SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
HON. PAUL I. MARX, J.S.C.

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HAZEL COADS, STEPHANIE M. CHASE, MARVIN AMAZAN, et al.,

Index No. 611872/2023

Plaintiffs,

v.

NASSAU COUNTY, the NASSAU COUNTY LEGISLATURE, et al.,

Defendants.

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NEW YORK COMMUNITIES FOR CHANGE, MARIA JORDAN AWALOM, et al.,

Index No. 602316/2024

Plaintiffs,

Motion Seq. 15

v.

COUNTY OF NASSAU, THE NASSAU COUNTY LEGISLATURE, et al.,

Defendants.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

Constitional Provisions

PRELIMINARY STATEMENT

Defendants do not move for summary judgment on the *NYCC* Plaintiffs' claim under Section 34 of the Municipal Home Rule Law ("MHRL"). That claim alleges that the Enacted Map violates the MHRL's prohibitions on partisan gerrymandering, as well as on racial vote dilution and intentional racial discrimination, which are *at least* co-extensive with Section 2 of the Federal Voting Rights Act of 1965 ("FVRA"). This case should therefore proceed to trial.

The Court should deny Defendants' motion for summary judgment (NYSCEF Doc. No. 282, the "Motion") on the two claims it does address—the *Coads* Plaintiffs' partisan-gerrymandering claim and the *NYCC* Plaintiffs' racial vote dilution claim under the John R. Lewis Voting Rights Act of New York ("NYVRA").

The *Coads* Plaintiffs' partisan-gerrymandering claim is trialworthy. Whether unlawful intent led to a challenged redistricting plan is a fact-intensive inquiry involving determinations of witness credibility and weighing of hotly disputed facts. This case is no exception, especially because New York's prohibition on partisan gerrymandering tolerates "*no* level of intentional discouragement of competition or partisan favoritism."[1] The Motion offers an incomplete set of facts and mischaracterizes fought-over facts as undisputed. Instead, the record developed so far shows that the Enacted Map was adopted without a single vote from the minority party, after a process that excluded minority party legislators from any participation in mapdrawing while denying them even basic information about the mapdrawing process. Moreover, evidence of the Map's strong pro-Republican effect, including analysis generated during the redistricting process, supports the inference that mapmakers knew and intended those effects.

[1] *Matter of Harkenrider v Hochul*, 204 AD3d 1366, 1370 [4th Dept 2022], *appeal dismissed*, *lv to appeal denied*, 38 NY3d 1168 [2022], and *affd as mod*, 38 NY3d 494 [2022].

The *NYCC* Plaintiffs' NYVRA claim is trialworthy. Defendants' facial constitutional challenge to the NYVRA's protections against racial vote dilution in district-based elections fails for several reasons. First, Defendants don't even argue that these NYVRA provisions are unconstitutional in all applications—indeed, they concede one isn't. Second, the NYVRA is patterned after voting rights acts in California and Washington, both upheld against challenges all but identical to those raised here. Third, although considering specific remedial measures would be premature, the NYVRA doesn't compel adopting race-predominant redistricting plans that would trigger strict scrutiny. Indeed, it only instructs an "appropriate remedy" and allows remedies with no line-drawing at all. Finally, although the NYVRA need not be read so narrowly as the FVRA, Plaintiffs have adduced ample evidence to prove each of the *Gingles* preconditions *and* the totality of circumstances to satisfy that standard.

An intervening event bears mention: On November 7, Supreme Court, Orange County in *Clarke v Town of Newburgh,* Index No. EF002460-2024, NYSCEF Doc No. 147, [Sup Ct, Orange County 2024] ("*Clarke* Slip Op.")—a case that only involves the NYVRA's prohibition on racial-vote dilution in at-large elections—issued an order purporting to strike down the NYVRA in its entirety. That decision is wrong many times over. To start, it didn't give the NYVRA provisions at issue a reasonable reading, let alone exhaust "every reasonable mode of reconciliation of the statute with the Constitution"[2] before declaring the statute unconstitutional. And even so, *Clarke* also ignored the NYVRA's severability provision. This Court of concurrent jurisdiction isn't bound by *Clarke* and shouldn't follow it. Instead, this Court should give the NYVRA provisions

[2] *Stefanik v Hochul*, – NY3d –, 2024 NY Slip Op 04236, *3 [2024], quoting *White v Cuomo*, 38 NY3d 209, 216 [2022].

applicable in this case a reasonable reading based on authorities interpreting the FVRA and other state VRAs upon which it is patterned.

Plaintiffs' responses to Defendants' statement of undisputed facts ("counterstatement") show extensive mischaracterizations in Defendants' assertions of undisputed fact and provide a more complete record. Reports from Plaintiffs' five experts also contradict Defendants' claims that their expert witnesses' opinions are unrebutted. Indeed, much of Defendants' expert evidence supports *Plaintiffs*' cases. Those issues, as well as determinations about the credibility of witnesses and the weight afforded to each witnesses' evidence, are properly resolved at trial.

LEGAL STANDARD

A party moving for summary judgment must establish that the "cause of action . . . has no merit" as a matter of law (*see* CPLR 3212 [b]). Summary judgment is denied "when there is any doubt as to the existence of a triable issue" (*Napierski v Finn*, 229 AD2d 869, 870 [3d Dept 1996]). The court views the evidence in the light most favorable to the non-moving party and draws every reasonable inference in its favor (*see e.g. Nicklas v Tedlen Realty Corp.*, 305 AD2d 385, 386 [2d Dept 2003]; *Myers by Myers v Fir Cab Corp.*, 64 NY2d 806, 808 [1985]).

As a court of concurrent jurisdiction, this Court is not bound by the *Clarke* decision and is "free to reach a contrary result" (*JY Not So Common L.P. v P & R Bronx, LLC*, 79 Misc 3d 626, 641 [Sup Ct, Bronx County 2023], quoting *Mtn. View Coach Lines, Inc. v Storms*, 102 AD2d 663, 665 [2d Dept 1984]; *see also Hudson Val. Bank, N.A. v Banxcorp*, 28 Misc 3d 1232(A), *7 [Sup Ct, Westchester County 2010]. Where part of a law is ruled unconstitutional, courts consider "whether those unconstitutional subdivisions 'may be severed from the valid and the remainder of the statute preserved'" (*People v Viviani*, 36 NY3d 564, 583 [2021]). Severability "is a question of legislative intent, namely 'whether the [L]egislature, if partial invalidity [of the statute] had

been foreseen, would have wished the statute to be enforced with the valid part exscinded, or rejected altogether'" (*id.*, quoting *People ex rel. Alpha Portland Cement Co. v Knapp*, 230 NY 48, 60 [1920]). The NYVRA includes an express severability provision (Election Law § 17-222), a statement of legislative purpose (*id*. § 17-200), and a canon of construction (*id*. § 17-202) that demonstrate the Legislature's intent to preserve as much of the NYVRA's protections against racial vote dilution as possible.

ARGUMENT

I. The Court should deny summary judgment on the *Coads* Plaintiffs' partisan gerrymandering claim.

A. Whether the Defendants acted with partisan intent is a disputed, triable issue.

The MHRL prohibits counties from redistricting "to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties" (MHRL § 34 [4][e]). This language mirrors the state constitutional bar on partisan gerrymandering (*see* NY Const, art III, § 4 [c] [5]). The MHRL permits "*no* level of intentional discouragement of competition or partisan favoritism" (*Harkenrider*, 204 AD3d at 1370). In addition to direct evidence, plaintiffs also may show partisan intent through (1) "proof of a partisan process excluding participation by the minority party"; and (2) "evidence of discriminatory results (*i.e.*, lines that impactfully and unduly favor or disfavor a political party or reduce competition)" (*Harkenrider v Hochul*, 38 NY3d 494, 519 [2022]).

Defendants ask this Court to find that the Legislature's process for passing the Enacted Map was so bipartisan and transparent that it could not possibly have involved *any* partisan intent in adopting the Enacted Map (*see* Defendants' motion for summary judgment ("mot") 3-10). The factual record cannot support such a finding—certainly not at this stage where every inference must be drawn in Plaintiffs' favor. "Where intent must be gleaned from evidence in controversy

or inferences outside written words, it is a question of fact requiring resolution by trial, and summary judgment will not lie" (*Pitter v Gussini Shoes, Inc.*, 206 AD2d 464, 466 [2d Dept 1994]). Tellingly, Defendants fail to cite any cases in which summary judgment was granted in a partisan gerrymandering case (*see* mot 16-26).

The Motion both provides an incomplete set of material facts and wrongfully asks this Court to view those facts in the light most favorable to Defendants. Importantly, the presumptions of constitutionality and regularity that Defendants invoke cannot hijack the summary-judgment standard to require all inferences be drawn in their favor (*e.g.* mot 3-4). *Harkenrider* also teaches that applicable presumptions in a partisan-gerrymandering case can be overcome by the kind of evidence of partisan process and effects that Plaintiffs have adduced (*see* 204 AD3d 1366, 1374 [4th Dept 2022]; 38 NY3d 494, 519 [2022]).

Further, this case involves a statutory challenge to a *local* enactment where these presumptions can be no more effective at immunizing the challenged map than *Harkenrider*'s constitutional challenge to the state legislature's enactment. For the "presumption of regularity," Defendants repeatedly cite *People v Dominique* (90 NY2d 880, 881 [1997]), a criminal case involving a procedural violation by a court issuing a search warrant, but don't explain how this presumption would apply in this context (mot 3-4, 8-10). This argument is particularly galling here where Defendants outsourced mapmaking to private, partisan consultants (counterstatement ¶¶66, 71)—who are not entitled to any such presumption—and now attempt to disclaim any impermissible intent through willfully blind reliance on their advice (*see e.g.* mot 9-10). Regardless, Plaintiffs have put forth enough evidence of impermissible partisan intent to overcome any applicable presumptions to warrant trial.

B. The Nassau County Map was the product of a one-sided partisan process.

Evidence of a "largely one-party process used to enact" a challenged redistricting plan can establish impermissible partisan intent (*Harkenrider*, 204 AD3d at 1371; *see also Harkenrider*, 38 NY3d at 519-20). The Fourth Department characterized the redistricting process in *Harkenrider* as "largely one-party" based on two factors: first, the map was adopted without a single minority-party vote in favor of it; and second, the map was drawn without meaningful input from the minority political party (*Harkenrider*, 204 AD3d at 1371). Both are present here.

First, the map was adopted without the support of a single minority-party member (counterstatement ¶73).

Second, as described *infra*, Section I.B., Republicans dominated the map-drawing process—from which Democratic legislators were consistently shut out. Defendants concede that no Democratic legislators participated in drawing the Enacted Map or any prior versions (counterstatement ¶66). Instead, while the Legislature's Rules Committee publicly considered two proposed maps that the Temporary Districting Advisory Commission ("TDAC") submitted on January 17, 2023, the Legislature's Republican Presiding Officer, Richard Nicolello, had already engaged partisan consultants who planned to reject the TDAC's maps as illegal and to draw their own (*id.*). The subject of FVRA compliance was discussed extensively during the January 17, 2023 Rules Committee hearing on the two TDAC maps, each of which included majority-minority districts drawn to protect against racial vote dilution, *id.* ¶64, just like prior redistricting plans for the Legislature (counterstatement ¶¶60-63). Although Nicolello chaired that Rules Committee meeting and voted to advance both TDAC maps to the full Legislature, he never mentioned that he planned to propose a new and different map that rejected any such efforts to protect minority voting rights as illegal (counterstatement ¶66).

Nicolello waited until February 9, 2023, to release his first proposed map (counterstatement ¶67). He then waited until the February 16 hearing—only 12 days before the start of the candidate petitioning period for 2023 elections—to justify introducing his new race-blind map and discarding the two TDAC maps, notwithstanding that his consultants had been developing a pretext to discard those maps for at least several weeks (*id.*). Democratic legislators weren't provided any explanation for the shift to this new map until just *five minutes* before the February 16, 2023 legislative hearing, when they received for the first time a memorandum authored by the Presiding Officer's mapmaking consultant, Troutman Pepper Hamilton Sanders LLP ("Troutman") (*id.*). And when Democratic legislators tried to question Misha Tseytlin, one of Nicolello's mapmaking consultants, about that memorandum, they were repeatedly stonewalled (*id.*).

Democratic legislators were also denied access to Sean Trende's analyses, which were the centerpiece of the Troutman Memo (counterstatement ¶68). Tseytlin and Nicolello dismissed the Democratic legislators' requests to see that underlying analysis or to hear from Trende (*id.* ["It is what it is"]; *id.* ¶69 ["We're not going to go into any further detail with respect to that"]). For an illuminating contrast, while Democratic legislators' repeated requests for information were all denied, no member of the Legislature's Republican caucus even asked to see Trende's analysis before voting on the map (counterstatement ¶70).

The map-drawing process was so one-sided, in fact, that Democratic legislators had to repeatedly request information about *who* exactly drew it (counterstatement ¶71). Tseytlin testified during the redistricting process that he and his law firm drew the map with the Presiding Officer (*see e.g. id.* ["LEGISLATOR ABRAHAMS: Mr. Tseytlin, let's back up. You drew this map with the with the Presiding Officer, correct? MR. TSEYTLIN: Yes."]). Defendants have

spent this litigation's lifespan backpedaling from that testimony, while also withholding the name of another redistricting consultant until this Court ordered its disclosure (*id.*). This dissembling over the mapmaker's identity raises an inference of impermissible intent—especially given that mapmakers' identities were not secret in previous redistricting cycles (counterstatement ¶65).

Defendants whitewash the process's partisanship. They highlight Nicolello's outreach to Minority Leader Abrahams purportedly to discuss Democratic proposals upon "completion of the work of TDAC" (mot 5). But whether and to what extent Nicolello's invitation was genuine is a disputed issue of fact to be resolved at trial. Nicolello's outreach apparently withheld critical information from Abrahams, including that he planned to introduce a map that rejected the need to include any districts drawn to protect Nassau's voters of color against racial vote dilution (counterstatement ¶¶10-11 (responses)). Nor does Nicolello appear to have mentioned that he had engaged Troutman or revealed any of the work Troutman had already done out of public view to reject the TDAC maps or to develop the Enacted Map (counterstatement ¶10 (response), ¶66.)

Defendants cite Troutman's own February 27 Memorandum to support their claim that they "'incorporated' four of five 'significant suggestions'" proposed by Democratic legislators and the public in making revisions between the proposed map and the Enacted Map (mot 6). This is misleading. Transcripts of the February 16 and 27 hearings are replete with Democratic legislators' voiced concerns about both the Enacted Map and the process that led to it (counterstatement ¶¶67-69, 71-72, 75-76). And Democratic legislators were never given enough information or time to fully provide input on the maps (*id.*; counterstatement ¶10 (response)). Democratic legislators raised many more concerns with the February 16 map and whether the five concerns were the most "significant" ones is disputed (counterstatement ¶¶23-24 (responses)).

Moreover, four of the five "suggestions" the Troutman Memo says mapmakers considered were not actually followed. Elmont and Mill Brook were not kept whole, even though it was unnecessary to divide either (counterstatement ¶¶28, 31 (responses), ¶74). The Village of Hempstead remained divided (counterstatement ¶74). And Lakeview remained in a district with neighboring communities that numerous Black Lakeview residents repeatedly testified they felt unwelcome in because of their race (counterstatement ¶¶11, 28 (responses), ¶74). The one suggestion that the mapmakers did address—combining Plainview and Old Bethpage—occurred after it was made public that Troutman drew district lines on the "front walk" of an incumbent's house, putting him into the same district as a Republican incumbent (counterstatement ¶74). Whether Troutman intentionally drew a Democratic incumbent into a heavily Republican district only to give the appearance of bipartisanship when they "fixed" this issue is a matter for resolution at trial.

Defendants stress that Democratic Legislators acknowledged revisions made to the Map (*see* mot 6-7). They make too much of a handful of legislative statements and pull others out of context. For example, after acknowledging changes to the map, Legislator Abrahams opined that "the map that's before us today is still an illegal document . . . [b]ecause it dilut[es] minority votes across the board" (counterstatement ¶¶11, 31 (responses), ¶75). Defendants also admit that Abrahams' acknowledgment of some changes followed several *pages* of criticism and concern (*id.* ¶75). So too with Legislator Bynoe, who acknowledged some changes while then criticizing the Enacted Map's inexcusable treatment of Lakeview at length (*id.* ¶76).

To distract from Plaintiffs' ample showing that the Enacted Map was drawn with impermissible partisan intent, Defendants criticize Plaintiffs for not proffering a viable alternative map (mot 8-9). Defendants cite no authority suggesting that plaintiffs need to proffer a viable

alternative map to prove liability—let alone withstand summary judgment—under the MHRL. Regardless, Plaintiffs have offered such a map: Dr. Cervas's illustrative map meets or beats the Enacted Map's performance on all the MHRL criteria (counterstatement ¶77). Defendants' claim that the Enacted Map is somehow preferable to Dr. Cervas's because it "scores comparably" on the "*Harkenrider* analysis" (mot 8) wrongfully conflates Dr. Trende's analysis with the actual opinions in *Harkenrider* and, regardless, is disputed by Dr. Cervas (counterstatement ¶77).

Defendants also baselessly argue that they offer unrebutted evidence that Dr. Cervas's map does not adequately account for communities of interest (mot 8-9). As Dr. Cervas explains and Defendants' experts agree, a well-accepted and objective method of maintaining communities of interest is to prioritize keeping villages whole and minimizing the splitting of Census Designated Places, or CDPs, because they "often represent neighborhoods with common interests" (counterstatement ¶78). Even Mr. Alfano, the witness whom Defendants hold out as an expert on communities of interest, agrees (*id.*).

By contrast, the Enacted Map's scattershot approach to communities of interest, as expressed in Appendix A of the Troutman Memos, is emblematic of the kind of "ad hoc reasoning" that Dr. Trende criticized in *Harkenrider*—"this is the district we want, find a community of interest to justify it" (counterstatement ¶79; *id.* ¶18 (response)). That Nicolello and Tseytlin made conspicuous efforts to shut down extensive questioning by Democratic legislators into the facts undergirding Appendix A during the February 16 hearing raises the inference that the mapmakers' professed solicitude for communities of interest was really just a smokescreen for partisan gerrymandering (*e.g.* counterstatement ¶ 79).

In light of these extensive factual disputes about whether the map-drawing process did not sufficiently include input from the minority party, summary judgment is inappropriate.

C. The Nassau County Map confers partisan advantage on Republicans.

Statistical evidence from both parties' experts show that the Enacted Map favors Republicans (counterstatement ¶¶80-82). The only dispute is whether the Enacted Map so decisively favors Republicans that it could *only* have been drawn with unlawful partisan intent. That dispute alone is sufficient to deny summary judgment.

The evidentiary record supports a finding of unlawful intent, in any event. The Enacted Map packs Democratic voters into districts that are already safely Democratic while cracking their votes in swing districts, ensuring Republican majority control over the Legislature (counterstatement ¶¶80-82). This is "exactly what gerrymandering looks like, i.e., where the voters of the disfavored party are disproportionately 'packed' into districts already favoring that party in order to make the districts around them either flip or become less competitive" (*Harkenrider*, 204 AD3d at 1372). In *Harkenrider*, the challenged map's "nine most competitive districts" were more democratic than in nearly all simulated maps in Trende's non-partisan ensemble (*id.*; *see also id.* ["[T]he more competitive districts were made safer [for Democrats] by packing republican voters into other republican-leaning districts."]). As a result, the court concluded that it had "the DNA of a gerrymander" (*id.*).

The Enacted Map shares this "DNA." Statistical analysis reveals the same pattern of packing and cracking Democratic voters for Republican advantage. Dr. Magleby's analysis shows that the Map is an extreme partisan gerrymander (counterstatement ¶¶80-82; *id.* ¶¶9, 21 (responses)).[3] Based on a review of analyses generated by Dr. Trende's during his time consulting on the Enacted Map's development, Dr. Magleby found that in strategically important "districts of

[3] Analyses conducted by the *NYCC* Plaintiffs' expert witness, Dr. Ari Stern, show that the Enacted Map is an extreme partisan gerrymander; Plaintiffs don't address that analysis here because Defendants didn't move for summary judgment on the *NYCC* Plaintiffs' MHRL claim.

rank 8, 9, and 10, the enacted map's [Democratic] vote share falls below what we observe in the distribution of districts of rank 8, 9, and 10 in the ensemble of maps" (counterstatement ¶81). Meanwhile, "[d]istricts of rank 13, 15, 16, and 18 show patterns of packing" of Democratic votes (*id*). Dr. Trende himself acknowledges that an analysis he generated shows that the crucial median district for controlling the legislature in Enacted Map favors Republicans more than any of 50,000 simulated maps (counterstatement ¶¶9, 21(responses)).

Another partisan fairness metric, known as "mean-median," reveals that the Enacted Map has an extreme bias in favor of maintaining Republican control. The mean-median score measures whether a legislature's fulcrum district is in line with the jurisdiction's underlying partisanship (counterstatement ¶82). As Dr. Trende explained, "the mean-median score limits a party's ability to gerrymander *control* of the chamber to its benefit, even if it might gerrymander the size of its majorities" (*id.*). Both Dr. Magleby and Dr. Trende have each found that, compared to their ensembles of simulated maps and using a variety of elections, the Enacted Map's mean-median score is more extreme than the vast majority—and in some cases every single simulated map out of hundreds of thousands (*id.*).

Dr. Trende's and Dr. Magleby's analyses also show the Enacted Map's clear pro-Republican bias—particularly in that crucial median district—was available to the mapmakers after its initial publication and prior to its adoption (*id.*). Neither the mapmakers, nor the Legislators who relied upon them, did anything to mitigate those extreme partisan effects. It is certainly a reasonable inference—perhaps, the *only* reasonable inference—that the map was drawn to achieve those partisan effects and adopted because of them.

II. The New York Voting Rights Act is constitutional and Plaintiffs' claim is trialworthy.

A. Defendants' facial challenge to the NYVRA fails because they concede that the law is not unconstitutional in every conceivable application.

Defendants' facial challenge to the constitutionality of the NYVRA's prohibition on racial vote dilution in district-based elections fails because they cannot show that the NYVRA is unconstitutional "in every conceivable application,"[4] (*Cohen v State*, 94 NY2d 1, 8 [1999]). "'[L]egislative enactments are entitled to a strong presumption of constitutionality'" (*Stefanik*, 2024 WL 3868644, *3, quoting *White*, 38 NY3d at 216 [cleaned up]). "'Courts strike them down only . . . after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to'" (*id.*, quoting 38 NY3d at 216). And "parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt'" (*LaValle v Hayden*, 98 NY2d 155, 161 [2002], quoting *People v Tichenor*, 89 NY2d 769, 773 [1997]). Defendants haven't met that burden.

Defendants concede there is at least one constitutional reading of the NYVRA: if applied consistent with Section 2 of the FVRA (*see* mot 12-13; *see also* counterstatement ¶83 Feb. 16 Tr. 123:8-124:16 ["The courts may decide that the John Lewis Law is in line with Section 2 of the VRA, and then there would be no constitutional problem" (testimony of Misha Tseytlin)]). And, as explained *infra*, Section II.D., Plaintiffs' NYVRA claim *would* satisfy the requirements of a Section 2 claim. Defendants suggest complying with the NYVRA would "require political subdivisions to alter race-neutral redistricting maps" which, they contend, would violate the Equal

[4] Consistent with the Attorney General's position in *Young v. Town of Cheektowaga*, No. 803989/2024, NYSCEF Doc No. 71, *11 (Sup Ct, Erie County), Plaintiffs here also contend that Defendants, as political subdivision and their officers, "lack capacity to mount constitutional challenges to . . . State legislation" (*City of New York v State*, 86 NY2d 286, 289 [1995]; *see In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY 3d 377, 384-85 [2017]).

Protection Clause (mot 13-14). But this is a premature argument about *remedies*. The NYVRA, like the California Voting Rights Act ("CVRA"), first upheld in *Sanchez v City of Modesto*, provides for a panoply of "appropriate remedies" for racial vote dilution in district-based elections—none that require race-predominant remedial districts (*see infra*, Section II.B.ii) and some that eschew redistricting schemes altogether (*e.g.* "an alternative method of election," Election Law § 17-206[5][a][b]; *see Sanchez*, 145 Cal App 4th at 670, 687). For example, the remedy for a village with five trustees and a dilutive redistricting plan may well be a switch away from single-member districts to at-large elections with proportional ranked-choice voting. "Whether one potential remedy under a statute would be subject to strict scrutiny if imposed is not the test for facial invalidity of the statute" (*Sanchez*, 145 Cal App 4th at 688). Because Defendants don't argue that the NYVRA is unconstitutional in all applications, their facial challenge must fail (*see LaValle*, 98 NY2d at 161).

B. The NYVRA, like other VRAs, is subject to rational basis review and serves a compelling state interest.

i. The NYVRA does not use racial classifications.

The NYVRA doesn't classify based on race (*contra* mot 11-13, 15-19 [claiming strict scrutiny appliable]). That it asks legislatures to be race-*conscious* doesn't mean it allocates "burdens or benefits" on that basis (*see id.* at 14). Courts have consistently evaluated nearly identical provisions of the FVRA and state VRAs under rational basis review.

First, the NYVRA doesn't make race-based classifications. Like the FVRA, it confers a cause of action on members of *any* "protected class," Election Law § 17-206[2][a], defined as "a class of individuals who are members of a race, color, or language-minority group" (*id.* § 17-204[5]). Similarly, the FVRA bars discrimination in voting "on account of race or color [or membership in a language-minority]" 52 U.S.C. §§ 10301[a], 10303[f][2]. Neither statute "says

nor implies that persons are to be treated differently on account of their race"[5] (*Crawford v Bd. of Educ. of L.A.*, 458 US 527, 537 [1982]). And a statutory reference to race is not, by itself, a racial classification (*see e.g. Tex Dept. of Hous. & Community Affairs v Inclusive Communities Project, Inc.*, 576 US 519, 545 [2015] ["[M]ere awareness of race in attempting to solve [race-related] problems . . . does not doom that endeavor . . . ."]). Defendants don't cite a single authority holding that the VRA's prohibition against racial discrimination in voting makes race-based classifications or is otherwise subject to strict scrutiny (*see* mot 11-13).[1]

Contrary to Defendants' and the *Clarke* court's misunderstanding (*see* mot 17-18; *Clarke*, Slip Op. at 17), both the NYVRA and the VRA can and do protect white voters as well as voters of color,[6] *see Harding v County of Dallas, Tex.*, 2018 WL 1157166, *10 (ND Tex Mar. 5, 2018, No. 3:15-CV-0131-D), *aff'd*, 948 F3d 302 [5th Cir 2020]). Although the *Clarke* court doubted that a group could be protected against racial vote dilution "*absent any evidence of historic discrimination against people of that color* in that political subdivision" (*Clarke*, Slip Op. at 17), nothing in the FVRA's text, case law, or other anti-discrimination law suggest that such historical evidence is required for a liability finding under the NYVRA.[7] Instead, *Clarke*'s recognition that the NYVRA protects "literally every person in the State of New York" equally directly contradicts its own reasoning that the NYVRA facially creates racial classifications (*see id.* at 9).

[5] The U.S. Supreme Court has only applied strict scrutiny to specific *districts* where "race was the predominant factor" driving redistricting (*see Miller v Johnson*, 515 US 900, 916 [1995]).

[6] Insofar as Defendants believe the NYVRA doesn't protect White voters (mot 17-18), they misread the law. In Election Law § 17-204[5], the term "minority" modifies only the word "language," as indicated by the hyphen appearing only in the compound adjective "language-minority" and not with the terms "race" or "color."

[7] *E.g.*, *Nat'l Ass'n for Advancement of Colored People, Spring Valley Branch v E. Ramapo Cent. Sch. Dist.*, 462 F Supp 3d 368, 392, 4178 [SD NY 2020] (finding liability for racial vote dilution under Section 2 without evidence of historical discrimination), *aff'd sub nom. Clerveaux v E. Ramapo Cent. Sch. Dist.*, 984 F3d 213 [2d Cir 2021] ("*East Ramapo*").

Second, Defendants and the *Clarke* decision are both wrong that the NYVRA distributes "burdens or benefits on the basis of individual racial classifications" (mot 15-16, quoting *Parents Involved in Community Schs. v Seattle Sch. Dist. No. 1*, 551 US 701, 720 [2007]; *see Clarke*, Slip Op. at 15-17). The NYVRA protects the individual right to vote against racial discrimination, but doesn't distribute benefits or burdens to any individual using racial classifications—unlike the cases that Defendants and the *Clarke* decision rely upon (mot 18; *Clarke* Slip Op. 14-15), *e.g.*, the California prison policy in *Johnson* that assigned people to racially segregated prison cells or the contracting policies in *Adarand* and *Croson* that gave favorable presumptions to applicants if they were members of only specific racial groups. Instead, the NYVRA protects the right to vote by simply prohibiting jurisdictions and their officers from using redistricting plans that cause vote dilution (Election Law § 17-206[2][a]).

To be sure, the NYVRA "reflect[s] a concern with race" (*Hayden v County of Nassau*, 180 F3d 42, 49 [2d Cir 1999] [citation omitted]). But "[t]hat does not make [it] unlawful or automatically 'suspect' . . . ." (*id.* [quotations omitted]). As noted above, "[m]ere awareness of race in attempting to solve [race-related] problems . . . does not doom th[e] endeavor at the outset" (*Tex Dep't. of Hous. & Community Affairs*, 576 US at 545). And "in the context of districting, . . . there is a difference 'between being aware of racial considerations and being motivated by them.' The former is permissible; the latter is usually not" (*Allen*, 599 US at 30, quoting *Miller v Johnson*, 515 US 900, 916 [1995]). The NYVRA is conscious of race; it doesn't confer benefits or burdens on any individual based on race.

Third, the courts that have considered similar arguments concerning the application of strict scrutiny to state VRAs have rejected them. In California, the CVRA "involves race and voting, but, also like the [FVRA], it does not allocate benefits or burdens on the basis of race or any other

suspect classification and does not burden anyone's right to vote" (*Sanchez*, 145 Cal App 4th at 680; *see Portugal v Franklin County*, 530 P.3d 994, 1012 [Wash 2023] ["the WVRA, on its face, does not require unconstitutional actions"]). The Court continued: "[a] legislature's intent to remedy a race-related harm" simply doesn't "constitute[] a racially discriminatory purpose" (*Sanchez*, 145 Cal App 4th at 687). So too with the NYVRA.

Finally, these principles didn't change with the Supreme Court's ruling in *Students for Fair Admissions, Inc. v President & Fellows of Harvard College* ("*SFFA*") (600 US 181 [2023]). In *SFFA*, the Court held that higher-education affirmative-action programs were "impermissibly aimed at achieving 'proportional representation' of minority students among the overall student-body population" (*Singleton v Allen*, 690 F Supp 3d 1226, 1317 [ND Ala 2023] [quoting *SFFA*, 143 SCt at 2172]). But as courts have recognized since *SFFA*, "[d]rawing a comparison between voting redistricting and affirmative action . . . is a tough analogy" (*Robinson v Ardoin*, 86 F4th 574, 593 [5th Cir. 2023]; *see also Singleton*, 690 F Supp 3d at 1317 ["affirmative action cases . . . are fundamentally unlike this [FVRA] case"]). While the Supreme Court described the process of "assigning students based on their race" as "[o]utright racial balancing," *SFFA*, 600 US at 214, 223-24, in *Allen*, it explained that remedying racial dilution doesn't "inevitably demand[] racial proportionality in districting" (*Allen*, 599 US at 26).[8]

[8] *Clarke* speculates that the NYVRA "effectively creates a proportional redistricting," citing only the statutory disclaimer against proportionality in the FVRA (*Clarke*, Slip. Op. 22-24). But it doesn't explain how the language's absence—a political compromise known as the "Dole Amendment" that helped win bipartisan support for enacting the 1982 amendments to the FVRA, *Milligan*, 599 US at 13—creates a right to proportional representation by negative implication. It does not.

ii. The NYVRA does not require political subdivisions to implement race-predominant redistricting plans.

Defendants argue that upon a finding of liability, the NYVRA necessarily requires racial gerrymandering, claiming that the political subdivision "must draw districts that lead to more minority-favored candidates winning [] after grouping voters together based *solely* upon their racial identity" (mot 15). But Defendants cannot point to any NYVRA provision that requires such race-predominant remedies. Rather, as noted above, the NYVRA provides a non-exhaustive list of vote dilution remedies, some which don't require districting plans at all and cannot implicate racial gerrymandering (*see supra*, Section II.A.; Election Law § 17-206[5][a]).

And where a revised redistricting plan is proper, the NYVRA doesn't require that racial considerations predominate. So strict scrutiny doesn't automatically apply on a facial challenge. That level of review may apply to *individual* districts only upon a court's finding that race predominates in the redistricting process (*see Ala Legis. Black Caucus v Alabama*, 575 US 254, 262 [2015]). But a court may order a remedial map that provides for reasonably configured districts and adheres to traditional districting principles without race predominating (*see Robinson*, 86 F4th at 595 ["The Supreme Court has implemented a high bar to racial gerrymander challenges, requiring a showing of racial predominance such that traditional redistricting criteria are subordinate to the racial consideration."]). And one clear way to avoid racial gerrymandering in a remedial map is to prioritize traditional districting principles and "good government criteria" such as "preserving the integrity of political subdivisions to the greatest extent feasible"—the approach that Dr. Cervas followed here and which Dr. Trende took as one of two special masters for redistricting in Virginia in 2022 (*see* counterstatement ¶85).

There are potentially thousands of options for a remedial redistricting plan in this case where race wouldn't predominate—such as one of the 58,888 redistricting plans that Dr. Trende

generated in his simulated, *race-blind* map ensemble that created at least six majority-minority districts (counterstatement ¶86). The possibility that someone could theoretically draw a remedial, racially gerrymandered *district* doesn't subject the NYVRA to strict scrutiny.

C. The NYVRA is narrowly tailored to achieve New York's clearly stated compelling interests in eliminating racial discrimination in voting.

Even if strict scrutiny applied, the NYVRA is narrowly tailored to serve New York's compelling interest in preventing racial discrimination in voting. New York's authority to vindicate this interest is tied to the State's constitutional values. Its ability to enact legislation to advance it can be limited only by the U.S. and New York Constitutions (*See Stefanik*, 2024 WL 3868644, *3).

Neither constitution bars New York from protecting the fundamental right to vote. The U.S. Constitution authorizes states to protect voters. "[T]he Framers . . . intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections" (*Shelby County, Ala v Holder*, 570 US 529, 543 [2013], quoting *Gregory v Ashcroft*, 501 US 452, 461-62 [1991] [internal quotations omitted]). This includes "broad powers to determine the conditions under which the right to suffrage may be exercised" (*Carrington v Rash*, 380 US 89, 91 [1965], quoting *Lassiter v Northampton County Bd. of Elections*, 360 US 45, 50 [1959] [internal quotations omitted]). New York retains broad authority to adopt policies "to eliminate racial disparities through race-neutral means." (*Tex Dep't. of Hous. & Community Affairs*, 576 US at 545).

Nor does New York's Constitution preclude the NYVRA. "The question in determining the constitutionality of a legislative action is [] not whether the State Constitution permits the act, but whether it prohibits it." *Stefanik*, 2024 WL 3868644, *3. The NYVRA recognizes that New York's Constitution "substantially exceed[s] the protections for the right to vote provided by the

[U.S.] constitution" and provides "guarantees of equal protection" (Election Law § 17-200; *see Esler v Walters*, 56 NY2d 306, 313 [1982]). Unlike the federal constitution, New York's charter affirmatively protects the right to vote (*see* NY Const, art I, §1; art II, §1). And "[i]n election matters . . . the State guarantee of equal protection 'is as broad in its coverage as that of the Fourteenth Amendment'" (*Esler*, 56 NY2d at 314, quoting *Seaman v Fedourich*, 16 NY2d 94, 102 [1965]; *see* NY Const, art I, § 11).

In short, New York can pass antidiscrimination laws to further an independent state-law interest in protecting voters from racial discrimination. Federal laws—including the FVRA—are the "*floor* below which [local] law cannot fall" (*Loeffler v Staten Island Univ. Hosp.*, 582 F3d 268, 278 [2d Cir 2009] [internal quotations omitted]). They are never the ceiling (s*ee Sanchez*, 145 Cal App 4th at 667 ["[t]here is no rule that a state legislature can never extend civil rights beyond what Congress has provided"]). Thus, states may protect the right to vote independent of federal law. And, in the context of gerrymandering, "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply" to ensure fair elections (*Rucho v Common Cause*, 588 US 684, 719 [2019]).

The NYVRA is narrowly tailored to further this compelling interest. To determine whether vote dilution exists, like the FVRA, it demands an "intensely local appraisal" of social and historical conditions to determine whether the political environment is equally open to members of those groups (*see Allen*, 599 US at 19, quoting *Thornburg v Gingles*, 478 US 30, 79 [1986]). A plaintiff must proffer evidence on the protected class's voting patterns, including whether their preferred candidates are usually defeated by a majority bloc (*see* Election Law § 17-206[2][b][ii][A]). That question has "widespread" recognition as "a fact-based inquiry" (*Pope v County of Albany*, 94 F Supp 3d 302, 335 [ND NY 2015] [collecting cases]). It isn't "measured

by mathematical formula but by the trial court's searching assessment of statistical and other evidence presented" (*Yumori-Kaku v City of Santa Clara*, 59 Cal App 5th 385, 413 [2020]).

The NYVRA also lets plaintiffs prove liability by pointing to the "totality of the circumstances," including a list of factors patterned on those applicable in FVRA claims (*see* Election Law § 17-206[2][b][ii][B]-[C] [listing NYVRA totality factors]; *compare Gingles*, 478 US at 36-37. Contrary to *Clarke*'s misconception that this inquiry is standardless, *Clarke*, Slip Op. at 19-20, the NYVRA's enumerated factors provide courts comparable guidance to the "totality of the circumstances" to the FVRA's "Senate Factors"—none of which appear in the text of the VRA, but instead were developed in the courts through the analysis of legislative history (*see United States v Euclid City Sch. Bd.*, 632 F Supp 2d 740, 748 [ND Ohio 2009]). Moreover, under the totality inquiry, the NYVRA also requires a plaintiff to prove that the preferred candidates of the protected class "would usually be defeated" (Election Law § 17-206[2][b][ii]), which can be satisfied by proof identical to the third *Gingles* precondition. And as discussed *infra*, Section II.D., under the NYVRA, a racial vote dilution plaintiff must also prove that there is an effective, workable remedy, like the other state VRAs and the FVRA that informed New York law (*see Pico Neighborhood Assn. v City of Santa Monica*, 15 Cal 5th 292, 314-15 [2023]). The NYVRA thus ensures that any action is narrowly tailored to the facts at hand. That the statutory text affords breathing space allows courts to ensure its constitutionality, not to read unreasonably invalidate it.

Even so, Defendants claim the NYVRA isn't narrowly tailored because the NYVRA's requirement of proving a workable remedy isn't limited to proof that a minority group is large and geographically compact enough "to constitute a majority in a single-member district" (*Gingles*, 478 US at 50; *see* mot 20-21). As explained *infra*, Section II.D., the Supreme Court created the

compactness precondition assuming majority-minority districts would remedy vote dilution claims; the Court intended that remedial districts could be drawn (*see id.* at 50, n.17). But compactness is not a constitutional requirement, and the NYVRA's provisions adopt comparable guardrails by requiring Plaintiffs to show that one or more reasonable alternative policies exist that would address the impairment of a protected class's representation relative to the status quo. (Election Law § 17-206[2]). This serves the same function as the first *Gingles* precondition: making sure that a valid remedy could be implemented if liability is found (*see id.*; Election Law §§ 17-206[2][b][ii], [5][ii]).

D. The NYVRA, like other state VRAs, closely resembles the FVRA by embracing the *Gingles* preconditions.

The NYVRA closely follows the liability framework outlined in the FVRA and other state VRAs—all of which have withstood constitutional challenges (*see e.g. Portugal*, 530 P3d at 1012; *Sanchez*, 145 Cal App 4th at 688). It builds upon "preconditions" applicable to federal racial vote dilution claims set forth in *Thornburg v Gingles* (478 US at 50-51).

Under *Gingles*, a plaintiff must establish: that "(1) the minority group 'is sufficiently large and geographically compact to constitute a majority in a single-member district,' (2) the minority group is 'politically cohesive,' and (3) 'the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances. . .—usually to defeat the minority's preferred candidate'" (*East Ramapo*, 462 F Supp 3d at 377-78, quoting *Gingles*, 478 US at 50-51).

Defendants argue that the statutory text of the NYVRA must follow these preconditions in every exact detail to be constitutional. Not true. Not even the FVRA itself directly mentions the *Gingles* preconditions (*see* 52 U.S.C. § 10301). The NYVRA maintains the requirement of proving racially polarized proving—the "essence of a vote dilution claim"—by its own terms (*Pope*, 94 F Supp 3d at 335 [citation omitted]). It incorporates the second and third *Gingles*

preconditions into its racial vote dilution prohibition by demanding proof that minority groups are "politically cohesive," Election Law § 17-206[2][c][iv]; voting patterns are "racially polarized," *id.* § 17-206[2][b][ii][A], *see also id.* at § 17-204(6) [defining racially polarized voting]; and "candidates. . . preferred by members of the protected class would usually be defeated," *id*. § 17-206[2][b][ii]. Although the *Clarke* decision expresses confusion about how these provisions may apply to multiple groups bringing coalition claims (*Clarke*, Slip Op. at 19), the NYVRA text shows that it simply follows established law—requiring those groups seeking to bring a claim together to show that they are politically cohesive and their preferred candidates are usually defeated by racially polarized voting.

As for the first *Gingles* precondition, there is no constitutional requirement that a plaintiff establish compactness to prevail on a vote dilution claim; this just follows from the FVRA's text (*see Gingles*, 478 US at 50 n.17 [describing compactness as necessary to showing injury under Section 2]; *League of United Latin Am. Citizens v Perry*, 548 US 399, 430 [2006] [noting FVRA "does not forbid the creation of a noncompact majority-minority district"]). The Supreme Court adopted the compactness requirement for prudential, not constitutional, reasons, positing that majority-minority districts would be the remedies in vote dilution cases and wanted to ensure that such districts could feasibly be created.

In any event, the NYVRA also incorporates the principle driving the *Gingles* "compactness" precondition by requiring a plaintiff to prove that an effective remedy for vote dilution exists. While "federal courts 'have strongly preferred single-member districts' as the remedy of choice," *Portugal*, 530 P3d at 1001, quoting *Growe v Emison*, 507 US 25, 40 [1993], state VRAs "contemplate [] a much broader range of available remedies" (*id.* at 1002; *see New State Ice Co. v Liebmann*, 285 US 262, 311 [1932] ["a single courageous state may, if its citizens

choose, serve as a laboratory"] [Brandeis, J., dissenting]). Election Law § 17-206[5][a] provides as examples of potential remedies not only revised redistricting plans but also "an alternative method of election" or "moving the dates of regular elections to be concurrent with the election dates for state . . . office." Requiring plaintiffs to prove that one of these remedies will effectively remedy the injury at issue preserves the "essence" of a vote dilution claim. "After all, 'the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured'" (*Pico*, 15 Cal 5th at 315, quoting *Reno v Bossier Parish Sch. Bd.*, 520 US 471, 480 [1997]).

Courts have affirmed that state VRAs don't violate the U.S. Constitution when they dispense with the *Gingles* compactness requirement as a threshold inquiry (*Portugal*, 530 P3d at 1002-03, *cert denied* 144 SCt 1343 [2024]).[9] The Washington Supreme Court upheld a similar statutory mechanism because a "plaintiff can state a redressable injury under a broader range of circumstances" (*Portugal*, 530 P3d at 1002-03). And the California Supreme Court similarly upheld the CVRA's departure from *Gingles* preconditions to accommodate a range of available remedies broader than merely single-member districting systems under that statute (*Pico*, 15 Cal 5th at 316-17). In California, as here, "[i]t would make little sense to require plaintiffs to show that the protected class could constitute a majority of a hypothetical district, given that the [NYVRA] is not limited to ability-to-elect claims nor are its remedies limited to district elections" (*id.* at 317).

[9] The *Clarke* decision's demand for federal case law on this point (*Clarke*, Slip Op. at 23) fails to recognize that *state* VRA claims are, by design, typically brought in *state* court. In any event, the U.S. Supreme Court declined a request to review the Washington Supreme Court's *Portugal* decision upholding that State's VRA. (*Gimenez v. Franklin County, Wash*, 144 SCt 1343 [2024]).

Further, the NYVRA does not prohibit plaintiffs from offering an illustrative plan that follows the *Gingles* compactness requirement (mot 20-21). It specifically contemplates "new or revised districting or redistricting plans" as a potential remedy for racial vote dilution (Election Law § 17-206[5][a][iii]). Though compactness is not a "threshold requirement" to demonstrate redressability under the NYVRA or similar state VRAs, *Portugal*, 530 P3d at 1003, it may still "be a factor in determining an appropriate remedy" (*see* Election Law § 17-206[2][c][viii]; *accord Portugal*, 530 P3d at 1003). Read together with Election Law § 17-206[2][b][ii], these clauses let a plaintiff to prove that a "district-based method of election" "impair[s] the ability of members of a protected class to elect their candidates of choice or influence the outcome of elections, as a result of vote dilution" by showing that a reasonable non-dilutive map, including compact ability-to-elect districts, would remedy that vote dilution (Election Law §§ 17-206[2][b][ii], 17-206[2][a]). Such a reading would maintain the NYVRA's consistency with its sister statutes (*see Portugal*, 530 P3d at 1003; *Pico*, 15 Cal 5th at 314-315). Defendants implicitly acknowledge that their read of the statute would frustrate the NYVRA's ability to remedy the kind of run-of-the-mill racial vote dilution that would be actionable under Section 2 of the FVRA (mot 22-23). Defendants' interpretation would have the effect of making the NYVRA substantially narrower than the FVRA in a nonsensical way.

Neither the plurality opinion in *Bartlett v Strickland*, (*see* mot 13, 20 [citing 556 US 1, 21 [2009]]), nor *Clarke*'s citation to the earlier case of *LULAC v Perry* (*Clarke*, Slip Op. at 20-21), changes these principles. Though the Court in *Bartlett* interpreted Section 2 to not compel the creation of crossover districts, it also held that states may continue to create these districts "as a matter of legislative choice or discretion" (*Bartlett*, 556 US at 23-24 ["States that wish to draw crossover districts are free to do so where no other prohibition exists."]). Other state VRAs also

"permit[] remedies that Section 2 does not," yet that "does not create a conflict between state and federal law because the states are free to implement remedies that are not *required* pursuant to Section 2, so long as those remedies are not otherwise *prohibited*" (*Portugal*, 530 P3d at 1002). Although the *Clarke* decision observes that federal courts have understood Congress to intend a relatively narrow scope of remedies in enacting Section 2 (*Clarke*, Slip Op. at 20-21), it does not follow that Congress' exercise of discretion necessarily circumscribes states' legislative choices in the same way (*see Pico*, 15 Cal 5th at 323-24).[10] Regardless, even if the NYVRA were read to reflect a more limited understanding of states' legislative discretion, Plaintiffs would prevail, as explained in the following section.

E. Plaintiffs have adduced evidence that would easily satisfy the NYVRA and Section 2 of the FVRA.

Defendants' facial challenge also fails because they've conceded that, even in their view, at least one reading of the NYVRA would *not* be unconstitutional: if the NYVRA were read as coextensive with FVRA Section 2 (mot 12-13; counterstatement ¶¶83-84). And here, Plaintiffs have adduced evidence to make out a FVRA Section 2 claim.[11]

i. Plaintiffs have shown it's possible to draw at least six majority-minority districts, satisfying the first* Gingles *precondition.

[10] Defendants' argument that the NYVRA is unconstitutional as-applied where a minority group "only 'influences the outcome of elections,'" (mot 21 [quoting *Perry*, 548 U.S. at 446]), is beside the point, as Plaintiffs' NYVRA coalition claim has been endorsed by the majority of federal appellate courts to address the issue, including the Second Circuit. Regardless, Defendants' argument lacks merit, as it relies entirely on case law holding that protection of minority influence districts lies beyond the text of the FVRA, not that it is unconstitutional for states to protect influence districts (mot 21). States may protect voting rights beyond the federal floor set by *Gingles,* including by protecting influence districts (*see, e.g. Pico*, 15 Cal 5th at 323-24).

[11] Plaintiffs rebut Defendants' arguments as they apply to the *Gingles* preconditions only because the Motion doesn't contest that Plaintiffs could satisfy the factors in the "totality of circumstances" inquiry under either the FVRA or the NYVRA.

The first *Gingles* precondition requires plaintiffs to show that the "minority group [is] sufficiently large and [geographically] compact to constitute a majority" in a district that "comports with traditional districting criteria, such as being contiguous and reasonably compact" (*Allen v Milligan*, 599 US 1, 18 [2023]). Defendants (mot 13), and the *Clarke* decision (*Clarke*, Slip Op. at 24-25, both wrongly assert that Section 2 does not permit "coalition districts," in which multiple, politically cohesive minority groups combine to form a majority of the electorate.

The one case both Defendants and *Clarke* cite for the proposition that the FVRA does not allow coalition districts, *Petteway v Galveston County* (mot 13, 24), confirms the opposite. After decades of permitting coalition districts under the FVRA, *see Campos v City of Baytown*, 840 F2d 1240, 1244 [5th Cir 1988], the Fifth Circuit overturned its own precedent to hold that the statutory "text of Section 2 does not authorize coalition claims" (*Petteway*, 111 F 4th at 604). But the Fifth Circuit acknowledged it was only one of two federal circuits to reach this conclusion. "*All* other circuits that have considered the issue ruled that minority coalition suits may be used to satisfy § 2" (*id.* at 623 [collecting cases]). This includes the Second Circuit (*see East Ramapo*, 462 F Supp 3d at 379 [SD NY 2020] [citations omitted] ["[D]iverse minority groups can be combined to meet VRA litigation requirements . . . provided they are shown to be politically cohesive"], *aff'd* 984 F 3d 213). Moreover, *Petteway*'s statutory interpretation of the FVRA has no application to the NYVRA, which expressly authorizes coalition claims (Election Law § 17-206[c][iv]).

Plaintiffs have established they satisfy the first *Gingles* precondition through their expert, Dr. Cervas, whose illustrative map demonstrates it is possible for Black, Latino, and Asian citizens of voting age to form a majority in at least six reasonably configured single-member districts (counterstatement ¶86). Moreover, Defendants' expert, Dr. Trende, as part of his ensemble of

simulated race-blind, party-blind maps has generated over 58,000 plans that include at least six majority-minority CVAP districts (counterstatement ¶86).

ii. Plaintiffs' and Defendants' experts agree that Black, Latino, and Asian voters are politically cohesive, satisfying the second* Gingles *precondition.

"Where a 'significant number of minority group members usually vote for the same candidates,' the minority group is politically cohesive and satisfies the second *Gingles* precondition." *East Ramapo*, 462 F Supp 3d at 380 (quoting *Gingles*, 478 US at 56). Here, both parties' experts agree that Black, Latino, and Asian voters in Nassau are politically cohesive (*see* counterstatement ¶87).

iii. Whether minority-preferred candidates are usually defeated by racially polarized voting in Nassau County is a fact-intensive inquiry; Plaintiffs have raised numerous material disputes of fact and law.

"[T]here is widespread recognition that" evaluating whether racially polarized voting usually defeats minority preferred candidates "is a fact-based inquiry" (*Pope*, 94 F Supp 3d at 335 [collecting cases]; *see East Ramapo*, 462 F Supp 3d at 380). This inquiry "is not measured by mathematical formula but by the trial court's searching assessment of statistical and other evidence presented" (*Yumori-Kaku*, 59 Cal App 5th at 413). Recognizing that "[c]ertain elections are more probative than others of minority electoral success," courts evaluating racial vote dilution claims have identified several factors to determine which elections are most probative. *Pope*, 94 F Supp 3d at 332. Defendants concede "the evidence is very strong that voting in Nassau County is racially polarized" (mot 27), but Defendants and their experts ignore that the fact-intensive inquiry into whether minority-preferred candidates are usually defeated by racially polarized voting "requires the Court to consider . . . elections before it, and to weigh their probative values based on precedent and the specific circumstances of the case at hand" (*Pope*, 94 F Supp 3d at 338; *see East Ramapo*, 462 F Supp 3d at 380). By contrast, Plaintiffs' expert, Dr. Oskooii, has accounted for those

considerations to determine minority-preferred candidates are usually defeated at both the county-level and district-level, thereby establishing the third *Gingles* precondition.

Dr. Oskooii's fact-intensive analysis show that minority-preferred candidates are usually defeated by white bloc voting substantially more than half the time, particularly when properly weighting elections by their relative probative value in accordance with caselaw (counterstatement ¶88-92). This conclusion holds whether looking at the areas where additional majority-minority districts could be drawn or county-wide *(id*.).

Defendants' attempts to resist this conclusion fall far short of establishing the absence of a dispute of material facts. *First*, Defendants' experts erred in weighting every contest they analyzed equally. They did so without regard to whether the contests were more recent or more distant, occurring in even years or odd years, involving any special circumstances such as incumbency, or whether the candidates were of different races (counterstatement ¶94) even though Dr. Lockerbie acknowledged that these factors may make certain elections more probative than others (counterstatement ¶94).

Second, Defendants are wrong that the NYVRA necessarily requires plaintiffs to show that minority-preferred candidates will usually be defeated "across the entire relevant jurisdiction," (mot 22), although as noted above, Plaintiffs here have shown just that. Courts addressing vote dilution claims under the FVRA have endorsed precisely the kind of analysis that Plaintiffs' experts have conducted in the area of the county where Plaintiffs' have alleged that Black, Latino, and Asian voters are packed and cracked and additional ability to elect district could be drawn (*see Allen*, 599 US at 22 [["Even Alabama's expert conceded "that the candidates preferred by white voters in the areas that he looked at regularly defeat the candidates preferred by Black voters"]; *see Rural W. Tenn. African-Am. Affs. Council v Sundquist*, 209 F3d 835, 844 [6th Cir 2000] ["the

admonitions of *De Grandy* and *Shaw* dissuade us from accepting the Tennessee's invitation to append Shelby County, or the State as whole, to the geographical frame of reference that the plaintiffs have selected because to do so would require us to trade the § 2 rights of individual African–Americans in rural west Tennessee against those of African-American groups elsewhere in the State"]). Given the commonalities between the FVRA and NYVRA in addressing "vote dilution" as a recognized concept, including the need for an effective alternative remedy (*Pico*, 15 Cal 5th at 315), the district-based provisions of the NYVRA permit a similarly localized approach. Regardless, Dr. Oskooii's detailed analysis shows minority-preferred candidates have been usually defeated by racially polarized voting on a county-wide basis and in the specific areas where remedial districts can be drawn (counterstatement ¶92 Oskooii Reply ¶¶ 21-26; 41).

Defendants are wrong to argue that they need not draw districts to protect voters of color against racial vote dilution because there are districts elsewhere in the county that might elect Democrats—even if few minority voters live in those districts (mot 29-30). Defendants just tally up the number of districts that Democratic candidates would have won across Nassau and equate that to "Districts Won by Minority-Preferred Candidate" *(id.*). But the Supreme Court has "reject[ed] the premise that a State can always make up for the less-than-equal opportunity of some individuals by providing greater opportunity to others" (*Perry*, 548 US at 429; *see id.* at 437 ["[A] State may not trade off the rights of some members of a racial group against the rights of other members of that group" (citing *Johnson v De Grandy,* 512 US 997, 1019 [1994]]). Thus, a jurisdiction that *could* have drawn a majority-minority district in an area where the *Gingles* preconditions were satisfied but instead diluted a racial group's voting power cannot escape Section 2 liability by drawing a majority-minority district elsewhere (*id.*). Nassau County may not discount the rights of Black, Latino, Asian voters in Valley Stream, Inwood, Lakeview, and

Freeport just because majority-*white* districts on the other side of the county in Port Washington and Old Bethpage may elect Democrats. And Dr. Cervas demonstrates that Enacted Map gratuitously injures minority voters and that it is possible to remedy the dilution while respecting traditional districting principles and without "robbing-Peter-to-pay-Paul," as Defendants' put it (counterstatement ¶¶77, 85; Cervas Reply ¶¶ 39, 55-59).

Third, Defendants' argument that the term "usually" requires Plaintiffs to show that minority-preferred candidates lose in a "significant majority of elections" is wrong and runs into disputed issues of fact (mot 26). In *Yumori-Kaku v City of Santa Clara*, a CVRA case, the court held that "the 'usually' threshold stated in the third *Gingles* factor does not as *a matter of law* preclude a determination of racially polarized voting when the factual findings point to an equal number of polarized and nonpolarized elections over time" (59 Cal App 5th at 416). The court observed that federal precedents "evince a flexible approach to ascertaining the third *Gingles* factor," which "cannot be reduced to a simple mathematical or doctrinal test" (*id.*). The court noted that federal courts in some cases had "endorsed the definition of 'usually' as "more than half the time" (*id.* at 412, citing *Old Person v Cooney*, 230 F3d 1133, 1122 [9th Cir 2000]), and other cases understood "usually" to "mean something more than just 51%" (*id.*, citing *Lewis v Alamance County*, 99 F3d 600, 606 [4th Cir 1996]).

In another case, Defendants' expert, Dr. Lockerbie, found evidence of racial vote dilution where minority-preferred candidates were defeated in only 4 out of 12 contests (33%) analyzed in which there was racially polarized voting (counterstatement ¶93). The upshot is that determining whether minority-preferred candidates are usually defeated is "not merely an arithmetic exercise that consists of toting up columns of numbers," but a flexible and fact-intensive inquiry (*Pope*, 94 F Supp 3d at 338). This kind of fact-intensive inquiry cannot be resolved on summary judgment.

Finally, Defendants' Motion presents tables of elections results that reveal significant flaws in their experts' data selection and the need to evaluate the weight of evidence and credibility of witnesses at trial (mot 28-30). Damningly, both tables are missing ten elections. First, while the tables include even year-old elections from 2012-2020, they omit odd-year races prior to 2017. Second, the tables omit the 2021 District Attorney contest—a race in which racially polarized voting defeated the minority-preferred candidates (counterstatement ¶47(response)). Third, the tables exclude all four 2022 contests, where Dr. Trende found that the minority-preferred candidates were defeated by racially polarized voting (counterstatement ¶95). Out of these ten missing elections, voting was racially polarized in eight and minority-preferred candidates lost all eight.

Ultimately, Defendants' motion underscores that this is a fact-intensive dispute requiring trial.

CONCLUSION

The Court should deny Defendants' Motions for Summary Judgment.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Memorandum complies with the word count limitations set forth in Uniform Rule 202.8-b for the Supreme Court, as modified by this Court's October 9, 2024 Order authorizing summary-judgment memoranda-in-chief of 10,000 words. NYSCEF No.141. This Memorandum uses Times New Roman 12-point typeface and contains 9,959 words, excluding parts of the document exempted by Rule 202.8-b. As permitted, the undersigned has relied on the word count feature of this word-processing program.

By: /s/ Perry M. Grossman
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