SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SERGIO SERRATTO, ANTHONY AGUIRRE, IDA MICHAEL, and KATHLEEN SIGUENZA, Plaintiffs, -against- TOWN OF MOUNT PLEASANT and TOWN BOARD OF THE TOWN OF MOUNT PLEASANT, Defendants.	Index No. 55442/2024 Hon. David F. Everett **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

Four residents out of over 44,000 sued the Town of Mount Pleasant ("Town") and its Town Board ("Town Board") (collectively "Defendants") claiming that its at-large voting system violates the John R. Lewis Voting Rights Act ("NYVRA"). Yet three Plaintiffs have no injury and hence no standing. That leaves a single voter challenging the Town's at-large election system that has existed, without complaint, for decades. Defendants are entitled to summary judgment for numerous reasons.

First, it appears the NYVRA was designed to eliminate virtually all elements that federal courts have inferred from § 2 of the federal Voting Rights Act ("VRA"). But in doing so, the New York Legislature adopted a statute that is unintelligible and lacks any manageable standards that courts can enforce. It is self-contradictory and creates absurd scenarios, including by affording claims to both white and minority voters under the same factual predicates. The statute is too indeterminate to be enforced.

Second, the NYVRA, at least as applied here, violates equal-protection guarantees of the U.S. and New York Constitutions. It distributes burdens or benefits on the basis of race by requiring a state-imposed system ensuring that some racial or ethnic groups are likely to prevail in at least some elections at the expense of other racial or ethnic groups. Strict scrutiny applies and the NYVRA fails it. No strong basis in evidence suggests the NYVRA was necessary to remedy specific instances of past discrimination, and states lack the compelling interest in preventing vote dilution that Congress may have under the Civil War Amendments. Moreover, the NYVRA is nowhere close to being narrowly tailored to achieve an interest like Congress had in enacting the VRA. It rejected nearly every guardrail Congress established under § 2 of the VRA and lacks the exacting requirements that make the VRA constitutional.

Third, the New York Legislature has already given Plaintiffs a remedy for any alleged polarization that forms the basis of their claims. In requiring the Town to move its elections from odd to even years, the New York Legislature has created conditions where the divergence in voting preferences that Plaintiffs cite as the basis of liability is unlikely to exist in future elections. This case is therefore moot.

Finally, even if this Court were to reach the merits, Plaintiffs' claims still fail. Plaintiffs cannot show a divergence between the voting preferences of Hispanic voters in the Town from the rest of the electorate, as required by the statute. In addition, Plaintiffs can demonstrate at most one of eleven factors governing the statutory totality-of-circumstances inquiry. Rather than attempt to meet the test for Mount Pleasant, Plaintiffs look predominantly to evidence in other jurisdictions or in New York as a whole. That cannot be the correct way to apply a statute applicable only to political subdivisions in New York and in a challenge against only the Town of Mount Pleasant. Plaintiffs cannot create a triable question of fact for the Town, which is the jurisdiction they sued. The Court should enter summary judgment for Defendants on all claims.

II. FACTUAL BACKGROUND

See Defendants' separate statement of material facts submitted with this memorandum of law.

III. LEGAL STANDARD

Summary judgment is appropriate where a "cause of action…has no merit" (CPLR § 3212[b]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Where the trial burden is on the plaintiff, "the proponent of a summary judgment motion must show that there is 'an absence of evidence to support the nonmoving party's case'" (*Tibbits v Verizon N.Y., Inc.*, 40 AD3d 1300, 1301 [3d Dept 2007] [citation omitted]; *see also Bobby D.*

Assoc. v Ohlson, 24 Misc 3d 1239[A], 899 NYS2d 57, *2 [Civ Ct, New York County 2009] [same]). The nonmoving party must then submit admissible evidence supporting its claim that material triable issues of fact exist (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" *(id.*).

IV. LAW AND ARGUMENT

A. The NYVRA Is So Indeterminate That It Cannot Be Enforced.

Plaintiffs' claims fail for lack of a determinate, justiciable cause of action. The NYVRA cannot be enforced under twin doctrines requiring that statutes "provide a standard of behavior which is definite or ascertainable" (*cf. People v Brill*, 255 AD 452, 457 [1st Dept 1938]). First, a statute that is unintelligible is "of no force or effect" (*People v Briggs*, 193 NY 457, 459 [1908]). Because the judiciary may not "revise [a] statute by insertion of clauses which could render it more enforceable," a law that "lead[s] to absurdity" leaves the courts no choice but "to declare the inoperative part unconstitutional for absurdity, ambiguity or indefiniteness" (*HNC Realty Co. v Bay View Towers Apts., Inc.*, 125 Misc 2d 1088, 1094 [Sup Ct, Queens County 1984] [collecting cases]; *see also* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 134-39 [2012] [discussing the "Unintelligibility Canon"]). Second, courts cannot adjudicate cases in the absence of "judicially discoverable and manageable standards for resolving it" (*Brennan Ctr. for Justice at NYU Sch. of Law v N.Y. State Bd. of Elections*, 56 Misc 3d 376, 380 [Sup Ct, Albany County 2017], *affd* 159 AD3d 1301 [3d Dept 2018] [citation omitted]). The NYVRA is incomprehensible and leaves the Court with a standardless inquiry. It cannot be enforced.

1. In Section 17-206(2)(a), the NYVRA creates a "[p]rohibition against vote dilution," which states that "[n]o…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*" (Elec. Law § 17-206[2][a] [emphasis added]). Setting aside the ambiguous "influence" prerequisite, that text alone might make sense. But the statute goes on in subsection (2)(b)(i) to state that a violation of subsection 2(a) "shall be established" on a showing that "voting patterns of members of the protected class within the political subdivision are racially polarized" or "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" (§ 17-206[2][b][i]). This renders the statute incoherent.

An initial quandary is why subsection (2)(a) requires proof of "vote dilution" when subsection (2)(b)(i), which states how one may prove a violation of subsection (2)(a), erases that same requirement. The phrase "as a result of vote dilution" in (2)(a) carries enormous significance; other state judiciaries have read such text to "require[] not only a showing that racially polarized voting exists, but also that the protected class thereby has less ability to elect its preferred candidate or influence the election's outcome than it would have if the at-large system had not been adopted" (*Pico Neighborhood Assn. v City of Santa Monica*, 534 P3d 54, 64 [Cal Aug. 24, 2023], *as mod* [Cal Sept. 20, 2023]). Subsection 2(a) seemingly adopts that same rule, but then subsection (2)(b)(i) apparently abandons it. Courts are thus left to guess whether proof of vote dilution is a requirement. One subsection says yes, and another, no.[1]

2. Subsection (2)(b)(i)(A) compounds these problems by allowing for liability based on the absurd scenario where "voting patterns *of* members *of* the protected class within the political subdivision are racially polarized" (§ 17-206[2][b][i][A] [emphasis added]). Read plainly, this text requires a showing that members of the plaintiff's racial or ethnic group are *not* cohesive—they prefer *different* candidates from *each other*. But that is nonsensical and incoherent. The Supreme

[1] Until recently amended, subsection (2)(b) also stopped mid-sentence with just a semicolon.

Court understood long ago that, "[i]f the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests" (*Thornburg v Gingles*, 478 US 30, 51 [1986]). Yet the NYVRA as written requires the opposite—that class members vote differently from each other!

The statutory definitions add further mystery. The statute defines "[r]acially polarized voting" to "mean[] voting in which there is a divergence in the candidate, political preferences, or electoral choice of members in a protected class *from* the candidates, or electoral choice of the *rest* of the electorate" (§ 17-204[6] [emphasis added]). But subsection (2)(b)(i) conflicts with that definition by requiring internal group racial polarization. To the extent the definition of racially polarized voting is translated into that provision—which is itself unclear, since subsection (2)(b)(i) does not use the term "racially polarized voting"—it requires internal and external polarization at once. Moreover, the statute goes a step further and *prohibits* courts from considering evidence that cohesion is absent: "evidence that sub-groups within a protected class have different voting patterns shall not be considered" (§ 17-206[2][c][vii]). In short, whatever one portion of text states, another portion refutes.

In addition, the definition of "racially polarized voting" requires "a divergence in the candidate, political preferences, or electoral choice of members of the protected class," but then drops the "political preferences" in the later part of the definition, saying only "from the candidates or electoral choice of the rest of the electorate" (§ 17-204[6]). This once again provides courts with no guidance on whether the legislature intended for "racially polarized voting" to be found where there is a divergence of political preferences apart from candidates or electoral choices.

3. The statute cannot be fixed, as Plaintiffs likely will propose, by ignoring the plain text of subsection (2)(b)(i), and instead adopting the definition of "racially polarized voting" in

place of the language "racially polarized." That would render its disjunctive test satisfied solely based on the definition of racially polarized voting, and render divergent preferences among *different* groups sufficient for liability. For one thing, this would be an impermissible judicial rewrite.

Anyway, that solution would only create more problems. The definition of "[p]rotected class" includes all "individuals who are members of a race, color, or language-minority group" (Elec. Law § 17-204[5]). All voters meet this definition because all have a race. As California and Washington courts have understood in reading similar language, white voters belong to a "race…group" (*Sanchez v City of Modesto*, 51 Cal Rptr 3d 821, 826 [Ct App 5th Dist 2006]; *Portugal v Franklin Cnty.*, 530 P3d 994, 1007 [Wash 2023]).[2] Because the definition of "protected class" is broad enough to embrace everyone, it supplies no limiting principle delineating the basis of liability. The statutory definition of polarization requires proof that "there is a divergence" of political preferences "in a protected class from the candidates, or electoral choice of the rest of the electorate" (Elec. Law § 17-204[6]). But if all voters are members of a protected class—as the statute says—and a mere divergence of views creates a claim, then everyone belongs to a class for which a violation can be claimed. The "divergence" standard does not require proof that "a bloc voting majority must *usually* be able to defeat candidates" of the plaintiff's class, (*Gingles*, 478 US at 48-49), so a white plaintiff could show that white and Hispanic preferences diverge and then be entitled to relief in favor of the *white* class of voters and, at the same time, a Hispanic voter could make the *same* showing and be entitled to relief in favor of the *Hispanic* class of voters.

[2] As these courts also noted, any other conclusion would render these laws unconstitutional. As explained below, the NYVRA is unconstitutional however it is read.

Where everyone is injured simply because different groups have different preferences, a court has no way to know who should win a judgment and judicial relief.

The statute is further unintelligible in addressing cases with more than two racial or language groups (which is virtually every case). On the one hand, it provides that, "where there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision, members of each of those protected classes may be combined" (Elec. Law § 17-206[2][c][iv]). On the other hand, the definition of racial bloc voting compares "a protected class" with "the *rest* of the electorate" (§ 17-204[6] [emphasis added]), which means the "remainder or residue" of it (XIII Oxford English Dictionary 746 [2d ed 1989], rest). Where every voter belongs to a protected class, the statute is internally conflicted about where different groups belong in the inquiry, and who should be afforded the relief.

4. Disjunctively, under subsection (b)(i)(B), the NYVRA establishes liability where, "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" (Elec. Law § 17-206[2][b][i][B]). The law then provides eleven factors "that may be considered," for that analysis in addition to "additional factors" that are unnamed (§ 17-206[3]). That is unmanageable. Just about any fact relating to a jurisdiction could, in the hands of one jurist, lead to liability and, in the hands of another, foreclose liability.

Plaintiffs may point to the federal VRA for guidance, since the "totality of the circumstances" text appears to be drawn from § 2 of that statute (*see* 52 USC § 10301[b]). Federal courts have found manageable standards under that provision, but that means nothing here. To the contrary, it appears the NYVRA was designed to eliminate virtually all elements that federal courts

have inferred from § 2, to the point that it lacks manageable standards under either disjunctive standard.

From § 2's text, the U.S. Supreme Court has inferred "exacting requirements" that "limit judicial intervention" to rare cases (*Allen v Milligan*, 599 US 1, 30 [2023]). Under VRA § 2, a plaintiff "must satisfy three 'preconditions'" known as the *Gingles* preconditions (*id.* at 18, quoting *Gingles*, 478 US at 50). "First, the 'minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district'" (*id.* [citation and alteration marks omitted]). But the NYVRA nixes this requirement, providing that "evidence concerning whether members of a protected class are geographically compact or concentrated shall not be considered" (Elec. Law § 17-206[2][c]).

Second, under the federal VRA, the "minority group must be able to show that it is politically cohesive" (*Milligan*, 599 US at 18 [citation omitted]). But, as noted above, the NYVRA requires courts to ignore "evidence that sub-groups within a protected class have different voting patterns" (Elec. Law § 17-206[2][c][vii]). And the statutory language actually suggests the opposite standard, requiring proof that "members of the protected class within the political subdivision are racially polarized" (§ 17-206[b][i][A]).

Third, a plaintiff must "demonstrate that the white majority votes sufficiently as a bloc to enable it…to defeat the minority's preferred candidate" (*Milligan*, 599 US at 18 [citation omitted]). But the NYVRA does not require a showing that a majority bloc usually prevails to prevent the minority community from electing its preferred candidates, only that that "there is a divergence in the candidate, political preferences or electoral choice" between a racial group and the rest of the electorate (Elec. Law § 17-204[6]). Again, as discussed above, under its plain text, the white

community would actually be entitled to prevail when its vote is divergent from other racial minority groups.

It is only after these strict showings are made that a federal VRA plaintiff "must also show, under the 'totality of circumstances,' that the political process is not 'equally open' to minority voters" (*Milligan*, 599 US at 18 [citation omitted]). This normally requires proof, among other things, "of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process" (*Gingles*, 478 US at 36-37 [citation omitted]). This analysis, however, does not lend credence to the NYVRA totality-of-circumstances analysis. As explained, the NYVRA renders this requirement disjunctive, not conjunctive, with the polarization standard. The federal VRA requires proof of both legally significant racially polarized voting and unequal opportunity under the totality of the circumstances (*id.* at 60, 79). The NYVRA, however, simply requires only proof of divergence (not even legally significant polarization) or some unknown quantum of inequality under an unknown number of totality factors. (*see* § 17-206[2][b][i]). By consequence, whereas federal courts in § 2 cases consider the totality of circumstances only in cases where injury, causation, and redressability have first been shown (i.e., the *Gingles* preconditions have been first met), New York courts are left to examine an indeterminate question of "totality" with no strictures and no manageable standard for sorting winning from losing cases. The statute's 11 factors do not "preclude any additional factors from being considered" and no "specified number of factors [is] required" for liability (Elec. Law § 17-206[3]). That is no standard at all.[3]

[3] As explained below, Plaintiffs do not even rely predominantly on factors germane to the Town—an approach that (if accepted) would further dig this statute into the unintelligibility hole.

5. Finally, New York courts are left to "implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process," which include 16 non-exhaustive options (Elec. Law § 17-206[5]). The statute supplies no rules for selecting among them. Faced with proof of divergent preferences on the basis of race (or an unknown quantum of "circumstances" showing something unknowable), courts are left with the standardless command to do whatever they deem "fair to all concerned" (Webster's Third New International Dictionary 769 [3d ed 1971], equitable). No one knows when a system is sufficiently fair to "all." Does each group need a number of representatives proportionate to its share of the electorate? Is it enough that each group has a fighting chance at that outcome? Does it need to be equal opportunity? What role does the statutory term "influence" play? How much influence is enough? Or will courts do whatever plaintiffs' lawyers propose? No two judges will view these questions along the same lines, and outcomes will be completely unpredictable. The statute is too indeterminate to enforce.

B. The NYVRA, at Least as Applied, Violates the U.S. and New York Constitutions.

Any effort to save the NYVRA by devising standards it does not contain (and actively resists) will only lead it into conflict with constitutional standards. At least as Plaintiffs would apply it here, the NYVRA imposes unjustified racial classifications in violation of the Equal Protection Clause of the U.S. Constitution and the analogue provision of the New York State Constitution. The Equal Protection Clause provides that "[n]o State shall…deny to any person within its jurisdiction the equal protection of the laws" (US Const Amend XIV, § 1), and the State Constitution contains similar text (NY Const, art I, § 11). These provisions require judicial scrutiny of government-created classifications, which are "reviewed under a two-tiered standard" (*Teytelman v Wing*, 2 Misc 3d 608, 612 [Sup Ct, New York County 2003]). "Where a statute

affects a 'fundamental interest or right' or employs a 'suspect' classification, it is reviewed under a standard of 'strict scrutiny,' requiring that the law "'furthers a compelling state interest by the least restrictive means practically available'" (*id.*). As shown here, the NYVRA imposes racial classifications, triggers strict scrutiny, and fails.[4]

1. Strict scrutiny applies.

As Plaintiffs wield it, the NYVRA requires state-imposed remedies for "race, color, and language-minority groups" (Elec. Law §§ 17-206[5][a], 17-204[5]). This state-imposed system, meant to "balkanize" New York localities "into competing racial factions," triggers "the strictest scrutiny" (*Shaw v Reno*, 509 US 630, 650, 657 [1993] [*Shaw I*]).

a. "It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny" (*Parents Involved in Community Schs. v Seattle Sch. Dist. No. 1*, 551 US 701, 720 [2007]). This rule applies to "*all* racial classifications imposed by the government" (*Johnson v California*, 543 US 499, 505 [2005] [emphasis added]). The clearest case of this is "an express racial classification" (*id.* at 509), which is "explicit" in a statute (*Hunt v Cromartie*, 526 US 541, 546 [1999]). Such classifications are "inherently suspect" on their face and require no further inquiry into motive (*Washington v Seattle Sch. Dist. No. 1*, 458 US 457, 485 [1982]; *see also Adarand Constructors, Inc. v Pena*, 515 US 200, 213 [1995] [distinguishing the easier cases where "classifications [are] based explicitly on race" from those "difficult[]" cases where "facially race neutral" laws "are motivated by a racially discriminatory purpose"]).

[4] Because the standards of New York's Equal Protection Clause mirror those of the federal Constitution, this memorandum focuses on federal standards (*see Aliessa ex rel Fayad v Novello*, 96 NY2d 418, 430-31 [2001] [similar approach]).

This is a clear-cut strict-scrutiny case. Plaintiffs assert the NYVRA is violated any time "voting patterns of members of the protected class within the political subdivision are racially polarized" (Elec. Law § 17-206[2][b][i][A]), which they construe to mean that "there is a divergence in the candidate, political preferences, or electoral choice of members" of different racial groups (§ 17-204[6]). Independently, liability arises if, "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" (§ 17-206[b][i][B]). Both bases of liability—assuming they mean what Plaintiffs allege them to mean—hinge on the phrase "protected class," which "means a class of individuals who are members of a race, color, or language-minority group" (§ 17-204[5]). A finding of liability in turn mandates "remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process" (§ 17-206[5][a]). Plaintiffs apply that terminology here to require a new voting system with Town board seats set aside as winnable for Hispanic-preferred candidates. Plaintiffs further identify multiple alternative election methods solely on the basis that they make it "possible for the minority to gain representation" (*see* Exhibit C, Expert Report of Dr. Daryl DeFord at 3 [cumulative voting]), prevent "the [white] majority" from "distribut[ing] its votes in such a way that" its preferred candidates "receive more than the … votes received by" the Hispanic-preferred candidate (*id.* at 4 [limited voting]), ensure that voters will "elect a candidate preferred by the minority" (*id.* [ranked choice voting]), "increase the ability of Hispanic residents to elect candidates of their choice" (*id.* at 5), and even ensure that "the minority is consistently able to elect candidates of their choice" (*id.* at 8 [single-member districts]).

In this way, the NYVRA is wielded to "distribute[] burdens or benefits on the basis of individual racial classifications" (*Parents Involved*, 551 US at 720), that are "explicit" on the face

of a statute (*Hunt*, 526 US at 546). Liability is explicitly race-based, and the law affords special race-based remedies: in at least some elections, candidates preferred by some racial groups should win and those preferred by others should lose (Elec. Law §§ 17-204[5]-[6], 17-206[5]). And it sets the standard so low that mere political differences between members of different racial and ethnic groups give rise to a state-imposed race-based election system (§ 17-206[5]). This is a race-based set-aside program where board elections must—by law—be configured to help groups based on their race or ethnicity (*see City of Richmond v J.A. Croson Co.*, 488 US 469, 505-06 [1989]).

It does not matter whether the NYVRA, as Plaintiffs wield it, guarantees minority-preferred candidate success; the state-imposed thumb on the scales is a "preference based on racial or ethnic criteria" (*Adarand Constructors*, 515 US at 219 [citation omitted]; *see id.* at 204-25 [applying strict scrutiny to a mere "incentive" based on race]; *Students for Fair Admissions, Inc. v President & Fellows of Harvard Coll.*, 600 US 181, 194 [2023] [*SFFA*] [applying strict scrutiny to admissions process that merely "take[s] an applicant's race into account"]). A state law requiring that election systems be designed to ensure that white voters may effectively "distribute" their "votes in such a way that" they may outvote Hispanic or Black voters in certain elections (DeFord Rep. 4), would clearly trigger strict scrutiny (and fail).[5] A claim on behalf of Hispanic voters is not evaluated differently under the Equal Protection Clause, and likewise fails here (*see, e.g.*, *McDonald v Santa Fe Trail Transp. Co.*, 427 US 273, 287 [1976]). Nor is it relevant whether, under Plaintiffs' preferred system, white voters will sometimes elect their preferred candidates. State efforts to achieve "white/nonwhite racial balance" are subject to strict scrutiny (*Parents*

[5] The NYVRA in fact appears to have that effect (*see* discussion *supra* § III.B), and even permits white voters to win on the record in *this* case. On the other hand, if the NYVRA does not protect white voters, then its race-based preferences are pernicious in failing to provide equal protection.

Involved, 551 US at 712; *see also Johnson*, 543 US at 499 [rejecting proposal that "equal" segregation does not violate the Fourteenth Amendment]).

b. The NYVRA goes further by imposing "impermissible racial stereotypes" (*Shaw I*, 509 US at 647). As noted, the statute as Plaintiffs construe it establishes liability based solely on a "divergence" of "candidate, political preferences, or electoral choice of members" of different racial groups[6] (Elec. Law § 17-204[4]). However, in that analysis, the statute provides that "evidence that sub-groups within a protected class have different voting patterns shall not be considered" (§ 17-206[c][vii]).

Through that mechanism, the statute makes a state-imposed determination "that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls" (*Shaw I*, 509 US at 647). That is so even if evidence refutes this offensive assumption. For instance, if one segment of a Hispanic population votes against a larger segment of a Hispanic population, the preferences of the smaller population must "not be considered" (Elec. Law § 17-206[c]). Instead, that segment must be racially categorized with the larger segment and the larger segment's views attributed to the smaller segment, "solely because of their ancestry or ethnic characteristics" (*Saint Francis Coll. v Al-Khazraji*, 481 US 604, 613 [1987]). Rarely is state-based discrimination so offensive as the directive here to silence voices for no reason but race. And here, this invidious outcome is not hypothetical. In the Town, significant portions of the Hispanic population *do* vote against the larger segment (*see infra* § IV.E.1).

[6] This is yet another drafting error. The singular term "candidate" is used adjectively but modifies no noun.

c. The statute triggers strict scrutiny for the additional reason that it compels "an effort to segregate voters on the basis of race" (*Miller v Johnson*, 515 US 900, 914 [1995] [citation and alteration marks omitted]). As applied to redistricting, the Equal Protection Clause contains a "requirement that race not predominate over traditional districting principles" (*Abrams v Johnson*, 521 US 74, 88 [1997]). Strict scrutiny is triggered any time race is "the predominant factor motivating" a state actor's "decision to place a significant number of voters within or without a particular district" (*Bethune-Hill v Virginia State Bd. of Elections*, 580 US 178, 187 [2017]). This standard does not turn on "an actual conflict between the enacted plan and traditional redistricting principles" (*id.* at 188). It is enough "that race was the overriding factor" motivating "the design of the district as a whole" (*id.* at 190-92). Indeed, race "may predominate" "if race for its own sake is the overriding reason for choosing one map over others" (*id.* at 190).

Here, any single-member districting scheme imposed as a result of this action would involve racial predominance. Elections in the Town are currently at-large, and the sole state-imposed reason to configure single-member districts would be to ensure "that voters of race, color, and language-minority groups" may prevail in some elections (Elec. Law § 17-206[5]). Just as "States often admit to considering race for the purpose of satisfying [the Supreme Court's] precedent interpreting the Voting Rights Act of 1965" (*Alexander v S.C. State Conference of the NAACP*, 144 S Ct 1221, 1234 [2024]), the predominant use of race under New York law triggers strict scrutiny (*see, e.g.*, *Miller*, 515 US at 917-18 [effort at federal VRA compliance triggered strict scrutiny]; *Shaw v Hunt*, 517 US 899, 907 [1996] [*Shaw II*] [same]). Any districting plan imposed on the Town would necessarily move a large number of voters into one or more districts for no other reason but to ensure a high level of minority voters in a particular district to give them a better opportunity to elect their preferred candidate (*Cooper v Harris*, 581 US 285, 300 [2017]

[movement of Black voters into an opportunity district triggered strict scrutiny]). And the only basis for choosing that plan over an at-large system would be the racial composition of districts (*Bethune-Hill*, 580 US at 190). In other words, districts must be drawn to benefit one racial group at the expense of others (even other segments of the same group). Strict scrutiny applies for this reason as well.

2. The NYVRA fails strict scrutiny.

"Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known…as 'strict scrutiny'" (*SFFA*, 600 US at 206 [citation omitted]). First, the racial classification must be "used to 'further compelling governmental interests'" (*id.* at 206-07 [citation omitted]). Second, it must be "'narrowly tailored'—meaning 'necessary'—to achieve that interest" (*id.* at 207 [citation omitted]). The NYVRA fails at both steps.

a. The NYVRA serves no compelling interest. Outside the college-admission and safety settings, Supreme Court precedents recognize only an interest in "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" (*id.* at 207). But a state actor invoking such an interest must "identify that discrimination, public or private, with some specificity before they may use race-conscious relief" (*Shaw II*, 517 US at 909). It must also have a "'strong basis in evidence' to conclude that remedial action was necessary, 'before it embarks on an affirmative-action program'" (*id.* at 910 [citation omitted]). The NYVRA's statement of purpose makes no pretense to satisfy this standard (*see* Elec. Law § 17-200). The Town is aware of no legally adequate findings and put Plaintiffs to their proof.

The legislative statement suggests purposes to "[e]ncourage participation in the elective franchise by all eligible voters" and "[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" (*id.*). "Although these are commendable goals, they are not

sufficiently coherent for purposes of strict scrutiny" (*SFFA*, 600 US at 214). These are simply too "amorphous" to justify race-based intervention in the electoral process (*id.* [citation omitted]).

The Legislature may have mistakenly believed itself entitled to enact a law modeled off of—and grossly expanding upon—§ 2 of the federal VRA, which imposes "race-based" remedies on grounds the Supreme Court recently approved (*Milligan*, 599 US at 41; *see* Elec. Law § 17-200). New York is not so entitled. Congress has unique authority to require race-conscious remedial action "pursuant to § 2 of the Fifteenth Amendment" (*Milligan*, 599 US at 41, quoting *City of Rome v United States*, 446 US 156, 173 [1980] [alterations accepted]). By consequence, Congress may require "race-based redistricting as a remedy" (*id.*; *see also Katzenbach v Morgan*, 384 US 641, 651 [1966] ["Correctly viewed, s 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."]). States do not stand in the same posture (*see J.A. Croson*, 488 US at 490-91 [plurality opinion]; *see also id.* at 521-22 [Scalia, J., concurring in the judgment] [same]; *Trump v Anderson*, 601 US 100, 112 [2024] [differentiating state and federal roles under the Fourteenth Amendment]). Where the Fourteenth and Fifteenth Amendments "embody significant limitations on state authority" (*Fitzpatrick v Bitzer*, 427 US 445, 456 [1976]), New York cannot claim the power of Congress to require race-based remedial efforts as prophylactic means to prevent violations of the Civil War Amendments (*see Milligan*, 599 US at 41 [locating Congress's right to "authorize race-based redistricting as a remedy for § 2 violations" in its "remedial authority" under the Fifteenth Amendment]). Put simply, because states are subject to the Civil War Amendments, they cannot justify presumptive violations of those Amendments by claiming to enforce them.

b. The NYVRA also fails the narrow-tailoring inquiry. "[R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification" (*Parents Involved*, 551 US at 720 [citation omitted]). This standard cannot be met.

To begin, any interest claimed in remedying past discrimination fails, not only for lack of evidence (*Shaw II*, 517 US at 909-10), but also because the NYVRA does not require a showing of past discrimination (*see* Elec. Law § 17-204[6]; *see also* §§ 17-206[2][b][i][A], 17-206[3]). A violation of the NYVRA can be shown purely through a divergence in voting patterns between a protected class and the rest of the electorate regardless of whether that protected class has faced any history of discrimination.

Moreover, any cognizable interest related to vote dilution fails for a similar disconnect. As shown above, the statute is internally conflicted on whether proof of vote dilution is required. Disjunctive standards that can be met with a mere showing that different groups have different "political preferences" or experience impairment of ability "to elect candidates of their choice or influence the outcome of elections" (§ 17-206[2][b][i], go far "beyond what [is] reasonably necessary" to prevent vote dilution (*Shaw I*, 509 US at 655). The categories of racial groups the NYVRA affords a claim in the face of differing political preferences are "plainly overbroad" (*SFFA*, 600 US at 216). Classes of voters will be entitled to relief under the NYVRA where there is no colorable impingement on their Fourteenth and Fifteenth Amendment rights.

Even if New York had power like that of Congress to enforce the Civil War Amendments, the NYVRA would not be narrowly tailored to exercise that power. As shown, Congress tailored VRA § 2 with "exacting requirements" (*Milligan*, 599 US at 30). But the New York Legislature dismantled each and every guardrail Congress established, as demonstrated above (*see supra* § IV.A). Where "Congress was to be chiefly responsible for implementing the rights" under the

Fifteenth Amendment (*South Carolina v Katzenbach*, 383 US 301, 326 [1966]), the New York Legislature rejected its judgment and commanded "political apartheid," (*Shaw I*, 509 US at 647), based on the flimsiest (and most confounding) showings. Notably, on two occasions the Supreme Court has signaled that without the existing guardrails, VRA § 2 would be unconstitutional (*see Milligan*, 599 US at 30 [suggesting that § 2 is defensible because it "never require[s] adoption of districts that violate traditional redistricting principles"] [citation omitted]; *Bartlett v Strickland*, 556 US 1, 21 [2009] [rejecting claims that fail the first *Gingles* precondition because, otherwise, § 2 would lie in constitutional doubt]). The NYVRA not only eliminates, but flouts, those guardrails. It eliminates *all Gingles* preconditions, along with the requirement that a plaintiff prove official discrimination under the totality of the circumstances. It is unconstitutional and cannot be enforced here, especially as Plaintiffs construe it.

C. Plaintiffs' Challenge Is Moot Given the Legislature's Decision to Move Town Elections to Even Years.

Even assuming a legally viable, and constitutional, statute, Plaintiffs cannot prevail. Due to the new state law moving elections in the Town from odd to even years, the Legislature has changed the electoral system at issue, and does so in a manner where voting, if even polarized under the current system (which it is not), is unlikely to be polarized in the future and cannot be proven polarized today. Because Plaintiffs' challenge is based on past election timing, it is moot.

By law, the Town currently conducts its regular elections in November of odd-numbered years. (Town Law § 80). In December 2023, the New York Legislature amended Town Law § 80 to move all town elections statewide to November of even-numbered years. (2023 McKinney's Sess Law News of NY, ch. 741, §§ 1, 7 [A. 4282-B] [Dec. 22, 2023]). Governor Hochul praised the new law as "expanding access to the ballot box and promoting a more inclusive democracy," and quoted the statement of the Chair of the Black, Puerto Rican, Hispanic, & Asian Legislative

Caucus that the change "empower[s] disadvantaged communities to select accountable representation at the local level." (NY Off of Governor, *Governor Hochul Signs Voting Rights Legislation to Expand Access to the Ballot Box and Improve Voter Participation,* [Dec. 22, 2023], https://www.governor.ny.gov/news/governor-hochul-signs-voting-rights-legislation-expand-access-ballot-box-and-improve-voter [visited Aug. 12, 2024]).

This material change to the Town's election system moots Plaintiffs' challenge to that system. Mootness is a "fundamental principle" that "ordinarily precludes courts from considering questions which, although once live, have become moot by passage of time or change in circumstances" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713-14 [1980]; *see Sedita v Board of Ed. of City of Buffalo,* 43 NY2d 827, 828 [1977]; *Cornell Univ. v Bagnardi*, 68 NY2d 583, 592 [1986]; *Matter of Sullivan Farms II, Inc. v Town of Mamakating Planning Bd.*, 165 AD3d 1447, 1449 [3d Dept 2018] [challenge to board decision mooted when it was "supplanted, superseded, and effectively rescinded"]). When a challenged law is "superseded by a significantly amended statutory scheme," the challenge to the original system is moot (*Holloway v City of Virginia Beach*, 42 F4th 266, 273 [4th Cir 2022] [citation omitted] [finding amendment to election law mooted Voting Rights Act challenge]; *see also Matter of Ballard v New York Safety Track, LLC*, 126 AD3d 1073, 1075 [3d Dept 2015]; *People ex rel. Prue v Imperati*, 216 AD3d 707, 708 [2d Dept 2023]).

Here, the new law marks a dramatic change in circumstances. Plaintiffs attempt to show a "divergence" in ethnic voting preferences (Elec. Law § 17-204[6]), or impairment of Hispanic voters' "ability…to elect candidates of their choice or influence the outcome of elections" (§ 17-206[2][b][i][B]). But election timing directly and significantly impacts those attempted showings because electorates change according to election timing. For example, in the 2019 Town Justice race in Mount Pleasant, Hispanic turnout was estimated at 5.8%, whereas it was estimated at 20.1%

in the 2018 Town Board race (Exhibit D, Report of Dr. Lisa Handley at 5). Future elections in even years will not be like past elections in odd years. Voting may be polarized or impairment may exist in November odd-year elections, but not in even-year elections. Plaintiffs have no evidence to the contrary. Indeed, that is why the NYVRA recognizes this very relief as a potential remedy (Elec. Law § 17-206[5][a][vi] ["moving the dates of regular elections to be concurrent with the primary or general election dates for state, county, or city office."]).

Thus, even if at-large elections *may* fail the governing standards (whatever they are) in odd years, there is no evidence they will similarly fail in even years. Plaintiffs attempt to prove liability based on odd-year election data and ignoring past even year election data, but that information cannot prove liability for elections conducted under the new timing. The available evidence suggests the new date will afford all relief Plaintiffs claim to need. In even-year elections, greater turnout consistently translates to greater success for Democratic candidates, whom Plaintiffs assert are the Hispanic-preferred candidates. Dr. Lewis found that "Democratic candidates have been nearly universally successful in even-year contests in Mount Pleasant" (Exhibit E, Expert Report of Dr. Jeffrey B. Lewis at 20-21). Plaintiffs' expert found that a Hispanic-preferred candidate, Hagadus-McHale, prevailed in a special even-year Town council election in 2018 (Exhibit F, Expert Report of Dr. Yamil Ricardo Velez at 6; *see also* DeFord Rep. 5; Lewis Rep. 24-25). Even if they exist now, divergent voting patterns are unlikely to persist under the new system.

Plaintiffs are likely to respond that, due to a transition period established by the Legislature, the election timing will not change until 2028. But that fact cannot change the outcome here because it reflects the Legislature's considered judgment about how a statewide transition from odd-year to even-year elections should occur. Under that process, any future Town Board elections occurring in odd-numbered years, for four-year terms, are deemed to have occurred in the even-

year prior to the year in which the election occurred (2023 McKinney's Sess Law News, ch 741, § 5 [A. 4282-B] [Dec. 22, 2023]). In setting that policy, the Legislature expressly established that, "[n]otwithstanding any provision of any general, special or local law,…a…town elected official…serving their term as of January 1, 2025, *shall* complete their full term as established by law" (*id.* [emphasis added]). This expressly forbids a change in election dates before 2028 and overrides other general laws, including the NYVRA. By necessary implication, this statutory directive also forecloses NYVRA liability founded on voting patterns that occur at times the Legislature commanded. In essence, Plaintiffs assert a "divergence" in voting preferences that exists precisely because the Legislature *commanded* odd-year elections during a transition period (and that is unlikely to exist past that). Plaintiffs' true quarrel is with the Legislature, not the Town. This matter is therefore moot.

D. Most Plaintiffs Lack Standing to Challenge the At-Large System.

Under any coherent application of the NYVRA, three of four Plaintiffs lack standing. "[I]n order to warrant a determination of the merits of a cause of action, [the] party requesting relief must state a justiciable claim—one that is capable of review and redress by the courts at the time it is brought for review" (*Schulz v Cuomo*, 133 AD3d 945, 947 [3d Dept 2015]). The question may "be answered by the statute at issue, which may identify the class of persons entitled to seek review" (*Socy. of Plastics Indus., Inc. v Cnty. of Suffolk*, 77 NY2d 761, 769 [1991]). Here, only an "aggrieved person" has standing under the NYVRA (Elec. Law § 17-206[4]). An "aggrieved person" standard requires "special damage, different in kind and degree from the community generally," i.e., an "injury in fact [that] must be pleaded and proved" (*Sun-Brite Car Wash, Inc. v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d 406, 413 [1987]; *see also Matter of Larchmont Pancake House v Bd. of Assessors and/or the Assessor of the Town of Mamaroneck*, 33 NY3d 228, 238 [2019] [discussing "established aggrievement principles"]).

As shown above, the NYVRA as written renders every resident in a locality a victim in all cases of divergence. The statute's use of an aggrieved-person standard that distinguishes those injured from the public at large is yet another case of incoherence. But assuming that a standard of injury can properly be invented apart from text, it cannot be met for most Plaintiffs here. Plaintiffs Aguirre, Siguenza, and Michael cannot show that the current Town Board members are not their candidates of choice. They have no injury.

1. Plaintiff Aguirre is a registered Republican, (Exhibit G, Anthony Aguirre Deposition 42:9-13), suggesting that the current Town Board members (who all ran on the Republican ticket) are his candidates of choice.[7] Plaintiff Aguirre does not know whether any Town Board members represent his interests or are his candidate of choice (*id*. at 97:14-23). The indisputable facts demonstrate that Plaintiff Aguirre has never voted in a Town Board election, and he did not have a preferred candidate in the 2023 Town elections (*id*. at 35:8-23, 39:14-18). He did not even know who the candidates were, who won, or who the current Town Board members are (*id*. at 35:24-36:5, 97:14-16).

Plaintiff Aguirre also cannot show more than a "hypothetical, contingent or remote" injury. (*see Schulz*, 133 AD3d at 947). Plaintiff Aguirre testified that he may not vote in future Town Board elections (Aguirre Dep. 39:18-40: 17). Someone who has not voted, and has no intent to vote, cannot claim injury in his right to vote from an election system (*compare Landes v Tartaglione*, 2004 WL 2415074, *2, 2004 U.S. Dist. LEXIS 22458, *4-6 [ED Pa Oct. 28, 2004, No. 04-3163], *affd* 153 Fed Appx 131 [3d Cir 2005] [finding no standing of plaintiff who failed to allege she voted under the challenged voting practice or intended to do so], *with Common Cause*

[7] Board Member Saracino ran on the Republican ticket in 2023, but he is not registered with any political party (Exhibit R, Mark Saracino Deposition 63:8-17).

Fla. v Byrd, 2024 WL 1308119, *25, 2024 U.S. Dist. LEXIS 54503, *69-72 [ND Fla Mar. 27, 2024, No. 22-109] [finding standing for voter who alleged he was "a registered and active voter, [and] that he intended to vote in future elections"]).

2. Plaintiffs Siguenza and Michael likewise cannot show injury. Plaintiff Siguenza cannot identify her preferred candidate in any Town Board election and does not know if her candidate of choice won (*see* Exhibit H, Plaintiff Siguenza's Discovery Responses at 9-13; Exhibit I, Kathleen Siguenza Deposition 39:19-42:19). She does not even recall if she voted in the 2023 Town Board election or who the candidates were (Siguenza Dep. 42:10-19).

Plaintiff Michael does not know whether any Town Board members are her candidate of choice or represent her interests (Exhibit J, Ida Michael Deposition 136:8-15). She does not know who she voted for in the 2017, 2019, or 2021 Town elections or whether her candidates of choice prevailed (Michael Dep. 41:15-21, 42:13-44:6; Exhibit K, Plaintiff Michael's Discovery Responses at 8-9). While Plaintiff Michael voted in the 2023 Town Board election, she did not vote in the Town Supervisor election (*id.* at 8). At most, Plaintiff Michael voted in elections for less than half of the five current Town Board members, and for just two of the last 13 seats since 2017. She, along with Plaintiffs Aguirre and Siguenza, cannot claim the status of an "aggrieved person," with injury distinct from the Town populace, who may bring this action under the NYVRA. At a minimum, these three Plaintiffs must be dismissed.

E. Plaintiffs' Claims Fail On Their Merits.

Assuming counterfactually that manageable and constitutional standards could be read into the NYVRA, Plaintiffs cannot meet them. For "an at-large method of election," the statute specifies that a violation is shown on proof that "(A) voting patterns of members of the protected class within the political subdivision are racially polarized; or (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the

outcome of elections is impaired" (Elec. Law § 17-206[2][b][i]). Plaintiffs fail to meet both standards.[8]

1. Plaintiffs cannot demonstrate that voting patterns within the Town are racially polarized.

No evidence shows that voting patterns are racially polarized for purposes of the first disjunctive element.[9] "Racially polarized voting" is defined as a "divergence in the candidate, political preferences, or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate." (Elec. Law § 17-204[6]). This requires proof of "divergence" in candidate or political preferences between members "in a protected class" and the "choice of the rest of the electorate" (*id*.). This text is unique within this law in that it "is clear and unambiguous" (*Patrolmen's Benevolent Assn. of City of New York v City of New York*, 41 NY2d 205, 208 [1976]). The polarization definition cannot be satisfied where large numbers of non-Hispanic residents vote for candidates chosen by (or share political views of) a large number of Hispanic residents. The term "divergence" means "moving off in different directions" (IV Oxford English Dictionary 885 [2d ed 1989]), and, as noted, the "rest" of the electorate is the "remainder or residue" of it (XIII Oxford English Dictionary 746 [2d ed 1989]), i.e., the non-Hispanic voters.

Here, there is no divergence between the political preferences of Hispanic voters and "the choice of the rest of the electorate" (non-Hispanic voters). Nearly 40% of non-Hispanic voters supported the Hispanic-preferred candidates in the 2019 Town Justice and 2021 Supervisor

[8] As explained above, the NYVRA is internally contradictory about whether a vote-dilution requirement applies. This memorandum assumes in places for the sake of argument that there is no such requirement under the plain language of the statute, but the Town suggests that vote-dilution should be part of the standard if a manageable one can be identified.

[9] Again, the plain text of subsection (2)(b) requires that Hispanic voters prefer *different* candidates from each other. But Plaintiffs attempt to show that Hispanic voters are cohesive (i.e., they prefer the same candidates). They cannot show the absence of cohesion with evidence of cohesion.

elections (Handley Rep. 3, 5). Nearly 20% of non-Hispanic voters supported Hispanic-preferred candidates in the 2015, 2019, and 2021 Town Board elections (*id.* at 5). These are high levels of non-Hispanic support for Hispanic-preferred candidates, so high that the Hispanic-preferred candidate prevailed in 2018 with over 55% of the vote—a significant feat for a group constituting only 19.1% of the electorate (*id*.). Although a majority of non-Hispanics do not appear to support Hispanic-preferred candidates, this merely shows "(to no one's great surprise)" that "there are discernible, non-random relationships between race and voting" (*Cooper*, 581 US at 304 n.5). The NYVRA definition does not set the standard of polarization so low.

Any other construction would only compound the drafting deficiencies described above. It would create the absurd result that any protected class, including white voters, would be entitled to relief, even if 49% of other voters supported its preferred candidates (*see People v Talluto*, 39 NY3d 306, 312 [2022]) [restating familiar rule that statutes will not be read to achieve "absurd" results]. It is hard to imagine a case where the standard would not be met, especially given the flexibility with which different racial groups may be combined (or not) with no manageable standard. Only where all voters monolithically support the same candidates—i.e., where contests lack competitiveness—would these minimal standards not be met. As shown, such an absurd reading would also underscore that the NYVRA is unconstitutional.

Plaintiffs cannot show a divergence between the Hispanic and non-Hispanic groups for the additional reason that the Hispanic group is not cohesive. Rather, Hispanic residents in the Town are "composed of many subgroups with differing national origins, diversity of political and social views, times of arrival in this country, and generational differences within and between subgroups." (Exhibit L, Expert Report of Dr. Donald Critchlow at 3.) They are also "economically, educationally, by origin of country, and politically diverse" (*id*. at 5.) Scholars predict that

Hispanic voting behavior will be divided between the parties (*id*.). Plaintiffs submit no evidence analyzing the differing voting patterns among these various groups with the "Hispanic community." It is inaccurate to refer to the "Hispanic community" as a singular "protected class" entitled to relief under the statute. There is no evidence that Ecuadorians in the Town vote the same as Dominicans (*see id*. at 7-8, Table 1 [reflecting that Ecuadorians and Dominicans are the two largest subgroups within the "Hispanic community."]). Absent such evidence there is no way to determine if the Hispanic community is truly cohesive. And to the extent the NYVRA precludes submission of evidence that sub-groups within a protected class have different voting patterns, (*see* Elec. Law § 17-206[2][c][vii]), that only further demonstrates that the only consideration in evaluating whether to change from an at-large voting system to some alternative system is race, in violation of the Fourteenth Amendment (*see supra* § IV.B).

2. Plaintiffs cannot demonstrate that their ability to elect or influence elections is impaired under the totality of the circumstances.

Under the second disjunctive element, Plaintiffs cannot show 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." (Elec. Law § 17-206[2][b][i][B]). As explained above (*see supra* § IV.A), this standard is too indeterminate to create enforceable obligations. But, insofar as coherent standards can be read into the test, Plaintiffs cannot satisfy them.

a. Plaintiffs sued the Town but rely predominantly on evidence concerning other political subdivisions and the entire state. This evidence is irrelevant. The NYVRA applies to a "political subdivision," and the totality test measures electoral opportunity in that "political subdivision" (Elec. Law §§ 17-206[2][a], [2][b][i]). It makes no sense for Plaintiffs to look elsewhere to prove that claim. A decision relying on evidence from other localities would lead to double counting, as cherrypicked evidence from multiple political subdivisions could condemn all

of their election systems together, even if there was minimal evidence in *each* supporting liability.[10] It is especially perplexing that Plaintiffs rely on evidence about New York state as an undifferentiated whole: that evidence would (if relevant) condemn *every* potential NYVRA defendant. If the Legislature wanted a statewide showing—e.g., based on evidence of statewide turnout differentials (*see* Exhibit M, Expert Report of A.K. Sandoval-Strausz at 24-26)—it would have nixed the totality-of-circumstances inquiry and directed a uniform outcome across New York (as it did in commanding a uniform election date). Properly construed, the inquiry in a suit against the Town concerns circumstances *in* Mount Pleasant. Any other test would compound, rather than resolve, the incoherence shown above.

b. Shorn of irrelevant evidence, Plaintiffs' claim lacks sufficient foundation to merit a trial. The statute identifies 11 illustrative factors for consideration (Elec. Law § 17-206[3]). Plaintiffs have no evidence related to most of them. They have no evidence of actual historical discrimination or political contribution rates in the Town (§17-206[3][a], [e]). Plaintiffs also have no evidence that Hispanics are excluded from "processes determining which groups of candidates receive access to the ballot, financial support, or other support in a given election" (§ 17-206[3][d]; *see* Sandoval-Strausz Rep. 23). Rather, there are Hispanic members on both the Mount Pleasant Republican and Democratic Committees (Exhibit N, Sergio Serratto Deposition 234:19-25; Exhibit O, Laurie Rogers-Smalley Deposition 86:17-25), and Plaintiff Serratto testified that Hispanic candidates can be nominated for the Town Board (Serratto Dep. 232:8-234:25, 238:16-19). There is no evidence Plaintiffs or any Hispanic residents have been prohibited from voting, contributing to political campaigns, or engaging in any other political activity (*see, e.g.*, Serratto

[10] This problem does not exist under VRA § 2, where the *Gingles* preconditions must be satisfied within the jurisdiction sued before any totality-of-circumstances inquiry begins. Under the NYVRA, the totality showing alone can create liability.

Dep. 101:14-17, 288:6-11, 270:18-271:13; Aguirre Dep. 40:18-41:8, 57:2-8, 58:2-9; Siguenza Dep. 43:13-15, 77:17-78:2; Michael Dep. 47:17-48:9, 83:6-10, 84:12-17). Plaintiffs also lack evidence of voting practices "that may enhance the dilutive effects of the election scheme" (Elec. Law § 17-206[3][c]). Plaintiffs' expert cites the at-large system itself, (*see* Sandoval-Strausz Rep. 19-22), but this factor instead looks for *other* practices that "may enhance the dilutive effects" of the challenged scheme.

c. That leaves Plaintiffs with a very small set of evidentiary contentions that create no triable fact question. From the innumerable elections occurring in the Town, Plaintiffs found minimal incidents they deem to be "racial appeals," (Elec. Law § 17-206[3][i]), and their few examples are so closely tied to the *policy* question of illegal immigration—on which people are allowed to disagree—as to say nothing discernible about local electoral opportunity (*see* Sandoval-Strausz Rep. 35-37). Similarly, in all of Mount Pleasant's history, Plaintiffs cite just one incident they say shows "a significant lack of responsiveness" to Hispanic needs (Elec. Law § 17-206[3][j]), and it was simply the expression of opposition to *this lawsuit* (Sandoval-Strausz Rep. 39-40).

Notably, Plaintiffs have never raised concerns specific to the Hispanic community with any Town officials, and most have never attended a Town Board meeting outside of this litigation (Serratto Dep. 185:2-9, 167:5-17; Aguirre Dep. 45:15-47:17, 49:10-15, 78:10-79:6; Siguenza Dep. 108:6-14, 110:2-25, 117:5-118:11; Michael Dep. 61:4-11, 70:17-20, 115:6-116:6). The only evidence demonstrates that the Town is responsive to members of all races and is actively working to respond to all residents' needs (*See, e.g.*, Exhibit P, Tom Sialiano Deposition 19:5-6, 53:19-54:12, 136:18-137:21; Rogers-Smalley Dep. 17:19-24, 97:12-98:9, 106:17-107:21; Saracino Dep. 150:21-152:9).

Moreover, Plaintiffs ignore that they live in the separately incorporated villages within the Town (Serratto Dep. 15:9-14; Siguenza Dep. 105:19-21; Aguirre Dep. 12:13-15; Michael Dep. 9:7-8), and they admitted they do not know what services the Town provides to the villages or what legal authority the Town has in the villages (Serratto Dep. 320:12-24; Michael Dep. 125:14-126:13; Siguenza Dep. 129:15-19; Aguirre Dep. 91:14-20). The Town Board has virtually no authority within the villages (Town Law § 60). These villages "have their own police, recreation, highway, water, and building departments, tax assessors, clerks' offices, and justice courts, which are separate and apart from" the Town, and the villages collect separate taxes for these services (*see Villages in the Town of Mount Pleasant, Town of Mount Pleasant,* https://www.mtpleasantny.com/335/Villages-in-the-Town-of-Mount-Pleasant [last visited Aug. 9, 2024]). Any concerns Plaintiffs have with housing, education, income, and other issues that occur in the villages are indisputably not within the Town's authority.

Plaintiffs also assert that Hispanic residents have never been elected to the Town Board (Sandoval-Strausz Rep. 18-19), but, even if that is true, there is no evidence that any Hispanic resident ever lost election to the Town Board. Plaintiffs have no evidence that any Hispanic candidates have even attempted to run (Serratto Dep. 204:5-17; Michael Dep. 78:11-79:6; Siguenza Dep. 66:6-9; Aguirre Dep. 52:25-53:8). Thus, there is no reason to believe this factor shows anything about electoral opportunity. Plaintiffs also allege that Hispanic residents are unable to take time to vote and that language barriers prevent them from obtaining election information (*see* Elec. Law § 17-206[3][h]), but they admitted the evidence on those points is anecdotal or entirely absent (Aguirre Dep. 62:14-69:18, 77:25-78:18; Siguenza Dep. 115:16-117:14; Serratto Dep. 298:13-303:8, 310:7-311:2; *see* Compl. ¶¶ 125-130). And Plaintiffs have no evidence that anyone has even asked the Town to assist with these purported language barriers (Michael Dep.

107:17-110:10, 119:2-9; Siguenza Dep. 116:18-117:14; Serratto Dep. 302:8-24), nor is there a logical connection between those allegations and at-large voting.

That leaves Plaintiffs to stand on a single factor concerning socioeconomic disparities (Sandoval-Strausz Rep. 26-30). But Plaintiffs' expert admits that these disparities do not exist in all areas (*id*. at 29 [noting Latinos and Whites have a virtual parity in households with a computer]). While the statute provides that no "specified number of factors [is] required" (Elec. Law § 17-206[3][k]), it cannot contemplate liability based on just *one* factor. That is not what "totality of the circumstances" means (§ 17-206[3]). Moreover, Plaintiffs' expert does not tie socioeconomic conditions to any government action or to electoral opportunity in the Town. On the first point, there is no evidence showing that any socioeconomic inequality results from discrimination in the Town, when there is an obvious alternative explanation that comparatively recent immigrants do not find instant economic equality in a new land. Plaintiffs' evidence does not differentiate these potential causes or suggest one over the other. On the second point, Plaintiffs have not demonstrated how their evidence on this factor (or any others) is tied to the Hispanic community's electoral opportunity in the Town, which is the statutory question (§ 17-206[2][b][i][B]).

d. The final factor calls for a review of the "policy justification" for at-large elections (§ 17-206[3][k]). The Town has compelling reasons for using them. Members elected at-large are accountable to the entire public of the Town, which is diverse; single-member districts would divide the residents and render members accountable to only a subset of the electorate (*see* Exhibit Q, Deposition of Town of Mount Pleasant, 131:22-132:6, 134:21-23). This is particularly damaging where there are only four members on the Town Board, which is an appropriate number given its minimal responsibilities. The NYVRA does not render at-large voting *per se* unlawful, and it necessarily contemplates that grounds like these are compelling.

V. CONCLUSION

For all these reasons, Defendants are entitled to judgment as a matter of law on all of Plaintiffs' claims.

Dated: August 13, 2024

New York, New York

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CERTIFICATION OF WORD COUNT

I certify that the word count of this memorandum of law complies with the word limits set forth in the parties' August 7, 2024, Stipulation modifying the limits of 2 NYCRR § 202.8-b. According to the word-processing system used to prepare this memorandum of law, the total word count for all printed text exclusive of the material omitted under 22 NYCRR § 202.8-b(b) is 9,993 words.

Dated: August 13, 2024 /s *Ariana Dindiyal*

New York, New York