SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

ORAL CLARKE, ROMANCE REED, GRACE PEREZ, PETER RAMON, ERNEST TIRADO, and DOROTHY FLOURNOY,

Plaintiffs,

v.

TOWN OF NEWBURGH and TOWN BOARD OF THE TOWN OF NEWBURGH,

Defendants.

Index No.: EF002460-2024

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REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. PRELIMINARY STATEMENT

In their Motion for Summary Judgment, Defendants explained that the NYVRA's vote-dilution provisions are unconstitutional and that, in any event, Plaintiffs failed to produce any evidence from which a factfinder could conclude that the Town violated the NYVRA. While Defendants strongly believe that the NYVRA is unconstitutional and respond to Plaintiffs' various arguments below, they respectfully submit that the most straightforward way to dispose of this case is for this Court to order summary judgment in Defendants' favor because Plaintiffs failed to submit *any* admissible evidence as to a critical element of their NYVRA claim. Specifically, Plaintiffs ignored their burden to show an alternative voting system that would give the Town's minority voters a greater chance to elect their preferred candidates than the current at-large system before this Court's deadline for doing so, and presented no other timely evidence on this point. Plaintiffs' attempt to rely upon a two-months-too-late expert "addendum" to make up for this evidentiary failure comes too late.

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II. ARGUMENT

A. Plaintiffs' Failure To Provide Any Admissible Evidence Of An Alternative Election System That Would Give Minority Voters A Greater Chance To Elect Their Preferred Candidates Should Be The End Of This Case

1. To prevail on their vote-dilution claim, Plaintiffs must show that there is an alternative voting system that would give the Town's minority voters a greater chance to elect their preferred candidates than the current at-large system. Op.Br.21–26. The only timely expert reports that Plaintiffs submitted in this case do not even try to carry their burden on this critical issue. Dr. Sandoval-Strausz's expert report does not address alternative voting systems at all. *See* Resp.Br.24–25. Dr. Barreto's expert report merely discusses different electoral systems generally, *without attempting to demonstrate that one of these systems would actually give minority voters a greater chance to elect their candidates of choice than the Town's current at-large system. See*

Expert Report of Dr. Barreto ("Barreto Report") at 16–18 (attached to NYSCEF 59, Affirmation of Bennet J. Moskowitz ("Moskowitz Aff."), as Exhibit I). Accordingly, the Town is entitled to summary judgment because Plaintiffs presented absolutely no evidence on a necessary element of their claim.

2. In their Opposition, Plaintiffs admit they have the burden to "prove that one or more reasonable alternative policies exist that would *improve* the protected class's representation relative to the status quo," Resp.Br.11 (emphasis added), but meekly claim that they did so because "Dr. Barreto opined" generally in his June 28, 2024 report "that numerous alternative voting systems would allow Black and Hispanic voters to elect their candidates of choice," Resp.Br.24. But this does not even purport to satisfy Plaintiffs' burden, which is to demonstrate a reasonable alternative voting system that would give the Town's minority voters a *greater* opportunity to elect their preferred candidates as compared to the current at-large system. Op.Br.21–24. Dr. Barreto's expert report performed absolutely no comparison between the Town's current at-large system and an alternative voting system. *See* Barreto Report at 16–18.

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Plaintiffs' only other response is to point to an untimely "addendum" from Dr. Barreto. Resp.Br.24–25. But as Defendants explain in more detail in their pending Motion In Limine, this addendum is not part of this case because ***Plaintiffs submitted it more than two months too late—on the eve of expert depositions—without even attempting to offer any justification for their untimely submittal.*** NYSCEF 126. Although Plaintiffs appeal to CPLR 3101's lack of specific "time limits" for expert disclosures, Resp.Br.25, they were required to comply with this Court's May 9, 2024 scheduling order and cannot "ignore" those deadlines "with impunity," *Colucci v. Stuyvesant Plaza, Inc.*, 157 A.D.3d 1095, 1099 (3d Dep't 2018).

Plaintiffs contend that their dilatory conduct does not suggest fault or prejudice, Resp.Br.25, but that is wrong. Plaintiffs' counsel was aware of Plaintiffs' obligation to establish a reasonable alternative system, *see* Op.Br.21–24, and yet Plaintiffs still chose to surprise Defendants with an untimely expert report on the eve of the parties' expert depositions, without providing any justification or explanation for their delay, *see* NYSCEF 126 at 1–4. And while no prejudice showing is necessary given Plaintiffs' unexplained and unjustified violation of this Court's scheduling order, *see Colucci*, 157 A.D.3d at 1099, the Town was prejudiced by Plaintiffs' delay, as they explain in detail in their pending Motion In Limine, NYSCEF 126 at 7–9.

No matter, say Plaintiffs, because, in their view, CPLR 3212(b) gives them free reign to ignore this Court's scheduling order, so long as they are submitting an untimely expert report in opposition to summary judgment. Resp.Br.25. But CPLR 3212(b) does no such thing. As the court explained in *Theroux v. Resnicow*—a case that Plaintiffs rely upon, *see* Resp.Br.25—although CPLR 3212(b) permits courts to consider expert affidavits at summary judgment regardless of whether the parties exchanged expert discovery beforehand, that rule does not eliminate a court's discretion to "preclude a party from introducing expert evidence at summary judgment because the party had flouted a specific *court-ordered* disclosure deadline." 148 N.Y.S.3d 885, 889 (Sup. Ct., N.Y. Cnty. 2021). That is exactly what happened here, and Plaintiffs offer no justification as to why they missed this Court's expert-disclosure deadline by over two months or why this Court should excuse them from this unexplained failure.

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B. Plaintiffs Cannot Successfully Defend The Constitutionality Of The NYVRA's At-Large Provisions

1. The NYVRA's at-large provisions require political subdivisions to abandon at-large systems that they adopted for race-neutral reasons in order to give voters lumped together by race a greater chance to elect candidates of their choice (and, given the zero-sum nature of elections,

give voters grouped together by other racial groups a smaller chance to elect candidates of their choice). Op.Br.10–21. Forcing political subdivisions to change their election systems to favor the voting preferences of voters grouped together by race vis-à-vis other voters obviously triggers strict scrutiny. Op.Br.13–16. And these provisions just as clearly cannot satisfy strict scrutiny because they are not necessary to achieve any compelling state interest. Op.Br.16–21.

2. Plaintiffs claim that the Town cannot constitutionally challenge the NYVRA, Resp.Br.8–10, that the NYVRA is not subject to strict scrutiny, Resp.Br.10–17, and, alternatively, that the NYVRA satisfies strict scrutiny, Resp.Br.17–22. All three arguments are wrong.

First, Plaintiffs' assertion that Defendants "lack capacity" to challenge the NYVRA's constitutionality, Resp.Br.8–9, is without merit. As Plaintiffs admit, "the capacity rule" is subject to an exception in that political subdivisions can 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.'" Resp.Br.10 (quoting *Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287 (1977)). That is *exactly* Defendants' argument here. Complying with the NYVRA's at-large voting provisions requires political subdivisions to abandon race-neutral at-large voting systems for the express statutory purpose of giving voters lumped together by race a greater chance to elect their preferred candidates, and thus give citizens grouped together by other racial groups a smaller chance to elect their preferred candidates. The "very compliance" with that mandate violates the Equal Protection Clauses of the United States and New York Constitutions, *Jeter*, 41 N.Y.2d at 287, by "classif[ying] [ ] citizens solely on the basis of race," *Shaw v. Reno*, 509 U.S. 630, 643 (1993), and using "race as a criterion for legislative action," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490–91 (1989); *see Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023) ("*SFFA*"), without satisfying strict scrutiny.

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A simple hypothetical makes this point even more clearly, while also refuting some of Plaintiffs' other arguments below. If the Legislature adopted a law that required political subdivisions to change their method of election whenever doing so would lead to the election of more white-voter-favored candidates, a town could *obviously* challenge that law successfully as *requiring* it to violate the Equal Protection Clauses of the United States and New York Constitutions. And while the NYVRA requires changing election systems to favor minority voters rather than white voters, the application of the capacity rule to this hypothetical statute and the NYVRA is no different.

Second, Plaintiffs' remarkable argument that the NYVRA's vote-dilution provisions are not subject to strict scrutiny, Resp.Br.13–17, fails.

Plaintiffs' assertions that "the NYVRA uses no racial classification," Resp.Br.13, merely contains "reference[s] to race," and does not "distribute[ ] burdens or benefits on the basis of individuals' race," Resp.Br.14 (emphasis omitted), are demonstrably false. The NYVRA requires political subdivisions to make "racial classification[s]" from top to bottom. *SFFA*, 600 U.S. at 206–07 (citations omitted). The NYVRA requires Defendants to group citizens by racial group and then abandon their race-neutral at-large election method with the singular goal of increasing some racial groups' chances of electoral success, thereby decreasing other racial groups' chances of electoral success. *Supra* pp.3–4. While the NYVRA claims doing so is necessary to prevent "vote dilution," N.Y. Elec. Law § 17-206(2), this cannot save the statute from the strictures of strict scrutiny, *see SFFA*, 600 U.S. at 206. To reference the hypothetical discussed immediately above, if a law required political subdivisions to change their election systems to ensure that white-favored candidates won more elections, that would clearly "burden" individual members of racial

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minority groups, and "distribute[ ] benefits" on the basis of race, Resp.Br.14, triggering strict scrutiny.

Plaintiffs and their *amici* claim that strict scrutiny does not apply because the NYVRA applies to "members of *any*" racial group, Resp.Br.14; *see* NYSCEF 108 at 4–6 ("ACLU Br."), but that is both incorrect and legally irrelevant.

Initially, the NYVRA's vote-dilution provisions do not apply to members of "any" racial group as Plaintiffs contend. Resp.Br.14. Rather, those provisions apply only to "members of [a] protected class," N.Y. Elec. Law § 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). Any contrary reading of the NYVRA as also protecting white-majority voters from vote dilution would render the provision "absurd." *See Bank of Am., N.A. v. Kessler*, 39 N.Y.3d 317, 324 (2023). To take just the most obvious example, the NYVRA renders district-based or alternative election systems unlawful if a racial minority group's preferred candidate "would usually be defeated" and there is "racially polarized voting." N.Y. Elec. Law § 17-206(2)(b)(ii). Due to the zero-sum nature of elections, if the NYVRA's race-based rules also protected white-majority voters like they do minority voters, as Plaintiffs suggest, Resp.Br.14, the NYVRA would render nearly *every* election system unlawful when there is racially polarized voting in a political subdivision. After all, given the zero-sum nature of elections, at least some racial groups' candidates of choice would "usually be defeated." N.Y. Elec. Law § 17-206(2)(b)(ii).

But even assuming the NYVRA's vote-dilution provisions did apply equally to white majorities as well, the statute would still be subject to strict scrutiny because that heightened review applies to "*all* racial classifications imposed by the government" by law, *Johnson v. California*,

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543 U.S. 499, 505 (2005), "even when they may be said to burden or benefit the races equally," *id.* at 506 (citations omitted). The NYVRA is still a racial-classification statute regardless whether it allows *any* group of citizens lumped together by *any* race to force a political subdivision to abandon its race-neutral at-large method of election to ensure that more of that group's preferred candidates win (again, necessarily at the expense of all other racial groups' preferred candidates). *See id.* A statute giving white voters state assistance in electing their preferred candidates at the expense of minority-preferred candidates would obviously be subject to strict scrutiny because it clearly creates racial classifications. *Supra* pp.5–6.

Plaintiffs' and their *amici*'s argument that the NYVRA is similar to "[o]ther state VRAs" in California and Washington that courts have found "are not subject to strict scrutiny," Resp.Br.14–15; *see* ACLU Br.5–9, is unpersuasive. While those statutes are still constitutionally problematic in some ways, each is far more narrowly tailored than the NYVRA. The California Voting Rights Act ("CVRA") incorporates "case law regarding enforcement of the federal Voting Rights Act," Cal. Elec. Code § 14026(e), and retains many of the federal VRA's procedural safeguards that allow it to survive strict scrutiny, *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 828 (Ct. App. 2006). For example, unlike with the NYVRA, CVRA plaintiffs must satisfy two of the three necessary preconditions to make out a vote-dilution claim under *Thornburg v. Gingles*, 478 U.S. 30 (1986). *Sanchez*, 51 Cal. Rptr. 3d at 828. Similarly, the Washington Voting Rights Act ("WVRA") allows courts to "rely on relevant federal case law" in interpreting its provisions, Wash. Rev. Code § 29A.92.010, and only eliminates consideration of the "sufficiently large and geographically compact" *Gingles* factor from its "threshold requirement[s] for vote dilution claims," *Portugal v. Franklin County*, 530 P.3d 994, 1011 (Wash. 2023) (en banc) (citations omitted). Further, unlike the NYVRA, the WVRA expressly incorporates the federal VRA's

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definition of "protected class." Wash. Rev. Code § 29A.92.010. The NYVRA goes much further than either the CVRA or WVRA in eliminating Section 2's exacting standards and the *Gingles* safeguards, such that reference to these statutes cannot save the NYVRA from strict scrutiny.

Contrary to Plaintiffs' suggestion, there is nothing "misleading," Resp.Br.15, about Defendants stating that Section 2 of the federal VRA is subject to the constitutional strict scrutiny analysis, *see* Op.Br.18 & n.4. As the Supreme Court has explained, Section 2 is subject to "strict scrutiny" because it "demands consideration of race" in a state's redistricting process. *Abbott v. Perez*, 585 U.S. 579, 587 (2018) (citations omitted). Plaintiffs claim that whether a district drawn to comply with Section 2 "withstands strict scrutiny was the question before the Court in *Abbott*, not whether Section 2 *itself* was subject to heightened scrutiny." Resp.Br.15. But this ignores the necessary implication of the Supreme Court's "assum[ption]" that "complying with the VRA" means that a state's "consideration of race" in enacting a redistricting plan "satisfies strict scrutiny." *Abbott*, 585 U.S. at 587; *see also Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 194 (2017); *Cooper v. Harris*, 581 U.S. 285, 292–93 (2017). Section 2 is only constitutional because it is narrowly tailored to satisfying a compelling government interest, unlike the NYVRA. *See infra* pp.9–12.

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Plaintiffs claim that the NYVRA's "framework for determining liability closely resembles the structure of Section 2 of the federal VRA," Resp.Br.12, and that the NYVRA instructs courts to evaluate totality-of-the-circumstances factors "just like in Section 2 cases" under *Gingles*, Resp.Br.16 (citing *Gingles*, 478 U.S. at 27). This is entirely false. In the Section 2 context, the all-things-considered inquiry acts as an additional requirement that plaintiffs need to satisfy, after making the difficult showing under the *Gingles* preconditions. Op.Br.9–10. The NYVRA's at-large provisions, however, require even a political subdivision without racially polarized voting to

change its election systems so that voters grouped together by some races will elect more candidates of choice, at the expense of other citizens grouped together by different races. *See* Op.Br.10–11, 19–21; N.Y. Elec. Law § 17-206(2)(b)(i).

Plaintiffs mischaracterize Defendants' arguments as only targeting "the consequences of potential vote dilution remedies." Resp.Br.16. While judicially imposing a remedy requiring a town to draw a race-based district would trigger strict scrutiny, *see Shaw*, 509 U.S. at 643, 646, so does imposing NYVRA *liability* on a town for refusing to abandon a race-neutral at-large election system so that the preferred candidates of the town's minority citizens grouped together by race will have more electoral success, *see* Op.Br.13–16; *supra* pp.4–5. Just as a statute imposing liability on a town if it did not adopt an election method favoring white-majority voters would be subject to strict scrutiny, *supra* pp.5–6, so is the NYVRA for the same reasons, *see SFFA*, 600 U.S. at 206.

Third, Plaintiffs' arguments that the NYVRA can pass strict scrutiny review, Resp.Br.17–22, are unpersuasive.

Plaintiffs identify "preventing and remedying racial discrimination in voting" as the compelling state interest that the NYVRA purportedly furthers. Resp.Br.17. But the NYVRA is not tailored to achieve that interest because the statute does not require plaintiffs to show that a political subdivision has engaged in racial discrimination in order to prove a vote-dilution claim. Op.Br.18–21. Plaintiffs' own argument demonstrates this: "A plaintiff alleging vote dilution under the NYVRA must offer evidence addressing the voting patterns of the protected class they belong to and/or evidence of discrimination against that protected class within the relevant political subdivision." Resp.Br.19. By using "and/or," Plaintiffs concede that the NYVRA does not *require*

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plaintiffs to present any evidence that the relevant political subdivision has engaged in discrimination.

Plaintiffs' claim that New York has a compelling interest in "combatting racial discrimination" because there is "evidence of discrimination in voting in New York," Resp.Br.18, cannot justify the NYVRA. Plaintiffs' "generalized assertion[s] of past discrimination in a particular [ ] region," are "not adequate" to establish a compelling interest for race-based legislation. *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996). At most, the limited examples that Plaintiffs point to could identify an interest in implementing a remedy to address discrimination in those particular jurisdictions, under a narrowly drawn statute. *See id.* Plaintiffs insinuate that Newburgh has engaged in racial discrimination because other, unnamed political subdivisions in Orange County "have been sued for voter suppression and vote dilution." Resp.Br.19. But, tellingly, Plaintiffs present no evidence that Newburgh has a history of engaging in such activity, nor would the mere filing of a lawsuit making such allegations establish "a strong basis in evidence to conclude that" Newburgh adopted its at-large method of election out of racial animus, such that "action [is] necessary" to remediate an "identified discrimination" in the town. *Shaw*, 517 U.S. at 909–10.

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In any event, this is not a compelling *state* interest because states do not share Congress's interest in remedying the effects of societal discrimination. Op.Br.17. Plaintiffs assert that states are no longer "more limited than the federal government in combatting racial discrimination," Resp.Br.18, but the Supreme Court has made clear that the Fourteenth Amendment serves 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 reaffirmed just last year 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; *accord Trump v. Anderson*, 601 U.S. 100, 112 (2024).

Even assuming the NYVRA's vote-dilution provisions pursue a compelling state interest in remediating "specific, identified instances of past discrimination," Plaintiffs still fail to explain how they are "narrowly tailored—meaning necessary—to achieve that interest." *SFFA*, 600 U.S. at 206–07 (citation omitted). Plaintiffs acknowledge that the "essence" of vote dilution is "racially polarized voting" and "past and present racial discrimination," but the NYVRA does not "correspond closely to this 'essence'" as Plaintiffs claim. Resp.Br.19–20. This is because, *inter alia*, unlike with Section 2 of the VRA, a plaintiff can prove an NYVRA vote-dilution claim relying solely on the "racially polarized voting" prong of the analysis without presenting any evidence of "past and present racial discrimination." *Supra* pp.9–10.

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Plaintiffs' attempt to cast the NYVRA as narrowly tailored despite the NYVRA's explicit rejection of both the *Gingles* preconditions and required totality-of-the-circumstances analysis, Resp.Br.20–22, similarly fails. Plaintiffs argue that the first *Gingles* precondition is "prudential" and irrelevant to the constitutionality analysis, Resp.Br.20, but the Supreme Court has warned that relaxing the *Gingles* standards would present "serious constitutional concerns under the Equal Protection Clause," *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion).

Alternatively, Plaintiffs claim that the NYVRA accounts for this precondition by instructing "courts to consider 'whether members of a protected class are geographically compact or concentrated . . . in determining an appropriate remedy.'" Resp.Br.20. But the NYVRA does no such thing: the NYVRA instructs that such evidence "*shall not* be considered" for liability purposes and then only provides that such evidence "*may* be a factor" at the remedy stage. N.Y. Elec. Law § 17-206(2)(c) (emphases added). Similarly, regarding the second precondition, the

NYVRA does not "expressly ask[ ] whether protected class members are 'politically cohesive.'" Resp.Br.21. Rather, the NYVRA only provides that such evidence is relevant when determining whether members of *different* protected classes may be combined. N.Y. Elec. Law § 17-206(2)(c). 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. Op.Br.9, 19. Regarding *Gingles*' required second step, satisfying the totality-of-the-circumstances inquiry, Plaintiffs admit that doing so is not required under the NYVRA and concede that the NYVRA's analysis is "more expansive than the federal VRA." Resp.Br.22. Plaintiffs argue that the NYVRA nevertheless provides sufficient safeguards because "plaintiffs must also satisfy the statute's reasonable-alternative-policy requirement," Resp.Br.22, but this requirement only necessitates determining whether minority-preferred candidates would fare better under an alternative method of election—it in no way requires courts to evaluate *Gingles*' totality-of-the-circumstances factors before imposing liability, Op.Br.18–21.

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Finally, the NYVRA cannot be "narrowly tailored" if a federal statute already achieves the compelling interest that the NYVRA purportedly furthers because it would not be "necessary [ ] to achiev[ing] that interest," and does so by more tailored means. *SFFA*, 600 U.S. at 206–07 (citation omitted). Here, Section 2 of the VRA does exactly that, and Plaintiffs point to nothing in that provision that would justify the additional race-based districting in the at-large election system context that the NYVRA requires.

C. Plaintiffs Point To No Evidence That Minority-Favored Candidates Do Not Have A Reasonable Opportunity To Elect Preferred Candidates In Even-Numbered Years

1. As an element of their NYVRA claim, Plaintiffs needed to show that the Town's minority voters will not have a reasonable opportunity to elect their preferred candidates under the Town's at-large system, which they have not done. Op.Br.21–26. Plaintiffs made no effort to

make such a showing for even-numbered years, which is when the Town will need to hold Town Board elections starting in 2026 under the Even Year Election Law, L. 2023 ch. 741. *See* Op.Br.24–25.

2. Plaintiffs say the Town should be estopped from even citing the effect of the Even Year Election Law, where the Town has argued that this law is unconstitutional in separate litigation. Resp.Br.22–23 & n.5. But this separate litigation remains ongoing, *see Ashlaw v. State of New York*, No.EF2024-00001746 (N.Y. Sup. Ct. Onondoga Cnty.), and while the law has now been struck down at the trial-court level, *see County of Onondaga v. New York*, No.003095/2024 (N.Y. Sup. Ct. Onondoga Cnty., Oct. 8, 2024), NYSCEF 224, there is no guarantee that the Town will succeed after appeal. There is no inconsistency in the Town's positions: presuming, as courts and litigants must, that the Even Year Election Law is constitutional, *see* Op.Br.5 (quoting *White v. Cuomo*, 38 N.Y.3d 209, 217 (2022)), the Town's elections for Town Board will move to even years, in which case the undisputed record evidence is that the minorities will have a strong chance to elect their preferred candidates to the Town Board, Expert Report of Dr. Lockerbie ("Lockerbie Report") at 3–6 (Moskowitz Aff., Exhibit C).

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Plaintiffs claim that the Town is advancing a mootness argument, Resp.Br.23, but this is wrong. The Town has never suggested that Plaintiffs' lawsuit is moot; rather, the Town has argued that the undisputed evidence is that the Town's minority voters have a reasonable opportunity to elect their preferred candidates under an at-large election method under the timing mandated by state law, Op.Br.24–25, which will control elections under the Town's at-large system after the single transition cycle that the Legislature itself built into the law, *see* Even Year Election Law § 1. Although Plaintiffs say there is a "triable issue of fact regarding the consequences of shifting to even-year elections," Resp.Br.23–24, they cite to no evidence that would raise a triable issue.

Dr. Lockerbie's expert testimony regarding the success of minority-favored candidates amongst the Town's electors in even years is *unrebutted*, and demonstrates that such candidates have a reasonable chance of success in even-numbered years in Town elections. Op.Br.24–25. Plaintiffs' *only* response is to point to Dr. Barreto's testimony, where he acknowledged that "the percentages are different" in even-numbered years versus odd-numbered years, even if, in Dr. Barreto's view, the pattern of racially polarized voting remains "consistent." Transcript of Deposition of Dr. Barreto ("Barreto Dep.") at 58:15–16 (Moskowitz Aff, Exhibit D); Resp.Br.24 (citing Barreto Dep. at 57:24–59:10). That testimony does not create any triable issue, where Dr. Barreto has conceded that he did not analyze whether minority-preferred candidates have a reasonable chance of winning a majority of the Town's votes in even-numbered years, Barreto Dep. at 64:25–65:8, and has acknowledged that the Town has had "close elections in even-numbered years," *id.* at 59:12–14.

III. CONCLUSION

This Court should enter summary judgment in Defendants' favor.

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Dated: New York, New York
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Affirmation complies with the word count limitations set forth in Uniform Rule 202.8-b for the Supreme Court. This Affirmation uses Times New Roman 12-point typeface and contains 4,199 words, excluding parts of the document exempted by Rule 202.8-b. As permitted, the undersigned has relied on the word count feature of this word-processing program.

/s/ Bennet J. Moskowitz

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