SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

Kenneth Young,

Plaintiff,

– vs –

TOWN OF CHEEKTOWAGA,

Defendant

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Index No: 803989/2024

Hon. Paul B. Wojtaszek, J.S.C., Assigned Justice

Dated: May 20 , 2024

Buffalo, NY

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I. Preliminary Statement

Plaintiff is a Black resident and registered voter in the Town of Cheektowaga. Plaintiff filed this lawsuit under the New York State John R. Lewis Voting Rights Act ("NYVRA"), Election Law §§ 17-206(4), because the at-large election system for the Cheektowaga Town Board violates Election Law § 17-206(2)(a).

Section 17-206(2)(a) of the Election Law prohibits the use of "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." Election Law § 17-206(2)(b) provides that a violation of § 17-206(2)(a) is proven upon a showing that (1) a political subdivision used an at-large method of election, and (2) voting patterns of members of a protected class within the political subdivision are racially polarized. Both elements of a cause of action under the NYVRA unquestionably exist in the Town of Cheektowaga, and there is no legitimate issue of fact in this regard because:

1. The Town of Cheektowaga elects its town board members using an at-large election system;
2. Experts engaged by both parties have conclusively determined that racially polarized voting exited in the most recent at-large election for town board in November of 2023; and
3. Defendant's expert determined that racially polarized voting infected numerous elections from 2015 to 2023 with respect to the Town of Cheektowaga voters.

See NYSCEF Doc No. 4, Exhibit 3 to Complaint, NYSCEF Doc No. 8, Exhibit 7 to Complaint, NYSCEF Doc No. 9, Exhibit 8 to Complaint, and the Affirmation of Dr. Loren Collingwood submitted in support of this motion for partial summary judgment.

Election Law § 17-206(5)(a) states that upon a finding of a violation of any provision of the NYVRA "the 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…." (emphasis added). Election Law § 17-216 provides that an NYVRA litigation "***shall*** be subject to expedited pretrial and trial proceedings and receive an automatic calendar preference" (emphasis added).

Plaintiff Commenced this action by filing of a summons and complaint, and an amended summons, on March 18, 2024. *See* NYSCEF Doc. No. 1, Summons and Complaint, NYSCEF Doc. No. 2 to 22, Exhibits to Complaint, and NYSCEF Doc. No. 23, Amended Summons. Service of process was completed on March 21, 2024. *See* NYSCEF Doc. No. 24, Affidavit of Service. Issue was joined on April 10, 2024. *See* NYSCEF Doc. No. 25, Answer.

Plaintiff now seeks a partial summary judgment with regard to issues for which there are no material issues of fact, specifically seeking:

1. A judgment that racially polarized voting in the context of the NYVRA exited in the November 2023 Town of Cheektowaga election for town board;

2. A judgment that racially polarized voting in the context of the NYVRA exited in numerous other Town of Cheektowaga elections, and county and state elections, since 2015;

3. A judgment that the existence of an at-large method of election and racially polarized voting in the Town of Cheektowaga violates Election Law § 17-206(2)(a);

4. A judgment that Defendant did not enact a safe harbor NYVRA Resolution before the expiration of the fifty-day period specified in Election Law § 17-206(7)(a);

5. A judgment dismissing Defendant's First Affirmative Defense because Plaintiff has stated a cause of action in the Complaint;

6. A judgment dismissing Defendant's Second, Third, Fourth, and Ninth Affirmative Defenses because said defenses are irrelevant to the cause of action based on the elements listed in Election Law § 17-206(2)(b), and because Defendant's own expert determined that there is racially polarized voting in the Town of Cheektowaga, which, combined with the existence of an at-large election system, is a *per se* violation of Election Law § 17-206(2)(a) as specified in Election Law § 17-206(2)(b)(i)(A);

7. A judgment dismissing Defendant's Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Affirmative Defenses because (1) Defendant, a subdivision of the State of New York, does not have the capacity to challenge the constitutionality of a state law; (2) Defendant, a subdivision of the state of New York, has no First, Fourteenth, or Fifteenth Amendment rights and no equal protection or due process rights under the Federal or New York State Constitutions; (3) the NYVRA is not facially unconstitutional as a matter of law; and (4) Defendant has not filed proof of service as required by CPR § 1012(b)(3);

8. A judgment dismissing Defendant's Twelfth Affirmative Defense because Plaintiff became entitled as a matter of law to commence an action to enforce the NYVRA as of February 1, 2024 due to Defendant's failure to enact a complaint NYVRA Resolution under Election Law § 17-206(7)(b);

9. A judgment that Defendant's February 5, 2024 Resolution and March 12, 2024 Resolution did not enact valid viable NYVRA remedies that will eliminate the violation of Election Law § 17-206(2)(a) caused by the existence of racially polarized voting and the at-large election system in the Town of Cheektowaga; and

10. A judgment that Defendant's elections for the six members of the town board must be conducted by using a district method of election beginning with the election in November of 2025.

II. Statement of facts

On December 12, 2023, Plaintiff mailed a NYVRA notification letter to Defendant's town clerk as required by Election Law § 17-206(7). *See* NYSCEF Doc No. 2, Exhibit 1 to Complaint.

On December `19, 2023, the NY Attorney General issued a determination that the Town of Cheektowaga is a covered entity under Election Law § 17-210. NYSCEF Doc No. 18, Exhibit 17 to the Verified Complaint, page 26 of 27. As a covered entity, Defendant must seek preclearance from either the NY Attorney General or the Supreme Court of New York, Erie County, for any changes in its method of election effective on or after September 22, 2024. Election Law § 17-210. NYSCEF Doc No. 18, Exhibit 17, page 1 of 27 to 6 of 27.

On January 9, 2024, Defendant adopted a resolution to investigate the NYVRA matter but failed to: (1) specify a remedy for the potential violation, (2) set forth the steps to be taken for approval and implementation of a specified remedy for the potential violation, and (3) provide a schedule for adopting and implementing a specified remedy for the potential violation, all as required by Election Law § 17-206(7)(b). *See* NYSCEF Doc No. 6, Exhibit 5 to Complaint . The January 9, 2023 Resolution was merely a statement that the Town Board would look into the matter.

On February 1, 2024, the 50-day period expired for enacting a compliant NYVRA Resolution needed to invoke the safe harbor provision in Election Law § 17-206(7)(b).

On February 5, 2024, Defendant passed a resolution to hold two public hearings to allow the public to comment on the "New York Voting Rights Act letter (hereinafter referred to as the "NYVRA letter") received by the town clerk." See NYSCEF Doc No. 07, Exhibit 6 to Complaint.

Said Resolution was passed after the 50-day period had expired. Moreover, said Resolution did not: (1) specify a remedy for the potential violation, (2) set forth the steps to be taken for approval and implementation of a specified remedy for the potential violation, and (3) provide a schedule for adopting and implementing a specified remedy for the potential violation, all as required by Election Law § 17-206(7)(b).

On February 21, 2024, and February 24, 2024, Defendant held the public hearings referenced in the February 5, 2024 Resolution. *See* NYSCEF Doc No. 11, Exhibit 10 to Complaint, and NYSCEF Doc No. 12, Exhibit 11 to Complaint. Along with the notices for the public hearings Defendant published the report of Defendant's expert, Dr. Lisa Handley (NYSCEF Doc No. 8, Exhibit 7 to Complaint), and the memorandum of Defendant's consultant, Jeffery M. Wice (NYSCEF Doc No. 9, Exhibit 8 to Complaint).

Defendant's expert, Dr. Lisa Handley, found racially polarized voting in the Town of Cheektowaga for elections in 2015, 2017, 2018, 2019, 2021, 2022, and 2023 as follows:

- 2015: In the Democratic Primary, Young was the clear first choice of Black voters, but Young was the last choice of White voters.
- 2017: The countywide general elections for County Sheriff and Comptroller were racially polarized. The Black candidate supported by Black voters did not carry the Town of Cheektowaga in those two contests.
- 2018: In the Democratic primary for Attorney General, Black voters favored one of the two Black candidates running, Leecia Eve, and White voters supported Sean Patrick Malone. Malone carried the Town of Cheektowaga with 52.4% of the vote.
- 2019: The election for Cheektowaga Town Justice was racially polarized. The candidate favored by Black voters lost to the candidate favored by White voters.

- 2021: The countywide general election for County Sheriff was racially polarized. The Black candidate supported by Black voters did not carry the Town of Cheektowaga in that contest.

- 2021: In the primary for Erie County Sheriff, Black voters supported Kimberly Beaty, one of the two Black candidates running. White voters supported the White candidate, Brian Gould, who won the contest with 66.5% of the vote.

- 2022: The election for Cheektowaga Town Justice was racially polarized. The candidate favored by Black voters lost to the candidate favored by White voters.

- 2023: The only Black candidate supported by Black voters to run very recently (2023) for Town Council was defeated in a racially polarized election contest.

See NYSCEF Doc No. 8, Exhibit 7 to Complaint, at page 4 of 19 to 6 of 19, and page 8 of 19. Defendant's expert concluded that:

> Voting in the Town of Cheektowaga appears to be more racially polarized since 2021 than was the case as little as five years ago (2019). Moreover, prior to 2021, even when a contest was racially polarized, the candidates preferred by Black voters usually prevailed. Since 2021, however, all of the elections for town office (as well as all of the countywide and statewide elections analyzed) have been racially polarized. And not all of the candidates of choice of Black voters won these polarized contests. Perhaps most significantly, the only Black candidate supported by Black voters to run very recently (2023) for town council was defeated in a racially polarized election contest.

See NYSCEF Doc No. 8, Exhibit 7 to Complaint, at page 9 of 19.

Defendant's consultant, Jeffery Wice, concluded that "the town may want to develop a remedial plan for the Town Board to consider in light of the findings of recent racial bloc voting. The challengers can bring a costly and time-consuming action in State Supreme Court unless a mutually agreed upon solution is reached." See NYSCEF Doc No. 9, Exhibit 8 to Complaint, at page 5 of 5.

After the public hearings were held, the Buffalo Evening News reported that "Cheektowagans back voting wards to reduce racial polarization." *See* NYSCEF Doc No. 16, Exhibit 15 to Complaint.

On March 12, 2024, Defendant adopted a resolution stating that Defendant "Town has identified the implementation of a ward system for Town Councilmember elections as a potential way to ensure that [NYVRA] public policy is achieved and to remedy racially polarized voting." *See* NYSCEF Doc No. 22, Exhibit 21 to Complaint, page 2 of 4. Said Resolution, however, did not adopt ward voting but rather directed a referendum vote to be held in November of 2024 to let the voters decide if that remedy should be adopted. See Id., page 2 of 4, Section 2.

On March 18, 2024, Plaintiff filed this action. Service was completed on March 21, 2024. Issue was joined on April 10, 2024.

III. The NYVRA gives municipalities an opportunity to avoid NYVRA litigation by enacting a resolution containing a specified remedy for a potential violation of the NYVRA and a schedule for enactment and implementation of the specified remedy for a potential violation of the NYVRA.

The NYVRA contains detailed pre-suit provisions aimed at affording political subdivisions the opportunity to "make necessary amendments to proposed election changes without needing to litigate in court." Senate Mem. in Support of Bill No. S1046-E (2021-22) (NYSCEF Doc. No 19 at page 7 of 9, Exhibit `18 to the Complaint). All that is necessary for a political subdivision to take advantage of the opportunity to avoid litigation is the assertion of a potential violation in the NYVRA notification letter and the enactment of a compliant NYVRA Resolution within 50-days after the mailing of a NYVRA Notification Letter. *See* Election Law § 17-206(7). The existence of a "potential violation" arises from the NYVRA Notification Letter which must assert that the political subdivision may be in violation of this title. Proof of an actual violation is not required Election Law § 17-206(7).

If the political subdivision decides to act upon a potential violation asserted in a NYVRA notification letter by adopting a complaint NYVRA Resolution within the 50-day period, then the statute provides an additional 90-day safe harbor from litigation. *See id.* If the political subdivision fails to enact a compliant NYVRA Resolution within the 50-day period, then any "aggrieved person" can file an action against the political subdivision to enforce the NYVRA. *See* Election Law § 17-206(4).

A complaint NYVRA Resolution must contain:

> (i) the political subdivision's intention to enact and implement a remedy for a potential violation of this title;
>
> (ii) specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy for a potential violation; and
>
> (iii) a schedule for enacting and implementing such a remedy for a potential violation.

See Election Law 17-206(7)(b)(i) to (iii). While the NYVRA has a non-exclusive list of numerous possible remedies, it does not allow a political subdivision to avoid the specificity requirement of Election Law § 17-206(7)(b) by merely stating that it will implement an unspecified remedy. To qualify as a NYVRA Resolution the political subdivision must specify a remedy and must specify a schedule for enactment and implementation of the specified remedy.

The NYVRA authorizes political subdivisions to act upon a "potential violation" rather than an "actual violation" because the legislature is design to accelerate the objectives of the NYVRA in light of the "the frequency of elections, the severe consequences and irreparable harm of holding elections under unlawful conditions, and the expenditure to defend potentially unlawful conditions that benefit incumbent officials… ." *See* Election Law § 17-216. The intention of the

legislature is further evidenced by comparing the NYVRA to the California VRA. Under the California VRA, a municipality has 45 days after receiving a written notice "asserting that the political subdivision's method of conducting elections ***may violate*** the California Voting Rights Act of 2001" to "pass a resolution outlining its intention to transition from at-large to district-based elections, specific steps it will undertake to facilitate this transition, and an estimated timeframe for doing so." *See* CA Elec Code §§ 10010(e) (2023) (emphasis added). Like the California VRA, the NYVRA is invoked by a notification letter that asserts a potential violation. *See* Election Law § 17-216. Like the California VRA, the NYVRA does not require that the political subdivision first determine that there is a potential or actual violation to take advantage of the safe harbor provision.

The NYVRA was designed by the legislature to be more comprehensive than the voting rights acts of California. *See* Senate Mem. in Support of Bill No. S1046-E (2021-22) (NYSCEF Doc. No 19 at page 8 of 9 to page 9 of 9, Exhibit `18 to the Complaint). To that end, the NYVRA expands the universe of remedies that a political subdivision can specify in a NYVRA Resolution rather than limiting the specific remedy to only district voting as is done in the California VRA. Nonetheless, to qualify as a compliant NYVRA Resolution a political subdivision must, within 50 days of the NYVRA notification letter asserting a potential violation, identify a specific remedy and specific schedule for enactment and implementation of the specified remedy. Political subdivisions are not forced to enact a compliant NYVRA resolution to remedy an assertion of a potential violation in the NYVRA notification letter, but they lose the protection from litigation if they fail to so act within the 50-day period.

IV. Defendants did not adopt a compliant NYVRA Resolution before the statutory deadline of February 1, 2024.

Defendant had 50 days from the mailing of the NYVRA Notification Letter to enact a complaint NYVRA Resolution that specified a remedy for the potential violation and a schedule for adoption and implementation of that specified remedy for the potential violation. During that 50-day period the statute prohibited Plaintiff from filing suit. Election Law § 17-206(7)(a). Had the Defendant enacted a compliant NYVRA Resolution then the statute would have provided Defendant an additional 90-day safe harbor from litigation. Election Law § 17-206(a)(7)(b). To receive the protection of this separate 90-day safe harbor, Defendant had to pass a compliant "NYVRA Resolution" within the initial 50-day period that "affirm[s]": (i) "the political subdivision's intention to enact and implement a remedy for a potential violation of this title;" (ii) "specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy;" and (iii) "a schedule for enacting and implementing such a remedy." Election Law 17-206(7)(b)(i) to (iii).

Defendant did not pass a compliant NYVRA Resolution before February 1, 2024. The January 9, 2024 Resolution merely states that the Town is going to pursue an investigation to be completed "within 30 days" which, of course, extended past the February 1, 2024 deadline. The January 9, 2024 Resolution also failed to specify a remedy, but instead merely stated that the Town would consider if a remedy might be needed after receiving the investigatory report:

> It is hereby directed that the Town Supervisor and Town Attorney will report their findings and the result of Mr. Wice's and Dr. Handley's analyses to the town board within thirty (30) days of the date of this Resolution (the "Report"). If, after considering the Report and any other information that may become available to the Town - including, without limitation, any report(s) that Mr. Young submits, the Town concludes that there may be a violation of the NYVRA, the Town intends to enact and implement the appropriate remedy(ies).

See NYSCEF Doc No. 6, Exhibit 5 to Complaint, at page 2. The NYVRA does not allow a political subdivision an endless amount of time to select a remedy and a schedule for the adoption and implementation of a remedy for a potential violation. The NYVRA gave Defendant just 50 days to do so, after which Plaintiff was entitled to bring an action to enforce the NYVRA because of Defendant's failure to adopt a compliant NYVRA Resolution to remedy the potential violation.

V. Defendant's February 5, 2024 and March 12, 2024 resolutions are not compliant NYVRA Resolutions.

The February 5, 2024, and March 12, 2024 resolutions do not meet the requirements of a "NYVRA Resolution" because (1) they were adopted after the 50-day period specified in Election Law 17-206(7)(b); and (2) they failed to contain all the necessary provisions required by Election Law 17-206(7)(b)(i) to (iii) (as discussed below).

A. The February 5, 2024 Resolution failed to specify a remedy, failed to specify the steps to be taken to implement a remedy, and failed to specify a schedule for enacting and implementing a remedy.

The February 5, 2024 Resolution merely calls for a public hearing to consider the NYVRA notification letter received by the town clerk and to continue the Town Board's investigation of the matter. It does not identify a specific remedy, but instead refers to an all-inclusive set of NYVRA remedies described as "including, but without limitation." *See* NYSCEF Doc No. 7, Exhibit 6 to Complaint, at page 2, "Section 2"". That Resolution contains no specific remedy, contains no steps for enacting and implementing any particular remedy, and contains no schedule for enacting and implementing any particular remedy.

B. The March 12, 2024 Resolution failed to adopt a valid or viable NYVRA remedy and failed to specify a schedule for enacting and implementing a remedy.

The March 12, 2024 Resolution, even if it had been adopted before the expiration of the 50-day period, would not qualify as a compliant NYVRA resolution. It suffers from several factual and substantive deficiencies.

First, it falsely claims that "Dr. Handley and Mr. Wice concluded that from 2015 to 2023, racially polarized voting only existed in the 2023 election for Town Councilmember." Dr. Hadly's expert report (see NYSCEF Doc No. 8, Exhibit 7 to Complaint) found racially polarized voting in elections in 2015, 2017, 2018, 2019, 2021, 2022, and 2023 as follows:

- 2015: In the Democratic Primary, Young was the clear first choice of Black voters, but Young was the last choice of White voters.
- 2017: The countywide general elections for County Sheriff and Comptroller were racially polarized. The Black candidate supported by Black voters did not carry the Town of Cheektowaga in those two contests.
- 2018: In the Democratic primary for Attorney General, Black voters favored one of the two Black candidates running, Leecia Eve, and White voters supported Sean Patrick Malone. Malone carried the Town of Cheektowaga with 52.4% of the vote.
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- 2023: The only Black candidate supported by Black voters to run very recently (2023) for Town Council was defeated in a racially polarized election contest.

Thus, Defendant's Second, Third, Fourth, and Ninth affirmative defenses are belied by Defendant's own experts, and should be summarily dismissed.

The March 12, 2024 Resolution references the recently enacted even-year voting requirement for towns under Town Law § 80 as a possible remedy for the existing racially polarized voting. Such a remedy is illusory. First, because there was racially polarized voting in two prior even-year elections (2018 and 2022) such a remedy is not likely to resolve the racially polarized voting causing injury to minority voters. Second, the even-year voting rules will not impact the Cheektowaga Town Board elections until November 2028 for three of the six town board seats, and November 2030 for the other three town board seats. *See* 2023 N.Y. Laws 741, Section 5.

Election Law § 17-216 focuses on resolving a violation of the NYVRA before the next election, not 4.5 years and 6.5 years from now:

> Because of the frequency of elections, the severe consequences and irreparable harm of holding elections under unlawful conditions, and the expenditure to defend potentially unlawful conditions that benefit incumbent officials, actions brought pursuant to this title shall be subject to expedited pretrial and trial proceedings and receive an automatic calendar preference.

The directive of the legislature to give priority to cases involving claims under the NYVRA reflects a policy to employ a remedy sooner rather than later, and is reminiscent of Dr. Martin Luther King's 1963 letter from his cell in a Birmingham jail after his arrest for engaging in a protest to advance the voting rights of minorities:

> For years now I have heard the word "Wait!" It rings in the ear of every Negro with piercing familiarity. This "Wait" has almost always meant "Never." We must come to see, with one of our distinguished jurists, that "justice too long delayed is justice denied."

Letter from Birmingham Jail, by Dr. Martin Luther King, Jr., April 16, 1963. The Black minority population in the Town of Cheektowaga should not be made to wait more than 6 years for a remedy of the existing NYVRA violations that have existed for almost a decade.

The only valid remedy identified by Defendant is the adoption of a district voting system to replace the at-large system. But the March 12, 2024 Resolution fails to adopt that remedy and instead leaves it up to the voters to decide in the November 2024 election if the voters want to adopt a remedy: "The Board believes the determination whether to enact a second remedy lies with the voters in the Town". *See* Exhibit 21 to the Complaint, page 3, at Section 2. Contrary to what Defendant "believes," the NYVRA does not leave the adoption of a remedy to the voters, but rather requires either that the Defendant adopt a remedy or that the Court impose a remedy.

Defendant's attempt to avoid compliance with the NYVRA by conditioning implementation of a remedy upon voter approval is nothing more than washing its hands of its responsibility to remedy the violation of the NYVRA. Fortunately, for the minority voters suffering from voter disenfranchisement in the Town of Cheektowaga, the NYVRA does not allow the voters who caused the problem to be the arbiters of whether the problem will be remedied. The NYVRA provides only three methods by which a remedy of a violation of the NYVRA can be implemented:

1. Imposition by a court after an aggrieved person or other authorized plaintiff has commenced a lawsuit. *See* Election Law § 17-206(5)(a);

2. Adoption by a municipality of a remedy by way of a compliant NYVRA Resolution. *See* Election Law § 17-206(7)(b); or

3. Submission by a municipality of a NYVRA Proposal to the NYS Attorney General's office for approval. *See* Election Law § 17-206(7)(c).

The NYVRA has no provision allowing submission for approval of a remedy to the electorate. Such a provision does not exist because it would be irrational to condition the adoption of a remedy upon approval by the same electorate that is infected with racially polarized voting that causes the violation of the NYVRA in the first place. Subjecting the adoption of an NYVRA remedy to a pre-condition of voter approval by the very at-large system that caused the violation of Election Law § 17-206(2)(a) would emasculate the very purpose of the NYVRA. Remedial legislation must be liberally construed "to effect or carry out the reforms intended and to promote justice" (McKinney's Cons Laws of NY, Book 1, Statutes § 321, Comment, at 490) (*Matter of Dewine v State of NY Bd. of Examiners of Sex Offenders*, 89 AD3d 88, 92 [4th Dept 2011]).

One purpose of the NYVRA is to protect voters who are members of a protected class from the employment of an at-large system of voting that results in the inability of those voters to elect candidates of their choosing or influence the outcome of elections. Thus, the NYVRA must be applied in a manner that will foster that objective rather than inhibit it. Conditioning the implementation of a remedy upon voter approval illogically subjects the remedy to the same illegal at-large voting system that causes the violation of the NYVRA in the first place.

Election Law § 17-206(2)(a) unambiguously states that “No board of elections or political subdivision shall 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.” Defendant’s attempt to use that prohibited system of election as a pre-condition to the adoption of a remedy is absurd and would lead to objectionable and unreasonable consequences because, if the remedy fails to get voter approval, then there would be no remedy and the NYVRA would be effectively repealed by a local municipality’s referendum. Such an absurd proposition should be summarily rejected by the Court:

> We are generally mindful not to read ordinances in a manner that would render the ordinance "absurd" (McKinney's Cons Laws of NY, Book 1, Statutes § 145), or that would "lead to objectionable and unreasonable consequences" (citations omitted).

People v Ivybrooke Equity Enters., LLC, 175 AD3d 1000, 1002 (4th Dept 2019).

Election Law § 17-202 provides that:

> all statutes, rules and regulations, and local laws or ordinances related to the elective franchise shall be construed liberally in favor of (a) protecting the right of voters to have their ballot cast and counted; (b) ensuring that eligible voters are not impaired in registering to vote, and (c) ensuring voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process in registering to vote and voting.

A liberal construction is one that is in the interest of those whose rights are to be protected. *See People v Ivybrooke Equity Enters*., LLC, 175 AD3d 1000, 1001 (4th Dept 2019); and *Matter of Dewine v State of N.Y. Bd. of Examiners of Sex Offenders*, 89 AD3d 88, 92, (4th Dept 2011), quoting McKinney's Cons Laws of NY, Book 1, Statutes § 321, Comment at 491 (1971 ed). Thus, The NYVRA must be interpreted and applied in the interest of protecting the effective voting power of the specified protected classes rather than protecting the voting power of the electorate found to be infected with racially polarized voting. Conditioning a remedy on voter approval is the antithesis of the NYVRA.

VI. Defendant's claims of unconstitutionality should be summarily dismissed.

The Defendant's affirmative defenses based on state and federal constitutional claims should be summarily dismissed because:

1. Defendant, a subdivision of the state of New York, lacks the capacity to challenge the constitutionality of a New York State law;
2. Defendant, a municipal corporation, has no substantive rights under the New York State or Federal Constitutions;

3. Even if Defendant had substantive constitutional rights and the capacity to raise them, the NYVRA does not violate the First, Fourteenth, or Fifteenth Amendments of the United States Constitution, nor Article I, Section 11 (Equal Protection), Article I, Section 6 (Due Process), or Article I, Section 8 (Freedom of Speech) of the New York State Constitution; and

4. In any event, the Court cannot grant a judgment in favor of Defendant based on the affirmative defenses because Defendant has failed to file proof of service on the NY Attorney General as required by CPLR 1012(b)(3). (*Matter of Kesel v Holtz*, ___ AD3d ___, 200 NYS3d 245, 2023 NY Slip Op 06639 [2023])

A. Defendant lacks capacity to challenge the constitutionality of a state law.

Defendant lacks capacity to mount constitutional challenges to the NYVRA:

> Constitutionally as well as a matter of historical fact, municipal corporate bodies—counties, towns and school districts—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. Viewed, therefore, by the courts as 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.

City of New York v State of New York, 86 NY2d 286, 289-290, (1995).

Thus, Defendant's Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh affirmative defenses should be summarily dismissed because of lack of capacity.

B. Defendant has no First, Fourteenth, or Fifteenth Amendment rights under the United States Constitution, nor such corresponding rights under the New York State Constitution.

A "municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator" (*Williams v Mayor of Baltimore*, 289 US 36, 40, 53 S Ct 431, 77 L Ed 1015 [1933]). The Equal Protection Clause does not protect local governments: "The regulation of

municipalities is a matter peculiarly within the domain of the state." (*City of Newark v. State of New Jersey*, 262 U.S. 192 [1923]). In *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907) the Supreme Court left no doubt that a municipality is at the mercy of the state that created it:

> The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects 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 Constitution of the United States.

Neither does a local government have First Amendment protections against action by the state: "The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government." (*Columbia Broadcasting Sys., Inc. v Democratic Natl. Comm.*, 412 US 94, 139 [1973]).

Defendant's lack of privileges and immunities under the Federal Constitution is equally true under the due process and equal protection clauses of the New York State Constitution:

> The New York City Board of Education and Department of Social Services and the Board of Education of the City of Yonkers seek also to mount attacks of varying degrees of plausibility and relevance under the due process and equal protection clauses of our State and Federal Constitutions. While these units of municipal government have procedural standing to participate in the present litigation (and thus to be heard, for instance, on questions of statutory interpretation), they do not have the substantive right to raise these constitutional challenges.

Jeter v Ellenville Cent. Sch. Dist., 41 NY2d 283, 287 (1977).

Thus, Defendant's Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh affirmative defenses should be summarily dismissed because Defendant does not have the claimed substantive rights under the New York State and Federal Constitutions.

C. The NYVRA does not violate the New York State of Federal Constitutions.

The NYVRA is similar in its basic structure to the Voting Rights Acts of the states of Washington and California. Defendant's claims about the unconstitutionality of the NYVRA have been rejected by every state and federal court that has considered them in a similar context. *Portugal v. Franklin Cnty.,* 530 P.3d 994 (Sup Ct Wash. en banc., 2023), *cert. denied sub nom. Gimenez v. Franklin County* (US Sup Ct Docket 23-500, 2024). *See also Sanchez v. City of Modesto***,** 145 Cal. App. 4th 660, 669, 51 Cal. Rptr. 3d 831 (2006) (California Voting Rights Act not unconstitutional), and *Higginson v. Becerra*, 786 F. App'x. 705 (9th Cir. 2019) (No. 19-55275) (California Voting Rights Act not unconstitutional). The New York Court of Appeals has itself relied on decisions of federal and state courts regarding the constitutionality of statutes that are similar to a New York law whose constitutionality has been put in issue. *People v. Schneider,* 37 NY3d 187, 202 (2021).

Like the VRA's of Washington and California, the NYVRA's definition of protected class applies to every race or skin color. Election Law § 17-204(5). The NYVRA protects White voters from racially polarized voting as well as Black voters. Because everyone is a member of a race and everyone is a color, every member of a political subdivision has standing to seek equal voting rights regardless of their race. Moreover, the standing provision of the NYVRA is especially broad to further ensure that anyone claiming injury can bring an action. Election Law § 17-206(4) states that "[a]ny aggrieved person, organization whose membership includes aggrieved persons or members of a protected class, organization whose mission, in whole or in part, is to ensure voting access . . . may file an action against a political subdivision." Thus, the NYVRA is race neutral as to those who are protected and those who can seek redress under the law.

The NYRA does not require the impermissible use of race in the imposition of a remedy by the court, but rather merely requires remedies that eliminate deprivations of the equal

opportunity to participate in the exercise of the elective franchise. Unconstitutional racial gerrymandering cannot arise from the imposition of "appropriate remedies" under Election Law § 17-212(3) because the New York State Constitution and Municipal Home Rule Law § 10(13)(a) prevent unconstitutional racial gerrymandering in the drawing of voting districts. As is the case under the Federal Voting Rights Act, the drawing of districts to eliminate disenfranchisement of minority voters does not violate the Constitution when remedial districts are drawn using "traditional, neutral redistricting criteria." See *Allen v Milligan*, 599 US 1, 41 (2023).

VII. Plaintiff is entitled to the imposition of a remedy of district voting by the Court.

The parties' experts agree that the Town of Cheektowaga's at-large system of voting is infected with racially polarized voting that inhibits the ability of a protected minority to elect candidates of their choice or influence the outcome of elections in violation of Election Law § 17-206(2)(a). Plaintiff requested that Defendant change to a ward system of voting for town board elections. Defendant proposed in its March 12, 2024 Resolution allowing the voters to decide if they wanted to adopt the ward system of voting as a remedy for the violation of Election Law § 17-206(2)(a). However, the NYVRA does not leave the correction of a violation of Election Law § 17-206(2)(a) to the voters. Because any such vote would not take place until after September 22, 2024, Defendant would have to seek preclearance for such a change in the Town's method of election. *See* Election Law §210. Moreover, the Town cannot unilaterally determine election districts because Town Law § 85 specifies that after the adoption of a proposition to change to a ward system, the county legislature has sole authority to determine the boundaries of the ward. A ward system cannot take effect until the next biennial election which is more than 120 days after the county legislature has completed the drawing and filing of the district maps. *Id.* Thus, even if voters approved a proposition forward voting in November of 2024, the earliest it could take effect would be November 2027.

The NYVRA provides two methods for overcoming Town Law § 85: (1) submission of a NYVRA Proposal to the NY Attorney General for approval pursuant to Election Law § 17-206(7)(c); or (2) imposition of a remedy by the Court pursuant to Election Law § 17-206(5). Defendant has not submitted a NYVRA Proposal to the NY Attorney General. This Court has the authority to override Town Law § 85 in all respects. *See* Election Law § 17-206(5)(b) ("The court shall have the power to require a political subdivision to implement remedies that are inconsistent with any other provision of law where such inconsistent provision of law would preclude the court from ordering an otherwise appropriate remedy in such matter.")

Election Law § 17-206(5)(a) states that upon a finding of a violation of any provision of the NYVRA "the 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…." (emphasis added). Therefore, Plaintiff is entitled to a judgment implementing a district voting system for the Town of Cheektowaga Town Board elections.

VIII. Conclusion.

Plaintiffs are entitled to partial summary judgment as follows:

1. A judgment that racially polarized voting in the context of the NYVRA exited in the November 2023 Town of Cheektowaga election for town board;

2. A judgment that racially polarized voting in the context of the NYVRA exited in numerous other Town of Cheektowaga elections, and county and state elections, since 2015;

3. A judgment that the existence of an at-large method of election and racially polarized voting in the Town of Cheektowaga violates Election Law § 17-206(2)(a);

4. A judgment that Defendant did not enact a safe harbor NYVRA Resolution before the expiration of the fifty-day period specified in Election Law § 17-206(7)(a);

5. A judgment dismissing Defendant's First Affirmative Defense because Plaintiff has stated a cause of action in the Complaint;

6. A judgment dismissing Defendant's Second, Third, Fourth, and Ninth Affirmative Defenses because said defenses are irrelevant to the cause of action based on the elements listed in Election Law § 17-206(2)(b), and because Defendant's own expert determined that there is racially polarized voting in the Town of Cheektowaga, which, combined with the existence of an at-large election system, is a *per se* violation of Election Law § 17-206(2)(a) as specified in Election Law § 17-206(2)(b)(i)(A);

7. A judgment dismissing Defendant's Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Affirmative Defenses because (1) Defendant, a subdivision of the State of New York, does not have the capacity to challenge the constitutionality of a state law; (2) Defendant, a subdivision of the state of New York, has no First, Fourteenth, or Fifteenth Amendment rights and no equal protection or due process rights under the Federal or New York State Constitutions; (3) the NYVRA is not facially unconstitutional as a matter of law; and (4) Defendant has not filed proof of service as required by CPR § 1012(b)(3);

8. A judgment dismissing Defendant's Twelfth Affirmative Defense because Plaintiff became entitled as a matter of law to commence an action to enforce the NYVRA as of February 1, 2024 due to Defendant's failure to enact a compliant NYVRA Resolution under Election Law § 17-206(7)(b);

9. A judgment that Defendant's February 5, 2024 Resolution and March 12, 2024 Resolution did not enact valid viable NYVRA remedies that will eliminate the violation of Election Law § 17-206(2)(a) caused by the existence of racially polarized voting and the at-large election system in the Town of Cheektowaga; and

10. A judgment that Defendant's elections for the six members of the Town Board must be conducted by using a district method of election beginning with the election of November of 2025.

Respectfully submitted,

Dated: May 20, 2024

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WORD COUNT CERTIFICATION

I, Gary D. Borek, hereby certify that this Memorandum of Law contains 6,995 words, excluding the caption, table of contents, table of authorities, and signature block, and complies with § 202.8-b(a) of Uniform Rules for New York State Trial Courts.

Pursuant to § 202.8-b(c) of Uniform Rules for New York State Trial Courts, I have relied on the word count of the word-processing system used to prepare this document.

Dated: May 20, 2024

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