SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

KENNETH YOUNG,

*Plaintiff*,

v.

TOWN OF CHEEKTOWAGA,

*Defendant*,

LETITIA JAMES, Attorney General of the State of New York,

*Intervenor*.

Index No. 803989/2024

Hon. Paul B. Wojtaszek



**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT**

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# TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

**Cases** **Page(s)**

**Cases** **Page(s)**

**Constitutions** **Page(s)**



**Federal Statutes**



**State Statutes**

**State Statutes** **Page(s)**



**State Regulations**



**Miscellaneous Authorities**

Letitia James, as the Attorney General of the State of New York, having intervened in this action as of right pursuant to Executive Law § 71 and C.P.L.R. 1012(b)(1), respectfully submits this memorandum of law in opposition to defendant's cross-motion for summary judgment, which seeks a declaration that the John R. Lewis Voting Rights Act of New York (NYVRA) is unconstitutional.

## PRELIMINARY STATEMENT

The NYVRA affirmatively protects New Yorkers' right to vote. To ensure that all voters have an equal opportunity to participate in the political processes of the State, the NYVRA—like its federal analogue, the Voting Rights Act—prohibits vote dilution. One way to support a claim of vote dilution is to show racially polarized voting patterns in a municipality that uses at-large elections, *i.e.*, election to a seat on a governing body representing an entire jurisdiction for which seat all eligible voters in the jurisdiction may vote. Upon finding vote dilution, a court must implement an appropriate remedy. This may include ordering the municipality to transition from at-large to district-based elections in which the jurisdiction is divided into defined geographic regions (commonly known as wards) and officials are elected by the voters of their ward.

Plaintiff Kenneth Young commenced this action under the NYVRA to compel the Town of Cheektowaga to adopt district-based elections for its Town Board. Plaintiff moved for partial summary judgment seeking a declaration that voting patterns in the Town are racially polarized and thus the Town Board's use of an at-large scheme violates the NYVRA. In opposition, the Town argues among other things that plaintiff's NYVRA claim is unripe because of a forthcoming change pursuant to state law shifting Town Board elections from odd- to even-numbered years. The Town also cross-moves for summary judgment, seeking a declaration that the NYVRA's prohibition against vote dilution is facially unconstitutional. Specifically, the Town argues that the

NYVRA violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as well as the Fifteenth Amendment, the First Amendment, and any analogues to these provisions in the New York State Constitution. The Town also argues that the NYVRA violates New York's separation-of-powers doctrine by improperly delegating lawmaking power to the Attorney General.

Contrary to the Town's argument, plaintiff's claim is ripe and a forthcoming shift to elections in even-numbered years does not prevent this Court from adjudicating plaintiff's NYVRA action. On the merits, the Town has failed to meet its heavy burden of demonstrating that the NYVRA is unconstitutional in *all* its applications, as it must in this facial challenge. The NYVRA comports with the Equal Protection Clause because its prohibition on vote dilution applies equally to members of all racial groups. And contrary to the Town's argument, the statute's references to race do not create an express racial classification. Nothing in the NYVRA, including its remedies for vote dilution, whether district-based elections or otherwise, distributes benefits or burdens on the basis of race. Therefore, like other antidiscrimination statutes, including other federal and state laws that prohibit race-based vote dilution, the NYVRA is not subject to strict scrutiny. And the statute easily satisfies the rational basis standard because it rationally advances the Legislature's interest in eliminating discriminatory conditions in voting. The Town's remaining constitutional arguments are also meritless, as explained below. Accordingly, the Court should decline to declare the NYVRA unconstitutional on its face.



## BACKGROUND

### A. The New York Voting Rights Act

The Legislature enacted the NYVRA in 2022 to "[e]ncourage participation in the elective franchise by all eligible voters to the maximum extent" and "[e]nsure that eligible voters who are

members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York." Election Law § 17-200. New York's statute is modeled in part after the federal Voting Rights Act, *see* 52 U.S.C. § 10101 *et seq.*, as well as analogous laws enacted in California and Washington, *see* Cal. Elec. Code §§ 14025-14032; Wash. Rev. Code §§ 29A.92.005-.900. The NYVRA prohibits, among other things, voter suppression, intimidation, deception, and obstruction, as well as vote dilution. Election Law §§ 17-206, 17-212.

Vote dilution is defined as "any method of election" that has "the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections." Election Law § 17-206(2)(a). A "protected class" is a class of voters who are "members of a race, color, or language-minority group." *Id.* § 17-204(5).[1] "Language-minority group" is defined as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." *Id.* § 17-204(5-a). Vote dilution may be shown where a political subdivision uses an "at-large" method of election, *id.* § 17-204(1) (defining "at-large"), and where either one of the two following elements is established:

> (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.* § 17-206(2)(b)(i). If a political subdivision already uses "a district-based or alternative method of election," then vote dilution may be shown if one of the above two elements is established and



[1] While the parties' cross-motions were pending, the Legislature amended the definition of "protected class" to add the following clause: "including individuals who are members of a minimum reporting category that has ever been officially recognized by the United States census bureau." *See* L. 2024, ch. 216, § 1 (amending Election Law § 17-204[5]).

"candidates or electoral choices preferred by members of the protected class would usually be defeated." *Id.* § 17-206(2)(b)(ii). This prohibition on vote dilution is modeled in part after Section 2 of the federal Voting Rights Act. *See* 52 U.S.C. § 10301; *Allen v. Milligan*, 599 U.S. 1, 17-18 (2023).

The NYVRA instructs how certain evidence should be weighed in determining whether vote dilution has occurred. For instance, elections conducted prior to the filing of an action under the NYVRA are more probative than elections conducted after. Election Law § 17-206(2)(c)(i). And the statute provides that a showing of racially polarized voting cannot be defeated by certain alternative explanations for voting patterns and election outcomes, and accordingly bars evidence of those explanations. For example, once a showing of racially polarized voting is made, "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). Likewise, "evidence that sub-groups within a protected class have different voting patterns shall not be considered." *Id.* § 17-206(2)(c)(vii). And "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).



The NYVRA authorizes any aggrieved person to file an action against a political subdivision to enforce, among other things, the statute's prohibition against vote dilution. Election Law § 17-206(4). At least 50 days before filing suit, a prospective plaintiff must notify the political subdivision that it may be in violation of the NYVRA. *Id.* § 17-206(7). The issuance of this notification letter thus creates a 50-day safe harbor from litigation. *Id.* § 17-206(7)(a). In response to a NYVRA notification letter, a political subdivision may obtain an additional 90-day safe harbor from litigation by passing a NYVRA resolution affirming "(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.* § 17-206(7)(b). During this additional 90-day period, the political subdivision may either "enact and implement such remedy" unilaterally, or in certain circumstances—for example, if the political subdivision lacks authority to unilaterally impose the remedy—the political subdivision may submit a proposed remedy to the Civil Rights Bureau of the Office of the Attorney General, which can then approve the remedy and order it into effect. *Id.* § 17-206(7)(b)-(c). The Civil Rights Bureau may approve a remedy only upon concluding that: "(A) the political subdivision may be in violation of this title; (B) the NYVRA proposal would remedy any potential violation of this title cited in the NYVRA notification letter and would not give rise to any other violation of this title; (C) the NYVRA proposal is unlikely to violate the constitution or any relevant federal law; and (D) implementation of the NYVRA proposal is feasible." *Id.* § 17-206(7)(c)(iv). If the Civil Rights Bureau denies approval, it may "make recommendations for an alternative remedy for which it would grant approval." *Id.* § 17-206(7)(c)(vii).



If a political subdivision does not pass a NYVRA resolution or fails to comply with any subsequent procedural steps, the plaintiff may bring suit. *See* Election Law §17-206(7)(f). The plaintiff also may bring suit if the petitioning period for the next regular election has begun or is scheduled to begin within 30 days, or if the political subdivision is scheduled to conduct an election within the next 120 days. *Id.* The action is subject to expedited proceedings and a calendar preference. *Id.* § 17-216. If a court finds vote dilution, then it must "implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process." *Id.* § 17-206(5)(a). Such remedies include, among

other options, alterations to the method of election, including switching to "a district-based method." *Id.* If the remedy requires new or revised districting plans, the statute provides certain procedures that must be followed, such as publicly releasing the plans and holding public hearings before and after the plans are released. *Id.* § 17-206(6)(a), (b). But the statute does not say how the district lines must be drawn. The statute includes a severability provision. *Id.* § 17-222.

The NYVRA also requires covered political subdivisions making certain voting- or election-related changes to seek prior approval of such changes, known as "preclearance." *See* Election Law § 17-210. The preclearance provisions came into effect on September 22, 2024. The Attorney General has promulgated rules implementing these preclearance provisions, which took effect on September 22, 2024. *See* 13 N.Y.C.R.R. Part 500. The Attorney General also has statutory authority to enforce the NYVRA, including by filing actions to remedy vote dilution. *See* Election Law §§ 17-206(4), 17-214.



**B. Factual Background**

The Town of Cheektowaga uses at-large elections to elect the six members of its Town Board. (Spitzer Aff. Ex. D, NYSCEF Doc. No. 60, at 1-2.) Approximately 19% of its almost 90,000 residents are Black or belong to other racial minority groups. (*Id.*; Answer, NYSCEF Doc. No. 25, ¶ 6.) The Civil Rights Bureau has preliminarily identified the Town as a covered entity subject to the NYVRA's preclearance requirement. (Compl. Ex. 17, NYSCEF Doc. No. 18, at 26.)

Plaintiff Kenneth Young, who is Black, is a resident of the Town and unsuccessfully ran for Town Board in November 2023. (Compl., NYSCEF Doc. No. 1, ¶¶ 8-10, 13-14.) On December 12, 2023, plaintiff sent a NYVRA notification letter to the Town. (Compl. Ex. 1, NYSCEF Doc. No. 2.) Plaintiff asserted that the Town's at-large voting system has prevented Black voters from electing their candidate of choice, namely plaintiff, during the November 2023 election. (*Id.* at 1.)

An expert hired by plaintiff found racially polarized voting in that election. (Compl. Ex. 3, NYSCEF Doc. No. 4.) The Town investigated plaintiff's allegations, including by retaining experts to analyze voting patterns. (*See* Resolution 2024-34, Compl. Ex. 5, NYSCEF Doc. No. 6.) The Town's experts, like plaintiff's expert, found that recent elections in the Town were racially polarized. (Compl. Exs. 7-8, NYSCEF Doc. Nos. 8-9.)

On March 12, 2024, the Town Board passed a resolution calling for a referendum on a transition from the Town's at-large elections to ward-based elections. (*See* Resolution 2024-138, Spitzer Aff. Ex. F, NYSCEF Doc. No. 45.) The resolution acknowledged that the Town's experts found racially polarized voting patterns in recent Town Board elections. (*Id.* at 3.) And the resolution noted that a ward-based system may serve the NYVRA's purpose of ensuring minority groups have an equal opportunity to vote. (*Id.*) The Town has since abandoned any attempt to place a referendum concerning ward-based elections on the ballot for the November 2024 general election.



**C. Procedural History**

Plaintiff commenced this action on March 18, 2024. (*See* Compl., NYSCEF Doc. No. 1.) The Complaint alleges that the Town's at-large voting system prevents Black voters from electing their candidate of choice. To remedy this NYVRA violation, the Complaint seeks a judgment ordering the Town to adopt ward-based voting for all future Town Board elections, starting with the November 2025 election. (*Id*. ¶¶ 83, 87.) The Town filed its Answer on April 10, 2024. (NYSCEF Doc. No. 25.) Among other affirmative defenses, the Town asserted that the NYVRA violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as well as the Fifteenth Amendment, First Amendment, and any analogues to these provisions in the New York State Constitution. (*Id.* at 13-15.)

Plaintiff moved for partial summary judgment seeking a declaration that racially polarized voting has occurred in the Town and that the Town failed to enact a NYVRA resolution that would have entitled it to a 90-day safe harbor. (Notice of Mot., NYSCEF Doc. No. 30, at 2.) Plaintiff also seeks a judgment dismissing the Town's defenses and directing the Town to adopt district-based voting for members of the Town Board, beginning with the November 2025 election. (*Id.*) The Town responded and cross-moved for summary judgment on its constitutional defenses. (Am. Notice of Cross-Mot., NYSCEF Doc. No. 55.) In opposition to plaintiff's motion, the Town argues that plaintiff's NYVRA claim is not ripe because a remedy has already been enacted—namely, the Legislature's 2023 amendment to Town Law § 80 shifting all town board elections to even-numbered years. (Town's Mem. of Law, NYSCEF Doc. No. 68, at 6-8.) The Town further argues that discovery is warranted on whether racially polarized voting exists in the Town, and therefore summary judgment is premature. (*Id.* at 8-14.) In support of its cross-motion, the Town argues that the NYVRA violates the rights of its voters under the federal and state constitutional provisions noted above. (*Id.* at 18-27.) The Town further argues that the NYVRA violates the separation-of-powers doctrine by improperly delegating lawmaking power to the Attorney General. (*Id.* at 27-28.) The Town asks the Court to strike down the NYVRA as facially unconstitutional. (*Id.* at 29.)



By letter dated July 2, 2024, this office informed the Court of the Attorney General's intent to intervene in defense of the facial constitutionality of the NYVRA. (NYSCEF Doc. No. 54.) The Attorney General urges this Court to deny the Town's cross-motion to the extent it seeks a declaration that the NYVRA is unconstitutional. The Attorney General takes no position on the substance of plaintiff's NYVRA claim, or on whether the Town has complied with the procedural steps under the NYVRA.

## ARGUMENT

## POINT I

## PLAINTIFF'S CLAIM IS RIPE

Plaintiff's vote dilution claim under the NYVRA is ripe for judicial review. "The doctrine of ripeness is intended to avoid premature adjudication or review of administrative action." *de St. Aubin v. Flacke*, 68 N.Y.2d 66, 75 (1986). In a declaratory judgment action, the ripeness inquiry turns on whether the issues are appropriate for judicial review and whether granting or denying judicial review would impose a hardship on the parties. *See Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 518-520 (1986), *cert. denied*, 479 U.S. 985 (1986). A "controversy cannot be ripe if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." *Id.* at 520. But "the ripeness doctrine does not impose a threshold barrier requiring pursuit of all possible remedies that might be available through myriad government regulatory and legislative bodies." *Matter of Ward v. Bennett*, 79 N.Y.2d 394, 400-01 (1992).



Plaintiff claims that the Town's at-large electoral system as it currently exists has the effect of diluting the votes of the Town's Black voters, leaving them unable to elect their preferred candidates to the Town Board and depriving them of representation. While the Attorney General takes no position on the merits of that claim, or what an appropriate remedy might be, the issues raised by plaintiff are appropriate for this Court to decide. Indeed, the Legislature mandated that actions brought pursuant to the NYVRA "shall be subject to expedited pretrial and trial proceedings." Election Law § 17-216. The only administrative prerequisite for filing suit is sending a NYVRA notification letter to the political subdivision, which plaintiff has done. (Compl. Ex. 1, NYSCEF Doc. No. 2.) Any delay in adjudicating plaintiff's claim would prejudice the Town's voters, who are entitled to "an equal opportunity to participate in the political processes of the

state." Election Law § 17-200(2). This Court should not deprive the Town's voters of a prompt decision on plaintiff's vote dilution claim.

Nor should this Court refrain from adjudicating the claim merely because of a forthcoming shift to even-numbered election years, as the Town contends. (Town's Mem. of Law at 6-8.) Pursuant to a recent amendment to Town Law § 80, *see* L. 2023, ch. 741, Town Board elections will shift from odd- to even-numbered years in 2028. The Town asserts that this change will remedy plaintiff's claim because it will increase voter turnout and "cur[e] racially polarized voting" (Town's Mem. of Law at 7), but offers no evidence in support of this assertion. And the mere possibility that a switch to even-year elections more than four years from now might remedy vote dilution does not render plaintiff's NYVRA claim unripe. The Court of Appeals has made clear that the ripeness doctrine does not bar a claim merely because there might be "possible remedies" provided by a future "change in governing law." *Matter of Ward*, 79 N.Y.2d at 401; *see also Matter of Rodriguez (Minna G.)*, 159 Misc. 2d 929, 930 (Sup. Ct. Greene County 1992) (holding that party's challenge to constitutionality of statute was ripe despite statutory amendments that, once in effect, would remedy party's alleged injury); *New York Bus Tours, Inc. v. City of New York*, 111 Misc. 2d 10, 16-17 (Sup. Ct. Bronx County 1981) (similarly holding that plaintiff's claim was ripe despite legislation under consideration that would moot plaintiff's claim if enacted). And the Town will hold two more elections, in 2025 and 2027, before the switch to even-year elections. Because plaintiff's claim is based on an existing electoral system that the Town concedes will persist for years, including those two upcoming elections, this Court's adjudication of plaintiff's claim is not premature.

## POINT II

## THE NYVRA IS NOT FACIALLY UNCONSTITUTIONAL

The Court should uphold the NYVRA as a valid exercise of legislative authority. Preliminarily, municipalities lack capacity to challenge the constitutionality of state legislation, subject to certain exceptions. *See In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 384 (2017); *City of New York v. State of New York*, 86 N.Y.2d 286, 289 (1995); *see also Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287 (1977) (local entities lacked capacity to challenge provision of Education Law on due process and equal protection grounds); *County of Chautauqua v. Shah*, 126 A.D.3d 1317, 1320-21 (4th Dep't 2015), *aff'd*, 28 N.Y.3d 244 (2016) (municipalities are not persons within the meaning of Due Process Clauses of U.S. and New York State Constitutions). The only exception applicable here is a municipality's claim that compliance with state law would cause the municipality to violate the constitutional rights of others. *See City of New York*, 86 N.Y.2d at 291-92. Accordingly, the Town's motion for summary judgment asserts that the NYVRA will cause it to violate the constitutional rights of its voters, not any constitutional violations that injure the Town itself.[2]



The NYVRA enjoys "a strong presumption of constitutionality," and the Town "bears the heavy burden of proving beyond a reasonable doubt that the statute is in conflict with the Constitution." *Matter of Kowal v. Mohr*, 216 A.D.3d 1472, 1473-74 (4th Dep't 2023) (quoting *People v. Viviani*, 36 N.Y.3d 564, 576 [2021]). Striking down a statute is appropriate "only as a

[2] The Town conclusorily asserts that the NYVRA violates the home rule provisions of the Constitution. (Town's Mem. of Law at 15.) While the Town may have capacity to assert a home rule challenge, its challenge is without merit. The Constitution authorizes the Legislature "to enact a 'general law' relating to the property, affairs or government of local governments." *Patrolmen's Benevolent Assn. of City of N.Y. v. City of New York*, 97 N.Y.2d 378, 385 (2001) (quoting N.Y. Const. art. IX, § 2[b][2]). The Legislature properly exercised that authority here by prohibiting vote dilution across the State—not only in Cheektowaga or other specified municipalities.

last unavoidable result[,] after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Id.* at 1474 (quoting *White v. Cuomo*, 38 N.Y.3d 209, 216 [2022]); *see also Stefanik v. Hochul*, No. 86, -- N.Y.3d --, 2024 WL 3868644, at *3 (Aug. 20, 2024). And because the Town raises a facial challenge, it "bear[s] 'the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment.'" *Matter of Walt Disney Co. v. Tax Appeals Tribunal*, Nos. 34, 35, -- N.Y.3d --, 2024 WL 1724639, at *4 (Apr. 23, 2024) (quoting *Matter of Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 [2003]). The Town therefore must show "that no set of circumstances exists under which" the NYVRA would be valid. *Id.* (quoting *Matter of Moran*, 99 N.Y.2d at 448).

The Town fails to show beyond a reasonable doubt that every conceivable application of the NYVRA violates either the Equal Protection or Due Process Clauses, the Fifteenth Amendment, or the First Amendment, or the analogous provisions in the New York State Constitution. Accordingly, the Court should reject the Town's constitutional challenges to the NYVRA.[3]



## A. The NYVRA Does Not Violate Equal Protection.

### 1. The NYVRA Does Not Create Any Racial Classification Subject to Strict Scrutiny.

The Fourteenth Amendment of the U.S. Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1, and "[t]he New York Constitution provides for equivalent equal protection safeguards,"

[3] If the Court disagrees and finds that any provision of the NYVRA is unconstitutional, it should strike only that provision because the Legislature has made clear that the statute is severable. *See* Election Law § 17-222 ("If any provision of this title or its application to any person, political subdivision, or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this title which can be given effect without the invalid provision or application, and to this end the provisions of this title are severable.").

*People v. Aviles*, 28 N.Y.3d 497, 502 (2016) (citing N.Y. Const. art. I, § 11). To demonstrate a facial equal protection violation, a plaintiff must identify "a law or policy that expressly classifies persons on the basis of race." *Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000) (citations and internal quotation marks omitted).[4] A law that "disadvantages a suspect class" is subject to strict scrutiny, and survives only if it is narrowly tailored to achieve a compelling government interest. *Aviles*, 28 N.Y.3d at 502; *see also Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206-07 (2023).

The Town's equal protection challenge rests on the mistaken premise that the NYVRA creates an express racial classification. (Town's Mem. of Law at 19.) An express racial classification exists only "when the government distributes burdens or benefits on the basis of individual racial classifications." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *see also, e.g.*, *Rothe Dev., Inc. v. Dep't of Def.*, 836 F.3d 57, 62, 64 (D.C. Cir. 2016); *Spurlock v. Fox*, 716 F.3d 383, 394 (6th Cir. 2013); *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 547 (3d Cir. 2011). But a law that "neither says nor implies that persons are to be treated differently on account of their race" does "*not* embody a racial classification." *Crawford v. Bd. of Educ.*, 458 U.S. 527, 537 (1982) (emphasis added).



The NYVRA does not treat people differently on the basis of race, either in its definitions of liability or its remedial provisions. Rather, the NYVRA protects members of all racial groups from vote dilution and other harms to the elective franchise. As to vote dilution in particular, the statute prohibits "any method of election" that has "the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections,"

[4] While an equal protection violation may also be shown by a facially neutral law applied in a discriminatory manner, or a facially neutral law with disparate impact that was motivated by discriminatory animus, *see Brown*, 221 F.3d at 337, the Town has made no attempt to challenge the NYVRA in either of these ways.

Election Law § 17-206(2), and defines "protected class" as "members of a race, color, or language-minority group," *id.* § 17-204(5). "Language-minority group" is specifically defined as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." *Id.* § 17-204(5-a). In other words, a protected class includes *any* group of people classified by race, color, or American Indian, Asian American, Alaskan Native, or Spanish heritage. Because that broad definition of "protected class" encompasses members of all racial groups, the NYVRA's protections against vote dilution may be invoked equally by voters of any race. Indeed, while the Town makes repeated reference to the NYVRA's purported purpose of protecting "racial minority" groups (*see* Town's Mem. of Law at 16, 19), the NYVRA does not use the term "racial minority," and instead applies to members of any "race . . . group." *See* Election Law § 17-204(5). Thus, the statute's plain text protects all persons, and not just "racial minorities" as the Town erroneously claims.[5] The NYVRA therefore treats members of all racial groups equally and does not trigger strict scrutiny.



Contrary to the Town's argument, the NYVRA does not create an express racial classification merely by referencing race. (*See* Town's Mem. of Law at 19.) In the voting rights context, the U.S. Supreme Court has "made clear that there is a difference 'between being aware of racial considerations and being motivated by them.'" *Allen*, 599 U.S. at 30 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 [1995]). "The former is permissible; the latter is usually not." *Id.*; *see also Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 545 (2015) ("mere awareness of race" does not raise equal protection concerns). Thus, governments "may act with an awareness of race—unaccompanied by a facial racial classification or a

[5] This conclusion is further evidenced by the recent amendments to the statute clarifying that it applies to all persons "who are members of a minimum reporting category that has ever been officially recognized by the United States census bureau." *See supra* note 1.

discriminatory purpose—without thereby subjecting the resultant policies to the rigors of strict constitutional scrutiny." *Rothe Dev., Inc*., 836 F.3d at 72. For example, in *Rothe Development*, the D.C. Circuit upheld a statute creating a program for "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group." *Id.* at 64 (quoting 15 U.S.C. § 637[a][5]). As the court explained, the statute creates no racial classification because it "uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such." *Id.* at 62. Because "a person of any racial or ethnic background may suffer such discrimination," the statute could apply to members of any racial group. *Id*. at 64.

Likewise, antidiscrimination laws that explicitly prohibit discrimination based on protected categories, including race, have long been upheld against equal protection challenges. *See, e.g.*, *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291 (2014) (upholding Michigan constitutional provision prohibiting discrimination on the basis of race); *Cohen v. Brown Univ.*, 101 F.3d 155, 170-72 (1st Cir. 1996) (upholding Title IX, prohibiting discrimination on the basis of sex, against equal protection challenge). As one federal court has explained: "Every anti-discrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect a concern with race. That does not make such enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause." *Raso v. Lago*, 135 F.3d 11, 16 (1st Cir. 1998); *see also Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 839 (Cal. App. 2006), *cert. denied*, 552 U.S. 974 (2007) ("Strict scrutiny . . . does not apply to antidiscrimination laws because . . . they are not racially discriminatory.").

Indeed, Section 2 of the federal Voting Rights Act—on which the NYVRA's vote dilution prohibition is based—has not been subject to strict scrutiny despite explicitly referring to race as

a protected category. Like the NYVRA, Section 2 prohibits voting methods that deny or abridge the right to vote "on account of race or color." 52 U.S.C. § 10301(a). The Town does not dispute that Section 2 is facially constitutional. And while the Town notes (at 21-22) that the text of the NYVRA lacks the "preconditions" for a finding of vote dilution under Section 2—namely, that "a bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group," *Thornburg v. Gingles*, 478 U.S. 30, 48-49 (1986)—those preconditions merely describe the elements of a Section 2 claim as set forth in *Gingles*. *See Allen*, 599 U.S. at 19-22 (applying each *Gingles* element of a vote dilution claim). The Supreme Court has never suggested they are necessary to save the statute from constitutional infirmity. And in any event, the NYVRA's provisions are substantially similar to the *Gingles* preconditions (although the NYVRA treats geographic concentration as a consideration at the remedy stage rather than as an element of a claim). *See* Election Law § 17-206(2)(b)(ii), (c)(viii); *see also Sanchez*, 51 Cal. Rptr. 3d at 843 (state voting rights laws are not unconstitutional merely because they depart from the federal Voting Rights Act, as "[t]here is no rule that a state legislature can never extend civil rights beyond what Congress has provided").



Based on the foregoing clearly established law, it is no surprise that both state and federal courts alike have upheld voting rights statutes in California and Washington—upon which the NYVRA is modeled in part—against facial equal protection challenges on the ground that they do not create any explicit racial classification. *See Higginson v. Becerra*, 786 F. App'x 705 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2807 (2020); *Sanchez*, 51 Cal. Rptr. 3d 821; *Portugal v. Franklin County*, 530 P.3d 994 (Wash. 2023), *cert. denied sub nom. Gimenez v. Franklin County*, 144 S. Ct. 1343 (2024). Like those laws, the NYVRA requires municipalities to consider race only to ensure that members of all racial groups have an equal opportunity to elect candidates of their

choice or otherwise influence elections. *See* Election Law § 17-206(2). Consideration of race in that context does not raise equal protection concerns.

Nor do the NYVRA's remedial provisions create any express racial classification. The NYVRA provides that upon finding vote dilution, a court must "implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process." Election Law § 17-206(5)(a). The NYVRA affords courts numerous remedial options to consider. *See id.* The remedy that plaintiff seeks in this action—and the one alleged by the Town to violate equal protection—is that the Town switch from at-large elections to a district-based system. *See id*. § 17-206(5)(a)(i). A district-based method of election is no more an express racial classification than an at-large method of election. And the process of drawing district lines as a remedy for race-based vote dilution does not trigger strict scrutiny merely because the municipality is aware of racial considerations. "That is because redistricting legislatures will almost always be aware of racial demographics, but such race consciousness does not lead inevitably to impermissible race discrimination." *Allen*, 599 U.S. at 30 (cleaned up).



Under federal precedent, district boundaries are subject to strict scrutiny only when racial considerations predominate above other criteria in the mapmaker's considerations. *See Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1234 (2024). But no provision of the NYVRA requires districts to be drawn using race as a predominant factor. Instead, the NYVRA allows the development of a remedial map based on traditional, race-neutral districting criteria, such as compactness and contiguity. *See id*. And the statute certainly does not "automatically provide[] minority voters with an electoral advantage," as the Town asserts (at 23). *Cf. Bartlett v. Strickland*, 556 U.S. 1, 20 (2009) (declining to interpret the federal Voting Rights Act as "guarantee[ing] minority voters an electoral advantage"). Like Section 2 of the federal Voting Rights Act, the

NYVRA requires only that the electoral process be equally open to members of all racial groups. *See Wisconsin Legislature v. Wisconsin Elections Comm'n*, 595 U.S. 398, 402 (2022); Election Law § 17-200. Just as Section 2 of the federal Voting Rights Act comports with the Equal Protection Clause, so does the NYVRA.

At most, a racial gerrymandering claim could be brought as an as-applied challenge to specific district boundaries imposed as a remedy in a NYVRA action. Federal courts routinely adjudicate such challenges, analyzing whether racial considerations predominated in the drawing of district boundaries, and, if so, whether those boundaries satisfy strict scrutiny. *See, e.g.*, *Wisconsin Legislature*, 595 U.S. at 401-03; *Abbott v. Perez*, 585 U.S. 579 (2018); *Cooper v. Harris*, 581 U.S. 285 (2017). But the NYVRA does not require any court to impose racially gerrymandered districts, and on its face, the statute is not subject to strict scrutiny merely because it could hypothetically be applied in an unconstitutional way. *See Matter of Moran*, 99 N.Y.2d at 448; *Portugal*, 530 P.3d at 1012; *Sanchez*, 51 Cal. Rptr. 3d at 843-44. Moreover, no as-applied challenge is ripe here because no party in this case has yet drawn any district boundaries for a court-imposed remedy. *See Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015) ("A racial gerrymandering claim, however, applies to the boundaries of individual districts."). Accordingly, the Town's reliance on the hypothetical risk of future racial gerrymandering—which has not yet occurred and may never occur—is not a basis on which to conclude that the Town has carried its heavy burden to establish beyond a reasonable doubt that the NYVRA violates the Equal Protection Clause. *See Matter of Kowal*, 216 A.D.3d at 1473-74.[6]



[6] If the Court rules that strict scrutiny applies, we would request an opportunity to develop a record to show that the statute satisfies that standard.

**2. The NYVRA Satisfies Rational Basis Review.**

In the absence of any express racial classification, the NYVRA is subject only to rational basis review. *See, e.g.*, *Aviles*, 28 N.Y.3d at 502-03; *Cassata v. State*, 115 A.D.3d 1209, 1210 (4th Dep't), *appeal dismissed*, 23 N.Y.3d 1005 (2014). Rational basis review "is a paradigm of judicial restraint." *Cassata*, 115 A.D.3d at 1210 (quoting *Affronti v. Croson*, 95 N.Y.2d 713, 719 [2001]). To satisfy this standard, a statute "need only be rationally related to a legitimate governmental purpose." *Aviles*, 28 N.Y.3d at 502. The Town does not, and cannot, show that the NYVRA fails to meet this minimal standard.

The NYVRA's prohibition against vote dilution rationally advances the Legislature's aim of eliminating discriminatory conditions in elections. As reflected in the NYVRA's legislative history, the Legislature determined that "New York has an extensive history of discrimination . . . in voting," and further, that "vote dilution remains prevalent." Sponsor's Mem., Bill Jacket, L. 2022, ch. 226 (Kiernan Aff. Ex. A), at 2. The public record bears this out. *See, e.g.*, *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021) (affirming trial court decision following bench trial that East Ramapo Central School District's at-large system of elections unlawfully diluted the votes of Black and Latino residents); *Flores v. Town of Islip*, No. 18-cv-3549, 2020 WL 6060982 (E.D.N.Y. Oct. 14, 2020) (consent decree requiring change of electoral system in case alleging that the Town of Islip's at-large electoral system unlawfully diluted the votes of Hispanic and Latino residents); *United States v. Village of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010) (requiring Village of Port Chester to remedy unlawfully dilutive at-large electoral system). The NYVRA's prohibition against vote dilution is a rational means of remedying such discrimination, and the Town does not contend otherwise. *See Sanchez*, 51 Cal. Rptr. 3d at 837-38 (holding that California's voting rights act "readily passes" rational basis review because "[c]uring

vote dilution is a legitimate government interest and the creation of a private right of action [to remedy vote dilution] is rationally related to it"); *Portugal*, 530 P.3d at 1011 (holding similarly with respect to Washington's voting rights act).

In sum, the NYVRA is not subject to strict scrutiny because it does not treat people differently based on race. Rather, it protects voters of all racial groups from vote dilution. And the statute easily satisfies the rational basis test because it rationally advances the Legislature's interest in remedying racial discrimination in voting. Thus, the Town has failed to show beyond a reasonable doubt that, in all its applications, the NYVRA violates the Equal Protection Clause, as it must to obtain a declaration striking down the statute on its face.



**B. The NYVRA Does Not Violate the Fifteenth Amendment.**

The Town fails to explain how the NYVRA facially violates the Fifteenth Amendment, which provides that the right to vote shall not be denied or abridged on account of race or color. U.S. Const. amend. XV, § 1. The NYVRA places no discriminatory restrictions on voting. *See South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (explaining that the Fifteenth Amendment "invalidate[s] state voting qualifications or procedures which are discriminatory on their face or in practice"); *Davis v. Guam*, 932 F.3d 822, 832, 843 (9th Cir. 2019) (finding Fifteenth Amendment violation based on race-based qualification to vote in plebiscite). Nor does it require municipalities to engage in discriminatory vote dilution. *See Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (racial gerrymandering violated Fifteenth Amendment); *Perkins v. City of W. Helena*, 675 F.2d 201, 205 (8th Cir.), *aff'd*, 459 U.S. 801 (1982). To the contrary, the NYVRA expressly prohibits race-based vote dilution. Far from violating the Fifteenth Amendment, the NYVRA therefore furthers its purpose of preventing racial discrimination in voting. Federal courts have repeatedly upheld Section 2 of the federal Voting Rights Act against Fifteenth Amendment

challenges on this ground. *See, e.g.*, *United States v. Blaine County*, 363 F.3d 897, 905 & n. 7 (9th Cir. 2004) (collecting cases). Moreover, a Fifteenth Amendment violation requires a showing of intentional discrimination based on race, *see City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980), and the Town makes no such showing here. Thus, the Town has failed to establish a Fifteenth Amendment violation.

**C. The NYVRA Does Not Violate the First Amendment.**

The Town also fails to explain how, in complying with the NYVRA, it is forced to violate its citizens' free speech rights under the First Amendment. *See* U.S. Const. amend. I. Preliminarily, the Town cites no authority for the proposition that voters have a First Amendment right to a particular method of voting, *i.e.*, at-large rather than district-based elections. And the Town fails to show that the NYVRA has any chilling effect on voters' speech. The Town argues that the NYVRA has "the effect of coercing voters, particularly those in the racial majority, to vote in a way that avoids racially polarized voting" in order to avoid liability under the NYVRA. (Town's Mem. of Law at 25.) But the NYVRA does not prohibit racially polarized voting. Racially polarized voting is merely an element of a vote dilution claim. *See* Election Law § 17-206(2)(b). And the Town's suggestion that concerns about liability under the NYVRA would cause voters to refrain from voting for their preferred candidates is purely speculative. Notably, racially polarized voting is also an element of a vote dilution claim under Section 2 of the federal Voting Rights Act, *see Allen*, 599 U.S. at 19, and the U.S. Supreme Court has not found that element to exert a chilling effect based on speculative and unsupported assertions about its influence on voter behavior. Section 2 has been federal law since 1965 and no court has ever held that it violates the First Amendment. The Town's First Amendment challenge therefore fails.

**D. The NYVRA Does Not Violate Due Process.**

The Town's procedural due process challenge likewise fails. To make out a federal or state due process violation, a party must show the deprivation of a protected liberty or property interest without constitutionally sufficient procedure. *See Bangs v. Smith*, 84 F.4th 87, 97 (2d Cir. 2023); *State v. Farnsworth*, 75 A.D.3d 14, 20 (4th Dep't), *appeal dismissed*, 15 N.Y.3d 848 (2010). The Town fails to show that the NYVRA deprives voters of any protected liberty or property interest. Again, the Town cites no authority for the proposition that voters have a protected interest in a particular method of election, whether at-large or by district. Nor does the NYVRA prevent voters from voting for their candidate of choice, as the Town conclusorily asserts. (Town's Mem. of Law at 26.) And to the extent the Town argues (at 27) that it cannot defend itself against a NYVRA claim because of evidentiary limitations, it lacks capacity to assert such a claim on its own behalf for the reasons explained above. *See City of New York*, 86 N.Y.2d at 289, 291-92; *supra* p. 11.



**E. The NYVRA Does Not Violate the Separation-of-Powers Doctrine.**

Finally, the Town's separation-of-powers challenge is meritless. While the Legislature "cannot pass on its law-making functions to other bodies," it may "constitutionally confer discretion upon an administrative agency" so long as the Legislature "limits the field in which that discretion is to operate and provides standards to govern its exercise." *Matter of Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976). A statute delegating authority to an entity within the executive branch will be upheld so long as it "is not so vague and indefinite as to set no standard or to outline no policy." *Id*. at 516; *see also Matter of Stevens v. New York State Div. of Criminal Justice Servs.*, 40 N.Y.3d 505, 517 (2023).

The NYVRA easily meets this standard. In enacting the NYVRA, the Legislature made the policy determination to prohibit vote dilution. *See* Election Law § 17-206(2). It is the responsibility of the executive branch—including the Attorney General—to implement that policy. *See Matter*

*of LeadingAge New York, Inc. v. Shah*, 32 N.Y.3d 249, 259 (2018). Accordingly, the NYVRA properly authorizes the Attorney General to enforce the statutory prohibition against vote dilution. *See* Election Law §§ 17-206(4), 17-214. The statute also properly authorizes the Civil Rights Bureau of the Office of the Attorney General to approve or deny remedies for vote dilution proposed by a political subdivision, *id.* § 17-206(7)(c)(iii), and sets standards guiding the Civil Rights Bureau in the exercise of this authority, *id.* § 17-206(7)(c)(iv). Importantly, the statute does not allow the Civil Rights Bureau to "override the decisions made and statutes enacted by elected officials regarding voting," as the Town argues. (Town's Mem. of Law at 28.) The statute provides that if the Civil Rights Bureau denies approval of a proposed remedy, it may "make recommendations for an alternative remedy for which it would grant approval." Election Law § 17-206(7)(c)(vii). No provision in the statute empowers the Attorney General to force a political subdivision to pursue or submit a proposed electoral remedy, or, in denying a remedy that has been proposed, impose an alternative remedy against the will of the political subdivision. Thus, the Town has not shown that it is entitled to a declaration striking down the NYVRA as facially unconstitutional.

## CONCLUSION

The Court should deny defendant's cross-motion for summary judgment and reject defendant's constitutional challenges to the NYVRA.

Dated: Albany, New York
September 27, 2024

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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, according to the word-count feature of the word-processing program used to prepare this memorandum, this memorandum of law contains 7,470 words.

BEEZLY J. KIERNAN