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.,

Plaintiffs,

-against-

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

Defendants.

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Oral Argument Requested

Index No. 611872/2023

ACTION I

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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

Plaintiffs,

v.

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

Defendants.

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Oral Argument Requested

Index No. 602316/2024

ACTION II

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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I. This Court Should Grant Summary Judgment For Defendants On Plaintiffs' Section 34 Partisan-Gerrymandering Claims

A. Plaintiffs have not presented the "substantial evidence [ ] necessary" to overcome the "presumption of regularity," such that a factfinder could conclude that Defendants engaged in partisan gerrymandering. Br.3 (quoting *People v. Dominique*, 90 N.Y.2d 880, 881 (1997)). Rather, the undisputed record evidence shows that a single legislator—Presiding Officer Nicolello—presented maps for his colleagues' consideration and incorporated numerous changes requested by Democratic legislators. Br.3–10. Nicolello relayed to all of his colleagues, Republican and Democrat alike, that Local Law 1 complied with the same partisan outlier analysis, conducted by the same expert, that the Court of Appeals endorsed in *Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022), a conclusion that the Legislature could reasonably have relied upon. Br.9–10. Given the chasm between these undisputed facts and *Harkenrider*, Plaintiffs fall far short of providing evidence sufficient to support their partisan-gerrymandering claim.[1]

B. Plaintiffs' effort to find record evidence that Defendants engaged in partisan gerrymandering to create a triable issue fails.[2]

1. Plaintiffs' argument that Local Law 1 was enacted "without any consultation or participation by the minority [party]," *Harkenrider*, 38 N.Y.3d at 505, is contrary to the undisputed evidence.

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[1] Plaintiffs note Defendants did not separately "move for summary judgment on the [Action II] Plaintiffs' claim under Section 34 of the Municipal Home Rule Law," Resp.1, but that claim is duplicative of the partisan gerrymandering and NYVRA claims on which Defendants sought summary judgment, Br.3–10. Accordingly, the law of the case doctrine would bar the Action II Plaintiffs' Section 34 claim. *See Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975).

[2] Plaintiffs try to water down their high burden to have this Court set aside Local Law 1 as unlawful, but ultimately concede that they must overcome the "strong presumption" that the Legislature did not engage in partisan gerrymandering. *Harkenrider*, 38 N.Y.3d at 509; *see* Resp.4–5.

Plaintiffs cite no evidence for their assertion that "Republicans dominated the map-drawing process" while "Democratic legislators were consistently shut out." Resp.6–10. The undisputed evidence shows that one legislator, Nicolello, proposed his own map for all of his colleagues' consideration. Br.5–7. Although Plaintiffs complain that Democratic legislators did not receive the memoranda that Nicolello released with his proposed maps as early as Plaintiffs would have liked, *see* Resp.7, there is no evidence that Nicolello gave those memoranda to any legislator—Republican or Democrat—in advance of the memoranda's public release. And while Plaintiffs assert that Nicolello engaged "partisan" consultants, Resp.6, the undisputed evidence is that Nicolello engaged a national law firm that successfully represented the individual-voter plaintiffs in *Harkenrider* (while also successfully defending maps drawn, for example, by the Colorado Independent Redistricting Commission, *see In re Colo. Indep. Cong. Redistricting Comm'n*, No.21SA208, 497 P.3d 493 (Colo. 2021)). Nicolello also retained Dr. Trende, the lead expert that the Court of Appeals credited in *Harkenrider*, whose bipartisan bona fides are so unimpeachable that he was appointed a special master by the Virginia Supreme Court to help redraw Virginia's state-legislative and Congressional district maps. Trende Rep. at 3.

No record evidence suggests that Nicolello rejected the TDAC's maps because he wanted a map more favorable to Republicans; to the contrary, the memoranda released to all legislators explained Dr. Trende's conclusion that *both* the Republican and the Democratic TDAC proposals were partisan outliers. Troutman Feb. 16, 2023 Memo at 4; Troutman Feb. 27, 2023 Memo at 7. As this Court noted, that "Nicolello rejected the partisan maps prepared by the Democratic and Republican cohorts of TDAC" does "not constitute objective evidence discriminatory intent and partisan bias." Index No.602316/2024, NYSCEF No.199 at 24–25 (June 7, 2024).

Plaintiffs' assertion that Nicolello's efforts to incorporate Democratic legislators' suggestions are evidence of partisan intent, Resp.8–9, is passing strange. Although Plaintiffs suggest that Democratic legislators had "many more concerns" with Nicolello's original map, Resp.8, the only other "specific criticism" they note is that "Minority Leader Abrahams critiqued the map for its split of Northeast Freeport," Pl.'s Counterstatement Of Facts at 19–20, Index No.611872/2023, NYSCEF No.199 (Nov. 12, 2024). This "critique" was not even a clear sentence, let alone a "specific criticism." *See* Feb. 16, 2023 Meeting Tr. at 82:11–25. Plaintiffs argue that "Elmont and Mill Brook were not kept whole," Resp.9, but the revised map "unifie[d] the vast majority of Elmont" and "restor[ed] a significant portion of Mill Brook to proposed District 3," to retain these communities of interest. Troutman Feb. 27, 2023 Memo at 2. While Plaintiffs claim it was "unnecessary to divide either," they offer no record citation to support this assertion. *See* Resp.9. Similarly, Plaintiffs claim that "Hempstead remained divided," Resp.9, but cite no evidence undermining the conclusion that "population-equality requirements largely require [Hempstead] to be split to make most maps work." Troutman Feb. 27, 2023 Memo at 2. And Plaintiffs do not even try to rebut Defendants' showing that Lakeview's inclusion in Proposed District 14 "reflect[s] the strong community of interest created by the shared school of Malverne and Lakeview . . . as well as the common transportation interests shared by residents," and was needed to comply with equal population requirements without "splitting multiple other communities of interest." *Id.* at 2 n.3. Plaintiffs instead appeal to considerations of race, Resp.9, which the revised map did not take into account, and so do not provide evidence of partisan intent.[3]

[3] Plaintiffs cite no record evidence for their rank speculation that the revised map's combination of Plainview and Old Bethpage (at Democratic legislators' request) was done "only to give the appearance of bipartisanship." Resp.9.

All told, Plaintiffs seem to suggest that the redistricting process was not sufficiently bipartisan because Nicolello did not *fully* adhere to the requests of a *single* party.

2. Plaintiffs contend that the enacted map gives Republicans a partisan advantage, but rely solely on Dr. Magleby's analysis, which, like Dr. Trende's analysis, was before the Legislature when it adopted Local Law 1. Resp.11–12. Dr. Trende's analysis demonstrates that Local Law 1 is fair under the partisan-outlier analysis endorsed in *Harkenrider*. Br.10. That the Legislature chose sides in a good-faith disagreement between these experts falls *far* short of rebutting the presumption that the Legislature enacted Local Law 1 with the "purpose" of adopting a partisan-neutral map, *see* N.Y. Mun. Home Rule L. § 34(4), especially where Nicolello substantially adopted Democratic legislators' proposed revisions, Br.10. In any event, Dr. Magleby analyzed a set of simulated maps that included a minimum number of majority-minority districts, Trende Rebuttal at 15–16; *see* Magleby Dep. at 121:24–122:7—but this is a *legal* conclusion that the Legislature rejected, and is therefore not evidence of partisan intent. And while Plaintiffs argue that Dr. Magleby's "mean-median" metric supports a finding that the enacted map unduly favors Republicans, Resp.12, they do not dispute Dr. Trende's point that this same metric would have *approved* the unlawful map rejected in *Harkenrider*, Br.9, providing another good-faith basis for legislators to listen to Dr. Trende, rather than Dr. Magleby. As this Court correctly explained, "good-faith disagreement[s] among experts" and "legal dispute[s] over whether . . . districts are constitutionally required" do "not constitute objective evidence of discriminatory intent and partisan bias." Index No.602316/2024, NYSCEF No.199 at 24–25.

Finally, Plaintiffs' appeal to Dr. Cervas' map, Resp.9–10, backfires. Defendants explained that the enacted map scores the *same* as Dr. Cervas' map under the *Harkenrider* analysis, which just shows that both maps are fair to both parties, a point that Plaintiffs do not address. *See* Br.8.

While Plaintiffs assert that Dr. Cervas' map better accounts for communities-of-interest than the enacted map, Resp.10, Plaintiffs did not submit *any* evidence (expert or otherwise) on Nassau's communities of interests, and Dr. Alfano's detailed expert report on communities-of-interest is entirely undisputed for purposes of summary judgment, Br.8–9.

II. Summary Judgment For Defendants Is Also Proper On The Action II Plaintiffs' NYVRA Vote-Dilution Claim

A. The Orange County Supreme Court Has Now Enjoined Enforcement Of The NYVRA Statewide, Which Applies To Nassau County

New York law prohibits litigants from collaterally attacking a court decision without filing a motion for reconsideration or a motion to vacate in the litigation in which that judgment was rendered. *See Gager v. White*, 53 N.Y.2d 475, 484 n.1 (1981); *Divito v. Glennon*, 193 A.D.3d 1326, 1328 (4th Dep't 2021); *Mitchell v. Ins. Co. of N. Am.*, 40 A.D.2d 873, 874 (2d Dep't 1972); CPLR 4404(b), 5015. Here, the Orange County Supreme Court has issued an order that mandates—in the clearest possible terms—that "the NYVRA is hereby **STRICKEN** in its entirety from further enforcement and application to these Defendants *and to any other political subdivision in the State of New York.*" Index No.EF002460-2024, NYSCEF No.147 at 2, 25 (Nov. 7, 2024) ("*Clarke* D&O") (second emphasis added). Plaintiffs cite no authority, from any court, that would permit another Supreme Court to override this relief.

The instant situation is not comparable to the New York Supreme Court rulings regarding the constitutionality of New York's "red flag laws." There, two trial courts ruled that those laws were unconstitutional, *G.W. v. C.N.*, 181 N.Y.S.3d 432, 441 (Sup. Ct. Monroe Cnty. 2022), *abrogated by R. M. v. C. M.*, 226 A.D.3d 153 (2d Dep't 2024); *Anonymous v. C.P.*, 196 N.Y.S.3d 900, 909–10 (Sup. Ct. Warren Cnty. 2023), *abrogated by R. M. v. C. M.*, 226 A.D.3d 153 (2d Dep't 2024), leaving another Supreme Court free to "disagree[ ] with that analysis" and apply the law, *Gonyo v. D.S.*, 210 N.Y.S.3d 612, 635 (Sup. Ct. Dutchess Cnty. 2024). Here, by contrast, the

Orange County Supreme Court issued an order blocking enforcement of the NYVRA statewide. *Clarke* D&O at 25. This is comparable to a federal district court issuing a nationwide injunction. *See Trump v. Hawaii*, 585 U.S. 667, 713 n.1 (2018) (Thomas, J., concurring) (nationwide injunctions "are distinctive because they prohibit the Government from enforcing a policy with respect to anyone, including nonparties").

B. The NYVRA's District-Based Provisions Are Unconstitutional

1. The NYVRA's District-Based Provisions Trigger Strict Scrutiny

a. The NYVRA's vote-dilution provisions are subject to strict scrutiny because they require subdivisions to group residents by race and draw district lines or otherwise change their election system to increase the electoral success of certain lumped-together-racial-minority-groups' preferred candidates, while necessarily decreasing the success of other lumped-together-racial-minority-groups' preferred candidates, given the zero-sum nature of elections. Br.13–18. Thus, the NYVRA distributes "burdens [and] benefits on the basis of individual racial classifications," demanding strict-scrutiny review. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *see* Br.13–18.[4]

b. Plaintiffs claim the NYVRA "doesn't make race-based classifications," Resp.14, but the vote-dilution provisions apply on their face to "members of a protected class," N.Y. Elec. L. § 17-206(2)(a), which the statute defines as "a *class* of individuals who are members of a *race*, color, or language-minority group," *id.* § 17-204 (emphasis added). Thus, the statute clearly makes "racial classifications." *Parents Involved*, 551 U.S. at 720; *see* Br.13–18. While Plaintiffs assert that the NYVRA only makes "a statutory *reference* to race," Resp.14–15 (emphasis added), the

[4] Plaintiffs' claim that Defendants lack capacity to bring this constitutional challenge, Resp.13 n.4, fails for the same reasons that *Clarke* rejected this argument, *Clarke* D&O at 11–13.

NYVRA's provisions confer "benefits" on groups of citizens lumped together by race, *see Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 204–06 (2023) ("*SFFA*").

Plaintiffs argue that the NYVRA is not subject to strict scrutiny because it only makes reference to race to "protect[ ] the individual right to vote against racial discrimination," Resp.16, but the statute does not prohibit "racial discrimination." Rather, it requires subdivisions to change their election systems to avoid "vote dilution," N.Y. Elec. L. § 17-206(2)—which the NYVRA defines as any circumstance where "candidates or electoral choices preferred by members of the protected class would usually be defeated, and either: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; or (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired." *id.* § 17-206(2)(b)(ii). The NYVRA's district-based provisions do not require any showing of "racial discrimination." Resp.16.

Plaintiffs' argument that the NYVRA "protect[s] white voters as well as voters of color," Resp.15, fails to address Defendants' point that such a reading "would render application of those provisions absurd and impossible for many political subdivisions to comply with," Br.18. Again, the NYVRA requires subdivisions to modify their electoral systems whenever there is racially polarized voting to ensure a protected class's preferred candidates are not usually defeated. Br.18. Indeed, "voter dilution . . . can rest on the slightest of impairments in [the] ability to influence an election"—the "NYVRA sets no minimum bar on the extent of any such impairment." *Clarke* D&O at 2, 20. But where voting is racially polarized—which Plaintiffs do not deny is a common occurrence in many places and not proof of any actual discrimination—it is impossible for subdivisions to adopt a redistricting plan that ensures the preferred candidates of racial minority

white groups are not usually defeated without the preferred candidates of majority voters being usually defeated, given the zero-sum nature of elections. Br.18. In any event, even if the NYVRA applied to all racial groups, those provisions would still be subject to strict scrutiny, which applies to "all racial classifications," "even when they . . . burden or benefit the races equally." *Johnson v. California*, 543 U.S. 499, 505–06 (2005) (citations omitted).

2. The NYVRA Cannot Satisfy Strict Scrutiny

a. The NYVRA neither furthers a compelling state interest nor is narrowly tailored. Br.19–21; *Clarke* D&O at 17–21.

b. Plaintiffs' arguments that the NYVRA furthers a compelling state interest, Resp.19–20, are wrong. "[G]eneralized assertion[s] of past discrimination" are "not adequate" to justify race-based legislation. *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996). Such legislation is only warranted where "a strong basis in evidence" shows a jurisdiction adopted its election method out of racial animus, such that "action [is] necessary," *id.*, to remediate "specific, identified instances of past discrimination," *SFFA*, 600 U.S. at 207, and the NYVRA requests no such showing, *supra* p.7.

But even assuming the NYVRA pursues a compelling interest in "remediating specific, identified instances of past discrimination," *SFFA*, 600 U.S. at 207, Plaintiffs cannot explain how the NYVRA's district-based provisions are "narrowly tailored—meaning necessary—to achieve that interest," *id.* at 206–07 (citation omitted). Plaintiffs claim the NYVRA "demands" an analysis "of social and historical conditions" in a given jurisdiction before determining liability, Resp.20, but it does no such thing. "[T]he wording of the NYVRA is devoid of any requirement of proving past discrimination by a protected class." *Clarke* D&O at 17.

Plaintiffs' effort to characterize the NYVRA as narrowly tailored by claiming that it "closely resembles the FVRA by embracing the *Gingles* preconditions," Resp.22, despite the NYVRA's explicit rejection of the *Gingles* framework, Br.20–21, fails.

Regarding the first *Gingles* precondition, Plaintiffs claim that "compactness is not a constitutional requirement," Resp.22, but the U.S. Supreme Court has warned that relaxing the *Gingles* standards would present "serious constitutional concerns under the Equal Protection Clause," *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion). Further, the NYVRA "mandates that a reviewing court *not* consider the first of the *Gingles* preconditions in determining a vote dilution claim" at the liability stage, *Clarke* D&O at 22, and only provides that such evidence "*may* be a factor" at the remedy stage, N.Y. Elec. Law § 17-206(2)(c) (emphasis added)—as Plaintiffs concede, Resp.25. If that is not enough, the NYVRA also exceeds the first precondition's scope by allowing a minority group to bring a vote-dilution claim merely upon showing that it could "influence the outcome of elections," N.Y. Elec. L. § 17-206(2)(b)(ii), and by allowing different minority groups to "combine[ ]" into coalition districts, *id.* § 17-206(2)(c)(iv). Plaintiffs suggest States may provide for "remedies that Section 2 does not," and "it is [not] unconstitutional for states to protect influence districts" or to allow "coalition claim[s]" Resp.26 n.10. But the first precondition is *not* satisfied "where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 446 (2006) ("*LULAC*") (citation omitted). As Plaintiffs note, a circuit split exists over whether Section 2 authorizes coalition claims, Resp.27, that the Supreme Court must ultimately resolve, but Defendants respectfully submit that the holding in *Petteway v. Galveston County*, 111 F.4th 596 (5th Cir. 2024) (en banc), is correct, and all contrary cases were decided before the Supreme Court issued *SFFA*.

Plaintiffs' argument that the NYVRA "incorporates the second and third *Gingles* preconditions into its racial vote dilution prohibition," Resp.22–23, is obviously wrong, as the NYVRA does not "demand[ ] proof that minority groups are 'politically cohesive,'" Resp.23.

Such evidence is only relevant under the NYVRA when determining whether members of *different* protected classes may "aggregate for purposes of proving vote dilution." *Clarke* D&O at 19; *see* N.Y. Elec. Law § 17-206(2)(c)(iv). There is no requirement that plaintiffs show that members of a protected class are politically cohesive to establish liability under the NYVRA, as is required under VRA Section 2. Br.21, 24–25.

Plaintiffs claim the NYVRA incorporates the third precondition via the "usually defeated" requirement, Resp.22–23, but the most Plaintiffs can say is that the "would usually be defeated" analysis "*can* be satisfied by proof identical to the third *Gingles* precondition," Resp.21 (emphasis added). The word "can" tellingly concedes, as Plaintiffs must, that the NYVRA allows a plaintiff to prove a vote-dilution claim without establishing this *Gingles* precondition. *See infra* pp.11–14.

Regarding *Gingles*' second step (the totality-of-the-circumstances showing), Plaintiffs admit it is not required for an NYVRA vote-dilution claim—serving instead as an independent path that "also lets plaintiffs prove liability"—and concede that the NYVRA's totality-of-the-circumstances analysis "affords breathing space" that makes it more expansive than the VRA's analysis. Resp.21. And the NYVRA's totality analysis "lacks any defined criteria because the NYVRA lists 11 factors that *may* be considered," thus allowing courts "to find voter dilution based on *any* criteria that the court itself creates, or no criteria at all." *Clarke* D&O at 20.[5]

[5] Plaintiffs say Defendants "conceded" that "the NYVRA would *not* be unconstitutional" if it "were read as coextensive with the FVRA Section 2," Resp.26, but Defendants merely stated that "the Court need not decide whether the NYVRA would be constitutional as applied to a situation where it was just requiring what the VRA requires" because Plaintiffs did "not even attempt to argue that they meet conditions necessary to establish a vote-dilution claim under Section 2," Br.14–15.

C. Plaintiffs Defend Their NYVRA Claim Based Only Upon An Assertion That They Satisfied The *Gingles* Preconditions, But Their Experts Admitted That They Conducted No *Gingles* Analysis

1. In their Motion, Defendants explained Plaintiffs put forth insufficient evidence that any of their identified minority groups' preferred candidates will "usually be defeated" under Local Law 1, Br.22–23, which is the legally required, threshold liability inquiry for Plaintiffs' NYVRA claim, *see* N.Y. Elec. L. § 17-206(2)(b)(ii). The NYVRA renders district-based plans like Local Law 1 unlawful when a racial group's preferred candidate "would usually be defeated" and there is "racially polarized" voting. *Id*. The only reasonable interpretation of "usually be defeated" is to require a vote-dilution plaintiff to demonstrate that the identified minority group's preferred candidate will be routinely defeated (a) in elections across the entire relevant jurisdiction, Br.22–25, and (b) in a significant majority of elections, Br.26. Here, the undisputed evidence is that minority-preferred candidates regularly win in Nassau using this approach. Br.27–33.

2. Plaintiffs do not respond to most of Defendants' arguments here, ***while not defending <u>either</u> their own Complaint's majority-minority-district-based approach to the NYVRA <u>or</u> their own experts' approaches to the NYVRA, and—remarkably—not even attempting to give any account of what they think the NYVRA requires counties like Nassau to do***. Resp.26–32. Instead, Plaintiffs base their defense of their NYVRA claim on the assertion—made for the first time in this litigation—that they "have adduced evidence to make out a FVRA Section 2 claim" by satisfying the three *Gingles* preconditions. Resp.26. Plaintiffs' reliance upon a new *Gingles*-based theory for the first time at the summary judgment stage is enough to require judgment in Defendants' favor. *See Troia v. City of New York*, 162 A.D.3d 1089, 1092 (2d Dep't 2018). In any event, Plaintiffs do not come close to establishing the third *Gingles* precondition, as doing so would require analyzing each new majority-minority district that Plaintiffs claim should be created in Nassau to determine whether Plaintiffs' identified minority groups' preferred candidates are

usually defeated in those districts by white-majority bloc voting, *see Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 404 (2022)—an analysis that Plaintiffs' experts admit they did not perform, *see* Cervas Dep. at 146:14–17, 147:7–8; Oskooii Dep. at 235:23–25, 236:11–13, 243:10–15, 266:18–269:7.

Plaintiffs claim that they satisfy the third precondition because Dr. Oskooii's analysis allegedly shows "that minority-preferred candidates are usually defeated by white bloc voting substantially more than half the time" in Nassau, Resp.29, but Plaintiffs' characterization of the law and the nature of Dr. Oskooii's analysis is obviously false, as Dr. Oskooii admitted at his deposition. *Gingles* requires "carefully ***evaluating evidence at the district level***" to determine whether each of the three *Gingles* preconditions are "satisfied as to ***each district***" that would constitute a newly created majority-minority district. *Wis. Legislature*, 595 U.S. at 404 (emphases added). ***Dr. Oskooii admitted at his deposition that he conducted no* Gingles *analysis to determine whether the third precondition would be "satisfied as to each district" Plaintiffs claimed could be drawn as an additional majority-minority district in Nassau.*** *See id.* When asked "Does anything that you analyze satisfy the Gingles requirement to create a race-based district under Section 2 of the VRA?," Dr. Oskooii admitted that he "did not" perform such an analysis. Oskooii Dep. at 266:18–269:7; *see id.*. at 206:3–209:1. He merely "examined the eight most recent, contested, county-wide, odd-year contests" and "contested odd-year elections held in years 2015 and 2013," Oskooii Rep. at 13; *see* Oskooii Dep. at 170:9–14, and concluded that "the County's White population votes sufficiently as a bloc for their preferred candidates to enable them to usually defeat the candidates preferred by Black, Latino, and Asian voters" on a county-wide basis, Oskooii Rep. at 27. Dr. Oskooii did not attempt to show that Nassau could draw two new "majority-minority district[s] in an area where the *Gingles* preconditions were satisfied,"

Resp.30, including as to the third *Gingles* precondition. Since Plaintiffs now proffer a *Gingles* theory and point only to Dr. Oskooii as evidence of that theory, his concession at his deposition that he performed no such analysis clearly mandates summary judgment.

Plaintiffs also fail to satisfy the first *Gingles* precondition. Plaintiffs incorrectly contend that they "satisfy" this "precondition through their expert, Dr. Cervas," because his "illustrative map demonstrates it is possible" for Plaintiffs' identified minority groups "to form a majority in at least six reasonably configured single-member districts" in Nassau. Resp.27. But Dr. Cervas combined different minority groups together to reach this figure, Br.16, 25, 32–33, which is not permitted under *Gingles*, *supra* pp.9–10; Br.24; *Clarke* D&O at 23–25; *Petteway*, 111 F.4th at 599.

Finally, while Plaintiffs focus their defense of their NYVRA claim on their obviously wrong theory that their experts showed that Plaintiffs satisfy the *Gingles* preconditions, Plaintiffs criticize Defendants for not including "ten elections," namely "odd-year races prior to 2017," "the 2021 District Attorney contest," and "four 2022 contests," Resp.32, in their demonstrative tables showing minority-preferred candidates' success in Nassau countywide, Br.28–30. But Plaintiffs admit that minority-preferred candidates won two of those ten elections, Resp.32, and those candidates were competitive and carried multiple districts in the eight elections that they did lose. Indeed, Defendants' experts analyzed the 2021 DA race and 2022 contests and concluded that they in no way establish that minority-preferred candidates routinely lose a significant majority of elections across Nassau. *See* Lockerbie Reply ¶¶ 23–42; Trende Reply at 17, 20. The record undisputedly shows that minority-preferred candidates are "obviously capable of winning, and do[ ] so regularly" across Nassau, Trende Rebuttal at 82, "when looking at all relevant elections," Lockerbie Reply ¶ 56, and Plaintiffs' experts only concluded otherwise by systematically excluding elections that do not fit their narrative, Br.27–33. In any event, since

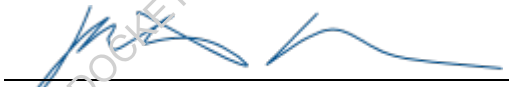
Plaintiffs base their defense of their NYVRA claim on their assertion that their experts show that Plaintiffs have satisfied the three *Gingles* preconditions, and their experts unambiguously admitted that they did not do a *Gingles* analysis, this Court need not decide these issues to grant summary judgment for Defendants.

CONCLUSION AND RELIEF REQUESTED

The Court should grant Defendants' Motions For Summary Judgment.

Dated: New York, New York
November 19, 2024

TROUTMAN PEPPER HAMILTON SANDERS LLP



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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Memorandum complies with the word count limitations set forth in Uniform Rule 202.8-b for the Supreme Court. This Memorandum uses Times New Roman 12-point typeface and contains 4,200 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/ Bennet J. Moskowitz*
BENNET J. MOSKOWITZ