STATE OF NEW YORK
SUPREME COURT : ERIE COUNTY

KENNETH YOUNG,

Plaintiff,

v.

TOWN OF CHEEKTOWAGA,

Defendant.

Index No.: 803989/2024

Hon. Paul Wojtaszek, J.S.C.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Federal Cases

TABLE OF AUTHORITIES - cont'd

TABLE OF AUTHORITIES - cont'd

State Cases

TABLE OF AUTHORITIES - cont'd

State Statutes

Rules

TABLE OF AUTHORITIES - cont'd

PRELIMINARY STATEMENT

There is a difference between mere losses of political candidates and voter dilution. Plaintiff's lawsuit neglects this difference. Instead, it uses the NYVRA as a tool to serve Plaintiff's political aspirations. But Plaintiff—a perennially failed candidate for multiple elected positions who is apparently more focused on the fee-shifting provisions of the applicable law than voting rights—has failed to prove his *prima facie* case. Plaintiff's attack on Cheektowaga's at-large democratic process is not merely a moral failure, but the motion before the court is mainly a request for an advisory opinion upon which the Court has no jurisdiction. The motion should be denied, and the proceeding dismissed. As to the required showing of "voting patterns of members of the protected class within the political subdivision are racially polarized", Plaintiff submits no expert or other evidence, just cherry-picked highlights of his own electoral career. He ignores both the repeated success of the protected class members in being elected (including a current Town Board member and state officials) and the overwhelming success that the protected classes in Cheektowaga have had over the years electing candidates of their choice. Their failure to provide admissible evidence or to even define the term "pattern" (and they may not do so for the first time in their reply), dooms their premature motion.

In 2022, the New York State Legislature enacted the John R. Lewis Voting Rights Act (the "NYVRA" or "the Act"). On its face, the law purports to grant additional voting rights protection to racial, ethnic, and language minority groups beyond that guaranteed by the federal Voting Rights Act (the "federal VRA"). In reality, the NYVRA infringes upon some of the very rights that it claims to protect and opens the floodgates for plaintiffs, like Kenneth Young, who seek to confuse voting rights with their own failed political campaigns. Moreover, the delegation

of authority to the Attorney General of a constitutionally reserved power of the Legislature over elections violates the separation of powers doctrine. Additionally, to accept the plain text and Plaintiff's interpretation of the NYVRA is to accept exactly what the Supreme Court rejected and remedied about the federal VRA—a lack of constitutional safeguards.

Plaintiff's motion should also be denied because it demands a litany of judgments that are premature, moot, and would result in nothing more than advisory opinions. It is axiomatic in our democracy that voters be able to cast their vote in accordance with their own free will. Yet, Plaintiff seeks to punish the Town and its citizens for precisely that. Plaintiff's precipitous, pre-discovery motion contains no evidence that his requested remedy would in fact remedy any allegedly racially polarized voting. The motion rests on out of context portions of reports that are neither in evidence nor submitted by experts retained for litigation, while ignoring the significant successes the Cheektowaga protected classes have had in Town elections. The Court should deny Plaintiff's motion because (1) it raises issues that are non-justiciable; (2) material issues of genuine fact preclude summary judgment; and (3) the NYVRA is unconstitutional.

The Court should instead grant the Town's Cross-Motion for Summary Judgment on the grounds that the NYVRA violates the U.S. and New York State Constitutions, and the resolutions adopted by the Town fully complied with the NYVRA. Control over voting methodology is vested in the State and Town Legislatures by the State Constitution and may not be delegated to the Attorney General to override the will of the elected representatives. Further, the NYVRA's prohibition against vote dilution forbids the use of an election method that impairs the ability of minorities to elect their candidates of choice. Fatally, this end does not match the

NYVRA's means. Rather, the Act creates liability based on how voters cast their votes, not whether the system itself impedes electoral power of minorities. The NYVRA presents the Town with an impossible choice: be sued under an unconstitutional law or violate the equal protection, Fifteenth Amendment, First Amendment, and procedural due process rights of its citizens. The Town respectfully requests that this Court uphold these rights, grant its cross-motion for summary judgment, dismiss Plaintiff's complaint in its entirety, and strike the NYVRA down as unconstitutional.

FACTUAL BACKGROUND

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

ARGUMENT

Summary judgment is appropriate where the movant sufficiently establishes its claim to warrant the Court to direct judgment as a matter of law in the movant's favor. CPLR 3212(b); *see also Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 562 (1980); *Goldstein v. Monroe Cnty.*, 77 A.D.2d 232, 237 (4th Dep't 1980). To prove a *prima facie* entitlement to summary judgment, the movant must offer "sufficient evidence demonstrating the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to meet this burden. *Zuckerman*, 49 N.Y.2d at 562; *see also Apache-Beals Corp. v. Int'l Adjusters, Ltd.*, 59 A.D.2d 1032, 1033 (4th Dep't 1977). Once the movant makes this showing, the burden shifts to

the opposing party to produce admissible evidence demonstrating the existence of factual issues requiring a trial of the action. *Id.*

Plaintiff has neither offered sufficient evidence nor even attempted to apply the law. He has no expert report, he has conducted no discovery, his material facts cherry-pick opinions (and opinions are not facts), he has not addressed all the elements of the law necessary to prevail, and his limited arguments do not eliminate questions of fact. The motion is deficient on its face.

Moreover, "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." CPLR 3212(b). While the Town has cross-moved, such motion is unnecessary for the Court to grant summary judgment in its favor. *See Chase Mortg. Co. v. Dwight Fowler*, 280 A.D.2d 893, 893 (4th Dep't 2001).

POINT I. THE COURT SHOULD DENY PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT BECAUSE IT IS PREMATURE AND SUBSTANTIVELY DEFICIENT.

A. Plaintiff's Premature Motion Demands Advisory Opinions from this Court.

1. The Court should disregard Plaintiff's arguments regarding the NYVRA Resolutions as moot.

Plaintiff exhaustively argues that the Town did not adopt a compliant NYVRA Resolution. This argument is wrong, moot, and wastes judicial resources.

The NYVRA contains a safe harbor provision allowing a NYVRA Resolution protecting the subdivision from an enforcement action for ninety days after the Resolution has

been passed. N.Y. Elec. Law § 17-206(7)(b) (McKinney). The Resolution may be passed within fifty days of the mailing of a NYVRA notification letter or before receiving a NYVRA notification letter. *Id.* The law states that the Resolution must state "(i) the political subdivision's intention to enact and implement a remedy for a potential violation of this title; (ii) specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy; and (iii) a schedule for enacting and implementing such a remedy." *Id.*

Even assuming the Town Resolutions were defective, as Plaintiff incorrectly asserts, the issue is meaningless. The safe harbor provisions only go to when a suit can be commenced. The timing of commencement is not at issue here. Any opinion issued by this Court on the safe harbor resolutions would simply be an advisory opinion because the Court lacks subject matter jurisdiction to make such a determination.

Any doubt on this issue is erased by Plaintiff's compliance with the resolution he now condemns. Plaintiff delayed commencement of this action, rather than initiating this proceeding when he claims he could have (but did not). Spitzer Aff. ¶ 19.

The Town passed a compliant NYVRA Resolution on January 9, 2024, within fifty days of the mailing of Plaintiff's NYVRA notification letter. Spitzer Aff. ¶ 17, Ex. B. However, it is unnecessary for this Court to determine the Resolution's compliance with the NYVRA because Plaintiff has brought his lawsuit. The Town has neither moved to dismiss the lawsuit under the safe harbor provision nor asserted the safe harbor provision's protections as an affirmative defense. *Cf. Oral Clark et al. v. Town of Newburgh et al.*, Index No. EF002460-2024, Doc. No. 31 (Sup. Ct. Orange Cnty. May 17, 2024) (rejecting defendants' motion to

dismiss plaintiff's NYVRA claim as premature under the Act's safe harbor provision where the NYVRA Resolution did not comply with N.Y. Elec. Law § 17-206(7)(b)).

Plaintiff's version of the law commands a remedy before investigation—a "Ready, Shoot, Aim" approach. The Legislature has made no such command, rather, directing the exact type of investigation that the Town undertook.

Simply put, the timing of Plaintiff's lawsuit under the Act's safe harbor provision does not matter. It is a fundamental principle of our jurisprudence that courts may only resolve issues "which are actually controverted" and not opine on academic, moot, or otherwise abstract questions. *Heart Corp. v. Clyne*, 50 N.Y.2d 707, 713 (1980); *see also Sportsmen's Tavern LLC v. N.Y.S. Liquor Auth.*, 195 A.D.3d 1557, 1158 (4th Dep't 2021). Plaintiff's requested judgment "that Defendant did not enact a safe harbor NYVRA Resolution before the expiration of the fifty-day period specified in Election Law § 17-206(7)(a)," NYSCEF Doc. No. 36, p. 2, would not result in any immediate or practical consequences to the parties. *See Sportsmen's Tavern*, 195 A.D. 3d at 1558. A judgment to this effect would be nothing more than an advisory opinion because the rights of the parties would not be affected by the determination of this non-issue. *See id.* The Court should reject Plaintiff's request for an advisory opinion and deny his fourth request for relief.

B. <u>Plaintiff's Claim is Not Ripe Because a Remedy Has Already Been Enacted.</u>

Plaintiff's demand for wards is premature because the recent amendment to Town Law § 80 requires biennial elections—a remedy recognized by the NYVRA. The doctrine of ripeness is meant to prevent courts from becoming entangled in premature adjudication. *See*

Ranco Sand & Stone Corp. v. Vecchio, 124 A.D.3d 73, 80 (2d Dep't 2014); *Street Vendor Project v. City of N.Y.*, 10 Misc.3d 978, 983 (Sup. Ct. N.Y. Cnty. 2005). Judicial opinions on issues that are not ripe for review are nothing more than advisory opinions. *See N.Y.S. Inspection, Sec. & Law Enforcement Emps., Dist. Council 82, AFSCME, AFL-CIO v. Cuomo*, 64 N.Y.2d 233, n.2 (1984). A ripeness inquiry requires a determination whether the issues are appropriate for judicial resolution and an assessment of the hardship to the parties if judicial relief is denied. *Ranco*, 124 A.D. at 80-81. Because Plaintiff's anticipated hardship is contingent upon biennial elections not curing racially polarized voting, the controversy is not ripe. *See Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 520 (1986).

Town Law § 80 was amended to require biennial elections for town officers. The NYVRA identifies the moving of "the dates of regular elections to be concurrent with the primary or general election dates for state, county, or city office" as a potential remedy for any violation of the Act. N.Y. Elec. Law 17-206(5)(vi) (McKinney). Moving local, state, and federal elections to the same dates is a recognized method for improving voter turnout. *See* Sarah F. Anzia, *Timing and Turnout: How Off-Cycle Elections Favor Organized Groups* 200-204 (Univ. of Chicago Press 2013). "[T]iming of elections matters for voter turnout, it matters for the composition of the electorate, and, in many cases, it makes a difference to election outcomes and public policy." *Id.* at 215. The Town Law § 80 amendment is a remedy for any allegedly racially polarized voting in the Town.

Plaintiff's lawsuit demanding a ward system is not ripe because he has not shown that biennial elections will be, or are, an ineffective remedy. Plaintiff objects to this change in the law as an effective remedy because it is not effective until January 1, 2025. NYSCEF Doc.

No. 36, p. 18. Under the implementation rules established by Section 5, Chapter 741 of the 2023 Law of New York the even-year election cycle would impact elections for the Town Board in November 2028. Plaintiff asserts that this is not quick enough. Plaintiff's objection lacks any basis in the law as the NYVRA is silent as to when a remedy must go into effect by. In the absence of any evidence to refute the efficacy of biennial elections, the Court should deny Plaintiff's motion for partial summary judgment.

C. Plaintiff is not Entitled to Summary Judgment because Material Issues of Fact Exist.

1. NYVRA actions require the Courts to weigh evidence and make factual determinations.

The NYVRA establishes that a violation of the prohibition against vote dilution shall be established upon a showing that a political subdivision used an at-large method of election and voting patterns of protected class members are racially polarized. N.Y. Elec. Law § 17-206(2)(b)(i). To demonstrate that a violation of this nature has occurred, Courts must weigh the evidence in accordance with the mandates of the law:

> (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; (iv) where there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision, members of each of those protected classes may be combined; (v) evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class is not required; (vi) evidence that voting patterns and election outcomes could be explained by factors other than racially polarized voting, including but not limited to partisanship, shall not be considered; (vii) evidence

> that sub-groups within a protected class have different voting patterns shall not be considered; (viii) evidence concerning whether members of a protected class are geographically compact or concentrated shall not be considered, but may be a factor in determining an appropriate remedy; and (ix) evidence concerning projected changes in population or demographics shall not be considered, but may be a factor, in determining an appropriate remedy.

Id. at § 17-206(2)(c). Contrary to Plaintiffs' belief, the existence of statistical evidence of racially polarized voting should not be considered *per se* evidence of a violation of the NYVRA. Rather, Plaintiff must establish a *pattern* of racially polarized voting. Plaintiff makes several missteps in this regard.

a. Whether racially polarized voting exists is an issue of fact.

First, the existence of racially polarized voting is a determination made by the Court after the weighing of the evidence delineated in § 17-206(2)(c). Therefore, it is a question of fact. *See also Magnolia Bar Ass'n, Inc. v. Lee*, 994 F.2d 1143, 1149 (5th Cir. 1993) (rejecting plaintiff's assertion that the court could only rely on expert conclusions in vote dilution analysis). This is in line with authorities on the federal VRA, which have similarly held that determinations of vote dilution based on race are issues of fact.

"[L]oss of political power through vote dilution is distinct from the mere inability to win a particular election . . ." *Gingles*, 478 U.S. at 58. Plaintiff fails to grasp this important distinction. Instead, Plaintiff demands that this Court disregard the factual deliberation necessary in a racial polarization analysis. "The ultimate finding that minorities do or do not possess equal opportunities to participate in the political process is a question of fact." *Ala. State Conference of NAACP v. Ala.*, 612 F.Supp.3d 1232, 1250 (M.D.Ala. 2020) (citing *Thornburg v. Gingles*, 478

U.S. 30, 79 (1986)). In the context of federal voting rights challenges, courts have treated this determination as one that is "peculiarly dependent upon the facts of each case" and requiring "an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Id.* (citations omitted). The same should be true here. Plaintiff asks this Court to rely on one expert analysis, disregard any other evidence the parties have not had the benefit of discovery to secure, and blindly rule in Plaintiff's favor. The Court should deny this request.

b. Plaintiff has not shown a pattern of racially polarized voting.

Even if Plaintiff could show that racially polarized voting exists, Plaintiff cannot and has not shown a *pattern* of racially polarized voting. A violation of the NYVRA requires that "voting patterns of protected class members" be racially polarized. N.Y. Elec. Law § 17-206(2)(b)(i). Plaintiff has not even attempted to define what sufficient "patterns" are under the NYVRA. The NYVRA does not define the standard for such a determination. Rather, it lists a number of factors the Court should use to determine whether racially polarized voting patterns exist. *See* N.Y. Elec. Law § 17-206(2)(c). Of these numerous factors, Plaintiff asks this Court to rest its decision on only one factor: statistical evidence.

Specifically, Plaintiff demands that the Court issue two judgments with respect to racial polarization. First, Plaintiff demands a judgment that racially polarized voting existed in the November 2023 Town of Cheektowaga Town Board election. Doc. No. 36, p. 7. Second, Plaintiff demands a judgment that racially polarized voting existed in "numerous other Town of Cheektowaga elections, and county and state elections, since 2015." *Id.* Both demands are improper.

In the November 2023 Town Board election, Black voters supported Kenneth Young, Gerald Kaminski, Linda Hammer, and Brian Nowak. *See* Spitzer Aff. ¶ 20 (Ex. E, p. 4). Out of those four candidates, two of the candidates of choice for Black voters won: Gerald Kaminski for Councilmember and Brian Nowak for Supervisor. *Id.* In that same election year, Black voters' candidate of choice for Superintendent of Highways, Richard Rusiniak, also won the seat. *Id*. This is not a clear-cut case where racial polarization undoubtedly exists across the board. Rather, the 2023 general election produced mixed results that require this Court to weigh more than just statistical evidence to make a factual determination regarding whether racially polarized voting existed in the November 2023 race. This weighing of evidence cannot occur at the summary judgment phase absent discovery and opportunities to depose expert witnesses.

A general judgment that states that racially polarized voting existed in "numerous other" elections at the local, county, and state levels since 2015 is similarly flawed. Though Plaintiff only points to elections where the candidates of choice for Black voters did not win, there are more instances where such candidates did win. Indeed, since 2015 Black voters have been able to elect their candidates of choice in 82.6% of the general elections for Town Office in Cheektowaga. Spitzer Aff. ¶ 23 (Ex. E, p. 7). The statistical evidence is not dispositive of a pattern of racially polarized voting.

In the 2021 Councilmember general election, two of the three candidates elected were the candidates of choice for Black voters. Spitzer Aff. ¶¶ 20 (Ex. E, p. 5), 24 (Ex. F, pp. 32-33). In the 2019 local general election, four out of five races for town office were not racially polarized. *Id.* In fact, in those four races, the candidates of choice won the overwhelming majority of the Cheektowaga election districts. Spitzer Aff. ¶¶ 25-29 (Ex. E, p. 5; Ex. F pp. 17-

18, 20-21, 23-24, 26-27, 29-30). Although Dr. Handley concluded that the fifth race—the race for Town Justice—was racially polarized, the candidate of choice for Black voters still won. *See* Spitzer Aff. ¶¶ 20, (Ex. E, p. 5); 28 (Ex. F, pp. 26-27). In 2017, Black voters elected all three of their candidates of choice in the Councilmember general election. Spitzer Aff. ¶ 30 (Ex. E, p. 5; Ex. F, pp. 14-15). Again, these candidates won nearly all of the election districts in this race. Spitzer Aff. ¶¶ 31-33 (Ex. E, p. 5; Ex. F, pp. 14-15). In light of these favorable results for Black voters and their candidates of choice, the Court cannot make a ruling regarding whether a pattern of racially polarized voting exists on summary judgment.

This Court must weigh the evidence, both statistical and non-statistical, to make that factual determination. The only evidence before the Court is statistical and, therefore, the need for discovery is apparent.

c. Plaintiff has not shown that a ward-system would remedy any alleged racially polarized voting.

Plaintiff has not overcome the two factual hurdles regarding a pattern of racially polarized voting. The Court should deny Plaintiff's motion and need not go any further in its analysis. To the extent the Court chooses to do so, Plaintiff has not shown that his requested remedy would resolve any allegedly racially polarized voting. Plaintiff has not offered any evidence that wards are the appropriate remedy here. Whether a ward system is an appropriate remedy is an issue of fact which requires discovery and a trial of the action.

Plaintiff's demand for wards is not supported by any evidence that wards would cure the allegedly racially polarized voting. Plaintiff asks the Court to blindly grant his judgment because it will benefit his own political prospects. There is no evidence in the record that his

demanded remedy would help minority voters as the NYVRA intended. Blind acceptance of Plaintiff's remedy will likely lead to a revolving door of litigation wherein plaintiffs can demand the remedy they want without any regard for the facts or the elimination of racially polarized voting. At the very least, should this case proceed, this Court must consider that there are substantial protected classes within the Town besides the Black population. Plaintiff may ignore these minority voters, but the Town has not and will not.

Plaintiff's demand for judicial intervention to enact wards is not rooted in the law, but rather Plaintiff's own personal preference for relief, on his preferred timeline, in his preferred way. The Court is not an enforcement tool for the whims of Plaintiff. Plaintiff's unsupported motion should be dismissed because the case is rife with genuine issues of material fact.

2. Discovery is necessary to resolve the material issues of fact.

On April 19, 2024, Plaintiff's attorneys were served with the Town's discovery demands via FedEx and with courtesy copies of the demands via email. Spitzer Aff. ¶ 44 (Exs. I J). Plaintiff's responses were due May 14, 2024. CPLR 2103(b). Plaintiff has attempted to use his motion for summary judgment and the Election Law as a shield against disclosure. The Court should reject this attempt. The expedited nature of Election Law cases does not undercut the need for discovery. Indeed, the litigants in three other cases brought under the NYVRA are currently engaged in or have completed discovery. Spitzer Aff. ¶ 41 (Ex. H). Plaintiff does not, and cannot, point to a reason why this case should be an exception.

In response, Plaintiff may try to argue that discovery was improperly served, as Plaintiff's counsel argued at the preliminary conference held on May 21, 2024. Plaintiff is

reminded that service via FedEx is a proper method of service for discovery demands. *See* CPLR 2103(b)(2). Any argument to the contrary would be baseless and frivolous.

POINT II. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT AS TO ITS CONSTITUTIONAL DEFENSES.

A. The Court is Authorized to Decide the Town's Constitutional Challenges to the NYVRA.

The Court can enter judgment in the Town's favor on its constitutional defenses because the Town provided notice of its defenses to the Attorney General's Office and filed proof of service of such. CPLR § 1012(b)(1), (3). The CPLR requires that "[w]hen the constitutionality of a statute of the state is challenged in an action where the State is not a party, the Attorney General must be notified and permitted to intervene in support of its constitutionality." *Id.* Thereafter, the Court may consider any such constitutional challenge once proof of service of the required notice is filed with the Court. CPLR § 1012(b)(3). Notably, the CPLR does not prescribe a specific time frame within which the proof of service must be filed.

The Town filed its Answer and Notice of Constitutional Question on April 10, 2024. NYSCEF Doc. No. 25-26. On May 21, 2024, the Town filed an affirmation of service affirming that the Attorney General was served with the Town's Answer and Notice of Constitutional Question on April 15, 2024. NYSCEF Doc. No. 37. Now, the Town asks that the Court decide the issues of its constitutional defenses. Therefore, the Town is empowered to consider the Town's constitutional arguments and Plaintiff's argument to the contrary lacks merit.

B. It is Well-Settled that the Town has the Capacity to Challenge the NYVRA.

Plaintiff has neglected to include two notable exceptions to the rule on capacity to challenge State law. Local governments may challenge State legislation where, as here, the municipality asserts that the State legislation impinges upon "Home Rule" powers of the municipality constitutionally guaranteed under Article IX of the State Constitution or that compliance with the legislation would force it to violate a constitutional proscription. *See Town of Black Rock v. State of N.Y.*, 41 N.Y.2d 486, 487 (1977); *Herzog v. Bd. of Educ. of Lawrence Union Free Sch. Dist.*, 171 Misc.2d 22, 27 (Sup. Ct. Nassau Cnty. 1996). The Town's challenge to the NYVRA falls under both exceptions.

The "mode of selection" for local officers is specifically enumerated as a Home Rule power of local governments. N.Y. Const. art. IX, § 2. The NYVRA, and specifically Plaintiff's requested remedy under the statute, impinges upon the Town's power to decide mode of selection. It shifts that power to the State Legislature which, in turn, has delegated it to the Attorney General and the Courts to decide the mode of selection. Plaintiff's defense of incapacity to challenge the NYVRA fails because it "would undermine the home rule protection afforded local governments in Article IX of the Constitution, by subverting the very purpose of giving the local governments powers which the State Legislature is forbidden by the Constitution to impair or annul except as provided in the Constitution (see NY Const, art IX, §2, subd [b], par [1]; § 3, subd [a])." *Town of Black Brook*, 41 N.Y.2d at 488. On that basis alone, the statute should be struck down for its encroachment on powers reserved to local governments.

Compliance with the NYVRA would also force the Town to violate provisions of the U.S. and New York State Constitutions. Specifically, the NYVRA forces the Town to

violate the First, Fourteenth, and Fifteenth Amendments of the U.S. Constitution and Article I and Sections 6, 8, and 11 of the New York Constitution. The Equal Protection Clause[1] prohibits the State from denying "to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14 § 2; *see also Herrera v. N.Y.C. Dep't of Educ.*, 2024 WL 245960, at *7 (S.D.N.Y. Jan. 23, 2024) ("The Equal Protection Clause of the Fourteenth Amendment of the Constitution prohibits race-based state action.") (citing *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 204 (2023)). The NYVRA makes distinctions between different racial groups—the majority and minorities. Indeed, the purpose of the NYVRA was to ensure voters of racial minority groups have equal opportunity to participate in political processes. N.Y. Elec. Law § 17-200 (McKinney). By attempting to bolster the voting power of minority groups, the NYVRA forces municipalities to eliminate their at-large election systems and adopt electoral systems that elevate the votes of minority voters over that of the votes from the racial majority. Similarly, the Fifteenth Amendment prohibits states from denying or abridging the right to vote based on race or color. *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 553 (2013). Additionally, the First Amendment prohibits government entities from abridging the freedom of speech. The coercive effect of the NYVRA's prohibition on vote dilution and mandatory remedies abridges the right of the Town's citizens to exercise their right to vote freely for their candidate of choice. Finally, the NYVRA's gutting of defenses that the

[1] The New York State Constitution's equal protection clause (Art. 1 § 11) is "no more broad in coverage" than its federal equivalent. *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 531 (1949); *see also Esler v. Walters*, 56 N.Y.2d 306, 313-314 (1982). Accordingly, a violation of the federal equal protection clause is tantamount to a violation of the State equal protection clause.

Town can raise in response to a vote dilution claim forces the Town to violate the procedural due process rights of its citizens. The Town has the capacity to challenge the NYVRA.

Plaintiff cites to an inapposite case wherein the municipality challenged the State's public-school funding as a violation of New York City students' equal protection rights. *City of N.Y. v. State of N.Y.*, 86 N.Y.2d 286, 289 (1995). Unlike here, the challenged State action did not force the municipality to violate the students' equal protection rights; therefore, the municipality's lawsuit did not fall within the capacity exception that allows municipalities to challenge laws that would force them to violate constitutional proscriptions. *Id*. at 295. Here, the NYVRA directs the Town to act in ways that would violate the constitutional rights of the Town and its citizens.

The United States Supreme Court just unanimously held that coercive action by New York State can be a violation of the First Amendment. *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 188 (2024). At a minimum, Defendants have stated a cause of action on each of the constitutional matters that cannot be summarily dismissed as Plaintiff seeks. Plaintiff misconstrues Town's constitutional defenses and argues that the Town is a municipal corporation without constitutional protections. The Courts of this State have continuously held that the federal and state constitutions are protections for municipal corporations and the Town has the legal capacity to challenge the NYVRA's violation of its rights and constitutional rights guaranteed to its citizens.

C. The NYVRA Violates the Protections of the U.S. and New York State Constitutions.

Despite its remedial intentions, the NYVRA violates the constitutional rights of the Town and its citizens. By removing the constitutional safeguards from the federal VRA racially polarized voting analysis; calling for racial gerrymandering; coercing the Town to suppress voter viewpoints; and drastically limiting the Town's defenses to a claim of racially polarized voting, the NYVRA violates the (1) Equal Protection Clauses of the U.S. and New York State Constitutions; (2) the Fifteenth Amendment; (3) the First Amendment; and (4) the procedural due process guarantees of the U.S. and New York State Constitutions. Additionally, the authority the NYVRA vests in the Attorney General to enact a remedy violates the separation of powers doctrine.

Plaintiff vaguely argues that because similar constitutional challenges to voting rights acts in other states have been rejected in other state and federal courts, the present constitutional defenses should meet the same fate. NYSCEF Doc. No. 36, p. 24. Obviously, none of those cases considered *Nat'l Rifle,* decided May 30, 2024. Furthermore, none of those constitutional challenges involved challenges under the New York State Constitution. "New York State courts have a long and proud tradition of exceptional legal scholarship, of independent responsibility and, most importantly, of protecting constitutional rights." *People ex rel. Johnson v. Warden*, 15 Misc.3d 1102(A), at *1 (Sup. Ct. Bronx Cnty. 2007); *see also Teshabaeva v. Family Home Care Servs. of Brooklyn & Queens, Inc.*, 214 A.D.3d 442, 444 (1st Dep't 2023) ("it is well settled that lower federal court decisions are "not binding" on New York state courts). This Court is empowered to make its own decision regarding the rights of New York's municipalities and citizens under the Act.

1. The Equal Protection Clause

Under the equal protection clause, express racial classifications are "immediately suspect because absent searching judicial inquiry, there is simply no way of determining what classifications are benign or remedial and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Shaw v. Reno*, 509 U.S. 630, 642-643 (1993) (internal quotations omitted) (citing *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493 (1989)). The "central mandate" of the equal protection clause is racial neutrality in governmental decision making. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). This mandate applies "regardless of the race of those burdened or benefited by a particular classification." *Id.* (internal quotations omitted). Although the NYVRA purports to be a remedial measure, the NYVRA explicitly distinguishes between citizens based on their race. Indeed, the purpose of the NYVRA was to ensure voters of racial minority groups have equal opportunity to participate in political processes. N.Y. Elec. Law § 17-200.

As noted by the Fourth Department, the United States Supreme Court has repeatedly emphasized that "all governmental action based on race" is subject to strict scrutiny. *Margerum v. City of Buffalo*, 63 A.D.3d 1574, 1577 (4th Dep't 2009) (internal quotations omitted) (citing *Grutter v. Bollinger*, 539 U.S. 306, 326) (2003)). Therefore, the equal protection analysis here triggers strict scrutiny, and the Act must be narrowly tailored to further a compelling governmental interest. *Shaw*, 509 U.S. at 643; *see also Ala. Legis. Black Caucus v. Ala.*, 575 U.S. 254, 263 (2015) (applying strict scrutiny to race-driven electoral system). The NYVRA fails both prongs of the strict scrutiny inquiry.

a. Compelling Governmental Interest

The federal government, acting through Congress, has a compelling governmental interest in preventing the vote dilution of racial minorities. New York State does not. "[U]nlike any State or political subdivision, [Congress] has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *See J.A. Croson Co.*, 488 U.S. at 490. Similarly, Congress is also empowered to enforce the prohibitions of the Fifteenth Amendment. *See Allen v. Milligan*, 599 U.S. 1, 10-11 (2023). This flows from the fact that the Fourteenth and Fifteenth Amendments, borne out of the Civil War, were intended to be a limitation on the powers of the States and an enlargement of Congress' power. *See J.A. Croson Co.*, 488 U.S. at 490; *Milligan*, 599 U.S. at 10. Accordingly, the Constitution empowers Congress, not the states, to prescribe appropriate legislation to enforce the Fourteenth Amendment. *Trump v. Anderson*, 601 U.S. 100, 109-110 (2024). New York State does not have a compelling governmental interest, beyond that already established by the federal VRA, in preventing minority vote dilution. Under the Fourteenth and Fifteenth Amendments, this is an interest reserved to the federal government.

b. Narrow Tailoring

Even if the Court held that the State has a compelling governmental interest, the NYVRA is not narrowly tailored to that end. Plaintiff's interpretation of the NYVRA makes any instance of racially polarized voting a *per se* violation of the NYVRA. Under this interpretation, the NYVRA attempts to circumvent the constitutional safeguards established by the federal VRA. This shows that the NYVRA is not narrowly tailored to prohibit vote dilution. The NYVRA requires political subdivisions within the State to replace at-large electoral systems with remedies based merely upon the presence of racially polarized voting alone. Specifically, the

NYVRA provides that a violation of the prohibition against vote dilution shall be established upon a showing that an at-large method of election was used and voting patterns of members of the protected class are racially polarized. N.Y. Elec. Law 17-206(2)(b)(i). Racially polarized voting is not evidence of unconstitutional discrimination or vote dilution. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 228 (2009) (Thomas, J., concurring in the judgment and dissenting in part). Courts have defined racially polarized voting as instances where there is a consistent relationship between the race of the voter and the way they vote. *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 372 (S.D.N.Y. 2004). By definition, this is an observation regarding voter behavior.

The NYVRA dismantles the constitutional protections established under the federal VRA jurisprudence. Like the NYVRA, the federal VRA prohibits vote dilution. However, under the federal VRA, the mere existence of racially polarized voting is not enough to establish a violation of the act. *See Wis. Legis. v. Wis. Elections Comm'n*, 595 U.S. 398, 405 (2022) (noting that 'no single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength"); *Bartlett v. Strickland*, 556 U.S. 1 (2009). Rather, an element of a vote dilution claim under the federal law is whether a political subdivision experiences *legally significant* racially polarized voting. *Gingles*, 478 U.S. at 52, 56. The NYVRA strips this qualification from a vote dilution challenge under the Act, thereby removing constitutional safeguards, and allows the mere existence of racially polarized voting to be dispositive of vote dilution.

Like the NYVRA, the federal VRA initially lacked safeguards necessary to pass constitutional muster. These safeguards were a creature of the judiciary. In *Gingles*, the

Supreme Court declared three preconditions that a plaintiff must meet to prove a vote dilution claim under § 2: the minority group must (i) be sufficiently large and geographically compact to constitute a majority in a single-member district; (ii) be able to show that it is politically cohesive; and (iii) demonstrate that the majority votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate. 478 U.S. at 51. The second and third preconditions focus on the extent of racially polarized voting and whether it is legally significant enough to prove vote dilution. *See Gingles*, 478 U.S. at 31; *Abrams v. Johnson*, 521 U.S. 74, 92 (1997).

The constitutional threat posed by the plain text of the NYVRA and Plaintiff's interpretation is illustrated in *Bartlett*. *Bartlett* dealt with "crossover" districts—districts where the minority makes up less than a majority of the voting-age population but is large enough to elect candidates of their choice with help from majority voters. *Id.* at 13. There, the Court was faced with competing interpretations of Section 2 of the federal VRA. Petitioners argued that crossover districts should be treated as "effective minority districts" for the purpose of demonstrating that minorities have less opportunity than other voters to elect representatives of their choice. *Id.* at 14. The Supreme Court noted that Petitioners' interpretation could not be reconciled with the third *Gingles* requirement that the majority votes as a bloc to defeat minority-preferred candidates. *Id.* at 16 ("Mandatory recognition of claims in which success for a minority depends upon crossover majority voters would create serious tension with the third Gingles requirement that the majority votes as a bloc to defeat minority-preferred candidates."). The Court held that Petitioners' interpretation would effectively guarantee minority voters an electoral advantage. *Id.* at 20. Applying the canon of constitutional avoidance, the Court rejected Petitioners' interpretation "to steer clear of serious constitutional concerns under the

Equal Protection Clause." *Id.* at 21. The NYVRA does precisely what the Court rejected in *Bartlett*—it demands automatic recognition of NYVRA claims where success of a minority candidate of choice depends upon majority voters backing those candidates. In other words, the NYVRA automatically provides minority voters with an electoral advantage by establishing racially polarized voting as a *per se* violation of the statute requiring a remedy.

The Equal Protection clause plainly prohibits the unjustified drawing of district lines based on race. *Cooper v. Harris*, 581 U.S. 285, 319 (2017). Any remedy implemented pursuant to a NYVRA violation would have to completely cure racially polarized voting—a voting phenomenon centered on voter behavior—or a political subdivision risks further NYVRA litigation. This effectively mandates remedies that grant minorities electoral advantages over the majority to try and avoid further racially polarized voting. Where, as here, the remedy at issue involves establishing districts, race becomes the "predominant factor motivating the [municipality's] decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916. Such districts would have to withstand strict scrutiny. *See Cooper*, 581 U.S. at 292. For the same reasons that the NYVRA does not withstand strict scrutiny, any racial gerrymandering undertaken in response to a violation of the law would also fail a strict scrutiny analysis. Simply put, the State does not have a compelling interest in regulating vote dilution beyond that required by the federal VRA and districts drawn based on race are not narrowly tailored to that end.

Therefore, the NYVRA improperly compels, or at the very least coerces, racial gerrymandering where the implementation of districts or wards is deemed the appropriate remedy for a NYVRA violation. The equal protection clause "cannot mean one thing when

applied to one individual and something else when applied to a person of another color." *Students for Fair Admissions*, 600 U.S. at 206. Yet, that is exactly the dichotomy that the NYVRA establishes.

2. The Fifteenth Amendment

"The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color . . ." *Shelby Cnty.*, 570 U.S. at 553. "The Amendment is not designed to punish for the past; its purpose is to ensure a better future." *Id.* (*citing Rice v. Cayetano*, 528 U.S. 495, 512 (2000)). As previously discussed, the NYVRA inevitably coerces municipalities to engage in racial gerrymandering to avoid NYVRA liability. This is also offensive to the Fifteenth Amendment and "threatens to carry us further from the goal of a political system in which race no longer matters." *Shaw*, 509 U.S. at 657.

3. The First Amendment

"At the heart of the First Amendment's Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society." *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. at 188. Attempts to suppress speech based on its expression of a particular viewpoint are presumptively unconstitutional. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995). In that vein, it is well-settled that government action offends the First Amendment when it imposes financial burdens on speakers based on the content of their expression. *Id.* at 829. The State cannot use its powers to attempt to coerce other entities or parties in order to punish or suppress disfavored expression. *Nat'l Rifle Ass'n of Am.*, 602 U.S. at 188; *see also Backpage.com, LLC v. Dart*, 807 F.3d 229, 230-231 (2015)

(noting that government coercion may come through a government's direct authority or "in some less-direct form."). That is precisely what the State has done here.

Here, the State Legislature has crafted a law that relies upon the "threat of invoking legal sanctions and other means of coercion . . . to achieve the suppression of disfavored speech." *Id.*; *see also Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). To be sure, the Legislature adopted a fee-shifting provision, which forces municipalities to either alter their electoral system in response to a *potential* violation or pay attorneys' fees to any prevailing plaintiff party. N.Y. Elec. Law § 17-216. The Town is forced to decide between one of two things: (1) alter their electoral system to respond to a potential violation and, therefore, chill its citizens' freedom to vote for their candidates of choice, or (2) refuse to enact a remedy to a potential violation and be forced to pay the plaintiff's attorneys fees. Both options have the effect of coercing voters, particularly those in the racial majority, to vote in a way that avoids racially polarized voting. In other words, it coerces voters to vote contrary to their free will. Though the coercive nature of the NYVRA upon the voters may be indirect, the Supreme Court has repeatedly and expressly acknowledged how indirect state action can still unconstitutionally burden First Amendment rights:

> In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.

See NAACP v. State of Ala. ex rel Patterson, 357 U.S. 449, 461 (1958). The coercive effect on Cheektowaga's citizens is real and imminent. Like in *Am. Comms. Ass'n, C.I.O., v. Douds*, 339 U.S. 382, 393 (1950), the NYVRA, on its face, seeks to prohibit an "apprehended evil"—here,

vote dilution. It also has the practical effect of "discouraging the exercise of political rights protected by the First Amendment." *Id.* The NYVRA creates a spectre of litigation, increased costs to the Town, and increased tax burdens over the shoulders of voters at the polls.

To the extent Plaintiff attempts to draw any analogies between the First Amendment challenge to the NYVRA and any prior, failed First Amendment challenges to other state voting rights acts, none of those cases were decided after *Nat'l Rifle Ass'n of Am.* The Supreme Court's express recognition of the unconstitutionality of State coercion to suppress specific viewpoints did not exist at the time those cases were decided.

4. Procedural Due Process

The Fourteenth Amendment prohibits States from depriving any person of "life, liberty, or property, without due process of law . . ." U.S. Const. amend XIV, § 1; N.Y. Const., Art. I, § 6; *see also Harner v. Cnty. of Tioga*, 5 N.Y.3d 136, 140 (2005). Procedural due process requires that the State afford a party threatened with the deprivation of a fundamental right a process involving pre-deprivation notice and "access to a tribunal in which the merits of the deprivation may be *fairly* challenged." *See Chase Grp. All. LLC v. City of N.Y. Dep't of Fin.*, 620 F.3d 146, 151-152 (2d Cir. 2010).

Here, the NYVRA deprives Cheektowaga voters of their ability to vote for their candidates of choice. Particularly in the case of the racial majority, the NYVRA deprives voters of their political free will. "The right to vote freely for the candidate of one's choice is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). This deprivation is a

violation of procedural due process because the NYVRA's provisions regarding the types of evidence the Court can consider in a NYVRA challenge deprive the Town, on behalf of its citizens, from addressing the merits of the issue.

Evidence deemed necessary to determine vote dilution under the federal VRA has been outlawed from consideration under the NYVRA. Evidence of other explanations for voting patterns and election outcomes, including partisanship, cannot be considered. N.Y. Elec. Law § 17-206(2)(c)(vi). Evidence that members of the minority group vote differently cannot be considered. N.Y. Elec. Law § 17-206(2)(c)(vii). Evidence regarding geographic compactness of the minority group and projected population changes also cannot be considered. N.Y. Elec. Law § 17-206(2)(c)(viii), (ix). "Without an inquiry into the circumstances underlying unfavorable election returns, courts lack the tools to discern results that are in any sense "discriminatory," and any distinction between deprivation and mere losses at the polls becomes untenable." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993); *see also Nipper v. Smith*, 39 F.3d 1494, 1523-1524 (11th Cir. 1994); *Reed v. Town of Babylon*, 914 F. Supp. 843, 877 (E.D.N.Y. 1996). Therefore, the NYVRA prevents the Town from fairly challenging the deprivation in violation of procedural due process.

5. The Separation of Powers Doctrine

The State Legislature improperly delegated its law-making powers to the Attorney General in the NYVRA. "Because of the constitutional provision that the legislative power of this State shall be vested in the Senate and the Assembly (N.Y. Const., art III, § 1), the Legislature cannot pass on its law-making functions to other." *Boreali v. Axelrod*, 71 N.Y.2d 1, 10 (1987) (citing *Matter of Levin v.* Whalen, 39 N.Y.2d 510, 515 (1976)) (internal quotations

omitted). The Legislature may only delegate its rulemaking authority where there are reasonable safeguards for the body to administer the law. *Id.* at 10. The NYVRA lacks those safeguards.

The NYVRA allows a political subdivision to submit a proposed remedy to any alleged NYVRA violation to the Civil Rights Bureau of the New York Attorney General's Office (the "CRB"). N.Y. Elec. Law § 17-206(7)(c)(i). The CRB then has the authority to grant or deny approval of the proposed remedy. N.Y. Elec. Law § 17-206(7)(c)(iii). If the CRB denies the proposed remedy, it can recommend an alternative remedy that it would approve and the remedy. N.Y. Elec. Law § 17-206(7)(c)(vii). When the CRB approves a remedy, it "shall be enacted and implemented immediately, notwithstanding any other provision of law, including any other state or local law." N.Y. Elec. Law § 17-206(7)(c)(v). In effect, these provisions of the NYVRA allows the CRB to override the decisions made and statutes enacted by elected officials regarding voting. It allows the CRB to select a remedy that it deems appropriate, absent any legislative guidance, and to force that remedy on a political subdivision regardless of any other state or local law. The CRB "may not use its authority as a license to correct whatever societal evils it perceives," *Boreali*, 71 N.Y.2d at 9, but that is precisely what the NYVRA gives the CRB free license to do.

The CRB should not be permitted "the open-ended discretion to choose ends" that it deems fit to serve the NYVRA's purpose. *See id.* at 11. The NYVRA's delegation of such discretion violates the nondelegation doctrine.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for summary judgment should be denied in its entirety, the Town's cross-motion for summary judgment should be granted, the Complaint should be dismissed in its entirety, and the NYVRA should be struck down as unconstitutional. If the Town's cross-motion is denied, Plaintiff's motion for summary judgment should be denied as wholly premature, and the Court should order discovery to proceed in its normal course, along with such other and further relief as the Court deems just and proper.

Dated: September 3, 2024

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Word Count Certification

The Court and the parties have agreed to waive the word limit contained in 22 N.Y.C.R.R. § 202.8-b. I hereby certify that the total number of words herein, inclusive of point headings and footnotes and exclusive of the caption, table of contents, table of authorities, and signature block, is 8,294. In making this certification, I relied on Microsoft Word's "Word Count" tool.

Dated: September 3, 2024
Buffalo, New York

Daniel A. Spitzer, Esq.