SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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

Plaintiffs,

v.

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

Defendants.

Index No.: EF002460-2024

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. PRELIMINARY STATEMENT

The Town of Newburgh has relied upon an at-large election method for more than 150 years. Plaintiffs challenge that longstanding system under the John R. Lewis New York Voting Rights Act ("NYVRA"), claiming that this system is not likely to result in a sufficient number of minority-preferred candidates winning seats on the Town Board. But the NYVRA's relevant provisions are unconstitutional because they require political subdivisions like the Town to make important decisions impacting their citizens based upon those citizens' race, without even arguably satisfying strict scrutiny (unlike, for example, the carefully tailored Section 2 of the federal Voting Rights Act ("VRA")). But even if the NYVRA were constitutional, the Town would be entitled to summary judgment on Plaintiffs' claims for two reasons. First, the undisputed evidence establishes that minority-favored candidates will have a strong chance to elect candidates of their choice under the Town's at-large system. Second, Plaintiffs failed to submit evidence that any other method of election would lead to more minority candidates of choice being elected to the Town Board. This Court should thus enter summary judgment in Defendants' favor.

II. STATEMENT OF FACTS

A. Background

1. Chartered in 1788, the Town of Newburgh (the "Town") is one of the oldest towns in New York. Expert Report of Dr. Donald T. Critchlow ("Critchlow Report") at 11 (attached to the Affirmation of Bennet J. Moskowitz ("Moskowitz Aff.") as Exhibit A). While the Town has historically been a farming community, today, the Town is "more of a 'bedroom' community," with many residents working in surrounding metropolitan areas and living in the Town for its "affordability" and "rural setting." *Id.* at 11–12 (citation omitted). The Town's current population is 31,987, and of this population, 61% are white, 15.4% are black, 10.7% are mixed race, and

25.2% are Hispanic. *Id.* at 12. Over 90% of the Town's population over the age of 25 has a high school diploma, with 32.8% of the Town's residents holding a bachelor's degree or higher. *Id.*

The Town prioritizes "inclusion and diversity," and is "committed to policy transparency, open public hearings, and elected officials representative of the entire community." *Id.* at 11. By way of example, the Town adopted a comprehensive plan for police innovation in March of 2021, developed to, among other things, promote inclusivity among the police force and provide every police officer anti-discrimination and implicit bias training. *Id.* at 12–13. In 2022, the Town passed a resolution requiring the Town to "assist all persons who feel they have been discriminated against" on the basis of race, color, ancestry, national origin, and other grounds "to seek equity under federal and state laws by filing a complaint" with state and federal agencies. *Id.* at 20–21.

2. Like most of New York's political subdivisions, the Town uses an at-large system for its elections, including its elections for Town Board members. *Id.* at 29–30. The Town has relied on its at-large system since at least 1865. Transcript of Deposition of Gilbert Piaquadio ("Piaquadio Dep.") at 132:15-17 (Moskowitz Aff., Exhibit B). While state law gives towns the option to adopt ward systems, *see* N.Y. Town Law §§ 81, 85, at-large systems remain popular, Critchlow Report at 29–30. In 2012, "only 13 of 932 towns had elected a ward system." *Id.* At-large elections "continue to be valued for their presumed tendency to encourage elected officials to act in accord with the general interest of the entire community," *id.* at 29 (citation omitted), and there is no evidence suggesting that the Town adopted its at-large voting system for any reasons related to race. *Id.*

The Town Board consists of five seats: one supervisor and four councilmembers. Piaquadio Dep. at 132:18-21. The Town Supervisor serves for a two-year term, while each Town Councilmember serves for a four-year term. *Id.* at 132:122-25. The Town's Supervisor is Gilbert

Piaquadio. *Id.* at 41:10-12. The Town Councilmembers are Councilmen Paul Ruggiero, Scott Manley, and Anthony LoBiondo, with one vacancy due to the recent death of a councilmember. *Id.* at 48:24–49:8. Supervisor Piaquadio and Councilman Ruggiero's terms expire on December 31, 2025, and Councilmen Manley and LoBiondo's terms expire on December 31, 2027. *Id.* at 133:6-8; Affirmation of Gilbert Piaquadio ¶ 17. In light of the current vacancy, the Town will hold a special election in November of this year to fill the fourth Town Board seat. Piaquadio Dep. at 49:17-23. Whomever is elected to the fourth Town Board seat will serve a one-year term, expiring on December 31, 2025. *Id.* 133:19-24.

3. "[D]emocratic participation is alive and well in the town of Newburgh," with Newburgh's voter turnout exceeding the national average in 2020 by 1%. Critchlow Report at 19. The Town is closely politically divided, with candidates from both major political parties often winning more votes in the Town. Expert Report of Dr. Brad Lockerbie ("Lockerbie Report") at 3 (Moskowitz Aff., Exhibit C). Since 2008, the winning candidate amongst the Town's voters in races between one Democratic candidate and one Republican candidate received less than 60% of the vote in over 70% of races and, using an even more demanding threshold, received less than 55% of the vote in over 40% of these races. *Id.* at 3–6. Out of the 77 election races during this period where one Democratic candidate and one Republican candidate contested an office, the Democratic candidates—who are the minority-preferred candidates amongst the Town's electors[1]—garnered more votes in 26 of them, whereas the Republican candidates garnered more

[1] *See* Transcript of Deposition of Dr. Matt A. Barreto ("Barreto Dep.") at 70:20–23 (Moskowitz Aff., Exhibit D) ("all of the candidates who have been elected to Newburgh town council have been Republicans and preferred by whites and all the candidates who have lost have been Democrats and were preferred by minorities"); *id.* at 75:2–6 (Q: "With the exception of Florida would you agree that the—within the last 20 years, the preferred candidate of Hispanic voters was the Democratic candidate?" A: "That's probably been the case."); *id.* at 81:2–5 ("I know that no minority-preferred candidate has ever won. So [Defendants' expert] is probably right that those are the Republicans, they are white preferred, and that they have won every town council election.").

votes in 51. *Id.* Further, while Republican candidates have historically done better in Newburgh than Democratic candidates, these races also demonstrate that the Town, like many jurisdictions, experiences fluctuations in voter turnout and results depending upon whether an election takes place in an odd-numbered year or an even-numbered year. *See id.* at 3. In particular, Republicans tend to do better in odd-numbered years, whereas Democrats tend to do better in even-numbered years due to the turnout generated by statewide and national races. *See id.* at 3–6; *see* Baretto Dep. at 145:4–6.[2] And so, while minority-favored candidates have won the most votes from the Town's electors in over 30% of races since 2008 between one Democratic candidate and one Republican candidate, these candidates have won the majority of Town votes just under half the time (48%, to be precise) in even-numbered year elections. Lockerbie Report at 3–6.

Notably, while the Town has historically held odd-year elections for its Town offices consistent with New York law, *see* N.Y. Town Law § 80 (effective until Jan. 1, 2025), in 2020, the Town held a special election for the Town Board in which the Democratic nominee received 49.57% of the vote and the Republican nominee received 50.43% on the vote—a difference of less than one percentage point. *Id.* at 4.

In December 2023, Governor Hochul signed into law Assembly Bill A4282/Senate Bill S3505B, known as the "Even Year Election Law," which moves many county and town elections from odd-numbered years to even-numbered years. Even Year Election Law § 1. As noted, prior to the Even Year Election Law, the presumption was that elections for town officers would occur in odd-numbered years. N.Y. Town Law § 80 (effective until Jan. 1, 2025). Subject to certain exceptions, the Even Year Election Law amends Section 80 of the New York Town Law to

[2] *See* Barreto Dep. at 78:5–10 (Q: "So, Dr. Barreto, would you agree with me Democrats are the preferred candidates of the minority electorate in statewide races in the Town of Newburgh?" A: "I would agree with you in the ones that we just went through, that they appear to have done quite well with Latino voters in Newburgh, yes.").

provide: "Notwithstanding any provisions of any general, specific or local law, charter, code, ordinance, resolution, rule or regulation to the contrary, a biennial town election for the election of town officers . . . and for the consideration of such questions as may be proposed to the town board or the duly qualified electors . . . shall be held on the Tuesday next succeeding the first Monday in November of every even-numbered year." Even Year Election Law § 1. Under the Even Year Election Law, the Town must begin holding elections for Town Board members in even years starting in 2026, including the races for the seats currently held by Supervisor Piaquadio and Councilman Ruggiero. *See* Even Year Election Law § 5. Although the Town is challenging the Even Year Election Law as unconstitutional in separate proceedings, *see Ashlaw v. State of New York*, No.EF2024-00001746 (N.Y. Sup. Ct. Onondaga Cnty.), that law is presumed constitutional unless the New York courts decide otherwise, *see White v. Cuomo*, 38 N.Y.3d 209, 217 (2022). Moreover, even if the Supreme Court in *Ashlaw* determines that the Even Year Election Law is unconstitutional, that decision will be subject to an automatic stay if the State appeals, *see* CPLR § 5519(a), such that the law will remain in place unless and until the appellate courts either dissolve the stay or ultimately strike down the law as unconstitutional.

B. Litigation Background

On March 26, 2024, Plaintiffs Oral Clarke, Romance Reed, Grace Perez, Peter Ramon, Ernest Tirado, and Dorothy Flournoy (collectively, "Plaintiffs") filed their Complaint, asserting that the Town's at-large election method violates Section 17-206(2) of the NYVRA. They bring two claims: Count One asserts vote dilution by means of racially polarized voting under Section 17-206(2)(b)(i)(A) and Count Two asserts vote dilution under the totality of the circumstances under Section 17-206(2)(b)(i)(B). Compl. ¶¶ 145–60, *Clarke v. Town of Newburgh*, Index No.: EF002460-2024 (N.Y. Sup. Ct. Orange Cnty.) (Moskowitz Aff, Exhibit E). Plaintiffs' end goal is

to require the Town to abandon its at-large election method and adopt either a district-based or alternative system. Compl. ¶ 133.

On April 16, 2024, the Town filed a motion to dismiss this lawsuit, explaining that Plaintiffs prematurely filed in violation of the NYVRA's mandatory safe-harbor provision. Defs.' Mot. to Dismiss, *Clarke v. Town of Newburgh*, Index No.: EF002460-2024 (N.Y. Sup. Ct. Orange Cnty.) (Moskowitz Aff. Exhibit F). This Court denied that motion on May 17, 2024. Dec. & Order Denying Defs.' Mot. to Dismiss, *Clarke v. Town of Newburgh*, Index No.: EF002460-2024 (N.Y. Sup. Ct. Orange Cnty.) (Moskowitz Aff. Exhibit G). The parties then proceeded to engage in expedited discovery pursuant to this Court's scheduling order, with opening expert reports due June 28, 2024, rebuttal expert reports due July 26, 2024, and discovery to conclude on August 16, 2024. Prelim. Scheduling Order, *Clarke v. Town of Newburgh*, Index No.: EF002460-2024 (N.Y. Sup. Ct. Orange Cnty.) (Moskowitz Aff. Exhibit H). After resolving scheduling conflicts, the parties concluded their depositions in this matter on September 23, 2024.

III. LEGAL STANDARD

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 501 N.E.2d 572, 574 (1986). The movant must "establish [its] cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment" in its favor. CPLR § 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560 (1980) (citation omitted). Then, the burden shifts to the opponent to establish with admissible evidence a genuine issue of material fact requiring a trial. *Zuckerman*, 49 N.Y.2d at 562; *Little v. Blue Cross of W. New York*, 72 A.D.2d 200, 204 (4th Dep't 1980).

IV. ARGUMENT

A. The NYVRA's Vote-Dilution Provisions—Including The At-Large Provisions Directly At Issue—Violate The Equal Protection Clauses Of The Fourteenth Amendment To The U.S. Constitution And Of The New York Constitution

1. Under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, "[n]o State shall make or enforce any law . . . [that] den[ies] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The New York Constitution provides that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof," and that "[n]o person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights . . . by the state or any agency or subdivision of the state." N.Y. Const. art. I, § 11; *see Esler v. Walters*, 56 N.Y.2d 306, 313 (1982); *Under 21 v. City of New York*, 65 N.Y.2d 344, 360 (1985).

The Equal Protection Clause "represent[s] a foundational principle" that "[t]he Constitution . . . should not permit any distinctions of law based on race or color, because any law which operates upon one man should operate *equally* upon all." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 201 (2023) ("*SFFA*") (citations omitted; brackets omitted); *see also Seaman v. Fedourich*, 16 N.Y.2d 94, 102 (1965); *Esler*, 56 N.Y.2d at 313–14. After the Equal Protection Clause, "[t]he time for making distinctions based on race had passed." *SFFA*, 600 U.S. at 204 (discussing *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954)); *accord Under 21*, 65 N.Y.2d at 363. The Equal Protection Clause will invalidate any state law that makes a "racial classification," unless it can "survive [the] daunting two-step examination known . . . as 'strict scrutiny.'" *SFFA*, 600 U.S. at 206–07 (citations omitted). "Under that standard," the Court must "ask, first, whether the racial classification is used to further compelling government interests" and, "second, . . . whether the government's use of race is

narrowly tailored—meaning necessary—to achieve that interest." *Id*. (citations omitted); *see Abbott v. Perez*, 585 U.S. 579, 587 (2018).

The U.S. Supreme Court has applied these Equal Protection Clause principles in the context of redistricting maps containing districts "that sort voters on the basis of race," *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 401 (2022) (per curiam) (citing *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*")), finding that, like "other state legislation classifying citizens on the basis of race," redistricting maps with race-based districts "are by their very nature odious" and constitutionally suspect, *Shaw I*, 509 U.S. at 643, 646 (citation omitted). Thus, if a State enacts a redistricting map where "the predominant factor motivating placement of voters in or out of a particular district" is race, the Equal Protection Clause places upon the State "the burden of showing that the design of that district withstands strict scrutiny," *Wis. Legislature*, 595 U.S. at 401 (citing *Cooper v. Harris*, 581 U.S. 285, 290–91 (2017)), meaning the State can only enforce the map if it can show that the district is "narrowly tailored to achieving a compelling state interest," *id*. (quoting *Miller v. Johnson*, 515 U.S. 900, 904 (1995)). As the Supreme Court has "long assumed," "one compelling interest" that may justify a State drawing district lines with predominantly racial motives is complying with Section 2 of the VRA, *Cooper*, 581 U.S. at 292 (citing *Shaw v. Hunt*, 517 U.S. 899, 915 (1996) ("*Shaw II*")), given Section 2's "exacting requirements" and safeguards that narrowly tailor its application, *Allen v. Milligan*, 599 U.S. 1, 30 (2023); *see generally* 52 U.S.C. § 10301 (formerly codified as 42 U.S.C. § 1973).

Section 2 of the federal VRA covers "vote dilution" claims, which allege that a State has "dispers[ed]" members of a racial minority "into districts in which they constitute an ineffective minority of voters." *Cooper*, 581 U.S. at 292 (citation omitted); *see also Wis. Legislature*, 595 U.S. at 401–02. To remedy a vote dilution violation, a court may require a State to draw "race-

based district lines," *Cooper*, 581 U.S. at 293, in which members of a racial minority will have a reasonable opportunity to elect their candidate of choice, *see Shaw II*, 517 U.S. at 911.

Thornburg v. Gingles, 478 U.S. 30 (1986), created a two-step "framework" for evaluating Section 2 vote-dilution claims. Step one requires a plaintiff to establish three "necessary preconditions" to make out a *prima facie* vote-dilution case. *Gingles*, 478 U.S. at 50. First, "[t]he minority group must be sufficiently large and compact to constitute a majority in a reasonably configured district." *Wis. Legislature*, 595 U.S. at 402. The first precondition is not satisfied by showing it is possible to create an "influence district," where "minority votes may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 445–46 (2006) (citation omitted). Nor is it sufficient for a plaintiff to lump minority groups together in a so-called "coalition district." *See Petteway v. Galveston Cnty.*, 111 F.4th 596, 599 (5th Cir. 2024) (en banc); *but see Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990). Second, "the minority group must be politically cohesive." *Wis. Legislature*, 595 U.S. at 402. And third, "a majority group must vote sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate." *Id.* Satisfying these preconditions "establish[es] that the challenged [map] thwarts a distinctive minority vote at least plausibly on account of race." *Allen*, 599 U.S. at 19 (first brackets in original) (citation omitted). Only a plaintiff who successfully makes out a *prima facie* case under step one proceeds to step two, where the "court considers the totality of circumstances to determine 'whether the political process is equally open to minority voters.'" *Wis. Legislature*, 595 U.S. at 402 (quoting *Gingles*, 478 U.S. at 79). The relevant totality-of-the-circumstances factors include the political subdivision's "history of voting-related discrimination," *Gingles*, 478 U.S. at 44–45, "recogniz[ing] that application of the *Gingles*

factors is peculiarly dependent upon the facts of each case," *Allen*, 599 U.S. at 19 (citations omitted). Only if a plaintiff satisfies *all* of these exacting standards to prove a violation of Section 2's vote-dilution protections may a court order a jurisdiction to draw new district lines based on racial considerations. *See Shaw II*, 517 U.S. at 911.

2. Here, the NYVRA's vote-dilution provisions violate the Fourteenth Amendment's Equal Protection Clause and the New York Constitution's Equal Protection Clause because these provisions require political subdivisions to make redistricting decisions based upon their residents' racial classifications, *see infra* pp.13–16, without satisfying strict scrutiny, *see infra* pp.16–21.

a. Subsection 17-206(2)(a) of the NYVRA, in relevant part, is a "[p]rohibition" against "vote dilution" of protected classes of racial minorities by "any . . . political subdivision" within New York. Under the NYVRA, "vote dilution" is "any method of election" that "ha[s] the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections," and a "protected class" is "a class of individuals who are members of a race, color, or language-minority group, including individuals who are members of a minimum reporting category that has ever been officially recognized by the United States census bureau." N.Y. Elec. Law §§ 17-204(5), 17-206(2)(a). Thus, the NYVRA's vote-dilution provisions draw racial distinctions, giving their special preferences only to minority groups' ability to elect candidates of their choice. *See id.* § 17-206(2)(a).

Subsection 17-206(2)(b) then provides that a violation of Subsection 17-206(2)(a)'s vote-dilution prohibition "shall be established" upon either of two "showings," depending on a political subdivision's use of either an at-large election method or a district-based or alternative election method, respectively. First—and most directly relevant here—for political subdivisions "us[ing] an at-large method of election," vote dilution occurs when "*either*: (A) voting patterns of members

of the protected class within the political subdivision are racially polarized," *id.* § 17-206(2)(b)(i) (emphasis added)—defined as "voting in which there is a divergence in the . . . choice[s] of members in a protected class from the . . . choice[s] of the rest of the electorate," *id.* § 17-204(6)—"*or* (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired," *id.* § 17-206(2)(b)(i) (emphasis added). As discussed below, *infra* pp.22–24, this provision includes implicit threshold requirements that a plaintiff also show that (1) the at-large method of election does not give minority-favored candidates a reasonable chance to win at-large races, and that (2) an alternative system would give minority-preferred candidates a chance to win more seats than under the at-large system. Second, Subsection 17-206(2)(b)(ii)—which serves as a mandatory fallback for towns that cannot use an at-large system under Subsection 17-206(2)(b)(i)—establishes when a political subdivision "us[ing] a district-based or alternative method of election" has engaged in what the VRA labels vote dilution. N.Y. Elec. Law § 17-206(2)(b)(ii). This occurs when "candidates or electoral choices preferred by members of the protected class would usually be defeated, and *either*: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; *or* (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired." *Id.* (emphases added).

Subsection 17-206(2)(c) then mandates several evidentiary rules for "purposes of demonstrating that a violation of [Subsection 17-206(2)(a)'s vote-dilution prohibition] has occurred." *Id.* § 17-206(2)(c). For example, "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." *Id.* § 17-206(2)(c)(viii) (emphasis added). Further,

"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" for vote-dilution-claim purposes. *Id.* § 17-206(2)(c)(iv). And "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," *id.* § 17-206(2)(c)(v); "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," *id.* § 17-206(2)(c)(vi); and "evidence that sub-groups within a protected class have different voting patterns shall *not* be considered," *id.* § 17-206(2)(c)(vii) (emphasis added).

Subsection 17-206(3) also provides a non-exhaustive list of "factors that may be considered" for determining whether a political subdivision has engaged in prohibited vote dilution under the "totality of the circumstances" method of proof within Subsection 17-206(2)(b)(i) and Subsection 17-206(2)(b)(ii). *Id.* § 17-206(3). This list includes factors like "the history of discrimination in or affecting the political subdivision," *id.* § 17-206(3)(a); "the extent to which members of the protected class have been elected to office in the political subdivision," *id.* § 17-206(3)(b); "the extent to which members of a protected class in the state or political subdivision vote at lower rates than other members of the electorate," *id.* § 17-206(3)(f); "the extent to which members of the protected class are disadvantaged in [for example] education, employment, health, criminal justice, housing, land use, or environmental protection," *id.* § 17-206(3)(g), and "the extent to which members of the protected class are disadvantaged in other areas which may hinder their ability to participate effectively in the political process," *id.* § 17-206(3)(h). Subsection 17-206(3) also permits a court to consider "any additional factors," and provides that no "specified

number of factors [is] required in establishing that [a vote-dilution] violation has occurred." *Id.* § 17-206(3)(k).

b. The NYVRA's provisions above violate the federal Equal Protection Clause and the New York Equal Protection Clause, given that the NYVRA requires political subdivisions to structure their redistricting based on "racial classification[s]" without even arguably surviving strict scrutiny's "daunting" review, *SFFA*, 600 U.S. at 206–07 (citations omitted), unlike Section 2 of the VRA, *infra* pp.7–8.

The NYVRA compels political subdivisions to make "distinctions of law based on race," *SFFA*, 600 U.S. at 202 (citations omitted), and take "official conduct discriminating on the basis of race," *id.* at 206 (citations omitted), triggering strict scrutiny, *id.* at 208. The NYVRA's vote-dilution provisions are race-infused from top to bottom, requiring political subdivision to make important decisions impacting their citizens based upon an analysis of voting preferences and expected voting behaviors of citizens as grouped by their race, while giving their special privileges only to racial minorities.

First—and mostly directly relevant here—the NYVRA's vote-dilution provisions for political subdivisions using "an at-large method of election," N.Y. Elec. Law § 17-206(2)(b)(i), require a jurisdiction to abandon its at-large method of election and adopt a district-based or alternative method of election if either: the "voting patterns of members of [a] protected class within the political subdivision are racially polarized"; or, under an all-things-considered, totality-of-the-circumstances inquiry, "the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired," *id.*; *see id.* § 17-206(5)(a)(i)–(ii) (remedies provision). Plaintiffs must also satisfy the implicit, threshold requirements to show that: (1) the at-large method of election does not give minority-favored candidates a reasonable chance

to win at-large races; and (2) that an alternative system would give minority-preferred candidates a chance to win more seats than under the at-large system. *See infra* pp.22–24. Thus, a political subdivision's decision of whether to abandon an at-large method of election to comply with the NYVRA necessitates grouping its residents by race because the NYVRA's vote-dilution inquiry hinges upon either how racial groups are expected to vote within the jurisdiction (*i.e.*, whether there is racial-polarized voting, *id.* § 17-206(2)(b)(i)) *or* a racial minority group's members' relative ability to impact elections under the nebulous and completely race-focused totality-of-the-circumstances balancing test, *id.*, as well as considerations of how minority-preferred candidates will do in future races, after grouping citizens' voting preferences by race and grouping the racial groups themselves together, regardless of where they live in the jurisdiction.

The evidence that both sides' experts submitted in this case further supports the conclusion that the NYVRA's vote-dilution provisions for at-large political subdivisions are race-based. In light of the NYVRA's mandate to assess how racial groups have voted in a political subdivision, both sides' experts had to use race to determine how racial minorities are projected to vote. *See* Expert Report of Dr. Matt A. Barreto ("Barreto Report") at 10–12 (Moskowitz Aff. Exhibit I); Lockerbie Report at 2–6. This is clear in Dr. Barreto's expert report, which repeatedly relies upon race to analyze the Town's electoral system. Dr. Barreto describes his project as "examin[ing] whether voters of different racial/ethnic backgrounds tend to prefer different or similar candidates," Barreto Report at 4, and expressly disaggregates and compares the voting preferences of white and non-white voters, *id.* at 10–15. Dr. Lockerbie, too, had to "examine[ ] elections in the Town of Newburgh to determine whether minorities have a reasonable opportunity to elect candidates of their choice." Lockerbie Report at 2. And this is precisely what the NYVRA asks parties to do. *See* N.Y. Elec. Law § 17-206(2)(b)(i).

Second—and relevant here because it serves as a mandatory fallback for a town that cannot have an at-large system under Subsection 17-206(2)(b)(i)—the NYVRA's vote-dilution provisions for jurisdictions using "a district-based or alternative method of election" (as they must if the NYVRA forces them to abandon an at-large system), similarly depend upon grouping voters by race. These provisions require political subdivisions to draw districts based upon race whenever—after grouping voters by race, including across various racial groups and without regard to whether the people in these groups live together—those racial-minority groups' preferred candidate "would usually be defeated" and there is either "racially polarized" voting in a district or, under the amorphous totality-of-the-circumstances standard, an impairment of "the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections." *Id.* § 17-206(2)(b)(ii). Thus, to avoid liability, political subdivisions using a district-based method of election must ensure that their maps do not "usually" result in the defeat of a racial-minority-preferred candidate (which presumably means that the white-favored candidates cannot win "too" often) if there is also "racially polarized" voting or an impairment of minority groups' ability to determine or influence an election under an amorphous totality-of-the-circumstances inquiry. *Id.*

In all, the NYVRA's vote-dilution provisions "distribut[e] burdens or benefits based on individual racial classifications," *Parents Involved In Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 702 (2007), give "preference[s] based on racial or ethnic criteria," *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 223 (1995), and "demand[] consideration of race," *Abbott*, 585 U.S. at 587 (citations omitted), thereby triggering strict scrutiny. Notably, even if these provisions applied equally to members of any racial group—which they clearly do not—the NYVRA would still be subject to strict-scrutiny review. The Equal Protection Clause applies to all individuals "without regard to *any* differences of race, of color, or of nationality," *SFFA*, 600

U.S. at 206 (emphasis added) (citations omitted), which means that "*all* racial classifications imposed by the government must be analyzed by a reviewing court under strict scrutiny," *Johnson v. California*, 543 U.S. 499, 505 (2005) (emphasis added). So, any time a law makes "racial classifications"—"even when they may be said to burden or benefit the races equally"—courts must subject that law to strict scrutiny. *Id*. at 499 (citation omitted); *see also Miller*, 515 U.S. at 904.

c. The NYVRA's vote-dilution provisions cannot survive strict-scrutiny review for multiple, independently fatal reasons.

First, the Legislature did not design the NYVRA to further a compelling government interest. The government, of course, has a compelling "interest in remedying the effects of . . . racial discrimination," where it "has a strong basis in evidence to conclude that . . . action [is] necessary" to remediate an "*identified* discrimination." *Shaw I*, 517 U.S. at 909–10 (emphasis added) (citation omitted). But the NYVRA does not target that particular interest, instead imposing liability for vote dilution without requiring proof of "specific, identified instances of past discrimination that violated the Constitution or a statute." *SFFA*, 600 U.S. at 207 (citing *Shaw I*, 517 U.S. at 909–10). That is, the NYVRA's vote-dilution provisions do not require a political subdivision to have previously discriminated on the basis of race with respect to its election method before subjecting that political subdivision to the race-based remedies of abandoning its at-large method of election, *see* N.Y. Elec. Law § 17-206(2)(b)(i), and then drawing districts predominantly based on race. At minimum, the Equal Protection Clauses would demand that a statute mandating race-based redistricting in circumstances beyond those covered by Section 2 of the VRA only do so for jurisdictions with histories of racial discrimination that are so severe that Section 2 does not address adequately that discrimination. *See Cooper*, 581 U.S. at 292. Not so

with the NYVRA. Rather than seeking to further the compelling interest of remediating "identified discrimination" where there exists "a strong basis in evidence to conclude" that such action is "necessary," *Shaw I*, 517 U.S. at 909–10 (citation omitted), the NYVRA seeks to protect one normative view of "an equal opportunity to vote" and "participation in voting by all eligible voters"—"particular[ly] members of racial, ethnic, and language-minority groups." Gov. Kathy Hochul, *Governor Hochul Signs Landmark John R. Lewis Voting Rights Act of New York Into Law* (June 20, 2022).[3] Such interests may be "commendable goals, [but] they are not sufficiently coherent" or compelling "for purposes of strict scrutiny" review and cannot justify racial classifications. *SFFA*, 600 U.S. at 215.

Notably, States do not have the same constitutional prerogatives as Congress to use voting-rights laws to remedy societal discrimination—further demonstrating that the NYVRA serves no compelling *state* interest. The Fourteenth Amendment "explicit[ly] constrain[s]" States' power by prohibiting their "use of race as a criterion for legislative action." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490–91 (1989). This prohibition applies even to "allegedly benign racial classifications," *id*. at 495, "without regard to any differences of race, of color, or of nationality," and serves to prevent States from engaging in the "odious" practice of "pick[ing] winners and losers based on the color of their skin," *SFFA*, 600 U.S. at 206, 208, 229 (citation omitted). So, while "Congress may identify and redress the effects of society-wide discrimination[, this] does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate." *City of Richmond*, 488 U.S. at 490; *accord Trump v. Anderson*, 601 US 100, 112 (2024).

[3] Available at https://www.governor.ny.gov/news/governor-hochul-signs-landmark-john-r-lewis-voting-rights-act-new-york-law (all webpages last accessed September 23, 2024).

Even assuming *arguendo* that the NYVRA's vote-dilution provisions do pursue a compelling interest in "remediating specific, identified instances of past discrimination," they still fail strict-scrutiny review because they are not "narrowly tailored—meaning necessary—to achieve that interest." *SFFA*, 600 U.S. at 206–07 (citation omitted).

The Supreme Court has assumed without deciding that Section 2 of the VRA does contain enough "exacting requirements" and safeguards, *Allen*, 599 U.S. at 30, to satisfy strict scrutiny.[4] As interpreted by the Supreme Court, Section 2 includes numerous carefully tailored safeguards: the plaintiff must first satisfy the three *Gingles* "necessary preconditions," *Gingles*, 478 U.S. at 50, and then *also* satisfy the totality-of-the-circumstances inquiry, *id.* at 79; *supra* pp.9–10. Only where a plaintiff has made this difficult two-step showing may a court conclude that a "[challenged] district is not equally open" because "minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter." *Allen*, 599 U.S. at 25.

The NYVRA lacks Section 2's tailoring by its core design. Disclaiming the first *Gingles* precondition, the NYVRA allows plaintiffs to show vote-dilution even where they have not demonstrated that a minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," *Gingles*, 478 U.S. at 50; *see* N.Y. Elec. Law § 17-206(2)(c)(viii). The NYVRA also expands the first precondition's scope by applying to a minority group that only "influence[s] the outcome of elections," *id.* § 17-206(2)(b)(ii), rather than playing a "decisive" role, *LULAC*, 548 U.S. at 445–46, and further authorizes the "combin[ing]" of

[4] The Supreme Court has *not* doubted that Section 2 is subject to the constitutional strict scrutiny analysis. While Section 2 is not *as* race-infused as the NYVRA, it "demands consideration of race" in making important government decisions, and thus is subject to "strict scrutiny." *Abbott*, 585 U.S. at 587 (citations omitted).

minority groups, N.Y. Elec. Law § 17-206(2)(c)(iv), into coalition districts. Similarly disregarding the second *Gingles* precondition, the NYVRA does not require plaintiffs to show that a minority group is "politically cohesive," *Wis. Legislature*, 595 U.S. at 402, as it broadly defines "racially polarized" to mean "voting in which there is a divergence in the . . . choice[s] of members in a protected class from the . . . choice[s] of the rest of the electorate," N.Y. Elec. Law § 17-204(6), rather than voting in which "a significant number" of members of the minority group usually vote for the same, "preferred candidate," *Gingles*, 478 U.S. at 51–53, 56. And the NYVRA does not require a plaintiff to satisfy the second step under *Gingles* where "a court considers the totality of circumstances to determine 'whether the political process is equally open to minority voters.'" *Wis. Legislature*, 595 U.S. at 402 (citations omitted).

By failing to incorporate the *Gingles* preconditions or require a subsequent totality-of-the-circumstances showing as a necessary element, the NYVRA mandates that political subdivisions make race-based districting decisions in a much broader range of circumstances than does Section 2 of the VRA, with this additional race-based mandate (additional beyond what Section 2 requires) not even arguably tailored to "remediat[e] specific, identified instances of past discrimination," *SFFA*, 600 U.S. at 206–07; *see also Parents Involved*, 551 U.S. at 720. Indeed, under Subsection 17-206(2)(b)(i), a political subdivision using an at-large election method may have engaged in "vote dilution" even where a plaintiff has not demonstrated that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," *Gingles*, 478 U.S. at 50; and has not shown that the minority group is "politically cohesive," as *Gingles* uses that term, *Wis. Legislature*, 595 U.S. at 402, has relied upon "influence," *LULAC*, 548 U.S. at 445–46, or "coalition" districts as the basis of their vote-dilution claim, *Petteway*, 111 F.4th at 599, or has not (under the first method of proof) "show[n], under the 'totality of circumstances,'

that the political process is not 'equally open' to minority voters," *Allen*, 599 U.S. at 18 (quoting *Gingles*, 478 U.S. at 45–46). Such jurisdictions must abandon that method and adopt a district-based method—which method itself frequently requires the drawing of race-based districts to comply with the NYVRA—any time voting is "racially polarized," the at-large method fails to give minority groups a reasonable chance to win at-large races, and an alternative system would give minority-preferred candidates a chance to win more seats than under the at-large system. *See* N.Y. Elec. Law § 17-206(2)(b)(i). Thus, an at-large jurisdiction will face vote-dilution liability far more frequently under the NYVRA than under Section 2 of the VRA, with no basis to conclude that this far broader scope is necessary to achieve any compelling government interest.

Subsection 17-206(2)(b)(ii) similarly provides that a political subdivision using a district-based method of election has engaged in impermissible vote dilution whenever a minority group's preferred candidates "would usually be defeated" and when there is "racially polarized" voting in a district—again defined in a manner that is free from many of the necessary safeguards found within Section 2 of the VRA, *supra* p.18, including lumping minority groups together, not requiring geographical compactness, and not mandating an all-things-considered inquiry that ensures that the political process is, in fact, not equally open to all. Again, there is no reason to believe that this far more capacious scope than Section 2 of the VRA provides is narrowly tailored to achieving any compelling state interest.

Finally, the NYVRA's totality-of-the-circumstances independent basis for finding liability—which applies both to political subdivisions using the at-large method of voting and the district-based method—further demonstrates the provision's lack of narrow tailoring. Section 2 of the VRA's totality-of-the-circumstances inquiry helps ensure the provision's narrow tailoring by requiring a plaintiff to make such a showing *in addition to* satisfying the *Gingles* preconditions.

The NYVRA's totality-of-the-circumstances test, however, allows for consideration of factors as varied as "disadvantages in [for example] education, employment, health, criminal justice, housing, land use, or environmental protection," N.Y. Elec. Law § 17-206(3)(g), without requiring any particular showing on any particular factor, before a court finds a violation of the NYVRA, *see id.* § 17-206(3). Thus, the NYVRA's amorphous totality-of-the-circumstances inquiry establishes an additional path for a plaintiff to obtain race-based redistricting, which is not even arguably narrowly tailored to satisfying any compelling interest.

In all, because the NYVRA's vote-dilution provisions mandate political subdivisions to engage in race-based redistricting in furtherance of no compelling interest and absent the careful safeguards present in Section 2 of the VRA, those provisions are unconstitutional and provide an independent basis to grant Defendants' motion for summary judgment.

B. The Undisputed Record Evidence Shows That The Town's At-Large System Complies With The NYVRA

1. To establish what the NYVRA calls "vote dilution" in the at-large context, a plaintiff must prove either that the "voting patterns of members of the protected class . . . are racially polarized," or that, "under the totality of circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired." N.Y. Elec. Law § 17-206(2)(b)(i)(A)–(B). Additionally, given that Section § 17-206(2)(b)(i) is a "vote dilution" provision, a plaintiff needs to make two additional threshold showings to prevail: (1) that members of a protected class will not have a reasonable opportunity to elect candidates of their choice under the at-large system; and (2) that an alternative voting system exists that would give those members of a protected class a greater chance to elect candidates of their choice than the at-large voting system.

The requirement that members of a protected class will not have a reasonable opportunity to elect candidates of their choice under the challenged system flows from the meaning of the term "dilution": under Section 17-206(2)(a), if an election method does not "hav[e] the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections," then there is no vote dilution. N.Y. Elec. Law § 17-206(2)(a). In other words, the plaintiff must show that the current "allocation of power between minority and majority voters" is not "reasonable." *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 368 (2000) (Souter, J., concurring in part); *Pico Neighborhood Ass'n v. City of Santa Monica*, 534 P.3d 54, 64–65 (Cal. 2023) ("'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"). The baseline is a "reasonable allocation of power," *see Reno*, 528 U.S. at 368 (Souter, J., concurring in part), not some hypothetical minority-voter-preference-maximizing allocation. By way of example, if an at-large system provides minority-favored candidates a 50% (or, let's say, 48%) chance to win each seat on a town board, it surely is not "vote dilution" merely because an alternative system would give them a 70% chance to win these seats. Under such circumstances, "the minority group's ability to elect candidates it prefers" is already sufficiently strong, such that there could not be possible vote dilution. *See Gingles*, 478 U.S. at 88 (O'Connor, J., concurring in part and concurring in judgment).

The second and interrelated requirement—that a Section 17-206(2) plaintiff prove that an alternative voting system would give minority voters a greater chance to elect their preferred candidates—similarly flows from "the very concept of vote dilution" itself, which "necessitates . . . the existence of an 'undiluted' practice against which the fact of dilution may be measured." *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997). A court cannot "decide whether

an electoral system has made it harder for minority voters to elect the candidates they prefer" unless the plaintiff first provides evidence of "how hard it should be for minority voters to elect their preferred candidates under an acceptable system." *Gingles*, 478 U.S. at 88 (O'Connor, J., concurring in part and concurring in judgment) (citation omitted). Without such a showing, a party could "prevail based solely on proof of racially polarized voting that could not be remedied or ameliorated by any other electoral system," which would "render the word 'dilution'" in Section 17-206(2) mere "surplusage." *See Pico*, 534 P.3d at 65. Accordingly, a Section 17-206(2) plaintiff must offer proof of a "reasonable alternative practice" to serve as the "benchmark for the existing voting practice." *Holder v. Hall*, 512 U.S. 874, 880 (1994) (plurality opinion).

Other Section 17-206(2) plaintiffs have recognized their burden to establish the second of these two necessary thresholds. In *Serrato v. Town of Mount Pleasant*, No.55442/2024 (N.Y. Sup. Ct. Westchester Cnty.), the plaintiffs—represented by the same counsel as Plaintiffs here—explained that, under either prong of Section 17-206(2)(b), a plaintiff "must also show that the existing system 'ha[s] the effect of' impairing their political influence, which they can do by comparing their ability to elect a candidate of choice under the current at-large system to a reasonable alternative system." Plaintiffs' Mem. Of Law In Support Of Summary J. at 12, *Serrato*, No.55442/2024 (N.Y. Sup. Ct. Westchester Cnty. Aug. 13, 2024) (Moskowitz Aff., Exhibit J). The *Serrato* plaintiffs, like the Town here, tie this threshold requirement to the concept of "vote dilution" itself, arguing that if a Section 17-206(2) plaintiff "cannot identify a reasonable alternative which could improve" the ability of members of protected class "to elect a candidate of their choice relative to the existing system, then logically they cannot show that *the existing system*" works to impair their political influence, "as opposed to demographics or some existing feature of natural or political geography." *Id.* at 15 (citing *Holder*, 512 U.S. 874; *Pico*, 534 P.3d

54). And while these plaintiffs do not address whether members of a protected class have a reasonable opportunity to elect candidates of their choosing—the Town's first necessary threshold—this too flows from the term "dilution" that the NYVRA uses, as explained above. *Supra* pp.22–23.

2. Here, the Town is entitled to summary judgment because Plaintiffs have made neither of these two mandatory showings.[5]

a. The undisputed evidence shows that Plaintiffs cannot establish the first necessary threshold of the Section 17-206(2) analysis because minority voters will have a strong chance to elect the candidates of their choice under Newburgh's at-large system. As noted, while the Town has historically held its Town Board elections in odd-numbered years, the State has recently enacted legislation that will move the Town's local elections to even-numbered years starting in 2026. *Supra* pp.4–5; Even Year Election Law § 1, N.Y. Town Law § 80 (effective Jan. 1, 2025). The undisputed record shows that minority-favored candidates get more votes 48% of the time in even-numbered years, Lockerbie Report at 3, with even stronger performance in recent years, *id.* In both 2018 and 2020, Democratic candidates garnered more of the Town's votes than Republican candidates in five out of the seven races where one Democratic candidate faced off against one Republican candidate, and in 2016, Democratic candidates garnered more votes than Republicans in three out the six such races. Lockerbie Report at 3–6.

The one Town Board election that recently took place in an even-numbered year shows that minority-favored candidates will have a reasonable chance to win at-large Town-Board elections. In the Town's 2020 Town Board special election, the Republican candidate won by less

[5] The Town does not address the other elements of a Section 17-206(2) vote-dilution claim in the at-large context in this summary judgment motion because there is reasonable expert disagreement on those issues. *See Khutoryanskaya v. Laser & Microsurgery, P.C.*, 222 A.D.3d 633, 635 (2d Dep't 2023).

than a percentage point, receiving 50.43% of the two-party vote while the Democratic candidate received 49.57% of the vote. Lockerbie Report at 3–4. Even Plaintiffs' own expert has described this "differential" as "close." Barreto Dep. at 118:2–9.

Thus, the undisputed evidence is that minority-favored candidates are likely to do well in the Town's future even-numbered year elections, with both sides' data showing that such candidates have regularly garnered more votes than their opponents in the Town's past even-numbered year elections. Lockerbie Report at 3–6; *see, e.g.*, Barreto Report at 10–15. Because the record establishes that minority voters have a reasonable opportunity to garner more votes for the candidates of their choice under the Town's at-large system in even-numbered years, Plaintiffs' vote-dilution claims fails.

b. Plaintiffs similarly did not meet their burden on Section 17-206(2)'s second threshold—demonstrating a "reasonable alternative voting practice" that would give minority voters a greater opportunity to elect their preferred candidate than the Town's at-large system. *See Reno*, 520 U.S. at 48; *Holder*, 512 U.S. at 881 (plurality opinion). Rather than provide evidence to establish this necessary showing, as their own counsel admitted plaintiffs had to do in litigating against Mt. Pleasant's at-large system, Plaintiffs' expert merely noted that several alternatives to at-large election methods exist, such as single-member districts, ranked-choice voting, and cumulative voting. Barreto Report at 16–18. Plaintiffs presented no evidence to suggest that any of these different election methods would provide the Town's minority electors a greater opportunity to elect candidates of their choosing than the Town's current at-large system. Plaintiffs' failure to provide such evidence is dispositive: without evidence of "an 'undiluted' practice against which

the fact of dilution may be measured," Plaintiffs cannot demonstrate vote dilution at all, and so cannot succeed on their Section 17-206(2) claims. *Reno*, 520 U.S. at 480.[6]

V. CONCLUSION

This Court should enter summary judgment in favor of Defendants on all claims.

Dated: New York, New York
September 25, 2024

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[6] Over two months after the time for serving expert reports had expired, and roughly a week before the parties' expert depositions were scheduled to begin, Plaintiffs purported to serve on the Town an "Expert Report Addendum" to the report of Dr. Barreto, which sought to establish a district-based scheme as an alternative voting practice. Given that this late submission is obviously improper, the Town does not address this submission in this motion.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing memorandum of law complies with the word count limitations set forth in Uniform Rule 202.8-b for the Supreme Court and this Court's orders. This memorandum of law uses Times New Roman 12-point typeface and contains 8,248 words, excluding parts of the document exempted by Rule 202.8-b. As permitted, the undersigned has relied on the word count feature of this word-processing program.

/s/ Bennet J. Moskowitz