the minority group must be politically cohesive." *Wis. Legislature*, 595 U.S. at 402. And third, "a majority group must vote sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate." *Id.* If a plaintiff satisfies the first step, the *Gingles* analysis then "considers the totality of circumstances to determine 'whether the political process is equally open to minority voters.'" *Wis. Legislature*, 595 U.S. at 402 (quoting *Gingles*, 478 U.S. at 79). Here, courts consider the political subdivision's "history of voting-related discrimination," *Gingles*, 478 U.S. at 44, "recogniz[ing] that application of the *Gingles* factors is peculiarly dependent upon the facts of each case," *Allen*, 599 U.S. at 19 (citations omitted). Notably, relaxing the *Gingles* standards of would present "serious constitutional concerns under the Equal Protection Clause," as the provision would no longer be narrowly tailored, sufficient to satisfy strict scrutiny. *Bartlett*, 556 U.S. at 21 (plurality opinion).

2. The NYVRA's District-Based Provisions Are Unconstitutional Because They Force Political Subdivisions To Change District Lines Based Upon Racial Classifications, Without Satisfying Strict Scrutiny And Far Beyond Situations Required By Section 2 Of The Federal VRA

The NYVRA's district-based provisions require political subdivisions to alter race-neutral redistricting maps by changing district lines so that citizens lumped together by race may elect more candidates of their choice; meaning that, given the zero-sum nature of elections, candidates favored by citizens categorized according to different races elect fewer candidates of their choice.

This gives "burdens or benefits on the basis of individual racial classifications," demanding strict-scrutiny review, *Parents Involved*, 551 U.S. at 720—which review the NYVRA cannot satisfy.

Subsection 17-206(2)(a) of the NYVRA prohibits what the NYVRA calls the "vote dilution" of protected classes by political subdivisions. N.Y. Elec. L. § 17-206(2)(a). Subsection 17-206(2)(b) then provides that a political subdivision "us[ing] a district-based or alternative method of election" has engaged in prohibited "vote dilution" when "candidates or electoral choices preferred by members of the protected class would usually be defeated," and "*either*: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; *or* (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired." *Id.* § 17-206(2)(b)(ii) (emphases added). "[E]vidence concerning whether members of a protected class are geographically compact or concentrated shall not be considered, but may be a factor in determining an appropriate remedy," *id.* § 17-206(2)(c)(viii), and "where there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision, members of each of those protected classes may be combined," *id.* § 17-206(2)(c)(iv). Section 17-206(3) provides a non-exhaustive list of factors to consider under Subsection 17-206(2)(b)(i)'s "totality of the circumstances" analysis, including "the extent to which members of the protected class are disadvantaged in [for example] education, employment, health, criminal justice, housing, land use, or environmental protection." *Id.* § 17-206(3)(g).

The NYVRA thus explicitly rejects many of the safeguards of Section 2 of the VRA. Notably, Plaintiffs do not even attempt to argue that they meet conditions necessary to establish a vote-dilution claim under Section 2 of the VRA, *see* Cervas Dep. at 145:4–146:17; Ex.12 at 206:3–209:1 ("Oskooii Dep."), so the Court need not decide whether the NYVRA would be constitutional

as applied to a situation where it was just requiring what the VRA requires, *see* Troutman Feb. 27, 2023 Memo at 9–10.

i. The NYVRA's District-Based Vote-Dilution Provision Triggers Strict Scrutiny

The NYVRA's provisions for political subdivisions using "a district-based or alternative method of election," N.Y. Elec. L. § 17-206(2)(b)(ii), are a racial-classification scheme from top to bottom, triggering strict scrutiny.

Under these provisions, a political subdivision using a district-based method of election must draw districts that lead to more minority-favored candidates winning whenever, after grouping voters together based solely upon their racial identity, those racial-minority groups' preferred candidates "would usually be defeated" and there is either: (a) "racially polarized voting" in a district, or (b) under the totality-of-the-circumstances standard discussed above, an impairment of "the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections." *Id.* § 17-206(2)(b)(ii). The NYVRA directs the political subdivisions to group their citizens by racial groups, *id.* § 17-206(2)(c)(iv), without regard to whether the people in these groups are geographically compact or concentrated, *id.* § 17-206(2)(c)(viii), and without regard to whether their voting behavior has anything to do with race, as opposed to politics, *id.* § 17-206(2)(c)(vii). If minority-preferred candidates "would usually be defeated" in a jurisdiction with "racially polarized voting," *id.* § 17-206(2)(b)(ii), the NYVRA requires that jurisdiction to alter its election system to ensure that those candidates have a greater chance of electoral success, thus necessarily decreasing the ability of candidates preferred by voters lumped together by other racial groups to win elections. This is an unambiguous distribution of "benefits" (more electoral success, or an increase in voting strength) and "burdens" (less electoral success, or a decrease in

voting strength) "on the basis of individual racial classifications," that the Equal Protection Clause subjects to strict-scrutiny review. *Parents Involved*, 551 U.S. at 720.

While there is some dispute among the parties' expert witnesses about how to conduct the critical "would usually be defeated" analysis under this NYVRA, *see infra* Part II.B, every approach on offer triggers strict scrutiny because all require counties to make "racial classification[s]" and then draw redistricting plans that "distribute[ ] burdens [and] benefits on the basis of [those] individual racial classifications," *Parents Involved*, 551 U.S. at 720; *see SFFA*, 600 U.S. at 204.

First, Plaintiffs' expert witness Dr. Cervas offers a district-based approach, requiring a political subdivision to only examine hand-selected districts within the jurisdiction and then to redraw those districts so that candidates supported by citizens lumped together by race win more seats, while candidates supported by citizens lumped together by other races will win less. *See infra* pp.32–33; Cervas Rep. at 49–50. Specifically, Dr. Cervas suggests that a political subdivision should only analyze districts "in which there are significant minority populations" and then pull minority voters "from surrounding districts, in order to increase the amount of minority voters in the district[s] [being] analyz[ed]" and ensure these minority voters-preferred candidates are not "usually defeated" in the analyzed districts. *See* Cervas Dep. at 271:13–272:18. This approach explicitly requires political subdivisions to "classify[ ] citizens . . . on the basis of race," *Shaw v. Reno*, 509 U.S. 630, 643, 646 (1993) (citation omitted), and then enact a redistricting plan where "the predominant factor motivating placement of voters in or out of a particular district" is race, *Wis. Legislature*, 595 U.S. at 401 (citing *Cooper v. Harris*, 581 U.S. 285, 290–91 (2017)).

Second, Plaintiffs' expert witness Dr. Magleby, *see* Magleby Rep. at 24—along with Plaintiffs in their complaint, *see* Compl. ¶ 45—appears to advocate for a majority-minority-

district-based approach. This approach requires a political subdivision to group minority voters together and draw a redistricting plan that creates a certain number of majority-minority districts. *Infra* pp.22–26. Thus, this approach, on its face, mandates "plac[ing] a significant number of voters within or without a particular district" predominantly based on "race" to hit a particulate racial target (50% minority voters, grouped across racial groups), *Cooper*, 581 U.S. at 291 (citations omitted), which is precisely the type of action the Supreme Court has said "must withstand strict scrutiny," *id.* at 292 (citation omitted).

Third and finally, Defendants submit that the Court should adopt a county-wide approach for the NYVRA's "usually defeated" analysis. *Infra* pp.22–26. Under this approach, an NYVRA vote-dilution plaintiff must demonstrate that the identified minority group's preferred candidates will be routinely defeated in a significant majority of elections across the entire relevant jurisdiction. *Infra* p.26. While this approach is the best reading of the statutory text, *see infra* p.26, it would still subject the NYVRA's district-based provisions to strict scrutiny. If not enough minority-preferred candidates are winning county-wide, the county would have to move voters grouped together by race in different districts to increase these candidates' electoral success, which would necessarily decrease the electoral chances of candidates preferred by other minority groups lumped together by race in the county. *Infra* pp.32–33. This "distribut[es] burdens or benefits based on individual racial classifications," *Parents Involved*, 551 U.S. at 720, triggering strict scrutiny.

The NYVRA's district-based provisions are also subject to strict scrutiny for the *additional* reason that they protect only "minority" groups. N.Y. Elec. L. § 17-204(5). By their plain text, those provisions apply only to "members of [a] protected class," N.Y. Elec. L. § 17-206(2)(b)(i)–(ii), statutorily defined as "a class of individuals who are members of a race, color, or language-

minority group," *id.* § 17-204(5) (emphasis added). Notably, reading the NYVRA's district-based vote-dilution provisions to apply to white majorities—as the Attorney General has argued, *see* Ex.13 at 13 ("AG *Young* Br.")—would render application of those provisions absurd and impossible for many political subdivisions to comply with. Given the zero-sum nature of elections, if the NYVRA's race-based rules also protected white-majority voters, this provision would render almost *every* district-based system violative of the NYVRA when there is racially-polarized voting in a political subdivision, making it seemingly impossible for such a subdivision to comply with the NYVRA no matter what district lines it adopted. As Dr. Trende explained, "redistricting is often a 'robbing-Peter-to-pay-Paul' exercise." Trende Rebuttal at 94; *see* Ex.14 at 20 ("Trende Reply") (same). Thus, compliance with the NYVRA's "usually defeated" provision would often be impossible if the NYVRA also protected the white majority's ability to elect candidates of choice: by accommodating one protected class, the county inevitably violates the statute with respect to another group.

But even if the NYVRA's district-based, "will usually be defeated" provisions applied to any citizen of any racial group, including white majorities, those provisions would still be subject to strict scrutiny because that heightened review applies to "*all* racial classifications imposed by the government" by law, *Johnson v. California*, 543 U.S. 499, 505 (2005) (emphasis added), "even when they may be said to burden or benefit the races equally," *id.* at 506 (citations omitted). So here, strict scrutiny applies no matter whether *any* group of citizens lumped together by *any* race could use the NYVRA to force a political subdivision to alter its district-based voting system by drawing districts predominantly based on race to ensure that more of their preferred candidates win at the expense of candidates preferred by other citizens in all other racial groups. *See id.*

ii. The NYVRA's District-Based Vote-Dilution Cannot Satisfy Strict Scrutiny

The NYVRA's district-based provisions do not satisfy strict-scrutiny review, given that these provisions neither further a compelling government interest nor are narrowly tailored.

No Compelling Interest. To begin, the NYVRA's district-based vote-dilution provisions do not further a compelling government interest. States have a compelling "interest in remedying the effects of . . . racial discrimination," where they "ha[ve] a strong basis in evidence to conclude that . . . action [is] necessary" to remediate an "*identified* discrimination." *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996) (emphasis added; citation omitted). But the NYVRA's district-based provisions do not target that interest, as a political subdivision's liability for vote-dilution under the NYVRA does not require proof of "specific, identified instances of past discrimination that violated the Constitution or a statute." *SFFA*, 600 U.S. at 207 (citations omitted). That is, the NYVRA does not require a political subdivision to have previously discriminated on the basis of race with respect to its method of election before those provisions may impose upon that political subdivision the race-based remedies of drawing districts predominantly based on race, *see* N.Y. Elec. L. §§ 17-206(2)(b)(i), 17-206(5). Instead of seeking to further the compelling interest of remediating "identified discrimination" where there exists "a strong basis in evidence to conclude" that such action is "necessary," *Shaw*, 517 U.S. at 909–10 (citation omitted), the NYVRA seeks to protect one normative view of "an equal opportunity to vote" and "participation in voting by all eligible voters"—"particular[ly] members of racial, ethnic, and language-minority groups." Gov. Hochul, *Governor Hochul Signs Landmark John R. Lewis Voting Rights Act of New York Into Law*. While such generalized interests may be "commendable goals, they are not sufficiently coherent for purposes of strict scrutiny" and are also not sufficiently compelling to justify racial classifications. *SFFA*, 600 U.S. at 214. The NYVRA's district-based provisions also do not pursue a compelling

government interest, as the New York Legislature does not have the same constitutional authority as Congress to impose racial classifications. *See supra* p.12.

Not Narrowly Tailored. Even if the NYVRA's provisions did pursue a compelling government interest in "remediating specific, identified instances of past discrimination," *SFFA*, 600 U.S. at 207; *but see supra* p.19, they would still fail strict-scrutiny review because they are not "narrowly tailored—meaning necessary—to achiev[ing] that interest," *SFFA*, 600 U.S. at 206–07 (citations omitted).

At minimum, the Equal Protection Clauses would demand that a statute mandating race-based redistricting contain the same safeguards of Section 2 of the VRA that make it narrowly tailored, given the historical pedigree and remedial design of that venerable provision. *See Cooper*, 581 U.S. at 292. Crucially, Section 2 carefully cabins the circumstances in which it allows the drawing of districts based upon race: the plaintiff must first satisfy the three *Gingles* "necessary preconditions," 478 U.S. at 50, and then *also* satisfy the subsequent totality-of-the-circumstances inquiry, *id*. at 79; *supra* pp.12–13. Only where a plaintiff makes this difficult two-step showing may a court conclude that a "[challenged] district is not equally open" because "minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter." *Allen*, 599 U.S. at 25. These safeguards are what render Section 2 constitutional. *Bartlett*, 556 U.S. at 21 (plurality opinion).

But the NYVRA rejects the safeguards from *Gingles*. The NYVRA expressly disclaims the first *Gingles* precondition in providing that "evidence concerning whether members of a protected class are geographically compact or concentrated shall *not* be considered [for liability]." N.Y. Elec. L. § 17-206(2)(c)(viii) (emphasis added). It then goes beyond the scope of this

precondition both by applying even where a minority group only "influence[s] the outcome of elections," *id.* § 17-206(2)(b)(ii), rather than plays a "decisive" role, *LULAC*, 548 U.S. at 446, and by authorizing the "combin[ing]" of minority groups into coalition districts, N.Y. Elec. L. § 17-206(2)(c)(iv). For the second *Gingles* precondition, the NYVRA does not require a "politically cohesive" minority group, *Wis. Legislature*, 595 U.S. at 402, as it capaciously defines "racially polariz[ed]" to mean "voting in which there is a divergence in the . . . choice[s] of members in a protected class from the . . . choice[s] of the rest of the electorate," *id.* § 17-204(6), rather than voting in which "a significant number" of members of the minority group usually vote for the same, "preferred candidate," *Gingles*, 478 U.S. at 56. For the third *Gingles* precondition, the NYVRA does not require that the "white majority votes sufficiently as a bloc to enable it . . . to defeat the minority group's preferred candidate," such that a "challenged districting [map] thwarts a distinctive minority vote *at least plausibly on account of race*." *Allen*, 599 U.S. at 18–19 (ellipses in original; emphasis added). And the NYVRA does not require the second step under *Gingles* where "a court considers the totality of circumstances to determine 'whether the political process is equally open to minority voters.'" *Wis. Legislature*, 595 U.S. at 402 (citations omitted).

Given the NYVRA's district-based provisions' failure to incorporate the *Gingles* preconditions or require a subsequent totality-of-the-circumstances showing (instead, making a looser version of this showing a stand-alone basis of liability after a "usually be defeated" threshold showing), the NYVRA mandates that political subdivisions draw race-based districts, or adopt an alternative election system, in a much broader range of circumstances than strictly "necessary" to "remediat[e] specific, identified instances of past discrimination," *SFFA*, 600 U.S. at 207; *see also Parents Involved*, 551 U.S. at 720, unlike with Section 2. The NYVRA therefore lacks the narrow tailoring that makes Section 2 constitutional.

B. Alternatively, The Action II Plaintiffs' NYVRA Claim Fails Because They Have Presented No Evidence That The Candidates Of Choice Of The Minority Racial Groups That They Identify Will "Usually Be Defeated" Under Local Law 1 Across The County

If the Court finds the NYVRA constitutional under the New York and federal Equal Protection Clauses, *but see* Part II.A, Plaintiffs' NYVRA claim still fails as a matter of law because Plaintiffs have put forth no evidence that any of their identified minority groups' preferred candidate will "usually be defeated" in Nassau County under Local Law 1, which is the legally required, threshold inquiry for liability here, *see* N.Y. Elec. L. § 17-206(2)(b)(ii).

1. "[T]he starting point in any case of interpretation must always be the language itself." *People v. Roberts*, 31 N.Y.3d 406, 418 (2018) (citations omitted). Courts also must give statutes "a sensible and practical over-all construction" that "avoid[s] an unreasonable or absurd application of the law." *Bank of Am., N.A. v. Kessler*, 39 N.Y.3d 317, 324–25 (2023) (citations omitted). The NYVRA is a recently enacted statute and courts have never applied its provisions governing jurisdictions with district-based systems, like Nassau County. Defendants respectfully suggest that this Court should adopt two legal principles to guide the NYVRA's "usually be defeated" analysis here.

First, this Court should interpret Subsection 17-206(2)(b)(ii)'s "usually be defeated" language as requiring an NYVRA vote-dilution plaintiff to demonstrate that the identified minority group's preferred candidate will be routinely defeated in elections across the entire relevant jurisdiction, not in hand-picked areas of the jurisdiction as some of Plaintiffs' experts have argued, *see* Cervas Dep. at 271:13–22; Oskooii Dep. at 233:11–237:16, or as requiring a certain number of majority-minority districts, as Plaintiffs' Complaint, Action I Compl. ¶ 45, and some of Plaintiffs' other experts, *see* Magleby Rep. at 24–25, have suggested.

To begin, there is no basis in "the [NYVRA's] language itself," *Roberts*, 31 N.Y.3d at 418, to conclude that satisfying the statute's mandatory "usually defeated" threshold showing requires a particular number of majority-minority districts. The NYVRA's plain text does not allow courts to even "consider evidence whether members of a protected class are geographically compact or concentrated" in a jurisdiction when evaluating a vote-dilution claim. N.Y. Elec. L. § 17-206(2)(c). Thus, the number of majority-minority districts is irrelevant to the "usually defeated" analysis.

Evaluating NYVRA vote-dilution claims on a jurisdiction-wide basis—here, across Nassau County—is necessary to avoid an "unreasonable . . . application of the law," *Bank of Am.*, 39 N.Y.3d at 325. After all, at least some racial group's candidate of choice "will usually be defeated" in *any* hand-picked district or districts given the zero-sum nature of elections, and the New York Legislature could not be assumed to have enacted an absurd statute, which makes compliance with the law impossible in any county or town that happens to have racially-polarized voting.

This is another place where the NYVRA's rejection of the *Gingles* framework makes a critical difference. The vote-dilution analysis under Section 2 of the VRA *does* focus on individual districts, precisely because the *Gingles* analysis is district-specific. *See Wis. Legislature*, 595 U.S. at 401–04. Indeed, where "race is the predominant factor motivating the placement of voters in or out of *a particular district*," *id.* at 401 (emphasis added), the *Gingles* analysis requires "carefully evaluating evidence *at the district level*," *id.* at 404 (emphasis added), to determine whether there is "a strong basis in evidence to conclude that § 2 demands" "mov[ing] voters based on race" into a new district, *id.*, such that the jurisdiction could "show[ ] that the design of *that district* withstands strict scrutiny," *id.* at 401 (emphasis added). Specifically, a jurisdiction only violates Section 2 of the VRA's vote-dilution provisions if all three *Gingles* "necessary preconditions" are

first satisfied. *Gingles*, 478 U.S. at 50; *Wis. Legislature*, 595 U.S. at 402. The first *Gingles* precondition, in turn, requires that a single, distinctive minority group is "sufficiently large and compact to constitute a majority in a reasonably configured district," *Wis. Legislature*, 595 U.S. at 402. Further, plaintiffs cannot satisfy this precondition by showing that *different* minority groups lumped together in a so-called "coalition" district would be able to elect their preferred candidates. *See Petteway*, 111 F.4th at 599. The second precondition requires that "the minority group must be politically cohesive," *Wis. Legislature*, 595 U.S. at 402, meaning "a significant number" of the members of the minority group usually vote for the same, "preferred candidate," *Gingles*, 478 U.S. at 51, 53–56. And the third requires that "a majority group must vote sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate." *Wis. Legislature*, 595 U.S. at 402. All of these preconditions must "be satisfied as to each district" at issue and require "carefully evaluating evidence at the district level," rather than "rel[ying] on generalizations" about the jurisdiction as a whole "to reach the conclusion that the preconditions [are] satisfied." *Id.* at 404 (citation omitted). Only if plaintiffs meet these first three, primary requirements can they proceed to establishing that the identified minority group also satisfies *Gingles*' separate, totality-of-the-circumstances inquiry. *Id.* at 402.

The NYVRA, by contrast, disclaims the *Gingles* preconditions. Regarding the first precondition, the NYVRA allows plaintiffs to prove a vote-dilution claim merely if they can show that minority groups in a jurisdiction lumped together by race regardless of where they live in the jurisdiction could "influence the outcomes of elections," N.Y. Elec. L. § 17-206(2)(b)(ii), when "combined" into a district, *id.* § 17-206(2)(c)(iv). Similarly, the NYVRA disregards the second precondition by not requiring plaintiffs to show that minority groups are "politically cohesive," *Wis. Legislature*, 595 U.S. at 402, and instead requires only a showing that voting is "racially

polarized" in the jurisdiction, which the NYVRA broadly defines as "a divergence" between these groups' voting preferences and those of other voters in the jurisdiction, N.Y. Elec. L. § 17-204(6). Because the NYVRA does not incorporate *Gingles*' preconditions, allowing NYVRA plaintiffs to show minority-preferred candidates are usually defeated on a district-by-district basis, rather than across an entire jurisdiction, would lead to non-administrable results as it would be impossible for politically divided subdivisions to comply with the statute. *Supra* pp.20–21. This is because "redistricting is often a 'robbing-Peter-to-pay-Paul' exercise," Trende Rebuttal at 94, such that by redrawing districts to ensure that one protected class's preferred candidates will not usually be defeated in one individual district, the County would inevitably "dilute" another protected class's ability to elect its preferred candidates in at least one other district.

Plaintiffs' own experts' analyses demonstrate the impossibility of complying with the NYVRA's vote-dilution provisions if they are evaluated on a district-by-district basis. Without first conducting a *Gingles* analysis for Nassau County, *see* Cervas Dep. at 145:4–146:17, Dr. Cervas drew an illustrative map to create more majority-minority districts in the County based on his analysis of seven individual districts in the County where there was racially-polarized voting, *see* Trende Rebuttal at 87, 94. In doing so, Dr. Cervas ignored the necessary effect that moving minority voters into those individual districts would have on the electoral success of the preferred candidates of members of other protected classes in the districts he did not analyze. *See* Trende Rebuttal at 94. Namely, because "redistricting is often a 'robbing-Peter-to-pay-Paul' exercise," *id.*, by redrawing districts to ensure that one protected class's preferred candidates will not usually be defeated in one individual district, the County would inevitably dilute another protected class's ability to elect its preferred candidates in at least one other district, *supra* p.18.

Second, this Court should interpret "usually be defeated" as requiring plaintiffs to show that minority-preferred candidates are routinely defeated in a significant majority of elections across the jurisdiction, as opposed to merely "50 percent" of the time, as one of Plaintiffs' experts suggest, *see* Oskooii Dep. at 129:7–12. The NYVRA does not define "usually," *see* N.Y. Elec. L. § 17-204, but, given the plain meaning of the word "usually," the Legislature's use of this word indicates that it is meant to be a robust requirement. "Usually" is commonly understood to refer to something that occurs "ordinarily" or "as a rule." *Usually*, Oxford English Dictionary (2024);[3] *see Usually*, Merriam-Webster.com Dictionary, Merriam-Webster (2024) (defining usually as "most often" or "as a rule");[4] *see also* Ex.15 at 196:8–21, 197:14–198:10 ("Lockerbie Dep.") (explaining that, in the redistricting context, "'usually defeated' means much more often than not" and cannot mean "just barely over 50 percent probability" because "we use 'usually' to mean a much more higher likelihood" like "75 percent"). Thus, based on its ordinary meaning, "usually be defeated" means one will routinely or "as a rule" be defeated and implies a standard that is far more robust than "more likely than not" or 50% plus one. It cannot reasonably be said that minority-preferred candidates are defeated "ordinarily" or "as a rule" in a political subdivision where they win—for example—49% of races in the relevant jurisdiction. *See Usually*, Oxford English Dictionary, *supra*. Indeed, that would often make compliance with the NYVRA impossible, as at least *some* racial groups' candidates of choice would be defeated more than 50% of the time, absent some unusual and mathematically improbable (or impossible) circumstance.

2. Applying this understanding of Subsection 17-206(2)(b)(ii) here, there is no "material issue[ ] of fact," *Alvarez*, 68 N.Y.2d at 324, regarding whether the preferred candidates of the

[3] Available at https://www.oed.com/search/dictionary/?scope=Entries&q=usually.

[4] Available at https://www.merriam-webster.com/dictionary/usually.

minority groups Plaintiffs identify will "usually be defeated" in Nassau County under Local Law 1. The NYVRA renders district-based plans like Local Law 1 unlawful when a racial group's preferred candidate "would usually be defeated" and there is "racially polarized voting," N.Y. Elec. L. § 17-206(2)(b)(ii). Here, "the evidence is very strong that voting in Nassau County is racially polarized," Oskooii Dep. at 135:9–11, thus Plaintiffs' claim hinges upon the "usually defeated" prong of the NYVRA's vote-dilution analysis, which they cannot satisfy.

a. Plaintiffs claim that Nassau County's redistricting plan "dilutes the voting strength of Black, Latino, and Asian voters," Action I Compl. ¶ 24, and it is undisputed that these minority-groups' "preferred candidates are Democrats" in Nassau County, Oskooii Dep. at 156:7–13; *see* Cervas Dep. at 165:3–12, 191:13–24; Ex.16 at 220:9–10 ("[I]n every election we've looked at the minority candidate of choice has been a Democrat.") ("Trende Dep."). The undisputed record evidence is that minority-preferred candidates are *not* usually defeated in Nassau County. Rather, the unrebutted expert analyses Defendants have presented demonstrate that Nassau County is "a jurisdiction where the minority candidate of choice is obviously capable of winning, and does so regularly." Trende Rebuttal at 82. That is because "[e]ven with racial polarization, there is enough crossover voting"—*i.e.* White residents voting for minority-preferred Democrat candidates—"to make the races competitive in Nassau County," such that "minority favored candidates are not usually defeated when looking at all relevant elections," "regardless of whether we are looking at even-year or odd-year races, midterm years, or presidential years, and county-wide or state-wide races." Ex.17 ¶¶ 56–57 ("Lockerbie Reply"). This is evident from the chart below showing recent national, state-wide, and county-level election results in Nassau County:

Year	Office	Minority-Preferred Candidate Victorious?
2012	President	Yes
2012	US Senate	Yes
2014	Attorney General	Yes
2014	Governor	Yes
2016	President	Yes
2016	US Senate	Yes
2017	County Executive	No
2017	County Comptroller	Yes
2017	County Clerk	No
2018	Attorney General	Yes
2018	Governor	Yes
2018	US Senate	Yes
2019	County District Attorney	Yes
2020	President	Yes
2021	County Executive	No
2021	County Comptroller	No
2021	County Clerk	No

See Lockerbie Rebuttal at T.1, T.2.

As the above chart demonstrates, "the minority favored candidates were victorious in Nassau County in every election that follows: 2012 President, 2012 Senate, 2014 Attorney General, 2014 Governor, 2016 President, 2016 Senate, 2018 Attorney General, 2018 Governor, 2018 Senate, and 2020 President." Ex.18 ¶ 21 ("Lockerbie Rebuttal"). Moreover, the minority-

favored candidate often won these races by large margins of victory. Trende Rebuttal at 78–82. For example, as recently as the last Presidential election, Joe Biden "carried the county by ten points." *Id.* at 80. Minority-favored candidates have been similarly successful in county-wide elections. Lockerbie Rebuttal ¶¶ 10–11, 33, 48; Lockerbie Reply ¶¶ 41, 56–57. As Dr. Lockerbie concluded, minority-favored candidates "win 3 and lose 4 of the county-wide elections examined in my report," and even where minority-favored candidates lose, election results "show that the county elections are competitive across the board." Lockerbie Rebuttal ¶¶ 10, 33.

As shown in the chart below, this conclusion is evident when viewing recent election results for each of the nineteen districts drawn in Nassau County's current map, which results make clear that minority-preferred candidates would often be capable of winning a majority of those nineteen districts.

Year	Office	Districts Won By Minority-Preferred Candidate	Districts Lost But Competitive
2012	President	12	5
2012	US Senate	19	0
2014	Attorney General	9	4
2014	Governor	14	2
2016	President	10	5
2016	US Senate	19	0
2017	County Executive	9	5
2017	County Comptroller	10	4
2017	County Clerk	8	2
2018	Attorney General	15	1

2018	Governor	15	1
2018	US Senate	15	1
2019	County District Attorney	15	3
2020	President	14	0
2021	County Executive	8	6
2021	County Comptroller	6	1
2021	County Clerk	4	3

See Lockerbie Rebuttal at T.1, T.2.

At bottom, Black, Latino, and Asian voters' preferred Democratic candidates in Nassau County simply do not lose elections "ordinarily" or "as a rule," *Usually*, Oxford English Dictionary, *supra*, across Nassau County, such that it cannot be said that they will "usually be defeated" within the meaning of Section 17-206, *see* N.Y. Elec. L. § 17-206(2)(b)(ii).

b. None of the evidence that Plaintiffs offer in response is sufficient to raise a genuine dispute of material fact regarding whether minority-preferred candidates will "usually be defeated" in Nassau County. *See Alvarez*, 68 N.Y.2d at 324.

Plaintiffs' primary expert on the "usually defeated" analysis is Dr. Oskooii, who concluded that "the County's White population votes sufficiently as a bloc for their preferred candidates to enable them to usually defeat the candidates preferred by Black, Latino, and Asian voters." Ex.19 at 27 ("Oskooii Rep."). But the cherry-picked evidence that Dr. Oskooii relies upon for this conclusion is that "the minority favored candidates lost in 5 out of the 8 [county-wide] races" he examines. Ex.20 ¶ 41 ("Oskooii Rebuttal"). "This, of course, tells us that they won in 3 of those elections," Lockerbie Reply ¶ 41, and this in no way shows that minority-preferred "candidates or

electoral choices" are "usually [ ] defeated," N.Y. Elec. L. § 17-206(2)(b)(ii), as that term must be interpreted, *see supra* pp.22–27. Dr. Oskooii only reaches a contrary conclusion based on his reading of "usually defeated" to mean losing in only "50 percent" of elections, *see* Oskooii Dep. at 128:5–11, 129:7–12, which interpretation is legally erroneous and would result in an absurd application of the NYVRA, *supra* pp.24–26.

In any event, even if this Court adopts Dr. Oskooii's 50% definition, there would still be no genuine dispute of fact regarding the usually defeated inquiry here because Dr. Oskooii examines only hand-picked elections, and looking at all relevant elections reveals that minority-preferred candidates do not lose a majority of the time in Nassau County. Dr. Oskooii only "examined the eight most recent, contested, county-wide, odd-year contests" and "contested odd-year elections held in years 2015 and 2013." Oskooii Rep. at 13; *see* Oskooii Dep. at 170:9–14. Dr. Oskooii simply ignores a swath of electoral results that "contradict[ ] his thesis" by showing that "White voters do not usually vote as a bloc to defeat the minority candidates of choice here." Trende Rebuttal at 77–78. For example, "White voters didn't vote sufficiently as a bloc to defeat the minority candidate of choice" in 2016. *Id.* at 78. Indeed, Hillary "Clinton carried Nassau County by six points" in the presidential election, "while Schumer carried it comfortably" in the U.S. Senate race. *Id.* The same is true of 2018, where "White voters backed the Republican candidate[s]" for Governor, Attorney General, and Senate, but "they did not vote sufficiently as a bloc to defeat the minority candidate of choice." *Id.* at 79. That year, Democratic gubernatorial candidate Andrew Cuomo won Nassau County "by just over 15 points," Democratic Attorney General Letitia James carried the county "by around 14 points," and Democrat U.S. Senator Kristen Gillibrand carried it "by 18 points." *Id.* And again, in 2020, White voters backed the Republican presidential candidate, Donald Trump, but "President Biden, the minority candidate of

choice, nevertheless carried the county by ten points." *Id.* at 80. Despite admitting that an "analysis of state and federal elections may shed light on voter behavior in county elections," Oskooii Rebuttal ¶ 7, Dr. Oskooii ignored this relevant election data, *see* Lockerbie Reply ¶ 9, and "fail[ed] to consider that white crossover voting is making minority favored candidates both competitive and successful," *id.* ¶ 46. But even only examining Dr. Oskooii's "sparse dataset," Trende Rebuttal at 77, "his own data defeats [his] claim," Lockerbie Rebuttal ¶ 10. As discussed and reflected in the charts above, minority-preferred candidates routinely win elections in Nassau County at the state-wide, national, and county-specific level and are at least competitive in elections where they are unsuccessful. *Supra* pp.27–30.

Plaintiffs also attempt to rely upon Dr. Cervas, but his analysis does not show a genuine factual dispute as to whether minority-favored candidates are usually defeated in Nassau County. First, Dr. Cervas examines a hand-picked set of "only [ ] seven districts" out of Nassau County's nineteen, Trende Rebuttal at 94; *see* Lockerbie Rebuttal ¶ 46, which is the legally wrong manner to conduct this analysis, *see supra* pp.24–25, and renders him unable to show that minority-preferred candidates will usually be defeated under the NYVRA. By ignoring the necessary impact that moving minority voters from around the County into these districts would have on minority-preferred candidates' ability to get elected in the County's twelve other districts that he did not individually analyze, Trende Rebuttal at 83, 94, Dr. Cervas failed to provide "an analysis of the competitiveness of the minority favored candidates in the districts" county-wide, Lockerbie Rebuttal ¶ 47, and cannot demonstrate whether his map actually "give[s] minorities a reasonable opportunity to elect candidates for their choice in more districts" than under Local Law 1, Trende Rebuttal at 87. Second, like Dr. Oskooii, Dr. Cervas only relied on cherry-picked, odd-year election data, *see* Cervas Dep. at 149:12–22, which data fail to show a genuine dispute of fact

regarding whether minority-preferred candidates are usually defeated in Nassau County for the reasons discussed above, *supra* pp.26–31. As Dr. Trende demonstrated, "the performance of Dr. Cervas' map is dependent upon the races selected," and "using the even-numbered year races, Dr. Cervas' map *actually decreases the number of races that the minority-preferred candidate won*." Trende Rebuttal at 94–96 (emphasis added). Both Dr. Oskooii's and Dr. Cervas' analyses do not comply with the NYVRA, are overly narrow in scope, and fail to establish a "material issue[ ] of fact which require[s] a trial of th[is] action." *Alvarez*, 68 N.Y.2d at 324.

CONCLUSION AND RELIEF REQUESTED

The Court should grant Defendants' Motions For Summary Judgment.

Dated: New York, New York
October 21, 2024

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Memorandum complies with the word count limitations set forth in Uniform Rule 202.8-b for the Supreme Court, as modified by this Court's October 9, 2024 Order authorizing summary-judgment memoranda-in-chief of 10,000 words. NYSCEF No.141. This Memorandum uses Times New Roman 12-point typeface and contains 9,899 words, excluding parts of the document exempted by Rule 202.8-b. As permitted, the undersigned has relied on the word count feature of this word-processing program.

By: */s/ Bennet J. Moskowitz*
BENNET J. MOSKOWITZ