SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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

Index No. EF002460-2024

Plaintiffs,

(Mot. Seq. 001)

-against-

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

Defendants.

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REPLY IN SUPPORT OF DEFENDANTS TOWN OF NEWBURGH AND TOWN BOARD OF THE TOWN OF NEWBURGH'S MOTION TO DISMISS THE COMPLAINT

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Defendants Town of Newburgh (the "Town") and Town Board of the Town of Newburgh (the "Town Board"), by and through their undersigned counsel, pursuant to CPLR 3211(a)(1) and 3211(a)(7), respectfully submit this Reply in support of their Motion to Dismiss the Complaint filed by Plaintiffs Oral Clarke, Romance Reed, Grace Perez, Peter Ramon, Ernest Tirado, and Dorothy Flournoy (collectively, "Plaintiffs").

PRELIMINARY STATEMENT

This lawsuit is an unlawful attempt to undermine the 90-day safe harbor from litigation provided to localities under the John R. Lewis Voting Rights Act of New York ("NYVRA"), applicable when those localities have adopted a resolution affirming their intention to remedy a potential NYVRA violation. That is precisely what the Town Board did here. After receiving Plaintiffs' NYVRA notification letter, the Town Board adopted a Resolution that affirmed its intent to remedy any potential violation, identified specific steps for facilitating a remedy if any violation actually occurred, and set forth a schedule for enacting and implementing a remedy. Plaintiffs' primary response is to read into the NYVRA a nonsensical provision found nowhere in the statutory text: that the NYVRA mandates that a locality pre-commit to changing its election system *even if it determines, after expert study, that the system is entirely lawful*. Because nothing in the NYVRA supports such an absurd reading of the statutory text, and given that Plaintiffs' remaining arguments are similarly meritless, this Court should dismiss the Complaint.

ARGUMENT

A. As Defendants explained in their Motion, Plaintiffs filed their lawsuit in violation of the NYVRA's 90-day safe harbor provision. Dkt.9 ("Op.Br.") at 9–13. The Town Board passed a NYVRA Resolution within the statutorily prescribed time period, and that Resolution contained each of the three elements necessary to entitle the Town to a 90-day safe harbor from litigation.

Id. First, the Resolution "affirm[s]" the Town Board's "intention to enact and implement a remedy for a potential violation of" the NYVRA. N.Y. Elec. Law § 17-206(7)(b)(i); *see* Op.Br.10–11. Second, the Resolution details the "specific steps" that the Town Board "will undertake to facilitate approval and implementation of such a remedy." N.Y. Elec. Law § 17-206(7)(b)(ii); *see* Op.Br.11. Finally, the Resolution provides a "schedule for enacting and implementing . . . a remedy," N.Y. Elec. Law § 17-206(7)(b)(iii), requiring that the NYVRA Proposal be presented to the Town Board within 10 days of the Town Board's finding that there may be a NYVRA violation, that the Town Board conduct public hearings and amend the Proposal based on public input within 30 days of that presentation, and that the Town Board approve the NYVRA Proposal and submit it to the State Attorney General within 90 days of the issuance of the Resolution. Op.Br.11–12. The NYVRA thus prohibited Plaintiffs from filing this lawsuit until the end of the 90-day statutory safe-harbor period. *See* N.Y. Elec. Law § 17-206(7)(b). They instead filed this action just 11 days after the Town Board adopted the Resolution, requiring dismissal of their lawsuit. *See* Op.Br.9–15.

B. Plaintiffs make a series of counterarguments, each of which is meritless.

First, Plaintiffs' primary argument is that the Resolution is insufficient because it "does not declare the Town's intention to enact and implement a remedy," Dkt.18 ("Resp.Br.") at 10, but Plaintiffs are legally wrong. The NYVRA requires that the resolution affirm "the political subdivision's intention to enact and implement a remedy for a *potential* violation of this title." N.Y. Elec. Law § 17-206(7)(b)(i) (emphasis added). The Resolution here complies with that requirement by expressly stating that the Town Board "intends to proactively review the Town's current at-large election system . . . and implement remedies for any potential violation of the NYVRA that may exist," Compl. Ex. B at 2, and "affirm[ing] that the Town intends to enact and implement the appropriate remed[ies]" if "the Town Board concludes that there may be a violation

of the NYVRA," Compl. Ex. B § 2. These statements fully accord with Section 17-206(7)(b)(i)'s plain text—indeed, the Resolution uses the same language as the NYVRA. *See* Op.Br.9–13.

Plaintiffs' position appears to be that the Resolution is insufficient because the Board did not affirm that it would enact a remedy *even if the Board's retained experts conclude that there is no NYVRA violation to remedy at all*, but that is atextual and nonsensical. It is atextual, first, because the statute requires only that a political subdivision's affirmation of intent be related to a "remedy for a *potential* violation." *Id.* § 17-206(7)(b)(i) (emphasis added). The meaning of "potential" is "possible if the necessary conditions exist." *Potential*, Black's Law Dictionary (11th ed. 2019). Thus, the NYVRA only requires that a Town Board affirm its intent to implement a remedy "if the necessary conditions exist," *id.*, that is, only if the Town Board determines that the current election system is *actually* unlawful. So, it is plainly appropriate for the Resolution to premise the Town Board's intention to launch the remedial process on the outcome of its initial investigation. *See* N.Y. Elec. Law § 17-206(7)(b)(i). The rest of the NYVRA's provisions confirm that a NYVRA resolution need not definitively "commit[ ]" to remedying an alleged NYVRA violation to trigger the 90-day safe-harbor period. *Contra* Resp.Br.8, 10. The statute's provision relating to extending the statutory safe-harbor period conclusively demonstrates that there is no such requirement when a political subdivision first undertakes to adopt a NYVRA resolution. *See* N.Y. Elec. Law § 17-206(7)(d). Section 17-206(7)(d) permits a "political subdivision that has passed a NYVRA resolution [to] enter into an agreement with the prospective plaintiff providing that" the plaintiff will not commence litigation "for an additional ninety days" beyond the initial 90-day safe harbor, but only so long as the agreement "***include[s] a requirement*** that either the political subdivision ***shall*** enact and implement a remedy . . . or the political subdivision ***shall*** pass a NYVRA proposal and submit it to the civil rights bureau." *Id.* (emphases added). Put another

way, a political subdivision is only "require[d]" to enact and implement a remedy for an alleged NYVRA resolution to avoid litigation for an "additional" 90 days. *Id.*[1] Accordingly, Plaintiffs' argument—echoed by the Attorney General in her *amicus* brief—that a NYVRA resolution must contain some "assurance" that the locality "*will in fact*" enact and implement a remedy, *see* Dkt.24 ("Amicus Br.") at 8, is meritless.

Plaintiffs' effort to rewrite the NYVRA as requiring political subdivisions to pre-commit to remedying an alleged violation, even before the subdivision has decided whether the prospective plaintiff's allegations are meritorious, is unreasonable. *See Ruttenberg v. Davidge Data Sys. Corp.*, 626 N.Y.S.2d 174, 177 (1995) (courts should avoid "unreasonable interpretation[s]" of contracts (citation omitted)). Their interpretation would, if adopted, require political subdivisions to obtain counsel and other experts, analyze the factual and legal validity of a prospective plaintiff's alleged NYVRA violation(s), determine whether a violation may exist, decide whether the political subdivision plans to remedy the alleged violation, evaluate the potential remedies available, decide on a remedy, and adopt a NYVRA resolution—all in under 50 days. *See* N.Y. Elec. Law § 17-206(7)(b) (giving political subdivisions 50 days from the date on which the NYVRA notification letter is mailed to pass a NYVRA resolution). Plaintiffs' unreasonable reading of the NYVRA

[1] The Town's interpretation of Section 17-206(7) is also perfectly consistent with the NYVRA's expedited procedure provisions. *Contra* Resp.Br.9 (citing N.Y. Elec. Law § 17-216). The NYVRA allows a prospective plaintiff to avoid the 90-day statutory safe harbor in certain limited situations not applicable here, such as where an election is scheduled to occur within the next 120 days. *See* N.Y. Elec. Law § 17-206(7)(f). Relatedly, the statute provides for expedited judicial proceedings where a plaintiff properly "seeks preliminary relief with respect to an upcoming election." *Id.* § 17-216. But in this case, Plaintiffs were statutorily required to wait until the end of the 90-day safe-harbor period to challenge the Town's response to their alleged NYVRA violation. *See id.* § 17-206(7)(b). The Attorney General's argument that adopting the Town's interpretation of Section 17-206(7)(b) would "incentivize routine delay in voting rights cases," *see* Amicus Br.8–10, is overblown; the statute merely gives localities a first shot at fixing alleged violations, while also ensuring expedited judicial review is available when time is of the essence. The Attorney General provides no support at all for her assertion that "routine 90-day delays in NYVRA litigation may have the effect of pushing some remedies past the point of feasibility." Amicus Br.10–11.

would allow prospective plaintiffs to disrupt a political subdivision's affairs merely by mailing a NYVRA notification letter, where such letters may demand a substantial change to a locality's voting system without offering factual support for why such a change is necessary or how it might be accomplished. *See* Compl., Ex. A. So, while Plaintiffs claim that this Court "should not allow local governments to avoid prompt compliance with NYVRA by making illusory promises," Resp.Br.11, it is not at all illusory for a municipality to commit to remedy a violation if it determines there is actually a violation of the NYVRA. Rather, the Legislature reasonably determined that a political subdivision must "affirm[ ]" its "intent[ ] to enact and implement a remedy for a potential violation," N.Y. Elec. Law § 17-206(b)(i), which the Town Board did here in expressly so stating in the Resolution.[2]

The Attorney General, too, would have this Court read into the NYVRA a burdensome requirement that is nowhere suggested in the statute's plain text—namely, that a political subdivision "decide whether and how to remedy a potential NYVRA violation" within 50 days of the date on which a NYVRA notification letter is mailed. Amicus Br.8. According to the Attorney General, a locality's stated intent to remedy any potential violation is not "meaningful[ ]" absent such an implicit requirement. *Id.* at 5. Like Plaintiff, the Attorney General fails to grapple with the unreasonable burden such an implicit requirement would place on localities, where the clock will have started ticking before the town even receives the NYVRA notification letter, and where

[2] Plaintiffs' citation to contract law for its assertion that the Resolution's commitment to resolve any NYVRA violation is "illusory" is misguided. *See* Resp.Br.11. They supply no basis for relying on the substantive principles of contract law here, where this case does not involve a contract and the Town has instead asked this Court to interpret and apply the NYVRA's statutory provisions. The Attorney General's reliance on *People v. Alexander*, 2003 WL 21169075, at *5 (Poughkeepsie City Ct. May 12, 2003), is similarly inapt. *See* Amicus Br.6. That court interpreted CPL § 710.30, which requires a prosecutor to provide a criminal defendant advanced notice when it "intend[s] to offer at trial" certain evidence or testimony, holding that such notice was not required where evidence was used merely for impeachment purposes. *See Pope*, 2003 WL 21169075, at *1–5. This decision has no relevance here.

the towns themselves may not hold any records at all relating to past elections. *See supra* pp.4–5. It could conceivably take several weeks for a town to even collect the data necessary to begin evaluating a prospective plaintiff's allegations—let alone determine the validity of those allegations and decide on a remedy. *Contra* Amicus Br.8. The NYVRA contains no extension for this less-than-50-day safe harbor; so, under the Attorney General's reading, if a locality cannot decide whether and how to remedy an alleged NYVRA violation in under 50 days, it is simply out of luck. By contrast, the Attorney General would give localities up to 180 days merely to enact and implement a predetermined remedy. *See* N.Y. Elec. Law § 17-206(7)(b), (d). That cannot be how the statute works. The fact that the Resolution allows the Town Board time to investigate Plaintiffs' allegations prior to deciding whether to enact a particular remedy does not make its intent to enact and implement a remedy for any violation any less "meaningful[ ]," *contra* Amicus Br.5, but rather ensures that any remedy is responsive to a plausible NYVRA violation.

Second, Plaintiffs' concern that the Resolution did not "identify specific steps the Town intends to take to implement a remedy," Resp.Br.12, does not call the Resolution's legality into doubt. The Resolution sets forth the "specific steps" the Town Board "shall" take to "facilitate approval and implementation" of a NYVRA remedy, one of which is to determine whether a NYVRA violation exists in the first place. *See* N.Y. Elec. Law § 17-206(7)(b)(ii); Compl. Ex. B § 12. To "facilitate" means "to assist in bringing about (a particular end or result)." *Facilitate*, Oxford English Dictionary Online (Dec. 2022).[3] A political subdivision, in turn, cannot "bring[ ] about," *id.*, a remedy without first determining whether a violation exists. If the Town Board here decides there is a violation in need of a remedy, the Resolution then commits the Town Board to several more "specific steps" intended to "facilitate" that remedy: the Town Board must prepare a

[3] Available at https://www.merriam-webster.com/dictionary/facilitate (subscription required).

NYVRA Proposal, solicit feedback on the Proposal at public hearings, amend the Proposal as necessary, approve the completed Proposal, and submit it to the State for final approval. *See* N.Y. Elec. Law § 17-206(7(b)(ii); Compl. Ex. B. §§ 4–5. The NYVRA does not dictate what "specific steps" must entail, Op.Br.13, and each of the "steps" set forth in the Resolution are tailored to "bring[ ] about" a remedy for any potential NYVRA violation, *see Facilitate*, Oxford English Dictionary Online (Dec. 2022). And so, contrary to the Attorney General's position, the fact that the NYVRA does not expressly mention "investigating" an alleged NYVRA violation is of no moment. *See* Amicus.Br.5. The statute instead gives political subdivisions discretion to decide what "specific steps" they will take to "facilitate" a "remedy." *See* N.Y. Elec. Law § 17-206(7)(b)(ii). Although Plaintiffs suggest that the Town Board's investigation and determination as to whether a NYVRA violation exists cannot be a "specific step" under Section 17-206(7)(b)(ii) because the Town was required to conduct a "proactive analysis of its method of election prior to the March 15, 2024 resolution," Resp.Br.12, they offer no support for this purported requirement.

Plaintiffs further complain that the Resolution's post-investigation steps are "not nearly specific enough to trigger the safe harbor" for a variety of reasons, Resp.Br.12, all of which are misplaced. Plaintiffs argue that the Resolution "does not even suggest what remedies might be considered or identify experts to assist in developing remedies," Resp.Br.12, and the Attorney General echoes this position, claiming that the "the NYVRA requires a political subdivision" to identify "a *particular* remedy to receive the benefit of the 90-day safe harbor," Amicus.Br.6–7, but the NYVRA requires *no such specificity*. Section 17-206(7)(b) exclusively governs the contents of NYVRA resolutions, and nowhere does it even purport to require that the Resolution set forth what specific remedies the political subdivision may intend to consider. *See* N.Y. Elec. Law § 17-206(7). Of course, had the Legislature intended to require a political subdivision to identify the

particular remedy it intends to implement, it would have said so.[4] Further, Plaintiffs complain that "the only specific steps for which the resolution provides are the hearings that the NYVRA already requires," Resp.12, but the NYVRA calls for a political subdivision's remedial process to involve preparing proposed remedies, holding public hearings on those remedies, revising those remedies to reflect public feedback, and submitting those remedies for state approval, N.Y. Election Law § 17-206(7)—which steps the Resolution commits the Board to undertaking here. *See* Compl. Ex. B §§ 1–5.

Relatedly, Plaintiffs contend that the Resolution's "schedule does not comply with the NYVRA" for several reasons, Resp.Br.12, but this argument also fails. The NYVRA requires a NYVRA resolution to contain "a schedule for enacting and implementing . . . a remedy" for "a potential violation" of the NYVRA. N.Y. Elec. Law 17-206(7)(b)(iii). The Resolution here complies with that requirement by providing specific deadlines for each step of the remedial process and requiring that the entire process be completed within 90 days of the Resolution's passage. Op.Br.11–12. That the Resolution does not put a specific deadline on the deliberation component is irrelevant because the NYVRA only asks that a schedule be in place for the "enact[ment] and implement[ation]" of a remedy, N.Y. Elec. Law § 17-206(b)(iii)—a process that, by definition, occurs *after* the political subdivision's deliberation has concluded. *See* Op.Br.11–12, 14. The Resolution sets forth deadlines to allow the Town Board to "enact[ ] and implement[ ]" a remedy for any potential NYVRA violation, which is all that the NYVRA requires. Compl. Ex. B § 1–5; N.Y. Election Law 17-206(7)(b).

[4] Section 17-206(7)(c) does not help the Attorney General's position, *see* Amicus Br.7, where that section contains no requirement that NYVRA resolutions identify any "specific" remedies and instead merely provides additional procedures if a political subdivisions does not remediate a NYVRA violation within 90 days following adoption of a NYVRA resolution. *See* N.Y. Elec. Law § 17-206(c).

Plaintiffs claim that the Resolution's 90-day "schedule is completely unrealistic," Resp.13–14, but their subjective belief on this score is immaterial to Section 17-206(7)(b). In any event, the NYVRA itself recognizes that a political subdivision may need additional time to implement a remedy after determining that such a remedy is necessary, and so provides a mechanism for the political subdivision and prospective plaintiffs to agree to an "additional" 90-day safe-harbor period so long as the political subdivision definitively commits at that time to "enact and implement a remedy." N.Y. Elec. Law § 17-206(7)(d). Plaintiffs' quibbles with the specific schedule adopted in the Resolution—including that the Resolution "does not leave any time or create any mechanism for the Town Board to modify [a] NYVRA proposal based on" public input or provide enough time to draw new districts, Resp.Br.13—have no bearing on whether the Resolution complies with Section 17-206(b)(iii). These complaints are also misplaced: the Resolution calls for the Town Board to "amend[] the NYVRA Proposal based upon the public input received," as appropriate, during the 30-day public hearing period prior to the final submission of the proposal to the State, and redistricting is only one of numerous remedial options available to a political subdivision to remedy a NYVRA violation, N.Y. Elec. Law § 17-206(6).

Third, Plaintiffs argue that the Resolution is void because the Town adopted it at a meeting that was not "duly called" pursuant to Town Law § 62(2), Resp.Br.15–16, but this contention is irrelevant. Plaintiffs' argument overlooks the fact that the Town, consistent with its Home Rule power, superseded and amended Town Law § 62 to enact Chapter 27 of the Municipal Code, which governs procedures related to calling special meetings. *See* Town of Newburgh Municipal Code, § 27-1.[5] In enacting Chapter 27, the Town Board "declar[ed] its intent to regulate and amend the powers of the Supervisor to call special meetings" otherwise governed by "the Town Law of the

[5] Available at https://ecode360.com/9609548#9609548.

State of New York, § 62," and indicated that it was exercising this authority pursuant to Municipal Home Rule Law, § 22. *See id.* Chapter 27 of the Municipal Code provides that the Supervisor of the Town Board can call a "[s]pecial meeting[ ], limited to one action item . . . by causing a written notice, specifying the time and place thereof, to be served upon each member of the Board personally at least one hour prior to the meeting," among other methods not relevant here. *Id.* § 27-3. Because Town Law § 62 does not govern the Town's notice procedures for special meetings, Plaintiffs' contention that the Resolution was not "duly noticed" under Town Law § 62 is irrelevant and should be rejected.

In any event, Plaintiffs' Complaint fails to include any factual allegations supporting their "bare legal assertion[ ]" that the special meeting at issue here was not adopted at a duly called meeting of the Town Board. *See Isnady v. Walden Preservation, L.P.*, 173 N.Y.S.3d 586, 588 (2022). The Complaint contains no factual allegations suggesting that the Supervisor of the Town Board did not serve written notice on all Town Board members at least one hour prior to the special meeting at issue, in accordance with Chapter 27. *See generally* Compl. And while Plaintiffs' response brief vaguely suggests that the Supervisor did not provide Town Board members at least two days' notice under Town Law § 62(2) prior to the special meeting, *see* Resp.Br.15, that factual allegation appears nowhere in the Complaint. So, even were the provisions of Town Law § 62(2) relevant here (which they are not), Plaintiffs fail to plead sufficiently any violation of that law or any other notice provision. *See Isnady*, 173 N.Y.S.3d at 588.

Finally, Plaintiffs argue that the Resolution "is no longer sufficient" to trigger the safe-harbor period because "the Town Board has 'suspended it,' eliminating any chance there might have been of implementing a remedy" within that period. Resp.Br.16. But this argument overlooks that it is *Plaintiffs*' action in filing this lawsuit—not the Town Board's action in

defending it—that has disrupted the safe-harbor period to which the Town Board was statutorily entitled, stripping the Town Board of its rights under the NYVRA. *See* Op.Br.12–13. Plaintiffs cannot have it both ways: they cannot challenge the validity of the Resolution and force the Town to defend that Resolution in this Court, while at the same time demanding that the Town continue the steps detailed in the Resolution without the benefit of Section 17-206(7)'s safe harbor. *See id.* Rather, as the Town has explained, the 90-day safe harbor must start anew following the Court's dismissal of this lawsuit, to ensure the Town has a litigation-free opportunity under Section 17-206(7) to investigate the alleged NYVRA violation and enact any necessary remedy. *See id.*

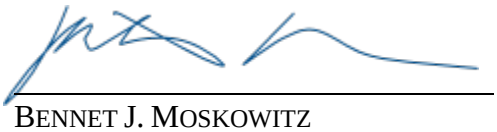
CONCLUSION & RELIEF REQUESTED

This Court should grant Defendants' Motion To Dismiss The Complaint.

Respectfully submitted,

Dated: New York, New York
May 1, 2024

TROUTMAN PEPPER HAMILTON SANDERS LLP



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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Memorandum of Law in Support of Defendants Town of Newburgh and Town Board of the Town of Newburgh's Motion to Dismiss the Complaint complies with the word count limitations set forth in Uniform Rule 202.8-b for the Supreme Court. This Memorandum uses Times New Roman 12-point typeface and contains 3,634 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.

By: _____
BENNET J. MOSKOWITZ