Office of the New York State Attorney General

Letitia James Attorney General

VIA NYSCEF

November 21, 2024

Chambers of Hon. Paul B. Wojtaszek
Supreme Court, Erie County
25 Delaware Avenue, Second Floor
Buffalo NY 14202

Re: *Young v. Town of Cheektowaga*, Index No. 803989/2024

Dear Justice Wojtaszek:

On behalf of the Attorney General of the State of New York, intervenor in this action, I write concerning the parties' pending cross-motions for summary judgment (Mot. Seq. Nos. 1, 3) and the recent decision of Supreme Court, Orange County, in *Clarke v. Newburgh*, Index No. EF002460-2024 (Vazquez-Doles, J.), which issued on November 7, 2024 and is appended hereto as **Exhibit A** (Op.). *Clarke* is currently on appeal in the Appellate Division, Second Department, docketed as Appeal No. 2024-11753. In this action, defendant cited *Clarke* in its reply memorandum of law in support of its cross-motion for summary judgment, dated November 11, 2024. (NYSCEF Doc. No. 153.) Because *Clarke* was decided after the Attorney General's earlier submissions in this case, filed on September 27, 2024 and November 4, 2024, the Attorney General did not previously have an opportunity to address *Clarke*'s effect on this case. (NYSCEF Doc. Nos. 71, 152.)[1]

For the reasons that follow, this Court should stay proceedings in this action, and adjourn the oral arguments on the pending cross-motions for summary judgment that are scheduled for December 4, 2024, until the Second Department issues a decision in the appeal of the *Clarke* decision, which has been expedited. Alternatively, if the Court elects to proceed with adjudication of the pending cross-motions, the Court should not follow *Clarke* because it is not binding here and was wrongly decided.

[1] Plaintiff consented to the Attorney General's submission of this letter to the Court, and defendant consented provided that it would have an opportunity to respond. In view of the consent of the parties and the lack of opportunity for the Attorney General to address the *Clarke* decision in earlier submissions, the Attorney General respectfully requests that the Court accept this letter brief.

I. Background

In *Clarke*, plaintiffs claimed that the Town of Newburgh's use of at-large elections for Town Board, combined with racially polarized voting in the town, operated to dilute the votes of a coalition of Black and Hispanic residents and left them unable to elect the coalition's preferred candidates, allegedly in violation of Election Law § 17-206(2)(b)(i), a section of the New York Voting Rights Act (NYVRA). (Op. at 3, 5, 9-10.) Defendant argued that the provisions of the NYVRA at issue were unconstitutional under the Equal Protection Clause (*Id*. at 1.) Supreme Court, Orange County agreed, reasoning that the relevant statutory provisions were subject to strict scrutiny because they imposed racial classifications and yet were not narrowly tailored to advancing a compelling state interest. (*Id*. at 13-25.)

Plaintiffs have appealed to the Appellate Division, Second Department, and the Attorney General intervened in the appeal to defend the constitutionality of the NYVRA. The Second Department has expedited the appeal, ordering an abbreviated briefing schedule and scheduling oral argument for December 18, 2024. The Second Department's scheduling order is appended hereto as **Exhibit B**, and its calendar for the argument is appended hereto as **Exhibit C**.

II. This Court Should Stay Proceedings in this Action Pending the Second Department's Decision in the Expedited Appeal of the *Clarke* Decision

Defendant in this case presents an equal protection defense that is substantially identical to the argument that prevailed in Supreme Court, Orange County's decision in *Clarke*. Because the Second Department has highly expedited the appeal of the *Clarke* decision, it is likely that the Second Department will decide the appeal expeditiously. And when it does, the Second Department's decision on the key equal protection issues will bind this Court, given that it will be the first and only decision of the Appellate Division on those issues. *See People v. Turner*, 5 N.Y.3d 476, 482 (2005) (Appellate Division decisions are "binding on all trial-level courts in the state."). Given that a binding appellate decision on the equal protection issues at the core of the pending cross-motions is likely forthcoming, interests of judicial economy militate in favor of staying adjudication of the cross-motions pending such appellate decision. *See* CPLR 2201; *Level 3 Commc'ns, LLC v. Essex Cnty.*, 54 Misc. 3d 291 (Sup. Ct. Essex County 2016) (staying trial court proceedings pending appellate decision); *Assenzio v. A.O. Smith Water Products*, No. 190008/12, 2015 WL 5283301 (Sup. Ct. New York County Aug. 28, 2015) (same).

The Attorney General therefore respectfully requests the Court adjourn the oral arguments currently scheduled for December 4, 2024 and stay further proceedings in this action, pending the decision of the Second Department in the *Clarke* appeal. Plaintiff stated that he consented to this request, and defendant did not consent.

III. If the Court Proceeds with Adjudicating the Pending Cross-Motions, It Should Not Follow *Clarke*, Which Is Not Binding and Was Wrongly Decided

If the Court proceeds with adjudication of the pending cross-motions before the Second Department has issued its decision in the *Clarke* appeal, this Court should decline to follow Supreme Court, Orange County's analysis in the *Clarke* decision. Defendant concedes, as it must, that *Clarke* "is not binding upon this Court." (NYSCEF Doc. No. 153 at 3 n.1.) *See, e.g.*, *JY Not So Common L.P. v. P & R Bronx, LLC*, 79 Misc. 3d 626, 641 (Sup. Ct. Bronx County 2023) ("[D]ecisions issued by judges of coordinate jurisdiction do not bind this court and need not be followed."). Further, *Clarke* was wrongly decided.

Newburgh has submitted an *amicus* brief in this action advancing the same arguments it prevailed on in the *Clarke* case. (NYSCEF Doc. No. 76.) But contrary to these arguments, the NYVRA's provisions concerning vote dilution and at-large electoral systems do not impose racial classifications as that concept is understood in equal protection jurisprudence. As the Attorney General previously explained, the relevant provisions of the NYVRA are race-neutral, meaning that they can be invoked by members of any racial group who have been deprived of an equal opportunity to elect candidates of their choice or influence the outcome of elections. In other words, all racial groups are treated equally under the statute, with none advantaged and none disadvantaged. (NYSCEF Doc. No. 71 at 12-18; NYSCEF Doc. No. 152 at 2, 5.) Thus, the statute does not "distribute[] burdens or benefits on the basis of individual racial classifications." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

The fact that the NYVRA is concerned with race, which is true of all antidiscrimination statutes, does not by itself make the statute subject to strict scrutiny. (NYSCEF Doc. No. 71 at 14-15; NYSCEF Doc. No. 152 at 5-6.) Supreme Court, Orange County's reasoning that the relevant statutory provisions are subject to strict scrutiny because "classification based on race, color and national origin is the *sine qua non* for relief under the NYVRA" (Op. at 16) upends decades of precedent and, if accepted by other courts, would call into question the constitutionality of longstanding antidiscrimination statutes across the country. (NYSCEF Doc. No. 71 at 14-15; NYSCEF Doc. No. 152 at 5-6.) It is true for all laws that prohibit discrimination based on race that plaintiffs "can only seek relief on the basis of their race" (Op. at 16), and yet such laws have never been subject to strict scrutiny. On the contrary, "it is well settled that governments may adopt measures designed 'to eliminate racial disparities through race-neutral means.' " *Higginson v. Becerra*, 786 F. App'x 705, 707 (9th Cir. 2019) (quoting *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 544-45 (2015)). Indeed, Supreme Court, Orange County's opinion did not mention the decisions from California and Washington state courts, and federal courts covering those states, that upheld the constitutionality of those states' respective voting rights acts, upon which the relevant provisions of the NYVRA were modeled. And contrary to *Clarke*, those courts rejected the argument that the comparable provisions of those acts were subject to strict scrutiny. *See Higginson*, 786 F. App'x at 706-07; *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821 (Cal. App. 2006); *Portugal v.*

Franklin County, 530 P.3d 994 (Wash. 2023), *cert. denied sub nom. Gimenez v. Franklin County*, 144 S. Ct. 1343 (2024). The NYVRA is similarly subject to rational basis review, which it easily satisfies. (NYSCEF Doc. No. 71 at 19-20.)[2]

Thus, if the Court proceeds with adjudication of the pending cross-motions, it should deny defendant's motion and reject defendant's constitutional challenges to the NYVRA.

Respectfully submitted,

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[2] In addition to its erroneous equal protection analysis, Supreme Court, Orange County purported to order relief in *Clarke* that was impermissibly overbroad. First, Supreme Court, Orange County purported to strike down the NYVRA "in its entirety." (Op. at 25.) But "the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are *actually controverted* in a particular case," *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713 (1980) (emphasis added), and the only claim asserted by the plaintiffs in *Clarke* was under one provision of the NYVRA concerning vote dilution and at-large electoral systems, Election Law § 17-206(2)(b)(i). Supreme Court, Orange County had no basis, therefore, to strike down any other provision of the NYVRA that was not at issue in the case, particularly in light of the NYVRA's statutory severability clause. *See* Election Law § 17-222; *St. Joseph Hosp. of Cheektowaga v. Novello*, 43 A.D.3d 139, 146 (4th Dep't 2007) (enforcing statutory severability clause). Second, Supreme Court, Orange County's decree stated that the NYVRA may not be enforced against Newburgh or "any other political subdivision in the State of New York." (Op. at 25.) But it is well established that courts have "no power to grant relief against an individual or entity not named as a party and not properly summoned before the court." *Hartloff v. Hartloff*, 296 A.D.2d 849, 849 (4th Dep't 2002). There was no basis, therefore, for Supreme Court, Orange County to purport to prohibit enforcement of the NYVRA against any party other than Newburgh. Even the defendant in this action disclaims any contention that this Court is bound by Supreme Court, Orange Court's judgment. (NYSCEF Doc. No. 153 at 3 n.1.) These errors of law also militate against this Court following *Clarke*'s analysis.

EXHIBIT A

At a term of the IAS Part of the Supreme Court of the State of New York,
held in and for the County of Orange located at 285 Main Street,
Goshen, New York 10924 on the 7th day of November 2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

ORAL CLARKE et al.,

Plaintiffs,

-against-

TOWN OF NEWBURGH et al.,

Defendants.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

DECISION & ORDER
Index No.: EF002460-2024
Motion date: 10/18/2024
Motion Seq. No.: 5

VAZQUEZ-DOLES, J.S.C.

The following papers were read on this motion by Defendants for summary judgement pursuant to CPLR §3212:

Notice of Motion/Memo of Law/Affirmations/Ex. A-J.....1-14
Opposition Affirmation/Memo of Law/Statement Material Facts/Ex. A-DD.....15-47
Amicus Brief of the ACLU et al.....48
Reply Memo of Law/Response to Material Facts/Affirmation/Ex. K-L.....49-53

I. SUMMARY OF THE DECISION

Defendants assert that no issue of fact exists as to whether the John Lewis Voting Rights Act of New York ("the NYVRA"), pled as the basis for the claims in the Complaint, violates the Equal Protection Clause of the 14th Amendment to the United States Constitution. Where race or national origin is the basis for unequal treatment by the State, as here, the NYVRA must satisfy strict scrutiny, i.e. it must both serve a compelling state interest and be narrowly tailored. The NYVRA does not satisfy either part of that exacting standard.

Defendants have capacity to assert this challenge herein on the basis that compliance with the NYVRA will force them to violate the constitutional proscription against unequal protection under the law. Under the requisite strict scrutiny analysis, no compelling interest of the State in this instance justifies the use of extremely broad race and national origin-based legislation, which opens the door to an overhaul of the electoral system of Defendant Town of Newburgh ("Defendant Town") that could be imposed by the Court. Additionally, there is no compelling State interest in allowing multiple protected classes (here, Black and Spanish heritage) to aggregate as a single group for purposes of determining whether voter dilution exists in the Defendant Town.

Moreover the process for reaching a determination of voter dilution is not narrowly tailored and can rest on the slightest of impairments in Plaintiffs' ability to influence an election. The explicit and intentional omission from the NYVRA of a requirement of past discrimination against the putative protected class(es), and of the guardrails created by the US Supreme Court when determining the permissible scope of the bases for reform when using race in voting rights cases, cannot be reconciled with US Supreme Court precedent. This Court must adhere to that precedent on issues of potential federal constitutional violations.

For these many reasons, the NYVRA is violative of the Equal Protection Clause of the 14th Amendment to the US Constitution, which is supreme to any law of New York. Therefore, the NYVRA is hereby STRICKEN in its entirety from further enforcement and application to these Defendants and to any other political subdivision in the State of New York. Defendants' motion for summary judgment is GRANTED and the Complaint is DISMISSED.

II. PROCEDURAL HISTORY

Plaintiffs sent a letter to Defendant Town and Defendant Town Board of Town of Newburgh ("Defendant Board") on January 26, 2024. The letter notified the Defendants of Plaintiffs' intention to file a lawsuit for violations of the NYVRA. Defendant Board passed a resolution concerning the letter from Plaintiffs on March 15, 2024 ("the Board Resolution") in which Defendant Town included a plan to investigate whether a violation of the Act is ongoing there. After the Board Resolution was enacted, less than 90 days passed before Plaintiffs filed the instant lawsuit.

Plaintiffs commenced the instant lawsuit by filing a Summons and Complaint on March 26, 2024. The Complaint asserts facts as to the composition of the population in Defendant Town, voting history and trends, community issues that have established a pattern of alleged racially motivated behavior by the Defendants, and other data related to the alleged disenfranchisement. The Complaint pleads two causes of action that allege illegal "vote dilution" in Defendant Town. The first cause of action asserts that racially polarized voting ("RPV") has caused vote dilution. The second cause of action asserts that under a totality of the circumstances, the ability of Plaintiffs to elect candidates of their choice "or" to influence the outcome of elections is impaired[1], regardless of proof of RPV.

Defendants filed a motion to dismiss (Seq. #1) in lieu of an Answer. The sole predicate for the motion was that Plaintiffs allegedly were prohibited by the NYVRA from filing this

[1] Notably, Count Two is pled in the disjunctive, an apparent recitation of the statutory wording. Neither the Complaint nor the Opposition to the instant motion clarify whether Plaintiffs assert that, under the totality standard, their votes were diluted on both bases for impairment (election of chosen candidate *and* ability to influence election). For purposes of the instant summary judgment motion, viewing the facts in the light most favorable to the non-movant, the Court addresses the Complaint as having pled both.

lawsuit until the expiration of the 90 day "safe harbor" provision, NY Election Law 17-206(7). The Court denied the motion on May 17, 2024. Defendants filed an Answer on May 28, 2024.

The NYVRA requires that "actions brought pursuant to this title shall be subject to expedited pretrial and trial proceedings and receive an automatic calendar preference". NY Election Law 17-216. A Preliminary Conference Order was entered on May 10, 2024 that required Plaintiffs to disclose expert reports by June 28, 2024 and Defendants to do so by July 2, 2024.

The parties each disclosed two experts, whose reports and depositions are appended as exhibits to the instant motion. In sum, Plaintiff's experts assert the two protected classes of Black and Hispanic voters can – in the aggregate – be configured within four or five newly created single-member districts that will render likely the election of one or two chosen candidates. The experts assert that RPV exists in Defendant Town based on a statistical analysis of voting trends. They also assert that the ability of voters in the two protected classes to influence the elections and elect their candidate of choice has been impaired by the current at-large system.

Defendants' experts contest these findings. They assert that the statistical analysis has a significant margin of error due to its reliance on numerous vaguely defined variables, such as whether voters with particular surnames or who live on a particular residential block are actually Black or Hispanic. They contest whether RPV does exist and also whether the creation of districts would have an effect on the alleged impairment of the protected classes.

A briefing schedule for the instant motion was set in an Order docketed on September 24, 2024 (letter endorsed by the Court). The Court had set this trial to begin on October 31, 2024 but that date was adjourned sine die in the Decision and Order on Motion Seq. #7.[2]

III. FACTS UNDERLYING THE COMPLAINT

Plaintiffs are six residents of Defendant Town. Defendant Town is a political subdivision of the State of New York. Three of the Plaintiffs assert that they identify as Black and three other Plaintiffs assert that they identify as Hispanic. The Complaint asserts that as of 2020, Defendant Town was comprised of a population that was 15% "black", 25% "Hispanic" and 61% "white". On the instant motion, Plaintiff slightly changed their position to assert that as of 2022, 15.4% identified as "non-Hispanic Black" and 25.2% as "Hispanic". *Compare* Complaint at Par. 32 *with* Plaintiff Statement of Facts at Par. 39. Defendants do not contest that the 2022 data Plaintiff rely upon provides these percentages.

Defendant Town holds elections on a periodic basis for voters to choose members of Defendant Board. The election process provides that voters living anywhere in Defendant Town may vote for each of the open seats in a given election ("at-large voting"). Defendant Board has four elected positions, with four years terms, that are voted upon in staggered two years intervals. A fifth member, the Town Supervisor, is not elected.

[2] Motion Seq. #7 concerned whether the untimely disclosure of an addendum by one of Plaintiff's experts should cause the exclusion of that document and his related testimony at trial. Motion Seq. #7 was not directed to the consideration of the expert addendum on the instant Motion Seq. #5.

IV. ANALYSIS

A. Summary Judgment Standard

CPLR §3212(b) states, in pertinent part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Section §3212(b) further states that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." "Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact" *Anyanwu v Johnson*, 276 A.D.2d 572 (2nd Dept. 2000). Issue finding, not issue determination, is the key to summary judgment. *Krupp v Aetna Casualty Co.*, 103 A.D.2d 252 (2nd Dept. 1984). In deciding the motion, the court must view the evidence in the light most favorable to the non-moving party. *Kutkiewicz v Horton*, 83 A.D.3d 904 (2nd Dept. 2011).

The facts at issue regarding RPV and diminished ability of the protected classes at issue to influence an election outcome are not material to the legal issue of whether the NYVRA violates the Equal Protection Clause. Those few facts that *are* material to a review of the NYVRA for constitutionality are not contested: Defendant Town is a political subdivision with at-large voting; Plaintiffs are members of two different protected classes; Plaintiffs have claimed RPV against them and/or impairment of their influence on election outcomes; and the Court is authorized to impose certain remedies in the NYVRA, including a mandate for new single-member districts, if Plaintiffs were to prevail at a trial.

Thus, viewing the facts most favorably for Plaintiffs, and assuming arguendo that the aforementioned factual disputes would be resolved in their favor at trial, remedies imposed

pursuant to the NYVRA could nonetheless require Defendants to violate the Equal Protection Clause. For that reason, the Court proceeds to review Defendants' challenge to the NYVRA.

B. Purpose of the NYVRA

The New York State Senate proposed Senate Bill 2021-S1046 in the 2021-2022 session. The bill was amended five times, passed by both the Senate and Assembly, and signed into law as version S1046E by the Governor in 2022 as NY Election Law 17-200 et seq.

The NYVRA states that its purposes are:

> 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.

NY Election Law 17-200.

The legislative history of the NYVRA corroborates this intention of the NYVRA, as well as states the justification for the breadth of the legislation:

> PURPOSE:
>
> The purpose of the NYVRA is to encourage participation in the elective franchise by all eligible voters to the maximum extent, to ensure that eligible voters who are members of racial, ethnic, 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; to improve the quality and availability of demographic and election data; and to protect eligible voters against intimidation and deceptive practices.
>
> JUSTIFICATION
>
> . . . But both the Washington and California state voting rights NYVRAs are limited to addressing vote dilution in at-large elections. The New York Voting rights NYVRA builds upon the demonstrated track record of success in California and Washington, as well as the historic success of the federal voting rights NYVRA by offering the most comprehensive state law protections for the right to vote in the United States. The law will

> address both a wide variety of long-overlooked infringements on the right to vote and also make New York a robust national leader in voting rights at a time when too many other states are trying to restrict access to the franchise.

Senate Bill 2021-S1046E, Sponsor (Myrie) Memorandum (Version E – final) within Ex. G to the Opposition.

The Governor signed a memorandum on June 20, 2022 that states in no uncertain terms that the NYVRA is intended to extend beyond the FVRA and provide greater protections:

> As the federal government fails to fulfill its duty to uphold voting rights across the nation, it is now incumbent upon states to step-up and step-in, and this legislation ensures voting rights will be protected in New York . . . . It also builds upon the federal Voting Rights act's vital preclearance scheme, which was gutted by the U.S Supreme Court in Shelby County v. Holder.

Governor's Bill Jacket (Ex. G to the Opposition).

C. Prohibitions and Remedies Created by the NYVRA

The NYVRA prohibits certain actions, or the effects of such actions, in the voting process within a "political subdivision". NY Election Law 17-206(1). "Political subdivision" is defined to include any town in New York. NY Election Law 17-204(4). Defendant Town is a "political subdivision" encompassed by the NYVRA.

The NYVRA makes it unlawful for Defendant Town to "use 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, as a result of vote dilution" (hereafter collectively, "Unlawful Vote Dilution"). NY Election Law 17-206(2)(a). A "protected class" (singular) is defined as "members of a race, color or language-minority group". NY Election

Law 17-204 (5). The use of "race, color or language-minority[3]" as the statutory definition of "protected class", and thus the universe of people who can claim "vote dilution", encompasses literally every person in the State of New York - because every person is a member of some race or is of some color.

The NYVRA refers to 'protected class' repeatedly in the singular in Section 17-206(2) with respect to prohibited practices. However, the NYVRA later allows the aggregation of an unlimited number of protected classes, in two instances. First, aggregation is allowed where "there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision." NY Election Law 17-206(2)(c)(vi). Later in the same subsection 17-206, aggregation is allowed for a different reason, to wit, "in the event that they demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate." NY Election Law 17-206(8). There is no explanatory wording in the NYVRA to address i) why protections extend to only a single class but are subsequently extended to multiple classes, and ii) if aggregation is authorized, whether both requirements (i.e., 206(2)(c)(vi) and 206(8)) must be satisfied.

The NYVRA provides that Unlawful Vote Dilution exists where a town: "(i) used[4] an at-large method of election and either: (A) voting patterns of members of the protected class within[5]

[3] The definition of "language-minorities" is the same as set forth in federal law, to wit, "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage". 52 USC § 10310(c)(3). Three of the Plaintiffs have described themselves as "Hispanic."

[4] The legislation provides no explanation for why the voting system is assessed retrospectively but RPV and impairment of ability are reviewed in real time. Thus, it is unclear whether *past* RPV or *past* impairment of the protected class is a basis for relief.

[5] The legislation does not clarify why a polarization of members of the protected class *from each other* is a criteria for relief, versus polarization of that class from the rest of the electorate.

the political subdivision are racially polarized; or[6] (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; . . . ." NY Election Law 17-206(2)(b). "At-large" method of election includes "a method of electing members to the governing body of a political subdivision: (a) in which all of the voters of the entire political subdivision elect each of the members to the governing body; . . . ." NY Election Law 17-204(1). There is no issue of fact herein that Defendant Town employs "at-large" voting.

"Racially polarized voting" means voting in which "there is a divergence in the candidate, political preferences[7], or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate." NY Election Law 17-204(6). However, the descriptive wording of subsection 17-206(2)(b) ("racially polarized") does not employ that three word definition of RPV as a noun. Moreover, subsection 17-206(2)(b) refers to racial polarization *among* the protected class, not in comparison to the majority.

The NYVRA lists 11 factors that a court *may* consider when deciding whether Unlawful Vote Dilution has occurred. NY Election Law 17-206(3)(a)-(k). This list is not exclusive. Id. The NYVRA specifies nine ways in which a reviewing court must weigh and consider evidence of Unlawful Vote Dilution. NY Election Law 17-206(2)(c)(i)-(ix).

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[6] Notably, in each of the Senate sponsor memoranda that accompanied the earlier versions (Original and A-D) of the Senate Bill, the word "and" appeared between subsections (A) and (B). Had the final bill used "and", then the NYVRA would have required RPV for any violation. But the final bill (and perhaps some or all of the earlier bills, the text of which are not available) used "or", thereby making proof of RPV merely optional. As discussed infra, this significant change of removing the RPV requirement, in comparison to RPV being required by the FVRA (as well as the California and Washington legislation), is one of the reasons why the NYVRA does not satisfy the strict scrutiny standard.

[7] The legislation does not explain how "political preferences" can be a factor for comparison when it is listed only in respect to the protected class but not for the rest of the electorate.

A court that finds in favor of a Plaintiff has extremely broad authority to change in virtually every respect how elections are conducted in the affected political subdivision. A court "shall implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process, which may include, but shall not be limited to:

(i) a district-based method of election;

(ii) an alternative method of election;

(iii) new or revised districting or redistricting plans; . . . .

NY Election Law 17-206(5).

D. Capacity of Defendants to Seek Summary Judgment

Plaintiffs oppose the motion initially on the basis that Defendants do not have capacity to challenge the NYVRA on the basis of its constitutionality, because Defendants are part of the very government that enacted the NYVRA. They also assert that the time for such a challenge comes only after the Court has adjudicated the case on the merits and imposed a remedy that Defendants must implement. Plaintiffs summarize the general rule but do not accurately capture the scope and application of the exceptions.

"[P]olitical power conferred by the Legislature confers no vested right as against the government itself." *City of New York v State of New York,* 86 NY2d 286 (1995). "The concept of the supreme power of the Legislature over its creatures has been respected and followed in many decisions . . . counties are mere political subdivisions of the State, created by the State Legislature and possessing no more power save that deputed to them by that body." *Id.* The Court of Appeals has extended the doctrine of no capacity to sue by municipal corporate bodies

to a wide variety of challenges based as well upon claimed violations of the State Constitution, not just the federal Constitution. *Id.* However, this rule is not without exceptions.

Four distinct instances have been defined by the Court of Appeals for when a municipality may challenge the constitutionality of a law that it is required to enforce. Those exceptions are as follows:

> (1) an express statutory authorization to bring such a suit *(County of Albany v Hooker,* 204 NY, at 9, *supra);* (2) where the State legislation adversely affects a municipality's proprietary interest in a specific fund of moneys *(County of Rensselaer v Regan,* 173 AD2d 37, *affd* 80 NY2d 988; *Matter of Town of Moreau v County of Saratoga,* 142 AD2d 864); (3) where the State statute impinges upon "Home Rule" powers of a municipality constitutionally guaranteed under article IX of the State Constitution *(Town of Black Brook v State of New York,* 41 NY2d 486); and (4) where "the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription" *(Matter of Jeter v Ellenville Cent. School Dist.,* 41 NY2d 283, 287 [citing *Board of Educ. v Allen,* 20 NY2d 109, *affd* 392 US 236]).

City of New York, 86 NY2d at 291-292.

Here, Defendants rely upon and fall squarely within the ambit of the fourth of these exceptions, namely that compliance with the NYVRA will force them to violate the constitutional proscription against unequal protection under the law. The Court of Appeals in *Matter of Jeter* held that certain parties lacked capacity because they did not assert that "***if*** they are obliged to comply with the State statute," said compliance would violate the constitution. 41 NY2d at 287 (emphasis added). The wording of the decision in the future tense ("if they are") confirms that an actual mandated violation is not a perquisite to a challenge. Here, Defendants assert that if they are required to comply with the NYVRA, through a mandate of this Court that

alters their electoral system, it will require them to violate the Equal Protection Clause. Under these circumstances, Defendants have capacity to assert their constitutional challenge of the NYVRA now, in the instant motion, which is ripe for review.

E. The Equal Protection Clause

In the wake of the Civil War, Congress proposed and the States ratified the Fourteenth Amendment. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." US Constitution, Amend. XIV, Sec. 1. The last clause of Section 1 is commonly referred to as the "Equal Protection Clause." It is this provision of law that is the basis for the constitutional challenge of the Defendants.

The US Supreme Court summarized the monumental passage of this amendment in *Students for Fair Admissions, Inc. v President and Fellows of Harvard College*, 600 US 181, 201-202 (2023):

> To its proponents, the Equal Protection Clause represented a 'foundation[al] principle'—the absolute equality of all citizens of the United States politically and civilly before their own laws . . . . The Constitution, they were determined, should not permit any distinctions of law based on race or color . . . because any "law which operates upon one man [should] operate *equally* upon all . . . . . As soon-to-be President James Garfield observed, the Fourteenth Amendment would hold 'over every American citizen, without regard to color, the protecting shield of law."

Id. (citations omitted).

The New York Constitution includes a provision with similar wording: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person

shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." NY Constitution, Art. 1, Sec. 11. Defendants also rely upon that state authority for their challenge to the NYVRA.

The US Constitution provides that it and all federal law is the supreme law of the United States. US Constitution, Art. VI. While no state can pass and enforce legislation that limits the rights of citizens in contravention of federal law, there is no bar to a state passing a law that provides enhanced rights to its citizens that exceeds the protections of federal law. For that reason, the Court reviews the instant motion for its compliance with the potentially narrower protections afforded Defendants by the US Constitution. To the extent that the NYVRA unlawfully exceeds the limits of the Equal Protection Clause, *a fortiori* it will also exceed the potentially more generous protections afforded by the New York Constitution.

F. Strict Scrutiny Standard

The US Supreme Court issued its first majority decision requiring "strict scrutiny" in *Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989). *See Adarand Constructors v Pena*, 515 US 200 (1995) (recounting the history of the heightened standard of review). In *Croson*, it considered whether a city's determination that 30% of its contracting work should go to minority-owned businesses was constitutional. *Croson* held that "the single standard of review for racial classifications should be "strict scrutiny." *Id.,* at 493–494. That standard has not changed since 1989 with regard to the review of a state or federal law that classifies the rights of differing people on the basis of race or national origin.

Notably, the Supreme Court has repeatedly held that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Adarand, 515 US.* at 273. "Racial classifications of any sort must be subjected to 'strict scrutiny." *Id.* at 285. The Court in *Croson* affirmed its adherence to requiring strict scrutiny in *all* instances of race-based legislation, regardless of the demographics in the protected class or the majority group: "The standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification". *Croson* at 493-494.

Thirty-five years later, the Supreme Court reaffirmed its precedent of requiring that the Equal Protection Clause prohibits discrimination against all people, not just those classes who have experienced historic discrimination or who experienced such morally repugnant treatment to a degree greater than other people:

> Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." *Yick Wo*, 118 U.S. at 369, 6 S.Ct. 1064. For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–290, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). "If both are not accorded the same protection, then it is not equal." *Id.*, at 290.

Students for Fair Admissions, 600 US at 206. *See Johnson v California,* 543 US 499, 505-506 (2005) ("We therefore apply strict scrutiny to *all* racial classifications to 'smoke out' illegitimate uses of race . . . .").

Here, the text of the NYVRA, on its face, classifies people according to their race, color and national origin. These are not mere passing references in the legislation. These classes of people are not simply mentioned as part of the justification for its passage, or as part of some broader plan for electoral reform by which these classes might derive some tangential benefit. Instead classification based on race, color and national origin is the *sine qua non* for relief under the NYVRA. A person can only seek relief on the basis of their race, color or national origin and remedies are likewise created based upon those classifications. For Plaintiffs to suggest that the NYVRA is not a race-based (or national origin-based) statute is simply to deny the obvious.

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent." *Affiliated Brookhaven Civic Org. v Planning Board of Town of Brookhaven*, 209 AD3d 854 (2d Dept. 2022) (citations omitted). "[T]he clearest indicator of legislative intent is the statutory text". Id. "It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.' " *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

That being said, the inclusion of a race-based criteria does not, in and of itself, foreclose the possibility for enforcement of the NYVRA. Whether statutes are violative of the Equal Protection Clause can only be determined after the analysis required by US Supreme Court precedent. Thus, the strict scrutiny standard will be the basis upon which this Court will decide whether the NYVRA's prohibitions and remedies can satisfy the bar that the US Supreme Court has established for such state action.

G. Compelling Interest and Narrowly Tailored Legislation

i. Compelling Interest

The NYVRA must satisfy one of the very few identifiable bases for race-based government action. *See Students for Fair Admissions,* 600 US at 203 (e.g. education, housing covenants, buses, golf courses, remediating specific, identified instances of past discrimination that violated the Constitution or a statute). Yet, the Court is unable to find within its text any of those enumerated justifications. In voting rights cases, past discrimination against the protected class has been the justification for race-based statutes, such as the FVRA.

Yet, the wording of the NYVRA is devoid of any requirement of proving past discrimination by a protected class. Section 17-206, as discussed in detail supra, includes no such requirement. Voter dilution can be established simply by a showing that a protected class has an impaired ability to influence an election. Moreover, "protected class" is not defined by reference to historic discrimination. Instead, persons of any "race, color or language minority" have standing to seek redress. Thus, a minority (or even a majority) in a political subdivision comprised of persons who identify as White can seek electoral changes if they establish any impairment of their ability to affect an election, *absent any evidence of historic discrimination against people of that color* in that political subdivision.

The only wording related to the NYVRA with regard to past discrimination is in the Senate Sponsor Memorandum, which is not part of the NYVRA. Moreover, that wording does not even go as far as stating that the NYVRA was enacted to remedy historic discrimination, only mentioning discrimination. *See* Senate Bill 2021-S1046E, Sponsor (Myrie) Memorandum (Version E – final) within Ex. G to the Opposition.

More importantly, the NYVRA lists discrimination among the factors that a Court *may, but need not necessarily,* consider when deciding if voter dilution has occurred. See NY Election law 17-206(3)(a) ("the history of discrimination in or affecting the political subdivision; . . . ."). A Court can grant relief pursuant to the NYVRA absent a history of *any* discrimination against the "protected class". This intent to exclude historic discrimination from the NYVRA requirements is also manifest in its omission of requiring RPV. Unlike the Washington and California voting rights acts that Plaintiffs rely upon so heavily to support their position, those acts do require RPV to prove vote dilution. Cal. Election Code 14028(a) ("A violation of Section 14027 is established if it is shown that racially polarized voting occurs . . ."); Wash. Elections Stat. Ann. 29A.92.030(1) (proof of a violation when it is shown that: "(a) Elections in the political subdivision exhibit polarized voting; ***and*** (b) Members of a protected class or classes do not have an equal opportunity to elect candidates of their choice . . . .") (emphasis added). As noted supra, fn. 6, the passage of the NYVRA used "or" to join RPV with other means of proving vote dilution, resulting in RPV being merely optional in New York to prove a violation.

As a result, the NYVRA fails to satisfy the first part of the strict scrutiny standard. No compelling interest -as that term has been defined by the US Supreme Court's interpretation of the Equal Protection Clause – exists in protecting the voting rights of any group that has historically never been discriminated against in a political subdivision. Here, while Plaintiffs' Opposition discusses alleged past discrimination against persons who are Black and of Spanish Heritage in Defendant Town, that is not a requirement for their cause of action. They can decline to offer such proof at trial. If they do offer such proof, there is no standard for this Court

to use in determining the sufficiency of that evidence because proof of discrimination is not required *to any degree* by the NYVRA. While the two groups herein might establish some impairment of their ability to influence an election, the US Supreme Court has held that such impairment – without a history of discrimination - is not sufficiently compelling to justify a state mandate based on race or national origin.

Additionally, no compelling interest exists in allowing multiple protected classes to aggregate for purposes of proving vote dilution. Aggregation is raised by the instant motion because the Complaint asserts that each group of Plaintiffs (Black and Spanish heritage) comprise less than a majority of the population of Defendant Town but cannot independently form a majority in a reasonably configured district. Therefore they seek to aggregate the two groups into a single group for purposes of proving vote dilution.

Even if such aggregation were permissible as a compelling interest, its boundaries must be defined. Here, the NYVRA states aggregation is allowed where "there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision." NY Election Law 17-206(2)(c)(vi). But in the same subsection 17-206, aggregation is allowed for a different reason, to wit, "in the event that they demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate." NY Election Law 17-206(8).

ii. Narrowly Tailored

Even if the Court assumes, arguendo, that the NYVRA does serve a compelling interest, Plaintiffs must also prove that the prohibitions and remedies are narrowly tailored. "Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it." *Grutter v*

Bollinger, 593 US 306, 26 (2003). "When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." Id. *See Parents Involved v Seattle School District No. 1*, 551 US 701, 704 (2007) ("Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives").

Here, the breadth of remedies that a Court can impose for the most minimal of impairments of a class of voters' ability to influence an election cannot be described as "narrow" in any sense of that word. The NYVRA sets no minimum bar on the extent of any such impairment of voter ability to influence an election and does not require RPV or impairment of the ability of a protected class to elect a candidate of choice.

Moreover, the review standard is lax to the point of explicitly allowing a court to find voter dilution exists without citing any basis. The NYVRA allows a finding of vote dilution based upon a "totality of circumstances", which lacks any defined criteria because the NYVRA lists 11 factors that *may* be considered. Thus, a court is free to find voter dilution based on *any* criteria that the court itself creates, or no criteria at all. NY Election Law 17-206(3)("Nothing in this subdivision 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.").

Plaintiffs are quick to compare the NYVRA to the FVRA when it suits their purposes. However, that is not entirely, but is largely a two way street. Attempts to extend the FVRA to the degree that Plaintiffs assert here have been soundly rejected. In *LULAC v. Perry*, 548 U.S. 399 (2006), the Supreme Court held that Section 2 of the FVRA does not require the creation of

"influence districts, " where a minority group cannot elect the candidate of its choice because of its sub-majority numbers but the group may still play an influential role in the electoral process. The Court held that the ability of members of a minority group to influence an election in a district was insufficient to state a claim for vote dilution. "The opportunity 'to elect representatives of their choice,' ***requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice.***" *Id.*

H. Precedent for Judicial Review of Voting Rights Legislation

In the context of voting rights, the Equal Protection Clause forbids "racial gerrymandering," that is, intentionally assigning citizens to a district on the basis of race without sufficient justification. *Abbott v Perez*, 585 US 579, 585 (2018), *citing Shaw v. Reno,* 509 U.S. 630, 641 (1993). "At the same time that the Equal Protection Clause restricts the consideration of race in the districting process, compliance with the [Federal] Voting Rights Act of 1965 . . . pulls in the opposite direction: it often insists that districts be created precisely because of race." *Id.* "Since the Equal Protection Clause restricts consideration of race and the [F]VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to " 'competing hazards of liability.' " *Id.* at 587, citing *Bush v. Vera,* 517 U.S. 952, 977 (1996) (plurality opinion).

As a result of this tension between the Equal Protection Clause and the FVRA, a significant body of law developed over the past 60 years whereby the FVRA could be applied as intended by Congress, but not without limitation. Plaintiffs on this score turn away from the FVRA and urge this Court to disregard that precedent, holding that the NYVRA is constitutional, despite its explicit rejection of certain guardrails so firmly created over decades to prevent undue

infringement on the Equal Protection Clause. The Court declines this invitation to ignore binding US Supreme Court precedent and apply the NYVRA in a manner by which it would become supreme over the guarantees provided by the US Constitution.

Thornburg v. Gingles, 478 U.S. 30 (1986) created the framework for analyzing vote dilution claims under the FVRA. *Gingles* specified three preconditions that a minority group must prove to succeed on a vote dilution claim: the minority group is i) sufficiently large and geographically compact to constitute a majority in a [reasonably configured] single-member district; ii) politically cohesive, and iii) able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... to defeat the minority's preferred candidate." *Id.* If these three preconditions are established, the minority group must then show that, "based on the totality of circumstances," the electoral process is not "equally open" to its members. This final step of the analysis entails considering several factors, often called 'the Senate factors' because they originated from the Senate Judiciary Committee Report accompanying the 1982 Amendments. *Id.* at 36-37.

That process has been followed in an unbroken line of Supreme Court decisions over four decades, regardless of the composition of that Court and the philosophies of its members. In some unusual instances, principles of law ring so true, and are established over time with repeated confirmation, that the doctrine of stare decisis overcomes the inclination of any member or faction of a court to disturb decades of precedent. The *Gingles* preconditions have been one of those rare examples.

The NYVRA mandates that a reviewing court *not* consider the first of the *Gingles* preconditions in determining a vote dilution claim. NY Election Law 17-206(c) "For the

purposes of demonstrating that a violation of paragraph (a) of this subdivision has occurred, evidence shall be weighed and considered as follows: . . . (viii) evidence 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 . . . ." Plaintiffs urge this Court to cast aside 40 years of jurisprudence and decline to apply *Gingles* to the analysis of the NYVRA, with no legal authority.

The Court is mindful that *Gingles* determines claims under the FVRA and this case presents a claim under the NYVRA. However, the analysis of *Gingles* is one by which the Supreme Court created a balance of the aforementioned tension between the Equal Protection Clause and voting rights legislation. Assuming arguendo that New York has authority equal to Congress to pass voting rights legislation that is race-based, a principle that is itself controversial, the NYVRA still must satisfy judicial precedent that permits a rare state-sanctioned infringement on the rights of persons not in the protected class. The Court is not aware of, and no party has provided upon its request, any case from the Supreme Court or any other federal court that determined that the first precondition of *Gingles* is not applicable to the issue of whether a state voting rights act is violative of the US Constitution.

The NYVRA's elimination of the first *Gingles* factor effectively creates a right to proportional representation. Where one class cannot establish that it can elect a candidate of choice - even if new districts are created -- then the aggregation of many such classes into one will result in a de jure mandate of representation in proportion to these innumerable classes, each of which has no minimum percentage of voting population. When the FVRA was amended, the Senate included wording to explicitly *reject* such a requirement. 52 USC 10301(b) ("nothing in

this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population").

In *Bartlett v State Board of Elections*, 556 US 1, 15 (2009), the Supreme Court rejected Plaintiff's argument herein, declining to hold that the FVRA "grants special protection to a minority group's right to form political coalitions." *Bartlett* rejected the argument that 'opportunity' under the FVRA includes the opportunity to form a majority with other voters—whether those other voters are other racial minorities, whites, or both. *Id.* When a minority group cannot constitute a majority in a single-member district without combining with members of another minority group, the FVRA does not provide protection because there neither has been a wrong nor can there be a remedy. *Growe v Emison*, 507 U.S. 25, 41 (1993); *see Allen v. Milligan*, 599 U.S. 1, 28 (2023) ("Forcing proportional representation is unlawful and inconsistent with this Court's approach to implementing § 2 [of the FVRA].").

A similar argument was recently raised and rejected in a federal appellate case, *Pettway v Galveston County*, 11 F4th 596 (5th Cir 2024) (en banc). In *Pettway*, the protected class asked for new "crossover districts" in which they could elect the candidate of their choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate. The court rejected the proposal because when "a minority group constitutes less than a majority of the citizen voting-age population in a reasonably configured district, it has no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength." Id. at 610.

Coalition claims pose the same practical problems as crossover claims in determining the existence of the *Gingles* preconditions, especially whether the distinct minority groups are

politically cohesive. *Pettway*, 11 F4th at 610-611. Coalition claims create questions of "judicially unmanageable complexity". *Id.* "[C]ontemporary demographics suggest there is no stopping point if minority coalitions may be formed out of any minority racial or language groups. Id. The factual complexity of coalition claims only increases as the number of minority groups within the coalition increases. Id.

Based on this history of cases rejecting the coalition claim that Plaintiffs herein plead as their basis for sweeping electoral reform in Defendant Town, this Court holds that such claims do not satisfy the clear standards set forth in *Gingles* and its progeny. For that additional reason, the NYVRA is in violation of federal law and therefore cannot stand.

Conclusion

For all the foregoing reasons, it is hereby

ORDERED that Defendants' Motion Seq. #5 for summary judgment is **GRANTED** and it is further

ORDERED that the Complaint is **DISMISSED**, and it is further

ORDERED that the NYVRA is hereby **STRICKEN** in its entirety from further enforcement and application to these Defendants and to any other political subdivision in the State of New York.

The foregoing constitutes the Decision and Order of this Court.

Dated: November 7, 2024
Goshen, New York

ENTER:

HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

EXHIBIT B

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M300905
KS/

HECTOR D. LASALLE, P.J.
CHERYL E. CHAMBERS
JANICE A. TAYLOR
DONNA-MARIE E. GOLIA, JJ.

2024-11753 DECISION & ORDER ON MOTION

Oral Clarke, et al., plaintiffs-appellants,
v Town of Newburgh, et al., respondents;
Letitia James, etc., intervenor-appellant.

(Index No. 2460/2024)

On the Court's own motion, it is

ORDERED that the decision and order on motion of this Court dated November 15, 2024, in the above-entitled case is recalled and vacated, and the following decision and order on motion is substituted therefor:

Appeals from an order of the Supreme Court, Orange County, dated November 7, 2024.

On the Court's own motion, it is

ORDERED that on or before November 26, 2024, the appellants shall perfect the appeals by causing the original papers constituting the record on appeal to be filed in the office of the Clerk of this Court (*see* 22 NYCRR 1250.9[a][5], 1250.14[b]), and by serving and filing the appellants' briefs via NYSCEF, if applicable, or, if NYSCEF is not mandated, by serving the appellants' briefs, and uploading a digital copy of the appellants' briefs, with proof of service thereof, through the digital portal on this Court's website; and it is further,

ORDERED that on or before December 5, 2024, the respondents shall serve and file the respondents' brief via NYSCEF, if applicable, or, if NYSCEF is not mandated, serve the brief and upload a digital copy of the brief, with proof of service thereof, through the digital portal on this Court's website; and it is further,

ORDERED that on or before December 9, 2024, the appellants shall serve and file the reply briefs, if any, via NYSCEF, if applicable, or if NYSCEF is not mandated, serve the reply

briefs and upload a digital copy of the reply briefs, with proof of service thereof, through the digital portal on this Court's website.

LASALLE, P.J., CHAMBERS, TAYLOR and GOLIA, JJ., concur.

ENTER:

Darrell M. Joseph
Clerk of the Court

EXHIBIT C

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

CALENDAR FOR: Wednesday, December 18, 2024 at 2:00 PM

LOCATION: Brooklyn, NY

LaSalle, P.J., Chambers, Taylor and Golia, JJ.

1 2024-11753 Clarke v Town of Newburgh
COURT: Supreme COUNTY: Orange J/O: Order DATED: 11/07/2024