SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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

Plaintiffs,

– against –

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

Defendants.

Index No. EF002460-2024

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In their headlong rush to eviscerate the protections afforded to New York voters under the John R. Lewis Voting Rights Act ("NYVRA"), Defendants ignore New York's settled rule that "municipalities . . . and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation." *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 383 (2017) (quoting *City of New York v. State of New York*, 86 N.Y.2d 286, 289 (1995)). As "the preeminent sovereign," *Baldwin Union Free Sch. Dist. v. Cnty. of Nassau*, 62 Misc. 3d 236, 255 (N.Y. Sup. Ct. 2018), New York rationally chose to prohibit its subdivisions from seeking to invalidate state laws. *See In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 892 F.3d 108, 110-11 (2d Cir. 2018). That choice must be respected here: Defendants may not advance a facial constitutional challenge to the NYVRA.

Regardless, the facial constitutional arguments Defendants are so eager to advance are meritless. The NYVRA is a relatively *new* law, but it is not a highly *novel* law. To the contrary, it strongly resembles both other state voting rights acts ("state VRAs") and, in many respects, the federal Voting Rights Act ("federal VRA"). Once these similarities are recognized, Defendants' arguments that the NYVRA is racially discriminatory collapse. Defendants offer no explanation as to how the NYVRA could possibly be unconstitutional "in every conceivable application," *Cohen v. State*, 94 N.Y.2d 1, 8 (1999), when courts routinely apply very similar laws consistent with equal protection principles. *See, e.g.*, *Portugal v. Franklin Cnty.*, 530 P.3d 994, 1006 (Wash. 2023); *Pico Neighborhood Assn. v. City of Santa Monica*, 15 Cal. 5th 292, 314 (2023). These courts include the U.S. Supreme Court, which affirmed the use of race-conscious districting to remedy racial vote dilution in *Allen v. Milligan*, 599 U.S. 1 (2023).

Defendants offer various other arguments premised on misleading excerpts from their preferred U.S. Supreme Court opinions, stitched together into a constitutional crazy quilt. None are persuasive. Defendants argue that the NYVRA violates the federal Equal Protection Clause because it "require[s] political subdivisions to make redistricting decisions based upon their residents' racial classifications." NYSCEF 70 at 15. That is wrong. The NYVRA does not include *any* racial classifications – none of its provisions distribute burdens or benefits to individuals on the basis of their race. While some provisions *refer* to race-related concepts (like racially polarized voting), that is entirely different from *classifying* people by race. Likewise, the fact that experts in this case assessed the voting patterns of voters from various racial groups does not invite heightened scrutiny. The U.S. Supreme Court has specifically rejected "[t]he contention that mapmakers must be entirely 'blind' to race" when identifying and remedying racial vote dilution. *Milligan*, 599 U.S. at 33. For these reasons, Defendants' reliance on *Students for Fair Admissions Inc. v. President & Fellows of Harvard Coll.,* 600 U.S. 181 (2023) – a case involving racial classifications in the very different context of elite university admissions – is misplaced.

Defendants also argue that the NYVRA's vote dilution provisions are unconstitutional because they cannot satisfy strict scrutiny. But the NYVRA is *not* subject to strict scrutiny because it does *not* classify individuals on the basis of their race. And Defendants are wrong that Section 2 of the federal VRA is itself subject to strict scrutiny. NYSCEF 70 at 23 n.4. Rather, strict scrutiny applies to *individual districts* only when race *predominates* in the redistricting process. *See, e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 907 (1996); *see also Milligan,* 599 U.S. at 33 ("The line that we have long drawn is between [race] consciousness and predominance."). The hypothetical possibility that a district drawn to comply with the NYVRA could be a racial gerrymander does not subject the NYVRA to strict scrutiny, either. The NYVRA deters racial gerrymandering by expressly

providing for numerous potential non-district remedies, *see* Election Law § 17-206(5)(a), and instructs courts to consider "whether members of a protected class are geographically compact or concentrated . . . in determining an appropriate remedy," *id*. § 17-206(2)(c)(viii). If a court ignores these safeguards, the remedy is for parties to bring an as-applied constitutional challenge to *individual districts* on the grounds that they are racial gerrymanders, not to invalidate the NYVRA in its entirety.

Even if strict scrutiny applies, however, the NYVRA is narrowly tailored to serve the State's compelling government interest in eradicating racial discrimination in voting. The NYVRA, like Section 2 of the federal VRA, "turns on the presence of discriminatory effects, not discriminatory intent," and targets voting systems or policies which "render[] a minority vote unequal to a vote by a nonminority voter." *Milligan*, 599 U.S. at 25. The fact that the NYVRA is, in some respects, more expansive than Section 2 is entirely unremarkable – the New York Constitution's protections for voters "substantially exceed" those contained in the federal constitution. Election Law § 17-200. And Defendants' assertion that New York is more limited than the federal government in the steps it may take to stop racial discrimination ignores U.S. Supreme Court decisions stating otherwise. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226 (1995). Finally, Defendants' attempt to manufacture a constitutional problem by noting differences between the NYVRA and Section 2 does not convert the NYVRA into a racial classification, as the NYVRA's vote dilution elements correspond closely to the "essence" of a federal vote dilution claim. *See Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

Defendants' motion also fails on the merits. Their argument that Plaintiffs claims are effectively moot because amendments to Town Law § 80 will eventually require even-year elections is deeply cynical, given that the Town is currently fighting to prevent Town Law § 80

from ever being implemented. *See Ashlaw v. State of New York*, No. EF2024-00001746 (N.Y. Sup. Ct. Onondaga Cnty.). Regardless, because of how Town Law § 80 will be phased in, there will undeniably be odd-year elections for Town Board seats in the coming years. The NYVRA, like the federal VRA, assuredly "reaches changes that affect even a single election." *N.A.A.C.P. v. Hampton Cnty. Election Comm'n*, 470 U.S. 166, 178 (1985). And dispositively at the summary judgment stage, whether minority-preferred candidates are likely to prevail in even-year Town elections is factually disputed.

Finally, Defendants choice to blind themselves to Plaintiffs' evidence on the reasonable-alternative-benchmark requirement does not, under New York rules, entitle them to summary judgment. Plaintiffs introduced Dr. Barreto's addendum in advance of the experts' depositions and the summary judgment motion deadline. Defendants have not and cannot show that the timing of this disclosure was prejudicial, as they must. *See Colon v. Bell*, 137 A.D.3d 1067, 1068 (2016). Regardless, Defendants' argument fails on its own terms: Plaintiffs can introduce Dr. Barreto's addendum in opposing Defendants' summary judgment motion, *see* CPLR 3212(b), and his initial report is sufficient on its own to create a factual dispute on this issue.

FACTUAL BACKGROUND

A. The Parties

Plaintiffs Oral Clarke, Romance Reed, Grace Perez, Peter Ramon, Ernest Tirado, and Dorothy Flournoy (collectively, "Plaintiffs") are residents of and registered voters in the Town of Newburgh ("the Town"). Plaintiffs' Statement of Facts ("SOF"), ¶¶ 1-18. Plaintiffs Clarke, Reed, and Flournoy are Black; Perez, Ramon, and Tirado are Latino. *Id.* The Town's governance authority is the Town Board of the Town of Newburgh ("the Town Board"), a political subdivision of the State of New York. *Id.* at ¶ 19. Its current members are Town Supervisor Gil Piaquadio and

Board members Paul Ruggiero, Scott Manley, and Anthony LoBiondo. *Id.* at ¶¶ 20-22. A vacant seat will be filled in a special election. *Id.* at ¶ 23. Board members are elected through at-large elections. *Id.* at ¶ 24.

On January 26, 2024, Plaintiffs sent a letter to the Town Clerk advising that the Town's at-large system of elections violated the NYVRA. *Id.* at ¶ 27. On March 15, 2025, the Town Board adopted a resolution to investigate Plaintiffs' allegations. *Id.* at ¶ 29. Because the Board's response did not satisfy Election Law § 17-206(7), it did not trigger the NYVRA's "safe harbor" provisions. NYSCEF 31. Plaintiffs filed suit. NYSCEF 1.

B. The Black and Hispanic communities in Newburgh.

The Black and Hispanic populations in Town have grown significantly in recent decades, from 6.6% of the population combined in 1980 to today, where 15.4% identify as Black and 25.2% as Hispanic. SOF at ¶¶ 33-39. The Town's government has not adapted to reflect Newburgh's changing demographics. Indeed, the Town is unaware of these communities' growth.[1] There has never been a Black or Hispanic member of the Town Board. *Id.* at ¶ 42. The Town does not provide information to residents in Spanish, except for a notice regarding mosquito-borne viruses issued after this litigation commenced. *Id.* at ¶ 41. Although at-large election systems were designed to minimize the political strength of minority voters, the Town has no justification for maintaining

[1] In his affidavit, Supervisor Piaquadio testified that the "Town's current population is 31,987," of which "15.4% are black . . . and 25.2% are Hispanic." NYSCEF 58 at 1. Previously, Piaquadio testified he did not know what percentage of the Town was Black or Hispanic, Piaquadio Deposition at 15:18-16:7, 17:20-18:8, and that he had no public, non-privileged information regarding the same. NYSCEF 61 (Town Deposition) at 44:11-23, 46:17-47:6. While Plaintiffs do not dispute the accuracy of Supervisor Piaquadio's figures, the discrepancies in his testimony cast serious doubt on Defendants' discovery efforts and the legitimacy of their privilege claims.

its at-large election system besides its assertion that it "has relied on [the system] since at least 1865." *Id.* at ¶¶ 43-47.

There is an extensive history of discrimination in New York, Orange County, and the Town of Newburgh affecting Black and Hispanic residents. *Id.* at ¶¶ 80-82. Black and Hispanic people were excluded from the housing market through restrictive covenants. *Id.* at ¶ 33. They were excluded from the political process through English-literacy requirements, racial gerrymandering, a lack of Spanish-language information and interpreters, and other barriers. *Id.* at ¶¶ 80-81. The consequences of this historical and ongoing discrimination are stark: Black and Hispanic residents of Newburgh, on the whole, experience significantly worse outcomes than white residents across most socioeconomic indicators. *Id.* at ¶¶ 91-96.

There have been numerous high-profile racial incidents within the Town. In 1992, members of the Ku Klux Klan and neo-Nazi groups hosted a rally at a local businessman's property. *Id.* at ¶ 83. There was a counterprotest in the neighboring City of Newburgh, but no reported response in or by the Town. *Id.*[2] In 2012, a Black Town employee filed a lawsuit alleging that his supervisors created a racially hostile work environment. *Id.* at ¶¶ 87-90. The employee's claims included being singled out for negative treatment and repeatedly subjected to racial slurs. The lawsuit quickly settled. Four years later, one of the same employees named in the 2012 complaint was again accused of racial discrimination. *Id.*

[2] Defendants' rebuttal expert, Professor Donald Critchlow, disputed the significance of this incident on the grounds that "relatively few people attended the neo-Nazi rally." NYSCEF 60 at 9-10. However, Professor Critchlow eventually conceded that the rally was a "historical fact" and "an expression of . . . [w]hite supremacy" in the Town. *See* Critchlow Deposition at 107:20-110:25.

There have also been numerous incidents evincing the use of racial appeals and the Town' nonresponsiveness to Black and Hispanic residents. After Orange County declared a state of emergency due to the arrival of around 60 asylum seekers, elected officials promoted a story that asylum seekers were displacing homeless veterans at a local hotel, even though the story was fabricated (as the hotel's manager quickly confirmed). *Id.* at ¶¶ 111-18. The Town subsequently sued the hotel based on alleged zoning violations, arguing that housing "single male asylum seekers from the City of New York will result in potential disaster." *Id.* Town officials have done little to accommodate or meet the needs of Black and Hispanic residents – the few actions they point to as benefiting these communities were either legally required or are completely unsubstantiated. *Id.* at ¶¶ 97-102. For example, the Town does not provide Spanish-language information to residents, and officials supported expanding a powerplant over the opposition of racial justice advocates who raised concerns about the environmental and health impacts on communities of color. *Id.* at ¶¶ 104-110. The Town has done little for its Black and Hispanic residents and has no plans to change course in the future. *Id.* at ¶ 103.

C. The dilutive effects of the at-large election system on Hispanic and Black voters' electoral power in Newburgh.

There is extensive evidence that the Town's at-large election system dilutes the voting power of Hispanic and Black voters. Plaintiffs' expert, Dr. Matt Barreto, analyzed dozens of elections using court-approved techniques and reported a "clear, consistent, and statistically significant finding of racially polarized voting in the Town of Newburgh." SOF at ¶¶ 48-64. Specifically, he found that "Latino and Black voters are cohesive in local elections for Town Council," but that these candidates "typically receive very low rates of support from white voters, who effectively block [them] from winning office." *Id*. Dr. Barreto also opined that various alternative election systems would allow Latino and Black voters a reasonable opportunity to elect

candidates of choice. *Id.* at ¶¶ 74-79. In an addendum, he reported multiple viable single-member district plans. *Id*. Defendants' rebuttal expert, Professor Brad Lockerbie, did not dispute Dr. Barreto's analysis and reached no conclusions regarding racially polarized voting. *Id.* at ¶¶ 67-73.

Notwithstanding this evidence, Defendants blithely maintain that, in the words of Professor Critchlow, "democratic participation is alive and well in the town of Newburgh." NYSCEF 70 at 8 (quoting NYSCEF 60 at 19). But Professor Critchlow reached this conclusion knowing *nothing* about Black and Hispanic participation in Town elections – indeed, he later testified that he did not *need* to know anything about Black and Hispanic participation to assess the health of Newburgh's democracy. *See* Critchlow Deposition at 140:9-144:20. Professor Critchlow also concluded that Hispanic turnout was increasing statewide based exclusively on his misreading of a report that found the opposite. *Id.* at 77:6-79:19, 82:9-93:4. The Town can only characterize democratic participation in Newburgh as "alive and well" if it ignores the voices of Black and Hispanic residents, as it has for years.

ARGUMENT

I Defendants lack capacity to challenge the facial constitutionality of the NYVRA.

As a municipality and its officers, Defendants "lack[] the capacity to mount a constitutional challenge to invalidate State legislation." *Bd. of Educ. of Roosevelt Union Free Sch. Dist. v. Bd. of Trustees of State Univ. of New York*, 282 A.D.2d 166, 172 (3d Dep't 2001).[3] All municipal authority in New York "is subject to the power provided by the State." *Baldwin*, 62 Misc. 3d at

[3] The Attorney General has taken the same position in another case where a defendant municipality is seeking to facially invalidate the NYVRA, *Young v. Town of Cheektowaga*, No. 803989/2024 (N.Y. Sup. Ct. Erie Cnty.). *See* NYAG Memorandum of Law at 18.

255. The State has chosen not to grant political subdivisions the authority to seek to have state statutes invalidated. *See, e.g.*, *Black River Regulating Dist. v. Adirondack League Club*, 307 N.Y. 475, 488 (1954) (explaining that the "political power conferred by the Legislature [on its subdivisions] confers no vested right as against the government itself"). Making this choice is plainly the State's prerogative. *See Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (explaining that in structuring political subdivisions, "the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the [federal] Constitution"). Given this choice, it makes no sense to suppose that the same Legislature which enacted the NYVRA to "breathe constitutional rights into . . . public entit[ies] [would] then equip [them] with authority to police state legislation on the basis of those rights." *Matter of World Trade Ctr.*, 30 N.Y.3d at 385.

The capacity rule "flows from judicial recognition of the juridical as well as political relationship between [municipal] entities and the State." *City of New York*, 86 N.Y.2d at 289.

> Constitutionally as well as a matter of historical fact, municipal corporate bodies . . . are merely subdivisions of the State, created by the State for the convenient carrying out of the State's governmental powers and responsibilities as its agents. . . . [A]s purely creatures or agents of the State, it followed that municipal corporate bodies cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants.

Id. at 290. The rule applies whether the constitutional argument is raised affirmatively or defensively. *See In re World Trade Ctr.*, 892 F.3d at 110-11 (holding that defendant public entity

lacked capacity to assert that statute sought to be enforced by plaintiffs was unconstitutional).[4] Defendants are therefore barred from seeking to invalidate the NYVRA.

To be clear, the capacity rule does not insulate the NYVRA from federal constitutional challenges. If this Court finds the Town liable and imposes a remedy, Defendants may seek to challenge the constitutionality of actions they would thereby be required to undertake. *See Jeter*, 41 N.Y.2d at 287 (recognizing possibility that municipal officials could assert constitutional challenge on grounds that "if they are obliged to comply . . . they will by that very compliance be forced to violate a constitutional proscription"). Or a private party may assert their own constitutional rights. *See e.g., Shaw*, 517 U.S. at 908 (adjudicating racial gerrymandering claim challenging federal VRA remedial district). The capacity rule leaves "many paths . . . to vindicate the supremacy of federal law in this area," so applying it here does not raise federal constitutional concerns. *Whole Woman's Health v. Jackson*, 595 U.S. 30, 48 (2021). But one party cannot raise the legal rights of another, *see Society of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 773 (1991), and a municipality and its officials cannot assert the constitutional rights of the municipality's residents, *see Village of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74, 89 (2d Dep't 2007). Defendants are precluded from challenging the facial validity of the NYVRA.

II The NYVRA is constitutional.

Even if Defendants could mount a facial constitutional challenge to the NVYRA, the NYVRA is facially constitutional. Under New York law, "[i]t is well settled that facial

[4] *See also Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287 (1977) (defendant school districts "do not have the substantive right to raise . . . constitutional challenges" to state statute); *City of New York*, 86 N.Y.2d at 289 (defendant political subdivisions lacked capacity to challenge public education funding system under federal and state constitutions).

constitutional challenges are disfavored." *Overstock.com, Inc. v. New York State Dep't of Tax'n & Fin.*, 20 N.Y.3d 586, 593 (2013). "Legislative enactments enjoy a strong presumption of constitutionality," and "parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt.'" *LaValle v. Hayden*, 98 N.Y.2d 155, 161 (2002) (quoting *People v. Tichenor*, 89 N.Y.2d 769, 773 (1997)). The NYVRA is a straightforward voting rights act that sets forth familiar elements for proving liability for vote dilution. It contains no racial classifications, so it is not subject to strict scrutiny. Even if strict scrutiny applied, the NYVRA is narrowly tailored to further the State's compelling interest in eradicating racial discrimination in voting. Defendants have not carried their heavy burden to prevail on their facial constitutional challenge.

i. Voting rights acts with similar elements to the NYVRA have universally withstood constitutional challenges.

The NYVRA's framework for determining liability for vote dilution is straightforward. With respect to at-large election systems like Newburgh's, this framework includes two potential claims. *First*, plaintiffs may establish illegal vote dilution by showing that the "voting patterns of members of the protected class within the political subdivision are racially polarized" from the voting patterns of other members of the electorate. Election Law § 17-206(2)(b)(i)(A). *Second*, plaintiffs may, instead or in addition, prove vote dilution by showing that "under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired." *Id.* § 17-206(2)(b)(i)(B). The first claim is based on racially polarized voting; the second hinges on the totality of the circumstances. Under either theory, Plaintiffs must *also* prove that one or more reasonable alternative policies exist that would improve the protected class's representation relative to the status quo. This element follows from the NYVRA's statement of the "[p]rohibition against vote dilution." *Id.* § 17-206(2). A challenged

practice only "*ha[s] the effect*" of "*impairing*" a protected class's electoral influence "*as a result of vote dilution*" if, under some other reasonable policy or system, the protected class would be better represented than it currently is. *Id.* § 17-206(2)(a) (emphasis added).

This framework for determining liability closely resembles the structure of Section 2 of the federal VRA and the California and Washington VRAs. That is no accident: the Legislature intended the NYVRA to "build[] upon the demonstrated track record of success [of state voting rights acts] in California and Washington, as well as the historic success of the federal voting rights act." SOF at ¶ 26. Statutes containing similar elements for proving racial vote dilution have universally withstood constitutional challenges. *See, e.g.*, *Milligan*, 599 U.S. at 19 ("[W]e have applied *Gingles* in one § 2 case after another, to different kinds of electoral systems and to different jurisdictions in States all over the country."); *Portugal*, 530 P.3d at 1012 ("[T]he [Washington] VRA, on its face, does not require unconstitutional actions."); *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 688 (2006) (rejecting argument "that the [California] VRA is facially invalid").

The track record of VRAs at the remedial stage is equally impressive. Hundreds of subdivisions have been required to switch from at-large elections to single-member districts under state VRAs. *See* Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 Emory L.J. 299, 329 (2023). Yet "*not a single district* created to remedy or avoid a [state VRA] violation has been found to be an illegal racial gerrymander." *Id.* Only one suit has even alleged that state VRA remedial districts were unlawful, and it was dismissed due to its "fail[ure] to plausibly state that [the plaintiff] is a victim of racial gerrymandering." *Higginson v. Becerra*, 786 F. App'x. 705, 706 (9th Cir. 2019). Hundreds more jurisdictions have been required to draw single-member districts under the federal VRA. *See, e.g.*, *The Evolution of Section 2: Numbers and Trends*, Michigan Law Voting Rights Initiative (2024), https://voting.law.umich.edu/findings/

(last accessed Aug. 26, 2024). In none of these cases has any court ever held that a VRA with similar elements to the NYVRA is facially unconstitutional.

ii. The NYVRA is not subject to strict scrutiny because it does not classify individuals on the basis of their race.

Defendants argue that the NYVRA is subject to strict scrutiny under the federal Equal Protection Clause "because [its vote dilution] provisions require political subdivisions to make redistricting decisions based upon their residents' racial classifications." NYSCEF 70 at 15. This audacious claim fails on its own terms. The NYVRA does not employ racial classifications, rely on racial stereotypes, or require racial gerrymandering. The implications of Defendants' logic – condemning most other state VRAs, the federal VRA, and much civil rights law beyond the voting rights context – are untenable.

To begin, the NYVRA uses no racial classifications and therefore is not subject to strict scrutiny on this ground. The U.S. Supreme Court has defined a racial classification as a legal provision that (1) distributes burdens or benefits (2) to individuals (3) on the basis of individuals' race. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) ("[W]hen the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."); *Crawford v. Board of Educ. of City of Los Angeles*, 458 U.S. 527, 537 (1982) (explaining that a law "does not embody a racial classification" if "[i]t neither says nor implies that persons are to be treated differently on account of their race"). The Court has made clear that a mere statutory *reference* to race *is not* a racial classification. *See, e.g.*, *Tex. Dep't of Hous. & Cmty. Aff. v. Inclusive Cmties. Project, Inc.*, 576 U.S. 519, 545 (2015) ("[M]ere awareness of race in attempting to solve [race-related] problems . . . does not doom that endeavor at the outset.").

Under this definition, no part of the NYVRA is a racial classification for two reasons. First, no part of the law distributes burdens or benefits to *individuals*. Rather, the law prohibits *political subdivisions* from committing voter suppression or vote dilution. The NYVRA's vote dilution section, for instance, provides that "[n]o board of elections or political subdivision shall use any [dilutive] method of election." Election Law § 17-206(2)(a). This imposes no requirements on any individuals. No individuals are compelled to do anything, nor may any individuals be sued. The sole regulated entities are political subdivisions.

Second, no part of the NYVRA distributes burdens or benefits *on the basis of individuals' race*. Political subdivisions never become liable for vote dilution because of the racial identities of their residents. An individual's racial identity is not even a statutory element, let alone the fulcrum on which liability hinges. Liability is instead predicated on voters' *voting patterns* and evidence that the existing election system dilutes their voting power. *See* Election Law § 17-206(2)(b)(i)(A)-(B). And members of *any* "race, color, or language-minority group" who can make the requisite showings may bring a vote dilution claim. Election Law § 17-204(5). Plaintiffs have asked this Court to remedy the dilutive effect of Newburgh's at-large system on Black and Hispanic voters, not to pick winners based on race *qua* race.

In an effort to find a racial classification where none exists, Defendants note that the NYVRA refers to a "[p]rotected class," which "means a class of individuals who are members of a race, color, or language-minority group." Election Law § 17-204(5). Defendants extrapolate from this definition that the NYVRA "draw[s] racial distinctions, giving . . . special preferences only to minority groups' ability to elect candidates of their choice." NYSCEF 70 at 15. But this is a quintessential *reference* to race, not a racial classification. *See, e.g.*, *Inclusive Cmties. Project*, 576 U.S. at 545. Other state VRAs, the federal VRA, and most civil rights statutes also refer to race in

similar ways. *See, e.g.*, 52 U.S.C. § 10301(a) (barring voting discrimination "on account of race"); *id.* § 10310(c)(3) (defining "language minority group[s]"); Wash. Rev. Code § 29A.92.010(6) (defining "protected class" to mean "a class of voters who are members of a race, color, or language minority group"). Courts have universally held that these laws do not classify by race and are not subject to strict scrutiny. *See Portugal*, 530 P.3d at 1011 ("[T]he [Washington] VRA . . . . mandates equal voting opportunities for members of every race, color, and language minority group" and is subject to "rational basis review, not strict scrutiny"); *Sanchez*, 51 Cal. Rptr. 3d at 838 (explaining that California VRA is not subject to strict scrutiny because "[l]ike the [federal] VRA, [the California VRA] involves race and voting, but, also like the [federal] VRA, it does not allocate benefits or burdens on the basis of race or any other suspect classification").

Defendants' assertion that that the U.S. Supreme Court "has *not* doubted that Section 2 [of the federal VRA] is subject to the constitutional strict scrutiny analysis" is misleading. NYSCEF 70 at 23 n.4 (citing *Abbot v. Perez*, 585 U.S. 579 (2018)) The U.S. Supreme Court has *never* applied strict scrutiny to Section 2. Strict scrutiny applies to *individual districts* drawn to comply with the federal VRA if "race was *the predominant factor* motivating the" drawing of the district and the mapmaker "subordinated traditional race-neutral districting principles." *Miller v. Johnson* 515 U.S. 900, 916 (1995) (emphasis added). Whether such a *district* withstands strict scrutiny was the question before the Court in *Abbot*, not whether Section 2 *itself* was subject to heightened scrutiny. 585 U.S. at 620 ("Texas does not dispute that race was the predominant factor in the design of [the challenged district], but it argues that this was permissible because it had good reasons to believe that this was necessary to satisfy § 2 of the Voting Rights Act.") (internal quotation marks omitted).

The Court has affirmed that "racial predominance" is what makes *districts* subject to strict scrutiny, not the need for "racial consciousness" when identifying and remedying racial vote dilution. *Milligan*, 599 U.S. at 31. The Court has also conclusively rejected another of Defendants' arguments: courts routinely assess the consequences of potential vote dilution remedies on minority voters' electoral influence, but that does not mean "racial predominance plagues *every single*" remedy. *Id.* at 33. Rather, accounting for race when identifying racial vote dilution and demonstrating it can be remedied "is the whole point of the enterprise." *Id.*

Continuing their hunt for a racial classification, Defendants emphasize that the NYVRA's vote dilution prong requires evidence "assess[ing] how racial groups have voted in a political subdivision." *See* NYSCEF 70 at 19. But racially polarized voting involves the *behavior* of members of different racial groups – how they vote – not their racial identity. Similarly, the NYVRA's totality of the circumstances factors are neither "amorphous" nor impermissibly race-based. *Id.* at 20. The NYVRA instructs courts to assess factors like a subdivision's history of racial discrimination, racial disparities in education, employment, and other areas, and the use of racial appeals in campaigns, Election Law § 17-206(3), just like in Section 2 cases, *see Gingles*, 478 U.S. at 37. These factors are race-related, of course, but they do not depend on race *per se*. Racially polarized voting and the totality of the circumstances are components of other state VRAs and the federal VRA, but no court has *ever* applied strict scrutiny to these laws because of these elements. *See, e.g.*, *Milligan*, 599 U.S. at 41; *Portugal*, 530 P.3d at 656 ("Recognizing the possibility of racially polarized voting is neither novel nor unique to the [Washington] VRA."); *Sanchez*, 51 Cal. Rptr. 3d at 826 (rejecting argument that California VRA "is unconstitutional because it uses 'race' to identify the polarized voting that causes vote dilution").

Because the NYVRA contains no racial classifications, Defendants' invocations of *Students for Fair Admissions* are misplaced. In *SFFA*, the question was whether affirmative action programs – which the Court characterized as "[c]lassifying and assigning students based on their race" – satisfied strict scrutiny. *SFFA*, 600 U.S. at 214 (internal quotation marks omitted). Moreover, while the Court in *SFFA* described affirmative action as "[o]utright racial balancing," *Id.* at 223-24, the Court in *Milligan* made clear that remedying racial vote dilution does not "inevitably demand[] racial proportionality in districting," *Milligan*, 599 U.S. at 26. And the "interests" considered "not sufficiently coherent" or "compelling" to satisfy strict scrutiny in *SFFA* were a university's interests in things like training future leaders, promoting a robust marketplace of ideas, and preparing engaged and productive citizens, *SFFA*, 600 U.S. at 214, not (as Defendants' misleadingly suggest) a state's interest in ensuring every citizen "an equal opportunity to vote," NYSCEF 70 at 22. Unsurprisingly, the few courts asked to apply *SFFA* in the racial vote dilution context have declined the invitation. *See Singleton v. Allen*, 690 F. Supp. 3d 1226, 1317 (N.D. Ala. 2023) (explaining that "affirmative action cases, like [*SFFA*] . . . are fundamentally unlike this case"); *Robinson v. Ardoin*, 86 F.4th 574, 593 (5th Cir. 2023) ("Drawing a comparison between voting redistricting and affirmative action occurring at Harvard is a tough analogy."). This Court should do the same.

iii. Even if it is subject to strict scrutiny, the NYVRA is narrowly tailored to achieve New York's compelling interest in combatting racial discrimination in voting.

As detailed above, strict scrutiny does not apply to the NYVRA. But even if strict scrutiny does apply, the NYVRA passes muster. To start, the NYVRA furthers a state interest of paramount importance: preventing and remedying racial discrimination in voting. This is the same urgent goal motivating the Fifteenth Amendment itself. The U.S. Supreme Court has described "racial discrimination in voting" as an "insidious and pervasive evil" that may be addressed through

"sterner and more elaborate measures." *South Carolina v. Katzenbach*, 383 U.S. 301, 308-09 (1966). The NYVRA indisputably aims to fight racial discrimination in voting. It says so in the very first section: to avoid "the denial or abridgement of the voting rights of members of a race, color, or language-minority group," the NYVRA seeks to "[e]nsure 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." Election Law § 17-200.

Defendants maintain that states are more limited than the federal government in combatting racial discrimination. NYSCEF 70 at 22. This may have been true in an earlier era. Since the 1990s, however, "congruence between the standards applicable to federal and state racial classifications" has been one of the "general propositions" on which equal protection law is based. *Adarand*, 515 U.S. at 223, 226 . Moreover, even under the earlier doctrine Defendants harken back to, New York would possess the authority to enact the NYVRA: unlike the municipality in *City of Richmond v. J.A. Croson Co.*, the Legislature here "ma[d]e specific findings of discrimination" prior to enacting the challenged law. 488 U.S. 469, 489 (1989); *see also* N.Y. Comm. Rpt. on S. 1046D (N.Y. May 20, 2022) (acknowledging the state's "extensive history of discrimination against racial, ethnic, and language minority groups in voting").

Indeed, the evidence of discrimination in voting in New York is overwhelming. In addition to the legislative findings, a detailed white paper confirmed that "many discriminatory practices remain in place" in New York, including "at-large election systems, redistricting plans that dilute minority voting strength, polling location plans with too few and/or too inconvenient sites, and failures to provide adequate language assistance." *See* NYCLU & LDF, John R. Lewis Voting Rights Act of New York at 2 (Feb. 24, 2022), https://www.naacpldf.org/wp-content/uploads/NYVRA-White-Paper-NYCLU-LDF-March-2022.pdf. Several New York

counties – including much of New York City – were previously covered by Section 5 of the federal VRA. *See* Jurisdictions Previously Covered by Section 5, U.S. Dep't of Justice (May 17, 2023), https://www.justice.gov/crt/jurisdictions-previously-covered-section-5. And since Section 2 of the federal VRA took its current form, dozens of New York political subdivisions – including Orange County – have been sued for voter suppression and vote dilution. *See Section 2 Cases Database*, Michigan Law Voting Rights Initiative (2024), https://voting.law.umich.edu/database/ (last accessed Aug. 26, 2024).

These findings and the extensive history of racial discrimination in voting across New York conclusively answer the question of the Legislature's authority to enact the NYVRA, a statewide bill designed to prevent and remedy racial discrimination in voting. Further, like the federal VRA, application of the NYVRA in a political subdivision is fact dependent and "requires courts to conduct 'an intensely local appraisal' of the electoral mechanism at issue." *Milligan*, 599 U.S. at 19 (quoting *Gingles*, 478 U.S. at 79). A plaintiff alleging vote dilution under the NYVRA must offer evidence addressing the voting patterns of the protected class they belong to and/or evidence of discrimination against that protected class within the relevant political subdivision. *See* Election Law § 17-206(2)(b)(i)(A)-(B). Plaintiffs can never prove vote dilution without demonstrating that what *causes* their vote to be diluted is the particular election system or policy they are challenging, as opposed to demographics or some existing feature of natural or political geography. *See* Election Law § 17-206(2)(a).

The NYVRA is also narrowly tailored. The "essence" of vote dilution is that an electoral practice "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [different racial groups] to elect their preferred representatives." *Gingles*, 478 U.S. at 47. The NYVRA's vote dilution elements correspond closely to this "essence." The "social and

historical conditions" that enable vote dilution are racially polarized voting, *see id.* at 52-74, and past and present racial discrimination, *see id.* at 36-37, 44-45. One of the NYVRA's vote dilution claims is based on racially polarized voting, *see* Election Law § 17-206(2)(b)(i)(A); the other focuses on historical and ongoing racial discrimination, the crux of the totality of the circumstances analysis, *see id.* §§ 17-206(2)(b)(i)(B), 17-206(3). The NYVRA's reasonable-alternative-policy requirement, *id.* § 17-206(2)(a), focuses the inquiry on whether different racial groups have an equal opportunity to elect candidates of their choice, *see Gingles*, 478 U.S. at 47.

Defendants contend that the NYVRA is not narrowly tailored because it departs from the *Gingles* prongs in certain ways. They first note that the NYVRA omits the first of *Gingles*'s three prongs (that an additional, reasonably compact, majority-minority district could be drawn). NYSCEF 70 at 23. But the U.S. Supreme Court adopted this prong for prudential, not constitutional, reasons – the Court thought that majority-minority districts would be the remedies in vote dilution cases and wanted to ensure that such districts could feasibly be created. *See Gingles*, 478 U.S. at 50 n.17. The Court said nothing about the Constitution in articulating this requirement. *Id.* at 50-51. Additionally, the NYVRA's reasonable-alternative-policy requirement serves exactly the same function as the first *Gingles* prong: ascertaining that a valid remedy could be implemented. And, like the first *Gingles* prong, the NYVRA mitigates the risk of racial gerrymandering by instructing courts to consider "whether members of a protected class are geographically compact or concentrated . . . in determining an appropriate remedy." Election Law § 17-206(2)(c)(viii). So even if something like the first *Gingles* prong is constitutionally required, it is present here.

Defendants next argue that the NYVRA "disregard[s] the second *Gingles* precondition" because it "does not require plaintiffs to show that a minority group is 'politically cohesive.'"

NYSCEF 70 at 24. Defendants are wrong: the NVYRA expressly asks whether protected class members are "politically cohesive," Election Law § 17-206(2)(c)(iv), and the need for proof of a minority community's political cohesion is inherent in the concept of racially polarized voting, *see Pico*, 15 Cal. 5th at 306 ("Both [the federal and California VRAs] require a plaintiff to show racially polarized voting — i.e., that the protected class members vote as a politically cohesive unit, while the majority votes 'sufficiently as a bloc usually to defeat' the protected class's preferred candidate.") (quoting *Gingles*, 478 U.S. at 56). Defendants' argument is also nonsensical: only if protected class members are politically cohesive do they have "candidates *of their choice*" whose election may be "impair[ed]" by an electoral system. Election Law § 17-206(2)(a) (emphasis added). A protected class that is not politically cohesive has no candidates it truly favors over others and will be unable to demonstrate "that an alternative voting system exists that would give those members of a protected class a greater chance to elect candidates of their choice." NYSECF 70 at 26.

Finally, Defendants raise various policy disputes properly directed at the Legislature, not this Court. Defendants dislike that the NYVRA allows for crossover and coalition claims, NYSCEF 70 at 23-24, but the fact that Section 2 does not *require* courts to implement a particular remedy does not mean states are constitutionally *forbidden* from doing so. *See Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) ("States that wish to draw crossover districts are free to do so where no other prohibition exists."); *Cooper v. Harris*, 581 U.S. 285, 306 (2017) (describing idea that states are prohibited from drawing crossover districts as "at war with our § 2 jurisprudence"). Other state VRAs also "permit[] remedies that Section 2 does not," yet that "does not create a conflict between state and federal law because the states are free to implement remedies that are

not required pursuant to Section 2, so long as those remedies are not otherwise prohibited." *Portugal*, 530 P.3d at 1002.

Defendants also dislike that, under the NYVRA, a vote dilution claim can be based on either racially polarized voting *or* the totality of the circumstances. Defendants would prefer that, as under the federal VRA, Plaintiffs had to prove *both* racially polarized voting *and* that the totality of the circumstances supports liability. *See* NYSCEF 70 at 25-26. Defendants call the latter test "amorphous," but, again, the "factors" that comprise the totality of the circumstances under the NYVRA, *see* Election Law § 17-206(3), largely parallel the factors first listed by a crucial U.S. Senate committee report and then deemed "probative of a [federal VRA] violation" in *Gingles*, 478 U.S. at 36. And the NYVRA *does* require more from plaintiffs than just evidence about the totality of the circumstances, as Defendants acknowledge. For a claim of this kind, as for a claim based on racially polarized voting, plaintiffs must also satisfy the statute's reasonable-alternative-policy requirement, which is necessary to establish that the challenged election system is what *causes* the dilution of members of a protected class's votes. NYSCEF 70 at 27-28. The fact that the NYVRA is, in some respects, more expansive than the federal VRA does not convert it into an unconstitutional racial classification.

III. The amendments to Town Law § 80, which Defendants are currently challenging as unconstitutional in a separate case, do not moot this case.

Defendants argue they are entitled to summary judgment because the Town may eventually conduct even-year elections. Defendants are speaking out of both sides of its mouth. They cannot evade liability in *this* case by pointing to the possible future implementation a law which they are seeking to have invalidated as facially unconstitutional in *another* case. *See* First Amended Complaint, *Ashlaw v. State of New York*, No. EF2024-00001746 (N.Y. Sup. Ct. Onondaga Cnty., May 13, 2024)); *see also Borges v. Placeres*, 64 Misc. 3d 92, 95 (N.Y. App. Term. 2019) ("[A]

litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise.").[5]

Their argument is also legally erroneous. Defendants are essentially advancing a mootness claim, contending that even if Black and Latino voters are currently suffering racial vote dilution, their votes will not be diluted in the *even*-year at-large elections which Town Law § 80 will eventually require. *See* NYSCEF 70 at 29-30.[6] A claim is not moot if "the rights of the parties will be directly affected by the determination of the [case] and the interest of the parties is an immediate consequence of the judgment." *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714 (1980). Town Law § 80 will not fully be implemented until 2028. *See* McKinney's Sess. Law News, ch 741, § 5 (A. 4282-B) (Dec. 22, 2023). The Town acknowledges there will be odd-year Town Board elections before then. *See* NYSCEF 58 at 3. The NYVRA, like the federal VRA, "reaches changes that affect even a single election." *Hampton Cnty. Election Comm'n*, 470 U.S. at 178. Absent judicial intervention, Plaintiffs will be deprived of their right to an undiluted vote in Town elections. SOF at ¶ 71-72.

Even if Defendants had a legally plausible mootness argument, Defendants have not met their "burden of establishing their entitlement to judgment as a matter of law." *Marshall v. Arias*, 12 A.D.3d 423, 424 (2004). At most, there is a triable issue of fact regarding the consequences of shifting to even-year elections. The sole evidence supporting Defendants' argument is Professor

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[5] Indeed, earlier this week, a judge issued an order in parallel litigation enjoining the State "from enforcing and/or implementing the Even Year Election Law." *County of Onondaga et al. v. New York et al.,* No. 003095/2024 (N.Y. Sup. Ct. Onondaga Cnty., Oct. 8, 2024) at 26.

[6] Notably, moving the timing of elections is a remedy under the NYVRA. *See* Election Law § 17-206(5)(vi). If Defendants are correct that shifting to even-year elections would enable Black and Hispanic voters a reasonable opportunity to elect candidates of choice, they are effectively conceding the availability of a reasonable alternative system that would remedy Plaintiffs' injuries.

Lockerbie's report, but he failed to analyze Town elections, which are obviously most probative to the question of likelihood of success in Town elections. SOF at ¶ 68. Dr. Barreto testified that his analysis of voting patterns in Town elections was largely consistent in even- and odd-year elections. Barreto Deposition at 57:24-59:10. Plaintiffs claims are not moot.

IV. There is extensive unrebutted evidence that a reasonable alternative election system would improve Black and Hispanic voters' electoral influence relative to the existing system.

Finally, Defendants assert that Plaintiffs failed to "demonstrate[e] a 'reasonable alternative voting practice' that would give minority voters a greater opportunity to elect their preferred candidate than the Town's at-large system." NYSCEF 70 at 30. That is wrong even on the evidence Defendants acknowledge. This Court "must view the evidence in the light most favorable to the nonmoving party and accord such party the benefit of every reasonable inference that can be drawn therefrom." *Myers v. Home Energy Performance by Halco*, 188 A.D.3d 1327, 1329 (2020) (quotations omitted). Dr. Barreto opined that numerous alternative voting systems would allow Black and Hispanic voters to elect their candidates of choice. SOF at ¶ 74. His opinion as an expert "raise[s] a triable issue of fact." *George v. New York City Hous. Auth.*, 151 A.D.3d 532, 533 (2017).

There is additional evidence. Plaintiffs disclosed an addendum to Dr. Barreto's report in which he analyzed different districting schemes that included either four districts or five districts and concluded "that a district-based scheme would be effective to remedy vote dilution and allow Black and Latino voters . . . to elect candidates of their choice in at least some districts." SOF at ¶¶ 75-79. This disclosure occurred after the stipulated deadline for expert disclosures but before the experts' depositions. Plaintiffs offered Defendants the opportunity to rebut the addendum, but Defendants instead chose not to share it with their expert. Lockerbie Deposition at 127:19-128:25.

Defendants now claim they need not address the addendum because its "late submission is obviously improper." NYSCEF 70 at 31 n.6. New York law says otherwise. The governing rules do not impose time limits on expert disclosures. *See* CPLR 3101(d). Indeed, recent amendments to the CPLR were intended to override "appellate decisions that limited a party's ability to rely on an expert at summary judgment merely because the expert had not been disclosed during pretrial discovery." *Theroux v. Resnicow*, 148 N.Y.S.3d 885, 889 (Sup. Ct., N.Y. Cty. [Gerald Leibovits, J.] 2021) (summarizing Report of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York (January 2015)). Defendants knew Plaintiffs had retained Dr. Barreto, knew his qualifications, and knew he intended to opine on this topic. Defendants may not ignore his addendum because they cannot show that the timing of its disclosure was "intentional, willful, or prejudicial." *Colon*, 137 A.D.3d at 1068; *see also Krimkevitch v. Imperiale*, 104 A.D.3d 649, 650 (2d Dep't 2013) (excluding expert testimony where supplemental report "was exchanged immediately before trial" and advanced novel theory).

Regardless, Plaintiffs can introduce the addendum at this stage. *See* CPLR 3212(b) ("Where an expert affidavit is submitted in . . . opposition to[] a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange . . . was not furnished prior to the submission of the affidavit."); *see also* Advisory Report at 28 (explaining that purpose of CPLR 3212(b) is to "mak[e] certain that where expert testimony is required or desired [at summary judgment] . . . that parties have the same latitude to utilize expert testimony as they do at trial").

CONCLUSION

For these reasons, Defendants' motion for summary judgment should be denied.

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CERTIFICATION OF COMPLIANCE WITH UNIFORM RULE 202.8-B

I, Ruth Greenwood, an attorney at law licensed to practice in the State of New York, certify that this document contains 7,981 words, as calculated by the Microsoft Word processing system, inclusive of point headings and footnotes, and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, and regulations, etc.

/s/ Ruth Greenwood