STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

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KENNETH YOUNG,

Plaintiff,

-vs-

TOWN OF CHEEKTOWAGA,

Defendant.

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Index No. 803898/2024

Hon. Paul B. Wojtaszek, J.S.C.
Assigned Justice

MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiff, Kenneth Young, established in his original motion papers that the present at-large method of voting maintained by Defendant, the Town of Cheektowaga, violates the John R. Lewis Voting Rights Act of New York, N.Y. Elec. L. Article 17, Title 2 (the "NYVRA") because there is a pattern of "racially polarized voting" as defined in Elec. L. § 17-204[6] and the at-large method has impaired the ability of Black voters to elect candidates of their choice or influence the outcome of elections as a result of vote dilution. These findings have been established by experts, including experts engaged by the Town itself who found that racially polarized voting has infected elections since 2015. One of those experts, whose report has been submitted and relied upon by the Town's attorneys in this case, see Amended Affirmation of Daniel A. Spitzer, Esq., dated September 3, 2024 ("Amended Spitzer Aff.") [Docket No. 56] and Exh. D thereto [Docket No. 60], advised the Town that "the [NYVRA] permits an action against the Town due to the level of racially polarized [voting], essentially a result of the decades old at-large voting system." He told the Town "there is an apparent trend against the election of minority preferred candidates beginning in 2022" and that "[t]his indicates a need for the Town to consider an alternative method of electing council members to avoid future liability." Id. That expert concluded that "in light of the findings of recent racial bloc voting," the Town may want to consider a "remedial plan" and faced a risk of "a costly and time-consuming action in State Supreme Court unless a mutually agreed upon solution is reached." Id. at 5. Although the Town now contends Mr. Young cannot rely upon the reports prepared by its experts to establish his prima facie case, the laws of evidence say otherwise. Those laws say, further, that although the Town has produced and seeks to rely upon its experts' findings, it cannot do so because it has

not produced them in sworn, admissible form, so the Court should not consider them in support of the Town's opposition and cross-motion.

Based on the experts' findings, which the Town attaches to, and references in, its own motion papers, and the indisputable statistical evidence of voting patterns and results presented by both parties, there is no material issue of fact precluding partial judgment in Mr. Young's favor. And although the Town nebulously claims that resolution of the motion should abide discovery, it fails to specify what discovery it seeks, what facts are unavailable to it and possessed solely by Mr. Young, or what fact it may discover that might change the proof already presented (including the reports of the Town's experts). The Town strangely suggests at page 4 of its latest memorandum that summary judgment should be denied because Mr. Young has conducted no discovery but fails to grasp that no discovery at all is required.

In an original set of responding and cross-moving papers submitted on June 12, 2024, the Town insisted Mr. Young is not entitled to summary judgment and that this action should be dismissed because, in response to the findings and recommendations of its experts, its Town Board already had taken measures to implement one of the remedies identified by Mr. Young and the experts, i.e., a ward method of elections. Although the manner in which the Board intended to pursue that remedy – putting the matter to a public referendum – is one not allowed by the NYVRA, was conceptually flawed, and had no teeth, the Town touted that proposed measure to this Court in an effort to avoid a finding of liability and the imposition of a decisive judicial remedy. Indeed, the Town Board publicly announced in its Resolution 2024-339 of June 11, 2024, the very day before it filed its original papers on the present motions, that "the Town remains steadfast in its efforts to create a ward system of election" and intends "to enact and implement remedies, including a ward-based system of election, for any potential violation of the

NYVRA that may exist" (emphasis added). See Affirmation of Daniel A. Spitzer, Esq., dated June 12, 2024, at 6, ¶ 26 [Docket No. 39] and Exh G thereto at 2 [Docket No. 46]. To that end, the Board "moved the ward remedy forward" by approving a contract with an expert to draw actual ward boundary lines. Id. Although the Town suggested in various resolutions and its original summary judgment papers that the recent amendment to N.Y. Town L. § 80 requiring the biennial election of town officers may alleviate racially polarized voting in the Town, that "fall-back" position was relegated to a mere footnote on page 6 of the Town's original June 12, 2024 memorandum.

As addressed in the October 7, 2024 reply affirmation of Gary D. Borek, Esq., submitted herewith ("Borek Reply Aff.") [Docket No. 83] and the exhibits thereto, the Town's purportedly "steadfast" commitment to a ward system of voting quickly proved to be ephemeral. Since deciding in June to move forward toward a ward system, the Town Board has decided not to act on any of a number of resolutions subsequently introduced for the purpose of holding an election to adopt the ward system and district maps. The Board tabled all of those resolutions without a vote. The Town has taken no other action to implement any other remedy. As a result, the Town has had to change gears in this litigation and submit amended motion papers that omit any reliance on the now-jettisoned plan for a ward system as a purported remedy. See Town's Amended Memorandum of Law, dated September 3, 2024 ("Town Amended Memo") [Docket No. 68].

Having abandoned the very measures it previously touted to resist Mr. Young's motion and avoid the need for action by this Court, the Town now endeavors to drag Section 80 of the Town Law out of the footnoted depths of obscurity and tout that as a purported remedy to the racial polarization, vote dilution, and suppression of minority influence that the experts, and the

data, have demonstrated to be present. As already addressed at page 13 of Mr. Young's principal memorandum, however, that is no remedy at all because: (1) the results of two prior even-year elections, which themselves were characterized by racial polarization, show that such a remedy would not resolve polarization and the demonstrated injury to minority voters; and (2) because members of the Town Board serve staggered terms, even-year voting will not take full effect in respect to the Board for six years.

Despite having had ample opportunity to adopt an NYVRA-compliant remedy, and despite previous professions of advocacy for a district-based voting system, the Town is left with no viable NYVRA solution. It is the particular prerogative of this Court to implement one now. As discussed below, the issue is ripe, there are no material facts in dispute, there is no demonstrated need for responses to any discovery demands (which the Town has not actually served), and the law is clear.

Aside from misplaced reliance on Section 80 of the Town Law, the Town's remaining effort to avoid a judicial remedy is an argument that the law itself is unconstitutional. But as discussed in Mr. Young's prior submissions and as further explicated below, the Town has no constitutional rights in this regard, lacks the capacity to assert any such rights on behalf of itself or its residents, and has not even pleaded many of its scattershot constitutional claims as affirmative defenses. Furthermore, even if this Court should for some reason decide to consider those claims, the Court should find they are completely without merit. The Town has come nowhere near meeting the heavy burden of demonstrating, beyond a reasonable doubt, that there is no way to read the statute in a way that is consonant with the state and federal Constitutions. In fact, as discussed below, the Town's attorneys in this action have, during the pendency of the present motions, advanced in a different courtroom the very same positions on critical

constitutional issues that Mr. Young asserts in this action and that fundamentally undermine the polar opposite positions they simultaneously have been advancing on behalf of the Town. They have done so in championing the constitutionality of election legislation on behalf of New York State actors – including the New York State Assembly – whose actions they purport to challenge here. Mr. Young adopts and incorporates the arguments the Town's attorneys have made on behalf of its State government clients in that case. No undiscovered facts are necessary to evaluate the constitutional questions, and they are fully susceptible to resolution at this phase of the litigation. And although the Town purports to raise constitutional claims on behalf of its residents in respect to a potential remedy, the arguments would be premature. Any such arguments can, and properly should, be raised when the time comes to establish, under judicial supervision, district boundaries comporting with the NYVRA and equal protection principles.

Bereft of facts or persuasive legal arguments to overcome Mr. Young's motion, the Town attempts to incline this Court against him by ad hominem attacks on his character and by questioning his motivation for seeking redress under the statute. The Town describes Mr. Young as a "perennially failed candidate" who is "more focused on the fee-shifting provisions of the applicable law than voting rights."[1] Town Amended Memo at 1. The Town claims he is "attack[ing]" the Town's "at-large democratic process" and "seek[ing] to confuse voting rights with [his] own failed political campaigns."[2] Id. It accuses him of trying to "punish the Town

[1]Not only is this argument purely ad hominem and irrelevant, it makes no logical sense. The Town suggests Mr. Young commenced this action not to vindicate rights protected under the Act but for some reason having to do with the Act's requirement that the Town will be required to pay his attorneys' fees in the event he prevails. But had he not commenced the action, he would have incurred no fees. Hence, the Town's argument falls under even its own light weight. Moreover, the irony of the Town's argument is plain in view of the fact that had the Town gone forward with a remedy as recommended by its own experts, it would have avoided the "costly and time-consuming" litigation against which those experts warned.

[2]This argument is both syntactically confusing (what does it mean to "seek to confuse voting rights"?) and irrelevant.

and its citizens." Id. at 2. The Town shamefully descends even to the level of questioning Mr. Young's morality. Id. at 1 (characterizing this action as a "moral failure"). So goes the saying attributed (probably incorrectly) to Socrates: "When the debate is lost, slander becomes the tool of the loser."

DISCUSSION

I. NEITHER DENIAL NOR CONTINUANCE OF PLAINTIFF'S MOTION IS WARRANTED BY ANY DEMONSTRATED NEED FOR ANY PENDING DISCOVERY.

The Town complains that Mr. Young's motion comes before the conducting of discovery and while it awaited responses to discovery requests it purportedly served in April 2024. That complaint rings hollow for numerous reasons.

First, the Town did not, in fact, serve any discovery demands – at least not in a manner permitted by, and effective under, the CPLR. On Friday, April 19, 2024, the Town's attorneys provided the discovery requests at issue to Federal Express ("FedEx") with an instruction to deliver them to Mr. Borek and Plaintiff's co-counsel Mark R. Uba, Esq., on Monday, April 22. The designated date for delivery is shown on the FedEx shipping labels attached as Exhibit 13 to Mr. Borek's Affirmation [Docket No. 83] and the associated FedEx tracking receipts attached as Exhibit J to Attorney Spitzer's September 3, 2024 Amended Affirmation [Docket No. 66]; see Spitzer Amended Aff. at 9, ¶ 44 [Docket No. 56]. The receipts further show that the terms of delivery were chosen by the "Sender," and the "Special Handling Section" shows that arrangements were made to "Deliver Weekday, Residential Delivery" (emphasis added). The receipts show that the materials were delivered, as ordered, on Monday, April 22.

The deposit of materials with FedEx on a Friday for delivery the next weekday (here, Monday, April 22) did not constitute actual, proper and effective service under Rule 2013(b)(6) of the CPLR and therefore was a nullity. That statute provides, in relevant part, that service upon a party's attorney may be made:

> . . . by dispatching the paper to the attorney by overnight delivery service. . . . Service by overnight delivery service shall be complete upon deposit of the paper enclosed in a properly addressed wrapper into the custody of the overnight delivery service for overnight delivery, prior to the latest time designated by the overnight delivery service for overnight delivery.

(Emphasis added.) Because the Town's attorneys did not serve the discovery requests by "overnight delivery," those requests were not, in fact and in law, "served" within the meaning of the statute."[3]

The Town cockily suggests Plaintiff's contention in this regard is "frivolous." It is anything but. Indeed, in *Moran v. BAC Field Servs. Corp.*, 164 A.D.3d 494, 83 N.Y.S.3d 111 (2d Dept. 2018), the First Department squarely held that, when construing CPLR 2103(b)(6) as it applies to FedEx Friday-Monday service, "overnight" means "overnight." The Appellate Division overturned the trial court's decision to entertain a defendant's motion to dismiss a complaint, holding that the defendant, "BAC," did not effectively serve its responding papers by the extended deadline to which the plaintiff and BAC had agreed, by depositing the papers with FedEx on that day, a Friday, for delivery to the plaintiff on the following Monday. The Appellate Division explained: "CPLR 2103(b)(6) provides that "[s]ervice by overnight delivery service shall be complete upon deposit of the paper . . . into the custody of the overnight delivery service *for overnight delivery*" [ ]. The record demonstrates that BAC failed to use Federal

[3] Although the Town emailed the materials to Attorneys Borek and Uba on April 19, such transmittal likewise did not constitute actual and effective service according to Rule 2103, and the Town properly does not contend it did.

Express's overnight delivery service, and instead deposited its papers with Federal Express on Friday for weekday delivery on Monday. Accordingly, the court should have denied BAC's motion as untimely." Id. at 495, 83 N.Y.S.3d at 2 (emphasis added by court); cf. 86 N.Y. Jur. 2d, "Process and Papers" § 153 ("the rule providing that service of papers by overnight delivery service was complete upon deposit of paper to such service for overnight delivery was held inapplicable to a defendant that deposited its motion for dismissal into the custody of a Federal Express courier for weekday, not overnight, delivery") (addressing *Moran*). If the strict terms of CPLR 2103(b)(6) should be applied to an issue as critical as whether a party has defaulted in responding to a complaint, it certainly should apply to the discovery issue here.

The Town condescendingly (and rather ironically) purports at pages 13 to 14 of its Amended Memorandum to "remind" Plaintiff "that service via FedEx is a proper method of service for discovery demands" and cites "CPLR 2103(b)(2)" in that regard. Not only is the Town's citation plainly incorrect (Section 2103(b)(2) relates exclusively to service by mail), but the Town's description and understanding of Section 2103(b)(6), which actually deals with FedEx and other "overnight delivery services," are imprecise and incomplete.

Second, according to Rule 3214(b) of the CPLR, the making of Plaintiff's motion stayed discovery in the absence of an order of the Court to the contrary, for which the Town could have applied. At no time in the four months Mr. Young's motion has been pending has the Town moved or cross-moved for an exception to the automatic stay, so its argument is unpersuasive. See, e.g., *Auerbach v. Bennett*, 47 N.Y.2d 619, 636, 419 N.Y.S.2d 920, 930 (1979) (rejecting argument that discovery was necessary based, in part, on the fact the non-moving party had not made an application therefor before Special Term).

Third, the Town itself affirmatively has cross-moved for summary judgment on constitutional grounds while discovery has been stayed; hence, it truly must believe there are no material facts precluding consideration of the relevant issues and a determination as a matter of law, at least as to those grounds. See *Mot Parking Corp. v. 86-90 Warren Street, LLC*, 104 A.D.3d 596, 962 N.Y.S.2d 116 (1st Dept. 2013) (finding defendant's argument it required discovery to oppose plaintiff's motion for summary judgment to be unpersuasive because defendant cross-moved for similar relief).

Fourth, according to Rule 3212(f), a court may deny a motion for summary judgment or order a continuance "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated" (emphasis added). "[A] grant of summary judgment is not premature merely because discovery has not been completed," and "[t]he mere hope that evidence sufficient to defeat the motion might be uncovered during the discovery process is an insufficient basis for denying the motion. *Lamore v. Panapolous*, 121 A.D.3d 863, 864, 994 N.Y.S.2d 640, 641 (2d Dept. 2014) (internal citations omitted). "A party who seeks a finding that a summary judgment motion is premature is required to put forth some evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant . . . . The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion." *Reale v. Tsoukas*, 146 A.D.3d 833, 835-36, 45 N.Y.S.3d 148, 150 (2d Dept. 2017) (emphasis added) (internal citations omitted); see also *HSBC USA, N.A. v. Armijos*, 151 A.D.3d 943, 944, 57 N.Y.S.3d 205, 207 (2d Dept. 2017) (non-moving party must "establish what additional information he hope[s] to glean" from discovery "that could not be gleaned" from the

information he already possesses) (internal citations omitted); *Joon Management One Corp. v. Town of Ramapo*, 142 A.D.3d 587, 589, 36 N.Y.S.3d 673, 676 (2d Dept. 2016) (party must "demonstrate how discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the [other party]") (emphasis added) (internal citations omitted).

Here, the Town does not identify any facts it believes may be "essential" to justify opposition to Plaintiff's motion but cannot yet be stated due to a need for any information that might be possessed solely by Mr. Young and otherwise unavailable to the Town. One of the Town's attorneys suggests Plaintiff "has attempted to circumvent the need for discovery with the filing of the instant motion for partial summary judgment," Spitzer Amended Aff. at 9, ¶ 46, but not a whit is said about what discovery might be necessary, how it might be obtained, or how its absence prejudices the Town in any way in respect to the pending motions. The Town contends at pages 13 to 14 of its Amended Memorandum that "discovery is necessary," but those pages are similarly devoid of any evidentiary basis. The Town vaguely refers at page 10 of that memorandum to "any other evidence the parties have not had the discovery to secure," without specifying any. Cf. id. at 11, 21 (mentioning "discovery" but failing to describe anything at all the Town would "discover"). The Town strangely suggests at page 4 of that memorandum that Mr. Young's motion is premature because he has conducted no discovery, but that obviously is no reason to deny his motion. The Town simply does not specify what information it hopes to glean that cannot be gleaned from the information it already possesses or how it would glean any such information. On the contrary, the Town plainly addresses numerous facts in support of its arguments, which, now that it has abandoned its original effort to implement an NYVRA remedy through a ward system, is focused principally on the constitutionality of the statute itself. Its

arguments in that regard depend essentially on the law and require no factual refinements, and the Town obviously has not been hindered in making those arguments based on any ignorance of additional facts. Furthermore, as discussed below, the material the Town purportedly seeks by way of discovery is patently immaterial, and the plain language of the NYVRA actually prohibits the Town from introducing much of that material – and this Court from considering it – in addressing the issues raised on the motions. In sum, the Town's request for a delay to conduct discovery of unspecified facts is premised on "mere hope" and speculation, and "[t]o speculate that something might be caught on a fishing expedition provides no basis to postpone decision on the summary judgment motions under the authority of CPLR 3212 (subd. (f))." Auerbach, 47 N.Y.2d at 636, 419 N.Y.S.2d at 930; see also Mancuso v. Allergy Associates of Rochester, 70 A.D.3d 1499, 1501, 895 N.Y.S.3d 756, 759 (4th Dept. 2010) (rejecting contention that need for discovery precluded award of summary judgment based on the party's "failure to demonstrate that the discovery being sought is anything more than a fishing expedition") (internal citation omitted).

Fifth, and further to the previous point, the Town's requests for discovery, had they actually been served, would not have sought to obtain information necessary, relevant, or material in assessing – or even permissibly could be considered in assessing – the issues presented in this case. The requests transparently would seek material for use in questioning Mr. Young's motivation for commencing this action, seeking to impeach his character, disparaging him for his own lack of success in running for political office, and questioning his standing (as to which, in view of his race, residency, and voter status, there can be no legitimate issue). Perhaps most important, the plain language of the NYVRA categorically and unequivocally precludes any consideration of many of the matters to which the requests would be directed.

For example, the Town would seek, in its document requests 3 and 4, information about Mr. Young's own "campaign efforts," "campaign budgets, canvassing plans, and related campaign plans." These requests plainly would be intended to garner proof that Mr. Young lost elections not because of vote dilution but rather because he ran poorly financed or otherwise inferior campaigns. Section 17-206[2](c) of the Act expressly prohibits the consideration of any evidence "that voting patterns and election outcomes could be explained by factors other than racially polarized voting. . . ." Hence, the Town's requests would be palpably improper. See Auerbach, 47 N.Y.2d at 636, 419 N.Y.S.2d at 930 (rejecting argument that discovery was necessary to oppose motion for summary judgment because the information sought related to matters the court could not consider in any event).

Furthermore, the Town's document requests 9 through 11 and interrogatories 10 through 16 would relate to the Town's initial – but now abandoned – measures to invent a purported safe harbor through the adoption of its January 9, February 5, and March 12, 2024 resolutions. The Town no longer touts those resolutions to suggest it has implemented an NYVRA-compliant remedy, so those discovery requests would have no bearing on the issues currently presented.

The Town's discovery requests also would purport to seek material and information the Town already has. For example, document requests 6, 7 and 20, and interrogatories 6-9 and 21, would relate to documentation and information supporting Mr. Young's allegation that racially polarized voting exists in the Town and that the Town's at-large voting system has impaired the ability of protected members to elect their candidates of choice. Those allegations are based in large measure on the reports of the experts consulted, including the Town's own experts. The Town certainly has possessed all the facts reasonably necessary to respond to Mr. Young's motion.

Furthermore, the Town suggests that because some discovery has been conducted in other cases pending in the state involving claims under the NYVRA discovery should proceed in this case as well. But unlike Mr. Young, who has raised only a claim under Section 17-206[2](a) and (b)(i)(A) of the NYVRA, the plaintiffs in the principal two cases referenced by the Town, those involving the Town of Mount Pleasant and the Town of Newburgh, have alleged additional claims under subsections [2](b)(i)(B) and (c), including (c)(3). Proof of a violation according to those additional subsections requires consideration of a "totality of circumstances," including a host of historical, societal, economic, and "any additional" conditions that might relate to voting practices, voting results, ballot access, and use of the elective franchise. See Serratto v. Town of Mount Pleasant, Westchester County Index No. 55442/2024 [Docket No. 1 at 6, 14-27, 31]; Clarke v. Town of Newburgh, Orange County Index No. EF002460-2024 [Docket No. 1 at 6, 14-24, 27-28]. It also bears observation that summary judgment motions were made in at least one of those cases before the parties agreed discovery was complete. In any event, the Town has made no evidentiary showing in this case why discovery is necessary, what essential facts the Town hopes to uncover, and how discovery would lead to such facts.

At page 9 of its amended memorandum the Town cites authority, including Ala. State Conference of NAACP v. Ala., 612 F.Supp.3d 1232 (M.D.Ala. 2020) to suggest it needs discovery and factual development to explore whether minorities possess "equal opportunities to participate in the political process." But that argument is another red herring because an exploration of such matters relates to a claim under subsections 17-206[2](b)(i)(B) and (c), including (c)(3) of the statute, based on "totality of circumstances." As explained immediately above, Mr. Young has not brought a claim under those subsections, but rather only under 17-

206[2](a) and (b)(i)(A), so the "totality of circumstances" is not at issue here. Even the vague discovery mentioned by the Town would not produce matter relevant to this action.

Sixth, and finally, the Town's discovery requests, had they been served, would have been subject to objection for numerous other reasons, including incomprehensibility, vagueness, overbreadth, and undue burden (e.g., what are "documents relating to any records," "documents relating to statements," or "records purporting" within the meaning of requests 1, 2, 5-8 and 17-19? Who are "persons . . . [who] have knowledge of any factual allegations" within the meaning of interrogatory 3?). This Court need not, nor has it been asked to, consider any such objections at this point. Not only has the Town failed to serve discovery requests as required by the CPLR, but it has not moved to compel discovery or demonstrate any facts exclusively within the knowledge of Mr. Young that would be essential to respond to his motion. And the Town itself has cross-moved for judgment as a matter of law notwithstanding any plausible need for discovery.

For all these reasons, the Town did not actually serve discovery requests according to the CPLR; and even if it had, the substance of neither those requests nor the Town's motion papers would present any legitimate reason to deny Mr. Young's motion.

II. NO MATERIAL ISSUES OF FACT PRECLUDE THE RELIEF REQUESTED IN MR. YOUNG'S MOTION.

A. The Undisputed Evidence Establishes That Racially Polarized Voting Existed in in Both the Most Recent and Past Elections.

Both Mr. Young's expert [see Docket No. 4, Exh. 3 to Verified Complaint, at 3] and the Town's own expert [see Docket No. 8, Exh. 7 to Verified Complaint, at 6-7 (also filed by the Town as Docket Nos. 44 and 61)] concluded that the November 2023 election for the Town Board was affected by racially polarized voting that caused the favored candidate of the minority

Black voters to lose the election. The Town's expert further determined that racially polarized voting has become more common in Town elections since 2021. [See Docket Nos. 8, 44, and 61 at 9.]

The Town's attempt to dispute the expert reports with an attorney's affirmation is inadequate to defeat Mr. Young's motion for summary judgment. See, e.g., Echeverri v. Flushing Hosp. & Medical Ctr., 123 A.D.2d 818, 507 N.Y.S.2d 433 (2d Dept. 1986) (in a medical malpractice action, a hospital was entitled to summary judgment where it presented detailed affidavit from qualifying physician which concluded that hospital had acted in accordance with good and accepted medical practice at all times in its treatment of patient, and patient's response to motion consisted only of affirmation of patient's counsel attesting to strength of patient's case.)

Furthermore, the Town's claim that its expert reports cannot be considered by the Court because the Town is not relying on that expert report is both factually false (in fact, the Town both produces its experts' report as part of its motion papers and relies heavily on the reports in its memorandum arguments) and legally incorrect. See *Caruso v. Stark*, 232 A.D.2d 518, 648 N.Y.S.2d 965 (2d Dept. 1996) ("We note that although the report was unsworn, because it was prepared by the defendant's medical expert it constitutes competent evidence for the purpose of opposing the motion for summary judgment.") (citing Pagano v. Kingsbury, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992)). The Town has failed to submit any competent evidence to dispute the conclusion of both parties' experts; hence, Mr. Young is entitled to judgment based on those reports.

B. The Undisputed Evidence Establishes That a Ward System of Voting Would Remedy the Vote Dilution Arising From the Use of an At-Large System Infected With Racially Polarized Voting.

Pages 7-9 of Exhibit 1 to the Verified Complaint present the voting tallies for the Town's November 2023 Board election. That undisputed evidence establishes that: (1) Mr. Young was the favored candidate in the sections of Town in which most of the protected class resides; and (2) had the 2023 Board election been held under a ward system of voting instead of an at-large system, Mr. Young would have been elected to the Board. As with California's version of the VRA, the dilution element of a NYVRA violation is established by demonstrating "a reasonable alternative practice as a benchmark against which to measure the existing voting practice." *Pico Neighborhood Ass'n v. City of Santa Monica*, 15 Cal.5th 292, 314, 534 P.3d 54, 64, 312 Cal. Rptr.3d 319, 330-31 (2023) (citing *Holder v. Hall*, 512 U.S. 874, 880, 114 S.Ct. 2581, 2585 (1994)). Mr. Young has demonstrated that a different result – i.e., the election of the protected class's favored candidate – would have prevailed under the alternative benchmark of a district voting system. The Town has offered no evidence to the contrary.

It is respectfully submitted that this Court "should . . . keep in mind that the inquiry at the liability stage is simply to prove that a solution is possible, and not necessarily to present the final solution to the problem." Id. at 321 (internal punctuation and citations omitted). In that regard, Mr. Young is not presently asking this Court to render summary judgment in respect to the particular wards to be drawn, although the proposed ward maps posited by the Town in its August 5, 2024, August 13, 2024, and August 27, 2024 resolutions do provide an adequate basis on which the Court could render judgment adopting the map proposed by Mr. Young. Those proposed resolutions were prepared after Mr. Young filed his motion for summary judgment. The specific ward boundaries will need to be determined at a later point in this action.

Contrary to the Town's claim, Election Law § 17-206[2](c) does not contain a list of evidence that must be considered by the court in a NYVRA action. Rather, that section

prioritizes evidence that may be presented, and specifies evidence that must not be considered. Most relevant here are the first three subsections, which state:

> (i) elections conducted prior to the filing of an action pursuant to this subdivision are more probative than elections conducted after the filing of the action;
>
> (ii) evidence concerning elections for members of the governing body of the political subdivision are more probative than evidence concerning other elections;
>
> (iii) statistical evidence is more probative than non-statistical evidence.

The Town ignores those prioritization rules when it posits that the facts found by its own expert do not show the existence of racially polarized voting that causes vote dilution. Focusing on the prioritized factors established in Election Law § 17-206[2](c) (e.g., the most recent Town Board elections) leads inexorably to the conclusion that racially polarized voting is causing vote dilution in Town Board elections because most of the candidates favored by the protected class are defeated by white bloc voting. In the 2023 Board election, only one of the three favored candidates was able to overcome the vote dilution caused by the at-large election system infected with racially polarized voting.

C. Mr. Young is Entitled to a Declaratory Judgment That the Town Did Not Adopt an NYVRA-Compliant Resolution Before the Statutory Deadline of February 1, 2024.

The Town consistently has asserted that it has enacted a safe harbor NYVRA resolution in compliance with Election Law § 17-206[7](b). See Borek Reply Aff. ¶¶ 39-44 [Docket No. 83]. The Town now argues this Court should disregard the portion of Mr. Young's motion for summary judgment showing that the safe harbor defense is not viable. It plainly appears the

Town does not now contend that its initial resolutions had any impact on the timeliness of this action, Mr. Young's ability to commence it, or the substantive questions raised by Mr. Young's present motion. Nonetheless, unless and until the Town formally acknowledges that it did not pass a compliant safe harbor resolution, or formally withdraws its claim of having done so, that issue remains in this case and must be addressed by the Court whether or not the Town is currently pursuing that potential defense.

Mr. Young is entitled to summary judgment on that issue in light of Supreme Court's May 17, 2024 decision in *Clarke v. Town of Newburgh*, Index No. EF002460-2024, Orange County Docket No. 31, in which the court held that a resolution passed by the Town of Newburgh (which was virtually identical to Defendant's January 9, 2024 resolution) was not a qualifying NYVRA safe harbor resolution. The Town has offered no argument in the present case to support its legally incorrect claim that its January 9, 2024 resolution complied with the NYVRA. See Town Amended Memo at 5 ("The Town passed a compliant NYVRA Resolution on January 9, 2024, within fifty days of the mailing of Plaintiff's NYVRA notification letter.").

Throughout this litigation, the Town has asserted that its January 9, 2024 resolution qualified under the NYVRA's safe harbor provisions and that its March 28, 2024 resolution, in itself, adopted remedies to correct the vote dilution caused by the combination of at-large elections and racially polarized voting. As fully explained at pages 10-16 of Mr. Young's original memorandum, both of those assertions miss the mark. In any event, subsequent recent events, particularly the Town Board's decision no longer to pursue the implementation of a ward system and its failure to pursue public hearings for the drawing of the wards, preclude the Town from arguing with any degree of plausibility that it has adopted any actual remedy for the NYVRA violation.

III. THE TOWN LACKS CAPACITY TO CHALLENGE THE CONSTITUTIONALITY OF THE NYVRA ON BEHALF OF ITSELF OR ITS RESIDENTS.

The Town lacks capacity to challenge the NYVRA. New York State and federal courts historically and consistently have held that municipal entities lack capacity to mount constitutional challenges to acts of the State and State legislation. Because municipalities are "purely creatures or agents of the State, it follow[s] that municipal corporate bodies cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants." *City of New York v. State of New York*, 86 N.Y.2d 286, 289-290, 631 N.Y.S.2d 553, 555 (1995); see also *City of Newark v. State of New Jersey*, 262 U.S. 192, 196, 43 S.Ct. 539, 540 (1923); *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40, 53 S.Ct. 431, 432 (1933); *Cnty. of Chautauqua v. Shah*, 126 A.D.3d 1317, 6 N.Y.S.3d 334 (4th Dept. 2015), aff'd sub nom. *Cnty. of Chemung v. Shah*, 28 N.Y.3d 244 (2016).

Standing and capacity to sue are related but distinguishable legal concepts. Capacity requires an inquiry into the litigant's "power to appear and bring its grievance before the court," *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155, 615 N.Y.S.2d 644, 647 (1994). By contrast, standing requires an inquiry into whether the litigant has "an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request." *Caprer v. Nussbaum*, 36 A.D.3d 176, 182, 825 N.Y.S.2d 55, 62 (2d Dept. 2006). Lack of capacity to sue is grounds for summary dismissal. *Shah*, 126 A.D.3d at 1320, 6 N.Y.S.3d at 337.

There are four "limited exceptions" to the lack of capacity rule: (1) where there is express statutory authorization to bring suit; (2) where a state statute interferes with a municipality's proprietary interest in a specific set of funds; (3) where the state statute impinges

upon the constitutionally protected Home Rule power of the municipality; and (4) where the municipality would be forced to violate a specific constitutional proscription (i.e., a specific prohibition) by complying with the state statute. *City of New York*, 86 N.Y.2d at 291-92, 631 N.Y.S.2d at 556; see also *Merola v. Cuomo*, 427 F.Supp.3d 286, 292 (N.D.N.Y. 2019).

The New York Court of Appeals has emphasized that these four exceptions are "narrow." *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 67 N.Y.S.3d 547 (2017). Accordingly, the capacity to sue rule has been applied to bar

> . . . public entities from challenging a wide variety of state actions, such as, e.g., the allocation of state funds amongst various localities, the modification of a village operated hospital's operating certificate, the closure of a local jail by the State, special exemptions from local real estate tax assessments, laws mandating that counties make certain expenditures, state land use regulations and state laws requiring electronic voting systems to be installed at polling places in lieu of lever-operated machines.

Id. at 387, 67 N.Y.S.3d at 553 (internal citations omitted).

Exceptions one (express authority) and two (proprietary interest) have not been raised by the Town, and no facts exist that would support their application here. The Town erroneously has asserted exceptions three (violation of Home Rule powers) and four (constitutional prohibition).

A. The "Home Rule Powers" Exception Does Not Apply to the NYVRA for Purposes of the Lack of Capacity Doctrine.

The Town has raised the third exception (violation of Home Rule powers) to the lack of capacity doctrine. Such an exception may apply when a state statute impinges upon Home Rule powers of a municipality that are constitutionally guaranteed under Article IX of the New York State Constitution. Even if this Court were to find this exception applicable to the NYVRA, the Town would not thereby gain capacity to raise other constitutionality claims, such as one based on equal protection, freedom of speech or assembly, the Fifteenth Amendment to the U.S.

Constitution, etc. *New York Blue Line Council, Inc. v. Adirondack Park Agency*, 86 A.D.3d 756, 759, 927 N.Y.S.2d 432, 437 (3d Dept. 2011) (applying the Home Rule exception and holding that municipal entities had capacity to sue state agency only under Article IX of the N.Y. Constitution, but not to bring other claims).

The Home Rule powers exception to the lack of capacity doctrine is inapplicable in the present case because:

1. The Town did not raise the Home Rule issue in its answer [Docket No. 25];

2. The NYVRA addresses a matter of "State concern" that transcends Home Rule powers, and;

3. The NYVRA does not impinge upon the Home Rule powers of the Town even absent the state concern doctrine.

1. The Town Is Precluded From Advancing any Home Rule Argument Because it Failed to Assert it as an Affirmative Defense.

Defendant cannot rely on the Home Rule exception because it did not raise that issue in its answer. [See Docket No. 25.] "A defense consisting of new matter must be pleaded and summary judgment may not be granted to a defendant dismissing the complaint upon the basis of such a defense unless it is pleaded in the action." *Furlo v.Cheek*, 20 A.D.2d 939, 940, 248 N.Y.S.2d 947, 949 (3d Dept. 1964). In *Blakeman v. James*, 2024 WL 3201671 (E.D.N.Y. April 4, 2024), the court, applying New York law, precluded the County of Nassau from raising the issue of the Home Rule powers exception to the lack of capacity doctrine because it had not pled the alleged Home Rule violation in its answer:

> Here, the Home Rule exception does not apply because the Complaint does not plead a claim that the New York Human Rights law, as applied to the Executive Order, violates the Home Rule provision of the New York Constitution.

Id. at *14. Nowhere in the Town's answer is it alleged that the NYVRA violates the Home Rule provisions of Article IX of the State Constitution. Therefore, the Town is precluded from raising that issue on its cross-motion for summary judgment.

2. The NYVRA Does Not Violate The Town's Constitutional Home Rule Powers Because the NYVRA Addresses Matters of State Concern.

In *Kelley v. McGee*, 57 N.Y.2d 522, 457 N.Y.S.2d 434 (1982), the Court of Appeals summarized the State concern doctrine for purposes of Home Rule issues:

> It is well established that the Home Rule provisions of Article IX do not operate to restrict the Legislature in acting upon matters of State concern. In questioning whether a challenged statute involves a matter other than the property, affairs or government of a municipality, this court has consistently analyzed the issue from the standpoint of whether the subject matter of the statute is of sufficient importance to the State generally to render it a proper subject of State legislation.

Id. at 538, 457 N.Y.S.2d at 439-40.

It has been held, for example, that even though a State land use regulation might impinge on local zoning and land use laws, the State land use regulations and laws do not violate the Home Rule provisions of the State Constitution because of the state concern doctrine: "Encroachment upon the zoning and planning powers of local governments by the State has been held to be proper when the subject of such legislation is a legitimate matter of state concern." *Town of Monroe v. Carey*, 96 Misc.2d 238, 241, 412 N.Y.S.2d 939, 941 (Sup. Ct. Orange County 1977), aff'd, 46 N.Y.2d 847, 414 N.Y.S.2d 3114 (1979); see also *Wambat Realty Corp. v. State*, 41 N.Y.2d 490, 494-495, 393 N.Y.S.2d 949, 952 (1977):

> Turning now to the Adirondack Park Agency Act, application to it of these principles leads inexorably to its validity. Of course, the Agency Act prevents localities within the Adirondack Park from freely exercising their zoning and planning powers. That indeed is its purpose and effect, not because the motive is to impair Home Rule, but because the motive is to serve a supervening State concern transcending local interests.

New York Blue Line Council, *Carey*, and *Wambat Realty* all illustrate that although a municipality may have Home Rule authority to adopt laws and regulations with respect to local land use, such authority yields to state laws regulating such use when the state laws advance a supervening state concern transcending local interests:

> . . . [T]he rule is that if the subject matter of the statute is of sufficient importance to the State generally to render it a proper subject of State legislation the State may freely legislate, notwithstanding the fact that the concern of the State may also touch upon local matters. Indeed, legislation on matters of State concern even though of localized application and having a direct effect on the most basic of local interests does not violate the constitutional Home Rule provisions.

Town of Islip v. Cuomo, 64 N.Y.2d 50, 56-57, 484 N.Y.S.2d 528, 531-32 (1984) (internal punctuation and citations omitted).

The Court of Appeals long has recognized that when a state law touches upon matters of local concern and State concern, the State concern doctrine applies and it eliminates any claim of violation of Home Rule powers:

> . . . [T]hat a proper concern of the State may also touch upon local concerns does not mean that the State may not freely legislate with respect to such concerns. Restated, the phrase 'property, affairs or government' of a locality has not served to paralyze the State Legislature where to a substantial degree, in depth or extent, a matter of State concern is involved (see Manes v Goldin, 400 F Supp 23, 27-28, aff'd 423 U.S. 1068).

Wambat Realty, 41 N.Y.2d at 494, 393 N.Y.S.2d at 952 (citations omitted).

The State Constitution further grants the Legislature the power to act in relation to the property, affairs or government of any local government. N.Y. Const., Art. IX, § 2(b)(2). To do so, the Legislature must act via a "general law" broadly applicable throughout the state. Id. Both the State Constitution and the Municipal Home Rule Law ("MHRL") define a "general law" as "[a] law which in terms and in effect applies alike to all counties, all counties other than those

wholly included within a city, all cities, all towns or all villages." N.Y. Const. Art. IX, § 3(d)(l); MHRL § 2[5]. As Chief Judge Cardozo explained in *Adler v Deegan*, 251 N.Y. 467 (1929),

> The test is . . . that if the subject be in a substantial degree a matter of State concern, the Legislature may act, though intermingled with it are concerns of the locality . . . I do not say that an affair must be one of city concern exclusively to bring it within the scope of the powers conferred upon the municipality. . . . I assume that if the affair is partly State and partly local, the city is free to act until the State has intervened. As to concerns of this class there is thus concurrent jurisdiction for each in default of action by the other.

Id. at 491 (concurring opinion).

Elections of local officers are matters of State concern sufficient to override local laws regarding the same:

> Uniform State-wide application of the Election Law to protect the fundamental right of suffrage and to ensure the orderly conduct of elections for local, State-wide, and federal offices is a matter of sufficient State-wide concern, and the power of the State Legislature in this area extends to regulation of the office of election commissioner. State law that is applicable to this office supersedes any conflicting local legislation.

Wood v. County of Cortland, 23 Misc 3d 913, 915-916, 874 N.Y.S.2d 359, 362 (Sup. Ct. Cortland County 2009) (internal citation omitted). Moreover, "the Court of Appeals has long recognized that the New York State Constitution grants the Legislature plenary power to promulgate reasonable regulations for the conduct of elections." *Stefanik v. Hochul*, 229 A.D.3d 79, 211 N.Y.S.3d 574, 579 (3d Dept.), aff'd, ___ N.Y. ___, ___ N.Y.S.3d ___, 2024 WL 3868644 (August 24, 2024) (internal punctuation omitted). Indeed, as discussed below in section IV(C)(3)(a), the courts – including the United States Supreme Court – have found that a state's interest in the integrity and fairness of its elections is a compelling one. The Town's attorneys have made this very point in a similar case.

The stated purpose of the NYVRA is to: (1) encourage participation in the elective franchise by all eligible voters to the maximum extent; and (2) ensure that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York, and especially to exercise the elective franchise. Election Law § 17-200. Both purposes are unquestionably matters of paramount State concern.

Therefore, the NYVRA does not violate the Town's Home Rule powers, even if it impinges on local elections.

3. <u>The NYVRA Does Not Impinge on Local Home Rule Powers.</u>

Separate and distinct from the State concern doctrine, the NYVRA affords the Town sufficient and substantial rights by including a safe harbor provision that gave the Town the opportunity to adopt an appropriate remedy. That the Town chose not to avail itself of that opportunity by enacting an NYVRA-compliant resolution under Election Law § 17-206[7] does not render the Act unconstitutional under the Home Rule provisions of Article IX of the State Constitution.

Article IX, § 1 of the Constitution grants municipalities certain "rights, powers, privileges and immunities," and the Home Rule Law safeguards these protections. Here, the Town wrongly argues that the NYVRA has requirements that impinge upon the Town's right to decide the "mode of selection" of its local officers. That right is fully maintained under the Act. The NYVRA permits a municipality to propose a remedy including a "district-based method of election" or "an alternative method of election." Election Law § 17-206[5]. Hence the Town fails to acknowledge both the NYVRA's purpose and its delegations of power. The NYVRA expressly reserves the decision of a mode of selection to the Town, and that decision is subject to

judicial review only to determine if a remedy is proper and sufficient. The NYVRA ensures only that a municipality has implemented a fair mode of selection, nothing more.

B. The "Constitutional Prohibition" Exception Does Not Apply Here.

The Town also wrongly argues it has capacity to claim that the NYVRA violates state and federal constitutional provisions, other than the Home Rule provisions in Article IX of the State Constitution, because compliance with the Act somehow would require it to violate other constitutional provisions. But the fourth exception to the lack of capacity doctrine does not apply to general claims of unconstitutionality; rather, its application requires that the municipality identify specific prohibitions in the constitution that the municipality would be required to violate by compliance with the State law. *City of New York*, 86 N.Y.2d at 291-92, 631 N.Y.S.2d at 556-57. This exception is inapplicable because the NYVRA does not force the Town to violate a specific prohibition in the state or federal constitution.

A bare allegation of conflict with a general constitutional proscription does not suffice for purposes of the "constitutional prohibition" exception to the lack of capacity doctrine. See *Matter of Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287, 392 N.Y.S.2d 403 (1977) (holding that a previous decision of constitutionality in the same area of law meant there was no conflict with a constitutional proscription); *Merola,* 427 F.Supp.3d at 293 (finding the defendant did not have capacity because a specific constitutional proscription was not provided). Here, as in *Merola*, the Town offers only vague claims of constitutional prohibition. Although the Town purports to invoke various constitutional amendments, it fails to explain how compliance with the statute would force it to violate any specific constitutional proscription, as is required by this exception.

Were the Town's reasoning adopted, then any time the Legislature were to act in a way that is not to a municipality's liking, the state would face an onslaught of unchecked legal

challenges. Such reasoning certainly is not reflected in the nearly 100 years of precedent, which has applied the exception only in extremely limited circumstances. This case does not present any of such circumstances.

IV. THE NYVRA IS NOT UNCONSTITUTIONAL.

A. The Town Possesses No Cognizable Rights Under the First, Fourteenth, or Fifteenth Amendments to the U.S. Constitution or Any Corresponding Provisions of the New York State Constitution.

It is respectfully submitted that this Court need not – and should not – proceed any further in considering the Town's constitutional arguments than to conclude the Town does not possess any of the rights it mentions in its Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Affirmative Defenses and pages 18 to 28 of its amended memorandum regarding the present motions. This is a matter of elemental law, which is explicated in the U.S. Supreme Court and New York Court of Appeals cases discussed at pages 17-18 of Plaintiff's principal memorandum. Likewise, for the reasons discussed above, the Town lacks the constitutional capacity to assert any of those rights before this Court or in any other context. Accordingly, the Town's constitutional arguments do not make it out of the starting gate, and Mr. Young is entitled to summary judgment on the affirmative defenses referenced above and the points discussed below.

B. Strong Presumptions and Heavy Burdens Apply to The Town's Challenge to the Constitutionality of the NYVRA.

It is respectfully submitted that should this Court, notwithstanding the foregoing points, conclude that the Town, as a threshold matter, possesses any constitutional rights and the capacity to assert them in relation to the NYVRA, and should the Court undertake a consideration of the Town's constitutional arguments on the merits, the Court's consideration should begin with an appreciation that the NYVRA, like any enactment by the Legislature,

carries "an exceedingly strong presumption of constitutionality." *Elmwood-Utica Houses, Inc. v. Buffalo Sewer Auth.*, 65 N.Y.2d 489, 495, 492 N.Y.S.2d 931, 933 (1985). Although such a presumption is rebuttable, the Town "carries a heavy burden of demonstrating unconstitutionality beyond a reasonable doubt." Id. (emphasis added). See also *Stefanik v. Hochul*, ___ N.Y.3d at ___, ___ N.Y.S.3d at ___, 2024 WL 3868644 (August 20, 2024); *Penn Advertising, Inc v. City of Buffalo*, 204 A.D.2d 1012, 613 N.Y.S.2d 84 (1994). "[C]ourts strike [legislative enactments] down only as a last unavoidable result . . . after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *White v. Cuomo*, 38 N.Y.3d 209, 216, 172 N.Y.S.3d 373, 380 (2022) (internal punctuation and citations omitted). In view of the Town's reference to separation of powers principles, the following observations by the Court of Appeals in *White* are especially apt:

> . . . [W]hen a legislative enactment is challenged on constitutional grounds, there is both an exceedingly strong presumption of constitutionality and a presumption that the legislature has investigated for and found facts necessary to support the legislation. While courts may look to the record relied on by the legislature, even in the absence of such a record, factual support for the legislation would be assumed by the courts to exist. Ultimately, because every intendment is in favor of the validity of statutes, where the question of what the facts establish is a fairly-debatable one, we accept and carry into effect the opinion of the legislature, which is the arbiter of questions of wisdom, need or appropriateness. Thus, while the legislature may not circumvent the Constitution . . . , we must remain cognizant of the distribution of powers in our State government that render it improper for courts to lightly disregard the considered judgment of a legislative body that is also charged with a duty to uphold the Constitution.

Id. at 217, 72 N.Y.S.3d at 381 (internal punctuation and citations omitted).

It also must be recognized at the outset that the Town's challenge to the Legislature's action is a broad, facial one. It is directed to the constitutionality of the Act as-a-whole, across-the-board, and wholly irrespective of how the Act might be applied or what remedy ultimately

might be implemented. This Court is not yet being requested to implement any specific remedy, including the selection or approval of specific ward maps. Yet the Town presently seeks to have the Act struck down on its face, even before it may be required to take any of the remedial measures described by the statute. Hence, the Town bears the corresponding burden of demonstrating, beyond a reasonable doubt, "that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment." Id. at 216, 72 N.Y.S.3d at 280 (emphasis added) (internal citations omitted); see also *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [this] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.").

As discussed further below, the Town utterly has failed to sustain those monumental burdens. It likewise has failed to account for the fact that the Supreme Court of Washington, a California Court of Appeal, and the Ninth Circuit United States Court of Appeals all have rejected constitutional challenges to similar voting legislation in those states that were premised on grounds advanced by the Town here. The Town makes no effort whatsoever to distinguish (or even cite) those cases; indeed, it mentions them only in passing only to suggest that: (1) they were decided before the United States Supreme Court's decision in *National Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175 (2024); (2) they did not consider the New York State Constitution; and (3) judges in New York State are very smart and might reach a conclusion different than all the judges in those state and federal courts (including all the nine judges of the Supreme Court of Washington who sat en banc and rendered a unanimous decision in the Washington case of

Portugal v. Franklin County, 530 P.3d 994 (2023), cert. denied sub nom. *Gimenez v. Franklin County*, ___ U.S. ___, 144 S.Ct. 1343 (2024); the three judges who rendered a unanimous decision in the California case of *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 51 Cal. Rptr. 3d 821 (2006), cert. denied, 552 U.S. 974, 128 S.Ct. 438 (2007); and the three-judge panel of the Ninth Circuit who unanimously rejected such challenges in *Higginson v. Becerra*, 786 F. App'x 705 (9th Cir. 2019), cert. denied, 140 S.Ct. 2807 (2020)). See Town Amended Memo at 18.

National Rifle Ass'n has no bearing on the present case for the reasons discussed below. Further, the Town makes no effort to distinguish the constitutions of those states or the U.S. Constitution from New York's or to claim any different standards apply in interpreting them to the present facts. See, e.g., *American Atheists, Inv. v. Port Auth. of NY and NJ,* 936 F.Supp.2d 321 (S.D.N.Y. 2013) (New York courts apply the same analysis for equal protection challenges under the New York Constitution as under the federal Constitution); *Sanchez*, 145 Cal. App. 4th 660, 51 Cal. Rptr. 3d 831 (applying federal equal protection principles and analysis – i.e., the same as New York's – in evaluating constitutional challenge to California Voting Rights Act because the parties relied on federal law and did not claim that any differences in California's standards were implicated); *State v. Manussier*, 129 Wash. 2d 652, 672, 921 P.2d 473, 482 (1996) ("This court has consistently construed the federal and state equal protection clauses identically and considered claims arising under their scope as one issue."). And as intelligent and otherwise "exceptional" as the Town describes our state's judges to be, the Town has offered this Court no reason to reach a conclusion any different than the ones reached by the presumably competent jurists who decided Portugal, *Sanchez*, and *Higginson*. Accordingly, even if the Town had constitutional rights and the capacity to raise them, it has not established beyond a

reasonable doubt that the NYVRA is unconstitutional on its face and that all the fifteen judges in *Portugal*, *Sanchez*, and *Higginson* got it wrong.

The Town's constitutional arguments are premised on its general assertions that the NYVRA "removes" constitutional safeguards from the federal VRA, "calls for racial gerrymandering," and "coerces" the Town to "suppress voter viewpoints" by affording a prevailing plaintiff attorney fees in the event the Town refuses to remedy a discriminatory voting practice that requires a judicially-implemented remedy and by "drastically limiting the Town's defenses to a claim of racially polarized voting." Town Amended Memo at 8. The Town invites this Court to examine the NYVRA under the "strict scrutiny" principle applicable to legislation that establishes "racial classifications." As discussed further below, the Act establishes no such classifications, so strict scrutiny does not apply, and the Town fails to address the statute under any other standard. Each of the Town's constitutional challenges should be rejected.

C. The Town Does Not Establish Any Equal Protection Violation.

1. Introduction

The Town argues at pages 19 to 24 of its memorandum that the NYVRA violates rights protected under the Equal Protection Clause of the U.S. Constitution. But as discussed above, the Town has no cognizable rights under the Fourteenth Amendment and lacks capacity to assert any.

In any event, the NYVRA does not violate equal protection principles. It is not subject to strict scrutiny because it does not distribute any burdens or benefits to any individuals on the basis of an individual's race; rather, it expressly protects members of all races to an equal degree. Even if strict scrutiny applied, the NYVRA would survive such analysis because the State has a compelling interest in protecting its citizens' right to vote and the Act's provisions are narrowly and permissibly tailored to that end. More specifically, and contrary to the Town's argument, a

violation of the Act does require the existence of vote dilution resulting in harmful effects to the members of a protected class. And the Town's claims of racially gerrymandering are both premature and inapt. Finally, the Town does not allege the Legislature lacked any rational basis for enacting the NYVRA, so this Court need not consider that question. See e.g., *Higginson*, 786 F. App'x at 707 (citing *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-5, 127 S.Ct. 2738, 2751 (2017)).

2. The NYVRA Is Not Susceptible to "Strict Scrutiny" Analysis.

The Town's equal protection argument hinges on its suggestion that the Act implements "express racial classifications." That suggestion is disproved by the plain language of the Act itself. The Supreme Court has explained that strict scrutiny is implemented only "when the government distributes burdens or benefits on the basis of individual racial classifications." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). The NYVRA does no such thing. On the contrary, its provisions expressly apply equally to all voting residents of the State, regardless of their race. Section 17-204 specifically defines "protected class" to include "a class of eligible voters who are members of a race. . . ." (emphasis added). The statute's substantive provisions afford the same protections and rights of action to all eligible voters, of whatever race. As every eligible voter is a member of some race, whether it be white, Black, or another, and as the statute does not allocate any "burdens or benefits" to members of one or more races in distinction to any other, the statute is not characterized by any "racial classifications" that warrant strict scrutiny. See Portugal, 530 P.3d at 1011 (the Washington VRA, which is indistinguishable from the NYVRA, "does not confer any privilege to any class of citizens").

The Town wrongly argues at page 19 of its memorandum that because the NYVRA may have been motivated by concerns about adverse impacts on minorities' right to vote and an

interest in ensuring that members of racial minority groups have equal opportunity to participate in the political process, the statute must be one that "distinguishes between citizens based on their race." In doing so the Town incorrectly conflates the putative purpose behind the statute with its plain text and import. "[A] law directing state actors to provide equal protection is (to say the least) facially neutral, and cannot violate the Constitution." Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291, 318, 134 S.Ct. 1623, 1640 (2014) (Scalia, J., concurring in the judgment); see also Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 544-45,135 S.Ct. 2507, 2524 (2015) (governments may adopt measures "to eliminate racial disparities through race-neutral means"); Bush v. Vera, 517 U.S. 952, 958, 116 S.Ct. 1941, 1951 (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race."); Sanchez, 145 Cal. App. 4th at 681, 51 Cal. Rptr. 3d at 838 ("If the CVRA were subject to strict scrutiny because of its reference to race, so would every law be that creates liability for race-based harm, including the FVRA [and] the federal Civil Rights Act. . . . A legislature's intent to remedy a race-related harm constitutes a racially discriminatory purpose no more than its use of the word 'race' in an antidiscrimination statute renders the statute racially discriminatory.").

In every respect relevant here the NYVRA is analogous to it counterparts in Washington and California, which have withstood similar challenges under the Equal Protection Clause. See Portugal and Sanchez. The courts in those cases held that strict scrutiny does not apply because the voting rights provisions in those states, like those in the NYVRA, apply equally to all races and do not involve a suspect racial classification. It is respectfully submitted this Court should reach the same conclusion in regard to New York's similar statute.

3. Even Under Strict Scrutiny, the Town Has Not Overcome the Presumption of Constitutionality and Demonstrated a Fourteenth Amendment Violation

Beyond a Reasonable Doubt.

a. The State Has a Compelling Interest in the Protection of Voting Rights.

Even if strict scrutiny applied to the NYVRA, the statute would pass constitutional muster. The Town premises its strict scrutiny argument on an uncanny proposition that the State has no compelling interest in preventing vote dilution and protecting the right of all citizens to participate equally and meaningfully in the electoral process. The Town claims "this is an interest reserved to the federal government." Town Amended Memo at 20. The Town cites no authority for its proposition that the State has no such interest, even under its own equal protection guaranty in Article I, §11 of its Constitution, its additional protections of the right to vote, see N.Y. Const. Art. I, §1, Art. II, § 1, and Art. III, § 4(c)(1), and as a matter of public policy. The Town's proposition is simply wrong. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 98-99, 112 S.Ct. 1846, 1851 (1992) (Tennessee's interests in protecting the right of its citizens to vote freely for the candidates of their choice and to vote in an election conducted with integrity and reliability "obviously are compelling ones").

Moreover, as our Court of Appeals explained in White, "[w]hile courts may look to the record relied on by the legislature, even in the absence of such a record, factual support for the legislation would be assumed by the courts to exist." *White v, Cuomo*, 38 N.Y.3d at 217, 72 N.Y.S.3d at 380. Here, the record is hardly absent regarding the Legislature's expressed compelling interest in ensuring voting equality and the facts that support that interest. The Introducer's Memorandum in Support of the Senate bill resulting in the Act plainly states:

> JUSTIFICATION
>
> The [NYVRA] provides an opportunity for this state to provide strong protections for the franchise at a time when voter suppression is on the rise, vote dilution remains prevalent, and the future of the federal voting rights act is uncertain due to a federal judiciary that is increasingly hostile to the protection of the franchise.

> 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. According to data from the U.S. census bureau, registration and turnout rates for non-Hispanic white New Yorkers led Asian, Black, and Hispanic New Yorkers – the latter two groups by particularly wide margins.
>
> New York will not be the first state to pass its own voting rights act. California has had a state voting rights act since 2001 and over the past two decades, the CVRA has been highly effective at increasing opportunities for minority voters to elect their candidates of choice to local government: [sic] bodies and to elect more minority candidates to local offices. . . . The law will address both a wide variety of long-overlooked infringements on the right to vote and also make New York a robust national leader in voting rights at a time when too many other states are trying to restrict access to the franchise.

Complaint, Exh.18 [Docket No. 19].

The governor's signing Memorandum likewise shows that the Act was implemented to increase protections against vote dilution and suppression in various respects. Id.

Perhaps most important, Section 17-200 of the Act itself reflects the compelling interests the Legislature sought to advance by the Act:

> In recognition of the protections for the right to vote provided by the constitution of the state of New York, which substantially exceed the protections for the right to vote provided by the constitution of the United States, and in conjunction with the constitutional guarantees of equal protection, freedom of expression, and freedom of association under the law and against the denial or abridgement of the voting rights of members of a race, color, or language-minority group, it is the public policy of the state of New York to:
>
> 1. Encourage participation in the elective franchise by all eligible voters to the maximum extent; and
>
> 2. Ensure that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York, and especially to exercise the elective franchise.

Whether one agrees with the interests possessed and advanced by the majorities in the two houses of the Legislature and the governor is immaterial – in fact, it cannot be considered. What is relevant is that such compelling interests plainly existed and were expressed, and that the NYVRA was enacted in furtherance of those interests. Even though, as explained above, the NYVRA does not implement or rely on "racial classifications," our Fourth Department has observed that "a sufficiently serious claim of discrimination may constitute a compelling interest to engage in race-conscious remedial action." *Margerum v. City of Buffalo*, 63 A.D.3d 1574, 1579, 880 N.Y.S.2d 820, 825 (4th Dept. 2009) (internal punctuation and citations omitted). See also cases cited supra at 34. Here, even if the NYVRA (just like the federal VRA) was motivated by concerns about, and a history of, racial discrimination, that does not mean the Legislature had no compelling interest in enacting the statute for the protection of all its voting residents. In fact, the Fourth Department plainly has stated that such concerns and history can be quintessential motivations for such legislation.

As recently as July 8, 2024, less than a month after filing the Town's cross-motion for summary judgment in this case claiming the State has no compelling interest in preventing minority vote dilution, its own attorneys, Hodgson Russ LLP, forcefully (and successfully) argued on behalf of the Assembly of the State of New York, its Speaker, and its Majority Leader, that the State has a "compelling interest in ensuring access to the ballot box." Hodgson Russ went on to say, "There can be little dispute as to the state's compelling interest in preserving and protecting the election process." Hodgson Russ advanced that very point to convince the Third Department to uphold the constitutionality of an Election Law provision as part of its argument that the petitioners in that case had not met their heavy burden to prove, beyond a reasonable doubt, that the legislation was unconstitutional. See *Amedure v. State of New York*, Case No.

CV-24-0891 (3d Dept.), Docket No. 32. It is respectfully submitted that this Court should accept those arguments advanced by Hodgson Russ, acknowledge the State's compelling interest in ensuring voting rights, hold Hodgson Russ's current client to the "beyond a reasonable doubt" standard, and uphold the constitutionality of the election legislation that was advanced by Hodgson Russ's other clients in the New York State Legislature.

b. The Town Does Not Establish That the NYVRA Offends the Equal Protection Clause.

The Town contends at pages 20-24 of its memorandum that the NYVRA does not withstand strict scrutiny because its remedial provisions are not narrowly tailored to accomplish the State's non-discriminatory purposes. In doing so the Town ignores the overall statutory scheme and consequently misapplies federal precedents relating to the federal VRA**.** Moreover, the Town invites the Court prematurely to evaluate the constitutionality of specific remedies that at this point are merely hypothetical and that, in any event, would be subject to strong legal safeguards, including the Equal Protection Clause itself, and future judicial approval to eliminate any equal protection concerns.

The Town's principal argument is that "any instance of racially polarized voting" is a per se violation of the NYVRA. It argues that this somehow "circumvents" unspecified "constitutional safeguards established by the federal VRA."[4] In doing so, it fails to construe and present the New York statute as an integrated piece of legislation.

[4] The federal VRA does not actually "establish" any constitutional safeguards. Also, insofar as the Town references *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 (1986), it must be recognized that the interpretive requirements articulated therein are not constitutional requirements; rather, they are distillations of the text of the VRA, which was a product of legislative compromise. See *Allen v. Milligan*, 599 U.S. 1, 13-14, 143 S.Ct. 1487, 1500-01 (2023).

As an initial matter, a violation of the NYVRA is not established by any mere "instance" of racially polarized voting. Section 17-206[2](b)(i)(A) requires a showing that "voting patterns . . . are racially polarized" (emphasis added).

More generally, the Town contends, by focusing solely on that particular subsection, that the NYVRA is violated by the mere existence of racial polarization, regardless of whether such polarization adversely affects a protected class. That too-narrow focus ignores the over-arching prefatory language in subsection [2](a) establishing that the violation itself necessarily involves an "effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution" (emphasis added). Hence, vote dilution resulting in impairment of ability to elect candidates of choice and/or to influence the outcome of elections is fundamental to a violation. Subsection [2](b)(i)(A) addresses the manner in which such a violation is proved and requires a showing of racial polarization, but that method of proof presumes the elements of a violation under [2](a), which expressly include the specified adverse effects caused by vote dilution. Interpreted this way, the NYVRA is not affected by the problems hypothesized by the Town and fully comports with any applicable equal protection requirements.

This is precisely how the Supreme Court of California has interpreted the California Voting Rights Act, which is indistinguishable from New York's in this respect. In Pico Neighborhood Ass'n v. City of Santa Monica, 15 Cal.5th 292, 534 P.3d 54, 312 Cal. Rptr.3d 319 (2023), the court rejected the "plaintiffs' view" of the statute – the same view espoused by the Town in the present case – that according to its "plain language," "proof of racially polarized voting, in itself, establishes 'dilution.'" The court wrote:

> When considered in isolation, this single sentence might arguably be susceptible to plaintiff's reading. However, a court construing a statute does not view a

> fragment in isolation, but considers the statute as a whole, in context with related provisions and the overall statutory structure, so that it may best identify and effectuate the scheme's underlying purpose.

Id. at 314, 534 P.3d at 65, 312 Cal. Rptr.3d at 332. The court explained that the statute is very similar to the federal VRA; hence, when construing "dilution," it is necessary to be mindful that this is a "term of art with a settled meaning under section 2 of the VRA: 'The phrase vote dilution itself suggests a norm with respect to which the fact of dilution may be ascertained.'" Id., 534 P.3d at 64, 312 Cal. Rptr.3d at 330 (quoting *Holder v. Hall*, 512 U.S. 874, 880 (1994) (plurality opinion)). The court addressed the instruction in *Holder* that for vote dilution to be established under the federal VRA, "a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice." Id., 534 P.3d at 64, 312 Cal. Rptr.3d at 330-31 (internal citations to *Holder* omitted). The California Supreme Court observed that "while the existence of racially polarized voting 'is relevant to a vote dilution claim' under the [federal] VRA (Gingles, supra, 478 U.S. at p. 55) – and is indeed 'a key element' (ibid.) – it is not in itself sufficient." Id., 534 P.3d at 64, 312 Cal. Rptr.3d at 331. (quoting *Thornburg v. Gingles*, 478 U.S. 30, 55 (1986)). The court concluded:

> We find, for several reasons, the same is true under the CVRA. The similarities between the two schemes strongly suggest that "dilution" requires not only a showing that racially polarized voting exists, but also that the protected class thereby has less ability to elect its preferred candidate or influence the election's outcome that it would have if the at-large system had not been adopted. . . .
>
> Plaintiffs' construction would allow a party to prevail based solely on proof of racially polarized voting that could not be remedied or ameliorated by any other electoral system. Moreover, such a construction would render the word "dilution" in [the California Elections Code] surplusage. Accordingly, we agree with the Court of Appeal that dilution is a separate element under the CVRA. To establish the dilution element, a plaintiff in a CVRA action must identify "a reasonable alternative voting practice" to the existing at-large electoral system that will "serve as the benchmark 'undiluted' voting practice."

Id. at 315-16, 534 P.3d at 64-65, 312 Ca. Rptr.3d at 331 (quoting *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480, 117 S.Ct. 1491, 1498 (1997)).

Section 7-206[2] of the NYVRA can – and must – be construed in precisely the same manner. It expressly premises a violation on actual "vote dilution" that impairs the ability of members of a protected class to elect their chosen candidates or influence the outcome of elections. To read that premise out of the statute, or to treat it as mere surplusage, would be contrary to longstanding principles of statutory construction and divorce it from its legislative purpose. Understood in this way, the statute does not risk providing minority voters "an electoral advantage by establishing racially polarized voting [alone] as a per se violation of the statute," Town Amended Memo at 23; and it affords equal protection consistent with its non-discriminatory definition of "protected class." Moreover, the Plaintiff here has demonstrated "a reasonable alternative voting practice" to the existing at-large electoral system that will "serve as the benchmark 'undiluted' voting practice" through election data showing that the preferred candidate of the protected class would have been elected to the Town Board had a simple district system of voting been used for the 2023 election. See Complaint, Exh. 1 at 7-9 [Docket No. 2].

The Town suggests at pages 23-24 of its memorandum that any remedy ultimately provided by this Court – and, specifically, a requirement to adopt district voting – necessarily would involve impermissible "racial gerrymandering." That suggestion is absurd in view of the Town Board's June 11, 2024 adoption of its Resolution 2024-339 by which, during the pendency of this action, the Board expressly declared that "the Town remains steadfast in its efforts to create a ward system of election" and intends "to enact and implement remedies, including a ward-based system of election, for any potential violation of the NYVRA that may exist" (emphasis added). See Affirmation of Daniel A. Spitzer, Esq., dated June 12, 2024, at 6, ¶ 26

[Docket No. 39] and Exh G thereto at 2 [Docket No. 46]. Based on its own very recent words and enactment, the Town cannot now argue against a ward system with a straight face.

In any event, the Town's subsequently-crafted litigation position in this regard is premature and otherwise unsound. First, as stated above, this case is not yet at the remedy phase and Plaintiff has not moved for summary judgment in relation to the specifics of any proposed remedy. If district voting ultimately is found to be an appropriate remedy, the Town will have the opportunity to propose a district plan that comports with equal protection (indeed, it already has commissioned an expert to prepare just such a plan and has received alternate versions, see Docket No. 83, Borek Aff., Exh. 8, and to challenge any plans as to which it believes "race was the predominant [motivating] factor." *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 2488 (1995). See *Sanchez*, 145 Cal. App. 4th at 683, 51 Cal. Rptr. 3d at 840 ("A court might wish to impose [a districting plan that uses race as the predominant line-drawing factor, thereby implicating strict scrutiny, but] . . . applications of the statute not involving that type of remedy are readily conceivable, so this problem is not a basis for a facial challenge."); Portugal, 550 P.3d at 1006 ("Strict scrutiny could certainly be triggered" in a future "as-applied challenge to districting maps that sort voters on the basis of race" (emphasis in original) (internal punctuation omitted).

Not only is a conjectural risk of some future, invalid, predominantly race-based districting plan an insufficient basis for a facial challenge to the NYVRA, but the Town fails to address the stringent protections against such risk included in the Act itself. For example, Section 7-206[2](c)(viii) of the Act provides that "whether members of a protected class are geographically compact or concentrated . . . may be a factor in determining an appropriate remedy." This invites consideration of whether members of a minority group do or do not live in

clustered geographic areas; if they do not, then this factor may militate against the creation of strangely-shaped gerrymandered districts. Subsection 5 requires that all remedies, including district election systems, be appropriate and ensure that voters of all races have "equitable access to fully participate in the electoral process." This requirement prohibits the creation of districts that might be subject to, and fail, strict scrutiny. It bolsters the overall requirement that any ward system ultimately implemented comport with equal protection principles. It prevents precisely the risk of unlawful gerrymandering that underlies the Town's facial constitutional attack.

Moreover, consciousness and consideration of race in some future drawing of actual district boundaries would not in itself, as the Town hypothesizes, reflect any predominance of racial motivations. The Supreme Court very recently rejected just such a concept in *Allen v. Milligan*, 599 U.S. 1, 30, 143 S.Ct. 1487, 1510 (2023) ("[r]edistricting legislatures will . . . almost always be aware of racial demographics . . . but such race consciousness does not lead inevitably to impermissible race discrimination. Section 2 itself demands consideration of race") (internal punctuation and citations omitted); see also id. at 33, 143 S.Ct. at 1512 ("The contention that mapmakers must be entirely "blind" to race has no footing in our § 2 case law.").

Other states' history with legislation comparable to the NYVRA demonstrates that the legislation uniformly has protected against the imposition of impermissible remedies, even when those remedies have involved conversions to district systems. Those systems have been implemented without any unlawful racial gerrymandering. In fact, hundreds of political entities have been required to convert to district systems to remedy or avoid state voting rights act violations. See Ruth M. Greenwood & Nicholas O. Stephanopoulos, "Voting Rights Federalism," 73 Emory L.J. 299, 329 (2023). "[N]ot a single district created to remedy or avoid

a [state VRA] violation has been found to be an illegal racial gerrymander." Id. The only suit that even alleged that districts drawn to remedy a state VRA violation were unlawful was the California Higginson case, which the Ninth Circuit dismissed due to the plaintiff's failure to "plausibly state that [he was] a victim of racial gerrymandering." 786 F. App'x at 706.

For all these reasons, even if the Town possessed any right to equal protection under the federal and/or New York State Constitution and had the capacity to assert it (it does not), and even if strict scrutiny were to apply to a facial evaluation of the NYVRA (it does not), the Town has failed to establish beyond a reasonable doubt that the Act violates the Fourteenth Amendment and Plaintiff is entitled to summary judgment on the Town's Fifth, Sixth, and Tenth Affirmative Defenses.

D. The Town Does Not Establish Any Violation of the Fifteenth Amendment.

The Town contends at page 24 of its memorandum that the NYVRA somehow violates the Fifteenth Amendment because it "inevitably coerces municipalities to engage in racial gerrymandering to avoid NYVRA liability." This contention should be summarily rejected, insofar as it has not been pleaded as an affirmative defense. Although the Town's Eleventh Affirmative Defense purports to raise an affirmative defense under the Fifteenth Amendment, it is directed expressly, and solely, to "Plaintiff's proposed ward boundaries." This necessarily pertains to the district map prepared and submitted on Plaintiff's behalf. [Docket Nos. 12-14] The Town's argument in its memorandum does not discuss those "proposed ward boundaries" to any extent.

Should this Court proceed to consider this defense on its merits, the Court should recognize that the NYVRA does nothing, on its face, to "deny" or "abridge" the right to vote of any individual on account of race or color. The text of the statute is race-neutral and protects equally every voter's rights. Moreover, the Act does not "inevitably coerce" any political

subdivision to engage in racial gerrymandering. In fact, it does not, on its face, require district-based elections at all and provides a total of sixteen remedies for consideration. See Section 17-206[5](a)(i)-(xvi). That subsection also explicitly states that these remedies are not exclusive and that others may be considered. Should this case proceed to the point of implementing a specific and definitive remedy, this Court freely can consider all suitable remedies, including a district system, and ensure at that time that any one or more of them selected does not include gerrymandered districts predominantly and impermissible motivated by race. In doing so, it may consider, of course, the district plans the Town Board itself commissioned pursuant to its June 11, 2024 resolution, when the Town was so professedly "steadfast" in its efforts to convert to a district system. In sum, the NYVRA does not violate the Fifteenth Amendment, just as the federal VRA does not. *Allen*, 599 U.S. at 41, 143 S.Ct. at 1516.

Therefore, even if the Town properly had asserted such an affirmative defense, even if it had rights under the Fifteenth Amendment, and even if it had capacity to assert them, which it does not, the Town has failed to establish beyond a reasonable doubt that the Act violates the Constitution and summary judgment should be granted to Plaintiff on the Town's Eleventh Affirmative Defense.

E. The Town Does Not Establish Any Violation of the First Amendment.

The Town suggests at pages 24 to 26 of its memorandum that the availability of attorney fees in Section 17-218 of the NYVRA perpetrates a violation of the First Amendment to the U.S. Constitution by "coercing" either the Town, or its voters, or its taxpayers (it keeps changing) to vote or otherwise act in a certain way. As with the Town's Fifteenth Amendment argument addressed in the immediately preceding section, this argument summarily should be rejected, insofar as it has not been pleaded as an affirmative defense. Although the Town's Eighth Affirmative Defense purports to raise an affirmative defense under the First Amendment and

Article I, Section 8 of the New York State Constitution, it is premised expressly, and solely, on an allegation that the Act violates those provisions "by stripping all legal defenses to racial polarization." That is not at all what the Town argues in its motion papers. Its affirmative defense makes no reference to any sort of coercion.

Should this Court proceed to consider this defense on its merits, the Court should realize that the Town's unpleaded defense makes neither logical nor legal sense. The Town apparently does not know even what or whose purported right it is championing: one of its own ("The Town is forced to decide. . . ."); one of voters ("Both options have the effect of coercing voters. . . ."); or one or all of the Town's residents ("The coercive effect on Cheektowaga's citizens is real and imminent" because of "increased tax burdens"). The Town cites no authority suggesting the Town Board has an institutional "expression" or "speech" right in respect to determining whether to implement alternate election measures. It claims the Board faces a "Catch-22" of having to decide between (1) altering the electoral system to respond to a potential violation of the Act "and, therefore, chill[ing] its citizens' freedom to vote" and (2) refusing to enact a remedy to a potential violation and being exposed to attorney fees. But the premises for that proposition are simply wrong. For one thing, there is no reason whatsoever to believe that the Town's adoption of an NYVRA remedy, even for a "potential" violation, will "chill its citizens' freedom to vote." It hardly can be argued that "additional voting hours," "additional polling locations," "expanded opportunities for voter registration," or "additional voter education" do anything to "chill" voter freedom. See Section 17-206[5](viii), (ix), (xi), (xii). On the contrary, each of those remedies undeniably enhances voter freedom, and implementing changes referenced in the Act generally may have a salutary effect, even in the absence of a violation. Yet the Town purports to mount a wholesale First Amendment challenge to the entirety of the

Act, on its face. And as discussed at length above, even a district system (like the one in the plan commissioned by the Town itself a mere three months ago) can – and must – be implemented in a way that avoids impermissible impact on voters in a racial majority. Furthermore, the choice described by the Town is illusory. The Town could have avoided substantial costs altogether by adopting the remedy – a ward system – to which it had been so openly and "steadfastly" committed. And it does not have to pay fees if it continues its refusal to enact a remedy for what it considers only a "potential" violation and prevails in this litigation. Such is the situation faced by parties in any type of case involving statutory fee-shifting, such as a Title VII or a § 1983 case. Those parties, including political subdivisions, are not considered improperly "coerced" by having to decide whether to settle or to pursue the case to its end and risk the accumulation of substantial attorney fees. Neither should the Town be in this case. And the Act's fee provision can be viewed equally as incentivizing the Town to enhance, rather than diminish, the voting rights of its electorate without the need for protracted litigation. In any event, there is no plausible argument or authority that the Act's fee provision "coerces voters to vote contrary to their free will."

None of the cases cited by the Town has anything at all to do with elections for government office. The Town obliquely suggests its "silver bullet" is the *National Rifle Association* case, but that case has no imaginable bearing on this one. In that case the Supreme Court held that the NRA stated a colorable first Amendment claim against the former superintendent of the New York State Department of Financial Services by alleging she had influenced insurance companies regulated by that agency to discontinue their business relationships with the NRA to punish or suppress gun-promotion advocacy. Those facts have no conceivable relation to those here. The Legislature has done nothing to influence improperly

either the Town, or any individual, to do anything in contravention of the right to vote or to suppress any protected form of speech or expression. By relying on *National Rifle Association*, the Town truly is shooting blanks.

Accordingly, even if the Town properly had asserted such an affirmative defense, even if it had rights under the First Amendment, and even if it had capacity to assert them, which it does not, summary judgment should be granted to Plaintiff on the Town's Eighth Affirmative Defense. One cannot help but add that in respect to this particular point that the Town premises on attorney fees, the Town needlessly has increased its exposure to such fees under Section 17-218 by requiring Plaintiff to respond to its wholly non-colorable arguments.

F. The Town Does Not Establish Any Violation of Procedural Due Process.

The Town contends at pages 26-27 of its memorandum that the NYVRA somehow deprives the Town's voters of their ability to vote for their candidates of choice and therefore of procedural due process: a truly ironic contention indeed, given that the Legislature's very purpose in enacting the Act was to protect and enhance that very ability for all voters. The contention relates to provisions in Section 7-206[2](c) precluding the consideration of certain evidence in determining whether there has been a violation of subsection [2](a). As with the arguments in the two preceding sections, the Town has not alleged such an affirmative defense, and this Court should not consider it. Although the Town has asserted a Seventh Affirmative Defense alleging that the Act violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 6 of the New York State Constitution, it is premised expressly, and solely, on an allegation that the Act violates those provisions "by stripping all legal defenses to racial polarization, depriving Defendants of substantive due process." The Town has not asserted or preserved any affirmative defense based on procedural due process.

Furthermore, none of the cases cited at page 27 of the Town's amended memorandum relates, even remotely, to any due process right possessed by a government body – or anyone – upon which the Legislature allegedly has infringed by making public policy decisions about what evidence can be considered in determining whether a voting rights violation has been established. Indeed, the cases are not "due process" cases at all and should not have been cited. No authority supporting the sort of "procedural due process" right the Town seeks to invent has been found and, as discussed above, the Town has no capacity to invent or assert one.

G. The NYVRA Does Not Violate the Separation of Powers Doctrine.

The Town has raised no affirmative defense premised on the separation of powers doctrine. A defense of this type is required to be raised as an affirmative defense. See CPLR § 308(b) ("A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading such as . . . illegality either by statute or common law. . . . The application of this subdivision shall not be confined to the instances enumerated."); cf. *Montano v. County Legislature of County of Suffolk*, 70 A.D.3d 203, 891 N.Y.S.2d 82 (2d Dept. 2009) (separation of powers pleaded as affirmative defense); *United States ex rel. Shepherd v. Fluor Corp.*, No. 13-CV-02428 (D.S.C. September 13, 2024) (Docket No. 461) (separation of powers must be pleaded with specificity as an affirmative defense).

Should this Court disregard that fact and consider the merits of this defense, it should reject the defense as a matter of law. In *Matter of Stevens v. New York State Div. of Criminal Justice Serv's*, 40 N.Y.3d 505, 517, 204 N.Y.S.3d 439, 446 (2023), the Court of Appeals explained:

> The Legislature may constitutionally confer discretion upon an administrative agency . . . if it limits the field in which that discretion is to operate and provides standards to govern its exercise. So long as the legislature stays

> within those confines, it enjoys great flexibility in delegating rulemaking powers to administrative agencies in order to meet its policymaking ends. In fact, this flexibility is necessary to the law-making. (Internal punctuation and citation omitted.)

In crafting the remedy portions of the NYVRA, the Legislature has in no sense passed on its law-making functions to the Attorney General's ("AG") Office. As the Town itself states, Section 17-206[7](c)(1) of the NYVRA merely "allows" a municipality to approve a proposed remedy and submit it to the AG under certain specified circumstances. Nothing requires the municipality to do so. And the Town did not do so in the present case, so it has not been aggrieved by any impermissible separation of powers. It lacks standing to challenge the Act on that ground, and no claim is ripe for adjudication.

Furthermore, the Act includes sufficient limitations on, and standards pertaining to, the AG's discretion in considering proposed NYVRA remedies. Those limitations and standards are thorough, explicit, and closely aligned with the text and purpose of the statute. In fact, they require the AG to protect the very interest asserted by the Town in this case, i.e., ensuring that any proposed remedy (such as a plan for ward elections) meets all statutory and constitutional requirements, including those of the Equal Protection Clause relating to racial gerrymandering. More particularly, subsection [7](c)(iv) provides:

> The civil rights bureau shall only grant approval to the NYVRA proposal if it concludes that: (A) the political subdivision may be in violation of this title; (B) the NYVRA proposal would remedy any potential violation of this title; (C) the NYVRA proposal is unlikely to violate the constitution or any federal law; (D) the NYVRA proposal would not diminish the ability of protected class members to participate in the political process and to elect their preferred candidates to office; and (E) implementation of the NYVRA proposal is feasible.

Moreover, subsections [7](c)(iii) and (vii) of the statute place time limitations on the AG's review and approval of proposed remedies and require the AG to explain the basis for

denying any proposal. The Legislature has not empowered the AG to require any political subdivision to implement any remedy, but only to "make recommendations for an alternate remedy for which it would grant approval." Section 17-206[7](c)(vii). In no sense has the Legislature given the AG carte blanche, "open-ended discretion to choose ends" in respect to the Act.

The only case the Town cites in support of its argument, *Boreali v. Axelrod*, 71 N.Y.2d 1, 523 N.Y.S.2d 464 (1987), did not involve a situation where the Legislature decided to grant purely legislative authority and discretion to an executive agency; rather, it involved an agency exceeding even the broad and proper discretion it had been granted: to, in effect, act ultra vires. In the present case, the Town has not submitted any proposed remedy to the AG, nor is there any present or conceivable danger of the AG impressing upon the Town any remedy against its will.

In sum, the NYVRA does not impermissibly delegate any legislative authority to the AG and establishes substantial, definite guidelines and limitations to ensure the AG is enforcing the law consistent with legislative intentions. The statute and its provisions regarding the AG's "administrative action" are entitled to the same "presumption of constitutionality" attendant to any act of the Legislature, Stevens, 40 N.Y.3d at 517, 204 N.Y.S.3d at 446, and the Town has not demonstrated beyond a reasonable doubt the NYVRA offends the separation of powers.

H. Summary: Plaintiff Is Entitled to Summary Judgment as to the Town's Fifth, Sixth, Seventh, Eighth Tenth, and Eleventh Affirmative Defenses Premised on Supposed Constitutional Infirmities of the NYVRA.

Plaintiff is entitled to summary judgment on the Town's Fifth and Sixth Affirmative Defenses because the Town possesses no rights or capacity to sue under the Fourteenth or Fifteenth Amendment to the U.S. Constitution or Article I, Section 11 of the New York State Constitution and because the NYVRA does not violate equal protection principles.

Plaintiff is entitled to summary judgment on the Town's Seventh Affirmative Defense and the contentions raised at pages 26 to 27 of the Town's amended memorandum because the Town possesses no rights or capacity to sue under the Fourteenth Amendment to the U.S. Constitution or Article I, Section 6 of the New York State Constitution and because the NYVRA does not violate due process principles. Moreover, the Town does not discuss in its memorandum the matter (substantive due process) alleged in the Seventh Affirmative Defense and has failed to plead as an affirmative defense the matter (procedural due process) discussed in its memorandum. In addition, the Town has failed to address Article I, Section 6 of the New York State Constitution.

Plaintiff is entitled to summary judgment on the Town's Eighth Affirmative Defense and the contentions raised at pages 24 to 26 of the Town's amended memorandum because the Town possesses no rights or capacity to sue under the First Amendment to the U.S. Constitution or Article I, Section 8 of the New York State Constitution and because the NYVRA does not violate First Amendment principles. Moreover, the Town does not address in its memorandum the matter (stripping all legal defenses to racial polarization) alleged in the Eighth Affirmative Defense and has failed to plead as an affirmative defense the matter (coercion) discussed in its memorandum. In addition, the Town's amended memorandum does not address Article I, Section 8.

Plaintiff is entitled to summary judgment on the Town's Tenth Affirmative Defense because the Town possesses no rights or capacity to sue under the Fourteenth Amendment and because the NYVRA does not violate that provision. Moreover, the Town does not address in its memorandum the matter (Plaintiff's proposed ward boundaries) alleged in the Tenth Affirmative Defense.

Plaintiff is entitled to summary judgment on the Town's Eleventh Affirmative Defense because the Town possesses no rights or capacity to sue under the Fifteenth Amendment and because the NYVRA does not violate that provision. Moreover, the Town does not address in its memorandum the matter (Plaintiff's proposed ward boundaries) alleged in the Eleventh Affirmative Defense and has failed to plead as an affirmative defense the matter (coercion) discussed in its memorandum.

CONCLUSION

For the reasons discussed above and in Mr. Young's original memorandum, it is respectfully requested that this Court award Mr. Young the following relief:

1. A judgment that racially polarized voting in the context of the NYVRA existed in the November 2023 Town of Cheektowaga election for Town Board;

2. A judgment that racially polarized voting in the context of the NYVRA existed in other Town of Cheektowaga elections, and county and state elections, since 2015, as identified in the parties' expert reports;

3. A judgment that the existence of an at-large method of election, racially polarized voting, and vote dilution in the Town of Cheektowaga violates Election Law § 17-206;

4. A judgment that Defendant did not enact a NYVRA-compliant safe harbor resolution before the expiration of the fifty-day period specified in Election Law § 17-206[7](a);

5. A judgment in Mr. Young's favor as to each of Defendant's Affirmative Defenses;

6. A judgment that Defendant's February 5, 2024 Resolution and March 12, 2024 Resolution did not enact valid viable NYVRA remedies that will eliminate the violation of Election Law § 17-206[2](a);

7. A judgment that Defendant's elections for the six members of the Town Board must be conducted by using a district method of election beginning with the election of November of 2025;

8. Denial of Defendant's Cross-Motion for Summary Judgment; and

9. Such other and further relief the Court considers just and proper.

Dated: October 7, 2024.

Respectfully submitted,

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-and-

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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, Gary D. Borek, hereby certify that this Memorandum of Law contains 17,025 words, excluding the caption, table of contents, table of authorities, and signature block, and complies with § 202.8-b(a) of Uniform Rules for New York State Trial Courts.

Pursuant to § 202.8-b(c) of Uniform Rules for New York State Trial Courts, I have relied on the word count of the word-processing system used to prepare this document.

Dated: October 7, 2024

Buffalo, NY

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