STATE OF NEW YORK
SUPREME COURT : ERIE COUNTY

KENNETH YOUNG,

Plaintiff,

v.

TOWN OF CHEEKTOWAGA,

Defendant.

Index No.: 803989/2024

Hon. Paul Wojtaszek, J.S.C.

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Federal Cases

TABLE OF AUTHORITIES - cont'd

TABLE OF AUTHORITIES - cont'd

State Cases

TABLE OF AUTHORITIES - cont'd

TABLE OF AUTHORITIES - cont'd

State Statutes

TABLE OF AUTHORITIES - cont'd

PAGE

Rules

Secondary Sources

PRELIMINARY STATEMENT

The vote dilution provision of the New York Voting Rights Act (the "NYVRA") violates the United States and New York State Constitutions. In doing so, the NYVRA forces political subdivisions, including the Town of Cheektowaga (the "Town"), to violate several constitutional proscriptions commanding equality among all voters. This Court should join the Orange County State Supreme Court which struck down the NYVRA as a violation of the Equal Protection Clause. *Clarke et al. v. Town of Newburgh et al.*, Index No. EF002460-2024, Doc. No. 147, 25 (Sup. Ct. Orange Cnty. Nov. 7, 2024), similarly dismiss the plaintiff's vote dilution claim and ordered that the NYVRA not be enforced or applied to any political subdivision in the State of New York. *Id.* at 25. And this is not the only reason the Town respectfully requests that the Court grant its Cross-Motion for Summary Judgment.

Plaintiff's and the Attorney General's arguments in opposition to the Town's Cross-Motion contradict the purpose and effects of the NYVRA. Their positions are inconsistent, self-contradictory, and misaligned with established precedent. The Court should not be swayed by Plaintiff's political ambitions at the expense of the constitutional rights of the Town's voters, nor should the Court tolerate the placement of legislative districting power in the arms of the Attorney General.

Plaintiff's strategy in response to the Town's constitutional challenges to the NYVRA consist of deflection, mischaracterizations, and straw man arguments. These tactics are transparent. Both Plaintiff and the Attorney General selectively cite to the federal Voting Rights Act ("VRA") and other state VRAs in an attempt to support the constitutionality of the NYVRA. These inapposite analogies are premised on misconceptions regarding the applicability of strict

scrutiny and fail to consider significant distinguishing factors between the statutes. The NYVRA is devoid of crucial provisions, which the other VRAs have. Indeed, the central purpose of the NYVRA is to *go beyond* what the federal VRA provides, in a manner that it takes it into constitutional *terra incognita*. And, as the Town has explained, those features that distinguish the NYVRA from its federal counterpart also render it unconstitutional.

The NYVRA's vote dilution prohibition is unconstitutional under the U.S. and New York State Constitutions. First, the law employs racial classifications, which trigger strict scrutiny analysis under the Equal Protection Clauses. The NYVRA does not survive this analysis because it (1) neither serves a compelling State interest nor (2) is it narrowly tailored to any such end. For these same reasons, the NYVRA violates the Fifteenth Amendment. Next, the Act impedes voters' rights to vote for their candidate of choice absent undue pressure or coercion from the State. In that same vein, the Act's limitation of permissible defenses to a NYVRA challenge forces the Town to choose between lessening the electoral power of certain groups or facing liability—yet another chilling effect on voters. Finally, the NYVRA's delegation of open-ended discretion to the Civil Rights Bureau ("CRB") is a plain violation of the separation of powers doctrine.

Plaintiff's repeated attempts to preclude this Court from analyzing the Town's constitutional challenges based on the Town's affirmative defenses is telling. Yet again, Plaintiff has prioritized his own political career over important questions of public policy affecting the electorate. Ultimately, Plaintiff and the Attorney General fail to grasp a critical distinction between the NYVRA's means and its ends. Voters have the right to *vote* for their candidate of choice. They do not have the right to any particular electoral outcome. The NYVRA aims to

accomplish the latter. In doing so, it creates a stream of constitutional deprivations that this Court should not allow to stand.

Moreover, Plaintiff's NYVRA challenge is not ripe.[1] In fact, no vote dilution challenge under the NYVRA can be ripe until after the biennial elections become effective under the recent amendment to Town Law § 80. The State chose to enact this remedy, the NYVRA specifically references this remedy. Any additional remedy ordered by the Court would have to assume, contrary to unanimous scholarship, that biennial elections would not cure any racially polarized voting in the Town – the record certainly discloses no such pattern. In other words, the Court would have to issue a hollow, advisory opinion.

Effectively conceding the validity of the Town's position, Plaintiff argues they are above challenge because the Town lacks the capacity to challenge the NYVRA's constitutionality. But the State Constitution specifically grants authority to the Town over these very issues while compliance with the NYVRA (as plaintiffs see it) forces the Town to violate several constitutional proscriptions. This is a well-settled exception to the general rule that political subdivisions lack the capacity to challenge State laws. The Attorney General concedes this. And rightly so. Plaintiff's arguments to the contrary are neither based in law nor reality.

[1] The Onondaga County State Supreme Court recently deemed the Town Law § 80 amendment void as violative of Article IX of the New York State Constitution. *Cnty. of Onondaga v. State*, Index No. 003095/2024, Doc. No. 225, 24-25 (Oct. 8, 2024). A notice of appeal to the Court of Appeals was filed on November 7, 2024. Id. at Doc. Nos. 241-242. The Onondaga County Supreme Court's decision – like the *Oral Clarke* decision - is not binding upon this Court and the constitutionality of the Town Law § 80 amendment is not an issue before this Court. Town Law § 80 remains valid and enforceable in Erie County. Therefore, Plaintiff's NYVRA challenge is not ripe.

Cheektowaga, a Town that recently elected a person of color to its Board, is not the hotbed of racial division Plaintiff suggests, and its residents have not surrendered their constitutional rights. The Town respectfully requests that the Court grant its Cross-Motion for Summary Judgment in its entirety, dismiss the suit and strike the NYVRA, along with such other and further relief as this Court deems just and proper.[2]

FACTUAL BACKGROUND

The facts relevant to this action are set forth in the Affirmation of Daniel A. Spitzer, dated September 3, 2024, and in the Town's Counterstatement of Material Facts. These facts are incorporated herein by reference.

ARGUMENT

POINT I. THE NYVRA VIOLATES SEVERAL PROVISIONS OF THE U.S. & NEW YORK STATE CONSTITUTIONS.

The NYVRA is unconstitutional under both the U.S. and New York State Constitutions. A statute may be considered facially invalid "either because it is unconstitutional in every conceivable application" or, in the context of the First Amendment, "it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad." *See Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984); *see also U.S. v. Stevens*, 559 U.S. 460, 473 (2010). The NYVRA's vote dilution provision is unconstitutional in

[2] On October 23, 2024, the Court held a conference wherein it granted Plaintiff the opportunity to respond to the amicus brief filed on October 2, 2024. The Town notes that Plaintiff should not use this as an opportunity for a sur-reply in further opposition to the Town's Cross-Motion for Summary Judgment. Such a sur-reply would be improper, and the Town reserves it rights to move to strike and/or seek leave from this Court for its own sur-reply in further support of the Town's Cross-Motion.

every conceivable application under the (A) the Equal Protection Clauses of the U.S. and New York State Constitutions; (B) the Fifteenth Amendment; (C) the Free Speech Clauses of the U.S. and New York State Constitutions; and (D) the procedural due process guarantees of the U.S. and New York State Constitutions. Even if this Court holds that the NYVRA's vote dilution provision is not unconstitutional in every conceivable application, the provision is unconstitutionally overbroad because a "substantial number of its applications are unconstitutional." *Stevens*, 599 U.S. at 473.

A. The Equal Protection Clauses Prohibit What the Vote Dilution Provision of the NYVRA Mandates.

The NYVRA forces the Town to violate its voters' right to equal protection of the law. Under the well-settled equal protection framework, the NYVRA is subject to strict scrutiny because of the race-based classifications the law creates. The NYVRA cannot survive the rigorous strict scrutiny inquiry because the State lacks a compelling governmental interest, and the NYVRA is not narrowly tailored.

1. The NYVRA has already been struck down for its violation of the Equal Protection Clause.

On November 7, 2024, the NYVRA was struck down by the New York State Supreme Court for the County of Orange. *Clarke*, Index. No. EF002460-2024, Doc. No. 147 at 1. The Court noted that "[w]here race or national origin is the basis for unequal treatment by the State, as here, the NYVRA must satisfy strict scrutiny. . ." *Id.* The Court stated that all instances of race-based legislation or racial classifications must withstand strict scrutiny. *Id.* at 15 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989)). Therefore, the NYVRA is subject to strict scrutiny because:

> Here, the text of the NYVRA, on its face, classifies people according to their race, color and national origin. These are not mere passing references in the legislation. These classes of people are not simply mentioned as part of the justification for its passage, or as part of some broader plan for electoral reform by which these classes might derive some tangential benefit. Instead classification based on race, color and national origin is the *sine qua non* for relief under the NYVRA.

Id. at 16.

In applying strict scrutiny, the Court held that the NYVRA neither serves a compelling interest nor is it narrowly tailored. *Id.* at 17-21. While past discrimination in voting rights cases has been the justification for race-based statutes, the NYVRA does not serve that interest. *Id.* at 17. The NYVRA does not require any proof of past discrimination by a protected class. *Id.* In fact, discrimination is a factor that the Court *may* consider in determining whether vote dilution exists—not a factor it must consider. *Id.* at 18. Therefore, the Court held that "[n]o compelling interest . . . exists in protecting the voting rights of any group that has historically never been discriminated against in a political subdivision." *Id.* at 18. Although plaintiffs had raised issues of past discrimination in the defendant town, the fact that the NYVRA does not require such proof shows that the law does not serve a compelling interest. *Id.* at 18-19.

Even if the NYVRA satisfied the first prong of the strict scrutiny analysis, it is not narrowly tailored. *Id.* at 20-21. "[T]he breadth of remedies that a Court can impose for the most minimal of impairments of a class of voters' ability to influence an election cannot be described as 'narrow' in any sense of that word." *Id.* at 20. The Court also rejected plaintiff's selective analogies to the FVRA and recognized that similar attempts to extend the FVRA in the way the NYVRA does have been rejected. *Id.* Specifically, the U.S. Supreme Court held that the ability

of members of a minority group to influence an election in a district was insufficient to state a claim for vote dilution under the FVRA. *Id.* (citing *LULAC v. Perry*, 548 U.S. 399 (2006)). The Court went on to note that the NYVRA's failure to incorporate *all* of the *Gingles* preconditions renders the NYVRA a violation of the Equal Protection Clause. *Id.* at 22-25. This same reasoning is applicable here. For these reasons and the reasons articulated herein by the Town, the NYVRA violates the Equal Protection Clause.

2. <u>The NYVRA triggers strict scrutiny.</u>

"[A]ll government action based on race" is subject to strict scrutiny. *Margerum v. City of Buffalo*, 63 A.D.3d 1574, 1577 (4th Dep't 2009) (internal quotations omitted) (citing *Grutter v. Bollinger*, 539 U.S. 306, 326) (2003)); *see also Adarand*, 515 U.S. at 227. This rule of law protects the "core purpose" of the Equal Protection Clause—"doing away with all governmentally imposed discrimination based on race." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 206 (2023). The NYVRA's race-based classifications appear in the law's definitions of "vote dilution" and "protected class" and the law's remedial provisions.

a. <u>Statutory Definitions</u>

The NYVRA prohibits vote dilution, which the law defines as any method of election that "ha[s] the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections." N.Y. Elec. Law § 17-206(2)(a). The law further defines a "protected class" as "a class of individuals who are members of a race, color, or language-minority group, including individuals who are members of a minimum reporting category that has ever been officially recognized by the United States

census bureau." *Id.* § 17-204(5). As the *Clarke* Court recognized, race, color, and national origin is the *sine qua non* for relief under the NYVRA. Index. No. EF002460-2024, Doc. No. 147 at 16. The Attorney General and Plaintiff interpret the NYVRA to mean that the law does not apply to racial minorities; rather, the law applies to members of all racial groups. *See* Doc. No. 71, p. 21; Doc. No. 139, p. 40; Doc. No. 152, p. 10. This does not save the NYVRA from strict scrutiny. Instead, "*all racial classifications* … must be analyzed by a reviewing court under strict scrutiny." *Adarand*, 515 U.S. at 227 (emphasis added); *see also Croson*, 488 U.S. at 493-494. And "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally." *Johnson v. Cal.*, 543 U.S. 499, 499 (2005) (citing *Shaw v. Reno*, 509 U.S. 630, 651 (1993)).

From a practical standpoint, this "race neutral" interpretation of the NYVRA renders the NYVRA incomprehensible and unworkable. Boosting the electoral power of a racial group, color group, or language-minority group inherently lessens the electoral power of all others. Unlike the law in *Crawford v. Bd. of Educ. of City of L.A.*, 458 U.S. 527 (1982), the NYVRA states and implies that people are meant to be treated differently based on their race. In *Crawford*, the challenged law forbade courts from ordering school assignment or transportation for students absent a Fourteenth Amendment violation. *Id.* at 537. The benefit of neighborhood schooling was made available regardless of race. That is not true here. Increasing the electoral power of some racial, color, or language-minority group is to burden other racial, color, and language-minority groups with a deprivation of electoral power. Because the law "classif[ies] citizens on the basis of race," the NYVRA is "constitutionally suspect and must be strictly scrutinized." *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (citing *Shaw v. Hunt*, 517 U.S. 899,

904 (1996) ("*Shaw II*"); *Miller v. Johnson*, 515 U.S. 900, 904-905 (1995); *Adarand Constr.*, 515 U.S. at 227)). The Attorney General's literal construction of the law would "lead to absurd or unreasonable consequences that are contrary to the purpose of the [statute's] enactment[.]" *Anonymous v. Malik*, 32 N.Y.3d 30, 37 (2018) (quoting *Matter of Auerbach v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 86 N.Y.2d 198, 204 (1995)). Therefore, it is necessary to turn to the legislative intent to determine the Act's proper construction. *Id.*

The Legislature could have chosen to make the NYVRA silent as to race. If the law truly applies to all races, as the Attorney General argues, then the specification of "protected classes" and any reference to race, color, or language-minority group would be unnecessary. But the Legislature chose to include this language. The Attorney General's and Plaintiff's assertions that the law is race neutral is undermined by Plaintiff's citation to the "Introducer's Memorandum in Support of the Senate Bill resulting in the NYVRA." Doc. No. 139, pp. 42-43. The justification given for the Act in that memorandum states:

> Although its record on voting has improved recently, New York has an extensive history of discrimination against racial, ethnic, and language minority groups in voting. The result is a persistent gap between white and non-white New Yorkers in political participation and elected representation.

Unless the Court is to read the NYVRA as contrary to its legislative intent, it is clear the Legislature intended to make racial classifications and distribute electoral benefits based on those classifications. The Attorney General ignores this intent and canons of statutory interpretation by arguing that any ambiguity should be resolved by interpreting the provisions "in a nondiscriminatory manner in order to eliminate any doubt as to the statute's constitutionality."

Doc. No. 152, p. 10, n. 2. However, "[u]nder the doctrine of separation of powers, courts may not legislate, or rewrite, or extend legislation" to make the legislation constitutional. *See Matter of Anonymous*, 40 N.Y.2d 96, 102 (1976) (internal citations omitted). That is exactly what the Attorney General asks of this Court—to rewrite the definition of a "protected class" to avoid strict scrutiny and render the statute constitutional. The NYVRA is not race neutral and the Court should not rewrite it to interpret it as such.

The Attorney General operates on the mistaken premise that the federal VRA has not been subject to strict scrutiny. *See* Doc. No. 71, pp. 22-23. The federal VRA presents a unique case. The Supreme Court has long assumed that the federal VRA satisfies strict scrutiny. *See Abbott v. Perez*, 585 U.S. 579, 587 (2018). It demands the consideration of race and thus triggers strict scrutiny. *See id.* The NYVRA is not entitled to that same assumption. This is especially true since the NYVRA specifically rejects the *Gingles* preconditions—the constitutional safeguards of the federal VRA—including size and compactness, cohesiveness, and the voting bloc requirement. *See Thornburg v. Gingles*, 478 U.S. 30, 31 (1986); *see also Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (noting that absent compliance with the *Gingles* preconditions, the VRA would raise "serious constitutional concerns under the Equal Protection Clause."). Under the NYVRA, a plaintiff does not have to prove the *Gingles* factors to establish liability for vote dilution. For example, for an NYVRA violation, geographic compactness is a factor that *may* be considered in determining a remedy. *See* N.Y. Elec. Law § 17-206(2)(c)(viii). But Courts are prohibited from analyzing compactness or concentration to determine liability. *Id.*; *see also Clarke*, Index. No. EF002460-2024, Doc. No. 147 at 22 (noting that the NYVRA mandates that courts do not consider the first *Gingles* factor). This is substantially different from

the federal VRA which requires that a group *must* be sufficiently large and geographically compact to establish liability. *See Gingles*, 478 U.S. at 31. The NYVRA's expansive definition of "racially polarized voting" hardly incorporates the narrowly defined second and third *Gingles* factors. Rather than showing that a minority group is politically cohesive and that the majority votes as a bloc to usually defeat the minority's preferred candidate, *id.*, the NYVRA requires an undefined pattern of mere divergence in the electoral choices of the minority and the majority. N.Y. Elec. Law § 17-206(6). In any event, even where the federal VRA applies, actions taken to comply with it where race predominates are *still* subject to strict scrutiny. *See*, *e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 193 (2017).

The Attorney General and Plaintiff repeatedly point to the California Voting Rights Act ("CVRA") and the Washington Voting Rights Act ("WVRA") in support of their arguments that the NYVRA should not trigger strict scrutiny. These arguments ignore the independence of New York State courts, rest on unsound statements of law, and ignore critical differences between the statutes. The CVRA's avoidance of strict scrutiny comes from, in part, the California Supreme Court's erroneous opinion that the federal VRA is not subject to strict scrutiny. *See Sanchez v. Modesto*, 51 Cal. Rptr. 3d 821, 828 (Ct. App. 2006). Additionally, the CVRA and WVRA incorporate federal case law from the federal VRA to guarantee protections of law in a manner that the NYVRA specifically rejects. For instance, the CVRA incorporates federal VRA enforcement case law and retains all of the *Gingles* requirements except the size and compactness precondition. *See* Cal. Elec. Code § 14026(e); *Sanchez*, 51 Cal. Rptr. at 828. Similarly, the WVRA allows courts to rely on federal case law to interpret it and expressly adopts the federal VRA's definition of a "protected class." Wash. Rev. Code § 29A.92.010. The

WVRA also incorporates the same *Gingles* factors as the CVRA. *Portugal v. Franklin Cnty.*, 530 P.3d 994, 1011 (Wash. 2023). The NYVRA lacks these attributes and should not receive the same treatment as the CVRA or WVRA.

The Attorney General points to other cases of purported "antidiscrimination laws" and argues that such laws have "long been upheld against equal protection challenges." Doc. No. 71, p. 22. These cases have no bearing on the equal protection analysis here. For example, in *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 134 S. Ct. 1623, 1624 (2014), the issue before the Court was "whether, and in what manner, voters in the States may choose to prohibit the consideration of such racial preferences." *Id.* Contrary to the Attorney General's assertion, the issue did not implicate the constitutionality of a prohibition on considering race in higher education. Thus, the Court hardly engaged in an equal protection analysis because it held that the judiciary did not have the authority to set aside a Michigan constitutional amendment enacted by Michigan's voters. *Id.* at 1638. The *Cohen* case, cited by the Attorney General, is also inapposite because it dealt with gender-conscious government action—a type of government action subject to intermediate scrutiny. *Cohen v. Brown Univ.*, 101 F.3d 155, 182 (1st Cir. 1996). The *Raso* case is particularly distinguishable since the First Circuit itself distinguished the race-blind availability of apartments there from voting cases where, like here, districts are designed "to concentrate minority voters and effectively reserve seats for minority candidates." *Raso v. Lago*, 135 F.3d 11, 16-17 (1st Cir. 1998). Unlike in *Raso*, the NYVRA does not merely reflect a *concern* with race. It was a government action taken *based* on race that mandates further action by political subdivisions based on race. Neither the Attorney General nor Plaintiff offer any convincing arguments or evidence that the NYVRA is race neutral—because it is not.

b. Remedial Provisions

Even if the Court holds that the text of the NYVRA's vote dilution provision does not create racial classifications, the NYVRA's remedial provisions certainly mandate such classifications. Under the NYVRA, if a political subdivision with an at-large electoral system is found liable for vote dilution, the law mandates that a *race-based* remedy be enacted. Any such remedy would require the adoption of political subdivisions with race-neutral, at-large electoral systems, or would require a Court to force the adoption of remedies that promote the electoral strength of a particular racial, ethnic, or language-minority group. This goes far beyond adopting remedies with a "mere awareness of race," as argued by the Attorney General. Doc. No. 152, p. 15. Given the zero-sum nature of elections, such a remedy would lessen the electoral power of all other groups. While the Attorney General argues that the law's remedial provisions do not create express racial classifications, this ignores the reality of what remedies will be deemed "effective" under the law. To be effective—and for a political subdivision to avoid a subsequent NYVRA vote dilution suit—the purpose of any remedial measure must be to increase the chances that a particular group can elect their candidate of choice. This comes at the expense of other groups being able to elect their candidates of choice. In the end, "[i]t is a sordid business, this divvying us up by race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part).

This is especially true where, as here, the remedy demanded by Plaintiff is the imposition of a ward system. The Equal Protection Clause forbids states from separating citizens into different voting districts based on race, *Miller*, 515 U.S. at 91; but that is precisely what the Plaintiff contends that the NYVRA demands here. The Attorney General attempts to minimize

the consideration of race that must go into a districting plan pursuant to the NYVRA by arguing that it is mere race consciousness. Doc. No. 71, p. 24. For a ward system to be an effective NYVRA remedy, district lines must be placed in such a way as to ensure that candidates favored by certain racial groups are able to win more elections. Therefore, an effective districting plan goes beyond mere race consciousness. The purpose of the imposition of districts will be to effectively reserve seats for candidates supported by a particular protected class—*i.e.*, racial groups. This is in direct conflict with the Fourteenth Amendment and Article I, Section 6 of the New York State Constitution.

The NYVRA creates a system in which race is the predominating consideration in creating districts, which triggers strict scrutiny. *See Bush v. Vera*, 517 U.S. 952, 972 (1996) (holding that new district lines were unconstitutional where the predominating factor in drawing lines was race and the overarching goal was to maximize African American voting power); *see also Shaw*, 509 U.S. at 654 ("Racial gerrymandering, even for remedial purposes, . . . threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody . . . It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny."). In this way, the NYVRA's remedial provision, particularly as it relates to the imposition of wards or districts, is "unexplainable on grounds other than race" and "demands the same close scrutiny that we give other state laws that classify citizens by race." *Miller*, 515 U.S. at 905.

The Attorney General points to the fact that the NYVRA does not mandate the imposition of districts. Doc. No. 71, p. 25. Rather, it simply provides districts as one possible remedy. This contention is irrelevant here because Plaintiff's requested remedy is a ward

system. Additionally, as previously discussed, to be an effective remedy that cures vote dilution, any remedy adopted by or imposed upon a political subdivision must place race at the forefront of the remedy's purpose.

The Attorney General's comparison of the NYVRA to the federal VRA is inapposite. Unlike the federal VRA, the NYVRA lacks the safeguards established by *Gingles*, which prevent the federal VRA from violating the Constitution. The Attorney General argues that because the U.S. Supreme Court declined to interpret the federal VRA as guaranteeing minority voters an electoral advantage, the Court should reach the same conclusion here. *Id.* at 24 (citing *Bartlett*, 556 U.S. at 20). This ignores the critical distinction between the federal VRA and the NYVRA: the NYVRA's prohibition against vote dilution does not incorporate the *Gingles* factors, which serve as essential safeguards for vote dilution claims. The *Gingles* factors set specific criteria that must be met to establish a claim of vote dilution under the federal VRA. These elements ensure that claims of vote dilution are grounded in concrete evidence of discriminatory voting practices and that any remedies address actual harms rather than speculative or marginal disparities. By omitting these factors, the NYVRA's framework lacks these critical guardrails. *See Clarke*, Index. No. EF002460-2024, Doc. No. 147 at 21-22. The Supreme Court noted in *Bartlett* that even a mere relaxation of the *Gingles* factors could raise "serious constitutional concerns under the Equal Protection Clause." *Id.* at 21. Contrary to the Attorney General's argument, Doc. No. 152, pp. 12-13, the NYVRA does not "substantially incorporate[]" the *Gingles* factors. Thus, the NYVRA is not entitled to the same treatment as the federal VRA. Moreover, *unlike Congress*, the New York Legislature lacks enforcement

authority under § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment. Its ability to adopt race-based remedies is thus far more circumscribed than Congress's.

The Equal Protection Clause mandates strict scrutiny review of the NYVRA and requires narrow tailoring to further a compelling governmental interest. *Shaw*, 509 U.S. at 643; *see also Ala. Legis. Black Caucus v. Ala.*, 575 U.S. 254, 263 (2015) (applying strict scrutiny to race-driven electoral system). The NYVRA fails both prongs of the strict scrutiny inquiry.

3. The NYVRA does not satisfy strict scrutiny.

The Attorney General fails to engage in a strict scrutiny analysis of the NYVRA. Instead, the Attorney General asks the Court to first decide whether strict scrutiny applies, and then if it applies, give the Attorney General more time to submit briefing on this issue. Doc. No. 71, p. 25, n. 6. The Attorney General cannot argue in one breath that delay in adjudicating this matter would prejudice voters and, in another breath, delay the resolution of the intertwined constitutional issues because of the Attorney General's own refusal to engage in the required analysis. The Court should not allow the Attorney General to supplement their deficient argument with a subsequent filing.

Regardless, the NYVRA does not satisfy strict scrutiny because the State cannot show a compelling governmental interest justifying the statute, and the statute is not narrowly tailored to achieve any compelling governmental interest.

a. Compelling Governmental Interest

Plaintiff argues that even if strict scrutiny applied, the NYVRA would survive review because the State has a compelling interest in preventing vote dilution and protecting the

right of all citizens to participate in the electoral process. Doc. No. 139, p. 42. There are two fatal flaws in Plaintiff's argument. First, these voting interests are at the core of the Fourteenth and Fifteenth Amendments. The protection of these interests is reserved for the *federal* government under the Fourteenth and Fifteenth Amendments. *See Croson*, 488 U.S. at 490; *Allen v. Milligan*, 599 U.S. 1, 10-11 (2023). That is why Congress *alone* possesses enforcement power authority under § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment. Thus, the State does not have a compelling governmental interest in enacting legislation to serve the goals of the Fourteenth and Fifteenth Amendments.

Second, the State's apparent interest extends well beyond protecting equal opportunity and reflects an interest in guaranteeing the ability of certain groups to elect their candidates of choice. Plaintiff's reference to the *Burson* case illustrates a critical distinction between the two interests. *See* Doc. No. 139, p. 42. In *Burson*, the Court was tasked with analyzing a regulation aimed at maintaining campaign-free zones at polling places. *Burson v. Freeman*, 504 U.S. 191, 198-199 (1992). The Court held that "a State has a compelling interest in protecting voters from confusion and undue influence." *Id.* at 199. Unlike in the instant case, the interests at issue in *Burson* did not implicate the Fourteenth and Fifteenth Amendments. The *Burson* legislation was neither aimed at vote dilution nor protecting the right to vote for all racial groups—and it certainly was not aimed at increasing the likelihood that certain groups will elect their candidates of choice, as the NYVRA is. Thus, Plaintiff's reliance on *Burson* is inapposite.

As a fallback, Plaintiff points to the State's purported interest in engaging in race-conscious remedial action. Doc. No. 139, p. 44. Though the Attorney General does not engage in a strict scrutiny analysis, the Attorney General's examples of historical discrimination in New

York—notably, all downstate cases—mirror Plaintiff's remediation argument. Doc. No. 71, p. 26. However, past discrimination in a particular region is inadequate to establish a compelling interest for race-based legislation. *Shaw II*, 517 U.S. at 909-910. A state's interest in remedying past discrimination is only compelling where (i) the identified discrimination is specific, and (ii) the State has a strong basis in evidence to conclude that the remedial action was necessary. *Bush*, 517 U.S. at 982 (citing *Shaw II*, at 910). Neither Plaintiff nor the Attorney General satisfy this standard. Neither point to evidence of specific, past discrimination in the Town. They both also fail to put forward any evidence to conclude that the NYVRA serves a compelling interest, let alone that it has a "strong basis in evidence." Moreover, as noted by the *Clarke* Court, even if remedial action were a compelling interest here, the NYVRA does not serve that interest. Index. No. EF002460-2024, Doc. No. 147 at 17 ("the NYVRA is devoid of any requirement of proving past discrimination by a protected class.").

In a misguided "gotcha" attempt, Plaintiff points to a case in the Third Department where the Town's law firm, Hodgson Russ LLP, argued that the State had a compelling interest in ensuring access to the ballot box. *Amedure v. State of N.Y.*, CV-24-0891, Doc. No. 32 (3d Dep't July 8, 2024). Plaintiff argues that the Town should somehow be bound to this argument—an argument made after the Town's argument here, in a separate case, between different parties, by different attorneys, and in a different factual scenario. The argument is illogical and mounted purely to prejudice the Town. Plaintiff cites no authority supporting his argument that the doctrine of estoppel against inconsistent positions locks *law firms* into certain legal positions for the lifetime of the law firm and irrespective of the client. Judicial estoppel, or the doctrine against inconsistent positions, precludes a *party*—not their

counsel—from framing their pleading in a manner inconsistent with a position taken in that party's prior judicial proceeding. *Borrelli v. Thomas*, 195 A.D.3d 1491, 1494 (4th Dep't 2021). Plaintiff's argument is as meritless as it is inappropriate. *Amedure* dealt with ballot access and did not address whether a specific group is able to elect their candidate of choice. The cases are clearly distinguishable.

The federal government, acting through Congress, has a compelling governmental interest in preventing the vote dilution of racial minorities. New York State does not. Additionally, neither the Attorney General nor Plaintiff have put forward any evidence or argument that the State has a compelling interest in remedying past discrimination in the Town. Therefore, the NYVRA fails to satisfy the first prong of the strict scrutiny analysis.

b. Narrow Tailoring

Even if the Attorney General or Plaintiff could demonstrate that the State had a compelling interest, they fail to show that the NYVRA is narrowly tailored. In fact, the NYVRA is not narrowly tailored because it lacks adequate constitutional protections and limitations. As previously discussed in Section III.A.1.a, *supra*, the NYVRA is substantively different from the federal VRA, and these differences underscore the lack of narrow tailoring in the NYVRA. The federal VRA is constitutionally sound because it contains critical constitutional protections in the *Gingles* factors, such as requiring compactness and adherence to traditional districting principles. The NYVRA intentionally rejects these vital limitations that ensure the VRA's constitutionality. Accordingly, the NYVRA is not narrowly tailored. Additionally, the sweeping remedies that a Court is authorized to impose under the NYVRA, regardless of the degree of vote dilution, is hardly narrow. *See Clarke*, Index. No. EF002460-2024, Doc. No. 147 at 20.

Nonetheless, Plaintiff mischaracterizes the Town's position by framing the Town's "principal argument" as being that racially polarized voting is a per se violation of the NYVRA. Doc. No. 139, p. 45. That is not the Town's argument. It is Plaintiff's. Plaintiff has brought a partial summary judgment motion relying exclusively on select electoral races that were purportedly racially polarized. But Plaintiff then fails to define the "voting patterns" necessary to find a violation of the NYVRA's vote dilution prohibition. In doing so, Plaintiff asks this Court to make a ruling that racially polarized voting is synonymous with vote dilution. It is not.

Plaintiff's arguments undermine one other. Plaintiff initially argues that the Town has not specified the constitutional safeguards in the federal VRA that the NYVRA lacks. Doc. No. 139, p. 45. On the next page, Plaintiff illogically argues that the federal VRA does not establish any constitutional safeguards. Doc. No. 139, p. 46, n. 4. Either the Town has specified the constitutional safeguards it refers to or it does not. But Plaintiff's latter argument against their existence certainly indicates Plaintiff's understanding of the specific safeguards the Town repeatedly references. Plaintiff goes on to argue that the *Gingles* factors are not constitutional requirements but rather "they are distillations of the text of the VRA, which was a product of legislative compromise. *See Allen*, [599 U.S. at 13-14]." *Id.* This assertion is not supported by *Allen*. Nor is this assertion true. Set forth by the Supreme Court, the *Gingles* factors are requirements for a vote dilution claim under the federal VRA to ensure that the federal VRA complies with the Constitution. Therefore, they are constitutional safeguards.

Specifically, the *Gingles* factors narrowly tailor the federal VRA to ensure that the Act complies with the Fourteenth Amendment. *See Wis. Legis. v. Wis. Elections Comm'n*,

595 U.S. 398, 402 (2022); *Bartlett*, 556 U.S. at 21. As such, the removal of the *Gingles* factors—specifically the preconditions—expands the scope of race-based remedies in a manner that violates the narrowly tailored inquiry. Absent the *Gingles* preconditions, the NYVRA automatically provides specific groups of voters, classified by race, with an electoral advantage by requiring that the imposed remedy bolster that group's electoral power.

The remedies required by the NYVRA are further proof that the statute is not narrowly tailored to accomplish any compelling governmental interest. Under the NYVRA, an effective remedy requires a race-driven purpose, not just race consciousness. The lack of narrow tailoring is especially evident when the remedy at issue is the establishment of a ward system.[3] Indeed, the NYVRA would require the drawing of district lines based on race in order to avoid future liability. However, the remedy prescribed by the NYVRA is unconstitutional because the Equal Protection Clause prohibits the unjustified drawing of district lines based on race. *Cooper v. Harris*, 581 U.S. 285, 319 (2017). This issue is hardly "premature" or "inapt" as Plaintiff argues. Doc. No. 139, p. 40. Plaintiff is seeking a ward system, and the NYVRA would require that system to be created with the specific purpose of increasing the voting power of African American voters. Therefore, the NYVRA improperly compels, or at the very least coerces, racial gerrymandering where the implementation of districts or wards is deemed the appropriate remedy for a NYVRA violation.

[3] Plaintiff's reference to Town Resolution 2024-339 is immaterial. Doc. No. 139, pp. 10, 48. The Resolution reflects an intent, at that time, to create a ward system. That has nothing to do with whether or not the NYVRA requires racial gerrymandering.

The NYVRA cannot survive the strict scrutiny analysis.

4. <u>The NYVRA forces the Town to violate the Fifteenth Amendment.</u>

The coerced allocation of more electoral power to a certain group deprives all other groups of electoral power. In effect, the remedies of the NYVRA require the dilution of the votes of some racial groups to enhance voting power of others. Such intentional race-based objectives render incoherent any attempt to characterize the NYVRA as "race neutral." The Legislature made this intent clear in its justification for the law. The Attorney General's and Plaintiff's arguments in opposition to the Town's Fifteenth Amendment challenge ignore the premise that the States do not have the authority to enforce the Fourteenth or Fifteenth Amendments and, therefore, cannot invoke that authority to justify race-based action. *See Croson*, 488 U.S. at 490.

Yet again, the Attorney General's position that the NYVRA should receive the same constitutional treatment as the federal VRA is unavailing. The NYVRA lacks the very factors that rendered the federal VRA constitutionally viable.

Plaintiff criticizes the Town's Eleventh Affirmative Defense and argues that the Court should not consider the Fifteenth Amendment challenge at all. According to Plaintiff, because the Town alleged that Plaintiff's proposed boundaries violate the Fifteenth Amendment, the Town cannot say that the NYVRA violates the Fifteenth Amendment. *See* Doc. No. 139, pp. 51-52. The NYVRA coerces municipalities into engaging in racial gerrymandering, as demonstrated by Plaintiff's proposed boundaries. Plaintiff does not cite to any authority requiring the Town to allege every specific detail of its affirmative defense in its answer. On the

contrary, New York courts interpret affirmative defenses liberally in favor of the party asserting "the defense and give that party the benefit of every reasonable inference." *See Galasso, Langione & Botter, LLP v. Liotti*, 81 A.D.3d 880, 882 (2d Dep't 2011); *Pick & Zabicki LLP v. Wu*, 2017 WL 1330493, at *2 (Sup. Ct. N.Y. Cnty. Apr. 4, 2017). The Court should not depart from that precedent here.

Even if the Court credits Plaintiff's argument that the Town's Eleventh Affirmative Defense does not encompass the Town's Fifteenth Amendment challenge, the Town's challenge is still not waived for three reasons. First, Plaintiff does not claim he has been surprised or prejudiced by the Town's Fifteenth Amendment argument, as required by CPLR § 3018. Second, where, as here, an issue of public policy has been raised, a failure to plead an affirmative defense should not be deemed a waiver. *See* Connors, Prac. Comm. McKinney's Cons. Laws of N.Y., Book 7B, C3018:22; *Carlson v. Travelers Ins. Co.*, 35 A.D. 351, 354 (2d Dep't 1970) (holding that illegality defense was not waived in illegal abortion case, particularly because the nature of the case implicated a public policy concern). Certainly, voting rights—one of the touchstones of our democracy—is a public policy concern great enough to trump an omission that a mere amendment would correct. Third, the failure to plead an affirmative defense should not constitute a waiver, particularly where, as here, Plaintiff's pre-discovery summary judgment motion has adversely impacted the Town's ability to amend its answer. *See Ronder & Ronder, O.C. v. Nationwide Abstract Corp.*, 99 A.D.2d 608, 471 N.Y.S.2d 716, 717 (3d Dep't 1984) ("While the better practice would have been for defendant to plead the lack of authority issue as an affirmative defense, the failure to do so does not constitute a waiver.").

Accordingly, the Court should hold that the NYVRA's vote dilution prohibition violates the Fifteenth Amendment.

5. <u>The NYVRA coerces the Town into violating the free speech of its voters.</u>

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The NYVRA bolsters this ability for some voters, while burdening that ability for others. Though the NYVRA may have been enacted as a remedial measure to safeguard voting rights, the Supreme Court has recognized that the abridgement of this right "may inevitably follow from varied forms of governmental action." *See NAACP v. State of Ala. ex rel Patterson*, 357 U.S. 449, 461 (1958). That is precisely the case here.

Contrary to Plaintiff's mischaracterization of the Town's argument, the NYVRA violates the First Amendment and Article I, Section 8 of the New York State Constitution because it coerces political subdivisions into chilling, and therefore violating, voters' freedom of speech. In effect, the NYVRA is facially invalid and overbroad because it chills this right for voters, particularly those in the majority, to elect their candidates of choice. The fee-shifting provision of the NYVRA is the source of this chilling effect. *See Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 188 (2024) (holding that the State cannot use its power to punish or suppress disfavored expression); *see also Backpage.com, LLC v. Dart*, 807 F.3d 229, 230-231 (2015) (noting that government coercion may come through a government's direct authority or "in some less-direct form.").

For many voters, particularly those in smaller political subdivisions like the Town, the prospect of this fee-shifting provision creates the threat of significant ramifications for taxpayers. The Legislature "cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors." *Nat'l Rifle*, 602 U.S. at 180. However, that is precisely what the Legislature has done here. Voters will effectively be dissuaded from voting for their candidates of choice if doing so runs the risk of racially polarized voting, a resulting NYVRA violation, and heightened tax burdens. This impediment to voters' right to vote for their candidates of choice will persist even if the Town alters its electoral system to respond to a potential violation. That specter of tax burdens will remain over voters' shoulders at the polls regardless of whether the Town faces a potential violation or an actual violation.

Plaintiff argues against the applicability of *Nat'l Rifle* and fixates on the factual differences between that case and the case at bar. The present case is a case of first impression, and the facts in *Nat'l Rifle* do not affect the rule of law that was applicable there and here. In *Nat'l Rifle*, the Supreme Court held that coercive action by the State, whether direct or indirect, can violate the First Amendment. *Id.* at 188. Though the facts are different here, the violation of law is the same—the State used its authority to suppress disfavored expression. Plaintiff's focus on the facts, rather than the holding and the proposition of law that comes from *Nat'l Rifle*, is yet another example of Plaintiff's deflection and creation of strawman arguments.

The Attorney General's opposition to the Town's First Amendment challenge mischaracterizes the Town's argument. The Town does not argue that voters are entitled to a specific method of voting. Rather, voters are entitled to vote for their candidate of choice without undue pressure from the State. The Attorney General further states that the NYVRA

does not prohibit racially polarized voting and that it is simply an element of a vote dilution claim, just as it is an element of a federal VRA claim. Doc. No. 71, p. 28. This argument fails because the federal VRA's definition of "racially polarized voting" is not nearly as expansive as the NYVRA's. The NYVRA defines racially polarized voting as "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. Law § 17-204(6). On the other hand, the federal VRA, through *Gingles*, defines racially polarized voting as voting where "a significant number of minority group members usually vote for the same candidates." *Gingles*, 478 U.S. at 56. To prove the racial polarization element of a federal VRA claim, the Court must determine whether minority group members are politically cohesive and whether whites vote sufficiently as a bloc to usually defeat the minority's preferred candidates. *Id.* However, in the NYVRA context, there are no statutory or judicially prescribed tools for the Court to assess whether, and the degree to which, racially polarized voting is necessary to constitute vote dilution under the NYVRA. The element of racial polarization under the NYVRA lacks the necessary safeguards to protect against viewpoint suppression in the form of chilling majority voters from voting for their candidates of choice.

The Town must decide whether to alter their electoral system to respond to a potential violation and, therefore, chill its citizens' freedom to vote for their candidates of choice or refuse to enact a remedy and be forced to pay attorneys fees in the event it is found liable. Plaintiff argues that the choice presented to the Town is illusory. Doc. No. 139, pp. 53-54. The true illusion is Plaintiff's argument that the Town could have avoided costs by adopting a ward system. The Town was forced to decide whether to violate the speech rights of its voters with a

ward system aimed at increasing the electoral power of African American voters or face liability under the NYVRA.

Plaintiff's attempt to preclude this Court from considering a First Amendment challenge is unpersuasive. The Town's Eighth Affirmative Defense invokes the First Amendment of the U.S. Constitution and Article I, Section 8 of the New York State Constitution. However, because the defense is not exactly stated in the Town's answer as it has been argued herein, Plaintiff argues that the Court should ignore the Town's challenge altogether. For the reasons articulated in Section III.A.3, *supra*, the Court should disregard Plaintiff's argument and consider the Town's arguments regarding the NYVRA's infringement upon the freedom of speech.

6. <u>The NYVRA forces the Town to deprive voters of procedural due process.</u>

Voters have a protected liberty interest in their ability to vote freely for their candidates of choice. *See Reynolds*, 377 U.S. at 555. The NYVRA forces the Town to deprive voters of this right, thereby depriving them of their procedural due process rights, because the NYVRA drastically limits the evidence that the Court can consider in a vote dilution challenge. When a court is deprived of the full ability to analyze the circumstances underlying certain elections, the court is also deprived of the ability to discern between losses at the polls and discriminatory voting systems. *See League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993); *see also Nipper v. Smith*, 39 F.3d 1494, 1523-1524 (11th Cir. 1994); *Reed v. Town of Babylon*, 914 F. Supp. 843, 877 (E.D.N.Y. 1996). In doing so, the NYVRA backs the Town up against a wall. The Town must choose whether to implement a system that lessens the electoral power of some groups—often the majority—or face liability

under the NYVRA, which would chill the ability of voters to cast their votes for their candidates of choice. In effect, this denies certain voters their right to cast their votes effectively.

Again, the Attorney General's and Plaintiff's oppositions mischaracterize the Town's argument because the Town does not assert that voters have a protected interest in a particular method of election. Voters have the rights to cast their vote effectively and for their candidates of choice. The NYVRA infringes upon those rights. What the Attorney General and Plaintiff fail to address is that the evidentiary limitations built into the NYVRA impede the Town's ability to defend against a NYVRA challenge. This, in turn, forces the Town to violate the procedural due process rights of its citizens. The Town clearly has capacity to bring this claim since it is based on the assertion that the evidentiary limitations cause the Town to violate the constitutional proscription against depriving voters of procedural due process.

Plaintiff's remaining arguments against the Town's procedural due process claim are unavailing. Plaintiff argues that none of the cases the Town cites deal with the precise factual scenario the NYVRA presents. *See* Doc. No. 139, pp. 56. Despite Plaintiff's insinuation to the contrary, that is not how our judicial system operates. If the Court subscribed to Plaintiff's argument, no cases of first impression would ever be decided. The cases and precedent cited by the Town are sufficiently similar to this case and should control the outcome of this case.

Again, Plaintiff opposes the Town's procedural due process claim with the argument that because the Town's due process affirmative defense does not exactly match its argument, the Court should disregard the argument entirely for the reasons articulated in Section

III.A.3, *supra*. The NYVRA forces the Town to violate the procedural due process rights of its voters, and taxpayers more broadly. This violation cannot stand.

7. <u>The NYVRA violates the separation of powers doctrine.</u>

The Legislature's delegation of lawmaking powers to the Civil Rights Bureau ("CRB") violates the separation of powers doctrine. The NYVRA grants unilateral authority to the CRB to approve or deny proposed remedies, without any evaluation standards. N.Y. Elec. Law § 17-206(7)(c). Therefore, the NYVRA empowers unelected decisionmakers to weigh evidence to try and predict whether a proposed remedy will be effective. There are no reasonable safeguards in place for the CRB to administer the law. The Legislature's delegation of rulemaking authority violates the separation of powers doctrine. *See Boreali v. Axelrod*, 71 N.Y.2d 1, 10 (1987) (noting that the nondelegation doctrine is violated where the Legislature empowers an entity to act "solely on its own ideas of sound public policy").

Plaintiff's "distinction" of *Boreali* is a distinction without a difference. The fact that the Legislature delegated authority to an administrative agency there does not change the nondelegation doctrine standard. Plaintiff also asserts, in conclusory fashion, that the Town does not have standing to raise a separation of powers issue and that such a claim is not ripe. Doc. No. 139, p. 57. But if the Court determines that the Town lacks standing, then "an important constitutional issue would be effectively insulated from judicial review" because there will be "few who can claim concrete injury resulting from a breach of the constitutional division of authority." *Saratoga Cnty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 1047, 1053 (2003).

This separation of powers claim is also ripe. *See U.S. v. Velez-Naranjo*, 691 F. Supp. 584, 585 (D. Conn. 1988) (holding that plaintiffs' separation of powers challenge to the Sentencing Reform Act of 1984 was ripe even though plaintiffs had not yet been convicted of their charged crimes). This issue is purely legal and, therefore, "susceptible to judicial resolution." *Id.* (citing, among others, *Thomas v. Union Carbide Agric. Prods. Co. et al.*, 473 U.S. 563, 581 (1985)). On the issue of hardship, the "public interest would be well served by a prompt resolution of the constitutionality" of the NYVRA's delegation of rulemaking authority to the CRB. *See Thomas*, 473 U.S. at 563. Finally, Plaintiff also argues that Section 17-206(7) provides guidelines by which the Attorney General must use when considering a proposed remedy. Doc. No. 139, pp. 57-58. Plaintiff neglects the fact that these "limitations and standards" give the Attorney General the open-ended discretion to determine: (i) whether a specific remedy would redress a potential violation, and (ii) whether the remedy would diminish the ability of protected class members to participate in the electoral process and elect their candidates of choice. This authority comes without any guidelines as to how to make those determinations. This is impermissible under the nondelegation doctrine.

On the other hand, the Attorney General argues that the NYVRA does not allow the CRB to override decisions and statutes enacted by elected officials. Doc. No. 71, p. 30. This is incorrect. The CRB has the authority to grant or deny approval of the proposed remedy. N.Y. Elec. Law § 17-206(7)(c)(iii). Thus, the NYVRA plainly grants the CRB the authority to override the decisions of elected officials. For example, if a town board deems increasing the size of the board as an appropriate remedy and chooses to do so, the CRB could override that

decision by withholding its approval. There are no standards governing the CRB's determination.

Additionally, the Attorney General ignores the coercive power of the NYVRA in arguing that the statute does not empower her to force a political subdivision to pursue or submit a specific remedy against the will of the subdivision. The Attorney General could certainly deny proposed remedies submitted by a political subdivision until the subdivision submits a remedy that the CRB arbitrarily decides is appropriate. Indeed, the law even allows the CRB to recommend an alternative remedy that it would approve. N.Y. Elec. Law § 17-206(7)(c)(vii). Given the time constraints associated with the safe harbor provision within the NYVRA, the NYVRA is structured to coerce political subdivisions into adopting the alternative remedy recommended by an unelected body, based on an unknown standard, and against the political free will of the subdivision and its elected officials. The Court should not allow this kind of open-ended discretion and unchecked power to be delegated outside of the legislative branch.

Plaintiff's argument that the Court should not consider the separation of powers challenge is baseless. Plaintiff grounds its argument against the separation of powers issue in CPLR § 308(b). Doc. No. 139, p. 56. This provision does not exist. CPLR § 308 deals with personal service upon a natural person. It appears Plaintiff may be referencing CPLR 3018(b) regarding amended and supplemental pleadings. However, Plaintiff does not claim that he was taken by surprise or that this has raised issues of fact not on the face of the pleading. Plaintiff also fails to cite to any New York State precedent mandating that a separation of powers defense must be pled under CPLR § 3018(b). In the *Montano* case, the Court noted that defendant had pled separation of powers as an affirmative defense—not that it was required to. *Matter of*

Montano v. Cnty. Legis. of Cnty. of Suffolk, 70 A.D.3d 203, 208 (2d Dep't 2009). The Court should disregard Plaintiff's citation to *U.S. ex rel. Shepherd v. Fluor Corp.* because it is a federal case subject to an entirely different pleading standard. No. 13-CV-02428 (D.S.C. Sep. 13, 2024), Dkt. No. 461. For the reasons articulated in Section III.A.3, *supra*, the Court should decide the separation of powers issue on the merits.

POINT II. PLAINTIFF'S NYVRA CHALLENGE IS NOT RIPE.

The amendment to Town Law § 80, which requires biennial elections, a remedy specifically included in the NYVRA, renders Plaintiff's lawsuit unripe. The Attorney General's opposition on this point is unpersuasive.[4]

First, the Attorney General erroneously argues that ripeness is not an issue here because "[t]he only administrative prerequisite for filing suit is sending a NYVRA notification letter to the political subdivision, which plaintiff has done." Doc. No. 71, p. 16. This argument is based on the mistaken premise that ripeness is just an administrative prerequisite. "[S]ubject matter jurisdiction requires that the matter before the court is ripe." *State v. Calhoun*, 106 A.D.3d 1470, 1472 (4th Dep't 2013) (citation omitted). Ripeness is a constitutional requirement, and a NYVRA challenge is not immune from this mandatory jurisdictional prerequisite.

Second, the Attorney General argues that the Court should not deem Plaintiff's lawsuit unripe because any further delay would prejudice the Town's voters. Doc. No. 71, pp.

[4] The issue of ripeness was raised in the Town's Opposition to Plaintiff's Motion for Partial Summary Judgment. *See* Doc. No. 68, pp. 13-15. To the extent Plaintiff argues the contrary in its reply papers, the Town is not entitled to respond to that herein. Though the Town opposes any claim by Plaintiff that his claim is ripe, the Town responds only to the Attorney General's Opposition to its Cross-Motion for Summary Judgment on the ripeness issue.

16-17. The Attorney General does not cite to any law to support the notion that an unripe case can be adjudicated upon a showing of prejudice. Moreover, it assumes what has yet to be proven as there has been no discovery in this case and we reject the Attorney General's apparent ability to read the minds of the residents. It assumes that voters will be prejudiced by the race-neutral, at-large electoral system currently in place. Neither the Attorney General nor Plaintiff have proven Plaintiff's case on this issue. It is hardly a reason to ignore the jurisdictional bar that Plaintiff's lawsuit fails to overcome.

Finally, the fact that the amendment to Town Law § 80 does not apply to the Town's next two elections is irrelevant. Plaintiff's challenge is still not ripe. The NYVRA does not specify when a remedy needs to be effective. To implement a remedy prior to the first biennial election, the Court would have to assume that the Town Law § 80 amendment would not be a sufficient remedy. When the Legislature amended Town Law § 80, it decided to transition to biennial elections on January 1, 2025. As a result, NYVRA vote dilution challenges are not ripe until after the first biennial election takes place in the Town.

The Attorney General points to a series of inapposite cases because, according to the Attorney General, the Town Law § 80 amendment is a "possible remed[y]" provided by a future "change in governing law." Doc. No. 71, p. 17. In other words, the Attorney General is demanding the electoral system be thrown out because a chosen remedy – specifically authorized by the NYVRA - may not remedy an unproven violation, and should not even be a given a chance to do so.

All of the cases cited involve remedies that were merely *possible* but that had not been implemented yet. For example, in *Matter of Ward*, 49 N.Y.2d 394, 401 (1992), the case was ripe because the alternative relief at issue was "an elaborate demapping procedure" that had not been implemented; would have been costly, cumbersome, and lengthy; and required the final approval of the New York City Council. Similarly, in *Matter of Rodriguez*, which involved a not-yet-enacted statute as the purported relief, the Court noted the "fact that the challenged provision of the Mental Hygiene Law *will* be repealed and replaced with a statute" did not render the plaintiff's challenge unripe. 159 Misc.2d 929, 930 (Sup. Ct. Greene Cnty. 1992) (emphasis added). Similarly, where new legislation that would have remedied a plaintiff's challenge was under consideration, the plaintiff's challenge was still ripe. *N.Y. Bus Tours, Inc. v. City of N.Y.*, 111 Misc.2d 10, 16-17 (Sup. Ct. Bronx Cnty. 1981). None of these cases involved legislation that had already been signed into law. This stands in stark contrast to the instant case where the amendment to Town Law § 80 has already been enacted.

Additionally, the Attorney General's argument that Town Law § 80, as amended, presents only a "mere possibility" of remedying any alleged vote dilution is entirely speculative and contrary to the evidence. The scholarship is unanimous and persuasive: changing the timing of elections to even years "is one of the most powerful reforms to improve turnout."[5] This increase in voter turnout increases the number of minority voters, younger voters, and less

[5] Christopher R. Berry, *Democracy Reform Primer Series The Timing of Local Elections*, THE UNIV. OF CHICAGO CENTER FOR EFFECTIVE GOVERNMENT (Jan. 25, 2024), https://effectivegov.uchicago.edu/primers/the-timing-of-local-elections; *see also* Sarah F. Anzia, *Timing and Turnout: How Off-Cycle Elections Favor Organized Groups* 200-204 (Univ. of Chicago Press 2013); Zoltan L. Hajnal et al., *Who Votes: City Election Timing and Voter Composition* 1-2 (Cambridge Univ. Press 2021); Michael T. Hartney & Sam D. Hayes, *Off-Cycle and Out of Sync: How Election Timing Influences Political Representation*, Univ. of Cambridge State Politics & Policy Quarterly 1, 16-17 (2021).

affluent voters.[6] The Legislature recognized the efficacy of this remedy when it passed the amendment and the NYVRA. The Legislature's justification for the amendment was to clarify the election process and increase voter turnout.[7] The NYVRA specifically identifies biennial elections as a potential remedy for any violation of the Act. N.Y. Elec. Law § 17-206(5)(vi). The Attorney General cannot credibly argue that the amendment to Town Law § 80 is any more speculative than any other remedy. This Court cannot reasonably ascertain whether a remedy will be effective until it takes effect; however, the evidence certainly points to biennial elections as an effective remedy. And the Court should not set the precedent of ordering a separate remedy when we have yet to see whether the remedy already in place is effective. That would lead to a never-ending, revolving door of remedy demands.

Plaintiff's challenge is not ripe because Plaintiff's anticipated hardship is contingent upon biennial elections not curing racially polarized voting. *See Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 520 (1986). There is substantial evidence demonstrating that biennial elections will cure any racially polarized voting in the Town. Thus, any opinion from the Court on this issue prior to the first biennial election in the Town would be advisory. *See N.Y.S. Inspection, Sec. & Law Enforcement Emps., Dist. Council 82, AFSCME, AFL-CIO v. Cuomo*, 64 N.Y.2d 233, n.2 (1984). Because Plaintiff's challenge is not ripe, the Court should deny Plaintiff's motion for partial summary judgment.

[6] *See* Berry, *supra* n. 2.

[7] Town Law § 80, N.Y.S. Assembly Memorandum in Support of Legislation, *Justification* (available at https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A04282&term=2023&Summary=Y&Memo=Y&Text=Y).

POINT III. THE TOWN HAS CAPACITY TO CHALLENGE THE CONSTITUTIONALITY OF THE NYVRA.

A. The NYVRA Forces the Town to Violate Constitutional Proscriptions.

The Attorney General admits that the Town has capacity to challenge the NYVRA. Specifically, the Town has the capacity to bring suit because municipalities may challenge State laws where, as here, the municipality asserts that compliance would force it to violate a constitutional proscription. Doc. No. 71, p. 18; *see also Herzog v. Bd. of Educ. of Lawrence Union Free Sch. Dist.*, 171 Misc.2d 22, 27 (Sup. Ct. Nassau Cnty. 1996). Similarly, in *Clarke*, the Orange County Supreme Court held that where, as here, the defendants asserted that compliance with the NYVRA would force them to violate the Equal Protection Clause, defendants had standing to challenge the law. Index. No. EF002460-2024, Doc. No. 147 at 12-13. Plaintiff fails to recognize this basic legal premise.[8]

Instead, Plaintiff incorrectly argues that a "bare allegation of conflict with a general constitutional proscription" is not enough and that the Town failed to identify specific prohibitions or explain how the NYVRA would force such a violation. Doc. No. 139, p. 34. Plaintiff's willful blindness to the Town's detailed arguments that address each of Plaintiff's points of opposition is unpersuasive. Notably, Plaintiff cannot cite to any authority to support his contention that a "bare allegation of conflict" is insufficient. Even worse, the cases cited by Plaintiff do not support his own contention. In *Matter of Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287 (1977), the Court noted that the municipal challengers did *not* assert that

[8] Plaintiff appears to have filed his papers in triplicate form. The Town's operative papers have been designated as Motion Sequence 3. Doc. Nos. 55-68. For the sake of this Reply, the Town cites to Plaintiff's papers purporting to be filed in Motion Sequence 3—Docs. Nos. 117-133, 139.

compliance with the State statute would force violation of a constitutional proscription. The Town has made that assertion here. Notably, the *Clarke* Court distinguished *Matter of Jeter* on this very basis. Index. No. EF002460-2024, Doc. No. 147 at 12. Plaintiff claims that in *Merola v. Cuomo* the Court held that the defendant did not have capacity to sue "because a specific constitutional proscription was not provided." Doc. No. 139, p. 34 (citing 427 F. Supp. 3d 286, 293 (N.D.N.Y. 2019)). This misses the mark. The issue in *Merola* was that the petitioner's alleged compliance with the State statute would force him to violate the "proscription on voting by non-citizens." *Merola*, 427 F. Supp. 3d at 292. The problem in *Merola* was not vagueness, as Plaintiff states; rather, the problem was that there is no constitutional proscription on voting by non-citizens. *Id.* at 292-293.

Even if Plaintiff's supposed "vagueness" and "bare allegation" arguments were legitimate limitations on a municipality's ability to assert capacity, the Town's argument is neither vague nor bare. The Town clearly identifies the specific constitutional prohibitions that the NYVRA forces the Town to violate. *See* Doc. No. 68, pp. 15-17. Unlike in *Merola*, this case implicates explicit constitutional proscriptions including, the denial of equal protection of the laws, the denial or abridgement of the right to vote based on race or color, the abridgement of freedom of speech, and the denial of citizens' due process rights. The Town has capacity to challenge the NYVRA because compliance with the NYVRA will force the Town to violate the First, Fourteenth, and Fifteenth Amendments of the U.S. Constitution and Article I, Sections 6, 8, and 11 of the New York Constitution.

In a last-ditch effort to deflect from the Town's clear capacity to challenge the constitutionality of the NYVRA, Plaintiff resorts to scare tactics. He argues that a finding of

capacity here would allow municipalities to challenge State laws any time the municipality does not agree with the Legislature. Doc. No. 139, pp. 34-35. Plaintiff's argument is flawed because, under this exception, capacity is only appropriate where a municipality asserts compliance with a State law would force the municipality to violate constitutional proscriptions. Regardless, a finding of capacity here would be consistent with the rule of law. *See Herzog*, 171 Misc.2d at 27. The Town has made that assertion, in significant detail, here.

CONCLUSION

For the foregoing reasons, the Town's Cross-Motion for Summary Judgment should be granted, the Complaint should be dismissed in its entirety, and the NYVRA should be struck down as unconstitutional, along with such other and further relief as the Court deems just and proper.

Dated: November 11, 2024

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Word Count Certification

The Court and the parties have agreed to waive the word limit contained in 22 N.Y.C.R.R. § 202.8-b. I hereby certify that the total number of words herein, inclusive of point headings and footnotes and exclusive of the caption, table of contents, table of authorities, and signature block, is 11,336. In making this certification, I relied on Microsoft Word's "Word Count" tool.

Dated: November 11, 2024
Buffalo, New York

Daniel A. Spitzer, Esq.