Exhibit A

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, - against – TOWN OF NEWBURGH and TOWN BOARD OF THE TOWN OF NEWBURGH, Defendants.	Index No. EF002460-2024 Hon. Maria S. Vazquez-Doles Mot. Seq. 1

MEMORANDUM OF LAW OF *AMICUS CURIAE* ATTORNEY GENERAL OF THE STATE OF NEW YORK IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT AND INTERESTS OF AMICUS CURIAE

The New York State Attorney General submits this memorandum of law as *amicus curiae* in opposition to the motion to dismiss filed by defendants, Town of Newburgh and Town Board of the Town of Newburgh. Plaintiffs are Newburgh residents who allege that the Town's at-large voting system for municipal elections prevents Black and Hispanic voters from electing candidates of their choice to the Town Board in violation of the John R. Lewis Voting Rights Act of New York ("NYVRA"). Defendants contend that plaintiffs filed this suit prematurely because the Town is entitled to the benefit of a 90-day safe harbor from litigation pursuant to Section 17-206(7)(b) of the NYVRA. The Attorney General submits this brief to explain why defendants' interpretation of the NYVRA is incorrect and why the motion to dismiss should therefore be denied.

The NYVRA is aimed at ensuring that "eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York, and especially to exercise the elective franchise." Election Law § 17-200(2). To that end, the statute authorizes the Attorney General and certain private parties, such as voters, to bring judicial actions against political subdivisions, such as counties, cities, towns, and villages, that have electoral schemes with discriminatory effects, so that courts may impose judicial remedies. *Id*. § 17-206. The Attorney General therefore has a strong interest in the proper interpretation and application of the statute. Further, consistent with the Attorney General's important role in defending access to the elective franchise for New York voters, the Attorney General is interested in ensuring that the NYVRA's safe harbor provisions are not erroneously construed in a manner that would frustrate the statutory aim of ensuring that unlawful conditions in voting and elections are remedied expeditiously.

BACKGROUND

A. Statutory Background

The NYVRA contains detailed pre-suit provisions aimed at affording political subdivisions the opportunity to "make necessary amendments to proposed election changes without needing to litigate in court." Senate Mem. in Support of Bill No. S1046-E (2021-22) (NYSCEF Doc. No 20 at 8). Prior to filing suit, a prospective plaintiff must provide written notice of a potential NYVRA violation to the political subdivision. Election Law § 17-206(7). The political subdivision then has 50 days from the mailing of the notification letter to consider the matter and determine whether to pursue a remedy for a potential violation, during which time the statute prohibits the prospective plaintiff from filing suit. *Id*. § 17-206(7)(a).

If the political subdivision decides within these 50 days to voluntarily enact and implement a remedy for the potential violation alleged in the notice, the statute provides an additional 90-day safe harbor from litigation. *Id.* § 17-206(a)(7)(b). To receive the protection of this separate safe harbor, a political subdivision must pass a resolution within the initial 50-day period that "affirm[s]": (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*.

During this 90-day period, the political subdivision would then "enact and implement such remedy" proposed in the resolution. *Id.* § 17-206(7)(b). In certain circumstances, such as if the political subdivision lacks authority to unilaterally enact and implement the "remedy identified in [the] resolution," it may submit a proposed remedy to the Attorney General for her review, who can then, upon approval, order the remedy into effect. *Id.* § 17-206(7)(c). The parties may agree to

extend the 90-day period by an additional 90 days, for a total of 180 days. *Id*. § 17-206(7)(d). However, any such agreement must "include a requirement that either the political subdivision shall enact and implement a remedy that complies with this title" or submit a proposal to the Attorney General. *Id.*

The safe harbor provisions do not apply if (i) the time for designating petitions for the political subdivision's next regular election to select members of its governing board has begun or is scheduled to begin within 30 days, or (ii) a political subdivision is scheduled to conduct an election within 120 days. *Id.* § 17-206(7)(f). In such circumstances, plaintiffs may file suit in court, so long as they also seek preliminary relief for the upcoming election and submit a notification letter concurrently. *Id.*

B. This Lawsuit

According to the complaint and attached exhibits, plaintiffs sent a letter to the Newburgh Town Clerk on January 26, 2024, alleging that the Town's at-large method of electing Town Board members, combined with the presence of racially polarized voting in the Town, operated to dilute the votes of Black and Hispanic voters, who have been systematically prevented from electing preferred candidates for the Town Board. (NYSCEF Doc. No. 2.)

On March 15, 2024, 49 days after the date of the notification letter, Newburgh's Town Board passed a resolution directing town officials to work with legal counsel and retained experts "to determine whether any violation of the NYVRA may exist and to evaluate potential alternatives to bring the election system into compliance with the NYVRA should a potential violation be determined to exist." (NYSCEF Doc. No. 3 § 1.) The resolution directed that the findings of such review be reported to the Town Board within 30 days, and provided that, "if, after considering the findings and evaluation and any other information that may become available to the Town . . ., the

Town Board concludes that there may be a violation of the NYVRA, the Town Board affirms that the Town intends to enact and implement the appropriate remedy(ies)." (*Id*. § 2.) The resolution did not propose any specific remedy, but instead stated that, if the Town Board determined a potential violation of the NYVRA may exist, it would direct a proposal of remedies to be prepared within 10 days, with public hearings to follow. (*Id.* §§ 3-4.)

On March 26, 2024, plaintiffs filed this action. (NYSCEF Doc. No. 1.) On April 8, the Town Board responded by adopting a new resolution which (i) suspended the schedule set forth in the March 15 resolution; and (ii) provided that the Town's evaluation of the potential NYVRA violation would recommence only if this Court dismisses plaintiffs' suit. *See Resolution of The Town Board of The Town of Newburgh Pertaining to New York State Election Law 17-206 and Commencement of Litigation* (Apr. 8, 2024). On April 16, defendants filed the instant motion to dismiss. (Mot. Seq. No. 1.)

ARGUMENT

I. The March 15 Resolution Does Not Satisfy the Statutory Requirements For a 90-Day Safe Harbor.

As explained above, the NYVRA affords every political subdivision a mandatory 50-day safe harbor from litigation upon receipt of a pre-suit notification letter. Election Law § 17-206(a). The purpose of this 50-day period is to allow a political subdivision to investigate the allegations, assess whether there is a potential violation, and if so, determine whether to voluntarily remedy the potential violation or face litigation.

The purpose of the NYVRA's separate 90-day safe harbor is different: it gives a political subdivision that has confirmed a potential violation time to implement a remedy without fear of litigation. *Id*. § 17-206(7)(b). Accordingly, a political subdivision receives the benefit of the 90-day safe harbor only if it enacts a resolution that "affirm[s]" its "intention to enact and implement

a remedy for a potential violation of this title" and details "specific steps the political subdivision will undertake to facilitate approval and implementation" and a "schedule for enacting and implementing" such a remedy. *Id*. § 17-206(7)(b).

Newburgh's March 15 resolution mistakenly treats the 90-day safe harbor as a routine extension of the 50-day safe harbor. In so doing, the resolution fails to meet the requirements of Section 17-206(7)(b) in at least two respects: (i) the resolution does not meaningfully affirm that Newburgh actually intends to enact and implement a remedy; and (ii) the resolution does not propose any specific remedy.[1]

First, the March 15 resolution commits the Town only to a "review and investigation of the current at-large election system . . . to determine whether any potential violation of the NYVRA may exist and to evaluate potential alternatives . . . should a potential violation be determined to exist." (NYSCEF Doc. No. 3 at § 1.) The resolution makes no effort to explain why the Town failed to conduct this review and investigation in the initial 50-day safe harbor. In any event, a commitment to "review and investigat[e]" is not a resolution "to enact and implement a remedy." *See* Election Law § 17-206(7)(b). Indeed, the statute makes no reference to "investigating" a remedy in detailing the required elements of a resolution. "The absence of this word" or similar ones must be considered "meaningful and intentional[,] as . . . the failure of the legislature to include a term in a statute is a significant indication that its exclusion was intended." *Commonwealth of N. Mariana Islands v. Canadian Imperial Bank of Com.*, 21 N.Y.3d 55, 60 (2013); *see also* Stat. Law § 74.

[1] The Attorney General takes no position on whether the March 15 resolution was "void and of no effect" because it allegedly "was not duly adopted at a duly called meeting of the Town Board." (Compl. ¶ 63.)

It is immaterial that the resolution separately states that the Town "intends to enact and implement the appropriate remedy(ies)" on condition that the Town Board later "concludes that there may be a violation of the NYVRA." (NYSCEF Doc. No. 3 at § 2.) An "intention" to take an action only upon the hypothetical contingency that the actor later decides after further deliberations that the action is warranted is not an "intention" to take any action at all. *Cf. People v. Alexander*, No. 03-28035, 2003 WL 21169075, at *5 (Poughkeepsie City Ct. May 12, 2003). *Alexander*, for example, concerned the proper interpretation of Criminal Procedure Law § 710.30, which requires a prosecutor to give pretrial notice of intent to use a defendant's statement in order to admit the statement into evidence. The court held that the statute does not apply when a prosecutor merely says that he intends to use the statement for impeachment purposes, because that intent "is really no more than an expression of contingency, at best an illusory promise, vastly different than a prosecutor's stated intent to use a particular statement as evidence in chief," as CPL § 710.30 requires. *Id.* The NYVRA's plain language likewise unambiguously requires that the political subdivision's intention to enact and implement a remedy, as reflected in the resolution, be meaningful, and not so conditional as to be entirely illusory, for the political subdivision to receive the benefit of the 90-day safe harbor. *See* Election Law § 17-206(7)(b), (c).

Second, the March 15 resolution fails to identify with any specificity the remedy that the Town intends to enact and implement to address the NYVRA violation alleged in the notification letter. Instead, the resolution commits only to "evaluat[ing] potential alternatives to bring the election system into compliance with the NYVRA should a potential violation be determined to exist." (NYSCEF Doc. No. 3 § 1.) While the resolution provides that the Town will "enact and implement the appropriate remedy(ies)" upon the finding of a violation (*id.* § 3) and makes a passing reference to "the composition of proposed new election districts" as a potential remedy

(*id.* § 4), the resolution does not explain the "specific steps" or "schedule" that would be used to implement that remedy or any other alternative, as required by Election Law § 17-206(7)(b)(ii) and (iii). And, as noted above, the selection of any remedy is itself contingent on a speculative future finding of a potential violation by the Town Board.

Contrary to defendants' argument (NYSCEF Doc. No. 9 at 13–14), the NYVRA requires a political subdivision to set forth "specific steps" and a "schedule for enacting and implementing" a *particular* remedy to receive the benefit of the 90-day safe harbor. Election Law § 17-206(7)(b)(ii), (iii); *see also id.* § 17-206(7)(c) (addressing the political subdivision's "enact[ment] or implement[ation] [of] *a remedy identified in* [the] resolution" during the 90-day safe harbor or the submission of a remedy to the Attorney General) (emphasis added). Requiring such specificity makes sense because different remedies require different steps and timetables. For example, the process of designating new poll sites is dramatically different from the process for increasing the number of representatives within a governing body. *See id*. § 17-206(5)(a) (listing remedial options). It would be illogical for the Legislature to require political subdivisions to detail "specific steps" and a "schedule" without also identifying the specific remedy that will be achieved at the end of the process. In other words, a political subdivision cannot comply with the statutory requirements for a resolution by merely invoking the term "remedy"; the subdivision must instead propose a specific remedy if it wishes to retain the benefit of the 90-day safe harbor. And, of course, the requirement that the subdivision must identify a specific remedy and specific steps to be taken toward that remedy would make no sense if the subdivision were not required to affirm its intent to provide a remedy in the first place.

II. Defendants' Interpretation of the Safe Harbor Subverts the Purposes of the NYVRA.

The NYVRA's safe harbor provisions strike a careful balance between the political subdivision's interest in investigating and remedying a potential violation outside of litigation and the prospective plaintiff's interest, as well as the broader public interest, in a speedy resolution of a potential denial or abridgment of a fundamental right. To that end, every political subdivision has 50 days after a notification letter to decide whether and how to remedy a potential NYVRA violation. However, any subsequent delay in judicial proceedings can happen only if the political subdivision meaningfully commits itself to pursuing the enactment and implementation of a specific remedy. Without reasonable assurance that a remedy for the NYVRA violation *will in fact* be enacted and implemented, the additional 90-day safe harbor risks causing unjustifiable delays in judicial remedies, even when time is of the essence. Such an interpretation would be inconsistent with the NYVRA's remedial purposes and would undermine the statute's operation.

First, adopting defendants' interpretation of the NYVRA would incentivize routine delay in voting rights cases, both by political divisions seeking to delay relief in bad faith and political subdivisions that intend, in good faith, to investigate potential violations after the initial 50-day safe harbor. Political subdivisions acting entirely in good faith may pass resolutions, like the one at issue here, that commit to no more than further investigation and consideration, even if their review and deliberations during the first 50 days have not yet progressed to the point that the political subdivision has decided it is, in fact, likely to pursue a remedy. If such resolutions were deemed sufficient, it would transform the 90-day safe harbor from a benefit provided to political subdivisions only when there is reasonable assurance of a voluntary remedy to an almost automatic entitlement irrespective of the existence of such reasonable assurance. The routine delays created by this outcome would be utterly at odds with the NYVRA's mandate for expedited judicial

proceedings. *See* Election Law § 17-216; *Bank of Am., N.A. v. Kessler*, 39 N.Y.3d 317, 325 (2023) (statutory construction "must . . . harmonize[] all [of a statute's] interlocking provisions").

To be sure, it may take time for certain political subdivisions to investigate alleged violations and determine whether to implement a voluntary remedy or litigate. But the same is true for any litigant facing a lawsuit. Indeed, the Legislature gave favorable treatment to political subdivisions by granting them a 50-day window *not* afforded to other litigants to resolve disputes on a voluntary basis. If the Legislature had intended to give political subdivisions more than 50 days to complete this process, it could have readily done so. And if the Legislature intended for both the 50-day and the 90-day safe harbors to serve the same purpose, it could have created a single 140-day safe harbor. Political subdivisions and courts should honor the Legislature's determination to treat the safe harbors as distinct periods serving different purposes.[2]

Second, the possibility that a political subdivision might use such a resolution to obtain delay without ultimately enacting a remedy is not speculative. Last year, for example, the Town of Mount Pleasant passed a resolution substantially similar to Newburgh's, stating in almost identical terms that Mount Pleasant's Town Board intended to use the 90-day extension to the initial 50-day stay to "review and investigate" Mount Pleasant's electoral system, and "*[i]f*, after [the review], the Town concludes that there may be a violation of the NYVRA, the Town intends to enact and implement" some unspecified "appropriate remedy(ies)." (NYSCEF Doc. No. 3 in *Serratto v. Town of Mount Pleasant*, Index No. 55442/2024 (Sup. Ct., Westchester Cnty.) (emphasis added).). After Mount Pleasant passed the resolution, no lawsuit was filed for more than 90 days. Yet, Mount

[2] If a political subdivision is interested in pursuing a remedy voluntarily but requires more than 50 days to reach that decision, it may enact and implement a remedy during the pendency of a subsequent lawsuit, either unilaterally, which may moot the lawsuit, or as a settlement with the plaintiffs. Thus, faithfully applying the Legislature's safe harbor scheme would not operate to impose any unfair hardship upon political subdivisions acting in good faith.

Pleasant never enacted and implemented a voluntary remedy during that time, leading the prospective plaintiffs to sue after having been delayed in their pursuit of a judicial remedy for months. (*See* NYSCEF Doc. No. 1 in *Serratto*.) And after the lawsuit was filed, Mount Pleasant asserted the position that it need not comply with the NYVRA on the purported basis that the statute was unconstitutional, delaying any relief further and potentially calling into question whether a voluntary remedy was ever likely. (*See* NYSCEF Doc. Nos. 8, 9 in *Serratto*.) The March 15 resolution offers no protection against Newburgh's decision to engage in similar tactics, and its April 8 resolution strongly indicates a lack of desire to resolve the issues raised in plaintiffs' notification letter expeditiously.

Third, routine 90-day delays in NYVRA lawsuits would undermine the imposition of timely judicial remedies in cases where discriminatory barriers must be quickly addressed before upcoming elections. *Cf., e.g.*, *Flores v. Town of Islip*, 382 F. Supp. 3d 197, 247 (E.D.N.Y. 2019) (in challenge to town's method of elections, denying motion for preliminary injunction because there was "simply not enough time" to implement a remedy "in time for the upcoming elections" that were "less than six months away"). And, given this delay, voters may be forced to vote in electoral systems later deemed illegal. *Cf., e.g.*, *Flores v. Town of Islip*, No. 18-CV-3549, 2020 WL 6060982, at *4 (E.D.N.Y. Oct. 14, 2020) (following denial of preliminary relief close to election, court approved post-election consent decree reflecting voting rights violation admission).

Although Election Law § 17-206(7)(f) allows plaintiffs to file suits without regard for the safe harbor in certain circumstances (see *supra* at 3), this exception does not adequately address the risk posed by misuse of resolutions. Even if certain remedies can be judicially implemented in close proximity to an election, as Section 17-206(7)(f) contemplates, that is not likely to always be so, and routine 90-day delays in NYVRA litigation may have the effect of pushing some

remedies past the point of feasibility. The NYVRA, like all "statutes . . . related to the elective franchise," must "be construed liberally in favor of . . . ensuring that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process in registering to vote and voting." Election Law § 17-202. Any interpretation of the statute's safe harbor provisions that would increase the risk of unremedied discriminatory conditions in elections would be violative of this interpretive mandate.

CONCLUSION

The Court should deny the motion to dismiss.

Dated: April 30, 2024
New York, New York

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CERTIFICATION

In accordance with Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court, I hereby certify that the Memorandum of Law of *Amicus Curiae* Attorney General of the State of New York in Opposition to Defendants' Motion to Dismiss contains 3,336 words, exclusive of caption, cover page, and signature block, as established using the word count function of Microsoft Word.

/s/ Derek Borchardt
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