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

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

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INTRODUCTION

The New York John R. Lewis Voting Rights Act ("NYVRA") is a relatively *new* law. But it is not a highly *novel* law. To the contrary, it strongly resembles both other state voting rights acts ("state VRAs") and, in certain respects, the federal Voting Rights Act ("federal VRA"). Once these similarities are recognized, Defendants' arguments that the NYVRA is indeterminate and racially discriminatory collapse. As under other state VRAs, determining whether a jurisdiction is liable for vote dilution under the NYVRA is straightforward. *Either* voting must be racially polarized in the jurisdiction *or*, under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice must be impaired. *Additionally*, for the challenged practice to "hav[e] the effect of" diluting the protected class's electoral influence, there must be a reasonable alternative policy or system that would improve the protected class's representation relative to the status quo. Election Law § 17-206(2)(a).

As courts across the country have recognized, a voting rights act with these elements is safe from any equal protection challenge. The NYVRA includes no racial classifications because none of its provisions distributes burdens or benefits to individuals on the basis of their race. While some of the NYVRA's provisions *refer* to race-related concepts (like racially polarized voting), that is entirely different from *classifying* people by race. Likewise, the NYVRA does not require, or even encourage, the drawing of racially gerrymandered districts. The statute actually deters this unlawful activity by stressing the availability of non-district remedies, especially when protected class members are geographically dispersed.

In any event, Defendants lack the legal right to assert that the NYVRA violates any state or federal constitutional provision. Defendants are an instrumentality of New York State and its officers. "[A]s a creature and subdivision of the State," the Town of Mount Pleasant and its Town

Board "lack[] the capacity to mount a constitutional challenge to invalidate State legislation." *Bd. of Educ. of Roosevelt Union Free Sch. Dist. v. Bd. of Trustees of State Univ. of New York*, 282 A.D.2d 166, 171 (3d Dep't 2001). Nor may Defendants invoke the exception for legislation that compels unconstitutional actions. At present, Defendants are not being forced to take *any* action at all. And if Defendants are found liable under the NYVRA, the remedy easily could – and should – be constitutional.

Defendants' other arguments are equally groundless. As to mootness, this case remains live despite a recent law moving local elections from odd to even years. Absent judicial intervention, Defendants will hold two more elections under their dilutive at-large electoral system before this law fully takes effect in 2028. As to standing, Defendants concede that one Plaintiff has suffered a concrete and redressable injury. Defendants' other objections are therefore irrelevant. They are also wrong, since all Plaintiffs have statutory standing as "members of a protected class" who are "aggrieved" by the dilution of this class's electoral influence. Election Law § 17-206(4).

Lastly, on the merits, Defendants cherry-pick two elections to suggest that voting in Mount Pleasant is not racially polarized. But that argument is defeated by Defendants' own expert, who concludes – based on the full set of relevant elections – that voting in the Town *is* racially polarized. Defendants further speculate that the Hispanic community might not be cohesive because it comprises individuals from different backgrounds. But the undisputed evidence establishes the political cohesion of Hispanic voters in the Town and, anyway, the NYVRA forbids consideration of whether "sub-groups within a protected class have different voting patterns." *Id.* § 17-206(2)(c)(vii). And while Defendants maintain that most of Plaintiffs' evidence about the totality of the circumstances comes from outside Mount Pleasant, the opposite is, in fact, true: the bulk of this evidence pertains to the Town itself. Regardless, evidence about other municipalities

and New York is plainly relevant to this inquiry. This Court should deny Defendants' summary judgment motion.

ARGUMENT

I

The NYVRA is a straightforward voting rights act that sets forth familiar elements for proving liability for vote dilution.

As Plaintiffs previously explained, the NYVRA's framework for determining liability for vote dilution is straightforward. *See* NYSCEF 60 at 16-20. With respect to an at-large electoral system like Mount Pleasant's, this framework includes two potential claims. *First*, plaintiffs may establish illegal vote dilution by showing that the "voting patterns of members of the protected class within the political subdivision are racially polarized" from the voting patterns of other members of the electorate. Election Law § 17-206(2)(b)(i)(A). *Second*, plaintiffs may, instead or in addition, prove vote dilution by showing that "under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired." *Id.* § 17-206(2)(b)(i)(B). The first claim is based on racially polarized voting; the second hinges on the totality of the circumstances.

Under either theory, Plaintiffs must *also* prove that one or more reasonable alternative policies exist that would improve the protected class's representation relative to the status quo. This element follows from the NYVRA's statement of the "[p]rohibition against vote dilution." *Id.* § 17-206(2). A challenged practice only "*ha[s] the effect*" of "*impairing*" a protected class's electoral influence "*as a result of vote dilution*" if, under some other reasonable policy or system, the protected class would be better represented than it currently is. *Id.* § 17-206(2)(a) (emphasis added). Construing the highly similar language of the California VRA, the California Supreme Court agreed that a vote dilution plaintiff "must identify a reasonable alternative voting practice

to the existing . . . system that will serve as the benchmark 'undiluted' voting practice." *Pico Neighborhood Ass'n v. City of Santa Monica*, 534 P.3d 54, 65 (Cal. 2023) (internal quotation marks omitted). This element, the court held, was required by the California VRA's use of the terms "impairs" and "dilution." *See id.* at 64-65. These terms, of course, are also part of – and pivotal to – the NYVRA. *See* Election Law § 17-206(2)(a).

Defendants nevertheless maintain that this framework of two well-defined claims, each with two recognizable elements, is so indeterminate that it violates the New York Constitution.[1] But as summarized above, this framework is perfectly comprehensible. Defendants try to sow confusion in the face of statutory clarity by reading words oddly and out of context, misdescribing how pieces of the framework fit together, and turning policy disagreements with the NYVRA into claims about the law's intelligibility. In assessing these constitutional challenges, Defendants "face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt" and this Court "must avoid, if possible, interpreting a presumptively valid statute in a way that will render it unconstitutional." *Overstock.com, Inc. v. New York State Dep't of Tax'n & Fin.*, 20 N.Y.3d 586, 593 (2013). Defendants cannot meet that burden.

First, Defendants profess to be unsure whether the NYVRA requires "proof of vote dilution," that is, a showing that the protected class's representation would be greater under a reasonable alternative policy or system. NYSCEF 118 at 11. This is indeed a requirement. The NYVRA expressly provides that a practice is unlawful only if it "ha[s] the effect" of "impairing" a protected class's electoral influence "as a result of vote dilution." Election Law § 17-206(2)(a).

[1] Initially, Defendants have waived their argument that the NYVRA is indeterminate by failing to raise it as an affirmative defense in their answer. *See* CPLR 3018(b); *Pataki v. New York State Assembly*, 4 N.Y.75, 88 (2004) (noting that even "valid" defenses "may be waived").

This element is consistent with how the California Supreme Court interpreted the California VRA's analogous vote dilution provision in *Pico*. Any other reading of the NYVRA would render much of Election Law § 17-206(2)(a) superfluous, violating the rule against statutory surplusage. *See, e.g.*, *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Reichman*, 221 A.D.3d 69, 74 (2023). And as the U.S. Supreme Court has observed, the concept of "vote dilution itself suggests a norm with respect to which the fact of dilution may be ascertained." *Holder v. Hall*, 512 U.S. 874, 880 (1994) (plurality opinion).

After expressing uncertainty as to whether the NYVRA includes a reasonable-alternative-policy requirement, Defendants eventually "suggest[] that vote-dilution should be part of the standard." NYSCEF 118 at 32 n.8. It is therefore undisputed that the reasonable-alternative-policy requirement is an element of vote dilution liability.

Second, Defendants allege that the NYVRA simultaneously requires "internal" and "external" racial polarization in voting – polarization within a protected class *and* between a protected class and the rest of the electorate. *Id.* at 12. The law does no such thing. Rather, like all voting rights acts, it requires only "external" racial polarization: polarization between a protected class and the rest of the electorate. This is apparent from the NYVRA's definition of "racially polarized voting." Election Law § 17-204(6). The term means "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*." *Id.* (emphasis added). This language is clear that, to determine whether racially polarized voting exists, the voting patterns of protected class members must be compared to the voting patterns of the rest of the electorate. Racially polarized voting *cannot* be assessed by looking solely at the voting patterns of protected class members.

Defendants themselves admit that an "internal" racial polarization requirement would be "nonsensical and incoherent." NYSCEF 118 at 11. Plaintiffs agree. If protected class members are internally polarized, then they are not politically cohesive. But the political cohesion of the protected class is undoubtedly an element of vote dilution liability. *See, e.g.*, Election Law § 17-206(2)(c)(iv) (asking whether protected class members are "politically cohesive"); *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986) ("[T]he minority group must be able to show that it is politically cohesive."). Only if protected class members are politically cohesive do they have "candidates *of their choice*" whose election may be "impair[ed]" by an electoral system. Election Law § 17-206(2)(a) (emphasis added). A protected class with internally polarized members has no candidates it truly favors over others.

To support their claim that the NYVRA demands "internal" racial polarization, Defendants point to the text of subsection 2(b)(i)(A). But this provision uses neither the word "internal" nor any synonym for it. The provision simply states that plaintiffs proceeding on the racially polarized voting track must prove that the "voting patterns of members of the protected class . . . are racially polarized." *Id.* § 17-206(2)(b)(i)(A). The natural way to read this language – the *only* way to read it to be consistent with the rest of the statute and with the concept of vote dilution itself – is as a requirement that the "voting patterns of members of the protected class . . . are racially polarized" from the voting patterns of the rest of the electorate. *Id.* In contrast, Defendants' suggestion that "internally" be inserted before "racially polarized" rewrites the text and unnecessarily leads to an absurd result, which the Court cannot countenance. *See People v. Santi*, 3 N.Y.3d 234, 244 (2004) ("[W]e must interpret a statute so as to avoid an 'unreasonable or absurd' application of the law.") (quoting *Williams v. Williams*, 23 N.Y.2d 592, 599 (1969)).

Third, if the NYVRA is construed (as it must be) to require only "external" racial

polarization, Defendants offer two more criticisms of this element. One is that, whenever racially polarized voting is present, *any* racial or language-minority group can prevail on a vote dilution claim. Here, Defendants suggest that non-Hispanic white voters in Mount Pleasant could win since they, too, are a protected class under the NYVRA. *See* NYSCEF 118 at 13-14. This ignores that vote dilution liability has *two* elements, not one. Plaintiffs must establish the existence of racially polarized voting *and* they must identify a reasonable alternative policy or system that would improve the protected class's representation relative to the status quo. In many cases, the second hurdle is insurmountable even if racially polarized voting is present. Here, for example, non-Hispanic white voters are currently able to elect the candidates of their choice to *all* seats on the Town Board. So non-Hispanic white voters cannot possibly identify a reasonable alternative policy or system that would increase their (already maximal) electoral influence.

Defendants' second criticism is that, while the NYVRA's definition of racially polarized voting refers to the voting behavior of "*a* protected class" (in the singular), another provision states that "protected *classes*" (in the plural) "may be combined" if they are mutually cohesive. Election Law §§ 17-204(6), 17-206(2)(c)(iv) (emphasis added). But there is no great mystery to solve here. In a traditional vote dilution case, members of a single protected class bring suit. Their voting patterns are compared to those of the rest of the electorate. But the NYVRA also authorizes "[c]oalition claims" in which "[m]embers of different protected classes" must "demonstrate that the[ir] combined voting preferences . . . are polarized against the rest of the electorate." Election Law § 17-206(8). The provision that confounds Defendants, subsection 17-206(2)(c)(iv), merely confirms that, in the case of a coalition claim, the voting patterns of *all* the protected classes that are part of the coalition must be mutually cohesive – and mutually divergent from the voting patterns of the rest of the electorate.

Fourth, Defendants dislike that, under the NYVRA, a vote dilution claim can be based on the totality of the circumstances without proof of racially polarized voting. Defendants would prefer that, as under the federal VRA, Plaintiffs had to prove *both* racially polarized voting *and* that the totality of the circumstances supports liability. *See* NYSCEF 118 at 14-16. This is nothing more than a policy disagreement Defendants should raise with the Legislature, not with this Court. Defendants concede that the NYVRA's "totality of circumstances" language is drawn directly from the federal VRA. *See id.*; 52 U.S.C. § 10301(b). In fact, the resemblance between the laws is even stronger. The "factors" that comprise the totality of the circumstances under the NYVRA, *see* Election Law § 17-206(3), largely parallel the factors first listed by a crucial U.S. Senate committee report and then deemed "probative of a [federal VRA] violation" by the U.S. Supreme Court in *Gingles*, 478 U.S. at 36. No court has ever hinted (let alone held) that the so-called "Senate factors" are indeterminate. The NYVRA's very similar factors are also intelligible. These factors do not become any murkier because they are unaccompanied by some of the federal VRA's *other* elements. *Other* elements do not affect how easy or hard it is for courts to apply *these* factors.

Again, Defendants also forget that the NYVRA does ask for more from plaintiffs than just evidence about the totality of the circumstances. For a claim of this kind, as for a claim based on racially polarized voting, plaintiffs must also satisfy the statute's reasonable-alternative-policy requirement. Accordingly, even if it is somehow relevant to an element's manageability whether it is combined with other elements, the NYVRA's totality-of-circumstances inquiry is so paired. On its own, totality-of-circumstances evidence cannot establish liability.

Fifth, Defendants raise another policy dispute with the Legislature, arguing that the Legislature should have provided more guidance as to how courts should remedy NYVRA violations. *See* NYSCEF 118 at 17. This ignores the fact that the NYVRA actually says much more

than the federal VRA about relief in vote dilution cases. The NYVRA contains an entire subsection specifying available remedies, authorizing continuing jurisdiction in certain cases, discussing how courts should treat parties' proposed remedies, and permitting remedies to override inconsistent legal provisions. *See* Election Law § 17-206(5). By comparison, the federal VRA is completely silent on the subject of judicial relief. *See* 52 U.S.C. § 10301. The Senate report is little better, stating only that "the court should exercise its traditional equitable powers . . . so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens." S. Rep. No. 97-417, at 31 (1982). For decades, this slim reed has been universally understood to make the federal VRA determinate enough to enforce. Defendants never explain how a different conclusion could possibly follow for the NYVRA's much more detailed subsection on remedies.

IV

The NYVRA does not violate the state or federal Equal Protection Clauses.

After arguing that the NYVRA violates the New York Constitution because of its indeterminacy, Defendants mount another constitutional challenge: that the law (at least its vote dilution section) runs afoul of the equal protection clauses of both the federal and state constitutions' Equal Protection Clauses. This audacious claim fails on its own terms because the NYVRA does not employ racial classifications, rely on racial stereotypes, or require racial gerrymandering. The argument also fails because the implications of Defendants' logic – condemning most other state VRAs, the federal VRA, and much civil rights law beyond the voting rights context – are untenable.

To begin with, the NYVRA uses no racial classifications and therefore is not subject to strict scrutiny on this ground. The U.S. Supreme Court has defined a racial classification as a legal

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

Under this definition, no part of the NYVRA is a racial classification for two reasons. *First*, no part of the law distributes burdens or benefits to *individuals*. To the contrary, the law applies exclusively to *political subdivisions*, which are prohibited from committing voter suppression or vote dilution. The NYVRA's vote dilution section, for instance, provides that "[n]o board of elections or political subdivision shall use any [dilutive] method of election." Election Law § 17-206(2)(a). This section imposes no requirements on any individuals. No individuals are compelled to do anything, nor may any individuals be sued. The sole regulated entities are political subdivisions. *Second*, no part of the NYVRA distributes burdens or benefits *on the basis of individuals' race*. In particular, political subdivisions never become liable for vote dilution because of the racial identities of any of their residents. Individuals' racial identity is not even a statutory factor, let alone the fulcrum on which liability hinges.

In an effort to find a racial classification where none exists, Defendants note that the NYVRA refers to a "protected class," which "means a class of individuals who are members of a

race, color, or language-minority group." Election Law § 17-204(5); *see* NYSCEF 118 at 19. But this is a quintessential statutory *reference* to race, not a racial classification. *See, e.g.*, *Inclusive Cmties. Project*, 576 U.S. at 545. Other state VRAs, the federal VRA, and most civil rights statutes also refer to race. The federal VRA, for example, bars voting discrimination "on account of race," 52 U.S.C. § 10301(a), and defines "language minority group[s]," *id.* § 10310(c)(3). Yet courts have consistently held that these laws do not classify by race and, therefore, are not subject to strict scrutiny. *See, e.g.*, *Allen v. Milligan*, 599 U.S. 1, 41 (2023) ("We . . . reject the argument that [the federal VRA] as applied to [vote dilution] is unconstitutional."); *Portugal v. Franklin Cnty.*, 530 P.3d 994, 1006 (Wash. 2023) (refuting claim that Washington VRA "makes 'racial classifications' by recognizing the existence of race, color, and language minority groups"); *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 838 (Cal. Ct. App. 2006) (refuting claim that California VRA is "subject to strict scrutiny because of its reference to race").

Continuing their hunt for a racial classification, Defendants point to the NYVRA's two kinds of vote dilution claims, one based on racially polarized voting, the other on the totality of the circumstances. *See* NYSCEF 118 at 19. But racially polarized *voting* involves the *behavior* of members of different racial groups – how they vote – not their racial identity. Similarly, the totality of the circumstances includes factors like a jurisdiction's history of racial discrimination, racial disparities in education, employment, and other areas, and the use of racial appeals in campaigns. Election Law § 17-206(3). These factors are race-related, of course, but they do not depend on anyone's race *per se*. Racially polarized voting and the totality of the circumstances are components of other state VRAs and the federal VRA, but no court has *ever* applied strict scrutiny to these laws because they contain these elements. *See, e.g.*, *Allen*, 599 U.S. at 41; *Portugal*, 530 P.3d at 656 ("Recognizing the possibility of racially polarized voting is neither novel nor unique

to the [Washington] VRA."); *Sanchez*, 51 Cal. Rptr. 3d at 826 (rejecting argument that California VRA "is unconstitutional because it uses 'race' to identify the polarized voting that causes vote dilution").

Defendants next contend that subsection (2)(c)(vii) – one of the NYVRA's nine guidelines for assessing vote dilution liability – relies on racial stereotypes. *See* NYSCEF 118 at 21. In fact, this provision merely clarifies that a finding that members of a protected class are politically cohesive is not undercut by "evidence that sub-groups within a protected class have different voting patterns." Election Law § 17-206(2)(c)(vii). The provision avoids a problem that could arise in cases where protected class members *are* cohesive but not unanimously so, and the dissenting members of the class are nonrandomly distributed. To illustrate, suppose that 80% of protected class members generally prefer the same candidates. This is more than enough unity to establish political cohesion, even if the other 20% of these individuals tend to be younger, wealthier, employed in certain jobs, or concentrated in certain neighborhoods. Thanks to the provision, the voting patterns of the 20% do not defeat the overall cohesion of the protected class. If the dissenters' voting patterns *could* be so used, then few classes would be deemed cohesive since no group of voters is monolithic and sub-groups with diverging preferences could frequently be identified.

For precisely this reason, courts applying other state VRAs and the federal VRA commonly find that protected class members are cohesive despite the presence of dissenting sub-groups. *See, e.g.*, *De Grandy v. Wetherell*, 815 F. Supp. 1550, 1571 (N.D. Fla. 1992), *aff'd in part, rev'd in part*, 512 U.S. 997 (1994) ("We conclude that there is a sufficient degree of political cohesiveness among Hispanics . . . although there might be differences between the several Hispanic subgroups."); *Yumori-Kaku v. City of Santa Clara*, 273 Cal. Rptr. 3d 437, 449 (Cal. Ct.

App. 2020) (approving analysis of Asian American cohesion by expert who "did not separate the Asian American group by country of origin"). Furthermore, while racial stereotypes are abhorrent, on their own they give rise to no equal protection claim. Defendants never allege that subsection (2)(c)(vii) violates the Equal Protection Clause on any recognized theory, such as the presumptive ban on racial classifications. And even if there is a constitutional issue with this provision, it can easily be excised without compromising the rest of the NYVRA. The provision is just one of nine guidelines, all probative but none dispositive, aimed at helping courts evaluate evidence of vote dilution.

Defendants' last equal protection argument is that the NYVRA "compels" unconstitutional racial gerrymandering. NYSCEF 118 at 22. This argument is both premature and wrong. The NYVRA provides for various remedies, including (but by no means limited to) single-member districts. *If* this Court eventually orders the creation of single-member Town Board districts, and *if* Defendants have reason to think that "race was the predominant factor motivating" the design of any of these districts, *Miller v. Johnson*, 515 U.S. 900, 916 (1995), *then* there may be a racial gerrymandering claim. At present, however, there are simply no districts to challenge. With no districts in existence, a racial gerrymandering claim cannot proceed. *See, e.g.*, *Portugal*, 530 P.3d at 1006 ("Strict scrutiny could certainly be triggered" in a future "*as-applied* challenge to districting maps that sort voters on the basis of race." (internal quotation marks omitted)); *Sanchez*, 51 Cal. Rptr. 3d at 844 ("[A]ny district-based remedy [a] court might impose . . . would be subject to analysis under the [racial gerrymandering] line of cases.").

Even at the remedial stage, a successful racial gerrymandering claim is implausible under the NYVRA. This is because the NYVRA (like other state VRAs) is carefully designed to prevent excessive reliance on race if remedial districts are drawn. Indeed, the NYVRA explicitly

contemplates remedies *other* than single-member districts, which plainly cannot be racial gerrymanders. These "alternative method[s] of election," Election Law § 17-206(5)(a)(ii), include "ranked-choice voting, cumulative voting, and limited voting," *id.* § 17-204(3). The NYVRA also states that "whether members of a protected class are geographically compact or concentrated . . . may be a factor in determining an appropriate remedy." *Id.* § 17-206(2)(c)(viii). This language implies that, where minority members live in close proximity to one another, a reasonably shaped district encompassing this minority population is a proper remedy. But where minority members *are not* geographically clustered, a district zigging and zagging to find dispersed minority members *is not* a suitable remedy. Such a "bizarrely shaped" district is a prototypical racial gerrymander. *Bush v. Vera*, 517 U.S. 952, 979 (1996) (plurality opinion). The NYVRA actively discourages drawing such districts.

The impressive record of other state VRAs containing comparable provisions demonstrates the efficacy of these safeguards against racial gerrymandering. Hundreds of political subdivisions have been required to switch from at-large elections to single-member districts under other state VRAs. *See* Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 Emory L.J. 299, 329 (2023). Yet "*not a single district* created to remedy or avoid a [state VRA] violation has been found to be an illegal racial gerrymander." *Id.* In fact, only one suit has even alleged that districts drawn to remedy a state VRA violation are unlawful, and it was dismissed due to its "fail[ure] to plausibly state that [the plaintiff] is a victim of racial gerrymandering." *Higginson v. Becerra*, 786 F. App'x. 705, 706 (9th Cir. 2019).

Defendants' assertion that "any single-member districting scheme" adopted to remedy a NYVRA violation "would involve racial predominance" is contradicted by both the above record and the long history of federal VRA litigation. NYSCEF 118 at 22. In addition to the hundreds of

political subdivisions compelled to abandon at-large elections by state VRAs, hundreds more have been forced to draw single-member districts by the federal VRA. *See, e.g.*, *The Evolution of Section 2: Numbers and Trends*, Michigan Law Voting Rights Initiative (2024), https://voting.law.umich.edu/findings/ (last accessed Aug. 26, 2024). Yet in none of these myriad cases has any court ever held that converting at-large elections to single-member districts amounts to racial gerrymandering. Indeed, such a holding would be both unprecedented and irreconcilable with the basic structure of a racial gerrymandering claim. This legal theory, the U.S. Supreme Court has explained, "applies to the boundaries of individual districts. It applies district-by-district." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015). Defendants' argument that an entire "districting scheme" could somehow be unconstitutional therefore "suggests the existence of a legal unicorn, an animal that exists only in the legal imagination." *Id.* at 263.

For all these reasons, strict scrutiny does not apply. But even if the NYVRA were subject to heightened review (in part or in full), it would pass muster. To start, the NYVRA indisputably furthers a state interest of paramount importance: preventing and remedying racial discrimination in voting. This is the same urgent goal motivating the Fifteenth Amendment itself. The U.S. Supreme Court has described "racial discrimination in voting" as an "insidious and pervasive evil" that may be addressed through "sterner and more elaborate measures." *South Carolina v. Katzenbach*, 383 U.S. 301, 308-09 (1966). And there is no doubt the NYVRA aims to fight racial discrimination in voting. The law says so in its very first section. To avoid "the denial or abridgement of the voting rights of members of a race, color, or language-minority group," the law seeks to "[e]nsure that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York." Election Law § 17-200.

Defendants maintain that states are more limited than the federal government in the steps they may take to stop racial discrimination. NYSCEF 118 at 24. This may have been true in an earlier era. Since the 1990s, however, "congruence between the standards applicable to federal and state racial classifications" has been one of the "general propositions" on which equal protection law is based. *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 223, 226 (1995). Defendants also purport to "put Plaintiffs to their proof" that New York has an ongoing problem with racial discrimination in voting. NYSCEF 118 at 23. The proof is overwhelming. The legislative committee report on the NYVRA acknowledged that "New York has an extensive history of discrimination against racial, ethnic, and language minority groups in voting." N.Y. Comm. Rpt. on S. 1046D (N.Y. May 20, 2022). A detailed white paper confirmed that "many discriminatory practices remain in place" in New York, including "at-large election systems, redistricting plans that dilute minority voting strength, polling location plans with too few and/or too inconvenient sites, and failures to provide adequate language assistance." *See* NYCLU & LDF, John R. Lewis Voting Rights Act of New York at 2 (Feb. 24, 2022), https://www.naacpldf.org/wp-content/uploads/NYVRA-White-Paper-NYCLU-LDF-March-2022.pdf. Several New York counties – including much of New York City – were covered by Section 5 of the federal VRA prior to *Shelby County v. Holder*, 570 U.S. 529 (2013). *See* Jurisdictions Previously Covered by Section 5, U.S. Dep't of Justice (May 17, 2023), https://www.justice.gov/crt/jurisdictions-previously-covered-section-5. And since Section 2 of the federal VRA took its current form, dozens of New York political subdivisions have been sued for voter suppression and vote dilution. *See Section 2 Cases Database*, Michigan Law Voting Rights Initiative (2024), https://voting.law.umich.edu/database/ (last accessed Aug. 26, 2024).

The NYVRA is narrowly tailored to combat racial discrimination in voting – in particular,

vote dilution – as well. The "essence" of vote dilution is that an electoral practice "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [different racial groups] to elect their preferred representatives." *Gingles*, 478 U.S. at 47. The NYVRA's vote dilution elements correspond closely to this "essence." The "social and historical conditions" that enable vote dilution are racially polarized voting, *see id.* at 52-74, and past and present racial discrimination, *see id.* at 36-37, 44-45. One of the NYVRA's vote dilution claims is based on racially polarized voting, *see* Election Law § 17-206(2)(b)(i)(A), the other focuses on historical and ongoing racial discrimination, the crux of the totality of the circumstances analysis, *see id.* §§ 17-206(2)(b)(i)(B), 17-206(3). The NYVRA's reasonable-alternative-policy requirement, *id.* § 17-206(2)(a), also dovetails with the unequal opportunities of different racial groups to elect the candidates of their choice, *see Gingles*, 478 U.S. at 47. This element is satisfied only if another policy could yield more equal electoral opportunities for a different racial group.

Defendants contend that the NYVRA is not narrowly tailored because it omits the first of *Gingles*'s three prongs (that an additional, reasonably compact, majority-minority district could be drawn). NYSCEF 118 at 25-26. But the U.S. Supreme Court adopted this prong for a prudential, not a constitutional, reason – the Court thought that majority-minority districts would be the remedies in vote dilution cases and wanted to ensure that such districts could feasibly be created. *See Gingles*, 478 U.S. at 50 n.17. The Court said nothing about the Constitution when it articulated this requirement. *See id.* at 50-51. Additionally, the NYVRA's reasonable-alternative-policy requirement serves exactly the same function as the first *Gingles* prong: ascertaining that a valid remedy could be implemented. So even if something like the first *Gingles* prong is constitutionally required, it is present in the NYVRA. And Defendants are simply wrong that, lacking the first *Gingles* prong, the NYVRA inevitably leads to unlawful racial gerrymandering. As explained

above, the NYVRA contains multiple safeguards to prevent this outcome (which, if it occurs, is always susceptible to an as-applied challenge anyway).

III

Defendants are barred from challenging the constitutionality of the NYVRA.

Defendants cannot, in any event, assert the constitutional claims on which they base their defense. It is settled New York law that "municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation." *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 383 (2017) (quoting *City of New York v. State of New York*, 86 N.Y.2d 286, 289 (1995)). Moreover, "[p]olitical subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment." *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973). For the reasons described above, Defendants' constitutional arguments are flatly wrong; regardless, Defendants lack the right or the capacity to bring them.

Defendants' brief describes various purported constitutional problems with the NYVRA, but it never identifies *whose* constitutional rights are allegedly being violated. *See* NYSCEF 118 at 10-26. That omission is unsurprising, given that "[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 & City Council of Baltimore*, 289 U.S. 36, 40 (1933). Defendants' constitutional arguments thus fail because, in the circumstances here, Defendants have no constitutional rights to assert.

In addition, and for similar reasons, Defendants "lack[] the capacity to mount a constitutional challenge to invalidate State legislation" under New York law. *Bd. of Educ. of Roosevelt Union Free Sch. Dist.*, 282 A.D.2d at 172. The legislature adopted the NYVRA to ensure

that political subdivisions did not dilute the right of citizens to vote. It makes no sense to suppose that the same legislature which enacted the NYVRA to "breathe constitutional rights into . . . public entit[ies] [would] then equip [them] with authority to police state legislation on the basis of those rights." *Matter of World Trade Ctr.*, 30 N.Y.3d at 385. This principle:

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

City of New York, 86 N.Y.2d at 289-90. For these reasons, Defendants' constitutional challenges to the NYVRA are barred. *See, e.g.*, *id.* at 289 (holding that City of New York, its Board of Education, and school district officials lacked capacity to challenge public education funding system under Equal Protection Clauses of the federal and state constitutions).[2]

The Court of Appeals has identified four circumstances where New York law does permit a local government or its officials to challenge state legislation. *See City of New York*, 86 N.Y.2d at 291-92. None are present here. The only possibly applicable exception – the so-called "dilemma exception," which derives from a footnote in *Board of Education of Central School Dist. No. 1 v. Allen*, 392 U.S. 236 (1968) – is of questionable validity. *Cf. Toth v. Chapman*, 2022 WL 821175, at *13 (M.D. Pa. 2022) (questioning precedential value of *Allen*). But even if it remains good law,

[2] *See also Cnty. of Nassau*, 100 A.D.3d at 1054 (holding that county lacked capacity to challenge constitutionality of state election law); *Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287 (1977) ("[U]nits of municipal government . . . do not have the substantive right to raise . . . constitutional challenges."); *Cranford Co. v. City of New York*, 38 F.2d 52, 54 (2d Cir. 1930) (affirming that municipal defendants cannot maintain defense challenging constitutionality of state statute); *Blakeman v. James*, 2024 WL 3201671, at *12-14 (E.D.N.Y. 2024) (holding that county lacked capacity to seek judgment declaring that order issued by New York Attorney General violated county's equal protection rights).

it does not apply here for two reasons. First, Defendants have not "properly invoke[d]" the exception because they have failed to plead necessary facts. *Cnty. of Nassau v. State*, 100 A.D.3d 1052, 1056 (2012). Their answer never alleges that compliance with the NYVRA will force them to undertake any acts that violate their oaths or other constitutional proscriptions or place their positions in jeopardy. *See Bd. of Educ. of Mt. Sinai Union Free Sch. Dist. v. New York State Tchrs. Ret. Sys.*, 60 F.3d 106, 112 (2nd Cir. 1995) (rejecting assertion of dilemma exception because "even if we were to assume that plaintiffs fear that they might violate their constitutional oaths, they have failed to demonstrate that they are presented with the dilemma that gave rise to standing in *Allen*"). Second, to the extent Defendants are asserting the unconstitutionality of a possible remedy, their argument is premature until liability has been established and the remedy identified. *See, e.g.*, *New York State Dep't of Env't Conservation v. Damico*, 130 A.D.2d 974, 974 (1987). Absent an identified remedy, Defendants are essentially asserting that *all* potential NYVRA remedies are unconstitutional, such that the NYVRA could not be enforced under *any* circumstances, a facial argument that is both incorrect and which Defendants lack the right and capacity to make.

IV

This case is not moot.

Defendants' argument that this case is moot because the Town may eventually conduct even-year elections is wrong for multiple reasons. A claim is not moot if "the rights of the parties will be directly affected by the determination of the [case] and the interest of the parties is an immediate consequence of the judgment." *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714 (1980). The NYVRA, like the federal VRA on which it builds, "reaches changes that affect even a single election." *N.A.A.C.P. v. Hampton Cnty. Election Comm'n*, 470 U.S. 166, 178 (1985). Here, as

Defendants acknowledge, the Town will continue holding odd-year elections at least "until 2028." NYSCEF 118 at 28. Plaintiffs will thus be denied their right to an undiluted vote in multiple Town elections absent judicial intervention.

Defendants are wrong to assert that the law requiring municipalities to conduct even-year elections limits this Court's authority to enforce the NYVRA. Defendants rely on language stating that Town officials "elected and serving their term as of January 1, 2025 shall complete their full term as established by law." 2023 McKinney's Sess. Law News, ch 741, § 5 (A. 4282-B) (Dec. 22, 2023). This simply establishes a default rule to manage the statewide transition from odd- to even-year elections. It does not preclude changing municipal election dates prior to 2028. Instead, the same law expressly disclaims limitations on the authority to "alter or permit alteration of an official's term limit." *Id*.[3] Moreover, even if officials elected as of January 1, 2025 must serve their full terms, this Court could still impose new districts or alternative remedies for subsequent elections.

Similarly, the provision's "[n]otwithstanding" clause does not shield unlawful voting practices from judicial scrutiny. If, as Defendants suggest, New York law "forecloses NYVRA liability founded on voting patterns that occur at times the Legislature commanded," NYSCEF 118 at 29, then the NYVRA's vote dilution prongs never apply. Plaintiffs would be prohibited from challenging unlawful vote dilution occurring in the odd-year elections "commanded" by existing law until 2028, at which point they would be barred from challenging unlawful vote dilution

[3] It makes no sense for Town Law § 80 to permit municipalities to voluntarily shift to on-cycle elections (for example, in response to an NYVRA notice letter), but impliedly prohibit courts from remedying unlawful vote dilution if a municipality contests liability. *See Freccia v. Carullo*, 93 A.D.2d 281, 288 (1983) (statute did not eliminate court's jurisdiction where "nowhere in the statute did the word 'jurisdiction' appear, much less an explicit limitation on the court's competence to entertain the action").

occurring in the even-year elections "commanded" by amended Town Law § 80. It would be absurd to construe Town Law § 80 to gut the NYVRA's vote dilution provisions without an explicit statutory command. *See Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 72 (2013) ("[L]egislative bodies generally do not 'hide elephants in mouseholes.'") (quoting *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)).

The cases Defendants rely upon illustrate the weakness of their arguments. In *Holloway v. City of Virginia Beach*, the plaintiffs' federal VRA suit was mooted when a state law "eliminated" the system of elections they were challenging, meaning *no* future elections would be conducted using the challenged system. 42 F.4th 266, 272-73 (4th Cir. 2022). In *Ballard v. New York Safety Track, LLC*, the plaintiffs' challenge to an agreement that terminated in 2013 became moot in 2014. 126 A.D.3d 1073, 1075 (2015). In *People ex rel. Prue v. Imperati*, a prisoner's habeas petition was mooted upon his release. 216 A.D.3d 707, 708 (2023). By contrast, Plaintiffs' challenge to the Town's at-large election system is not mooted by a state law leaves the basic structure of the election system intact, and where changes will not take effect until two more elections have occurred.

Even if Defendants had a legally plausible mootness argument, they still would not be entitled to summary judgment. The evidence does not demonstrate that shifting to even-year elections will remedy Plaintiffs' vote dilution claims. While it is correct that the sole Hispanic-preferred candidate to prevail in a Town election did so in an even year, that election coincided with a hotly contested gubernatorial race that contributed to unusually high turnout. NYSCEF 65 (Handley Report) at 4. There is evidence of racially polarized voting in the "overwhelming majority" of exogenous elections (i.e., elections for non-Town offices) since 2014, most occurring in even years. NYSCEF 70 (Velez Report) at 7. There is evidence of racially polarized voting

patterns in Democratic Party primary elections. NYSCEF 72 (Velez Rebuttal Report) at 11. Shifting to even-year elections may improve Democratic candidates' prospects, but it does not follow that this shift would allow Hispanic voters the opportunity to elect their preferred candidates. *See Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 644 (D.S.C. 2002) ("[S]ince a minority candidate cannot win the seat without having an equal opportunity to win the party primary, equal opportunity must be measured at every step in the electoral process.").

V

Plaintiffs have standing to allege vote dilution.

Defendants' assertion that certain Plaintiffs lack standing misinterprets the NYVRA and applicable law. "[T]he Legislature may confer or deny standing as it sees fit." *Dairylea Coop., Inc. v. Walkley*, 38 N.Y.2d 6, 10 (1975). Here, "[t]he question of standing" is "answered by the [NYVRA]" because the NYVRA "identif[ies] the class of persons entitled to seek review." *Soc'y. of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 769 (1991). Plaintiffs have standing because their "injury asserted fall[s] within the zone of interests protected by the statute invoked." *Id.* at 773.[4]

Under the NYVRA, all "aggrieved persons [and certain organizations] may file an action against a political subdivision pursuant to this section." Election Law § 17-206(4). A person is "aggrieved" if, as relevant here, the person is an eligible voter and member of a protected class in a jurisdiction that maintains a "method of election[] having the effect of impairing *the ability of*

[4] Allowing members of a protected class to challenge election methods operating where they are eligible to vote is also consistent with the prevailing approach in federal VRA cases. *See, e.g.*, *Rose v. Raffensperger*, 511 F. Supp. 3d 1340, 1352 (N.D. Ga. 2021) (concluding that "African Americans who reside and are registered to vote in Fulton County, Georgia" have standing to challenge allegedly dilutive statewide election system).

members of a protected class to elect candidates of their choice or influence the outcome of elections." *Id.* § 17-206(2)(a) (emphasis added). A "protected class" is defined as "a class of individuals who are members of a race, color, or language-minority group, including individuals who are members of a minimum reporting category that has ever been officially recognized by the United States census bureau." *Id.* § 17-204(5). Thus, as Hispanic residents of and eligible voters in Mount Pleasant who allege that the Town's at-large election system dilutes Hispanic voters' electoral influence, Plaintiffs undoubtedly have statutory standing.

Defendants' contrary assertion that Plaintiffs Aguirre, Sigüenza, and Michael lack standing because they have not alleged an injury "distinct from the Town populace" is nonsensical. NYSCEF 118 at 31. To prove vote dilution under § 17-206(2)(b)(i)(A), a plaintiff must show racially polarized voting *and* the existence of a reasonable alternative policy. *Supra* at 3-9. By necessity, residents who are not members of the protected class *cannot* assert a vote dilution claim: they will be unable to demonstrate that the group they belong to could be better represented under a reasonable alternate system (because their preferred candidates will already usually prevail). Through the NYVRA, the Legislature has defined a legally cognizable injury (vote dilution) and a discrete class of individuals who are harmed (members of the protected class whose electoral influence has been diluted).

Defendants erroneously claim that the NYVRA requires plaintiffs to plead "special damage[s]." NYSCEF 118 at 29. But the NYVRA contains no "special damages" requirement, nor is one required by New York law. Courts have made clear that "proof of special damage . . . is not required in every instance to establish" standing. *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals of Town of N. Hempstead*, 69 N.Y.2d 406, 413 (1987). On this point, *McCrory v. Vill. of Mamaroneck Bd. of Trustees*, 181 A.D.3d 67 (2020), is instructive. There, the court reversed a

decision concluding that the plaintiff was not an aggrieved person because she failed to show "special damages," holding that the Open Meeting Law at issue did not require plaintiffs to "demonstrate . . . additional personal damage or injury." *Id.* at 74. The court noted that application of New York standing law varies by context, and that the special damages requirement was particular to the land use context. *Id.* at 73-74. Requiring special damages absent legislative authorization would "undermine, erode, and emasculate the stated objective of this statute, which was designed to benefit the citizens of this state and the general commonweal." *Id*.

Similarly, imposing a special damages requirement here would frustrate the NYVRA's dual purposes of encouraging participation in the elective franchise and ensuring protected classes an equal opportunity to participate in the political process, especially given the legislature's express instruction that courts should interpret laws relating to the franchise "liberally." Election Law § 17-202. This Court should reject Defendants' effort to undermine a statute designed to eliminate electoral systems that diminish the voting power of *all* members of protected classes.[5]

VI

There is extensive evidence of racially polarized voting.

Defendants argue that Plaintiffs' vote dilution claim based on § 17-206(2)(b)(i)(A) must fail because "[n]o evidence shows that voting patterns are racially polarized." NYSCEF 118 at 32. This is a stunning mischaracterization of the record. Plaintiffs have introduced extensive evidence establishing racially polarized voting and demonstrating the existence of a reasonable alternative

[5] Regardless, Defendants concede that Plaintiff Serratto has standing. NYSCEF 118 at 29-31. Accordingly, Defendants' motion for summary judgment must be denied to the extent it requests dismissal of Plaintiffs' complaint. *See Empire State Ch. of Associated Builders and Contractors, Inc. v. Smith*, 21 N.Y.3d 309, 315 (2013) (explaining that merits of a claim must be considered provided "at least one" of the plaintiffs has standing).

system as required to prove vote dilution. *See* NYSCEF 60 at 13-16; NYSCEF 72 (Velez Rebuttal Report) at 7-8; NYSCEF 73 (DeFord Report). Defendants' own experts concluded that "voting is racially/ethnically polarized [in Mount Pleasant]." NYSCEF 65 (Handley Report) at 1; *see also* NYSCEF 66 (Wice Report). Defendants might not like their own experts' conclusions, but they cannot wish them away. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980) (noting that "expressions of hope" carry no weight at summary judgment).

Rather than acknowledge this evidence, Defendants torture the definition of racially polarized voting into meaninglessness. They contend that racially polarized voting "cannot be [present] where large numbers of non-Hispanic residents vote for candidates chosen by . . . a large number of Hispanic residents." NYSCEF 118 at 32. True enough. If minority voters support the same candidates as the rest of the electorate, then Hispanic-preferred candidates will typically prevail. There will be no vote dilution claim. But sporadic white support for Hispanic-preferred candidates does not negate a pattern of racially polarized voting. In federal cases, the relevant test is whether "a bloc voting majority [is] *usually* . . . able to defeat candidates supported by" the minority community," *Gingles*, 478 U.S. at 49, not whether "white voters vote as an unbending monolithic block against whoever happens to be the minority's preferred candidate," *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1123 (3d Cir. 1993). Indeed, "the *Gingles* standard presupposes the existence of crossover voting" and "variations in the levels of crossover voting from election to election." *Id.* The NYVRA, which builds on the federal VRA, incorporates similar principles.

Defendants' theory would render the vote dilution prong toothless: *no* group of voters is monolithic. Federal courts routinely find racially polarized voting where there is similar or less political cohesion than found here. *See, e.g.*, *Gingles*, 478 U.S. at 59 (affirming finding of racially

polarized voting with up to 50% white crossover voting); *Flores v. Town of Islip*, 382 F. Supp. 3d 197, 231-23 (E.D.N.Y. 2019) (finding racially polarized voting with up to 45% white crossover voting and noting that "the particular percentage of bloc voting is significantly less important than whether the white bloc regularly defeats the minority-preferred candidate"). The legislature did not intend to protect New York voters from racial vote dilution by making racial vote dilution impossible to prove. *See Gordon v. State*, 141 Misc. 2d 242, 249 (Ct. Cl. 1988) (refusing to interpret statute to "both authorize a result and require an impossible condition be met in order to achieve that result").

Regardless, Defendants' arguments fail on their own terms. Defendants note that "[n]early 40% of non-Hispanic voters supported the Hispanic-preferred candidates in the 2019 Town Justice and 2021 Supervisor elections." NYSCEF 118 at 32-33. But the Hispanic-preferred candidates lost those races, and "in a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting." *Gingles*, 478 U.S. at 57. Defendants emphasize that "[n]early 20% of non-Hispanic voters supported Hispanic-preferred candidates in the 2015, 2019, and 2021 Town Board elections." NYSCEF 118 at 33. But that level of crossover voting is nowhere near sufficient to defeat a finding of racially polarized voting. *Supra* at 27. Defendants highlight that the Hispanic-preferred candidate prevailed in one out of eight contested Town elections. NYSCEF 118 at 32-33. But that means the white-preferred candidate prevailed in *87.5% of elections*. *See United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 442-43 (S.D.N.Y. 2010) (finding racially polarized voting where white-preferred candidate prevailed in 75% of elections).

Defendants next argue that Plaintiffs cannot show racially polarized voting because the

Hispanic community is internally diverse. Again, true enough. The Hispanic community, like all minority groups, is comprised of individuals from different backgrounds with varying perspectives. But the undisputed evidence establishes that the Hispanic community is highly politically cohesive: Hispanic voters consistently support the same candidates, candidates who consistently lose to candidates preferred by white voters. *See* NYSCEF 60 at 13-16; *supra* at 26. Even if evidence of divergent voting patterns among subgroups were relevant – and it is not - the absence of *any* evidence indicating that "Ecuadorians and Dominicans" vote differently is telling. NYSCEF 118 at 34.

Finally, Defendants argue that Plaintiffs' claim must fail because Hispanic is not a cognizable identity under the NYVRA. *See id.* ("It is inaccurate to refer to the 'Hispanic community' as a singular 'protected class' entitled to relief under the [NYVRA]."). That would be news to Plaintiffs and the millions of Americans who identify as Hispanic, the countless businesses, non-profits, and political entities which serve the Hispanic community, and the courts which consistently adjudicate cases brought by and on behalf of Hispanic voters without questioning their existence.[6] *See* NYSCEF 67 (Sandoval-Strausz Report); NYSCEF 69 (Sandoval-Strausz Rebuttal Report) at 2-8. The fact that Hispanic people are heterogeneous does not negate the Hispanic community's status as a real (and legally cognizable) minority group. According to Defendants' theory, no racial or ethnic minority group qualifies as a "protected class" under the NYVRA, because all racial or ethnic groups can be divided into subgroups based on "national origin[], . . . political and social views, times of arrival in this country, and generational

[6] *See, e.g.*, *Flores*, 382 F. Supp. 3d at 205 (deciding federal VRA claim brought by Hispanic voters on the merits without questioning existence of Hispanic community); *Vill. of Port Chester*, 704 F. Supp. 2d at 443 (same); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 427 (2006) (same).

differences." NYSCEF 118 at 33. This Court should reject this callous effort to write Hispanics out of existence and deprive all minority groups of the protections afforded by the NYVRA.

VII

There is ample evidence that Hispanic voters' electoral influence is impaired under the totality of the circumstances.

Defendants deny the existence of extensive record evidence when they argue that Plaintiffs' totality of the circumstances claim is unsupported. NYSCEF 118 at 34-38. Putting aside Defendants' attempt to redefine the totality of the circumstances test, *see supra* at 7-8, Defendants are wrong on the record evidence in at least six ways.

First, Defendants are wrong that "evidence concerning other political subdivisions and the entire state . . . . is irrelevant" under the NYVRA. NYSCEF 118 at 34. Courts must consider "[t]he history of discrimination in *or affecting* the political subdivision." Election Law § 17-206(3)(a) (emphasis added). This reflects how discrimination affects minority communities, *see* NYSCEF 69 (Sandoval-Strausz Rebuttal Report) at 2, and is consistent with how courts apply the federal VRA, *see, e.g.*, *Luna v. Cnty. of Kern*, 291 F. Supp. 3d 1088, 1135 (E.D. Cal. 2018) (rejecting "myopic view" that evidence of statewide discrimination is irrelevant to totality of the circumstances); *Goosby v. Town Bd. of the Town of Hempstead*, 180 F.3d 476, 488 (2d Cir. 1999) (considering extrajurisdictional evidence in analyzing totality of the circumstances). Further, allowing consideration of statewide discrimination does not guarantee liability: it is simply one factor among many courts may consider. Defendants also ignore ample evidence of discrimination emanating from Mount Pleasant's elected officials and the Town itself. *See* NYSCEF 67 (Sandoval-Strausz Report) at 35, 39-40.

Second, Defendants wildly overreach in claiming there is "no evidence related to most of"

the § 17-206(3) factors. Plaintiffs have introduced evidence addressing every enumerated NYVRA factor. *See, e.g.*, NYSCEF 60 at 4-11, 18-29; NYSCEF 67 (Sandoval-Strausz Report); NYSCEF 69 (Sandoval-Strausz Report); NYSCEF 70 (Velez Report) at 10. Defendants also mischaracterize the evidence relevant to §§ 17-206(3)(i) and (j). They see "minimal" evidence of racial appeals, claiming these incidents solely address legitimate policy debates while ignoring the many statements and policies denigrating non-white immigrants and deploying anti-Hispanic stereotypes. *See* NYSCEF 60 at 31-32; NYSCEF 96 (Record of Public Comments) at 102-09; NYSCEF 99 (Mount Pleasant Republican Committee Post); NYSCEF 106-08. Defendants note "just one incident" of nonresponsiveness to the Hispanic community's needs,[7] ignoring the Town's acknowledged failures in areas like affordable housing. *See* NYSCEF 60 at 10-13; NYSCEF 136 (Town Deposition) at 126:7-10, 132:8-11.[8]

Third, Defendants' depiction of the Town's authority over Sleepy Hollow is factually erroneous and legally irrelevant. Plaintiffs' claims are on behalf of *the Hispanic community of Mount Pleasant*, which includes residents of Sleepy Hollow and other areas of the Town alike. Regardless, the Town provides numerous services to Sleepy Hollow and retains a percentage of taxes it collects from village residents. NYSCEF 136 (Town Deposition) at 39:16-40:14. Village residents are eligible to vote in Town elections and are represented by the Town's officials. NYSCEF 84 (Rogers-Smalley Deposition) at 16:25-18:24. Voters are entitled to political equality in every jurisdiction where they are eligible to vote. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632-33 (1969) (concluding that New York statute which precluded certain residents

[7] Presumably referring to Mark Saracino's comment that Hispanic residents who desire political equality should secede from the Town.

[8] Defendants also ignore the Board's demonstrated failure to accommodate and engage Hispanic residents. *See* NYSCEF 60 at 32-34.

from voting in school board elections violated Equal Protection Clause).

Fourth, Defendants' minimization of the evidence of socioeconomic disparities between Hispanic and white residents is borderline frivolous. The legislature reasonably concluded that socioeconomic disparities are probative to a vote dilution claim. *See Gingles*, 478 U.S. at 69 ("[P]olitical participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination."). There are significant disparities between white and Hispanic residents of Mount Pleasant on numerous socioeconomic indicators, including educational attainment, employment, income, wealth, and homeownership. *See* NYSCEF 67 (Sandoval-Strausz Report); NYSCEF 69 (Sandoval-Strausz Report); NYSCEF 70 (Velez Report) at 10.[9] These disparities matter more than the "virtual parity [between Hispanic and white residents] in households with a computer." NYSCEF 118 at 38.

Fifth, the absence of Hispanic candidates for Town office supports rather than detracts from Plaintiffs' claim. *Cf. Pope v. Cnty. of Albany*, 94 F. Supp. 3d 302, 341 (N.D.N.Y. 2015) (fact that "no minority candidate had ever been elected to County-wide office or nominated by a political party to run for County-wide office" supported vote dilution finding). The only realistic path to Town office is to be appointed or to appear on the Republican Party ballot line. *See* NYSCEF 60 at 28. Either way, access is limited to those who can navigate an insular process overseen by the Mount Pleasant Republican Committee, a "club" where "if you didn't fit the mold they didn't want you and they made your life harder." NYSCEF 81 (Fulgenzi Deposition) at 26:14-28:8.

Sixth, Defendants' stated justification for maintaining at-large elections is unsupported by

[9] Defendants' assertion that these disparities are attributable to the immigration status of Hispanic residents is both irrelevant and, because it is unsupported by record evidence, entitled to no weight. *See Signature Bank v. Galit Properties, Inc.*, 80 A.D.3d 689, 690 (2011) (refusing to credit "unsupported conclusory allegation" at summary judgment).

evidence. During discovery, Defendants failed to offer *any* justification for maintaining at-large elections, stating there was "no specific decision to keep an at-large system." NYSCEF 63 (Defendants' Responses to Plaintiffs' Interrogatories), No. 8; NYSCEF 80 (Town Deposition) at 49:21-50:3. The NYVRA allows political subdivisions to assert "a *compelling* policy justification *that is substantiated and supported by evidence*," Election Law § 17-206(3)(k) (emphasis added), not to conjure justifications out of thin air.

CONCLUSION

For these reasons, this Court should deny Defendants' motion for summary judgment.

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Dated: White Plains, New York
September 12, 2024

CERTIFICATION OF COMPLIANCE WITH UNIFORM RULE 202.8-B

I, Robert A. Spolzino, an attorney at law licensed to practice in the State of New York, certify that this document contains 9986 words, as calculated by the Microsoft Word processing system, inclusive of point headings and footnotes, and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules and regulations, etc.

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