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, **ACTION I**

-against-

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

Defendants.

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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., Index No. 602316/2024

Plaintiffs, **ACTION II**

-against-

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

Defendants.

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DEFENDANTS NASSAU COUNTY AND THE NASSAU COUNTY LEGISLATURE, BRUCE BLAKEMAN, MICHAEL C. PULITZER, AND HOWARD J. KOPEL'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROPOSED FINDINGS OF FACT

Defendants Nassau County and the Nassau County Legislature, Bruce Blakeman, Michael C. Pulitzer, and Howard J. Kopel (collectively, "Defendants") respectfully submit the following proposed findings of fact:

I. Defendants

1. Defendant Nassau County ("County") is a political subdivision of the State of New York. N.Y. Elec. L. § 17-204.

2. Defendant Nassau County Legislature ("Legislature") is the legislative branch of Nassau County's government. Nassau Cnty. Charter § 102.[1]

3. The Legislature is comprised of 19 members, each representing one of the County's 19 legislative districts. *Id.* § 104.

4. The Legislature selects a Presiding Officer from its own members to preside over legislative sessions and perform various official functions. *Id.* § 106.1.

5. Bruce Blakeman is the Nassau County Executive.

6. Michael C. Pulitzer is the Clerk of the Legislature.

7. Howard J. Kopel is the Presiding Officer of the Legislature.

II. The Nassau County Legislature Creates The Temporary Redistricting Advisory Commission To Propose A Redistricting Map, But The Commission Fails To Propose A Legally Compliant Map

8. The Legislature is vested with the authority to adopt local laws for the County, including laws related to redistricting. *See id.* §§ 102–03, 112, 114.

[1] Available at https://www.nassaucountyny.gov/DocumentCenter/View/37579/Charter-1124?bidId= (all websites last visited Dec. 9, 2024).

9. Following each federal decennial census, the Legislature must adopt a redistricting plan that reapportions the County legislative districts in line with the results of that census. *Id.* §§ 113–114.

10. After the 2020 federal decennial census, the Legislature began the process of redistricting the County for the upcoming decade. *Id.* § 113(1)(a).

11. Successfully completing that complicated process required the Legislature to adopt a redistricting map for the County that adhered to numerous federal and state-law requirements.

12. The Legislature began the redistricting process by establishing the Temporary Districting Advisory Commission ("TDAC" or the "Commission"). *Id.* § 113(1)(a).

13. This Commission—composed of eleven members appointed by the County Executive, the Presiding Officer, and the Minority Leader of the Legislature, *id.*—was tasked with "recommend[ing] one or more [redistricting] plans to the [ ] Legislature for dividing the [C]ounty into legislative districts for the election of county legislators," *id.* § 113(2). Any recommended plan, however, required not less than six affirmative votes from the Commissioners. *Id.* § 113(3).

14. The Legislature maintains the authority to "reject, adopt, revise or amend the redistricting plan recommended by [TDAC] or adopt any other redistricting plan, provided that any plan adopted by the [ ] Legislature shall meet all constitutional and statutory requirements." *Id.* § 114.

15. The Commission was unable to recommend a redistricting plan to the Legislature. *See* Transcript of the Nassau County Legislature's Full Legislature Meeting beginning at 6:30 p.m., on the evening of February 16, 2023 at 10–11 ("Feb. 16, 2023 Meeting Tr.").[2]

[2]Available at https://www.nassaucountyny.gov/AgendaCenter/ViewFile/Item/2922?fileID=208109.

16. Rather, the Republican members of the Commission and the Democratic members of the Commission each developed and proposed separate maps for the Legislature's consideration. *See* Nassau Cnty., *TDAC Republican Commissioners Proposed Maps* (Nov. 21, 2022)[3]; Nassau Cnty., *TDAC Democrat Commissioners Proposed Maps* (Nov. 10, 2022).[4]

17. Each of these proposals suffered from legal defects and received significant criticism, with numerous allegations of partisan gerrymandering, minority-vote dilution, and neglect of traditional redistricting criteria. *See* Report To Nassau County Legislature From The Democratic Commissioners Of The Temporary Districting Advisory Commission, dated January 6, 2023, Index No.602316/2024, NYSCEF No.33 at 22–23; Testimony of the New York Civil Liberties Union, Nassau County Region before the Nassau County Temporary Districting Advisory Commission regarding Proposed Redistricting Plans for the Nassau County Legislature, dated November 16, 2022, Index No.602316/2024, NYSCEF No.34 at 2–4 ("NYCLU Testimony"); February 16, 2023, Memorandum of Troutman Pepper Hamilton Sanders LLP regarding Proposed Redistricting Plan for Nassau County Legislature Districts at 4 ("Troutman Feb. 16, 2023 Memo").

18. Further, neither of these proposals obtained the necessary six affirmative votes from the members of the Commission. Nassau Cnty. Charter § 113(3).

19. In light of these failings, the Presiding Officer at the time, Richard Nicolello, decided to develop and propose his own redistricting map for the Legislature's consideration, so as to faithfully satisfy the County's redistricting obligations.

[3] Available at https://www.nassaucountyny.gov/5457/RepubPropMaps.

[4] Available at https://www.nassaucountyny.gov/5458/DemProposedMaps.

III. The Presiding Officer Proposes A Legally Compliant Map That Resolves The Criticisms Of The Commission's Maps, After Meeting With Legislators Across The Political Spectrum

20. The Presiding Officer first met with Legislators from across the political spectrum to hear about their concerns, including as to the two proposed maps from both the Democratic and Republican members of the TDAC. Feb. 16, 2023 Meeting Tr.107–09.

21. In January 2023, the Presiding Officer sent a letter to Minority Leader Kevan Abrahams asking to meet with him, his staff, and "any Minority delegation member" in order "to discuss specific proposals that [the Minority] delegation may have with respect to the new district lines," while promising to consider any "proposals offered by [the Minority Leader] on behalf of [his] delegation." Letter From Richard Nicolello, Presiding Officer Of The Nassau County Legislature, To Kevan Abrahams, Minority Leader Of The Nassau County Legislature, dated January 4, 2023 at 1.

22. The Presiding Officer "ma[d]e efforts as much as possible to incorporate what was said during [the Legislature's Rules] Committee [meeting]," on January 17, 2023, "and during the TDAC process," and Democratic members of the Legislature recognized the Presiding Officer's willingness to listen to and address their constituents' and their own concerns "very early on in the [map drawing] process." Feb. 16, 2023 Meeting Tr. 107–09; *see* Nassau Cnty. Legislature, *14th Term Meeting Agenda: Rules Committee* (Jan. 17, 2023).[5] Notwithstanding these efforts, the Presiding Officer "still ha[d] to make sure that what [he] arrive[d] at at the end [wa]s something that's going to survive a lawsuit." *Id.* at 108.

[5] Avsilable at https://nassaucountyny.iqm2.com/Citizens/FileOpen.aspx?Type=14&ID=1653&Inline=True.

23. In designing his own proposed map for the Legislature's consideration, the Presiding Officer took into consideration written and oral public comment, the Republican and Democratic TDAC members' views, the opinions of the Legislature's majority and minority party members, and advice from legal counsel and a redistricting expert. *See id.* at 107–08; *see generally* Troutman Feb. 16, 2023 Memo; February 27, 2023, Memorandum of Troutman Pepper Hamilton Sanders LLP regarding Proposed Revised Redistricting Plan for Nassau County Legislature Districts ("Troutman Feb. 27, 2023 Memo").

24. To ensure that his proposed map complied with all applicable legal requirements, the Presiding Officer retained the law firm Troutman Pepper Hamilton Sanders LLP ("Troutman Pepper"), including partner Misha Tseytlin, to provide legal advice on his proposed map. *See* Feb. 16, 2023 Meeting Tr.17–19, 32–33, 46; Troutman Feb. 16, 2023 Memo at 1.

25. Mr. Tseytlin was the lead attorney for the prevailing petitioners in the landmark New York redistricting case of *Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022), where the New York Court of Appeals held that the State's congressional map violated the New York Constitution's ban on partisan gerrymandering. Feb. 16, 2023 Meeting Tr.18; Troutman Feb. 16, 2023 Memo at 1, 9–10.

26. Troutman Pepper then retained Dr. Sean P. Trende, a leading redistricting expert and the lead expert for the petitioners in *Harkenrider*, 38 N.Y.3d at 506, to facilitate the firm's provision of legal advice to the Presiding Officer, Feb. 16, 2023 Meeting Tr.19, given Dr. Trende's expertise performing the complicated social-science analyses necessary to comply with the legal requirements for redistricting, Troutman Feb. 16, 2023 Memo at 1, 5, 9–11; Feb. 16, 2023 Meeting Tr.28, 31, 34–35.

27. The process that culminated in passing Local Law 1 involved the minority political party throughout and was the opposite of the "largely one-party process" in *Harkenrider*, 38 N.Y.3d at 519. The Presiding Officer here met with legislators from across the political spectrum, convened with the entire Legislature to discuss and review the proposed maps twice, and amended his proposed map in accordance with the minority political party's concerns, including by incorporating four of five major suggestions made by the minority party. *See infra* pp.11–13.

28. On February 9, 2023, the Presiding Officer publicly released his first proposed redistricting map for the Legislature's consideration. *See* Feb. 16, 2023 Meeting Tr.10–12, 274–75.

29. The Legislature held a meeting on February 16, 2023, to review and discuss all proposed maps it had received, including the Presiding Officer's proposal (the "February 16 Map"). *See id*. at 10–12.

30. At that meeting, the Presiding Officer presented a memorandum prepared by Troutman Pepper that explained how the February 16 Map complied with all applicable laws, including by citing relevant social-science analyses conducted by Dr. Trende. *See id.* at 19–20; *see generally* Troutman Feb. 16, 2023 Memo.

31. The memorandum highlighted that the February 16 Map conformed with population equality standards, ensuring that the largest and smallest districts had a deviation well below the U.S. Supreme Court's 10% threshold, *see* Troutman Feb. 16, 2023 Memo at 1–3; *see also Brown v. Thomson*, 462 U.S. 835, 842–43 (1983) (citations omitted); *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78–79 (1992); complied with the federal Equal Protection Clause's prohibition on racial gerrymandering, as traditional redistricting criteria were not subordinated to racial considerations, Troutman Feb. 16, 2023 Memo at 3–4; "contain[ed] no districts meeting the

Gingles preconditions that would require or permit the creation of any race-focused districts, for purposes of compliance with Section 2 of the VRA," *id.* at 4–5; and adhered to the various requirements of New York's Municipal Home Rule Law and the John R. Lewis Voting Rights Act of New York ("NYVRA"), *id.* at 5–12.

32. Additionally, this memorandum explained why the proposed maps from the Republican and Democratic members of the Commission failed to meet some of those same legal requirements, *see id.* at 4, and detailed all community-of-interest considerations that guided the creation of each district in the February 16 Map, *see id.* at A1–A4.

33. Mr. Tseytlin testified at this meeting at the Presiding Officer's direction, summarizing the conclusions reached in the memorandum. Feb. 16, 2023 Meeting Tr.18–41.

34. During his testimony, Mr. Tseytlin explained that the February 16 Map complied with all applicable legal requirements, including the federal Equal Protection Clause, the federal Voting Rights Act ("VRA"), Section 34 of the New York State Municipal Home Rule Law's ("Section 34") prohibition on partisan gerrymandering, and the NYVRA's prohibitions on what it calls "vote dilution." Feb. 16, 2023 Meeting Tr.18–25, 28–41; Troutman Feb. 16, 2023 Memo at 1–12 (explaining the proposed map complied with all other legal requirements, including all redistricting standards under Section 10 of New York's Municipal Home Rule Law).

35. As to Section 34's prohibition on partisan gerrymandering, the memorandum explained Dr. Trende's "conclu[sion] that the [February 16 Map] very clearly satisfied" the "partisan fairness metrics at issue in [*Harkenrider*]," after Dr. Trende evaluated the February 16 Map "using the same approach that he used in *Harkenrider*." Troutman Feb. 16, 2023 Memo at 9.

36. This analysis followed the process endorsed in *Harkenrider*, 38 N.Y.3d at 506, by first beginning with the creation of an "ensemble[ ]" of thousands of potential maps "by computer

simulation" that requires each map to conform with existing legal constraints, such that the ensemble illustrates the range of all possible maps that could have been adopted.

37. The difference between the average partisan lean of the districts in the ensemble and the particular partisan lean of the districts in a given map provides the "gerrymandering index" for that map. *See infra* p.99.

38. The gerrymandering index of a proposed or "enacted map" is then compared to the average of the maps in the ensemble to "reveal[ ] [whether] the enacted map [is] an 'extreme outlier.'" *Harkenrider*, 38 N.Y.3d at 506.

39. Dr. Trende concluded that the February 16 Map had "a gerrymandering index of just below 0.08," which is "well within the center of the range of computer simulated maps," indicating that the February 16 Map was likely to have been drawn without extralegal partisan intent. Troutman Feb. 16, 2023 Memo at 9.

40. The Presiding Officer did not propose any race-based districts because Dr. Trende had "conducted a *Gingles* precondition analysis of the County and the proposed map, and concluded that Nassau County contains no districts meeting the *Gingles* preconditions that would require or permit the creation of any race-focused districts, for purposes of compliance with Section 2 of the VRA." *Id.* at 5.

41. At this February 16, 2023 meeting, Legislators from both sides of the political aisle praised the Presiding Officer's proposed map for incorporating many of their proposals. *See* Feb. 16, 2023 Meeting Tr.108–09.

42. Legislator Siela A. Bynoe thanked the Presiding Officer for "hear[ing] the voices" of her constituents and restoring the Lakeview community as a whole when it had previously been "split into three different districts." *Id.* Legislator Bynoe also "acknowledge[d] that [the Presiding

Officer] heard testimony from even Legislator Mule regarding portions of her district"—namely, Freeport—and "acknowledge[d]" that "Westbury/Newcastle have been put together whole" in line with public comment. *Id.* at 109. Similarly, in response to both "public comment" and "concerns raised by Democratic . . . Commission[ers]," this proposal "combine[d] the interconnected communities of the Five Towns," Troutman Feb. 16, 2023 Memo at A2, and "ke[pt] Uniondale whole, in a single district," *id.* at A1, a decision lauded by several members of the public, *see* Feb. 16, 2023 Meeting Tr.286, 292.

43. During the February 16, 2023 meeting, Democratic legislators made five specific criticisms of the February 16 Map.

44. First, Minority Leader Abrahams and Legislator Bynoe disapproved of the number of times the Village of Hempstead was split between districts. *Id.* at 13–14, 17, 51–54, 78, 96, 106–07.

45. Second, Legislator Carrié Solages "implore[d] [her] colleagues to reconsider th[e] map to keep Elmont truly whole." *Id.* at 112.

46. Third, Legislator Solages further requested that Millbrook and Valley Stream be combined into the same district. *Id.* at 111.

47. Fourth, Legislator Arnold W. Drucker objected to the splitting of Plainview and Old Bethpage into separate districts. *Id.* at 133–34.

48. Fifth, Minority Leader Abrahams and Legislator Bynoe advocated for a change to the map to move Lakeview into a different district. *Id.* at 13, 17, 56–57, 105–06, 109.

49. More generally, Democratic legislators also complained that the map should contain more majority-minority districts. *Id.* at 13:12–14:13, 112:25–113:22, 124:17–23.

50. Finally, during the February 16, 2023 meeting, the Democratic Minority Leader presented his own expert, Dr. Daniel Magleby, who testified that the February 16 Map was too partisan. *See id.* at 160–93.

51. Dr. Magleby employed "an entirely different approach than that affirmed by the Court of Appeals in *Harkenrider*" and "d[id] not use the gerrymandering-index analysis" that Dr. Trende utilized in that case. Troutman Feb. 27, 2023 Memo at 15. Instead, Dr. Magleby relied "upon a mean-median metric that no expert or court opined on in *Harkenrider*," *id.*, without citing any legal authority to support this alternative approach. Dr. Magleby also based his findings on data from "countywide races" rather than "using the same statewide races that [Dr. Trende] used in *Harkenrider* to determine the partisanship baseline for his simulation analysis." *Id.* at 18. And, finally, Dr. Magleby relied upon odd-year election results, which is dissimilar to the approach that was blessed by the court in *Harkenrider*. *See infra* at pp.72–73; *see also* Expert Rebuttal Report of Dr. Sean P. Trende, dated July 22, 2024 at 19, 78 ("Trende Rebuttal").

IV. The Presiding Officer Releases Revised Versions Of His Map In Response To Feedback From Legislators And The Public, And The Legislature Adopts The Final Iteration Of The Map As Local Law 1

52. The Presiding Officer then presented another supporting memorandum on February 27, 2023, which discussed the revised map (the "February 27 Map" or "Local Law 1") in detail and explained how it complies with all applicable legal requirements, including, again by citing certain social-science analyses by Dr. Trende as relevant. Troutman Feb. 27, 2023 Memo at 1.

53. As this second memorandum explained, the February 27 Map reflected "significant changes to accommodate requests from the public and Legislators" that were raised during the February 16, 2023 meeting as well as "additional revisions" that the Presiding Officer was required to make in order "to keep the map compliant with equal population requirements" after accommodating those requests. *Id.* at 3.

54. The Presiding Officer also made changes to address various concerns raised "in the form of supplemental reports filed by Dr. Megan Gall" (the Democratic Commissioners' expert) "and Professor Daniel Magleby" (the Democratic Minority Leader's expert). *Id.* at 1.

55. Specifically, the February 27 Map "incorporate[d]" four of the five "significant suggestions" Democratic members of the Legislature "discussed at the [February 16, 2023] Legislature Meeting." *Id.* at 2.

56. First, the February 27 Map "combin[ed] Plainview and Old Bethpage into a single district," given the "compelling testimony" of Democratic "Legislator Arnold W. Drucker and members of the public." *Id.* In the February 16, 2023 proposal, Old Bethpage was included in District 15. *Id.* at A4. However, "to accommodate the compelling community-of-interest testimony of Legislator Drucker and members of the public explaining that Plainview and Old Bethpage were a deep-seated community of interest together," Old Bethpage was moved to District 16, which further comprises Plainview, Woodbury, Syosset, Muttontown, Brookville, and Old Westbury. *Id.* In the western portion, this district retains together various villages and synagogues that serve these related communities. *Id.* Syosset, Plainview, and Woodbury maintain similar interests related to a consistent commuter train line. Syosset and Woodbury share a school district, community parks, and commercial interests, with their extensive commercial relationship embodied in a single Chamber of Commerce covering both areas. *Id.* In addition, the Syosset Fire Department operates in Muttontown and Woodbury, so these communities are also linked by shared public services. *Id.* To equalize the population of the district, District 16 shed Roslyn Heights and East Williston to District 9. *Id.*

57. Second, the February 27 Map "unifie[d] the vast majority of Elmont . . . in a single district," because Democratic "Legislator Solages explained[ ] [that] the hamlet [ ] is a community

of interest." *Id.* at 2. District 3 in the February 16 Map was composed of Valley Stream, North Valley Stream, Elmont, South Floral Park and Bellerose Terrace. At the February 16, 2023, Full Legislature Meeting, Democratic Legislator Solages expressed concern that parts of Elmont were not included in the proposed version of District 3, as they had been in previous redistricting cycles. Feb. 16, 2023 Meeting Tr.111:15–22. As a result, the February 27 Map unifies the vast majority of Elmont in District 3, with only a very small portion remaining in District 8, to retain as much of this community of interest in a single district as practicable. Troutman Feb. 27, 2023 Memo at 2. For this to be possible, some portions of Valley Stream were moved to District 14 for population-equality purposes. *Id.* at 3. Thus, District 3 now comprises most of Valley Stream, North Valley Stream, Elmont, and includes the Village of South Floral Park. This district preserves the core structure of the previous map, uniting communities within the Sewanhaka Central High School District, Valley Stream Central High School District, and Elmont Union Free School District. Additionally, it consolidates all mutual-aid fire services for the area into a single district. These communities already share public safety services as they all fall within Nassau County's Fifth Precinct. *Id.* at A1.

58. Third, the February 27 Map "restor[ed] a significant portion of Mill Brook" to the same district as Valley Stream, as Legislator Solages "testified that . . . these communities have significant connections." *Id.* at 2. Thus, the current map "accommodates this request as much as possible, restoring a significant portion of Mill Brook to [ ] District 3." *Id.* at 2.

59. Fourth, "the number of times the Village of Hempstead [was] split between districts" was reduced in the revised proposed map to address "criticisms raised at the February 16, 2023, Full Legislature Meeting," *id.*, particularly those of Minority Leader Abrahams, *see* Feb. 16, 2023 Meeting Tr.13–14, 17, 51–54, 78, 96, and Legislator Bynoe, *id.* at 106–07. Specifically,

during the February 16, 2023, Full Legislature Meeting, several Democratic Legislators, including Minority Leader Abrahams, expressed concern that Hempstead was split into three districts and that District 1 combined portions of Hempstead with South Hempstead. Feb. 16, 2023 Meeting Tr.13:17–22, 54:11–19. Although population-equality requirements largely require splitting the Village of Hempstead between districts, the February 27 Map reduced the number of splits in the Village of Hempstead and moved South Hempstead to District 6. Troutman Feb. 16, 2023 Memo at 2–3, A1. District 1, which also contains the entirety of Rockville Centre, is a cohesive community of interest as these areas share municipal and community services, such as coordinated mutual-aid fire services. *Id.* at A1. This district also encompasses large and growing communities of interest supported by local nonprofit organizations that offer various programs and services to its residents. Notably, the Village of Hempstead and Rockville Centre were previously consolidated into a single state Senate District during the statewide court-drawn redistricting in *Harkenrider*. *Id.*

60. However, to "remain consistent with the legal requirements for equal population" and to avoid "splitting multiple other communities of interest," the proposed revised map was "unable to accommodate" requests to move Lakeview into a different district. Troutman Feb. 27, 2023 Memo at 2–3 n.3.

61. In creating and evaluating the proposed revised map, the Presiding Officer declined to consider racial demographics or draw districts to reach racial targets because doing so would constitute racial gerrymandering, which is prohibited under the Equal Protection Clause. *Id.* at 9.

62. Specifically, the Presiding Officer was advised that the Equal Protection Clause prohibits racial gerrymandering where "racial considerations predominate[]" over traditional redistricting criteria, unless the consideration of race can survive strict scrutiny. *See* Troutman

Feb. 16, 2023 Memo at 3 (quoting *Cooper v. Harris*, 581 U.S. 285, 291–92 (2017)). By contrast, the maps proposed by both the Republican and Democratic members of the Commission were unconstitutionally racially gerrymandered. *Id.* at 4. The NYCLU, in fact, noted in its submission to the Commission that the Republican members' proposed map intentionally created a race-focused district in violation of the Equal Protection Clause's prohibition against racial gerrymandering. *Id.*; *see also* NYCLU Testimony at 2–4. Specifically, the NYCLU noted that the Republican's proposed map "use[d] the Voting Rights Act as a pretext for racial gerrymandering by packing Black and Latinx voters into District 1" where there was "no evidence that the preferred candidates of Black voters in District 1 are usually defeated." NYCLU Testimony at 3.

63. In *Thornburg v. Gingles*, 478 U.S. 30, 31 (1986), the U.S. Supreme Court established a framework for evaluating vote dilution claims brought under the VRA and determined that whether the political processes are truly "equally open" to the minority group will depend upon "a searching practical evaluation of the past and present reality, and on a functional view of the political process." *Id.* at 45, 50–51 (citations omitted). *Gingles* laid out three "necessary preconditions" that a minority group must satisfy to state a prima facie case for a § 2 violation. *Id.* at 50–51; *see infra* pp.113–14. If the minority group meets the threshold requirements and the totality of circumstances shows a violation by a preponderance of the evidence, then a court *may* order the creation of a new majority-minority district to remedy a State's violation of federal law. *Voinovich v. Quilter*, 507 U.S. 146, 156–58 (1993).

64. Dr. Trende concluded, and advised the Presiding Officer through counsel, that Nassau County contains no districts meeting the *Gingles* preconditions that would require or permit the creation of any race-focused districts, for purposes of compliance with the VRA.

Troutman Feb. 27, 2023 Memo at 9. Accordingly, and consistent with the requirements of the Equal Protection Clause, the proposed revised map did not contain any districts drawn to racial targets. *Id.*

65. The revised map was created based on non-racial considerations such as communities of interest, population equality, and traditional redistricting criteria. The Presiding Officer aimed to avoid legal risks associated with racial gerrymandering, which has been heavily scrutinized by the U.S. Supreme Court. The revised map's demographic mix, including districts where racial minorities make up the majority, resulted from permissible, non-racial considerations rather than an intent to meet specific racial targets. *See generally* Troutman Feb. 27, 2023 Memo.

66. As with the February 16 Map, Dr. Trende analyzed the revised map using the same "partisan fairness metrics" and criteria approved in *Harkenrider* and concluded that the revised map still "very clearly" satisfied those metrics. *Id.* at 13.

67. The revised map's partisan-gerrymandering-index score remained "well within the bell curve of the range of computer simulated maps" that do not account for partisanship, meaning that it too scored far better than the maps proposed by the Republican members and the Democratic members of the Commission. *Id.* at 13–14.

68. The Presiding Officer's revised map also "declin[ed] all requests to draw any districts to any racial targets, in order to remain in compliance with the Equal Protection Clause." *Id.* at 10.

69. On February 27, 2023, the County Legislature held another full meeting to discuss the February 27 Map. *See* Transcript of the Nassau County Legislature's Full Legislature Meeting beginning at 1:14 p.m., in the afternoon of February 27, 2023 at 9–13 ("Feb. 27, 2023 Afternoon Meeting Tr.").

70. During this meeting, Democratic members of the Legislature and the public acknowledged that the Presiding Officer had addressed many of the concerns raised at the Legislature's prior meeting with the February 27 Map. For example, Legislator Solages expressed his thanks for the revisions to address concerns regarding unifying Elmont and Mill Brook in District 3. *Id.* at 147. Legislator Bynoe similarly remarked that she was "heartened" by the changes made in response to public comments and recognized that the Presiding Officer had "done a lot" to address concerns raised by other Legislators during the previous meetings. *Id.* at 138.

71. Finally, at the February 27, 2023 meeting, the Legislature voted on and adopted the February 27 Map as Nassau County's current redistricting map, denominating the map "Local Law 1." *See* Loc. L. 1-2023.[6]

72. The Nassau County Executive signed Local Law 1 into law on February 28, 2023 (the "Enacted Map"). *Id.*

73. No record evidence suggests that the Presiding Officer rejected the TDAC maps because he wanted a map more favorable to Republicans; to the contrary, the memoranda that the Presiding Officer 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.

74. As this Court previously held, that "Nicolello rejected the partisan maps prepared by the Democratic and Republican cohorts of TDAC" does "not constitute objective evidence of discriminatory intent and partisan bias." Decision & Order, Index No.602316/2024, NYSCEF No.199 at 24–25 (June 7, 2024).

[6] Available at https://www.nassaucountyny.gov/DocumentCenter/View/40335/Local-Law-1-2023.

75. That some legislators and members of the public were dissatisfied with Local Law 1 is not evidence of the "minority party" being "exclud[ed]" from the map-drawing process, *Harkenrider*, 38 N.Y.3d at 519, it is merely evidence of the inevitable compromises inherent in the legislative process, especially when dealing with "complex" legislation like redistricting plans, *see Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 7 (2024).

76. The record does not show that the Presiding Officer failed to address Democratic legislators' concerns or that the Presiding Officer acted with partisan intent.

77. There is no record evidence that it was unnecessary to divide Elmont and Mill Brook between districts.

78. Similarly, there is no record evidence contradicting that "population-equality requirements largely require [Hempstead] to be split to make most maps work." Troutman Feb. 27, 2023 Memo at 2.

79. And Lakeview's inclusion in Proposed District 14 "reflect[s] the strong community of interest created by the shared schools 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.

80. Democrats' primary concern and complaints revolved around the purported need to add more majority-minority districts within Nassau County. *See* Feb. 16, 2023 Meeting Tr.13:6–13 (Abrahams); *id*. at 113:7–22 (Solages), *id*. at 124:17–23 (same); Feb. 27, 2023 Afternoon Meeting Tr.16:2–18, 21:2–8 (Abrahams), *id*. at 88:23–90:4 (Ortiz); *see also supra* pp.11–13. However, the Presiding Officer received legal advice that it would not be lawful to change his map to add any districts based upon racial makeup. *See infra* pp.102–03.

81. The Legislature also had before it a different analysis from Plaintiffs' expert, Dr. Magleby, which concluded that the enacted map unduly favors Republicans, *infra* pp.30, 35, but that the Legislature chose sides in a good faith disagreement between these experts falls 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).). This is especially so when the expert that the Legislature reasonably credited uses the same methodology the Court of Appeals recently approved. As this Court has 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." Decision & Order, Index No.602316/2024, NYSCEF No.199 at 24–25.

82. Further, it is unclear what other map would better honor Nassau County's community-of-interest considerations while remaining in compliance with all relevant legal standards, because the only alternative map proposed—Dr. Cervas's map, *see generally* Expert Report of Dr. Jonathan Cervas, dated May 31, 2024 ("Cervas Report")—scores comparably to Local Law 1 on the *Harkenrider* analysis, *see* Trende Rebuttal at 87–92, but does not adequately account for communities of interest, *see* Transcript of the Deposition of Jonathan Cervas, Ph.D., dated September 25, 2024 at 246:4–22 ("Cervas Dep."), as Defendants' expert Dr. Thomas W. Alfano explained in an unrebutted report, *see generally* Rebuttal Expert Report of Thomas W. Alfano, dated July 21, 2024 ("Alfano Rebuttal").

83. **District 1**: The February 16 Map included parts of the Village of Hempstead, all of South Hempstead and all of Rockville Centre. During the February 16, 2023, Full Legislature Meeting, several Democratic Legislators, including Minority Leader Abrahams, expressed concern that Hempstead was split into three districts. Feb. 16, 2023 Meeting Tr.13:17–22; 54:11–

19. Although population-equality requirements largely require the Village of Hempstead to be split to make most maps work, the Enacted Map reduced the number of times that the Village of Hempstead was split, and, as a result, moved South Hempstead to District 6. Troutman Feb. 16, 2023 Memo at 2–3. District 1 now includes portions of the Village of Hempstead and entirety of Rockville Centre. District 1 is a cohesive community of interest as these areas share municipal and community services, such as coordinated mutual-aid fire services. *See* Alfano Rebuttal ¶ 29. This district also encompasses large and growing communities of interest supported by local nonprofit organizations that offer various programs and services to its residents. Notably, the Village of Hempstead and Rockville Centre were previously consolidated into a single state Senate District during the recent statewide court-drawn redistricting in *Harkenrider*. Troutman Feb. 27, 2023 Memo at A1.

84. **District 2**: In the Enacted Map, District 2 includes Uniondale, parts of the Village of Hempstead including the Hempstead Heights area, as well as Westbury and New Cassel. The district forms the central hub of Nassau County, ensuring that Westbury remains whole and incorporates New Cassel in response to feedback from Legislator Bynoe. District 2 reunites the Uniondale School District and communities of interest that were previously divided by redistricting plans, and it fully encompasses the "Yes We Can" Community Center, a vital recreation and community hub for the region. Projects including a $5 billion redevelopment of the Nassau HUB and a $4 billion healthcare facility have been proposed, as well as other development, beautification, and transportation projects. Alfano Rebuttal ¶ 33. Further, by keeping Uniondale as a single district and unifying Westbury and New Cassel, District 2 addresses concerns raised by the Democratic members of the Commission. Troutman Feb. 27, 2023 Memo at A1; *see also* Alfano Rebuttal ¶¶ 33–34.

85. **District 3**: District 3 in the February 16 Map was composed of Valley Stream, North Valley Stream, Elmont, South Floral Park and Bellerose Terrace. At the February 16, 2023, Full Legislature Meeting, Democratic Legislator Solages expressed concern that parts of Elmont were not included in the proposed Third Legislative District as they were in previous redistricting cycles. *See* Feb. 16, 2023 Meeting Tr.111:15–22. As a result, the Enacted Map unifies the vast majority of Elmont in District 3, with only a very small portion remaining in District 8, to retain as much of this community of interest in a single district as practicable, as expressed by Legislator Solages. Troutman Feb. 27, 2023 Memo at 2. For this to be possible, some portions of Valley Stream were moved to District 14 for population-equality purposes. *Id.* at 3. Thus, District 3 now comprises most of Valley Stream, North Valley Stream, Elmont, and includes the Village of South Floral Park. This district preserves the core structure of the previous map, uniting communities within the Valley Stream Central High School District and Elmont Union Free School District. The Valley Stream Central High School District incorporates all of Valley Stream and most of South and North Valley Stream, as well as portions of Elmont. Alfano Rebuttal ¶ 40. Additionally, it consolidates all mutual-aid fire services for the area into a single district. These communities already share public safety services as they all fall within Nassau County's Fifth Police Precinct. *Id.* ¶ 42. Additionally, the communities encompassed by District 3 include a growing Muslim population and are home to two of the largest mosques in Nassau County, providing cultural and religious services to the members of these communities. *Id.* ¶ 43.

86. **District 4**: In the Enacted Map, District 4 encompasses the Barrier Islands, which include Atlantic Beach, East Atlantic Beach, the City of Long Beach, Lido Beach, Point Lookout, Harbor Isle, Island Park, Barnum Island, a large portion of Oceanside, and Bay Park. These beach communities share many common interests and were all severely impacted by Hurricane Sandy.

As a result, they have rebuilt together and maintain strong mutual support and aid in emergencies. They share emergency services, such as fire and ambulance services, and collaborate on municipal concerns, including water management, flooding, healthcare, and more. Additionally, they share evacuation routes that interconnect their territories. Additionally, these locales form a strong community of interest because of their history with the Western Bays and Reynolds Channel, a once thriving fishing and recreational area that supports ecologically sensitive coastal marshlands that, with the assistance of various local non-profits and environmental groups, the communities have advocated for county, state, and federal funding to redirect effluent discharges from a sewage treatment facility. Alfano Rebuttal ¶ 46. Compared to the February 16 Map, the enacted District 4 includes extra portions of Oceanside to ensure population equality and to accommodate public and legislative requests for changes to the District's boundaries. Troutman Feb. 27, 2023 Memo at A1.

87. **District 5**: District 5 in the Enacted Map encompasses most of North Merrick, parts of Merrick, most of Freeport, and sections of North Bellmore. These interconnected communities share numerous interests and benefit from intermunicipal mutual-aid services for fire and ambulatory departments. Reflecting this level of cooperation, they have previously collaborated on federal aid applications following Hurricane Sandy. Beyond governmental operations, these areas also share significant business interests, with Merrick and North Merrick even having a joint Chamber of Commerce. Additionally, they are connected by the same rail line, which serves as an economic corridor along Sunrise Highway and Merrick Road, highlighting their common public transportation interests. District 5 underwent minor adjustments during the legislative redistricting process, losing parts of North Merrick and Merrick and gaining portions

of Freeport to balance the population and accommodate other requests. Troutman Feb. 27, 2023 Memo at A2; *see also* Feb. 16, 2023 Meeting Tr.275:18–23, 285:12–18.

88. **District 6**: The February 16 Map's District 6 comprised most of Baldwin, Roosevelt, and portions of Freeport. During the February 16, 2023 Full Legislature Meeting, concerns were expressed by Democratic legislators regarding the split of the Village of Hempstead into three districts, *see supra* pp.12–13. Accordingly, to allow for the Village of Hempstead to be reduced to spanning two districts, South Hempstead was moved in its entirety to District 6, as well as portions of Oceanside, to account for changes to District 5. District 6 now includes Baldwin, Roosevelt, parts of Freeport, portions of Oceanside, and South Hempstead. These communities share a strong interest in redevelopment, with Baldwin already receiving significant state aid for the development of its downtown areas, and the entire district posed to receive substantial funding for community and park revitalization. The Baldwin Civic Association and the South Hempstead Civic Association are influential entities within these communities. Troutman Feb. 27, 2023 Memo at A2. Baldwin is kept whole in District 6, representing a cohesive community centered around its Long Island Railroad Station and major thoroughfare, Grand Avenue. The Baldwin community has pushed successfully for the amendment to zoning laws and received millions of dollars in state funding to building hundreds of housing units along the railroad. Alfano Rebuttal ¶ 48.

89. **District 7**: District 7 in the Enacted Map encompasses a portion of the Village of Valley Stream and unites the interconnected communities of the Five Towns, in response to public comments advocating for their inclusion in a single district. This configuration brings together Orthodox Jewish synagogues, train stations, and other services essential to these communities. Unifying the Five Towns also addresses concerns raised by Democratic members of the

Commission. The municipalities within District 7 have a long history of intermunicipal communication and share services such as fire protection and public planning for flooding and flood zones, including the establishment of joint evacuation routes for severe flooding events. Additionally, these communities collaborate on business improvement and community revitalization initiatives. Alfano Rebuttal ¶¶ 55–56; Troutman Feb. 27, 2023 Memo at A2.

90. **District 8**: The District 8 set forth in the February 16 Map encompassed Garden City, Stewart Manor, Garden City South, and Franklin Square. Troutman Feb. 16, 2023 Memo at A3. For population purposes, a small area of Elmont, parts of West Hempstead, and Carle Place were added to District 8 in the Enacted Map. Troutman Feb. 27, 2023 Memo at A2. The district brought together the Garden City School District and the Franklin Square School District, merging communities that already collaborate on public services, such as mutual-aid fire services, and which engage in extensive intermunicipal cooperation. *Id.* The communities within District 8 are recognized as a community of interest, sharing the same train station and having previously united to advocate for their common redevelopment interests during the Long Island Railroad's third track expansion. *Id.*

91. **District 9**: The February 16 Map's District 9 includes Floral Park, Garden City Park, New Hyde Park, Mineola, and Carle Place. Troutman Feb. 16, 2023 Memo at A2. District 9 in the Enacted Map comprises the villages of Bellerose, Floral Park, New Hyde Park, Mineola and East Williston and includes the hamlets of Bellerose Terrace, parts of North New Hyde Park, Garden City Park, and Roslyn Heights. Troutman Feb. 27, 2023 Memo at A2. These minor adjustments were made for population purposes. *Id.* The Sewanhaka High School District serves many of the communities included in District 9, namely Bellerose, Bellerose Terrace, Floral Park, North New Hyde Park, and Garden City Park. Alfano Rebuttal ¶ 39. These areas have a strong

history of intermunicipal cooperation and shared public services, such as mutual-aid fire services. The district includes a commercial corridor along the Jericho Turnpike. Troutman Feb. 27, 2023 Memo at A3. District 9 has common interests related to the railroad and the Metropolitan Transportation Authority, with many of its communities and schools located along the tracks. *Id.* Additionally, communities along this main line have developed transit-oriented shopping and housing by leveraging state funds to introduce parking garages, lots, and business improvement districts. *Id.*

92. **District 10**: District 10 did not change much throughout the 2023 redistricting process except to add three census districts of North Hyde Park for population purposes. *Id.* The district centers on the Great Neck Peninsula communities, including the villages of Kings Point, Great Neck, Saddle Rock, Kensington, Thomaston, Great Neck Estates, Great Neck Plaza, Russell Gardens, Plandome Manor Plandome, Plandome Heights, Munsey Park, North Hills, Lake Success, and Roslyn Estates. *Id.* It also included the hamlets of Manhasset and Manhasset Hills, as well as three census districts in North Hyde Park, closely reflecting the core of the district from the previously enacted map. *Id.* This district unites communities of interest, including various synagogues that serve these areas. *Id.*; Alfano Rebuttal ¶ 65. It encompasses the Great Neck public school system and maintains interrelated public services, such as the Great Neck Alert and Vigilant Fire Companies, and the Manhasset and Lakeville fire districts. Troutman Feb. 27, 2023 Memo at A3; Alfano Rebuttal ¶ 65. Many of these communities share transportation infrastructure, with the Great Neck train station serving as a main artery into New York City. Troutman Feb. 27, 2023 Memo at A3; Alfano Rebuttal ¶ 65. Additionally, this district unites the Great Neck, Cutter Mill, Middle Neck, and Northern Boulevard corridors for business and economic development. Troutman Feb. 27, 2023 Memo at A3; Alfano Rebuttal ¶ 65.

93. **District 11**: District 11 similarly remained consistent throughout the 2023 redistricting process. District 11 encompasses Sands Point, Port Washington, Manorhaven, Flower Hill, Roslyn, Roslyn Harbor, Glenwood Landing, Sea Cliff, and the City of Glen Cove, largely reflecting the district's previous boundaries. Troutman Feb. 27, 2023 Memo at A3. This district includes the Coalition to Preserve Hempstead Harbor, established in 1986, which connects parts of North Hempstead and the City of Glen Cove to address environmental preservation and downtown revitalization issues. *Id.* This intermunicipal collaboration has amplified the voice of these communities, enabling them to more effectively interact with state agencies such as the New York State Department of Environmental Conservation and the Environmental Protection Agency, while also allowing them to pool resources, raise funds, and secure grants for environmental studies and the cleanup of Hempstead Harbor. Alfano Rebuttal ¶ 62. The Port Washington train station services many of these communities, making it a popular park-and-ride area. Troutman Feb. 27, 2023 Memo at A3. This district also unites the Glen Cove area communities, which share common transportation and economic development concerns. *Id.* Additionally, these areas have historically engaged in shared emergency services agreements. *Id.*

94. **District 12**: District 12 in the February 16 Map included Seaford, Bellmore, Wantagh, North Wantagh, and portions of North Bellmore. Troutman Feb. 16, 2023 Memo at A3. To accommodate population changes and other requested changes, *see generally* Feb. 16, 2023 Meeting Tr., District 12 shed some portions of Seaford to District 19 and added some portions of Merrick and North Merrick. Troutman Feb. 27, 2023 Memo at A3. These communities share recreational programs and sports leagues, with the southern portion of the district utilizing public spaces like Cedar Creek Park. *Id.* The entire district is served by the Babylon train line, which many residents use for commuting. The southern part of the district, having dealt with the impacts

of Hurricane Sandy, continues to require coordinated emergency services. *Id.* These areas already collaborate on certain public services, such as mutual-aid fire services. *Id.* Additionally, the communities share common economic corridors, including Merrick Road, Sunrise Highway, and Jerusalem Avenue. *Id.*

95. **District 13**: District 13 remained consistent throughout the redistricting process. District 13 includes East Meadow, Salisbury, and parts of Levittown. *Id.* at A4. It is a compact district and unites several communities that share a fire protection district, while maintaining the East Meadow school district and other local school districts. *Id.*; Alfano Rebuttal ¶ 71. Additionally, the district benefits from shared public and general services, such as the Nassau University Medical Center, public parks, and the economic corridor along Hempstead Turnpike. Troutman Feb. 27, 2023 Memo at A4.

96. **District 14**: Proposed District 14 included East Rockaway, Lynbrook, North Lynbrook, Malverne, Lakeview, West Hempstead, and portions of Hempstead. Troutman Feb. 16, 2023 Memo at A3. Following significant public comments and input from Legislators, Feb. 16 Meeting Tr.13:17–22; 54:11–19, the areas of the Village of Hempstead that were previously in this district were removed into District 1, *see supra* pp.18–19, to reduce the splits of the Village of Hempstead. Troutman Feb. 27, 2023 Memo at A4. As a result, for population reasons, portions of Valley Stream, North Valley Stream, and Oceanside were added to the Enacted Map's District 14 to make up for the loss. *Id.* This district brings together similar incorporated villages known for their strong religious communities, including the synagogues and churches that serve their residents. *Id.* District 14 unites Malverne and Lakeview, which share a school district, and the Lakeview Fire District also serves parts of West Hempstead. *Id.*; Alfano Rebuttal ¶ 51. Additionally, the district includes several train stations along the West Hempstead line of the Long

Island Railroad, which facilitate commuting to and from the city. Troutman Feb. 27, 2023 Memo at A4. Notably, the Lakeview Long Island Railroad station on the West Hempstead line is located in West Hempstead. *Id.* West Hempstead has strong community connections with the communities of Lakeview and Malverne, more so than it does with the Village of Hempstead. Alfano Rebuttal ¶¶ 30, 51.

97. **District 15**: District 15 includes the southern part of Levittown, Plainedge, South Farmingdale, the incorporated village of Farmingdale, a small portion of Bethpage, and parts of North Massapequa and North Wantagh. Troutman Feb. 27, 2023 Memo at A4. This district ensures consistent and singular representation by encompassing entire school district areas. *Id.* Additionally, it covers the Hempstead Turnpike corridor, a major economic development hub, while keeping both sides of the turnpike connected with shared bus services. *Id.* The Village of Farmingdale and hamlet of South Farmingdale also are intrinsically linked by their shared inclusion in the Farmingdale School District and Library District, and the Farmingdale Chamber of Commerce. Alfano Rebuttal ¶ 83. Compared to the original proposed map, District 5 no longer includes Old Bethpage, which was moved to District 16 to honor community of interest testimony from Legislator Drucker and the public, highlighting the deep connection between Plainview and Old Bethpage. Troutman Feb. 27, 2023 Memo at A4; *see also supra* p.11; Alfano Rebuttal ¶ 82. To balance the population change, areas in North Massapequa and North Wantagh were added to the revised map. Troutman Feb. 27, 2023 Memo at A4.

98. **District 16**: Like District 15, *supra*, District 16 underwent significant change during the redistricting process to accommodate feedback received from Legislators and members of the public. District 16 includes the areas of Plainview, Woodbury, Syosset, Muttontown, Brookville, Old Westbury, and Old Bethpage. *Id.* In its western section, the district encompasses

various villages and synagogues that serve these interconnected communities. *Id.* Syosset, Plainview, and Woodbury form a recognized community of interest, supported by a consistent commuter train line, which aligns their interests related to this shared infrastructure. *Id.* Syosset and Woodbury share a school district, community parks, and commercial interests, with their strong commercial relationship represented by a single Chamber of Commerce that serves both areas. *Id.* Additionally, the Syosset Fire Department provides services to Muttontown and Woodbury, further linking these communities through shared public services. *Id.* The inclusion of Old Bethpage in this proposed district aligns with previous legislative and public testimony that identified Old Bethpage and Plainview as a community of interest. *Id.*; *see also supra* p.11; Alfano Rebuttal ¶ 82. To balance the district's population following this addition, Roslyn Heights and East Williston have been moved to proposed District 9. Troutman Feb. 27, 2023 Memo at A4.

99. **District 17**: District 17 in the Enacted Map encompasses Hicksville, the majority of Bethpage, and portions of Jericho. *Id.* at A5. This district consolidates the entire Hicksville School District within a single County Legislature district and includes a thriving commercial area. *Id.* Additionally, District 17 brings together a growing South Asian business and cultural community, supported by a South Asian Chamber of Commerce that frequently collaborates with the general Chamber of Commerce and organizes various community and cultural events for residents. *Id.*; Alfano Rebuttal ¶ 35. Furthermore, this district unifies a vibrant arts community, encompassing numerous music schools and other arts-related organizations. Troutman Feb. 27, 2023 Memo at A5. Hicksville and Bethpage, both part of this district, also share environmental concerns related to the Grumman Superfund site and the associated groundwater contamination. *Id.* Hicksville is a major transportation hub for all of Nassau County, with the Hicksville Train Station on the Main Line of the Long Island Railroad and several state parkways and thoroughfares

connecting it to surrounding communities. Alfano Rebuttal ¶ 35. Hicksville has also become the focus of major housing and redevelopment projects, including a $130 million mixed-use transit-oriented development. *Id.*

100. **District 18**: District 18 includes the communities of Bayville, Lattingtown, Locust Valley, Mill Neck, Matinecock, Oyster Bay, East Norwich, Oyster Bay Cove, Laurel Hollow, Cove Neck, Centre Island, Upper Brookville, Old Brookville, Glen Head, Greenvale, East Hills, Roslyn Heights, Albertson, Williston Park, Herricks, Searingtown, and portions of Glenwood Landing. Troutman Feb. 27, 2023 Memo at A5. Many of these communities are incorporated villages with shared school districts, facing common issues such as water, sewage, and flooding. *Id.* Additionally, several communities in this district are connected by the same rail line but lack public bus transportation. *Id.* The district also benefits from extensive arrangements for shared fire services and other public services. *Id.*

101. **District 19**: District 19 as drawn in the February 16 Map contained the communities of Massapequa, East Massapequa, Massapequa Park, and most of North Massapequa. Troutman Feb. 16, 2023 Memo at A4. A very small portion of Seaford was added to the district in the Enacted Map solely for population-equality purposes. Troutman Feb. 27, 2023 Memo at A5. This district is cohesive, much like the one in the previously enacted map. *Id.* The communities within District 19 are unified by a single district that serves the entire district, as well as some common civic groups and cooperative chambers of commerce. *Id.* Furthermore, these communities were all significantly impacted by Hurricane Sandy, which has fostered a shared interest in emergency preparedness and evacuation services for any future emergencies. *Id.*

IV. Plaintiffs Filed Two Separate Lawsuits Challenging Local Law 1, The Cases Proceeded Through Fact And Expert Discovery, And The Cases Are Now Ripe For Summary Judgment

102. Two groups of Plaintiffs eventually filed two separate lawsuits challenging Local Law 1 on separate grounds.

103. Plaintiffs in *Coads, et al. v. Nassau County, et al.*, Index No.611872/2023 ("Action I") claim that Local Law 1 impermissibly favors the Republican Party and disfavors the Democratic Party, in violation of Section 34. Compl. at 2, 19–21, Index No.611872/2023, NYSCEF No.1 (July 26, 2023) ("Action I Compl."); *see also id.* at 20–21 (also asserting claims the County's prior map is now malapportioned and that an actual controversy exists between the parties).

104. Action I Plaintiffs ask this Court to order the Legislature either to adopt a new redistricting plan or implement a court-ordered plan, and then hold a special election under the newly established map at the earliest feasible date. *See id.* at 21–22.

105. Like Action I Plaintiffs, Plaintiffs in *New York Communities For Change, et al. v. County of Nassau, et al.*, Index No.602316/2024 ("Action II") claim that Local Law 1 violates Section 34's prohibition of partisan gerrymandering, but they additionally claim that the map dilutes the votes of racial minorities in the County, in violation of both Section 34 the NYVRA's vote-dilution provisions, *see* Compl. at 1, 18–19, Index No.602316/2024, NYSCEF No.2 (Feb. 7, 2024) ("Action II Compl.").

106. Action II Plaintiffs allege that the "Legislature's decision to draw only four majority-minority districts" constitutes "racial vote dilution," because "Black, Latino, and Asian communities are politically cohesive and sufficiently numerous and compact to form a majority in six single-member districts." *Id.* at 9.

107. Like Plaintiffs in Action I, Plaintiffs in Action II request an injunction prohibiting the Legislature from using this redistricting map in future elections. *See id.* at 34.

108. Action II Plaintiffs ask this Court to order the implementation of a remedial plan that is "recommend[ed] to the Court" by a "Special Master" who the Court appoints "to evaluate potential remedial plans . . . without deferring to remedies proposed by Defendants." *Id.*

109. The parties proceeded through expert discovery, during which each side presented multiple experts.

Defendants' Experts

Dr. Sean Trende

110. Defendants' expert, Dr. Sean Trende, was retained in this litigation to evaluate the Enacted Map and provide expert analysis to determine if the map violates prohibitions against partisan and incumbent-favoring or disfavoring gerrymandering found in Article III, Section 4(c)(5) of the New York Constitution and New York Legislative Law § 93(2)(e). Expert Report of Dr. Sean P. Trende, dated May 31, 2024 at 4 ("Trende Report").

111. Dr. Trende is a Senior Elections Analyst for Real Clear Politics, one of the most heavily trafficked political websites in the world that publishes political analysis relied upon by all sides of the political spectrum. *Id.* at 1. In his role at Real Clear Politics, Dr. Trende collaborates in rating the competitiveness of Presidential, Senate, House, and gubernatorial races and writes extensively about democratic trends in the country, exit poll data at the state and federal level, public opinion polling, and voter turnout and behavior. *Id.*

112. Dr. Trende is one of the nation's foremost experts on elections and legislative maps and has extensive experience with not only analyzing electoral maps to determine their legality but also drawing maps that are enacted into law. *Id.* at 3–4. For example, Dr. Trende was appointed to serve as one of two Special Masters by the Supreme Court of Virginia to redraw maps for the Virginia House of Delegates, the Senate of Virginia, and for Virginia's delegation to the

United States Congress for the 2022 election cycle. *Id.* at 3, 32. Upon completion of his work, the Supreme Court of Virginia accepted the proposed maps and Dr. Trende's received significant praise by observers across the political spectrum. *See id.* at 32. In addition to his work for the State of Virginia, Dr. Trende also served as a Voting Right Act expert to counsel for the Arizona Independent Commission in 2021 and 2022 and was appointed by the Supreme Court of Belize to serve as an expert to advise regarding Belize's electoral divisions and draw alternative maps to remedy any existing malapportionment. *Id.* at 3–4, 32.

113. Dr. Trende has extensive experience analyzing enacted legislative maps and utilizing statistical analysis to determine the likelihood they were drawn with an intent to favor or disfavor a political party. *Id.* at 2–3. Due to his experience in this area, Dr. Trende has served as an expert witness in various cases across the country involving allegations of political gerrymandering. *Id.* at 30–32 (referencing experience as an expert witness in New York, Kentucky, Maryland, Ohio, North Carolina, Texas, New Mexico, and Wisconsin). Dr. Trende served as the Plaintiffs' expert in *Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022), where the New York Court of Appeals held that the State's congressional map violated the New York Constitution's ban on partisan gerrymandering based upon Dr. Trende's analysis of the enacted map utilizing a simulation technique and the gerrymandering index. *Id.* at 31.

114. As part of his engagement as litigation expert for Defendants, Dr. Trende conducted a simulation analysis of the Enacted Map. *Id.* at 5. As discussed above, *supra* p.15, Dr. Trende employed the same simulation technique methodology he utilized in *Harkenrider*. *Id.*

115. There are various simulation techniques, but they all follow the same fundamental methodology: precincts are randomly aggregated, potentially subject to different parameters based upon applicable law, to form districts across hundreds or thousands of maps. *Id.* This process

generates an "ensemble" of randomly generated legislative maps that represent what would be expected in a state or county if the maps were drawn without partisan considerations. *Id.* The greater the enacted legislative map deviates from the maps generated by the ensemble, the more likely it is that the map was drawn to favor or disfavor a specific political party. *Id.* at 5–6.

116. Here, in particular adherence to the *Harkenrider* methodology, Dr. Trende initially generated an ensemble of 50,000 legislative maps without the use of partisan considerations. *Id.* at 10–12. In so doing, the ensemble was generated in such a manner that would reflect what one would expect a random collection of legislative maps would look like if they were drawn without partisan considerations while still incorporating legally required redistricting criteria under New York law, such as population, compactness, respect for county lines, and contiguity. *See id.* at 10–17. Then, in further compliance with the *Harkenrider* methodology, upon generation of the ensemble, Dr. Trende properly compared the enacted map to the neutrally generated ensemble by using a statistical metric, the gerrymandering index, to evaluate the likelihood of whether the enacted map was drawn with the intent to favor or disfavor a particular political party. *Id.* at 12–13. Throughout this process, Dr. Trende relied on even-year election data, as he did in *Harkenrider*. *See id.* at 12.

117. This simulation approach to redistricting has been accepted in other courts, including state courts in New Mexico, Maryland, Ohio, North Carolina, and Pennsylvania. *Id.* at 5.

118. When conducting his analysis, Dr. Trende employed a broadly accepted software "package" in R called "redist," which generates a representative sample of districts. *Id.* at 5. To conduct the simulations, Dr. Trende used a shapefile of blocks for Nassau County as the basis for

his analysis. *Id.* at 8–9. A shapefile is similar to a spreadsheet. It includes columns for data, and rows for each geographic unit. *Id.* at 8 n.11.

119. The initial shapefile that Dr. Trende used provides the geographic boundaries for the census blocks and the areas to which they are assigned. *Id.* at 8–9. This data was then merged with adjusted population data provided by the New York Legislative Task Force on Demographic Research and Reapportionment. *Id.* at 9. Dr. Trende then used a "block assignment file" to integrate the legislative map. *Id.* A "block assignment file" is a spreadsheet with two columns, one that includes a geographic identifier assigned by the U.S. Census Bureau, and another that provides the district to which that block is assigned. *Id.* at 9 n.12.

120. The result is a shapefile that contains demographic counts by census block, the city/town/village/cdp to which each block is assigned, and the district to which each block is assigned. *Id.* at 9. The blocks also incorporate political information from various elections in New York. *Id.*

121. The blocks and accompanying data were then re-aggregated to the precinct level to allow for accurate analysis of Nassau County. *Id.*

122. As previously noted, Dr. Trende began his simulation analysis by instructing the simulation program to create 50,000 maps containing 19 districts. *Id.*

123. Dr. Trende's ensemble was generated without partisan constraints, but rather data constraints concerning population, compactness, respect for Nassau County's municipal lines, and contiguity. *See id.* at 8–17. For example, to comply with applicable legal requirements, Dr. Trende specifically instructed the program to avoid splitting jurisdictions with populations exceeding 40% of the ideal district population. *Id.* As such, the maps in the ensemble were representative of

legally drawn maps, *i.e.*, those that were created based upon certain legal constraints (*e.g.*, population)—not partisanship. *Id.* at 7–8.

124. Upon creating an ensemble of maps that complied with applicable law concerning population, compactness, respect for municipal lines, and contiguity, Dr. Trende employed a reliable statistic metric, the gerrymandering index, to determine the degree to which the Enacted Map compares to the typical maps in the ensemble using even-year election data. *Id.* at 10–12. This analysis was aimed to address an issue at the core of this lawsuit, i.e., whether the Enacted Map is a political gerrymander drawn to favor the Republican Party and disfavor the Democratic Party, as alleged. *Id.* at 13.

125. In order to calculate the gerrymandering index, Dr. Trende analyzed the ensemble and ranked the districts generated from the most heavily Democratic to least heavily Democratic. *Id.* at 10. Dr. Trende then averaged Democratic vote shares across ranks. *Id.* Dr. Trende engaged in this process to provide a general expectation of the Democratic vote share for the most heavily Democratic district in a map drawn without political considerations, the Democratic vote share in the second-most heavily Democratic district, and so on. *Id.* at 10–11. This analysis then provides Dr. Trende with a baseline to allow for a reliable analysis of the deviation between the average outcome of the ensemble and the enacted map. *Id.* at 11.

126. Specifically, Dr. Trende calculated the deviations in each map in the ensemble from the mean for each "bin," or district. *Id.* This method provides the total deviations from the ensemble for all districts in the maps, with greater weight given to particularly large discrepancies. *Id.* Dr. Trende then took the square root of these deviations, which effectively converts the results back to a percentage scale. *Id.* The same process was then applied to the Enacted Map, and those calculations were compared to those in the ensemble. *Id.* at 11–12.

127. Unlike the Congressional map at issue in *Harkenrider*, which had a gerrymandering index score far outside the range of what one might expect from a neutrally drawn map, Dr. Trende concluded that the Enacted Map did not "appear[ ] . . . to be drawn primarily to favor a party." *Id.* at 12–13.

128. Specifically, Dr. Trende found that his ensemble of maps presented an average gerrymandering index of approximately 0.09, with a standard deviation of 0.02. *Id.* at 12. In contrast, the Enacted Map has a gerrymandering index of 0.112. *Id.* This finding indicates that roughly "one-in-five maps drawn without respect to politics showed larger deviations from the average neutral map than the Enacted Map." *Id.* at 12–13 (internal quotations omitted). As such, Dr. Trende concluded that the Enacted Map "falls squarely within the distribution of gerrymandering indices [one] might find when drawing maps without respect to politics." *Id.* at 12.

129. In addition to utilizing the gerrymandering index, Dr. Trende, to further compare the partisanship of the Enacted Map to that of the simulations, prepared a dotplot comparing the partisanship of individual districts in the Enacted Map with the Ensemble districts. *Id.* at 13–14. Dotplots are used to illustrate the direction of partisan bias rather than to detect such bias. Reply Report of Dr. Sean P. Trende, dated August 16, 2024 at 2 ("Trende Reply").

130. If the Enacted Map was not drawn to favor or disfavor a political party, or did so only moderately, the dotplot should convey that the Enacted Map aligns relatively closely with the results produced by the simulated maps, which, again, were drawn without partisanship considerations. Trende Report at 14–16. Conversely, if the map drawers heavily relied on political considerations when drawing district lines, there would likely be significant, noticeable deviations in the dotplots, as there were in the dotplots generated in *Harkenrider*. *Id.*

131. Upon review of the dotplots generated, Dr. Trende found that there was little deviation between the Enacted Map and the ensemble. *Id.* Specifically, Dr. Trende concluded that all of the districts in the Enacted Map exhibit partisanship levels that fall within ranges consistent with partisan-neutral map-drawing. *Id*. at 16.

132. In sum, the statistical techniques employed by Dr. Trende in *Harkenrider* demonstrate that there is insufficient statistical evidence to conclude that the Enacted Map was drawn with an intent to assist a political party, or represent a partisan gerrymander. *Id*. at 16–17.

133. After Dr. Trende's initial analysis utilizing the *Harkenrider* methodology, Dr. Trende noticed that the maps in the ensemble contained districts that were less compact on average than the districts found in the Enacted Map. *Id.* at 17. In light of this finding, Dr. Trende slightly increased the compactness parameter of the simulation program to determine how the Enacted Map performed when compared to the ensemble with similar compactness constraints. *Id*.

134. Notably, Dr. Trende found that slightly increasing the compactness parameter of the simulation program had no substantial effect on the Enacted Map's performance under the *Harkenrider* methodology. *Id.* In fact, the Enacted Map performed well when the compactness constraints were added, further demonstrating that the Enacted Map was not passed with partisan considerations. *Id*. at 18.

135. Dr. Trende then further increased the compactness constraint in a third set of simulations and found that the Enacted Map was still not an outlier, as over 25% of the maps in the ensemble had larger gerrymandering indices than the Enacted Map, further demonstrating the enacted map was not drawn with intent to favor or disfavor any political party. *Id.* at 20.

136. To ensure he remained thorough and to avoid any criticism that his original ensemble was not created with enough simulations, Dr. Trende then proceeded to generate an ensemble containing 500,000 simulated maps and compare the Enacted Map to the new ensemble utilizing the *Harkenrider* methodology. *Id.* at 23–24. Dr. Trende confirmed that an increased ensemble did not change the analysis. *Id.* at 24. In fact, over 24% of the maps in the ensemble had gerrymandering indices larger than that of the Enacted Map, demonstrating again that the enacted map was not drawn with intent to favor or disfavor any political party. *Id.*

137. Like in *Harkenrider*, Dr. Trende analyzed data from even-numbered years, which tend to be higher-profile elections with better information about candidates, and thus may reveal more about the partisanship of the districts. Trende Rebuttal at 28. Specifically, Dr. Trende analyzed the average party performance in the 2016 Senate and Presidential races, the 2018 Gubernatorial, Attorney General, and Senate races, and the 2020 Presidential race. *Id.* at 30; *see also* Transcript of the Deposition of Sean P. Trende, Ph.D., dated October 11, 2024 at 104:20–106:14 ("Trende Dep."). This analysis, along with the other factors of Dr. Trende's analysis blessed by the Court in *Harkenrider*, showed that "[t]here is insufficient statistical evidence to conclude that these maps were drawn with an intent to assist a political party, or represent a partisan gerrymander." Trende Report at 16–17.

138. In addition, Dr. Trende also considered the possibility that other elections might reveal different patterns. He examined the average party performance in the 2017 County Executive, Comptroller, and Clerk races, the 2019 District Attorney race, and the 2021 County Executive, Comptroller, and Clerk races. *Id.* at 25–26. Dr. Trende further reviewed the average Republican performance across those three sets of races. *Id.* at 26. In total, that provided 20

combinations of races versus simulations. *Id.* Dr. Trende found that the map was not a partisan outlier when looking at these odd-year elections. *Id*. at 25–26.

139. Using well-established political science techniques, Dr. Trende concluded that there is no evidence that the Enacted Map was drawn with the purpose of favoring or disfavoring a particular political party, incumbents, or competitive elections. Trende Report at 27; Trende Reply at 1. "The maps fall within reasonable boundaries of what would be expected from maps that were not drawn to favor or disfavor a particular party." Trende Report at 27.

140. Dr. Magleby and Dr. Stern take issue with the dotplots utilized by Dr. Trende, claiming they are too big and thus misleading. Dr. Stern, however, uses dotplots that are too *small*. His dotplots are so small, they fade into nothing, making it appear as though there are no ensemble maps in the 95th and 5th percentiles, when, in fact, there are hundreds. Ultimately, the dotplots are simply a depiction of data and, critically, were not used to decide whether or not the map was a gerrymander. *Id.* at 5. Instead, Dr. Trende's conclusion that the Enacted Map is not a partisan gerrymander is based on the gerrymandering index. *Id*. This is a preferred method because "(1) individual outliers are likely in a map with a large number of districts and (2) local factors or slight divergences between the parameters of the simulations and those employed by actual map drawers can produce consequential deviations at a district level that are less likely to show up in the aggregate." *Id.* at 2.

141. Dr. Trende's ensemble analysis properly took into account the redistricting criteria under which the "legislature actually operated (while withholding partisan data from the analysis), not the criteria that a third party believes a legislature would have acted under if it had been advised of a different understanding of the law, without regard to partisanship." *Id.* at 5.

142. The primary goal of ensemble analysis is to create a "poll" of maps that accurately reflects the constraints under which the legislature operated, without allowing the algorithm to access political data. *Id.* If the partisanship of an enacted map aligns with the partisanship of the ensemble (calculated after the ensemble maps are drawn), it can be inferred that the enacted map was also drawn without using political data. *Id.* Conversely, if it does not align, the opposite conclusion can be drawn. *Id*. at 5–6.

143. In conducting his analysis, Dr. Trende appropriately considered even-numbered year elections (whereas Plaintiffs' experts ignored those elections in order to support their desired conclusions, *see infra* p.10) particularly where the correlation between odd- and even-year elections and the actual election results in Nassau County is strong regardless of the election year employed. *Id.* at 8–9; *see also* Trende Rebuttal at 28–35.

144. Notably, future elections in Nassau may well be held in even-numbered years, providing additional reason to consider those elections. *See* Trende Rebuttal at 28 & n.37 (citing Senate Bill S3505B, 2023-2024 Leg. Sess. (N.Y. 2023); *Onondaga et al v. New York et al*., No.003095/2024 (N.Y. Sup. Onondaga Cnty. Mar. 24, 2024)); *see also infra* pp.53–54.

Dr. Brad Lockerbie

145. Defendants engaged Dr. Brad Lockerbie, a professor of political science at East Carolina University, who has published over 30 peer-reviewed articles on elections and public opinion in political science journals and interdisciplinary journals, including the American Journal of Political Science, P.S.: Political Science and Politics, Social Science Quarterly, and Public Choice, and who has previously served as an expert in a redistricting case, *see Agee, et al. v. Benson, et al.*, No.1:22-cv-00272, 2023 WL 8237017 (W.D. Mich. May 9, 2023), as well as various other election-law related cases, *see, e.g.*, *Nielsen v. DeSantis*, 469 F. Supp. 3d 1261 (N.D.

Fla. 2020); *Donald J. Trump for President, Inc., et al. v. Kathy Boockvar et al.*, No.2:20-cv-966, 2020 WL 4696795 (W.D. Pa. Aug. 13, 2020); *North Carolina Alliance for Retired Americans v. North Carolina State Board of Elections*, No.20 CVS 8881, 2020 WL 10758664 (Wake Cnty. Sup. Ct. Oct. 5, 2020). *See* Expert Report of Dr. Brad Lockerbie, dated May 31, 2024 at ¶¶ 3, 6–7 ("Lockerbie Report").

146. Dr. Lockerbie reviewed political characteristics and voting in Nassau County. *Id.* ¶ 1. Through Dr. Lockerbie's review, he made use of Nassau County block data made available by Defendants' counsel, as well as publicly accessible news sources to assess the race and names of the specific candidates for office in New York. *Id.* ¶¶ 1–2.

147. Dr. Lockerbie conducted an analysis to determine whether minority voters in Nassau County are able to elect their preferred candidate. *Id.* ¶ 9; *see* Transcript of the Deposition of Brad Lockerbie, Ph.D., dated September 23, 2024 at 42:3–9 ("Lockerbie Dep."). In order to do so, Dr. Lockerbie first analyzed whether there was racially polarized voting in Nassau County, meaning a circumstance where minority voters prefer one candidate and white voters prefer another, Lockerbie Report ¶ 10, and then analyzed countywide election results to see whether the minority-preferred candidates were victorious, *id.* ¶ 11.

148. First, Dr. Lockerbie concluded that there is some racially polarized voting in Nassau County, *see id.* ¶ 10; Lockerbie Dep. at 102:7–11, because in the elections he analyzed, there were several cases where minority voters preferred one candidate and white voters preferred another, and there were also cases in which the minority voters preferred the same candidate as white voters, Lockerbie Report ¶ 10.

149. Dr. Lockerbie reached that conclusion by using a methodology referred to as "ecological regression," *see* Lockerbie Dep. at 66:9–16, which has been accepted by courts,

including the U.S. Supreme Court, *see League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 467 (2006) (Stevens, J., concurring in part) ("*LULAC*") (citing *Thornburg v. Gingles*, 478 U.S. 30, 53 n.20 (1986)), and is a reliable method to analyze the question of racially polarized voting. *See* Reply Report of Dr. Brad Lockerbie, dated August 16, 2024 at ¶ 14 ("Lockerbie Reply"). This method requires the user to start with aggregate level data and then run a regression analysis to draw inferences at the individual level. Lockerbie Dep. at 66:17–21.

150. To run an ecological regression analysis in this case, Dr. Lockerbie measured the racial makeup of the Nassau County electorate by using two population metrics—voting age population and citizen voting age population. *Id.* at 79:21–80:04, 81:8–18. Specifically, Dr. Lockerbie used voting age population as a means to simply diagnose whether the measure of racially polarized voting mattered substantively. Lockerbie Reply ¶ 22.

151. To measure racial polarization, Dr. Lockerbie analyzed racial voting patterns and compiled data from even-year state and federal elections and odd-year local elections to analyze all the available information. *Id.* ¶ 9. As it relates to even-year elections, Dr. Lockerbie reviewed data from the 2012 Presidential election; 2012 Senatorial general election; 2014 Attorney General election; 2014 Gubernatorial general election; 2016 Presidential general election; 2016 Senatorial general election; 2018 Attorney General election; 2018 Gubernatorial general election; 2018 Senatorial general election; and 2020 Presidential general election. *See generally* Lockerbie Report. Dr. Lockerbie concluded that studying these non-local elections provides useful data when analyzing racially polarized voting and is an accepted method among social scientists. Lockerbie Reply ¶ 9.

152. Dr. Lockerbie also examined data from odd-year elections at the county-specific level in Nassau County, including the 2017 races for County Executive, County Comptroller, and

County Clerk; the 2019 race for County District Attorney, and the 2021 races for County Executive, County Comptroller, County Clerk, and County District Attorney. *See* Expert Rebuttal Report of Dr. Brad Lockerbie, dated July 22, 2024 at T.1 ("Lockerbie Rebuttal"); Lockerbie Reply ¶¶ 26, 33.

153. Dr. Lockerbie examined the level of racial polarization in voting across these elections to determine the amount of racial polarization in Nassau County at the district level and concluded that there was some evidence of racially polarized voting. *See* Lockerbie Report ¶¶ 95–100. However, Dr. Lockerbie also observed that there is considerable "white crossover voting" in Nassau County, Lockerbie Reply ¶ 46, meaning a significant amount of White majority voters tend to support the minority-preferred candidate in elections.

154. At bottom, Dr. Lockerbie concluded that "while there is racial polarization" in Nassau County, there is also "considerable crossover voting" across elections in the County with a significant number of White voters supporting "minority favored candidates." Lockerbie Reply ¶¶ 37–40, 46–48.

155. Second, regardless of the level of racially polarized voting in the County, Dr. Lockerbie concluded that minority voters' preferred candidates of choice are not "usually defeated." Lockerbie Report ¶ 56; *see also id.* ¶¶ 11, 91. In each election that Dr. Lockerbie analyzed, the Democratic party's candidate was the preferred candidate of the minority voters, *id.* ¶ 11, and Dr. Lockerbie found that Democratic candidates are not usually defeated in Nassau County when looking at all relevant elections, *id.*; Lockerbie Reply ¶ 45.

156. Dr. Lockerbie found that the minority-preferred candidate won the majority of the two-party vote in every state-wide and national election that he analyzed. Lockerbie Report ¶ 11.

157. Dr. Lockerbie also analyzed the election results of local, county-specific elections and concluded that minority voters are able to elect their preferred candidate, even if the frequency of victories is not as universal as the state-wide and national elections. *Id.* ¶ 59.

158. Dr. Lockerbie's conclusion is demonstrated by the below chart showing how often the minority-candidate was victorious in recent national, state-wide, and county-specific elections.

Year	Office	Minority-Preferred Candidate Victorious?
2012	President	Yes
2012	US Senate	Yes
2014	Attorney General	Yes
2014	Governor	Yes
2016	President	Yes
2016	US Senate	Yes
2017	County Executive	No
2017	County Comptroller	Yes
2017	County Clerk	No
2018	Attorney General	Yes
2018	Governor	Yes
2018	US Senate	Yes
2019	County District Attorney	Yes
2020	President	Yes
2021	County Executive	No
2021	County Comptroller	No

Year	Office	Minority-Preferred Candidate Victorious?
2021	County Clerk	No
2021	County District Attorney	No

See Lockerbie Rebuttal at T.1, T.2; Lockerbie Reply ¶¶ 23, 26, 33.

159. As the above chart demonstrates, the minority-favored candidate was successful in each of the following national and state-wide elections in Nassau County: 2012 President, 2012 Senate, 2014 Attorney General, 2014 Governor, 2016 President, 2016 Senate, 2018 Attorney General, 2018 Governor, 2018 Senate, and 2020 President. Lockerbie Rebuttal ¶ 21; *see* Lockerbie Report ¶¶ 11–17.

160. The above chart also shows that minority favored candidates have been similarly successful in countywide elections. *See* Lockerbie Rebuttal ¶¶ 10–11, 33, 48; Lockerbie Reply ¶¶ 41, 56–57. Minority-favored candidates "win 3 and lose 4 of the county-wide elections examined in [Dr. Lockerbie's] report," and even where Democratic candidates lose, election results "show that the elections are competitive across the board." Lockerbie Rebuttal ¶¶ 10, 33.

161. Notably, Dr. Lockerbie found that even in most instances where minority-preferred candidates do not win an election, they are highly competitive and are able to carry a significant number of individual districts. Lockerbie Reply ¶ 56. This is because, as discussed above, *supra* p.43, even with racially polarized voting in Nassau County, there is enough White crossover voting to make the races competitive. *Id*.

162. For an election to be competitive, both sides must have a plausible chance of victory. *See* Lockerbie Dep. at 119:19–22, 206:16–21. One norm Dr. Lockerbie has utilized is the 55/45 norm, which defines competitiveness within that range. *Id*. at 119:23–120:2. This norm

is based on inter-election swings, indicating that a candidate who won with over 55% of the vote was very likely to be reelected. *Id*. at 120:6–10.

163. Dr. Lockerbie demonstrated that "[e]ven with racial polarization, there is enough crossover voting to make the races competitive in Nassau County." Lockerbie Reply ¶ 56.

164. As shown in the chart below, this conclusion is evident when viewing recent election results for each of the nineteen districts drawn in Nassau County's current map, which results make clear that minority-preferred candidates would often be capable of winning a majority of those nineteen districts.

Year	Office	Districts Won By Minority-Preferred Candidate	Districts Lost But Competitive
2012	President	12	5
2012	US Senate	19	0
2014	Attorney General	9	4
2014	Governor	14	2
2016	President	10	5
2016	US Senate	19	0
2017	County Executive	9	5
2017	County Comptroller	10	4
2017	County Clerk	8	2

Year	Office	Districts Won By Minority-Preferred Candidate	Districts Lost But Competitive
2018	Attorney General	15	1
2018	Governor	15	1
2018	US Senate	15	1
2019	County District Attorney	15	3
2020	President	14	0
2021	County Executive	8	6
2021	County Comptroller	6	1
2021	County Clerk	4	3
2021	County District Attorney	6	1

See Lockerbie Report ¶¶ 49–58, 71–78, Lockerbie Rebuttal at T.1, T.2; Lockerbie Reply ¶¶ 26, 33.

165. Dr. Lockerbie's analysis demonstrated that "white crossover voting is making minority favored candidates both competitive and successful" in Nassau County, Lockerbie Reply ¶ 46, such that "minority favored candidates are not usually defeated when looking at all relevant elections" and even in "instances where they do not win, they are in a competitive situation," *id.*¶ 56.

166. And Dr. Lockerbie found that this conclusion holds up "regardless of whether we are looking at even-year or odd-year races, midterm years or presidential years, and county-wide or state-wide races." *Id.* ¶ 57.

167. Even where there is racial polarization, there is more than sufficient crossover voting to make minority favored candidates competitive. *Id.* ¶ 40. Dr. Oskooii fails to consider adequately that white crossover voting is making minority favored candidates both competitive and successful. *Id.* ¶ 46.

168. Dr. Lockerbie properly considered state and federal elections in his analysis of minority-favored candidates' ability to win elections in Nassau County, despite Dr. Oskooii's criticisms thereto, particularly given the uncertainties surrounding Assembly Bill A4282B/Senate Bill S3505B, which seeks to shift Nassau County's local elections to even years. *See id.* ¶¶ 8–9. The analysis of non-local elections provides useful data when analyzing racially polarized voting and is an accepted method among social scientists. *Id.* ¶ 9; *see also Clarke, et al. v. Town of Newburgh, et al.*, EF002460-2024; *New York 2020, Ecological Inference Estimates*, Harvard Law School Election Law Clinic.[7]

169. Minority-preferred candidates do not usually lose their contests in Nassau County. Lockerbie Reply ¶ 41.

170. While Dr. Oskooii criticizes the data used in Dr. Lockerbie's analysis, their conclusions are similar and largely consistent. *Id.* ¶¶ 12, 48.

171. As mentioned above, and despite Dr. Oskooii's critique, Dr. Lockerbie's ecological regression analysis to assess the nature of racially polarized voting is sound as it is a widely accepted method for analysis of such data. *Id.* ¶¶ 13–16, 19.

[7] Available at https://rpvnearme.org/analyses/NY_2020.html.

172. While ecological regression can result in predictions that are below 0% and above 100% (because the ordinary least squares regression does not constrain predictions to a fixed interval when inputting the scores from the independent variable to the equation), the convention is to truncate these to the logically possible 0% and 100%. *Id.* ¶¶ 49–50. Dr. Lockerbie includes the actual predictions so the reader can do the simple adjustment. *Id.* ¶ 50.

173. While Dr. Oskooii criticizes Dr. Lockerbie's data, he does not note any specific instances where the purported data discrepancies resulted in differing interpretations. *Id.* ¶ 54.

Dr. Donald Critchlow

174. Plaintiffs' claims of a linear, unchanging pattern of racism in Nassau County are overly simplistic and not supported by historical evidence. *See* Expert Report of Dr. Donald T. Critchlow, dated May 31, 2024 ¶¶ 3, 11–12 ("Critchlow Report").

175. As Defendants' expert Dr. Donald T. Critchlow explains, "a historian's interpretation must be based on the complete body of evidence, not just evidence that fits a preordained schema." *See id.* ¶ 1. In fact, Nassau County has had substantial advancements in minority rights and integration over the years. *See id.* ¶ 23.

176. Dr. Critchlow uses the factors to be considered under New York Election Law § 17-206 when determining whether members of a protected class have less opportunity than the rest of the electorate to elect candidates of their choice or influence the outcome of elections to discredit Plaintiffs' overbroad "Community of Interest" claims. *See generally* Critchlow Report; Reply Report of Dr. Donald T. Critchlow, dated August 16, 2024 ("Critchlow Reply"); Dr. Donald T. Critchlow's Response to Expert Report of Thomas J. Sugrue, dated July 19, 2024 ("Critchlow Rebuttal").

177. These factors are: (a) the history of discrimination in or affecting the political subdivision; (b) the extent to which members of the protected class have been elected to office in the political subdivision; (c) the use of any voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy that may enhance the dilutive effects of the election scheme; (d) denying eligible voters or candidates who are members of the protected class to processes determining which groups of candidates receive access to the ballot, financial support, or other support in a given election; (e) the extent to which members of the protected class contribute to political campaigns at lower rates; (f) the extent to which members of a protected class in the state or political subdivision vote at lower rates than other members of the electorate; (g) the extent to which members of the protected class are disadvantaged in areas including but not limited to education, employment, health, criminal justice, housing, land use, or environmental protection; (h) the extent to which members of the protected class are disadvantaged in other areas which may hinder their ability to participate effectively in the political process; (i) the use of overt or subtle racial appeals in political campaigns; (j) a significant lack of responsiveness on the part of elected officials to the particularized needs of members of the protected class; and (k) whether the political subdivision has a compelling policy justification that is substantiated and supported by evidence for adopting or maintaining the method of election or the voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy. Critchlow Report ¶ 37.

178. Dr. Critchlow ultimately concludes after careful consideration that Blacks, Asian Americans, and Hispanic Americans do not have less opportunity than the rest of the electorate to elect candidates of their choice or influence the outcome of elections based upon considerations of the statutory factors. *Id.* ¶ 38.

179. As to factor (a)—the history of discrimination in or affecting the political subdivision, Dr. Critchlow explains that Plaintiffs' claim regarding the "notable presence in Nassau County [of] Klan members," Action II Compl. ¶ 50, is misleading, because "much of KKK activity in Long Island . . . focused their efforts on Catholics and southern and eastern Europeans," with some incidents against Blacks, but resistance to the Klan in Nassau County highlights significant progress toward diversity and inclusion. Critchlow Report ¶¶ 40–42. Despite a history of discriminatory laws against ethnic minorities, the successful repeal of such laws is the lens through which evidence of social and racial progress must be viewed and calls into question Plaintiffs' assertions of a linear pattern of systemic racism. *Id.* ¶¶ 14, 19, 65; Critchlow Reply at VII.b.

180. In further addressing Plaintiffs' misleading claims of Nassau County's history of discrimination, Dr. Critchlow lists the decades of progress made within the County to overcome historical practices including: the formation of a black police officers association in 1949; the founding of the Long Island Council for Integrated Housing in 1959; the creation of the Nassau County Commission on Human Rights in 1963; the formation of an Economic Opportunity Commission; the establishment of the Office for the Physically Challenged; and the establishment of the Long Island Community Housing Resources Board in 1984 to assist minorities in looking for housing on Long Island. Critchlow Report ¶¶ 44, 46. Political advancement of minority populations in the County also dates back to 1949 with the first Italian American to hold a countywide office, through the 2000s, including the election of Governor David Paterson, who grew up in Hampstead, as the first Black governor of New York. *Id.*

181. In addition, "Plaintiffs do not provide support for th[eir] contention" that "Nassau County [is] 'the most segregated county in its population class in the United States.'" *Id.* ¶ 47. In

fact, "[t]he claim that Nassau County is the most segregated county in its population class is [ ] not supported by empirical evidence," as the "County shows a trajectory of declining black/white segregation," and "does not rank in the top 25 cities for Hispanic or Asian American segregation or isolation, as seen in U.S. Census [data]." *Id.* ¶¶ 49, 51.

182. As to factor (b)—the extent to which members of the protected class have been elected to office in the political subdivision, Dr. Critchlow refutes Plaintiffs' claims of absence of minority representation in the Legislature, *see* Action II Compl. ¶ 60, by naming "at least two Hispanics serving in the . . . [L]egislature," another who previously served for 22 years, and "at least 4 Black legislators," which "exceed[s] the percentage of African Americans in Nassau County," Critchlow Report ¶¶ 54–55, 57. Historically, ethnic group mobilization emerges gradually, and there is no reason to believe that this historical pattern will not be replicated in Nassau County as the Hispanic and Asian American populations grow. Critchlow Report ¶ 56.

183. In their Complaint, Plaintiffs point to the imposition of literacy tests from 1922 through 1969 as an example of historic discrimination against minorities, *see* Action II Compl. ¶ 66, that Progressives in 1921, through the New York State Legislature, passed a required literacy test for voter registration, which was seen as a progressive measure specifically aimed at white voters, particularly Southern and Eastern European recently arrived immigrants, *see* Critchlow Report ¶¶ 59–60.

184. However, Dr. Critchlow explains that factor (c)—the use of any voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy that may enhance the dilutive effects of the election scheme—fails for much the same reason as factor (a). Namely, "in northern states the enactment of literacy tests were primarily aimed against Eastern and Southern European immigrants." Critchlow Report ¶ 61. Much of the support

for the literacy test came from progressive "good government" groups, generally native-born, upper-class individuals aiming to "clean up" politics, as New York had one of the highest illiteracy rates in the nation, primarily due to recently arrived immigrants and rural New Yorkers, leading to a 1921 constitutional amendment for a literacy test administered by the state board of education, which required fourth-grade English literacy or proof of completing the fifth grade. *See id.* ¶¶ 63–64. Despite initial high failure rates, literacy improved significantly by 1938; however, in the 1960s and 1970s, Hispanics increasingly challenged the test, with Puerto Rican activists seeking its removal, although its constitutionality was upheld in *Camacho v. Doe*, 7 N.Y.2d 762 (1959), and *Camacho v. Rogers*, 199 F. Supp. 155 (S.D.N.Y. 1961), during which time Puerto Rican voter registration rose significantly from 39,000 in 1955 to over 150,000 in 1963. *See* Critchlow Report ¶¶ 63–64. (Of course, in 1964, Congress passed the Voting Rights Act of 1965, outlawing literacy tests. *Id.* ¶ 65.) Further, it is worth noting that before the Voting Rights Act of 1965, the U.S. Supreme Court upheld literacy tests if enforced without racial prejudice, as seen in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1958), where Justice William O. Douglas stated that because the tests were applied equally to all races and not merely as a device for racial discrimination, a state could determine the conditions under which the right of suffrage may be exercised, a ruling that applied to New York and Nassau County. *See* Critchlow Report ¶ 66.

185. Similarly, the legislation imposing odd-year elections was "aimed at the New York City Tammany Hall machine that relied on white ethnic voters." *Id.* ¶ 67. And while Plaintiffs also reference a racial covenant imposed in the development of Levittown, such racial covenants were ruled unconstitutional by the U.S. Supreme Court in 1948. *Id.* ¶ 19. A study by the non-partisan Citizen's Union predicts that holding elections in even-numbered years will increase voter turnout among minority and young voters, although it suggests that election consolidation would

likely have only modest effects on boosting voter turnout in local primaries, and while the constitutionality of Assembly Bill A4282B/Senate Bill S3505B—requiring many political subdivisions, including Nassau County, to hold certain local elections in even-numbered years and signed into law on December 22, 2023—under the New York State Constitution (Articles I, II, and IX) is for the courts to decide, ultimately, voter turnout is influenced by party mobilization and general American political behavior, with higher income and educational attainment correlating with higher voting rates regardless of ethnicity, race, or age. *See id*. ¶¶ 68–69. Thus, Dr. Critchlow concludes as to this factor that there is no evidence of any voting qualification, prerequisite to voting, law, ordinance, standing, practice, procedure, regulation, or policy that dilutes the votes of any member of a protected class in Nassau County. *Id*. ¶ 70.

186. As to factors (d), (e), and (h), Dr. Critchlow concluded there is no evidence that Blacks, Asian Americans, or Hispanics are denied access to the processes that determine which candidates receive access to the ballot, financial support, or other support in a given election; contribute to campaigns in different amounts; or are disadvantaged in any ways that may hinder their ability to participate effectively in the political process in Nassau County. *Id*. ¶¶ 71–72, 93.

187. As to factor (f)—the extent to which members of a protected class in the state or political subdivision vote at lower rates than other members of the electorate—Dr. Critchlow points to the "universal agreement" in "the Political Science discipline" that "voter turnout is determined by economic status and educational attainment, *not* ethnicity or race." *Id.* ¶ 73. The U.S. Census Bureau's surveys on voter turnout in the 2020 presidential and 2022 congressional elections reveal that many eligible voters did not participate due to lack of interest, dissatisfaction with candidates, being too busy, illness, forgetfulness, transportation issues, or weather problems. *Id.* ¶ 74. In 2022, voter turnout was the highest since 2002, with 52.2% of eligible voters casting

ballots, and the most common reason for not voting was conflicting schedules. *Id.* ¶ 75. This data challenges the notion that lower minority voter turnout is solely due to systemic suppression. Specific data for Nassau County is limited, but general New York state turnout rates have declined across all demographics from 2013 to 2021. *Id.* ¶¶ 76–77. The Plaintiffs' Complaint assumes uniformity among minority groups, yet the Asian American community in Nassau County has higher education levels and household incomes than the county average, suggesting diverse voting interests. *Id.* ¶ 78. Voter registration and turnout are influenced by economic affluence and educational attainment, indicating that Asian Americans may have higher participation in future elections. *Id.* ¶ 79.

188. Plaintiffs' argument on factor (g)—the extent to which members of the protected class are disadvantaged in areas including but not limited to education, employment, health, criminal justice, housing, land use, or environmental protection—focuses primarily on housing policies in place during the middle of the twentieth century. *See id.* ¶ 80 (citing Action II Compl. ¶¶ 51–54). Levittown, built by Abraham Levitt and his sons in 1947, was America's first mass-produced suburb, featuring 10,600 affordable homes priced at $7,990 each. *See id.* ¶ 81. Despite its amenities, the community excluded Blacks and Jews through a discriminatory covenant. *See id.* Abraham Levitt justified this by claiming it was necessary to maintain property values, though he personally believed segregation was morally wrong. *See id.* ¶ 82. Civil rights activists challenged these covenants, and the U.S. Supreme Court ruled them unconstitutional in *Shelley v. Kraemer* (1948). *See id.* ¶ 84. Today, Levittown is a diverse community with a population of around 52,000, including 14% Hispanic and 7.3% Asian American residents. *See id.* ¶ 86. The town's transformation reflects broader societal progress towards racial equality. *See id.* ¶ 87. The Plaintiffs' Complaint overlooks Levittown's success as an integrated community and challenges

the narrative of FHA-imposed redlining, citing scholarship that disputes this claim. *See id*. ¶¶ 88–89 (citing Action II Compl. ¶ 53). However, Dr. Critchlow shows that Nassau County's changes since that time ensure that "Levittown stands as symbol of a once racially segregated town that became ethnically integrated." *Id.* ¶ 87. Moreover, Plaintiffs' blanket assumption that federal housing loan policies in place fifty years ago has resulted in discriminatory districting by the County Legislature today is seriously flawed. *Id*. ¶ 90. Affordable housing remains a problem in Nassau County and across the United States, as evidenced by New York Governor Kathy Hochul's failed 2023 housing plan and a Pew Foundation survey showing that 49% of Americans oppose reducing minimum lot size, reflecting widespread resistance to public housing projects in their neighborhoods. *See id*. ¶¶ 91–92.

189. However, Dr. Critchlow disproves factor (i) regarding the use of overt or subtle racial appeals in political campaigns, using campaign data to establish that overt racial appeals do not historically work in Nassau County. *Id*. ¶¶ 99–100. The Plaintiffs allege that systemic racism is apparent in political campaigns in Nassau County, yet Republican legislators won their elections on promises of low taxes and fiscal responsibility, rather than on restoring law and order, which might have racial connotations. *Id*. ¶¶ 94–95 (citing Action II Compl. ¶¶ 73–81). Indeed, Dr. Critchlow provides a "breakdown" of the issues that animated the campaigns of each Nassau County legislator: "10 ran on low taxes or fiscal health; 8 ran on public safety; 7 ran on clean water or infrastructure; 1 ran on combating antisemitism; 1 on housing and senior programs; 1 on police reform; 1 on union support; 1 in opposition to hate crimes; and 1 on senior housing." *Id*. ¶ 96. Additionally, the Plaintiffs claim that racist campaign ads, depicting Hispanic gang members or other alleged criminals, have been used by Republican candidates to create a racially hostile environment. *Id*. ¶¶ 97–98. The Plaintiffs reference an ad allegedly placed by Anthony D'Esposito

displaying a man accused of committing crimes in the Bronx, Action II Compl. ¶ 80, but it is unclear from the photo that the assailant was Vietnamese, and there was no mention of his ethnicity in D'Esposito's post, which referenced a New York Post article about a violent attack on a Latino man, Critchlow Report ¶ 102. Additionally, the Plaintiffs point to ads allegedly sponsored by the Nassau Republican Committee attacking Joshua Lafazan for speaking about white privilege, but he was defeated by Samantha Goetz, a Latina deputy county attorney, with race having little to do with the election outcome. Critchlow Report ¶ 103.

190. As for factor (j), Nassau's County's responsiveness of elected officials to the particularized needs of minorities cannot be overlooked as Plaintiffs suggest. Local governments in Nassau County, a Charter County with an elected county executive and a district-elected County Legislature, have attempted to be responsive to its diverse economic interests and communities by administering day-to-day government tasks, proposing budgets, appointing department heads, enacting laws through a committee system, and managing expenditures primarily in public safety and education, while also enforcing building codes, operating museums, libraries, and parks, providing public health services, and enforcing traffic and fire safety laws through its fifty-seven departments. *Id*. ¶¶ 104–05. The structure of the County government indicates its responsiveness to a changing population and efforts to promote diversity including: the Asian American Affairs Department, the Office of Hispanic Affairs, the Nassau County Human Rights Commission; the Minority Affairs Department; and the Disadvantaged Business Enterprise program. *Id*. ¶¶ 106–08. And while Plaintiffs' suggest that this factor should weigh in their favor due to issues with the tax assessment system, *see id*. ¶ 109 (citing Action II Compl. ¶¶ 57, 84), Dr. Critchlow explains that the "tax assessment system's problems are long-standing and not a matter of racial unfairness." *Id*. ¶¶ 110–11.

191. Finally, and as related to factor (k), Plaintiffs' concept of "Community of Interest" "conflates ethnic and racial groups and ignores distinct cultural and socio-economic differences between and among these groups." Critchlow Reply ¶ 5. Plaintiffs' Complaint assumes a "community of interest" among minority groups such as Blacks, Hispanics, and Asian Americans; however, data from the county Comptroller's office reveals significant diversity within these groups, particularly in terms of income and educational attainment, which are key determinants of voting behavior and party affiliation. Critchlow Report ¶¶ 112–14. In Nassau County, Asian Americans tend to be wealthier, better educated, and reside in more affluent areas compared to Hispanics and Blacks, with nearly 47% of Asian Americans having household incomes over $150,000 and 64.3% holding a bachelor's degree or higher. *Id.* ¶ 115. These socio-economic differences, along with the varied languages and national origins within the Asian American and Hispanic communities, undermine the argument for a unified "community of interest" among these minority voters. *Id.* ¶¶ 114–15. The concept of community extends beyond ethnic or racial identities to encompass shared interests among neighbors, towns, counties, states, and the nation. *See id.* ¶¶ 116–17. There is no evidence to support the notion that Blacks, Hispanic Americans, and Asian Americans are politically cohesive, vote for the same candidates, prioritize the same issues, or agree on political strategies. *Id.* ¶ 118.

192. Plaintiffs' assertion of a "Community of Interest" among Asian, Hispanic, and Black populations in Nassau County, further lacks support as it assumes these groups are cohesive. *See id.* ¶ 27; Critchlow Reply ¶ 8. Asian Americans in Nassau County, comprising various ethnicities such as Indian, Chinese, Korean, Filipino, and Pakistani, exhibit high educational attainment and income levels, with significant linguistic diversity. *See* Critchlow Report ¶¶ 28–29; Critchlow Reply ¶ 7. Similarly, Hispanics in Nassau County, originating from Mexico, Central

America, and the Caribbean, are economically, educationally, and politically diverse. *See* Critchlow Report ¶ 31; Critchlow Reply ¶ 6.

193. Scholars of American voter behavior suggest that Hispanic voters do not form a single voting bloc and project the Hispanic vote dividing between the parties. *See* Critchlow Report ¶ 32. Given the diversity in languages, residential patterns, education, and income among these minority populations, Plaintiffs' notion of a unified "community of interest" is questionable, especially since educational attainment is a primary determinant of voting behavior. *See id.* ¶ 33.

194. Voter turnout is determined most prominently by economic status and educational attainment, not ethnicity or race as Plaintiffs suggest. *See id.* Dr. Critchlow's report solidifies this point using data showing voter turnout for all demographic groups was lower in 2021 than in 2013, irrespective of race. *Id.* ¶ 77.

195. Dr. Critchlow persuasively responds to Dr. Sugrue's criticisms in his Reply Report. To begin, Dr. Sugrue charges that the Critchlow Report "distorted or neglected a huge scholarly literature on the history of racism including federal housing policy, New York literacy testing, and the creation of suburbs as a reflection of white flight and racism." Rebuttal Expert Report of Thomas J. Sugrue, dated July 22, 2024 ¶¶ 51, 62 ("Sugrue Rebuttal"); *see* Critchlow Reply ¶ 4.d. The point raised in the Critchlow Report and the Critchlow Rebuttal was not to deny that federal housing policy was discriminatory, but to show that the debate was more nuanced than Dr. Sugrue described in his report. Critchlow Reply ¶ 48. Dr. Sugrue claims that there is unanimous or a near consensus on this issue. However, his viewpoint is not unanimous. *Id.* Dr. Sugrue challenges a misreading of the works cited in the Critchlow Report, but he does not appear to have read Todd M. Michney's important revisionist account that shows the complexity of federal housing policy. *Id.* ¶ 56. Further, Dr. Sugrue asserts that Dr. Critchlow overlooks legislation, legal actions, and

investigations of racial bias in Nassau County government and police agencies. *See id.* ¶ 4.c. Dr. Sugrue maintains that the Critchlow Report provides only a cursory history of Ku Klux Klan activities in the 1920s and in later decades. That is because it is wholly unnecessary to provide a detailed recount of the KKK's history in Nassau County, but rather explains that Dr. Sugrue's historical narrative neglects important details in resistance to the KKK. *Id.* ¶¶ 29, 32. "It is not necessary, nor a good use of judicial resources, to provide the Court with a full academic debate, nor should it be a place for polemical accusation and vituperative charges of superficiality, idiosyncrasy, and ignorance. Data can be debated on its own, and the Court will judge the relevance of this data in the end." *Id.*

196. Dr. Sugrue further contends that the Critchlow Report offers a cursory history of civil rights in Nassau County. Sugrue Rebuttal ¶ 9. "The Critchlow Report was not meant to present a detailed history of Nassau County's civil rights. Rather, it offers context to the portrayal of Nassau County's history that is lacking in Dr. Sugrue's report. Context is vital for historians to understand and consider when analyzing and opining on historical events. Dr. Sugrue's report exhibits no signs that he considered such context in developing his opinions." Critchlow Reply ¶ 23. The Critchlow Report was also not meant to catalogue every historical event in Nassau County beginning a hundred years ago through to current day. *Id.* ¶ 4.c.

197. Dr. Sugrue likewise says the examples of pickets, protests, and civil rights litigation contradicts the Critchlow Report's assertion of progress. Sugrue Rebuttal ¶ 17. However, those pickets, protests, and civil rights litigation were instrumental to progress in the civil rights' era. They do not belie progress, they are progress. Critchlow Reply ¶ 25.

198. Dr. Sugrue specifically criticizes the Critchlow Report's conclusion that there was evidence of progress in the 1970s and 1980s. Sugrue Rebuttal ¶ 19. He contends that the Hofstra

University timeline of Civil Rights and curriculum guide "forcefully concludes" there was no progress in the 1970s and 1980s. Sugrue Rebuttal ¶¶ 16–19. His support for this assertion is that the guide states that the racial injustice on Long Island in the 1960s "continues to influence" life on Long Island today. *Id.* One would be hard pressed to find another historian who cannot admit that there was progress made during the Civil Rights era. While the events of the 1960s, 1970s, and 1980s undoubtedly influence life today, a historian needs to consider the full body of evidence in order to provide a true look at Nassau County today. Dr. Sugrue fails to do this. *See* Critchlow Reply ¶ 27. The Hofstra suggested curriculum were used to show that a full account of civil rights history in Long Island is balanced and, of course, included civil rights violations and social protest toward discriminatory racial laws and practices but also highlighted progress and achievement. *Id.* ¶ 26. Dr. Sugrue also comments that the curriculum was not complete and was presented as a "work in progress." Sugrue Rebuttal ¶ 10. Curriculum by its nature is a "work in progress." This caveat by the developers of this timeline is not exceptional and should not be grounds for dismissing the curriculum itself. The importance of the curriculum is to demonstrate that a leading university on Long Island is presenting a more balanced history than Dr. Sugrue provides in his report. Critchlow Reply ¶ 28.

199. In supporting his claim that the Critchlow Report contains "errors," the Sugrue Rebuttal points to the history of Levittown. Sugrue Rebuttal ¶¶ 32–39. Dr. Sugrue asserts that Levittown's initial covenant did not exclude Jews. *Id.* ¶ 32. This is rebutted by the following historical facts: (1) Charije Zehren, in his revealing article, "The Dream Builder," reports that the William Levitt's first high-end housing developments in Great Neck and North Strathmore and Westchester County, barred Jews. He quotes Yale University historian John Thomas Liell, that "But before laws and mores changed, Bill Levitt—a grandson of a rabbi—also restricted Jews

from his North Shore 'pride of company developments[;]" (2) Zehren quotes Paul Townsend, Levitt's former public relations man: "'Sure he [Levitt] went along with the local practice of real estate agents not selling to Jews. . . . History should show that Levitt was part of the ugly gentleman's agreement.'" Levittown sales employees were encouraged not to sell to Jews, especially if they appeared to be left wing. In the end, however, about a third of Levittown's residents were Jewish. Critchlow Reply ¶¶ 34(a), (b). The importance of Levittown, as made clear in the Critchlow Report and the Critchlow Rebuttal, is that, in 1948, the U.S. Supreme Court declared discriminatory covenants unconstitutional. If they continued as Dr. Sugrue finds on one occasion, such covenants were illegal and declined in the 1950s. This is but one example of the judicial system working as it should and of progress in Nassau County. *Id.* ¶ 35.

200. Dr. Sugrue characterizes the Critchlow Report's analysis of so-called racial appeals as "exculpatory." Sugrue Rebuttal ¶ 64. The Report does not condone or excuse such appeals but rather disagrees with Dr. Sugrue's description of his evidence as constituting a racial appeal. Critchlow Reply ¶ 68. For example, Dr. Sugrue seems to believe that any candidate characterizing him/herself as a "law and order" candidate or "tough on crime" is secretly (or perhaps not so secretly) a racist. Sugrue Rebuttal ¶ 64. He thereby does not allow for the possibility that candidates—and voters, including Black and other people of color—might believe that crime is an issue in a given district that needs to be met head on. Critchlow Reply ¶ 69. For example, according to the Pew Research Center, the majority of Black adults want funding for police departments in their communities to stay the same or increase. Indeed, respondents of a 2021 survey conducted by Ipsos found that a strong majority of Black (52%), Latino (66%), and Asian (61%) adults opposed efforts to defund the police. Being "tough on crime" does not automatically denote a racist. *Id.*

Thomas W. Alfano

201. Defendants engaged Thomas W. Alfano, an individual with extensive personal and professional ties to Nassau County to review the report by Plaintiffs' expert, Dr. Jonathan Cervas. *See generally* Cervas Report. Mr. Alfano has maintained a significant presence in Nassau County throughout his life, previously residing in various locations including North Valley Stream, Garden City, and East Rockaway, currently living in the Town of Hempstead, and having a family with strong connections to the area, including three children residing in East Meadow, Long Beach, and Island Park. In addition, Mr. Alfano has served as legal counsel to local communities within the County and held public office for 14 years on behalf of its citizens. *See* Alfano Rebuttal ¶¶ 1, 4, 6–7, 18; *see also* Transcript of the Deposition of Thomas Alfano, dated September 20, 2024 at 17:2–25 ("Alfano Dep.").

202. Mr. Alfano reviewed the Legislature's 2023 redistricting plan, Troutman Pepper's public memoranda, the public record related to the redistricting process, and the Cervas' Report, particularly the "Cervas Illustrative Plan." *See* Alfano Rebuttal ¶ 1. Additionally, Mr. Alfano examined high-quality images of each district within Dr. Cervas' Plan. *Id.*; *see also* Alfano Dep. at 40:8–10.

203. Based on this review, Mr. Alfano concluded that the Cervas Illustrative Plan divides numerous and varied communities-of-interest within Nassau County, favoring other considerations such as racial demographic targets. *See* Alfano Rebuttal ¶ 2.

204. Mr. Alfano highlighted that New York's Municipal Home Rule Law does not delineate what a "community of interest is," instead, he identified that "general caselaw and redistricting guidance ha[s] provided [] guideposts for determining what makes a community of interest." *Id.* ¶¶ 20–21.

205. Specifically, Mr. Alfano, identified that the Supreme Court has defined the "traditional redistricting criteria of 'communities of interest'" with respect to "political subdivisions or communities defined by actual shared interests." *Id.* ¶ 22 (citation omitted). Further, Mr. Alfano points to the New York Independent Redistricting Commission's definition of "community of interest," which defines the term to mean "a population which shares [ ] social and economic interests of importance," such as "similar standards of living, shared methods and patterns of transportation, or similar economic and societal concerns." *Id.* ¶ 23 (citation omitted). This definition further provides, as an "example, the population of a rural area might have different shared interests from those living in an urban area, as might those living in an industrial area from the priorities shared by those living in a primarily agricultural area." *Id.* (citation omitted). However, "[s]hared interests within a Community of Interest do not include relationships with political parties, incumbents, or political candidates." *Id.* (citation omitted).

206. Mr. Alfano found that "it is important to consider the important, nonpartisan interests that bind a community together, including but not limited to, social and economic interests, similar standards of living, shared transportation methods, and shared community experiences." *Id.* ¶ 24.

207. With this guidance in mind, Alfano found that Local Law 1 properly accounted for communities of interest in Nassau County. *See generally* Alfano Rebuttal. By contrast, the alternative, illustrative map Dr. Cervas provided did not adequately consider Nassau County's communities of interest. *Id.* ¶ 25. Dr. Cervas' map subordinates the core, traditional redistricting criteria of keeping Nassau County's communities of interest intact in favor of other considerations, such as the racial demographics of districts. *Id.* ¶ 26.

208. Dr. Cervas' proposed plan prioritized achieving certain racial demographic targets over maintaining communities of interest. *See id.* ¶¶ 25–26. The Cervas Illustrative Plan makes numerous redistricting choices that undermine and divide Nassau County's communities and geography, as that hypothetical map prioritizes racial demographics over the traditional redistricting criterion of keeping communities of interest intact. *See id.* ¶¶ 27, 88–89.

209. ***District 1.*** Dr. Cervas' Illustrative Plan for District 1 includes the entire Village of Hempstead and parts of West Hempstead to avoid splitting Hempstead, Valley Stream, and Freeport. *See id.* ¶ 29. However, the Village of Hempstead has its own municipal services, unlike West Hempstead, which shares services with nearby communities like Garden City South, Lakeview, Malverne, and Franklin Square. *Id.* The Enacted Map reflects these community ties by placing West Hempstead with its neighboring areas. *See id.* ¶ 30. Dr. Cervas defends his design of District 1 based on its 79.8% minority CVAP and his goal of creating districts where the CVAP of Black, Latino, and Asian residents exceeds 50%, but this approach indicates that there was a prioritization of racial demographics over other redistricting criteria. *See id.* ¶ 31.

210. ***District 2.*** In the Cervas Illustrative Plan, District 2 includes the Village of Westbury and New Cassell but splits portions of Uniondale and Hicksville, which fractures important communities of interest. *See id.* ¶ 32. Community leaders and residents had advocated for Uniondale to be fully incorporated into one legislative district due to their significant economic, transportation, and development interests, including major projects like the $5 billion Nassau HUB redevelopment. *See id.* ¶¶ 33–34. Similarly, Hicksville, a major transportation hub with a diverse economy and growing South Asian community, has been the focus of substantial housing and redevelopment projects. *See id.* ¶ 35. Local Law 1 respects these communities by keeping them whole, unlike the Cervas Illustrative Plan, which prioritizes racial demographics over maintaining

unified communities of interest, as evidenced by Dr. Cervas' goal of adjusting minority CVAP percentages in District 2. *See id.* ¶ 36.

211. ***District 3.*** Dr. Cervas' plan for District 3 includes Floral Park, Bellerose, Bellerose Terrace, Elmont, and North Valley Stream, but removes significant portions of Valley Stream and adds new areas, disrupting established communities of interest. *See id.* ¶¶ 37–38. This plan splits the Sewanhaka and Valley Stream Central high school districts and separates communities that share public services, such as those within the 5th police precinct. *See id.* ¶¶ 39–42. In contrast, Local Law 1 maintains these communities' integrity, incorporating areas like Millbrook into District 3 and ensuring that Valley Stream, North Valley Stream, and Elmont remain unified. *See id.* ¶ 43. These areas, which include a growing Muslim population and significant community institutions, are better represented together. *Id.* Dr. Cervas' plan prioritizes racial demographics over traditional redistricting criteria, aiming to avoid "packing voters of color" by creating a district with a 69.3% minority CVAP. *See id.* ¶ 44.

212. ***District 4.*** District 4 of the Cervas Illustrative Plan includes several communities but notably excludes Bay Park and parts of Oceanside that border the Western Bays and Reynolds Channel, unlike the Enacted Map. *See id.* ¶¶ 45–46. This exclusion fractures a well-defined community of interest that has collectively advocated for environmental restoration due to severe pollution from local sewage treatment plants. *See id.* ¶ 46. The united efforts of these communities, alongside non-profits and environmental groups, have secured significant state and federal funding for essential cleanup projects. *Id.* The exclusion of Bay Park and parts of Oceanside from District 4 undermines this collaborative effort and damages the cohesive representation needed to maximize the benefits of restored waterways and to foster new recreational and commercial opportunities. *Id.*

213. ***District 5.*** District 5 of the Cervas Illustrative Plan includes the Village of Freeport and parts of Baldwin and Oceanside, keeping Freeport whole but dividing Baldwin. *See id.* ¶ 47. The division disrupts Baldwin's cohesive community, which has a unified downtown centered around the Long Island Railroad Station and Grand Avenue. *See id.* ¶ 48. Community leaders and residents have strongly advocated for Baldwin to remain within a single legislative district to maintain its collaborative efforts in zoning amendments and securing funding for transit-oriented housing and downtown revitalization. *Id*. Dr. Cervas defends his redistricting decision by emphasizing racial demographics, noting that District 5 is 64.1% minority CVAP, but this approach overlooks the importance of preserving communities of interest. *See id.* ¶ 49.

214. ***District 6.*** District 6 of the Cervas Illustrative Plan includes the Village of Rockville Centre, Roosevelt, Lakeview, and parts of Baldwin and Uniondale. *See id.* ¶ 50. This plan splits the communities of Uniondale and Baldwin, disrupting important communities of interest that the Enacted Map kept intact. *Id.* Additionally, combining Lakeview and Rockville Centre in one district merges two distinct communities with different public services and interests. *See id*. ¶ 51. Lakeview is part of the Malverne School District and its Fire District services West Hempstead, while Rockville Centre has its own governance and services. *Id*. These distinctions justify the Legislature's decision to group Lakeview with Malverne and West Hempstead in District 14. *See id.* ¶ 52. Dr. Cervas' plan, however, prioritizes racial demographics, noting that District 6 is 61.1% minority CVAP, over these community considerations. *See id.* ¶ 53.

215. ***District 7.*** District 7 of the Cervas Illustrative Plan includes the Village of Valley Stream, South Valley Stream, Inwood, and splits the hamlet of Woodmere. *See id.* ¶ 54. This plan removes Inwood and much of Woodmere from the "Five Towns" community, which traditionally includes Lawrence, Cedarhurst, Woodmere, Hewlett, and Inwood. *See id.* ¶¶ 54–55. These

communities share services such as the Far Rockaway Branch of the Long Island Railroad, two school districts, and various community organizations. *Id.* The "Five Towns" also has a significant Jewish population with numerous synagogues, Jewish schools, and kosher establishments. *Id.* By splitting Inwood and Woodmere, the plan fractures this cohesive community. *Id.* The Nassau County Legislature's 2023 redistricting plan keeps the "Five Towns" intact in a single district, reflecting community interests. *See id.* ¶ 56. Dr. Cervas' plan, however, prioritizes achieving racial demographic targets, noting that District 7 is 61.8% minority CVAP, without addressing the impact on community cohesion. *See id.* ¶¶ 57–58.

216. ***District 8.*** District 8 of the Cervas Illustrative Plan includes Garden City, Stewart Manor, Garden City South, Franklin Square, and Malverne. *See id.* ¶ 59. However, this plan separates Malverne from its closely connected communities of Lakeview and West Hempstead, unnecessarily fracturing a strong community of interest. *See id.* ¶ 60.

217. ***District 9.*** District 9 of the Cervas Illustrative Plan includes several communities but removes Roslyn Harbor from Legislative District 11, disrupting its inclusion in the Hempstead Harbor Protection Committee. *See id.* ¶¶ 61–62. This committee unites various waterfront communities and their elected officials to collaborate on environmental protection efforts, interact with state and federal agencies, and to secure funding for Hempstead Harbor's cleanup. *See id.* ¶ 62. By splitting these communities into separate districts, Dr. Cervas' plan undermines their ability to advocate effectively for their shared environmental interests and conservation efforts. *See id.* ¶ 63.

218. ***District 10.*** District 10 of the Cervas Illustrative Plan includes New Hyde Park, Manhasset Hills, Searingtown, North Hills, Russell Gardens, Lake Success, and University Gardens. *See id.* ¶ 64. This plan removes Russell Gardens and Lake Success from the Great Neck

Peninsula, which includes several interconnected communities sharing transportation infrastructure and municipal services such as education, fire protection, and emergency services. *See id.* ¶ 65. For instance, these communities are part of the Great Neck School District and the Great Neck Park District. *Id.* By splitting these communities, Dr. Cervas' plan disregards their shared interests and services. *Id.* The Enacted Map keeps the Great Neck Peninsula communities united. *See id.* ¶ 66. Dr. Cervas justifies his boundaries primarily on racial demographics, noting the sizable minority population in District 10, without addressing the importance of maintaining community cohesion. *See id.* ¶ 67.

219. ***District 11.*** District 11 of the Cervas Illustrative Plan includes Sands Point, Manorhaven, Port Washington, Flower Hill, Plandome, Plandome Heights, Great Neck Plaza, Kensington, Great Neck Gardens, and Kings Point. *See id.* ¶ 68. This plan splits the Great Neck Peninsula communities by removing Lake Success, Russell Gardens, and University Gardens, disrupting their cohesion. *See id.* ¶ 69. Additionally, it separates core communities of interest surrounding Hempstead Harbor, further fragmenting unified neighborhoods with shared interests and services. *Id.*

220. ***District 13.*** District 13 of the Cervas Illustrative Plan includes East Meadow, North Merrick, North Bellmore, and North Wantagh. *See id.* ¶ 70. This plan fractures a significant community of interest by separating East Meadow from Salisbury, two closely connected communities that share a school district, various community organizations, and services such as the fire department. *See id.* ¶ 71. Both communities also utilize Eisenhower Park and have a vested interest in the development of the Nassau HUB. *Id.* The Enacted Map, unlike Dr. Cervas; plan, wisely keeps East Meadow and Salisbury together in a single district, maintaining their united interests and services. *See id.* ¶ 72.

221. ***District 14.*** District 14 of the Cervas Illustrative Plan includes Lawrence, Cedarhurst, Hewlett, East Rockaway, Lynbrook, and parts of Woodmere. *See id.* ¶ 73. This plan makes a significant error by splitting the "Five Towns" communities, separating Lawrence, Cedarhurst, Hewlett, and Woodmere from Inwood. *See id.* ¶ 74. This division undermines the cohesive community of interest that these areas share. *Id.* The Enacted Map keeps these tight-knit communities together, reflecting a better understanding of the area's longstanding connections. *Id.*

222. ***District 15.*** District 15 of the Cervas Illustrative Plan includes Levittown and Salisbury. *See id.* ¶ 75. This plan erroneously separates East Meadow and Salisbury into two districts, despite their significant and extensive ties, such as shared community organizations, services, and interests. *See id.* ¶ 76. This division lacks a valid basis and disrupts the cohesion of these closely connected communities. *Id.*

223. ***District 16.*** District 16 of the Cervas Illustrative Plan includes Muttontown, Syosset, Woodbury, and parts of Hicksville, Jericho, and Plainview. *See id.* ¶ 77. This plan erroneously splits Hicksville and divides Plainview, removing portions of it and excluding Old Bethpage from the district. *See id.* ¶¶ 78–79. These changes harm the communities of interest, which share many municipal services, including the Plainview-Old Bethpage School District, Library District, and Volunteer Fire Department. *See id.* ¶ 80. The Enacted Map keeps Plainview and Old Bethpage together in a single district, reflecting their strong community ties and the advocacy of local representatives. *Id.*

224. ***District 17.*** District 17 of the Cervas Illustrative Plan includes Old Bethpage, Bethpage, Farmingdale, Plainedge, and North Massapequa. *See id.* ¶ 81. This plan mistakenly splits Old Bethpage from Plainview, despite their strong, longstanding connections. *See id.* ¶ 82.

Additionally, it separates the Village of Farmingdale from South Farmingdale, which share numerous services, including the Farmingdale School District, Library District, Chamber of Commerce, and Fire District, as well as the Farmingdale Train Station. *See id.* ¶ 83. The Enacted Map correctly keeps these interconnected communities together in a single district. *Id*.

225. ***District 18.*** District 18 of the Cervas Illustrative Plan includes Oyster Bay, Bayville, Laurel Hollow, East Norwich, Upper Brookville, Old Brookville, Sea Cliff, Glenwood Landing, Glen Cove, Lattingtown, and Locust Valley. *See id.* ¶ 84. This plan makes a fundamental error by separating Glen Cove from related waterfront communities which are part of the Hempstead Harbor Protection Committee, thereby fracturing a strong community of interest. *See id.* ¶ 85. This division hampers their ability to effectively advocate for the unique issues affecting these coastal areas. *Id*.

226. ***District 19.*** District 19 of the Cervas Illustrative Plan includes South Farmingdale, Massapequa, Massapequa Park, and East Massapequa. *See id.* ¶ 86. This plan makes the error of splitting South Farmingdale from the Village of Farmingdale, a decision that lacks adequate justification and disrupts the cohesion of these closely connected communities. *See id.* ¶ 87.

Plaintiffs' Experts

Dr. Daniel Magleby

227. Plaintiffs' expert witness Dr. Magleby analyzed Local Law 1 "to determine whether the map violates the prohibition against partisan gerrymandering found in Section 34 of the New York Municipal Home Rule Law." Expert Report of Daniel B. Magleby, Ph.D., dated May 31, 2024 at 3 ("Magleby Report").

228. Dr. Magleby's analysis employed "an entirely different approach than that affirmed by the Court of Appeals in *Harkenrider*" and "d[id] not use the gerrymandering-index analysis"

that Dr. Trende utilized in that case. Troutman Feb. 27, 2023 Memo at 15. Instead, Dr. Magleby relied upon a partisan fairness metric, specially "a mean-median metric that no expert or court opined on in *Harkenrider*," *id.*, without citing any legal authority to support this alternative approach.

229. Unlike Dr. Trende who adhered to the *Harkenrider* methodology's use of the gerrymandering index, Dr. Magleby based his conclusions on his use of an alternative, "median-mean" "metric," Magleby Report at 35, that was not mentioned—let alone endorsed—in *Harkenrider*. This median-mean metric "focuse[s] exclusively on the median district," which Dr. Magleby calculated based upon the partisanship of districts in his own simulations. Trende Rebuttal at 10, 38. This metric "would have blessed" "the egregious pro-Democrat gerrymander that the Court of Appeals invalidated in *Harkenrider*." Troutman Feb. 27, 2023 Memo at 16.

230. Dr. Magleby explains that the median-mean metric "characterizes bias in a map as a comparison between a party's overall performance (the mean of the party's vote share in all districts) and the party's performance in the strategically important median district." Magleby Report at 35. However, this metric focuses on the effect or outcome of the map—*i.e.*, "whether or not districts ultimately perform for Republicans and Democrats." Trende Rebuttal at 38. Thus, Dr. Magleby's chosen metric does not provide any information relevant to Section 34's prohibition on partisan gerrymandering, which focuses on legislative *intent* in drawing the map and *not* whether there is ultimately a partisan *effect* under a contested normative theory of redistricting fairness. *See infra* pp.149–50.

231. Dr. Magleby also used different elections from those analyzed in *Harkenrider*, completely excluding even-year elections from his analysis in this case. *See* Trende Rebuttal at 28. Rather than both even-year and odd-year elections like Dr. Trende did in his expert report, *see*

Trende Report at 12 (even-numbered year analysis); *id.* at 41 (odd-numbered year analysis), Dr. Magleby only used data from elections held during odd years. However, this approach is flawed for multiple reasons. First, even-year elections "tend to be higher profile," thereby "reveal[ing] more about the actual partisanship of the district because [the even-year elections] aren't as susceptible to the unique local appeals of candidates." Trende Rebuttal at 28. Second, the even-year elections were the ones analyzed in *Harkenrider*, and Magleby cites no legal authority for his decision to ignore this precedent. Third, the New York state legislature recently passed legislation—which was introduced in January 2023, during the redistricting cycle at issue here—that would force all future elections for the Legislature to be held in even years. *See* S.B. S3505B, 2023-2024 Leg. Sess. (N.Y. 2023). This legislation, like the NYVRA, was struck down by one Supreme Court. *See* Decision, Order, & J., *Onondaga v. New York*, Index No.003095/2024, NYSCEF No.224 (N.Y. Sup. Onondaga Cnty. Oct. 8, 2024). Moreover, the ultimate fate of this even-year legislation is uncertain and thus necessitates consideration of all election data. Indeed, the New York Attorney General has appealed the decision striking down that legislation to the Court of Appeals, which appeal is pending. *See* Notice of Appeal, Index. No.003095/2024, NYSCEF No.238. At a minimum, Dr. Magleby's decision to ignore completely even-year elections undermines the usefulness of his analysis, as even Plaintiffs' expert Dr. Oskooii concedes that an "analysis of state and federal elections may shed light on voter behavior in county elections." Lockerbie Reply ¶ 9.

232. Notwithstanding the fact that partisan fairness metrics are improper under the *Harkenrider* methodology, Dr. Magleby ignores various other partisan fairness metrics that experts have suggested and defended as useful to measure whether a map is fair, such as the efficiency gap, partisan bias, and declination. Trende Rebuttal at 39, 47. And, in this case, these

partisan fairness metrics generally contradict Dr. Magleby's conclusion that the Enacted Map is a partisan gerrymander, particularly in even-year elections, *id.* at 39, demonstrating that Dr. Magleby hand-picked the only combination of partisan fairness metric—*i.e.*, the median-mean metric—and election year data—odd-year elections—*id.* at 39, that could consistently support a finding that the Enacted Map unfairly benefits Republicans.

233. Specifically, the Enacted Map generally performs well under all partisan fairness metrics when even-year elections are considered—even the mean-median metric. *Id.* at 39–40.

234. When odd-year elections are considered, the Enacted Map still generally performs well. *Id.* at 39. For example, the Enacted Map scores well under each partisan fairness metric when the 2017 and 2019 elections are considered. *Id.* And when analyzing the cumulative vote totals from the 2017-2021 odd-year elections, the Enacted Map scores well on all partisan fairness metrics, except for the mean-median metric. *Id.*

235. The only odd-year election in which the Enacted Map underperformed using multiple partisan fairness metrics—which, again, are improper under the *Harkenrider* methodology—was the 2021 election, when the Enacted Map scored poorly under the efficiency gap and the mean-median metric. *Id.*

236. Even though the Enacted Map generally performed worse in odd-year elections under these partisan fairness metrics, depending on the election analyzed, the metrics often undermined Dr. Magleby's conclusion that the Enacted Map is a partisan gerrymander, thereby highlighting their inconsistency.

237. Indeed, all races correlate strongly with each other and with the final 2021 Nassau Legislative races held before the Enacted Map was adopted. *See id.* at 29. If probing what the

legislature might have known when it drew the map in early 2023, the even numbered year races are just as probative as the odd-numbered years. *Id.*

238. Additionally, Dr. Magleby's analysis improperly required each simulated map to contain a minimum number of minority-majority districts—specifically, each map in Dr. Magleby's ensemble included four minority-majority districts. Trende Rebuttal at 35; *see also* Transcript of the Deposition of Daniel B. Magleby, Ph.D., dated October 2, 2024 at 121:24–122:7 ("Magleby Dep."). By programming the simulations in his analysis to create only maps that include a certain number of majority-minority districts, Trende Rebuttal at 35; *see also* Magleby Dep. at 121:24–122:7, Dr. Magleby built into his analysis a constraint that the Legislature did not use when it created and adopted of Local Law 1, *see* Troutman Feb. 16, 2023 Memo at 4; Troutman Feb. 27, 2023 Memo at 7. Dr. Magleby still proceeded to evaluate the Enacted Map against his ensemble, engaging in an "apples-to-oranges comparison that sheds no light on the Legislature's intent," Trende Rebuttal at 15, and which thereby negates any utility of Dr. Magleby's analysis.

239. The maps in Dr. Magleby's ensemble also fail to be functionally and technically contiguous. Even a small, 30-map sample of the thousands of maps in Magleby's ensemble clearly show numerous issues with contiguity. *See* Trende Rebuttal at 48–60.

240. At his deposition, Dr. Magleby, in agreement with Dr. Trende concerning applicable legal requirements, stated that the maps in his ensemble "should be technically contiguous," Magleby Dep. at 287:8–13, but openly acknowledged that "it is possible" the ensemble included maps with districts that lack technical contiguity, *id.* at 294:9–13. In addition, Dr. Magleby admitted that he "did not do anything to correct any maps from [his] ensemble in this case based on a lack of functional contiguity," *id.* at 282:3–7, and that "it is possible" that the ensemble also included maps with districts that lack technical contiguity, *id.* at 294:9–13.

Dr. Ari J. Stern

241. Dr. Stern was hired by Plaintiffs' counsel in this case to conduct an analysis of the Nassau County legislative districting plan adopted on February 27, 2023, focusing on its impact on partisanship and minority representation. Expert Report of Dr. Ari J. Stern, dated May 31, 2024 at ¶ 6 ("Stern Report").

242. Dr. Stern's analysis suffers from many of the same "infirmities as Dr. Magleby's." Trende Rebuttal at 2.

243. Dr. Stern asserts that the Enacted Map is a partisan and racial gerrymander, but his conclusions are flawed. Stern Report ¶ 9.

244. To begin, Dr. Stern has no meaningful response to Dr. Trende's gerrymandering index, which is the primary analysis Dr. Trende used not only here, but also in *Harkenrider*. As previously explained, the gerrymandering index is the only accepted method by the Supreme Court of New York to assess political gerrymandering. Here, it clearly demonstrates that the Enacted Map was not drawn with partisan intent. *See supra* pp.35–37.

245. Dr. Stern instead suggests removing the most Democratic district from the ensemble and recreating the gerrymandering index. Trende Reply at 18. His proposal would thus eliminate the best-fitting district for the Enacted Map and the worst-fitting district for the Ensemble districts, and then evaluate the map on the basis of those 18 districts. Dr. Stern cites no authority—no journal, peer reviewed article, research, or test—to support this novel and unusual method. *Id.* The method is therefore unreliable and fails to demonstrate that Dr. Trende's gerrymandering analysis, or the conclusions drawn therefrom, is inaccurate.

246. Dr. Stern also created his own ensemble of maps to analyze the Enacted Map. He could have, but did not, create a gerrymandering index with his ensemble, despite its endorsement in *Harkenrider*. Trende Rebuttal at 62–63.

247. Instead, he engages in an "effects analysis" rather than an intent analysis, which compares the performance of Democratic and Republican vote share in a median ensemble plan versus the enacted map to determine partisan intent. Transcript of the Deposition of Ari J. Stern, Ph.D., dated October 1, 2024 at 31:11–32:15 ("Stern Dep.").

248. To determine vote share and analyze his ensemble, however, Dr. Stern entirely ignored even-year elections and instead used ***only*** odd-year elections, *see id.* at 24:2–4, as opposed to Dr. Trende, who utilized both odd-year and even-year elections, *see, e.g.*, Trende Report at 12, 41. As explained with regard to Dr. Magleby, this approach of ignoring an important set of elections undermines Dr. Stern's analysis substantially. And, as noted above, future elections in Nassau may well be held in even-numbered years, providing additional reason to consider those elections. *See* Trende Rebuttal at 28 & n.37 (citing Senate Bill S3505B, 2023-2024 Leg. Sess. (N.Y. 2023); *Onondaga et al v. New York et al.*, No. 003095/2024 (N.Y. Sup. Onondaga Cnty. Mar. 24, 2024)); *see also supra* p.73.

249. And all races correlate strongly with each other and with the final 2021 Nassau Legislative races held before the Enacted Map was adopted. Trende Rebuttal at 29; *see also supra* pp.77–78. For example, if looking at the correlations between the various races proposed to measure partisanship and the actual county legislature outcomes in 2021, the strongest correlation is found with the 2020 presidential race. *Id.* The value of the 10th most Republican district in that race falls within the 95% confidence bounce of the ensembles. Thus, there is no justification to

consider the odd-numbered years over the even-numbered and certainly no reason to outright ignore the latter. *Id.*

250. Dr. Stern likewise used only even-year elections in prior ensembles he has created. Stern Dep. at 82:25–83:9. In fact, Dr. Stern was a non-testifying expert for defendants in the *Harkenrider* case, *id.* at 12:8–21, and in in performing his analysis of the maps there, he used only even-year races, *id.* at 83:10–20.

251. Dr. Stern also employs a "naïve interpretation" of Democratic and Republican vote share, by focusing on a 50% threshold. Trende Rebuttal at 64. Yet, whether a district becomes "Republican" or "Democrat" is not as simple as examining the 50-50 mark Dr. Stern proposes. *Id.* at 68. The 50-50 mark simply does not reflect actual results, even in close races. *Id.*

252. He similarly invents terms, such as "swing district" and "competitive district," assigning them arbitrary meanings that are advantageous to his analysis. *Id.* at 38, 64, 66.

253. Next, Dr. Stern's conducting a competitiveness analysis is at odds with the actual analysis of elections. *Id.* at 63. This exemplifies the difficulties that the wide variety of ways to measure gerrymandering creates. The differences in analyses can be consequential and illustrate the importance of allowing an expert to select a single, well-established set of metrics. *Id.* Dr. Stern's analysis also shifts from an intent analysis to an effect analysis.

254. Dr. Stern is a mathematician and not a political scientist or elections analyst. Stern Dep. at 5:19–6:4. He has no relevant experience predicting elections. *Id.* at 6:5–10. He has never created an ensemble of maps for litigation before this case. *Id.* at 8:1–3. He is, thus, not qualified to provide an effects-based analysis of the Enacted Map, which requires knowledge and training in the field of political science.

255. Dr. Stern's suggestion to focus on "strategically important" districts is untenable as neither he nor any other of Plaintiffs' experts can agree upon a definition of at what point a district becomes "strategically important." Trende Reply at 14. And examining individual districts in maps generates a tremendous number of false positives. *Id.* at 17.

256. While the gerrymandering index has a straightforward interpretation and punishes large outliers, focusing on individual districts can lead to misleading conclusions. *Id.* at 14. Small changes in how a computer algorithm draws districts compared to human decisions can result in meaningful differences in partisanship at the district level. *See id.* Examining individual districts, as Dr. Stern suggests, can generate a high number of false positives, as even maps drawn without partisan intent can have outliers. *Id.* at 15–17. Many maps in an ensemble may naturally contain outliers, but Dr. Stern's approach would incorrectly identify a significant portion of these maps as having partisan intent. *Id.* Thus, this suggested method only serves to complicate the analysis and makes it difficult to reach reliable conclusions about partisan intent. *Id.* at 17–18.

257. The gerrymandering index is a better method to measure partisan intent because it "sidesteps" these problems, *i.e.*, defining concepts like "competitive" and instead examines the degree to which districts depart overall rather than focusing on certain districts. Trende Rebuttal at 66.

258. To assess whether the Enacted Map was racially gerrymandered, Dr. Stern relies on Citizen Voting Age Population ("CVAP") data. CVAP data—unlike Voting Age Population ("VAP") data, which Dr. Trende uses—has significant error margins. *Id*. at 69–75. This is because CVAP data is drawn from a special publication of the American Community Survey ("ACS"), not actual counts.

259. VAP is more reliable because it is a decennial census product and therefore reflects actual counts and is much less prone to errors. *Id.* at 71.

260. Unlike the census, which at least seeks to speak with every American, the ACS data are a sample. Effectively, the ACS is an extremely large national poll of Americans, from which the characteristics of the actual population may be estimated. But like all polls, it has error margins. *Id.* at 71–72. At the national level, these poll differences and error margins are miniscule. When examining lower populations, however, they can be considerable. *Id.* at 72. For example, consider the block groups within District 9 in the Enacted Map. According to the 2022 data, these groups have an estimated CVAP minority population of 31,022 and an estimated total CVAP of 85,605. This results in an estimated minority CVAP percentage of 36.2%. However, the 90% error margin for the minority population in these block groups is +/- 2,055 minority citizens. Additionally, the error margin for the total CVAP is +/- 3,052 citizens. *Id.*

261. Since both the numerator (minority CVAP) and the denominator (total CVAP) are estimates, the error margins are larger than expected given the sample size. The 36.2% estimate has a 90% confidence interval of +/- 2.7%. Therefore, using traditional social science criteria, one cannot rule out the possibility that the actual minority CVAP is as low as 33.5% or as high as 38.9%. This uncertainty applies to every estimated district, as to every district in the ensemble. However, the dotplots/boxplots only report the point estimates and do not account for this uncertainty. Consequently, the dotplots/boxplots and district estimates layered over them do not capture the true uncertainty in the estimates. *Id.*

262. CVAP data is also prone to error because precincts do not necessarily follow block group boundaries and, thus, districts may slice through a large number of block groups. Stern Dep. at 55:9–11; Trende Rebuttal at 72. The Nassau County countywide election data used by Dr. Stern

was only provided at the precinct level. Stern Report ¶ 23. However, CVAP data is only available at the Block Group level. Accordingly, for each DOJ racial category, CVAP in each Block Group has to be prorated to its constituent Blocks in proportion to the VAP in that same DOJ racial category, which is not an exact science.

263. While there are accepted social science techniques for making the allocation between those within the district and those outside of it, they are by no means perfect. Trende Rebuttal at 74. These techniques introduce additional error, as some individuals residing within the district may be misclassified as living outside of it, and vice versa. *Id*. Further, reducing the population of the block groups increases the sampling error margin by an unknown amount. *Id*. There is simply no clear mathematical formula for adjusting sampling error for disaggregation, as opposed to aggregation. *Id*.

264. Finally, among other things, CVAP is not prisoner adjusted, which can lead to a disjunction between the counts used for New York Law and the census results. *Id.* at 71.

265. However, using either data—CVAP or VAP—as Dr. Trende persuasively explains, contrary to Dr. Stern's suggestions, the enacted maps do not show signs of racial gerrymandering, as there are no significant deviations between the Enacted Map and the ensembles. *Id.* at 75.

Dr. Kassra Oskooii

266. For the NYVRA claim, Plaintiffs primarily rely on the expert analysis of Dr. Oskooii, who 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." Expert Report of Dr. Kassra A.R. Oskooii, dated May 31, 2024 at 27 ("Oskooii Report"). Dr. Oskooii reached that conclusion by relying on data from a limited set of hand-picked elections that were favorable to his thesis, ignoring a large amount of relevant

elections, and employing a legally improper definition of "usually defeated." *See generally* Oskooii Report.

267. Dr. Oskooii only "examined the eight most recent, contested, county-wide, odd-year contests" and five "contested odd-year elections held in years 2015 and 2013," *id.* at 13, 18; *see* Transcript of the Deposition of Kassra A.R. Oskooii, Ph.D., dated September 20, 2024 at 170:9–14 ("Oskooii Dep."); *see also* Oskooii Dep. at 89:16–20 ("I looked at odd-year elections going back to 2013 . . . ."); Oskooii Dep. at 144:22–145:2 ("I only looked at countywide elections because those countywide elections were on the same ballot as subject jurisdiction in which this case is about county legislature. And my analysis is from 2013 to 2021, which include five election cycles."); Oskooii Dep. at 126:1–7 ("[T]his is a universe of countywide elections and odd years that cover the entire county . . . .").

268. Dr. Oskooii analyzed 13 elections in total between 2013 and 2021. Oskooii Report at Table 7. Dr. Oskooii declined to include the 2019 District Attorney election because he admits that it does not have evidence of racially polarized voting. Oskooii Dep. at 229:16–24; Oskooii Rebuttal ¶ 122. There is no reason to only view races with polarization to assess minority-preferred candidates' competitiveness. Lockerbie Rebuttal ¶ 39.

269. Dr. Oskooii did *not* examine any even-year elections. Oskooii Report at 13, 18; *see* Oskooii Dep. at 170:9–14; *see also id.* at 89:16–20 ("I looked at odd-year elections going back to 2013 . . . ."); *id.* at 144:22–145:2 ("I only looked at countywide elections because those countywide elections were on the same ballot as subject jurisdiction in which this case is about county legislature. And my analysis is from 2013 to 2021, which include five election cycles."); *id.* at 126:1–7 ("[T]his is a universe of countywide elections and odd years that cover the entire county . . . .").; *see also id.* at 90:2–7. By doing so, Dr. Oskooii simply ignores a swath of electoral results

that "contradict[ ] his thesis." Trende Rebuttal at 77–78. For example, "White voters didn't vote sufficiently as a bloc to defeat the minority candidate of choice" in 2016. *Id*. at 78. Indeed, Hillary "Clinton carried Nassau County by six points" in the Presidential election, "while Schumer carried it comfortably" in the U.S. Senate race. *Id.* The same is true of 2018, where "White voters backed the Republican candidate[s]" for Governor, Attorney General, and Senate, but "they did not vote sufficiently as a bloc to defeat the minority candidate of choice." *Id*. at 79. That year, Democratic gubernatorial candidate Andrew Cuomo won Nassau County "by just over 15 points," Democratic Attorney General Letitia James carried the County "by around 14 points," and Democratic U.S. Senator Kristen Gillibrand carried it "by 18 points." *Id*. And again, in 2020, White voters backed the Republican Presidential candidate, Donald Trump, but "President Biden, the minority candidate of choice, nevertheless carried the county by ten points." *Id*. at 80.

270. This is consistent with the fact that all races correlate strongly with each other and with the final 2021 Nassau Legislative races held before the Enacted Map was adopted. *Id.* at 29; *see also supra* pp.77–78.

271. As noted, that future elections in Nassau County may well be held in even-numbered years provides additional reason to consider those elections. *See* Trende Rebuttal at 28 & n.37 (citing Senate Bill S3505B, 2023-2024 Leg. Sess. (N.Y. 2023); *Onondaga et al v. New York et al*., No.003095/2024 (N.Y. Sup. Onondaga Cnty. Mar. 24, 2024)); *see also supra* p.73.

272. Dr. Oskooii's methodology uses the fully Bayesian Improved Surname Geocoding to estimate the race and demographics of Nassau voters, Oskooii Report ¶ 37, of which Dr. Oskooii could not identify any peer-reviewed articles citing this as an accepted methodology, Oskooii Dep. at 97:25–98:4. This method has an overall 11.98% error rate, with varying percentages across racial groups, Lockerbie Rebuttal ¶ 43, and Dr. Oskooii does not provide any significance tests as

he "can't calculate the specific error rate … in Nassau County," Oskooii Dep. at 105:5–8. To estimate vote choice using this fully Bayesian Improved Surname Geocoding method, Dr. Oskooii used a software package called eiCompare, which was authored by Dr. Oskooii himself. Oskooii Report ¶ 42; Oskooii Dep. at 116:8–12.

273. Dr. Oskooii based his opinion on the fact that "the minority favored candidates "were defeated in 5 out of 8 [county-wide] contests" he examined, Rebuttal Expert Report of Dr. Kassra A.R. Oskooii, dated July 20, 2024 at ¶ 41 ("Oskooii Rebuttal"). "This, of course, tells us they won in 3 of these elections," Lockerbie Reply ¶ 41; *see also* Oskooii Dep. at 128:19–23 (Q: "So of the eight races that you looked at, the candidate referred by POC voters won three of them. Is that correct?"; A: "That is correct, with the caveats that I mention in the report."), and this in no way shows that minority-preferred "candidates or electoral choices" lose a significant majority of elections across Nassau County, *see* N.Y. Elec. L. § 17-206(2)(b)(ii).

274. Dr. Oskooii only reached a contrary conclusion based on his belief of "usually defeated" to mean losing in only "50 percent" of elections, despite acknowledging there is "no bright-line rule…that the Court has established" as to its meaning. *See* Oskooii Dep. at 128:5–15; *id.* at 128:5–15 ("Well, the question is, do minority preferred candidates usually get defeated. There is no bright-line rule that I'm aware of that the Court has established, but for all intents and purposes, usually mean more often than not more the 50 percent. Now, in this particular instance we have diversion candidate preferences in seven out of eight, so certainly more often than not, well over 50 percent."); *id.* at 129:7–12 (claiming 50 percent is a "logical or common-sense definition of usually").

275. Further, Dr. Oskooii ignored a large swath of electoral results that "contradict[ ] his thesis" by showing that "White voters do not usually vote as a bloc to defeat the minority

candidates of choice here." Trende Rebuttal at 77–78; *see also* Oskooii Dep. at 188:4–189:4 (Q: "[In Dr. Trende's report it states] in 2016, White voters didn't vote sufficiently as a bloc to defeat the minority candidate of choice, as Clinton carried Nassau County by six points, while Schumer carried it comfortably.". . . . A: "In the second one where he said, no, they have diversion candidate preferences, nevertheless, the preferred candidate of minority voters prevailed, so the White-bloc voting was not sufficient to deny Clinton from winning in Nassau County."). Despite admitting that an "analysis of state and federal elections may shed light on voter behavior in county elections," Oskooii Rebuttal ¶ 7, Dr. Oskooii ignored this relevant election data, *see* Lockerbie Reply ¶ 9, and "fail[ed] to consider that white crossover voting is making minority favored candidates both competitive and successful," *id.* ¶ 46. In fact, in many of the state-wide federal elections, White voters "did not vote sufficiently as a bloc to defeat the minority candidate of choice." Trende Rebuttal at 78–79.

276. But even only examining Dr. Oskooii's "sparse dataset," Trende Rebuttal at 77, "his own data defeats [his] claim," Lockerbie Rebuttal ¶ 10. The evidence shows that minority-preferred candidates routinely win elections in Nassau County and are at least competitive in elections where they are unsuccessful, regardless of whether we analyze district-by-district or countywide or state-wide elections. *See* Lockerbie Rebuttal ¶¶ 35–38.

277. For example, in the County Executive election of 2017, the minority favored candidate won 9 out of the 19 districts. *Id.* ¶ 12. In the County Comptroller election of 2017, the minority favored candidate won 10 out of the 19 districts. *Id.* ¶ 13. In the County Clerk election of 2017, the minority favored candidate won 8 out of the 19 districts. *Id.* ¶ 14. In the District Attorney election of 2019, the minority favored candidate won 15 out of the 19 districts. *Id.* ¶ 15. In the County Executive election of 2021, the minority favored candidate won 8 out of the 19

districts. *Id.* ¶ 16. In the County Comptroller election of 2021, the minority favored candidate won 6 out of the 19 districts. *Id.* ¶ 17. In the County Clerk election of 2021, the minority favored candidate won 4 out of the 19 districts. *Id.* ¶ 18.

278. Of the 13 total countywide elections Dr. Oskooii analyzed between 2013 and 2021 (excluding the 2019 District Attorney race, *see supra* p.82), five of the minority-preferred candidates (Democrats) received the majority of votes (*i.e.*, won the election). Oskooii Report at Table 7. In other words, of the 13 countywide elections Dr. Oskooii analyzed, the minority-preferred candidate (Democrat) was defeated eight times. *Id.* But of those eight times where the minority-preferred candidate (Democrat) was defeated, one election was by a 0.8% margin, another by a 4.8% margin, and another by an 8.6% margin. *Id.*

279. Of the last eight presidential elections five of them had a Democrat prevailing. Oskooii Dep. at 85:4–15. Dr. Oskooii admits that "in even-year statewide and federal elections, Democrats have prevailed more often than not." *Id.* at 158:15–23; *see also* Lockerbie Rebuttal ¶ 21.

280. Finally, Dr. Oskooii's rebuttal analysis illustrates the problem identified with respect to Dr. Cervas's analysis, focusing only on a single region. *See* Oskooii Rebuttal at 28–29. Dr. Oskooii examines districts in the area that Dr. Cervas identifies as potentially giving rise to majority-minority districts. *Id.* at 29; Trende Reply at 20. In doing so, Dr. Oskooii also fails to recognize that redistricting frequently involves making trade-offs, such that when Democratic margins are built up by moving certain voters to one district, it comes at the expense of Democratic votes in another district(s). Trende Reply at 21; *see also* Trende Rebuttal at 92–96.

281. Notwithstanding this fact, Democratic candidates performed well in this hand-picked region. For example, in this region, Democrats carried the 2022 State Comptroller race,

the 2022 Senate race, the 2016 Presidential race, the 2018 Senate race, the 2020 Presidential race, the 2017 County Executive race, the 2017 County Comptroller race, the 2019 DA race, and the 2021 County Executive race. Trende Rebuttal at 92–95. They lost it in the 2022 Attorney General race, the 2022 gubernatorial race, the 2017 County Clerk race, the 2021 County Clerk race, and the 2021 County Comptroller race. *Id.*

282. Despite the fact that minority-preferred candidates generally prevail in elections in this region, Dr. Oskooii still proceeds to analyze a single, hand-selected area *within* this specific region where minority-preferred candidates usually lose (except in District 5 where minority-preferred candidates frequently win), albeit often by narrow margins, to support his finding that voting is racially polarized in this region. *Id.* at 29–30.

283. Yet, building up the number of minority influence districts keeps overall performance the same, while in other instances reduces performance. Trende Reply at 21. Thus, minority candidates of choice often do just as well under the Enacted Map as under Dr. Cervas' Illustrative Plan, undermining Dr. Oskooii's findings. *Id.*

Dr. Jonathan Cervas

284. Plaintiffs' expert witness Dr. Jonathan Cervas offers a district-based approach to conduct the NYVRA's usually defeated analysis. *See generally* Cervas Report. Dr. Cervas' approach requires a political subdivision to only examine hand-selected districts within the jurisdiction and then to redraw those districts so that candidates supported by citizens lumped together by race win more seats, while candidates supported by citizens lumped together by other races will win less. *See id*. at 49–50.

285. Specifically, Dr. Cervas suggests that a political subdivision should only analyze districts "in which there are significant minority populations" and then pull minority voters "from

surrounding districts, in order to increase the amount of minority voters in the district[s] you are analyzing" and ensure these minority voters-preferred candidates are not "usually defeated" in the analyzed districts. *See* Cervas Dep. at 271:13–272:18.

286. Dr. Cervas's map, scores comparably to Local Law 1 according to the *Harkenrider* analysis. *See* Trende Rebuttal at 87–92. However, it does not adequately account for communities of interest. *See* Cervas Dep. at 246:4–22.

287. Dr. Cervas' analysis too fails to show that minority-favored candidates are usually defeated in Nassau County.

288. First, Dr. Cervas incorrectly suggests that six minority-majority districts should be the target used [in relation to Dr. Magleby's ensembles being drawn to an "arbitrary racial target"]. Trende Rebuttal at 15–16.

289. Second, Dr. Cervas focuses only upon seven districts, obscuring the fact that redistricting is often a "robbing-Peter-to-pay-Paul" exercise. By moving minority voters favoring Candidate A (here, typically a Democrat) out of one district, other districts will necessarily become more concentrated with voters that support Candidate B (here, typically a Republican). Trende Rebuttal at 94.

290. Dr. Cervas' examination of a hand-picked set of "only [ ] seven districts" out of Nassau County's nineteen, Trende Rebuttal at 94; *see* Lockerbie Rebuttal ¶ 46, renders him unable to show that minority-preferred candidates will usually be defeated in Nassau County. *See also* Cervas Dep. at 190:23–191:5 (Q: "So on your table seven, you only include districts one, two, three, five, six, seven and fourteen. Doesn't it matter how minority preferred candidates fare in other districts under [both] maps?" A: "I don't think so.").

291. By ignoring the necessary impact that moving minority voters from around the County into these districts would have on minority-preferred candidates' ability to get elected in the County's twelve other districts that he did not individually analyze, *see* Trende Rebuttal at 83, 94, Dr. Cervas failed to provide "an analysis of the competitiveness of the minority favored candidates in the districts" countywide, *see* Lockerbie Rebuttal ¶ 47, and cannot demonstrate whether his map actually "give[s] minorities a reasonable opportunity to elect candidates for their choice in more districts" than under Local Law 1, *see* Trende Rebuttal at 87.

292. The performance of Dr. Cervas' map varies depending on the races selected: in some cases, it creates an additional minority-performing district; in others, it reduces one; and in yet others, the performance remains the same, with districts 8, 15, and 19 under the Enacted Map never being carried by minority-preferred candidates, making it unclear whether he improves minority opportunity overall, as he never explicitly sets out to demonstrate it. Trende Rebuttal at 95–96. In the 2017 clerk's race, there is no net change as Dr. Cervas creates a new minority-preferred district (District 7) but removes one elsewhere (District 10). *Id.* at 95. The 2017 Comptroller and Executive races show a new district won by the minority-preferred candidate, achieved by making District 18 marginally more Democratic. *Id.* However, this is counterbalanced by transforming District 7 from a district where the non-minority-preferred candidate won by less than two points to one where the minority-preferred candidate won by 14 points, while District 10 shifts from a 54.9% win for the minority-preferred candidate to a 48.1% loss. *Id.* In the 2019 District Attorney race, District 7 votes more heavily for the minority-preferred candidate, but the partisanship in Districts 14 and 15 is swapped, resulting in no net gain for minority-preferred candidates. *Id.* In the 2021 clerk race, District 5 flips to support the minority-preferred candidate. *Id.* However, in the 2021 Comptroller race, Dr. Cervas' map results

in an additional district where a minority-preferred candidate loses by making a slightly Democratic district more solidly Republican. *Id.* Finally, the 2021 County Executive race under Dr. Cervas' map creates three additional districts where the minority-preferred candidate wins, although narrowly in all three instances. *Id.* Notably, these districts supported the minority-preferred candidate in other elections as well. *Id.*

293. Third, like all of Plaintiffs' other experts, Dr. Cervas only relied on cherry-picked, odd-year election data, *see* Cervas Dep. at 149:12–22. "[T]he performance of Dr. Cervas' map is dependent upon the races selected," and "using the even-numbered year races, Dr. Cervas' map *actually decreases the number of races that the minority-preferred candidate won.*" Trende Rebuttal at 94–96 (emphasis added). Because future elections in Nassau may well be held in even-numbered years, this provides additional reason to consider those elections. *See id.* at 28 & n.37 (citing Senate Bill S3505B, 2023-2024 Leg. Sess. (N.Y. 2023); *Onondaga et al v. New York et al.*, No.003095/2024 (N.Y. Sup. Onondaga Cnty. Mar. 24, 2024)); *see also supra* p.73.

294. Ultimately, "Dr. Cervas does not demonstrate that his map[ ] improve[s] minority opportunity to elect candidates of their choice," Trende Rebuttal at 87, because taking all relevant elections into account reveals that "minority candidates of choice often do just as well under the Enacted Map as under the Cervas map," Trende Reply at 21.

295. Specifically, Dr. Cervas examined three elections in 2017 and four elections in 2021, but did not examine the election in 2019. *See* Cervas Report at Table 6; Cervas Dep. at 176:6–20. Of the three 2017 elections, the minority-preferred candidates won two of those three. *See* Cervas Report at Table 6. And in the third election, the minority-preferred candidate received over 45% of the vote share. *Id.*

296. Indeed, using the 2022 CVAP data available in Dr. Cervas' dataset and in the baseline simulations, there is no demonstrable significant deviations from the ensemble, evidencing that there is no racial gerrymandering here. Trende Rebuttal at 75.

297. Unsurprisingly, Dr. Cervas' map is a racial outlier in terms of the demographic composition of districts when compared to the neutral ensemble. This is true whether you use VAP to measure partisanship or CVAP. *Id.* at 83.

298. "In fact, even when compared to a subset of [Defendants'] 500,000 map ensemble that consists only of maps drawn with six majority minority CVAP districts (there are 58,888 such maps), Dr. Cervas' map still presents as a statistical outlier." *Id.* at 87.

299. Dr. Cervas' maps do not present as strong political outliers, even though the racial features of the maps are changed considerably. *Id.* at 87.

300. Fourth, at his deposition, Dr. Cervas explained that he developed his map to avoid splitting political subdivisions, but did not otherwise account for communities of interest. Cervas Dep. at 246:4–22.

301. While Dr. Cervas acknowledges there are other approaches to communities of interests, his approach counts the number of political divisions that have been split and he did not consider any communities of interest other than what he defined as "objective political subdivisions." *Id.* at 242:1–16, 247:13–18. This does not account for any local knowledge or considerations about Nassau County, for which Dr. Cervas does not have. *See id.* at 236:2–237:4.

302. Dr. Cervas admitted that he did not perform an analysis under *Gingles* prong one of the test for the 2023 redistricting plan, instead admitting that the test was "equivalent to Gingles one." *Id.* at 147:2–19. Dr. Cervas claimed that the plan "creates geographically compact districts, [ ] and demonstrates that you can draw six majority-minority districts." *Id.*

303. Combining multiple different minority groups together in coalition districts—as done by Plaintiffs' expert Dr. Cervas—is not permitted under *Gingles*, *see Petteway v. Galveston Cnty.*, 111 F.4th 596, 599 (5th Cir. 2024) (*en banc*); which requires the identification of specific areas where new majority-minority districts would be created and the conducting of a district-by-district analysis to show that all three preconditions, including the first, would be satisfied as to each of those districts, *see Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 404 (2022), which Dr. Cervas did not do; Cervas Dep. at 118:22–119:1, 120:7–11, 124:1–5. Moreover, Dr. Cervas did not identify any area where the Legislature could have drawn a majority-minority district without combining multiple different minority groups. The only record evidence relating to a non-coalitional majority-minority district related to the agreed analysis of Troutman Pepper and NYCLU that such a district would be unconstitutional. *See supra* p.14.

Dr. Thomas Sugrue

304. Dr. Thomas Sugrue is offered by Plaintiffs as a researcher of patterns of racial discrimination and socio-economic status disparities by race among Nassau County residents. *See* Expert Report of Thomas J. Sugrue, dated May 31, 2024 at ¶ 6 ("Sugrue Report").

305. As a Professor, Dr. Sugrue has taught no classes in Nassau County, no classes about Nassau County, and has not published any scholarly papers or articles specifically related to Nassau County. *See* Transcript of the Deposition of Thomas J. Sugrue, Ph.D., dated September 27, 2024 at 29:9–16, 36:4–6 ("Sugrue Dep.").

306. Dr. Sugrue's accounts of Nassau County history arbitrarily assume an inaccurate monochromic, linear, and unchanging pattern of racism in Nassau County over the last hundred years. Critchlow Reply ¶ 9.

307. One fundamental error in Dr. Sugrue's analysis is that it is improper to automatically jump to the conclusion that since racialized policies and behavior occurred in the past—even up to a decade ago, let alone a hundred years earlier—today's political or legal environment, therefore, is a direct result of this racism. *Id.* ¶ 11.

308. In so doing, Dr. Sugrue overlooks critical advances and present practices of voting, political participation, housing, and education while ignoring the great advancements of Nassau County to overcome discriminatory practices and promote growth in participation of minority groups in local politics, thereby presenting a misleading picture of Nassau County today. Critchlow Rebuttal ¶¶ 9, 11; *see also* Critchlow Report ¶ 13.

309. Dr. Sugrue's flawed and incomplete perspective of Nassau County picks and chooses those events that fit his "preordained schema." Critchlow Reply ¶ 1, and, thus, ignores evidence that shows that Nassau County's political and legal systems actively address problems of injustice.

310. While Dr. Sugrue attempts to discredit Dr. Critchlow by stating that he fails to use essential U.S. Census data and legal cases, and by pointing out alleged factual errors and omissions, *see generally* Sugrue Rebuttal, it is Dr. Sugrue, not Dr. Critchlow, who selectively interprets evidence and ignores minority progress in Nassau County.

311. Dr. Sugrue's approach neglects the appropriate nuance and complexity and is entirely untethered from consideration of today's political environment, including insofar as his recounting of the history of the Ku Klux Klan in Long Island in the mid-1920s blindly ignores that the KKK in Long Island in the 1920s was primarily anti-Catholic, anti-Jewish, and pro-temperance, in their ideology. Critchlow Rebuttal ¶¶ 12–13. Dr. Sugrue also fails to acknowledge

Nassau County's history of considerable community resistance to KKK activities, rendering his account of Nassau County's history incomplete. *Id.* ¶ 14.

312. Dr. Sugrue similarly cites the economic, social, and political hurdles that immigrants in Long Island face, Sugrue Report ¶¶ 13–18, but he ignores any data about positive immigrant outcomes, including the fact that 60 percent of immigrants with full-time jobs earn at least $48,000 per year, putting them in the middle class; roughly two-thirds of the immigrant Black population makes a middle-class income or better and 60% of U.S.-born Blacks make a middle-class income; and when examining the upper-wage occupations, 54% of health care professionals are immigrants, including 4,300 of 12,000 Long Island physicians. Critchlow Rebuttal ¶ 15. Thus, contrary to Dr. Sugrue's narrative, immigrants in Nassau County range considerably in occupational and educational achievement and socio-economic standing. *Id.*

313. Dr. Sugrue's Report downplays and/or ignores the responsiveness of Nassau County to Blacks, Hispanics, and Asian Americans and the participation of those minority groups in local politics. *Id.* ¶ 9.

314. Dr. Sugrue primarily relies on reports and studies conducted *over ten years ago*, improperly diminishing the progress made to overcome Nassau County's history of discrimination and segregation. *See, e.g.*, Sugrue Report ¶¶ 68 & n.101, 72 & n.107–08.

315. Dr. Sugrue relies on a 2012 study containing only 153 interviews with Black Nassau County residents, when combined with another 152 from Suffolk County, resulted in only a 15% response rate. Thus, an unrepresentative class of the 13% Black population of Nassau County. Sugrue Report ¶ 34 & n.30. However, Dr. Sugrue separately states that it is "problematic" to combine data from Nassau and Suffolk Counties when discussing the index of dissimilarity. Sugrue Rebuttal ¶ 21; *see also* Critchlow Reply ¶ 36.

316. As an additional example, Dr. Sugrue discusses at length a 2019 investigative report conducted by *Newsday* regarding housing discrimination in Nassau and Suffolk Counties. *See generally* Sugrue Report at D.3. However, Dr. Sugrue does not mention anywhere in his reports that (1) many of the impediments to fair housing present in Nassau County are present in other communities and parts of the United States, Sugrue Dep. at 100:4–16; (2) following the publication of this report, the Long Island Board of Realtors and New York State Association of Realtors redesigned their fair-housing classes and training programs, *id*. at 101:17–25; (3) the New York State Board of Real Estate promulgated new regulations to combat discriminatory actions, which became effective in June 2020, *id*. at 102:2–103:5; and (4) affordable housing projects in Nassau County are continuing to be proposed and developed due to the enactment of the Long Island Housing Act and the support of Nassau County Executive Laura Curran, *id*. at 107:7–15; 108:5–13.

317. This is especially ironic considering it is Dr. Sugrue who states that "[i]t is not historically accurate to cite civil rights gains without also considering setbacks, or to list the passage of anti-discrimination laws or the creation of agencies without also evaluating their implementation and effectiveness." Sugrue Rebuttal ¶ 11.

318. Legislative actions against discrimination in Nassau County demonstrate a functioning system that emphasizes the growth, diversity, and participation of minority populations, but yet, Dr. Sugrue conveniently ignores these developments despite his statement that historians must also "consider[] setbacks." *Id*.

319. Dr. Sugrue's analysis also ignores progress that has been made over the last five years in diversifying Nassau County, despite the fact that such continued diversification has even been celebrated in educational materials. *See* Critchlow Rebuttal ¶¶ 8–9.

320. Dr. Sugrue's discussion on the history of discrimination and segregation in education in Nassau County similarly fails to account for the considerable advancements made with respect to education and school reform. *Id.* ¶ 62.

321. In his report, Dr. Sugrue argues that the boundaries between white and non-white "school districts in Nassau County shape citizens' understandings of community and common interests." Sugrue Report ¶ 87.

322. Public education policy, funding, or the creation of school districts are complex social problems that the County Legislature plays little role in as compared to the federal government, state legislature and local townships. Critchlow Rebuttal ¶ 63. Education in New York is shaped by the collaboration and compromises among various stakeholders, including the Board of Regents, the legislature, the governor, the courts, mayors, teachers' unions, school administrators, and locally elected school boards. *See id.* ¶ 64.

323. Dr. Sugrue's opinion that minorities are underrepresented in the Nassau County Government workforce is also misleading and under-researched as he does not examine engagement of Blacks, Latinos, or Asian Americans in Nassau County politics at the local level. Critchlow Rebuttal ¶ 70. As Nassau County has grown more diverse, so has the representation of ethnic and racial groups in local government. For example, Republican James A. Garner was the first elected Black mayor on Long Island, serving the Village of Hempstead, in 1989 and served four terms despite the strong Democratic majority. Following him was a Black Democrat, the son of Jamaican immigrants, who served three terms. Currently, all of the Village's trustees are Black. *Id.* ¶ 73. Angel Soto was among the first Hispanic mayors in New York and served in South Floral Park from 2002 to 2010, when he was replaced by a Black candidate. The entire Village Board today including the Mayor, Police, and Fire Commissioner are all Black. *Id.*¶ 74. Dr. Sugrue

further undervalues Asian American and Indian political participation, which Dr. Critchlow easily rebuts. *Id.* ¶¶ 77–82.

324. Minority candidates have had success in both diverse and less-diverse villages. For example, the current mayor and previous trustee of Sea Cliff is the daughter of a Caribbean immigrant father. Critchlow Rebuttal ¶ 76. The population of Sea Cliff is more than 87% white. *Id.* Two of the four current trustees of Westbury are black, despite the 2021 population being 40% white, 18.9% black, and 29.4% Hispanic. *Id.*

325. Finally, Dr. Sugrue incorrectly claims that there is a "community of interest" comprised of all Asian, all Hispanic, and all Black communities. *Id.* ¶ 9. This conflation of minority groups, especially Asian Americans and Hispanics, into broad categories without noting multiple subgroups within each of these communities or generational differences within these groups is improper. *Id.* at ¶ 10(b). In fact, Asian Americans and Hispanics are made up of many subgroups that do not share places of origin, shared languages (in the case of Asian Americans), educational attainment or income levels, or shared residential communities. *Id.*

PROPOSED CONCLUSIONS OF LAW

Defendants Nassau County ("County") and the Nassau County Legislature ("Legislature"), Bruce Blakeman, Michael C. Pulitzer, and Howard J. Kopel (collectively, "Defendants") respectfully submit the following proposed conclusions of law:

I. Local Law 1 Does Not Violate Section 34 Of The New York Municipal Home Rule Law's Prohibition On Partisan Gerrymandering

326. Subsection 34(4)(e) of the New York Municipal Home Rule Law prohibits political subdivisions from engaging in partisan gerrymandering: "[d]istricts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." N.Y. Mun. Home R. L. § 34(4)(e).

327. Subsection 34(4)(e) of the Municipal Home Rule Law and Section 4 of Article III of the New York Constitution are worded identically. *See* N.Y. Const. art. III, § 4(c)(5).

328. Under the "presumption of regularity," the law "presumes that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything which his official duty requires to be done," and "[s]ubstantial evidence is necessary to overcome that presumption." *People v. Dominique*, 90 N.Y.2d 880, 881 (1997). Thus, county legislators charged with drawing redistricting plans are presumed to have complied with Section 34(4) when doing so—that is, they are presumed to have not engaged in partisan gerrymandering—and "substantial evidence" is needed to prove otherwise. *Id.*

329. The Court of Appeals' decision in *Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022)—which determined that the state legislature violated the New York Constitution's prohibition against partisan gerrymandering—provides the most relevant precedent for determining when a legislature engages in partisan gerrymandering under Section 34 because Section 34's partisan-gerrymandering prohibition virtually mirrors the New York Constitution's ban on partisan gerrymandering. *Compare* N.Y. Const. art. III, § 4 *with* N.Y. Mun. Home R. L. § 34(4)(e).

330. In *Harkenrider*, several "New York voters . . . challeng[ed] the [2022] congressional and senate maps" as "unconstitutionally gerrymandered," 38 N.Y.3d at 505, alleging the map was "enacted by the [state] legislature" with the "impermissible intent or motive . . . to 'discourage competition' or to 'favor[ ] or disfavor[ ] incumbents or other particular candidates or political parties,'" *id.* at 519 (quoting N.Y. Const. art. III, § 4) (alterations in original).

331. The Court of Appeals provided an evidentiary standard in line with the "presumption of regularity," *see Dominique*, 90 N.Y.2d at 881—namely, plaintiffs bringing such

gerrymandering claims must rebut "a strong presumption of constitutionality" afforded to "redistricting plans," where "legislation will be declared unconstitutional by the courts only when it can be shown beyond reasonable doubt that it conflicts with the Constitution after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible," *Harkenrider*, 38 N.Y.3d at 509 (citation omitted).

332. As for evidence of partisan intent, *Harkenrider* explained that "[s]uch invidious intent could be demonstrated [either] directly or circumstantially through proof of a partisan process excluding participation by the minority party and evidence of discriminatory results (*i.e.*, lines that impactfully and unduly favor or disfavor a political party or reduce competition)." *Id.* at 519.

333. With respect to using expert testimony about a map's discriminatory results, *Harkenrider* relied upon the partisan-outlier analysis conducted by Dr. Sean P. Trende. *Id.* at 506–08, 519–20. This analysis begins with the creation of an "ensemble" of thousands of potential maps through the use of a "computer simulation" that requires each map to conform with existing legal constraints, such that the ensemble illustrates the range of all possible maps that could have been adopted. *Id.* at 506. The difference between the average partisan lean of the districts in the ensemble and the particular partisan lean of the districts in a given map provides the "gerrymandering index" for that map. Trende Report at 10–12. Finally, to assess whether a proposed or enacted map is a partisan gerrymander, the average gerrymandering index for all ensemble maps is compared to the gerrymandering index of the proposed or enacted map to "reveal[ ]" the likelihood that the proposed or enacted map was developed under the same legal, nonpartisan requirements that constrained the computer simulation. *See Harkenrider*, 38 N.Y.3d at 506.

334. Dr. Trende's partisan-outlier analysis "revealed that the enacted map was an 'extreme outlier' that likely reduced the number of Republican congressional seats from eight to four"—halving the expected number of Republican seats—"by 'packing' Republican voters into four discrete districts and 'cracking' Republican voter blocks across the remaining districts in such manner as to dilute the strength of their vote and render such districts noncompetitive." *Id.* at 506. Tellingly, the map at issue in *Harkenrider* "ensur[ed] there were 'virtually *zero* competitive districts.'" *Id.* at 506–07 (emphasis added).

335. The *Harkenrider* Court ultimately concluded that the state legislature engaged in partisan gerrymandering, overcoming the presumption of constitutionality, a determination that the court grounded in the egregious facts of that case. *Id.* at 520–21.

336. As for the "exclu[sion] [of] the minority party," *id.* at 519, the Court of Appeals observed that "the Democrats in the legislature—in control of both the senate and assembly—composed and enacted . . . [the] redistricting maps, undisputedly *without any consultation or participation by the minority Republican Party.*" *Id.* at 505 (emphasis added; citations omitted). In fact, the *Harkenrider* Court noted that, in the view of Senate Democrats, "there was no reason for the Democratic super-majorities in both houses of the legislature to seek input or involvement from the Republican minorities' regarding the development of the[ ] legislative maps, characterizing such communications as inviting 'time-wasting political theater." *Id.* at 505 n.3 (alterations accepted; citation omitted).

337. Plaintiffs have not submitted the "substantial evidence [ ] necessary" to meet the high standard established in *Dominique*, 90 N.Y.2d at 881, and *Harkenrider*, 38 N.Y.3d at 506. They therefore fail to establish that Defendants engaged in partisan gerrymandering in violation of Section 34.

338. The process that culminated in passing Local Law 1 involved the minority political party throughout and was the opposite of the "largely one-party process" in *Harkenrider*, 38 N.Y.3d at 519.

339. First, Plaintiffs fail to present the "substantial evidence [ ] necessary," *Dominique*, 90 N.Y.2d at 881, to support their assertions that "Republicans dominated the map-drawing process" and that "Democratic legislators were consistently shut out," Pls.' Consolidated Mem. Of L. In Opp'n To Defs.' Mot. For Summ. J. at 6–10, Index No.611872/2023, NYSCEF No.187 (Nov. 11, 2024) ("Resp.") In fact, the evidence shows quite the opposite: the Presiding Officer met with the minority leader, convened with the entire Legislature to discuss and review the proposed maps twice, and amended his proposed map in accordance with the minority political party's concerns, including by incorporating four of the five major suggestions made by the minority party. *See supra* pp.10–11.

340. Second, while Plaintiffs assert that the Presiding Officer engaged "partisan" consultants, Resp.6, there is no record evidence of this. Instead, the record shows that the Presiding Officer 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 ("CIRC")[8]). That firm then retained Dr. Trende, the lead expert that the Court of Appeals credited in *Harkenrider*, who has also been appointed as a Voting Rights Act expert by the Arizona Independent Redistricting Commission, Trende Report at Ex.1 at 32, and as a special master by the Virginia Supreme Court to help redraw Virginia's state-legislative and Congressional district maps, Trende Report at 3.

[8] Counsel for Defendants represented CIRC in that litigation, as indicated in public filings. *See In re Colo. Indep. Cong. Redistricting Comm'n*, No.21SA208, 497 P.3d 493 (Colo. 2021).

341. Third, no record evidence suggests that the Presiding Officer rejected the TDAC's maps because he wanted a map more favorable to Republicans. Instead, the Presiding Officer rejected those maps because they were illegal partisan gerrymanders, including because they appeared to be drawn with partisan intent. For example, Dr. Trende informed the Presiding Officer that both of those maps were partisan outliers using the *Harkenrider* analysis. *See supra* pp.7, 13–14. Troutman Pepper also identified other legal flaws in maps, including that both maps appeared to engage in race-focused redistricting in violation of the Equal Protection Clause. *See* Troutman Feb. 27, 2023 Memo at 7. Plaintiffs do not dispute that the TDAC map created by the Republican Commissioners was a partisan gerrymander. And this Court already held that "Nicolello['s] reject[ion of] partisan maps prepared by the Democratic and Republican cohorts of TDAC" does "not constitute objective evidence of discriminatory intent and partisan bias." NYSCEF No.199 at 24–25 (June 7, 2024).

342. Fourth, the Presiding Officer's revisions to his proposed maps also do not constitute evidence of partisan intent because those revisions were made to accommodate the demands of the minority political party. Indeed, the Presiding Officer's revisions incorporated a majority of the requests Democratic legislators made on the record, while ensuring that the proposed map remained compliant with equal population requirements and respected Nassau County's communities of interest. *See supra* p.11. Some legislators and members of the public being dissatisfied with Local Law 1 is not evidence of the "minority party" being "exclud[ed]" from the map-drawing process, *Harkenrider*, 38 N.Y.3d at 519, but is merely evidence of the inevitable compromises inherent in the legislative process, especially when dealing with "complex" legislation like redistricting plans, *see Alexander*, 602 U.S. at 7. And in any case, that Local Law 1 does not *fully* adhere to the requests of a *single* party is certainly not evidence that the map was

drawn with partisan intent. The minority party primarily criticized the Presiding Officer for not proposing a map that created additional majority-minority districts. *Supra* pp.9, 17. However, the Presiding Officer rejected that request based on the legal advice he received from Troutman Pepper that it would be unconstitutional for him to purposefully create more race-focused districts in Nassau County, which advice was in turn based on Dr. Trende's *Gingles* analysis, which revealed that none of the County's districts satisfied the three *Gingles* preconditions. *See supra* p.17. Plaintiffs' experts may disagree with Dr. Trende's conclusion but "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.

343. Further, there is no evidence that the Legislature could have adopted an alternative map that would have better honored Nassau County's communities of interest considerations while remaining compliant with all relevant legal standards, because the only alternative map Plaintiffs proposed—Dr. Cervas' map—scored comparably to Local Law 1 on the *Harkenrider* analysis and does not adequately account for communities of interest. *See supra* pp.18, 63.

344. New York's Municipal Home Rule Law requires a county's legislative body to consider "[t]he maintenance of . . . communities of interest" when drawing a redistricting plan. N.Y. Mun. Home R. L. § 34(4)(e). New York law does not provide a definition for a community of interest, but the U.S. Supreme Court has broadly defined properly accounting for "communities of interest" redistricting criteria as drawing district lines that demonstrate "respect for political subdivisions or communities defined by actual shared interests." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). The New York Independent Redistricting Commission has also provided helpful guidance regarding the meaning of this redistricting criteria, defining a "community of interest" as

"a population which shares enough social and economic interests of importance that suggest said community should be included in a single district for effective and fair representation. These might include similar standards of living, shared methods and patterns of transportation, or similar economic and societal concerns. For example, the population of a rural area might have different shared interests from those living in an urban area, as might those living in an industrial area from the priorities shared by those living in a primarily agricultural area. Shared interests within a Community of Interest do not include relationships with political parties, incumbents, or political candidates." Alfano Rebuttal ¶ 23 (citation omitted). Thus, it is important for a legislature to consider the important, nonpartisan interests that bind a community together, including but not limited to, social and economic interests, similar standards of living, shared transportation methods, and shared community experiences, when drawing a redistricting plan. *See* Alfano Rebuttal ¶ 24.

345. With this guidance in mind, it is clear that Local Law 1 properly accounted for communities of interest in Nassau County. *See supra* p.64. By contrast, the alternative, illustrative map Plaintiffs' expert Dr. Cervas provided did not adequately consider Nassau County's communities of interest. *See supra* p.63. Rather, that map subordinates the core, traditional redistricting criteria of keeping Nassau County's communities of interest intact in favor of other considerations, such as the racial demographics of districts, as demonstrated by the unrebutted expert report of Defendants' expert Mr. Alfano. *See supra* p.63.

346. "[S]ubstantial evidence" is required to support a finding that the Legislature did not reasonably and in good faith credit Dr. Trende's analysis in voting to adopt Local Law 1 and instead passed the law for partisan considerations. *See Dominique*, 90 N.Y.2d at 881. Such evidence is not present in this case. The Legislature was reasonable to rely on the expert opinion

and analysis of the legal team and gerrymandering expert whose expert opinion and analysis prevailed in *Harkenrider* because that case provides the most relevant precedent for determining when a legislature engages in partisan gerrymandering. Dr. Trende concluded that Local Law 1 did not constitute a partisan gerrymander using the exact same analysis—including the use of even-year elections and the gerrymandering index—endorsed by the Court of Appeals in *Harkenrider*. *See supra* p.7. Thus, the Legislature acted reasonably and in good faith when it accepted Dr. Trende's conclusions.

347. That the Legislature had before it a different expert opinion of Dr. Magleby that, in his view, Local Law 1 is not fair as a matter of partisanship, is insufficient as a matter of law to rebut the presumption of regularity. *See Dominique*, 90 N.Y.2d at 881. The Legislature, including the Presiding Officer, learned that Dr. Magleby utilized an approach to analyzing Local Law 1 that was different from the approach the Court of Appeals endorsed in *Harkenrider* and which would have blessed the map that the Court rejected in that case, and he evaluated Local Law 1 by comparing it to maps that contained a minimum number of majority-minority districts, which is a metric that the Legislature did not consider when creating and adopting Local Law 1. *See supra* p.8. Accordingly, it was reasonable for the Legislature, including the Presiding Officer, to conclude that Dr. Magleby's approach was less credible than Dr. Trende's for ensuring that Local Law 1 was legally compliant with the partisan gerrymandering prohibition. *See supra* p.18.

348. New York's Municipal Home Rule Law also requires districts to consist of contiguous territory. N.Y. Mun. Home R. L. § 10(1)(a)(13)(a). Under New York law, contiguous territory means "territory touching, adjoining and connected, as distinguished from territory separated by other territory." *Schneider v. Rockefeller*, 31 N.Y.2d 420, 429 (1972) (citation omitted). In the redistricting context, this does not mean that no "part of a district is divided by

water," but rather that in none of the districts "is it necessary to travel through an adjoining district to keep within the boundaries of the [first] district." *Id.* at 430. As explained above, Dr. Magleby's ensemble of maps included districts that fail to meet the Municipal Home Rule Law's contiguity requirements. *See supra* p.75. As such, Dr. Magleby's conclusions were based on a comparison between Local Law 1 and a set of maps that the Legislature could not have legally adopted. For this reason alone, Dr. Magleby's analysis fails to provide any evidence that the Legislature enacted Local Law 1 with partisan intent.

349. While Dr. Stern's analysis was not before the Legislature when it considered Local Law 1, if the Legislature had rejected Dr. Stern's approach, that too would have been a reasonable decision with a good-faith basis. Namely, the gerrymandering expert whose expert opinion and analysis prevailed in *Harkenrider* provided an alternative opinion, and it is reasonable to conclude—like the Court of Appeals—that Dr. Trende provided an accurate analysis regarding whether a redistricting map is a partisan gerrymander.

350. Moreover, the existence of disagreement among experts does not qualify as the "substantial evidence [ ] necessary to overcome th[e] presumption," *Dominique*, 90 N.Y.2d at 881, that the Legislature enacted Local Law 1 with the "purpose" of adopting a partisan-neutral map, N.Y. Mun. Home Rule L. § 34(4). Even if this Court did find Dr. Magleby's or a different expert's approach to measuring a redistricting plan's partisan fairness preferable to Dr. Trende's *Harkenrider* analysis, that is not sufficient to establish that any "[d]istricts [were] drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." *Harkenrider*, 38 N.Y.3d at 518 (citation omitted).

351. Overall, this case is significantly different from *Harkenrider* and every other case where a court has found partisan gerrymandering anywhere in the country. *See, e.g.*, *League of*

Women Voters of Ohio v. Ohio Redistricting Comm'n, 192 N.E.3d 379, 412 (Ohio 2022) ("*LWV of Ohio*"); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1096 (S.D. Ohio 2019) (citation omitted), *vacated and remanded sub nom. Chabot v. Ohio A. Philip Randolph Inst.*, 140 S. Ct. 102 (2019); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 379–86, 388–89, 392–93 (Fla. 2015) ("*LWV of Fla.*"); *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 861–64 (M.D.N.C. 2018), *vacated and remanded*, 588 U.S. 684 (2019); *Whitford v. Gill*, 218 F. Supp. 3d 837, 887–98 (W.D. Wis. 2016), *vacated and remanded sub nom. Rucho*, 588 U.S. at 725, 742–43. For example, the Supreme Court of Florida, in rejecting the state legislature's 2012 redistricting plan, noted that "the starting point for drawing the 2012 congressional redistricting map was the 2002 map," for which "the Legislature itself had . . . 'stipulated' that its intent 'was to draw the congressional districts in a way that advantages Republican incumbents and potential candidates.'" *LWV of Fla.*, 172 So. 3d at 371. Similarly, the Supreme Court of Ohio invalidated a state commission's redistricting plan where "the commission itself did not engage in any map drawing or hire independent staff to do so" and instead "one political party's legislative leaders . . . exclusively control[led] the redistricting process" such that no "other commission members ha[d] *any* role in drawing the plan" and the legislative leaders even admitted that "while drafting the proposed plan" they viewed "the partisan leanings of potential districts." *LWV of Ohio*, 192 N.E.3d at 410–11 (emphasis added). And Pennsylvania's Supreme Court determined that the state's congressional district map was an impermissible partisan gerrymander where the evidence showed that Republicans had exercised "single-party control of the redistricting process" and drew district lines that "subordinate[d] the traditional redistricting criteria in service of achieving unfair partisan advantage." *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 795, 821 (Pa. 2018). The facts justifying findings that redistricting plans constituted

partisan gerrymanders in those cases stand in sharp contrast to this case where the evidence shows that in drafting and proposing Local Law 1 the Presiding Officer consistently involved legislators from the minority party, incorporating their and the public's concerns, *supra* pp.10–11, and engaged a national law firm and a highly respected redistricting expert to ensure that the map satisfied all traditional redistricting criteria and the same partisan gerrymandering analysis endorsed by the Court of Appeals in *Harkenrider*, *supra* p.101.

II. The New York Voting Rights Act's District-Based Vote-Dilution Provisions Are Unconstitutional

A. The Orange County Supreme Court Has Already Issued An Order Ruling That The NYVRA Violates The Federal Equal Protection Clause And Enjoining Enforcement Of the NYVRA Statewide, Which Order Applies To Nassau County

352. New York law generally 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.[9] *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); *Calabrese Bakeries, Inc. v. Rockland Bakery, Inc.*, 83 A.D.3d 1060, 1061 (2d Dep't 2011); *Mitchell v. Ins. Co. of N. Am.*, 40 A.D.2d 873, 874 (2d Dep't 1972); *Tomasello Bros. Inc. v. Friedman*, 293 N.Y.S.2d 688, 690 (Sup. Ct. Nassau Cnty. 1968); CPLR 4404(b), 5015. This rule "appli[es] not only to the parties but to other interested persons, who were not parties, as well." *Donato v. Am. Locomotive Co.*, 283 A.D. 410, 414 (3d Dep't 1954). Therefore, compliance with New York's prohibition on collateral attacks requires "any interested person" who desires relief from a judgment or order to file a motion directly with "[t]he court which *rendered* [that] judgment [or order]." CPLR 5015(a) (emphasis added).

[9] Of course, Defendants are aware that this Court has determined that this principle does not apply for purposes of their Motion for Summary Judgement. Index No.611872/2023, NYSCEF No.229 at 21 n.12 (Dec. 6, 2024).

353. Here, the Orange County Supreme Court has issued an order that mandates 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.*" *Clarke* D&O at 2, 25 (second emphasis added).

354. Another Supreme Court cannot override this relief. The Orange County Supreme Court's Order is currently effective and applies to Defendants here, which include Nassau County, a New York political subdivision, *see supra* p.1.

355. Plaintiffs here have not filed a motion for reconsideration or to vacate that Order with "[t]he court which rendered" it, CPLR § 5015(a), despite clearly being "interested," *Donato*, 283 A.D. at 414, in the NYVRA's enforcement given their filing of this lawsuit, *see generally* Action II Compl. Rather, Plaintiffs seek an order from *this* Court declaring that Nassau County's redistricting plan "dilutes the votes of Black, Latino, and Asian voters in violation of the NYVRA" and requiring Defendants to implement "a remedial plan that complies with . . . the NYVRA." Action II Compl. at 34. Granting such relief would necessarily require the Court to find that at least the NYVRA's district-based vote-dilution provisions are constitutional and then to apply those provisions to Nassau County—directly contradicting *Clarke*'s order that the NYVRA is unconstitutional "in its entirety" and *not* to enforce or apply its provisions to "any" political subdivision statewide, including Nassau County. *Clarke* D&O at 25. In other words, the Court cannot grant Plaintiffs' requested relief without changing the scope or finality of the Orange County Supreme Court's Order in *Clarke*, which the Nassau County Supreme Court cannot do. *See Gager*, 53 N.Y.2d at 484 n.1; *Divito*, 193 A.D.3d at 1328; *Calabrese Bakeries, Inc.*, 83 A.D.3d at 1061.

356. 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 Vote-Dilution Provisions Are Unconstitutional Because They Force Political Subdivisions To Change District Lines Based Upon Racial Classifications, Without Satisfying Strict Scrutiny And Far Beyond Situations Required By Section 2 Of The Federal VRA[10]

357. As an initial matter, Defendants have capacity to constitutionally challenge to the NYVRA's district-based vote-dilution provisions. Under Civil Practice Law and Rule § 3211(a)(3), a litigant must have "capacity to sue." CPLR § 3211(a)(3). Generally, "municipalities . . . and their officers lack capacity to mount constitutional challenges to acts of . . . State legislation," *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30

[10] Defendants understand that the Court rejected the argument that the NYVRA is subject to strict scrutiny, *see* Index No.611872/2023, NYSCEF No.229 at 16–21, but include this discussion here for preservation purposes and note that some of these issues relating to the NYVRA's constitutionality are on appeal and may well be decided before a final verdict is rendered in this case, *see Clarke, et al. v. Town of Newburgh, et al.*, Index No.2024-11753 (2d Dep't 2024).

N.Y.3d 377, 383 (2017), but this rule is "not absolute," *id*. at 386. The capacity rule is subject to a well-known exception allowing political subdivisions to challenge a statute on grounds that "if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription." *Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287 (1977).

358. Here, the County, the Legislature, and the individual legislators, are defendants and have not sued anyone related to the NYVRA's enforcement. Thus, the capacity-to-sue limitation does not apply because the municipal entities and officers in this case are merely defending themselves under the U.S. Constitution, which is the supreme law of the land. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015). Even if Defendants needed capacity to raise a constitutional challenge as a defense against the NYVRA's district-based vote-dilution provisions, the forced-constitutional-violation exception discussed above is plainly applicable here. Indeed, *Clarke* applied this very exception to hold that the political subdivision defendants there "ha[d] capacity to assert their constitutional challenge of the NYVRA" because they "assert[ed] that if they are required to comply with the NYVRA, through a mandate of this Court that alters their electoral system, it will require them to violate the Equal Protection Clause." *Clarke* D&O at 12–13. Defendants here have capacity to challenge the NYVRA provisions at issue in this case for the same reason.

359. The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law . . . [that] den[ies] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; *accord* N.Y. Const. Art. I, § 11. These safeguards "represent[ ] a foundational principle" that our Nation "should not permit any distinctions of law based on race or color." *Students for Fair Admissions, Inc. v. President &*

Fellows of Harvard Coll., 600 U.S. 181, 201–02, 206 (2023) ("*SFFA*") (citations omitted; brackets omitted); *see also Seaman v. Fedourich*, 16 N.Y.2d 94, 102 (1965). After the adoption of the Equal Protection Clause, "[t]he time for making distinctions based on race had passed." *SFFA*, 600 U.S. at 204 (discussing *Brown v. Bd. of Ed. of Topeka*, 349 U.S. 294 (1955)); *accord Under 21 v. City of New York*, 65 N.Y.2d 344, 363 (1985). Thus, where a state law makes a "racial classification," the Equal Protection Clause invalidates that law unless it can survive "daunting . . . strict scrutiny" review. *SFFA*, 600 U.S. at 206–07 (citations omitted). Strict scrutiny under the Equal Protection Clause applies whenever "the government distributes burdens or benefits on the basis of individual racial classifications." *Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No.1*, 551 U.S. 701, 720 (2007). "[A]n express racial classification," *id.* at 707, that is "explicit" in a statute, *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999), is "inherently suspect" without any further inquiry into motive, *Wash. v. Seattle Sch. Dist. No.1*, 458 U.S. 457, 485 (1982); *see also SFFA*, 600 U.S. at 213. Thus, strict scrutiny applies whenever a political subdivision alters its extant race-neutral election system in order to ensure that candidates favored by citizens of one race are elected more often relative to candidates favored by citizens of some other race. In such a scenario, the political subdivision has "distribute[d] burdens or benefits on the basis of individual racial classifications." *Parents Involved*, 551 U.S. at 720.

360. Strict scrutiny imposes a "daunting" standard on any law that draws racial classifications, *SFFA*, 600 U.S. at 206–07, and only the most carefully crafted laws—such as Section 2 of the VRA—could even possibly survive this review. Strict-scrutiny review proceeds in two steps. *Id.* First, the racial classification in the law at issue must be "used to 'further compelling governmental interests.'" *Id.* (citation omitted). Second, the law under review must be "narrowly tailored . . . to achieve that interest." *Id.* at 207 (citation omitted). While strict-

scrutiny applies to racial classifications in both federal and state law, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 230 (1995), Congress and the states do not have equal authority to pass laws that satisfy this review, with Congress having greater authority under the Fourteenth and Fifteenth Amendments to "enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent," *Tenn. v. Lane*, 541 U.S. 509, 520 (2004).

361. Section 2 of the VRA is the rare law that satisfies strict scrutiny because it contains numerous "exacting requirements" and safeguards that narrowly tailor its application. *Allen v. Milligan*, 599 U.S. 1, 30 (2023); *see generally* 52 U.S.C. § 10301. In particular, *Thornburg v. Gingles*, 478 U.S. 30 (1986), provided a two-step "framework" for adjudicating Section 2 vote-dilution claims. *Id.* at 50–51; *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 402 (2022); *see Bartlett v Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion). Under the *Gingles* analysis, a Section 2 plaintiff must establish three "necessary preconditions." *Gingles*, 478 U.S. at 50. First, "[t]he minority group must be sufficiently large and compact to constitute a majority in a reasonably configured district." *Wis. Legislature*, 595 U.S. at 402. A party cannot satisfy this precondition by showing that it is possible to create an "influence district[ ]" 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* ("*LULAC*"), 548 U.S. 399, 446 (2006) (citation omitted). Further, the *en banc* Fifth Circuit recently held that Section 2 does not permit lumping minority groups together in a so-called "coalition district." *See Petteway*, 111 F.4th at 599; *but see Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990).[11] Under the second precondition, "the minority group must be

[11] A circuit split currently exists over whether Section 2 authorizes coalition claims that the U.S. Supreme Court must ultimately resolve. The holding in *Petteway v. Galveston County*, 111 F.4th 596 (5th Cir. 2024) (*en banc*) is the most recent from a federal Circuit Court on the issue and provides the most

politically cohesive." *Wis. Legislature*, 595 U.S. at 402. And third, "a majority group must vote sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate." *Id.* If a plaintiff satisfies the first step, the *Gingles* analysis then "considers the totality of circumstances to determine 'whether the political process is equally open to minority voters.'" *Id.* (quoting *Gingles*, 478 U.S. at 79). Here, courts consider the political subdivision's "history of voting-related discrimination," *Gingles*, 478 U.S. at 44, "recogniz[ing] that application of the *Gingles* factors is peculiarly dependent upon the facts of each case," *Allen*, 599 U.S. at 19 (citations omitted). Notably, relaxing the *Gingles* standards of would present "serious constitutional concerns under the Equal Protection Clause," as the provision would no longer be narrowly tailored, sufficient to satisfy strict scrutiny. *Bartlett*, 556 U.S. at 21 (plurality opinion).

362. The NYVRA's district-based vote-dilution provisions reject many of the safeguards present in Section 2 of the VRA. Subsection 17-206(2)(a) of the NYVRA prohibits what the NYVRA calls the "vote dilution" of protected classes by political subdivisions. N.Y. Elec. L. § 17-206(2)(a). Subsection 17-206(2)(b) then provides that a political subdivision "us[ing] a district-based or alternative method of election" has engaged in prohibited "vote dilution" when "candidates of 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) (emphases added). "[E]vidence concerning whether members of a protected class are geographically compact or concentrated shall

persuasive interpretation of Section 2, especially given that all contrary cases were decided prior to the U.S. Supreme Court issuing its landmark *SFFA* decision.

not be considered, but may be a factor in determining an appropriate remedy," *id.* § 17-206(2)(c)(viii), and "where there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision, members of each of those protected classes may be combined," *id.* § 17-206(2)(c)(iv). Section 17-206(3) provides a non-exhaustive list of factors to consider under Subsection 17-206(2)(b)(i)'s "totality of the circumstances" analysis, including "the extent to which members of the protected class are disadvantaged in [for example] education, employment, health, criminal justice, housing, land use, or environmental protection." *Id.* § 17-206(3)(g); *supra* pp.50, 55.

363. The NYVRA's district-based vote-dilution provisions require political subdivisions to alter race-neutral redistricting maps by changing district lines or otherwise altering their voting systems so that citizens lumped together by race may elect more candidates of their choice, meaning that, given the zero-sum nature of elections, candidates favored by citizens categorized according to different races elect fewer candidates of their choice. This gives "burdens or benefits on the basis of individual racial classifications," demanding strict-scrutiny review, *Parents Involved*, 551 U.S. at 720—which review the NYVRA cannot satisfy.

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

364. The NYVRA's vote-dilution provisions applicable to political subdivisions using "a district-based or alternative method of election," N.Y. Elec. L. § 17-206(2)(b)(ii), constitute a racial-classification scheme that is subject to strict scrutiny.

365. These provisions require a political subdivision using a district-based method of election to draw district lines that increase minority-preferred candidates' electoral success whenever, after grouping voters together based solely upon their racial identity, those racial groups' preferred candidates "would usually be defeated" and there is either: (a) "racially

polarized" voting in a district, or (b) under the totality-of-the-circumstances standard discussed above, an impairment of "the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections." *Id.* The NYVRA directs political subdivisions to group their citizens by racial groups, *id.* § 17-206(2)(c)(iv), without regard to whether the people in these groups are geographically compact or concentrated, *id.* § 17-206(2)(c)(viii), and without regard to whether their voting behavior has anything to do with race, as opposed to politics, *id.* § 17-206(2)(c)(vii). If minority-preferred candidates "would usually be defeated" in a jurisdiction with "racially polarized" voting, *id.* § 17-206(2)(b)(ii), the NYVRA requires that jurisdiction to alter its election system to ensure that those candidates have a greater chance of electoral success, thus necessarily decreasing the ability of candidates preferred by voters lumped together by other racial groups to win elections. This is an unambiguous distribution of "benefits" (more electoral success, or an increase in voting strength) and "burdens" (less electoral success, or a decrease in voting strength) "on the basis of individual racial classifications," that the Equal Protection Clause subjects to strict-scrutiny review. *Parents Involved*, 551 U.S. at 720.

366. Conducting the NYVRA's "would usually be defeated" analysis, N.Y. Elec. L. § 17-206(2)(b)(ii), triggers strict scrutiny because doing so necessarily requires political subdivisions to make "racial classification[s]" and then draw redistricting plans that "distribute[ ] burdens [and] benefits on the basis of [those] individual racial classifications," *Parents Involved*, 551 U.S. at 720; *see SFFA*, 600 U.S. at 204. A countywide approach must be used to conduct the NYVRA's usually defeated analysis. This method requires an NYVRA vote-dilution plaintiff to demonstrate that the identified minority group's preferred candidates will be routinely defeated in a significant majority of elections across the entire relevant jurisdiction. *See supra* pp.14, 43, 47, 87–88. Under this method, if not enough minority-preferred candidates are winning countywide,

a county would have to move voters grouped together by race into different districts to increase these candidates' chances of electoral success, which would necessarily decrease the electoral chances of candidates preferred by other minority groups lumped together by race in the county. Thus, the NYVRA's "would usually be defeated" inquiry, N.Y. Elec. L. § 17-206(2)(b)(ii), triggers strict scrutiny because it mandates that political subdivisions "distribute[ ] burdens or benefits based on individual racial classifications," *Parents Involved*, 551 U.S. at 720.

367. Each alternative approach that the parties offered to conduct the NYVRA's "would usually be defeated" analysis, N.Y. Elec. L. § 17-206(2)(b)(ii), would also trigger strict scrutiny because all require political subdivisions to make "racial classification[s]" and then draw redistricting plans that "distribute[ ] burdens [and] benefits on the basis of [those] individual racial classifications," *Parents Involved*, 551 U.S. at 720; *see SFFA*, 600 U.S. at 204.

368. First, Plaintiffs' expert witness Dr. Cervas proposes a district-based approach. This method requires examining only those districts with racially polarized voting and redrawing them so that candidates preferred by certain racial groups will win more often, while candidates preferred by other racial groups will win less often. *See supra* p.87. Dr. Cervas' approach triggers strict scrutiny because it plainly requires political subdivisions to "classify[ ] citizens . . . on the basis of race," *Shaw v. Reno*, 509 U.S. 630, 643, 646 (1993) (citation omitted), and then enact a redistricting plan where "the predominant factor motivating placement of voters in or out of a particular district" is race, *Wis. Legislature*, 595 U.S. at 401 (citing *Cooper*, 581 U.S. at 291–92).

369. Second, the majority-minority-district-based approach that Plaintiffs themselves and their expert Dr. Magleby offer, *see* Magleby Report at 24; Action II Compl. ¶ 45, similarly triggers strict scrutiny. Under this approach, a political subdivision must group minority voters together by racial classifications and then draw a redistricting plan that ensures a certain number

of majority-minority districts are created in the jurisdiction. Accordingly, this method of conducting the analysis requires "plac[ing] a significant number of voters within or without a particular district" predominantly based on "race" to hit a particular racial target (50% minority voters, grouped across racial groups), *Cooper*, 581 U.S. at 291 (citations omitted), which is precisely the type of action the U.S. Supreme Court has said "must withstand strict scrutiny," *id.* at 292 (citation omitted).

370. Aside from how one conducts the usually defeated analysis, the NYVRA's district-based vote-dilution provisions are subject to strict scrutiny for the additional reason that they only protect "minority" groups. N.Y. Elec. L. § 17-204(5). By their own text, those provisions only apply to "members of [a] protected class," *id.* § 17-206(2)(b)(i)-(ii), which the NYVRA statutorily defines as "a class of individuals who are members of a race, color, or language-*minority* group," *id.* § 17-204(5) (emphasis added). Reading the NYVRA's vote-dilution provisions to apply to white majorities would render application of those provisions judicially non-administrable because it would be impossible for many political subdivisions to comply with them. "[R]edistricting is often a 'robbing-Peter-to-pay-Paul' exercise." Trende Rebuttal at 94. Given this dynamic and the zero-sum nature of elections, if the NYVRA's race-based rules also protected white-majority voters, this provision would render almost *every* district-based system violative of the NYVRA when there is racially-polarized voting in a political subdivision, making it seemingly impossible for such a subdivision to comply with the NYVRA no matter what district lines it adopted. Compliance with the NYVRA's "usually defeated" provision would often be impossible if the NYVRA also protected the white majority's ability to elect candidates of choice: by accommodating one protected class, the county inevitably violates the statute with respect to

another group. Thus, the NYVRA must be read to apply only to certain racial minority groups, and is subject to strict scrutiny for that reason alone.

371. Notably, even if the NYVRA's district-based "will usually be defeated" provisions applied to any citizen of any racial group, including white majorities, those provisions would still be subject to strict scrutiny because that standard applies to "*all* racial classifications imposed by the government" by law, *Johnson v. Cal.*, 543 U.S. 499, 505 (2005) (emphasis added), "even when they may be said to burden or benefit the races equally," *id.* at 506 (citations omitted). Accordingly, strict scrutiny applies whether *any* group of citizens lumped together by *any* race could use the NYVRA to force a political subdivision to alter its district-based voting system by drawing districts predominantly based on race to ensure that more of their preferred candidates win at the expense of candidates preferred by other citizens in all other racial groups. *See id.*

372. As *Clarke* put it, "to suggest that the NYVRA is not a race-based [ ] statute is simply to deny the obvious." *Clarke* D&O at 16.

373. To begin, the NYVRA's district-based vote-dilution provisions make "racial classification[s]." *SFFA*, 600 U.S. at 206–07. These provisions apply on their face only 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 (emphases added). Thus, the statute clearly makes "racial classifications." *Parents Involved*, 551 U.S. at 720; *see also Classify*, Oxford English Dictionary (2024) ("To arrange in or analyze into classes according to shared qualities or characteristics[.]").[12] The NYVRA does not only make a statutory *reference* to race or merely ask legislatures to be race-conscious. Rather, the statute plainly confers "benefits" on groups of citizens lumped together by race. *See SFFA*, 600 U.S.

[12] Available at https://www.oed.com/search/dictionary/?scope=Entries&q=classify.

at 204–06. The U.S. Supreme Court's decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015) does not change this conclusion because that case did not consider when a statutory reference to race qualifies as a racial classification. As relevant here, that case held that government "authorities" have a "valid interest," *id.* at 541, in "foster[ing] diversity and combat[ing] racial isolation," but explained that government authorities may only pursue these "larger goals" with "*race-neutral* tools," *id.* at 545 (emphasis added).

374. The NYVRA is not an administrative policy and the statute's district-based vote-dilution provisions are not race-neutral. Instead, these provisions facially confer "benefits on the basis of individual racial classifications," *Parents Involved*, 551 U.S. at 720, as they require political subdivisions to adopt redistricting plans that allocate chances of electoral success on the basis of racial classifications. To suggest that the NYVRA does not require political subdivisions to implement race-predominant redistricting plans elides the plain text of the statute. *See* N.Y. Elec. L. § 17-206(5). While remedies other than redistricting might be available, the statute undoubtedly requires political subdivisions to discard district maps solely based on racial considerations. *See Clarke* D&O at 16.

375. The NYVRA's district-based vote-dilution provisions do not make reference to race only to protect the individual right to vote against racial discrimination, because those provisions do not prohibit racial discrimination. Rather, the NYVRA requires political subdivisions to change their district-based or alternative methods of election to avoid what the statute calls "vote-dilution," N.Y. Elec. L. § 17-206(2), which is defined 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) (emphases added). Consequently, the NYVRA's district-based vote-dilution provisions do not require any showing of racial discrimination, because an NYVRA plaintiff can prove a vote-dilution claim relying solely on the "racially polarized" voting prong of the analysis without presenting any evidence of past or present racial discrimination in the jurisdiction. *See id.* The VRA and federal case law strongly indicate that such historical evidence should be required before imposing liability under the NYVRA. *See Clarke* D&O at 18–19. Indeed, the second step of the *Gingles* analysis—the totality-of-the-circumstances inquiry—plainly requires courts to consider the political subdivision's "history of voting-related discrimination." *Gingles*, 478 U.S. at 44.

376. Reading the NYVRA to protect white voters as well as voters of color would render application of those provisions absurd and impossible for many political subdivisions to comply with, and does not allow the NYVRA to escape strict scrutiny in any event. 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. As *Clarke* explained, "a determination of voter dilution . . . can rest on the slightest of impairments in [the] ability to influence an election," as the "NYVRA sets no minimum bar on the extent of any such impairment of voter ability to influence an election." *Clarke* D&O at 2, 20. However, where voting is racially polarized, it is impossible for political subdivisions to adopt a redistricting plan that ensures the preferred candidates of racial minority groups are not "usually defeated" without the preferred candidates of white-majority voters being "usually defeated." Regardless, 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*, 543 U.S. at 505–06 (citations omitted). Multiple U.S. Supreme Court cases have established the legal principle that strict scrutiny applies to "all racial classifications imposed by the government," *id*. at 505, in both federal and state law, *Adarand*, 515 U.S. at 230, regardless of the particular race of the protected class or majority group, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989); *Clarke* D&O at 14–15. This principle is plainly applicable here and subjects the NYVRA to strict scrutiny.

377. Accordingly, the NYVRA's district-based vote-dilution provisions are subject to strict scrutiny and, for the reasons explained below, cannot meet that standard.

2. The NYVRA's District-Based Vote-Dilution Provisions Cannot Satisfy Strict Scrutiny

378. The NYVRA's district-based vote-dilution provisions fail strict scrutiny because they neither further a compelling state interest nor are narrowly tailored to achieving one. *See Clarke* D&O at 17–21.

379. *No Compelling Interest.* States have a compelling "interest in remedying the effects of . . . racial discrimination," where they "ha[ve] a strong basis in evidence to conclude that . . . action [is] necessary" to remediate an "*identified* discrimination." *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996) (emphasis added; citation omitted). But the NYVRA's district-based vote-dilution provisions do not target that interest, as a political subdivision's liability for vote-dilution under the NYVRA does not require proof of "specific, identified instances of past discrimination that violated the Constitution or a statute." *SFFA*, 600 U.S. at 207 (citations omitted). That is, the NYVRA does not require a political subdivision to have previously discriminated on the basis of race with respect to its method of election before those provisions may impose upon that political subdivision the race-based remedies of drawing districts predominantly based on race. *See* N.Y.

Elec. L. §§ 17-206(2)(b)(i), 17-206(5). Instead of seeking to further the compelling interest of remediating "identified discrimination" where there exists "a strong basis in evidence to conclude" that such action is "necessary," *Shaw,* 517 U.S. at 909–10 (citation omitted), the NYVRA seeks to protect one normative view of "an equal opportunity to vote" and "participation in voting by all eligible voters"—"particular[ly] members of racial, ethnic, and language-minority groups," Gov. Kathy Hochul, *Governor Hochul Signs Landmark John R. Lewis Voting Rights Act of N.Y. Into Law* (June 20, 2022).[13] While such generalized interests may be "commendable goals, they are not sufficiently coherent for purposes of strict scrutiny" and are also not sufficiently compelling to justify racial classifications. *SFFA*, 600 U.S. at 214.

380. The NYVRA's district-based vote-dilution provisions also do not pursue a compelling government interest because the New York Legislature does not have the same constitutional authority as Congress to impose racial classifications. Strict scrutiny applies to both federal and state laws that make racial classifications, *see Adarand,* 515 U.S. at 230, but Congress has greater authority than the States under the Fourteenth and Fifteenth Amendments to "enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent," *Lane*, 541 U.S. at 520. By contrast, the U.S. Supreme Court has made clear that the Fourteenth Amendment acts as a "limit[ ] on the States' use of race as a criterion for legislative action," *City of Richmond,* 488 U.S. at 490–91, and the court recently reaffirmed that this "explicit constraint on state power" applies even to allegedly "benign" racial classifications, *id.*, "without regard to any differences of race, of color, or of nationality," *SFFA*, 600 U.S. at 206. This constitutional constraint is meant to prevent States from engaging in the "odious" practice of "pick[ing] winners

[13] Available at https://www.governor.ny.gov/news/governor-hochul-signs-landmark-john-r-lewis-voting-rights-act-new-york-law.

and losers based on the color of their skin." *Id.* at 208, 229 (citation omitted). Accordingly, while "Congress may identify and redress the effects of society-wide discrimination[, this] does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate." *City of Richmond*, 488 U.S. at 490; *accord Trump v. Anderson*, 601 U.S. 100, 112 (2024). Thus, the NYVRA's district-based vote-dilution provisions' use of racial classifications do not target a compelling *state* interest.

381. New York does not have an independent state-law interest in protecting voters from racial discrimination sufficient to justify the NYVRA's race-based redistricting scheme simply because the U.S. and New York constitutions do not specifically bar such protection. "[G]eneralized assertion[s] of past discrimination" are "not adequate" to justify race-based legislation. *Shaw*, 517 U.S. at 909–10. Such legislation is only warranted where there is "a strong basis in evidence to conclude that" a political subdivision 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 208. Even then, the legislation must be narrowly drawn to address those "identified instances." *Id.*; *see Shaw*, 517 U.S. at 909–10. After all, "[n]o compelling interest . . . exists in protecting the voting rights of any group that has historically never been discriminated against in a political subdivision." *Clarke* D&O at 18. There is no evidence in this case that Nassau County or any jurisdiction in New York adopted their district-based election method out of racial animus. *See supra* p.54. Further, a State's claimed interest in remedying the societal effects of racial discrimination generally may be a compelling interest for Congress under the Fourteenth and Fifteenth Amendments, *see Lane*, 541 U.S. at 520, but not for a *state* legislature, *supra* pp.113, 123.

382. *Not Narrowly Tailored.* Even if the NYVRA's district-based vote-dilution provisions did pursue a compelling state interest in "remediating specific, identified instances of past discrimination," *SFFA*, 600 U.S. at 207, they still fail strict-scrutiny review because they are not "narrowly tailored—meaning necessary—to achiev[ing] that interest," *id*. at 206–07 (citations omitted).

383. The federal Equal Protection Clause at minimum demands that a statute mandating race-based redistricting, like the NYVRA, contains the same or at least comparable safeguards of Section 2 of the VRA that make it narrowly tailored, given the historical pedigree and remedial design of that venerable provision. *See Cooper*, 581 U.S. at 292; *Clarke* D&O at 21–25. Section 2 carefully cabins the circumstances in which it allows the drawing of districts based upon race: the plaintiff must first satisfy the three *Gingles* "necessary preconditions," 478 U.S. at 50, and then *also* satisfy the subsequent totality-of-the-circumstances inquiry, *id.* at 79; *supra* pp.14, 113–14. Only where a plaintiff makes this difficult two-step showing may a court conclude that a "[challenged] district is not equally open" because "minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter." *Allen*, 599 U.S. at 25.

384. These safeguards are what render Section 2 constitutional, *Bartlett*, 556 U.S. at 21 (plurality opinion), but the NYVRA's district-based vote-dilution provisions explicitly reject them, without adding any additional safeguards. The NYVRA's district-based vote-dilution provisions expressly disclaim the first *Gingles* precondition in providing that "evidence concerning whether members of a protected class are geographically compact or concentrated shall *not* be considered [for liability]." N.Y. Elec. L. § 17-206(2)(c)(viii) (emphasis added). These provisions then go

beyond the scope of this precondition both by applying even where a minority group only "influence[s] the outcome of elections," *id.* § 17-206(2)(b)(ii)(B), rather than plays a "decisive" role, *LULAC*, 548 U.S. at 446, and by authorizing the "combin[ing]" of minority groups into coalition districts, N.Y. Elec. L. § 17-206(2)(c)(iv). For the second *Gingles* precondition, the NYVRA does not require a "politically cohesive" minority group, *Wis. Legislature*, 595 U.S. at 402, as it capaciously defines "racially polariz[ed]" to mean "voting in which there is a divergence in the . . . choice[s] of members in a protected class from the . . . choice[s] of the rest of the electorate," N.Y. Elec. L. § 17-204(6), rather than voting in which "a significant number" of members of the minority group usually vote for the same "preferred candidate," *Gingles*, 478 U.S. at 56. For the third *Gingles* precondition, the NYVRA does not require that the "white majority votes sufficiently as a bloc to enable it . . . to defeat the minority group's preferred candidate," such that a "challenged districting [map] thwarts a distinctive minority vote *at least plausibly on account of race.*" *Allen*, 599 U.S. at 18–19 (ellipses in original; emphasis added).

385. Further, the NYVRA's district-based vote-dilution provisions similarly do not require the second step under *Gingles* where "a court considers the totality of circumstances to determine whether the political process is equally open to minority voters." *Wis. Legislature*, 595 U.S. at 402 (citations omitted). Section 2's totality-of-the-circumstances inquiry helps ensure that provision's narrow tailoring because it is an additional showing that vote-dilution plaintiffs must make after satisfying the three *Gingles* preconditions. However, the NYVRA establishes a looser version of Section 2's totality-of-the-circumstances inquiry "which lacks any defined criteria," *Clarke* D&O at 20, and which serves as an independent basis for finding liability. The NYVRA's version of the test provides a non-exhaustive list of eleven factors that courts may consider such as "disadvantage[s] in . . . education, employment, health, criminal justice, housing, land use, or

environmental protection," N.Y. Elec. L. § 17-206(3)(g), and does not require plaintiffs to make a particular showing on any particular factor before a court may find a political subdivision liable for vote-dilution under the NYVRA, *see id.* § 17-206(3). Indeed, the NYVRA's totality-of-the-circumstances inquiry permits a court to consider "any additional factors" it finds appropriate and does not require a court to consider "any specified number of factors" before imposing liability. *Id.* This nebulous independent pathway to liability further demonstrates the NYVRA's lack of narrow tailoring because it leaves "a court [ ] free to find voter dilution based on *any* criteria that the court itself creates, or no criteria at all." *Clarke* D&O at 20.

386. Because the NYVRA's district-based vote-dilution provisions do not incorporate the *Gingles* preconditions or require a subsequent totality-of-the-circumstances showing, the NYVRA mandates that political subdivisions draw race-based districts, or adopt an alternative election system, in a much broader range of circumstances than strictly "necessary" to "remediat[e] specific, identified instances of past discrimination," *SFFA*, 600 U.S. at 207; *see also Parents Involved*, 551 U.S. at 720, unlike with Section 2. For example, a plaintiff can establish that a political subdivision using a district-based method of election has engaged in vote-dilution under the NYVRA without demonstrating that the identified minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," as *Gingles*' first precondition requires, *Gingles*, 478 U.S. at 50; without showing that the minority group is "politically cohesive," as *Gingles*' second precondition requires, *Wis. Legislature*, 595 U.S. at 402; without proving that "a majority group [ ] vote[s] sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate," as required under *Gingles*' third precondition, *id.*; or without "show[ing], under the 'totality of circumstances,' that the political process is not 'equally open' to minority voters," *Allen*, 599 U.S. at 18 (quoting *Gingles*, 478 U.S. at 45–46). All of these

are required showings under Section 2, but not necessarily under the NYVRA. The NYVRA's district-based vote-dilution provisions therefore lack the narrow tailoring that makes Section 2 constitutional.

387. None of the arguments raised in this case show that the NYVRA's district-based vote-dilution provisions are narrowly tailored. To begin, the NYVRA does not require any analysis of the social and historical conditions in a given jurisdiction before determining liability. Indeed, "the wording of the NYVRA is devoid of any requirement of proving past discrimination by a protected class." *Clarke* D&O at 17. All that is actually required to prove an NYVRA vote-dilution claim is for a plaintiff to proffer evidence on the protected class's "voting patterns," including whether their preferred candidates are "usually defeated" within the jurisdiction, N.Y. Elec. L. § 17-206(2)(b)(ii)—nothing more and certainly no "specific, identified instances of past discrimination," *SFFA*, 600 U.S. at 207. Thus, so long as racially polarized voting exists in a jurisdiction, "a minority (or even a majority) in a political subdivision comprised of persons who identify as White can seek electoral changes if they establish any impairment of their ability to affect an election, *absent any evidence of historic discrimination against people of that color* in that political subdivision." *Clarke* D&O at 17.

388. Notably, the NYVRA explicitly rejects the *Gingles* framework, without adding any comparable safeguards, thereby rendering it clearly not narrowly tailored.

389. Regarding the first *Gingles* precondition, the NYVRA's text explicitly "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 then only provides that such evidence "*may* be a factor" at the remedy stage, N.Y. Elec. Law § 17-206(2)(c) (emphasis added). The NYVRA's district-based vote-dilution provisions do not adopt comparable guardrails to the first

precondition by requiring plaintiffs to show that a valid remedy could be implemented if liability is found, because requiring a plaintiff to show that an effective remedy for vote dilution exists is not arguably close to requiring that a minority group be "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. Similarly, that the NYVRA *does not prohibit* plaintiffs from offering an illustrative plan that follows the *Gingles* compactness requirement is beside the point because this is not part of the liability finding as the statute allows plaintiffs to establish a violation of the NYVRA without any proof of compactness. *See Clarke* D&O at 22–25.

390. The significance of the NYVRA's elimination of the first precondition cannot be overstated because in doing so the statute "effectively creates a right to proportional representation," which the U.S. Supreme Court has rejected. *Clarke* D&O at 23. While the NYVRA is a state statute, the U.S. Supreme Court has never held that compactness is not a constitutional requirement, *see Clarke* D&O at 23, and has instead warned that relaxing the *Gingles* standards would present "serious constitutional concerns under the Equal Protection Clause," *Bartlett*, 556 U.S. at 21 (plurality opinion). As *Clarke* explained, "[t]he Court is not aware of, and no party has provided upon its request, any case from the Supreme Court or any other federal court that determined that the first precondition of *Gingles* is not applicable to the issue of whether a state voting rights act is violative of the US Constitution." *Clarke* D&O at 23. Thus, the NYVRA's district-based vote-dilution provisions' elimination of the first *Gingles* precondition without providing comparable safeguards renders those provisions incapable of withstanding strict scrutiny.

391. 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). States may provide for remedies that Section 2 does not, 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," *LULAC*, 548 U.S. at 446 (citation omitted), and the U.S. Supreme Court has declined to hold that Section 2 "grants special protection to a minority group's right to form political coalitions," *Bartlett*, 556 U.S. at 15 (plurality opinion). A circuit split exists over whether Section 2 authorizes coalition claims that the Supreme Court must ultimately resolve. But this does not mean that it is currently constitutional for the NYVRA to authorize coalition claims. This Court finds the Fifth Circuit's recent decision in *Petteway v. Galveston County*, 111 F.4th 596 (5th Cir. 2024) (*en banc*) that the VRA does not authorize such claims persuasive, especially given that all contrary cases were decided before the Supreme Court issued *SFFA*. Further, the only New York court to squarely address this issue in the NYVRA context found that "such claims do not satisfy the clear standards set forth in *Gingles* and its progeny" and invalidated the NYVRA "for th[e] additional reason" that it allows "coalition claim[s]." *Clarke* D&O at 25.

392. The NYVRA also fails to incorporate the second and third *Gingles* preconditions into its racial vote dilution prohibition for jurisdictions using district-based methods of election. Regarding the second precondition, the NYVRA does not require proof that the identified minority group is "politically cohesive." *Wis. Legislature*, 595 U.S. at 402. Rather, 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. L. § 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 Section 2 of the

VRA. The NYVRA's district-based vote-dilution provisions similarly do not incorporate the third *Gingles* precondition via the "usually defeated" requirement. While the "would usually be defeated" analysis *could* be satisfied by proof identical to the third *Gingles* precondition, there is no requirement for a plaintiff to do so and the NYVRA plainly allows a plaintiff to prove a vote-dilution claim without establishing any of the *Gingles* preconditions. *Supra* p.121.

393. Regarding *Gingles*' mandatory second step (the totality-of-the-circumstances showing), this is not required for an NYVRA vote-dilution claim—serving instead as an independent pathway for plaintiffs to prove liability. *See* N.Y. Elec. L. § 17-206(2)(b)(ii). Further, the NYVRA's totality-of-the-circumstances analysis is far more expansive than the VRA's analysis. *See Clarke* D&O at 10, 20. As *Clarke* explained, the NYVRA's totality analysis "lacks any defined criteria because the NYVRA lists 11 factors that *may* be considered," and it thus allows a court "to find voter dilution based on *any* criteria that the court itself creates, or no criteria at all." *Clarke* D&O at 20.

394. In sum, the NYVRA's district-based vote-dilution provisions create racial classifications, distribute electoral benefits and burdens based on those classifications, and eschew the exacting requirements and safeguards that allow Section 2 of the VRA to satisfy strict scrutiny. Therefore, the NYVRA's district-based vote-dilution provisions violate the federal Equal Protection Clause.

III. The NYVRA's District-Based Vote-Dilution Provisions Are At Least Unconstitutional As Applied To Nassau County

395. At a minimum, the NYVRA would be unconstitutional as applied to Nassau County, where the Legislature adopted its map in a race-blind manner with the advice of counsel that it should not draw any race-based districts. *See supra* pp.5, 17, 103. Requiring Nassau County to change that map—with the express goal of allowing citizens statutorily lumped together by race

to achieve more electoral success at the expense of voters grouped together by other races—triggers strict scrutiny. *See supra* pp.110, 112. "While 'the line between racial predominance and racial consciousness can be difficult to discern . . . race for its own sake [cannot be] the overriding reason for choosing one map over others." Index No.611872/2023, NYSCEF No.229 at 20 (citations omitted; brackets in original). Here, the only reason Nassau County could be forced to adopt a new map over its currently enacted race-blind plan would be if it was forced to use "race for its own sake"—clearly making race "the overriding reason" and triggering strict scrutiny. *See id.*

396. It is particularly clear that it would be unconstitutional to apply the NYVRA's district-based vote-dilution provisions to force Nassau County to create additional majority-minority districts. Doing so would compel the County to group its residents based upon racial classifications and then to draw district lines "plac[ing] a significant number of voters within or without a particular district" predominantly based on "race" in order to achieve a particular racial target, *Cooper*, 581 U.S. at 291 (citations omitted), thus triggering "strict scrutiny," *id.* at 292 (citation omitted). Because the NYVRA's district-based vote-dilution provisions do not serve a compelling state interest, *supra* pp.122, 124, 125, and are not narrowly tailored to furthering such an interest, *supra* pp.112, 122, 125, requiring Nassau County to create race-based districts under those provisions would constitute a straightforward violation of *Cooper*, 581 U.S. at 291–92.

397. Applying those provisions to force Nassau County to draw additional "influence districts" would raise the same constitutional problems, *LULAC*, 548 U.S. at 446; *see Petteway*, 111 F.4th at 599, because Plaintiffs have put forth no evidence that forcing Nassau County to adopt such a map would serve any compelling state interest, nor have they provided evidence that such a map would be narrowly tailored to achieve that interest.

IV. The Preferred Candidates Of The Racial Minority Groups Plaintiffs Identified In Their Complaint Will Not "Usually Be Defeated" Under Local Law 1 Across Nassau County

398. Plaintiffs' NYVRA claim would still fail as a matter of law because they put forth insufficient evidence to prove that their identified minority groups' preferred candidates will "usually be defeated" in Nassau County under Local Law 1, which is the legally required, threshold inquiry for liability under those provisions. *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*.

399. "[T]he starting point in any case of interpretation must always be the language itself." *People v. Roberts*, 31 N.Y.3d 406, 418 (2018) (citations omitted). Courts also must give statutes "a sensible and practical over-all construction" that "avoid[s] an unreasonable or absurd application of the law." *Bank of Am., N.A. v. Kessler*, 39 N.Y.3d 317, 324–25 (2023) (citations omitted). Because the NYVRA is a recently enacted statute and courts have never before applied its provisions governing jurisdictions with district-based systems, like Nassau County, the Court adopts the following two legal principles to guide the NYVRA's "usually be defeated" analysis.

400. *First*, Subsection 17-206(2)(b)(ii)'s "usually be defeated" language must be interpreted as requiring an NYVRA vote-dilution plaintiff to demonstrate that the identified minority group's preferred candidate will be routinely defeated in elections across the entire relevant jurisdiction. Evaluating NYVRA vote-dilution claims on a jurisdiction-wide basis—here, across Nassau County—is the best reading of the statutory text and is necessary to avoid an "unreasonable . . . application of the law." *Bank of Am.*, 39 N.Y.3d at 324. The NYVRA's textual rejection of the *Gingles* framework supports this reading. The vote-dilution analysis under Section 2 of the VRA does focus on individual districts, rather than entire jurisdictions as a whole, precisely because the *Gingles* analysis is district-specific. *See Wis. Legislature*, 595 U.S. at 401–04. Where

"race is the predominant factor motivating the placement of voters in or out of *a particular district*," *id.* at 401 (emphasis added), the *Gingles* analysis requires "carefully evaluating evidence *at the district level*," *id.* at 404 (emphasis added), to determine whether there is "a strong basis in evidence to conclude that § 2 demands" "mov[ing] voters based on race" into a new district, *id.*, such that the jurisdiction could "show[ ] that the design of *that district* withstands strict scrutiny," *id.* at 401 (emphasis added). Accordingly, a jurisdiction only violates Section 2's vote-dilution provisions if a plaintiff can show that all three *Gingles* preconditions are satisfied as to each new majority-minority district that he seeks to force the jurisdiction to create. *Gingles*, 478 U.S. at 50; *Wis. Legislature*, 595 U.S. at 402. The plaintiff would then need to satisfy *Gingles*' separate totality-of-the-circumstances inquiry to show that "the political process is [not] equally open to minority voters" in the jurisdiction. *Wis. Legislature*, 595 U.S. at 402 (citations omitted). The NYVRA, by contrast, disclaims each of the three *Gingles* preconditions and its totality-of-the-circumstances analysis. *Supra* p.127. So, there is not a similar basis in the NYVRA's text as there is in Section 2 to evaluate vote-dilution claims on a district-by-district basis.

401. Moreover, because the NYVRA does not incorporate *Gingles*' preconditions, allowing NYVRA plaintiffs to show that minority-preferred candidates are usually defeated on a district-by-district basis, rather than across an entire jurisdiction, would lead to non-administrable results as it would be impossible for politically divided subdivisions to comply with the statute. This is because "redistricting is often a 'robbing-Peter-to-pay-Paul' exercise," Trende Rebuttal at 94, such that by redrawing districts to ensure that one protected class's preferred candidates will not usually be defeated in one individual district, the county would inevitably "dilute" another protected class's ability to elect its preferred candidates in at least one other district.

402. After all, at least some racial group's candidate of choice "will usually be defeated" in *any* hand-picked district or districts given the zero-sum nature of elections, and the New York Legislature could not be assumed to have enacted an absurd statute, which makes compliance with the law impossible in any county or town that happens to have racially-polarized voting.

403. Indeed, the analysis of Plaintiffs' expert Dr. Cervas demonstrates this impossibility. Dr. Cervas analyzed only seven of the County's nineteen districts—those where he determined there to be racially polarized voting—and drew a map to create more majority-minority districts. *See* Trende Rebuttal at 87, 94. However, this approach ignores that moving minority voters into those districts inevitably dilutes the ability of minority voters to elect their preferred candidates in the other districts. *See supra* p.133. Thus, the usually defeated analysis must be conducted on a jurisdiction-wide basis in order for the NYVRA's district-based vote-dilution provisions to be administrable.

404. *Second*, the "usually be defeated" language means plaintiffs must show that minority-preferred candidates are routinely defeated in a significant majority of elections across the jurisdiction. The NYVRA does not define "usually," *see* N.Y. Elec. L. § 17-204, but, given the plain meaning of the word "usually," the Legislature's use of this word indicates that it is meant to be a robust requirement. "Usually" is commonly understood to refer to something that occurs "ordinarily" or "as a rule." *Usually*, Oxford English Dictionary (2024);[14] *see Usually*, Merriam-Webster.com Dictionary, Merriam-Webster (2024) (defining usually as "most often" or "as a rule").[15] Thus, based on its ordinary meaning, "usually be defeated" means one will routinely or "as a rule" be defeated and implies a standard that is far more robust than "more likely than not"

[14] Available at https://www.oed.com/search/dictionary/?scope=Entries&q=usually.

[15] Available at https://www.merriam-webster.com/dictionary/usually.

or 50% plus one. It cannot reasonably be said that minority-preferred candidates are defeated "ordinarily" or "as a rule" in a political subdivision where they win—for example—49% of races in the relevant jurisdiction. *See Usually*, Oxford English Dictionary, *supra.* Indeed, that would often make compliance with the NYVRA impossible, as at least *some* racial groups' candidates of choice would be defeated more than 50% of the time, absent some unusual and mathematically improbable (or impossible) circumstance.

405. The NYVRA's usually be defeated analysis cannot be interpreted as requiring only an examination of certain areas of the jurisdiction, as some of Plaintiffs' experts argued, *see* Cervas Dep. at 271:13–22; Oskooii Dep. at 233:11–237:16, or as requiring a certain number of majority-minority districts, as Plaintiffs' Complaint, Action II Compl. ¶ 45, and some of Plaintiffs' other experts, *see* Magleby Report at 24–25, suggested, *supra* pp.117–18. Conducting the analysis on a district-by-district rather than jurisdiction-wide basis is not based in the NYVRA's text and would lead to non-administrable results, as explained above, *supra* pp.134–35. Similarly, there is no basis in "the [NYVRA's] language itself," *Roberts*, 31 N.Y.3d at 418, to conclude that satisfying the statute's mandatory "usually defeated" threshold showing requires a particular number of majority-minority districts. The NYVRA's plain text does not allow courts to even consider "evidence concerning whether members of a protected class are geographically compact or concentrated" in a jurisdiction when evaluating a vote-dilution claim. N.Y. Elec. L. § 17-206(2)(c). Thus, the number of majority-minority districts is irrelevant to the "usually defeated" analysis.

406. Under Subsection 17-206(2)(b)(ii)'s "usually [ ] defeated" analysis, "crossover voting"—*i.e.* White residents voting for minority-preferred Democrat candidates—can serve "to make the races competitive" and to ensure that "minority favored candidates are not usually

defeated." Lockerbie Reply ¶¶ 56–57. Further, courts must consider all relevant elections when conducting this analysis to determine if minority preferred candidates lose elections "ordinarily" or "as a rule." *Usually*, Oxford English Dictionary, *supra*. *See supra* p.90.

407. Given this proper understanding of Subsection 17-206(2)(b)(ii), Plaintiffs do not satisfy the NYVRA's "usually be defeated" showing. The undisputed record evidence is that minority-preferred candidates are not usually defeated in Nassau County. *See supra* p.43. Rather, Nassau County is "a jurisdiction where the minority candidate of choice is obviously capable of winning, and does so regularly." Trende Rebuttal at 82. That is because "[e]ven with racial polarization, there is enough crossover voting"—*i.e.*, White residents voting for minority-preferred Democratic candidates—"to make the races competitive in Nassau County," such that "minority favored candidates are not usually defeated when looking at all relevant elections," "regardless of whether we are looking at even-year or odd-year races, midterm years, or presidential years, and county-wide or state-wide races." Lockerbie Reply ¶¶ 56–57. Indeed, minority-preferred candidates have been successful in elections at all levels of government in Nassau County. This is evident from the unrebutted analyses Defendants' experts presented regarding the recent national, state-wide, and county-level election results in Nassau County, *see supra* p.44, which results are summarized in the chart below.

Year	**Office**	**Minority-Preferred Candidate Victorious?**
2012	President	Yes
2012	US Senate	Yes
2014	Attorney General	Yes
2014	Governor	Yes
2016	President	Yes

Year	Office	Minority-Preferred Candidate Victorious?
2016	US Senate	Yes
2017	County Executive	Yes
2017	County Comptroller	Yes
2017	County Clerk	No
2018	Attorney General	Yes
2018	Governor	Yes
2018	US Senate	Yes
2019	County District Attorney	Yes
2020	President	Yes
2021	County Executive	No
2021	County Comptroller	No
2021	County Clerk	No
2021	County District Attorney	No
2022	Attorney General	No
2022	Governor	No
2022	State Comptroller	Yes
2022	US Senate	Yes

See Lockerbie Rebuttal at T.1, T.2; Lockerbie Reply ¶¶ 23–42; Trende Reply at 17, 20.

408. That the minority-preferred Democratic candidate won the 2012 President, 2012 Senate, 2014 Attorney General, 2014 Governor, 2016 President, 2016 Senate, 2017 County Executive, 2017 Comptroller, 2018 Attorney General, 2018 Governor, 2018 Senate, 2019 District Attorney, 2020 President, 2022 Comptroller, and 2022 Senate elections clearly demonstrates that

such candidates are not "usually defeated" in elections in Nassau County, as that term must be interpreted under the proper construction of the NYVRA, *supra* pp.44–45, 86–87. Further underscoring this conclusion is the fact that many of the Democratic candidates won these races by large margins of victory, including in the 2020 Presidential Election where Joe Biden carried the county by ten points. *See supra* p.83. Alternatively, even looking only at odd-year elections—while not a permissible way to conduct the NYVRA's usually defeated analysis—Plaintiffs still fail to demonstrate that minority-favored candidates are defeated "ordinarily" or "as a rule," *Usually*, Oxford English Dictionary, *supra*, in Nassau County because such candidates clearly won a number of those elections, *supra* pp.84–86.

409. The conclusion that minority-candidates are not usually defeated in Nassau County is also evident from the fact that such candidates are highly competitive and often win many individual districts within the County even in the elections that they lose, *see supra* pp.44–47, as demonstrated by the chart discussed above showing the number of districts minority-preferred candidates won in recent national, state-wide, and county-specific elections in Nassau County and the number of districts those candidates lost but in which they were competitive, *see supra* pp.46–47.

410. Ultimately, Black, Latino, and Asian voters' preferred Democratic candidates in Nassau County do not lose elections "ordinarily" or "as a rule," *Usually*, Oxford English Dictionary, *supra*, across Nassau County, such that it cannot be said that they will "usually be defeated" within the meaning of Section 17-206, *see* N.Y. Elec. L. § 17-206(2)(b)(ii).

411. Plaintiffs put forth insufficient evidence to show otherwise. To begin, Plaintiffs rely on their experts Dr. Oskooii and Dr. Cervas for the usually defeated analysis, but both Drs. Oskooii's and Cervas' analyses do not comply with the NYVRA, are overly narrow in scope,

and fail to establish that minority preferred candidates will usually be defeated in Nassau County under Local Law 1. *See supra* pp.81–92.

412. Dr. Oskooii 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," Oskooii Report at 27, but he reached that conclusion by relying on data from an overly narrow set of hand-picked elections that were favorable to his thesis, ignoring a large amount of relevant elections, *supra* pp.81–83, and employing a legally improper definition of "usually defeated," *supra* p.82. Dr. Oskooii only examined odd-year election data, and based his conclusion on the fact that the minority favored candidates lost in 5 out of the 8 county-wide races. Oskooii Rebuttal ¶ 41. It was improper for Dr. Oskooii to ignore a large swath of electoral results from even-numbered years that contradicted his thesis by showing that "White voters do not usually vote as a bloc to defeat the minority candidates of choice here." Trende Rebuttal at 77–78. Despite admitting that an "analysis of state and federal elections may shed light on voter behavior in county elections," Oskooii Rebuttal ¶ 7, Dr. Oskooii also ignored this relevant election data, *see* Lockerbie Reply ¶ 9, and "fail[ed] to consider that white crossover voting is making minority favored candidates both competitive and successful," *id.* ¶ 46.

413. But even Dr. Oskooii's limited data set does not support his conclusion. Indeed, the evidence shows that minority-favored candidates won three of the eight county-wide odd-year elections that he examined, Lockerbie Reply ¶ 41, and those candidates were often highly competitive and carried multiple individual districts in the elections that they lost, *see supra* pp.44–47. This evidence in no way shows that minority-preferred "candidates or electoral choices" are "usually [ ] defeated" in Nassau County, N.Y. Elec. L. § 17-206(2)(b)(ii), as that term must be interpreted, *supra* pp.135–37. Dr. Oskooii only reached a contrary conclusion based on his reading

of "usually defeated" to mean losing in only "50 percent" of elections, *see* Oskooii Dep. at 129:7–12, which interpretation is legally erroneous and would result in an absurd application of the NYVRA's district-based vote-dilution provisions, *see supra* pp.133–35.

414. Dr. Cervas' analysis too fails to show that minority-favored candidates are usually defeated in Nassau County under Local Law 1. Like Dr. Oskooii, Dr. Cervas based his conclusions on cherry-picked, odd-year election data, which data fail to show that minority-preferred candidates are usually defeated in Nassau County for the reasons discussed immediately above. Indeed, Defendants' expert Dr. Trende demonstrated "the performance of Dr. Cervas' map is dependent upon the races selected," and showed that "using the even-numbered year races, Dr. Cervas' map actually decreases the number of races that the minority-preferred candidate won." Trende Rebuttal at 94–96. Further, Dr. Cervas examined only a hand-picked set of seven of Nassau County's nineteen districts, *supra* p.88, which is a legally improper manner to conduct the NYVRA's usually defeated analysis, *supra* pp.116–17. Conducting the analysis in this way renders Dr. Cervas unable to show that minority-preferred candidates will usually be defeated in Nassau County under the NYVRA's district-based vote-dilution provisions. As Defendants' experts explained, by ignoring the necessary impact that moving minority voters from around Nassau County into the seven districts Dr. Cervas examined would have on minority-preferred candidates' ability to get elected in the County's twelve other districts that he did not individually analyze, Trende Rebuttal at 94, Dr. Cervas failed to provide "an analysis of the competitiveness of the minority favored candidates in the districts" county-wide, Lockerbie Rebuttal ¶ 47, and cannot demonstrate whether his map actually "give[s] minorities a reasonable opportunity to elect candidates for their choice in more districts" than under Local Law 1, Trende Rebuttal at 87. In

sum, both Dr. Oskooii's and Dr. Cervas' analyses are insufficient as a matter of law to establish that minority-preferred candidates are usually defeated in Nassau County.

415. Plaintiffs are also wrong that additionally considering the election results of odd-year races prior to 2017, the 2021 District Attorney contest, and 2022 contests in Nassau County changes this conclusion. Minority-preferred candidates won two of those ten elections, were competitive in most elections they lost, and considering these elections in no way changes the conclusion that minority-preferred candidates regularly win elections and are competitive in those that they lose across Nassau County when looking at all relevant elections. *See supra* pp.44–47, 86, 138–39.

V. Local Law 1 Does Not Violate The NYVRA's District-Based Vote-Dilution Provisions Under The Statute's Totality-Of-The-Circumstances Inquiry

416. While this analysis is unnecessary to the Court's holding because Plaintiffs cannot satisfy the usually defeated showing—which is the legally required, threshold inquiry for liability under the NYVRA's district-based provisions, *see* N.Y. Elec. L. § 17-206(2)(b)(ii)—there is also insufficient evidence in the record to establish that Local Law 1 violates the NYVRA's vote-dilution prohibition under the statute's totality-of-the-circumstances inquiry. As discussed above, *supra* pp.114–15, the NYVRA provides that a political subdivision using a district-based system has engaged in "vote dilution" when minority-preferred candidates "would usually be defeated" and either there is racially polarized voting in the jurisdiction "*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," N.Y. Elec. L. § 17-206(2)(b)(ii) (emphasis added). The NYVRA provides a non-exhaustive list of eleven factors that courts may consider when conducting the totality-of-the-circumstances inquiry. *Id.* § 17-206(3).

417. The enumerated factors are: (a) the history of discrimination in or affecting the political subdivision; (b) the extent to which members of the protected class have been elected to office in the political subdivision; (c) the use of any voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy that may enhance the dilutive effects of the election scheme; (d) denying eligible voters or candidates who are members of the protected class to processes determining which groups of candidates receive access to the ballot, financial support, or other support in a given election; (e) the extent to which members of the protected class contribute to political campaigns at lower rates; (f) the extent to which members of a protected class in the state or political subdivision vote at lower rates than other members of the electorate; (g) the extent to which members of the protected class are disadvantaged in areas including but not limited to education, employment, health, criminal justice, housing, land use, or environmental protection; (h) the extent to which members of the protected class are disadvantaged in other areas which may hinder their ability to participate effectively in the political process; (i) the use of overt or subtle racial appeals in political campaigns; (j) a significant lack of responsiveness on the part of elected officials to the particularized needs of members of the protected class; and (k) whether the political subdivision has a compelling policy justification that is substantiated and supported by evidence for adopting or maintaining the method of election or the voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy. *Id.*

418. Here, Defendants' expert Dr. Donald T. Critchlow provided a careful analysis of each and every one of the NYVRA's totality-of-the-circumstances factors, demonstrating that consideration of those factors does not support a finding that Local Law 1 violates the NYVRA's vote-dilution prohibition. *See supra* pp.49–62; Critchlow Report; Critchlow Reply. Based on Dr.

Critchlow's analysis of the enumerated factors, the allegations in Plaintiffs' Complaints, and the historical information reviewed, the record evidence demonstrates that Black, Latino, and Asian voters—the minority groups Plaintiffs identified—do not have less of an opportunity than the rest of the electorate to elect candidates of their choice or an impaired ability to influence the outcome of elections in Nassau County under the totality of the circumstances. *See supra* pp.49–62; Critchlow Report ¶ 11.

419. As to factor (a)—the history of discrimination in or affecting the political subdivision—Dr. Critchlow argues that Dr. Sugrue's claims about historical discrimination in Nassau County are misleading, noting that KKK activity primarily targeted Catholics and southern and eastern Europeans, with some incidents against Blacks, but significant progress has been made toward diversity and inclusion. He highlights decades of advancements, including the formation of various organizations and political milestones that demonstrate social and racial progress. Furthermore, Dr. Critchlow refutes the claim that Nassau County is the most segregated in its population class, citing empirical evidence of declining segregation and its absence from top rankings for Hispanic or Asian American segregation. *See supra* pp.51–52.

420. As to factor (b)—the extent to which members of the protected class have been elected to office in the political subdivision—Dr. Critchlow counters Plaintiffs' claims of a lack of minority representation in the Nassau County Legislature by noting the presence of multiple Hispanic and Black legislators, with Black representation exceeding the county's Black population percentage. He suggests that ethnic group mobilization historically occurs gradually and expects this pattern to continue as Hispanic and Asian American populations grow. Additionally, he addresses the historical imposition of literacy tests, noting that these measures, enacted by

Progressives in 1921, were primarily aimed at white Southern and Eastern European immigrants. *See supra* p.52.

421. Dr. Critchlow explains that factor (c)—the use of any voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy that may enhance the dilutive effects of the election scheme, regarding voting qualifications and practices—fails similarly to factor (a) as literacy tests in northern states were primarily aimed at Eastern and Southern European immigrants, not racial minorities. He explains that these tests were supported by progressive groups to improve literacy and were upheld by the courts if applied without racial prejudice. Additionally, legislation for odd-year elections targeted the New York City Tammany Hall machine, and racial covenants were ruled unconstitutional in 1948. Dr. Critchlow concludes that there is no evidence of any voting-related laws or practices in Nassau County that dilute the votes of protected class members. *See supra* pp.52–54.

422. As to factors (d), (e), and (h), Dr. Critchlow concluded there is no evidence that Blacks, Asian Americans, or Hispanics are denied access to the processes that determine which candidates receive access to the ballot, financial support, or other support in a given election; contribute to campaigns in different amounts; or are disadvantaged in any ways that may hinder their ability to participate effectively in the political process in Nassau County. *See supra* p.54.

423. As to factor (f)—the extent to which members of a protected class in the state or political subdivision vote at lower rates than other members of the electorate—Dr. Critchlow asserts that voter turnout is influenced by economic status and educational attainment rather than ethnicity or race. Census data from recent elections indicate that many eligible voters did not participate due to various personal reasons, challenging the idea that lower minority turnout is solely due to systemic suppression. While specific data for Nassau County is limited, overall voter

turnout in New York state has declined across all demographics. Additionally, the Asian American community in Nassau County, with higher education levels and household incomes, may have diverse voting interests and potentially higher future participation rates. *See supra* pp.54–55.

424. Plaintiffs' argument on factor (g)—the extent to which members of the protected class are disadvantaged in areas including but not limited to education, employment, health, criminal justice, housing, land use, or environmental protection—Dr. Critchlow argues that Plaintiffs' focus on mid-twentieth-century housing policies, particularly in Levittown, overlooks the significant progress made towards racial integration. Levittown, initially built with discriminatory covenants, has transformed into a diverse community, reflecting broader societal advancements. He disputes the Plaintiffs' narrative of FHA-imposed redlining and asserts that Nassau County's evolution has negated past segregation. Dr. Critchlow also contends that the assumption linking historical federal housing policies to current discriminatory districting is flawed, noting that affordable housing remains a widespread issue, as evidenced by recent policy challenges and public resistance. *See supra* pp.55–56.

425. Dr. Critchlow refutes factor (i) regarding the use of overt or subtle racial appeals in political campaigns, demonstrating that such tactics are historically ineffective. He notes that Republican legislators' campaigns focused on issues like low taxes, public safety, and infrastructure rather than racially charged themes. While Plaintiffs allege the use of racist campaign ads, Dr. Critchlow provides examples where race was not a significant factor in election outcomes. He concludes that the evidence does not support the assertion of systemic racism in Nassau County's political campaigns. *See supra* pp.56–57.

426. Dr. Critchlow argues as to factor (j), regarding a significant lack of responsiveness on the part of elected officials to the particularized needs of members of the protected class, that

Nassau County's elected officials have been responsive to the needs of minority communities, contrary to Plaintiffs' claims. He highlights the County's efforts to address diverse economic interests and community needs through various government functions and services. The County has established departments and offices specifically aimed at promoting diversity and supporting minority groups. Dr. Critchlow also contends that issues with the tax assessment system are longstanding and not racially motivated, challenging the Plaintiffs' assertion that this factor should weigh in their favor. *See supra* p.57.

427. As for factor (k), whether the political subdivision has a compelling policy justification that is substantiated and supported by evidence for adopting or maintaining the method of election or the voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy, Dr. Critchlow challenges Plaintiffs' assertion of a unified "Community of Interest" among minority groups in Nassau County, arguing that it overlooks significant cultural and socio-economic differences. He highlights that Asian Americans in the County tend to be wealthier and better educated than Hispanics and Blacks, with diverse languages and national origins further complicating the notion of a cohesive community. Additionally, he notes that voter behavior is more influenced by economic status and educational attainment than by ethnicity or race. Dr. Critchlow concludes that there is no evidence to support the idea that these minority groups vote cohesively or share the same political priorities. *See supra* p.58.

VI. Local Law 1 Does Not Violate Section 34's Prohibition On Racial Gerrymandering

428. As an initial matter, Plaintiffs have not provided a clear theory supporting their claim that Local Law 1 constitutes a racial gerrymander under Section 34. *See* Action II Compl. ¶¶ 4, 91–93; *see generally* Resp. As such, Plaintiffs have not properly stated their claim and are therefore not entitled to relief. *See* CPLR § 3013. To the extent that Plaintiffs' racial

gerrymandering claim relates to the analysis under *Cooper v. Harris*, 581 U.S. 285 (2017), then the following conclusions of law apply.

429. The Equal Protection Clause prohibits racial gerrymandering—where "racial considerations predominate[ ]" over traditional redistricting criteria—unless the consideration of race can survive strict scrutiny. *Id.* at 291–92. In other words, if "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," the plan violates the Equal Protection Clause unless such considerations satisfy strict scrutiny. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

430. Compliance with Section 2 of the VRA is the only justification for drawing lines based upon race that the Supreme Court has recognized. *See Wis. Legislature*, 595 U.S. at 401–02. While the Supreme Court has not definitely ruled as to whether any other justifications could suffice, Justice Kennedy—in his controlling opinion in *LULAC*, 548 U.S. 399—warned against any approach that "would unnecessarily infuse race into virtually every redistricting," explaining that such approaches "rais[e] serious constitutional questions." *Id.* at 446.

431. Like the federal prohibition, Section 34 provides—as relevant to this specific argument—that "[d]istricts shall not be drawn with the intent . . . of denying or abridging the equal opportunity of racial or language minority groups to participate in the political process or to diminish their ability to elect representatives of their choice." N.Y. Mun. Home Rule Law § 34(4).

432. Plaintiffs have presented insufficient evidence to rebut the presumption that Local Law 1 does not constitute an unlawful racial gerrymander under Section 34. *See Dominique*, 90 N.Y.2d at 881; *Harkenrider*, 38 N.Y.3d at 506.

433. The memoranda Troutman Pepper provided to the Legislature prior to the adoption of Local Law 1 support the conclusion that the Legislature did not "draw[ ]" the redistricting map

"with the intent" to subordinate community of interest considerations to racial considerations, and Plaintiffs provide no evidence to the contrary. N.Y. Mun. Home Rule Law § 34(4). Those memoranda explain that because Nassau County "contain[ed] no districts meeting the *Gingles* preconditions that would require or permit the creation of any race-focused districts, for purposes of compliance with Section 2 of the VRA," Troutman Feb. 16, 2023 Memo at 4–5; Troutman Feb. 27, 2023 Memo at 9, the map does not take race into account, let alone make it a predominate factor in any line within the map.

434. Far from providing evidence that that Local Law 1 was "drawn with the intent" to subordinate community of interest considerations to racial considerations, N.Y. Mun. Home Rule Law § 34(4), Plaintiffs have instead correctly and repeatedly characterized the map as "race-blind."

435. Meanwhile, Defendants have provided ample, undisputed evidence that Local Law 1 was drawn to adhere to community-of-interest considerations. Indeed, the memoranda provided to the Legislature explain that Local Law 1 "resulted *entirely* from nonracial considerations"—namely, "considerations of communities of interests raised at the [Legislature's February 16, 2023] Meeting and then necessary population adjustments to reach population equality." Troutman Feb. 27, 2023 Memo at 3.

436. Defendants also provide the only record evidence related to the County's communities of interest, showing that Local Law 1 properly accounts for relevant community-of-interest considerations; *see* Alfano Rebuttal; Troutman Feb. 16, 2023 Memo; Troutman Feb. 27, 2023 Memo, and Plaintiffs have offered no evidence to rebut this conclusion.

437. Plaintiffs' expert Dr. Stern provide no evidence that the Legislature acted with predominant racial intent.

438. To start, Dr. Stern's analysis simply does not show that the Legislature disregarded the legal advice and analysis offered in the memoranda it received prior to adopting Local Law 1. Dr. Stern's analysis is also unreliable because it uses only CVAP data, which suffers from significant error margins as it is an estimate derived from the American Community Survey and misaligned with precinct boundaries, *see supra* pp.76–81, unlike the robust VAP data from the federal decennial census utilized in Dr. Trende's analysis, *see supra* pp.31–40.

439. In any case, using either data source—CVAP or VAP—Local Law 1 does not show any signs of racial intent because there are no significant deviations between Local Law 1 and the ensembles in terms of racial gerrymandering. Trende Rebuttal at 75.

440. Dr. Cervas' map does not provide evidence to support Plaintiffs' racial gerrymandering claim. Instead, Dr. Cervas' map subordinates the core, traditional redistricting criteria of keeping Nassau County's communities of interest intact in favor of other considerations, particularly the racial demographics of districts. Alfano Rebuttal ¶ 26. That is, the Cervas Illustrative Plan makes numerous redistricting choices that undermine and divide Nassau County's communities and geography, as that hypothetical map prioritizes racial demographics over the traditional redistricting criterion of keeping communities of interest intact. *See id.* ¶¶ 27, 88–89.

441. Accordingly, Plaintiffs have presented insufficient evidence that Local Law 1 constitutes a racial gerrymander in violation of Section 34.

CONCLUSION

442. ORDERED that JUDGMENT is entered in Defendants' favor.

Dated: January ___, 2025

By_____
Hon. Paul I. Marx, J.S.C.

Dated: December 9, 2024
New York, New York

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