

APL-2025-00110

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Appellate Division, Second Department Docket No. 2024-11753

Court of Appeals

STATE OF NEW YORK



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

Plaintiffs-Respondents,

against

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

Defendants-Appellants,

and

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

Intervenor-Respondent.

APPENDIX

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Table of Contents

	<u>Page</u>
Statement Pursuant to CPLR 5531	A1
Decision and Order of the Appellate Division, Second Department Granting Leave to Appeal, dated May 23, 2025	A2
Opinion and Order of the Appellate Division, Second Department, dated January 30, 2025, with Notice of Entry	A3
Decision and Order of the Honorable Maria S. Vazquez-Doles, dated November 7, 2024, Appealed From, with Notice of Entry	A26
Affirmation of Bennet J. Moskowitz, for Defendants, in Support of Motion for Summary Judgment, dated September 25, 2024	A53
Exhibit A to Moskowitz Affirmation - Expert Report of Donald T. Critchlow, Ph.D., M.A., dated July 26, 2024	A57
Exhibit B to Moskowitz Affirmation - Deposition Testimony of Gilbert Piaquadio, taken September 23, 2024	A111
Exhibit E to Moskowitz Affirmation - Summons and Verified Complaint, dated March 26, 2024	A281
Exhibit J to Moskowitz Affirmation - Memorandum of Law by Plaintiffs in Support of Motion for Summary Judgment, dated August 13, 2024	A315
Memorandum of Law by Defendants in Support of Motion for Summary Judgment, dated September 25, 2024	A354
Memorandum of Law by Plaintiffs in Opposition to Motion for Summary Judgment, dated October 10, 2024	A386

Table of Contents
(Continued)

	<u>Page</u>
Reply Memorandum of Law by Defendants in Further Support of Motion for Summary Judgment, dated October 17, 2024	A417
Certification Pursuant to CPLR § 2105	A437

STATEMENT PURSUANT TO CPLR 5531

Court of Appeals

STATE OF NEW YORK



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

Plaintiffs-Respondents,

against

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

Defendants-Appellants,

and

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

Intervenor-Respondent.

-
1. The index number of the case in the Court below is EF002460/2024.
 2. The full names of the original parties are set forth above. There has been no change to the caption.
 3. The action was commenced in the Supreme Court, Orange County.
 4. This action was commenced on March 26, 2024 by filing of a Summons and Verified Complaint. Issue was joined by service of an Answer on or about May 28, 2024.
 5. The nature and object of the action: to enforce the requirements of the John R. Lewis Voting Rights Act of New York.
 6. The appeal is from the Opinion and Order of the Appellate Division, Second Department, dated January 30, 2025.
 7. This appeal is being perfected on the Appendix method.

Decision and Order of the Appellate Division, Second Department
Granting Leave to Appeal, dated May 23, 2025

FILED: APPELLATE DIVISION - 2ND DEPT 05/23/2025 04:14 PM

NYSCEF DOC. NO. 44

Supreme Court of the State of New York

RECEIVED NYSCEF: 05/23/2025

2024-11753

Appellate Division: Second Judicial Department

M305407

KS/

HECTOR D. LASALLE, P.J.
CHERYL E. CHAMBERS
JANICE A. TAYLOR
DONNA-MARIE E. GOLIA, JJ.

2024-11753

DECISION & ORDER ON MOTION

Oral Clarke, et al., plaintiffs-appellants,
v Town of Newburgh, et al., respondents;
Letitia James, etc., intervenor-appellant.

(Index No. 2460/2024)

Appeal from an order of the Supreme Court, Orange County, dated November 7, 2024, which was determined by opinion and order of this Court dated January 30, 2025. Motion by the respondents for leave to appeal to the Court of Appeals from the opinion and order of this Court and, in effect, in the event leave to appeal is granted, to stay all proceedings in the above-entitled action, pending hearing and determination of any appeal to the Court of Appeals.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

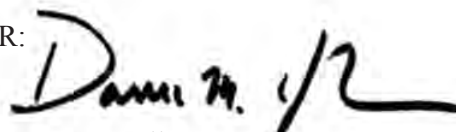
ORDERED that the branch of the motion which is for leave to appeal to the Court of Appeals from the opinion and order of this Court is granted, and the following question is certified to the Court of Appeals: Was the opinion and order of this Court dated January 30, 2025, properly made?

Questions of law have arisen, which, in our opinion, ought to be reviewed by the Court of Appeals (*see* CPLR 5713); and it is further,

ORDERED that the branch of the motion which is, in effect, to stay all proceedings in the above-entitled action, pending hearing and determination of any appeal to the Court of Appeals is granted, and all proceedings in the above-entitled action are stayed, pending hearing and determination of the appeal to the Court of Appeals.

LASALLE, P.J., CHAMBERS, TAYLOR and GOLIA, JJ., concur.

ENTER:



Darrell M. Joseph
Clerk of the Court

May 23, 2025

CLARKE v TOWN OF NEWBURGH

Opinion and Order of the Appellate Division, Second Department,
dated January 30, 2025, with Notice of Entry
[pp. A3 - A25]

FILED: APPELLATE DIVISION - 2ND DEPT 02/07/2025 01:09 PM

2024-11753

NYSCEF DOC. NO. 36

RECEIVED NYSCEF: 02/07/2025

NEW YORK SUPREME COURT
APPELLATE DIVISION : SECOND DEPARTMENT

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

Plaintiffs-Appellants,

NOTICE OF ENTRY

v

A.D. No. 2024-11753

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

Defendants-Respondents,

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

Intervenor.

PLEASE TAKE NOTICE that the within is a true and complete copy of the
Opinion and Order duly entered in the above-entitled matter in the Office of the
Clerk of the Supreme Court, Appellate Division, Second Department on January 30,
2025.

Dated: February 7, 2025
Albany, New York

LETITIA JAMES
Attorney General of the
State of New York
Intervenor
The Capitol
Albany, New York 12224

By:


BEEZLY J. KIERNAN
Assistant Solicitor General
Telephone (518) 776-2023

TO: Counsel of Record via NYSCEF

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D76388
E/htr

_____AD3d_____

Argued - December 18, 2024

HECTOR D. LASALLE, P.J.
 CHERYL E. CHAMBERS
 JANICE A. TAYLOR
 DONNA-MARIE E. GOLIA, JJ.

2024-11753

OPINION & ORDER

Oral Clarke, et al., plaintiffs-appellants,
 v Town of Newburgh, et al., respondents;
 Letitia James, etc., intervenor-appellant.

(Index No. 2460/24)

APPEALS, in an action pursuant to Election Law § 17-206, from an order of the Supreme Court (Maria S. Vazquez-Doles, J.), dated November 7, 2024, and entered in Orange County. The order granted the defendants' motion for summary judgment dismissing the complaint and directed that the John R. Lewis Voting Rights Act of New York was stricken in its entirety from further enforcement and application to the defendants and to any other political subdivision in New York State.

Abrams Fensterman, LLP, White Plains, NY (Robert A. Spolzino, Jeffrey A. Cohen, David Imamura, Steven Still, and Election Law Clinic at Harvard Law School [Ruth Greenwood, Nicholas O. Stephanopoulos, Daniel Hessel, and Samuel Jacob Davis, pro hac vice], of counsel), for plaintiffs-appellants.

Letitia James, Attorney General, New York, NY (Barbara D. Underwood, Judith Vale, Andrea Trento, Beezly J. Kiernan, Sandra Park, Lindsay McKenzie, and Derek Borchardt of counsel), intervenor-appellant pro se.

Troutman Pepper Hamilton Sanders LLP, New York, NY (Misha Tseytlin and Bennet J. Moskowitz of counsel), for respondents.

Campaign Legal Center, Washington, DC (Robert Brent Ferguson of counsel),

amicus curiae pro se and for amici curiae American Civil Liberties Union of Southern California and American Civil Liberties Union of Northern California.

NAACP Legal Defense & Educational Fund, Inc., New York, NY (Adam Lioz, Samuel Spital, Stuart Naifeh, Michael Pernick, and Maia Cole of counsel), amicus curiae pro se.

Baker & Hostetler, LLP, New York, NY (Ariana Dindiyal, Robert J. Tucker, Erika D. Prouty, Rebecca Schrote, and E. Mark Braden of counsel), for amici curiae Town of Mount Pleasant and Town Board of the Town of Mount Pleasant.

Holtzman Vogel Baran Torchinsky & Josefiak, PLLC, Buffalo, NY (Joseph Burns of counsel), for amicus curiae Town of Cheektowaga.

LASALLE, P.J.

I. Introduction

In addition to setting out the powers of the branches of our government, the constitutions of the United States and New York State contain provisions protecting the rights of minorities from the “tyranny of the majority” (John Adams, *A Defence of the Constitutions of Government of the United States of America*, Vol. 3, 291 [1788]; *see also* James Madison, *Federalist* No. 10), including provisions guaranteeing citizens equal protection of the laws (*see* US Const, 14th Am, § 1; NY Const, art I, § 11). On this appeal we are asked to decide whether the vote dilution provisions of the John R. Lewis Voting Rights Act of New York (L 2022, ch 226; hereinafter NYVRA), intended to ensure that a numerical minority’s voice is not removed from local government, facially violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (hereinafter the Equal Protection Clause).¹ The defendants in this case, the Town of Newburgh and the Town Board of the Town of Newburgh (hereinafter the Town Board), lack the capacity to challenge the constitutionality of the NYVRA except to the extent that it forces them to

¹ The defendants contend that the NYVRA also violates the New York State Constitution, which the Court of Appeals has stated “provides for equivalent equal protection safeguards” (*People v Aviles*, 28 NY3d 497, 502; *see* NY Const, art I, § 11). As the parties do not contend that equal protection claims under the New York State Constitution should be analyzed differently than the equal protection claims under the Fourteenth Amendment, the equal protection claim set forth by the defendants will be analyzed with reference to the Fourteenth Amendment, bearing in mind that the rationale would also be dispositive of the defendants’ equal protection claim under the New York State Constitution.

violate the Equal Protection Clause. Since, on this record, the defendants failed to show as a matter of law that compliance with the NYVRA would force them to violate the Equal Protection Clause, we reverse the order of the Supreme Court.

II. The Federal Voting Rights Act

Sixty years ago, Congress enacted the Voting Rights Act of 1965 (hereinafter the FVRA), pursuant to its authority to enforce the Fifteenth Amendment to the United States Constitution (*see Allen v Milligan*, 599 US 1, 41). Section 5 of the FVRA, which initially was set to expire after five years, provided that no change in voting procedures in certain jurisdictions defined by a “coverage formula” set out in section 4 of the FVRA could take effect until it was approved by the United States Attorney General or a court of three judges (*Shelby County v Holder*, 570 US 529, 537-538). Although these sections of the FVRA were repeatedly reauthorized by Congress, in 2013, the United States Supreme Court struck down section 4 because the coverage formula was based on data that was more than 40 years old and no longer responsive to current needs and thus an impermissible burden on the principles of federalism and the equal sovereignty among the states (*see id.* at 535, 543-544, 550-557). Accordingly, section 5 has been rendered unenforceable until Congress drafts a new coverage formula, which it has not done (*see id.* at 557).

However, section 2 of the FVRA, which applies throughout the United States and concerns vote dilution, remains in effect (*see id.*). “In its original form, § 2 closely tracked the language of the [Fifteenth] Amendment and, as a result, had little independent force. [The] leading case on § 2 at the time was *City of Mobile v Bolden* [(446 US 55)], which involved a claim by black voters that the City’s at-large election system effectively excluded them from participating in the election of city commissioners. The commission had three seats, black voters comprised one-third of the City’s population, but no black-preferred candidate had ever won election” (*Allen v Milligan*, 599 US at 10-11 [citations, footnote, and internal quotation marks omitted]). The Court in *City of Mobile* ruled against the plaintiffs, concluding that the Fifteenth Amendment, and thus section 2, did not “prohibit laws that [were] discriminatory only in effect” (*id.* at 11; *see City of Mobile v Bolden*, 446 US at 61-65).

“Almost immediately after it was decided, *Mobile* produced an avalanche of criticism, both in the media and within the civil rights community” (*Allen v Milligan*, 599 US at 11 [internal quotation marks omitted]). “By focusing on discriminatory intent and ignoring disparate effect,

critics argued, the Court had abrogated the standard used by the courts to determine whether [racial] discrimination existed” (*id.* at 12 [internal quotation marks omitted]). On the other hand, “mandating racial proportionality in elections was regarded by many as intolerable” (*id.*). In 1982, the impasse was resolved “when Senator Bob Dole proposed a compromise. Section 2 would include the effects test that many desired but also a robust disclaimer against proportionality” (*id.* at 13 [citation omitted]).

As amended by Congress in 1982, section 2 provides that the section is violated “if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial] class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population” (52 USC § 10301[b]).

A violation of section 2 occurs “where an ‘electoral structure operates to minimize or cancel out’ minority voters’ ‘ability to elect their preferred candidates.’ Such a risk is greatest ‘where minority and majority voters consistently prefer different candidates’ and where minority voters are submerged in a majority voting population that ‘regularly defeat[s]’ their choices” (*Allen v Milligan*, 599 US at 17-18, quoting *Thornburg v Gingles*, 478 US 30, 48). In interpreting section 2, the United States Supreme Court developed the *Gingles* test for deciding section 2 claims. The *Gingles* test “focuses . . . on vote dilution accomplished through cracking or packing, *i.e.*, ‘the dispersal of [a protected class of voters] into districts in which they constitute an ineffective minority of voters or from the concentration of [those voters] into districts where they constitute an excessive majority’” (*Abbott v Perez*, 585 US 579, 627 n 2 [Sotomoyor, J., dissenting], quoting *Thornburg v Gingles*, 478 US at 46 n 11).

“To succeed in proving a § 2 violation under *Gingles*, plaintiffs must satisfy three preconditions. First, the minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district. A district will be reasonably configured . . . if it comports with traditional districting criteria, such as being contiguous and reasonably

compact. Second, the minority group must be able to show that it is politically cohesive. And third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority’s preferred candidate. Finally, a plaintiff who demonstrates the three preconditions must also show, under the totality of the circumstances, that the political process is not equally open to minority voters” (*Allen v Milligan*, 599 US at 18 [citations and internal quotation marks omitted]). Factors relevant to this last determination include: “the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; . . . the extent to which voting in the elections of the state or political subdivision is racially polarized; . . . the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; . . . if there is a candidate slating process, whether the members of the minority group have been denied access to that process; . . . the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; . . . whether political campaigns have been characterized by overt or subtle racial appeals; . . . the extent to which members of the minority group have been elected to public office in the jurisdiction . . . whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[; and] whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous” (*Thornburg v Gingles*, 478 US at 36-37 [internal quotation marks omitted]). In the 39 years that has followed *Gingles*, courts have required the creation of majority-minority districts all over the country (*see Allen v Milligan*, 599 US at 19).

In *Voinovich v Quilter* (507 US 146), the United States Supreme Court first considered an “influence-dilution” claim, in which the “complaint . . . is not that black voters have been deprived of the ability to constitute a *majority*, but of the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over voters from the white majority” (*id.* at 158). In doing so, the court stated that “[o]f course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim. For example, the first *Gingles*

precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume, *arguendo*, to be actionable today” (*id.*).

However, in *Bartlett v Strickland* (556 US 1), the United States Supreme Court reached the issue and held that section 2 could not be invoked to require the creation of such influence or crossover districts (*see id.* at 6). Nevertheless, the controlling opinion in *Bartlett* noted that “[o]ur holding that § 2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion” and that “[s]tates that wish to draw crossover districts are free to do so where no other prohibition exists” (*id.* at 23-24 [Kennedy, J.]).

Federal Circuit Courts of Appeal are split as to whether “coalition claims” are permitted under section 2 of the FVRA, where members of different races or language-minority groups claim that they are politically cohesive and that their combined voting strength would constitute a majority in a reasonably compact district (*see Growe v Emison*, 507 US 25, 41 [assuming without deciding that it was permissible for the District Court to combine distinct ethnic and language minority groups for purposes of assessing compliance with section 2 of the FVRA]; *Petteway v Galveston County*, 111 F4th 596, 599 [5th Cir] [overruling a prior decision and holding that section 2 of the FVRA does not authorize coalitions of racial and language minorities to claim vote dilution in legislative redistricting]; *Clerveaux v East Ramapo Centr. Sch. Dist.*, 984 F3d 213, 323-233 [2d Cir] [finding that the second and third *Gingles* preconditions were met based on evidence “that black and Latino residents were politically cohesive and that white residents voted as a bloc”]).

Recently, the United States Supreme Court rejected arguments made by the State of Alabama that section 2 of the FVRA “as applied to redistricting is unconstitutional under the Fifteenth Amendment” and that “the Fifteenth Amendment does not authorize race-based redistricting as a remedy for § 2 violations” (*Allen v Milligan*, 599 US at 41). The Court explained that “we held over 40 years ago ‘that, even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2 [of the Fifteenth Amendment] outlaw voting practices that are discriminatory in effect,’” and that the VRA’s “‘ban on electoral changes that are discriminatory in effect . . . is an appropriate method of promoting the purposes of the Fifteenth Amendment’” (*id.*,

quoting *City of Rome v United States*, 446 US 156, 173, 177). The Court further explained that “for the last four decades, this Court and the lower federal courts have repeatedly applied the effects test of § 2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as a remedy for state districting maps that violate § 2. In light of that precedent . . . , we are not persuaded by Alabama’s arguments that § 2 as interpreted in *Gingles* exceeds the remedial authority of Congress” (*id.* [citations omitted]).

III. The NYVRA

In 2022, the Legislature enacted the NYVRA in order to “[e]ncourage participation in the elective franchise by all eligible voters to the maximum extent” (Election Law § 17-200[1]) and to “[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, and especially to exercise the elective franchise” (*id.* § 17-200[2]). According to the Governor’s Approval Memorandum, the act “ensures that the state continues to move toward being a national leader in voting rights. As the federal government fails to fulfill its duty to uphold voting rights across the nation, it is now incumbent upon states to step-up and step-in” (Governor’s Approval Mem, Bill Jacket, L 2022, ch 226 at 5). In response to *Shelby County v Holder* and Congress’s failure to update the coverage formula, the NYVRA mandates that certain changes in voting laws in certain covered jurisdictions be precleared by the Civil Rights Bureau of the Office of the New York State Attorney General or by a designated court (*see* Election Law §§ 17-204[8]; 17-210). Among other things, the NYVRA also contains sections prohibiting voter suppression, intimidation, deception, and obstruction (*see id.* §§ 17-206[1]; 17-212).

As relevant to this action, similar to section 2 of the FVRA, and modeled after very similar laws enacted in California and Washington (*see* Cal Elec Code § 14025 *et seq.*; Wash. Rev. Code 29A.92.005 *et seq.*), the NYVRA contains a “[p]rohibition against vote dilution,” which provides that no political subdivision “shall use any method of election, having the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution” (Election Law § 17-206[2][a]).² A “protected

² For the purposes of demonstrating that vote dilution has occurred, the NYVRA provides that “evidence shall be weighed and considered as follows: (i) elections conducted prior to the filing of an action pursuant to this subdivision are more probative than elections conducted after the filing of the action; (ii) evidence concerning elections for members of the governing body of the political

class” is defined as “a class of individuals who are members of a race, color, or language-minority group, including individuals who are members of a minimum reporting category that has ever been officially recognized by the United States census bureau” (*id.* § 17-204[5]). The NYVRA provides that a violation of the vote dilution provision “shall be established upon a showing that a political subdivision” used “an at-large method of election” and either “voting patterns of members of the protected class within the political subdivision are racially polarized,”³ or “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][A]-[B]).⁴ The NYVRA also

subdivision are more probative than evidence concerning other elections; (iii) statistical evidence is more probative than non-statistical evidence; (iv) where there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision, members of each of those protected classes may be combined; (v) evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class is not required; (vi) evidence that voting patterns and election outcomes could be explained by factors other than racially polarized voting, including but not limited to partisanship, shall not be considered; (vii) evidence that sub-groups within a protected class have different voting patterns shall not be considered; (viii) evidence concerning whether members of a protected class are geographically compact or concentrated shall not be considered, but may be a factor in determining an appropriate remedy; and (ix) evidence concerning projected changes in population or demographics shall not be considered, but may be a factor, in determining an appropriate remedy” (Election Law § 206[2][c]).

³ “Racially polarized voting” is defined as “voting in which there is a divergence in the candidate, political preferences, or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate” (Election Law § 17-204[6]).

⁴ In making a “totality of the circumstances” determination, “factors that may be considered shall include, but not be limited to: (a) the history of discrimination in or affecting the political subdivision; (b) the extent to which members of the protected class have been elected to office in the political subdivision; (c) the use of any voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy that may enhance the dilutive effects of the election scheme; (d) denying eligible voters or candidates who are members of the protected class to processes determining which groups of candidates receive access to the ballot, financial support, or other support in a given election; (e) the extent to which members of the protected class contribute to political campaigns at lower rates; (f) the extent to which members of a protected class in the state or political subdivision vote at lower rates than other members of the electorate; (g) the extent to which members of the protected class are disadvantaged in areas including but not limited to education, employment, health, criminal justice, housing, land use, or environmental protection; (h) the extent to which members of the protected class are disadvantaged in other areas which may hinder their ability to participate effectively in the political process; (i) the use of overt or subtle racial appeals in political campaigns; (j) a significant lack of responsiveness on the part of elected

provides that a violation of the vote dilution provision “shall be established upon a showing that a political subdivision” “used a district-based or alternative method of election and that candidates or electoral choices preferred by members of the protected class would usually be defeated, and either: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; or (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired” (*id.* § 17-206[2][b][ii]).

“Any aggrieved person” may file an action against a political subdivision pursuant to Election Law § 17-206(4), and upon a finding of a violation of the vote dilution prohibition, a court “shall implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process . . . , which may include (i) a district-based method of election; (ii) an alternative method of election ; (iii) new or revised districting or redistricting plans; (iv) elimination of staggered elections so that all members of the governing body are elected on the same date; [or] (v) reasonably increasing the size of the governing body” (*id.* § 17-206[5][a][i]-[v]). “Alternative method of election” is defined as “a method of electing members to the governing body of a political subdivision using a method other than at-large or district-based, including, but not limited to, ranked-choice voting⁵, cumulative voting⁶, and limited voting⁷” (*id.* § 17-204[3]). “Coalition claims [are] permitted,” in that “[m]embers of different protected classes may file an action jointly pursuant to this title in the event that they demonstrate that the combined voting preferences of the multiple protected classes are

officials to the particularized needs of members of the protected class; and (k) whether the political subdivision has a compelling policy justification that is substantiated and supported by evidence for adopting or maintaining the method of election or the voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy. Nothing in this subdivision shall preclude any additional factors from being considered, nor shall any specified number of factors be required in establishing that such a violation has occurred” (*id.* § 17-206[3]).

⁵ Ranked-choice voting is “where a voter ranks candidates in order of preference, and votes are transferred to lower-ranked candidates who are not elected on first-place votes if a majority is not reached” (*Portugal v Franklin County*, 1 Wash 3d 629, 640, 530 P3d 994, 1002).

⁶ Cumulative voting is “where a voter receives as many votes as there are candidates to elect, but may cast multiple votes for a single candidate” (*id.*).

⁷ Limited voting is “where a voter receives fewer votes than there are candidates to elect” (*id.*).

polarized against the rest of the electorate” (*id.* § 17-206[8]).

Thus, the major differences between the vote dilution provisions of the FVRA and the NYVRA are that the NYVRA, like the California and Washington statutes, permits “influence” claims, and does not require the first *Gingles* precondition, i.e., that the minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district (*see* Cal Elec Code §§ 14027, 14028[c]; Wash. Rev. Code 29A.92.030[5]; *Pico Neighborhood Assn. v City of Santa Monica*, 15 Cal 5th 292, 316, 534 P3d 54, 65-66, 312 Cal Rptr 3d 319, 332; *Portugal v Franklin County*, 1 Wash 3d at 638-640, 530 P3d at 1001-1004). The NYVRA, like the California and Washington statutes, also allows for non-district based remedies, such as ranked-choice voting, cumulative voting, limited voting, and the elimination of staggered terms (*see* Election Law §§ 17-204[3]; 17-206[5][a][ii], [iv]; *Pico Neighborhood Assn. v City of Santa Monica*, 15 Cal 5th at 317, 534 P3d at 66, 312 Cal Rptr at 333; *Portugal v Franklin County*, 1 Wash 3d at 640, 530 P3d at 1002). While the text of Election Law § 17-206(2)(b)(i) suggests that a vote dilution claim shall be established simply upon a showing that a political subdivision used an at-large method of election and the voting patterns are racially polarized, the California Supreme Court, in interpreting a nearly identical provision, concluded that it should not be so-construed, explaining:

“In plaintiffs’ view, proof of racially polarized voting, in itself, establishes ‘dilution’ within the meaning of the CVRA [California Voting Rights Act]. They rely on the ‘plain language’ of Elections Code section 14028, subdivision (a), which provides, “A violation of Section 14027 *is established* if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision” (Italics added.) According to plaintiffs, ‘Section 14028 expressly states how a violation of Section 14027 is shown’—i.e., simply by demonstrating the existence of racially polarized voting in an at-large jurisdiction.

“When considered in isolation, this single sentence might arguably be susceptible to plaintiffs’ reading. However, a court construing a statute does not view a fragment in isolation, but considers the statute as a whole, in context with related provisions and the overall statutory structure, so that it may best identify and effectuate the scheme’s underlying purpose. As plaintiffs concede, and as the legislative history reveals, the CVRA is in many ways very similar to the VRA. When we construe ‘dilution’ under the CVRA, we must therefore be mindful that it is a term of art with a settled meaning under section 2 of the VRA: ‘The phrase vote dilution itself suggests a norm with respect to which the fact of dilution may be ascertained.’ (*Holder*

v. Hall (1994) 512 U.S. 874, 880 [129 L. Ed. 2d 687, 114 S. Ct. 2581] (plur. opn. of Kennedy, J.).) To establish vote dilution under the VRA, ‘a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice.’ (*Holder*, at p. 880 . . . (plur. opn. of Kennedy, J.); *id.* at p. 887 . . . (conc. opn. of O'Connor, J.) [‘On this, there is general agreement’]; *id.* at p. 951 . . . (dis. opn. of Blackmun, J.) [‘There is widespread agreement’].) So while the existence of racially polarized voting ‘is relevant to a vote dilution claim’ under the VRA (*Gingles*, supra, 478 U.S. at p. 55)—and is indeed ‘a key element’ (*ibid.*)—it is not in itself sufficient.

“We find, for several reasons, the same is true under the CVRA. The similarities between the two schemes strongly suggest that ‘dilution’ requires not only a showing that racially polarized voting exists, but also that the protected class thereby has less ability to elect its preferred candidate or influence the election’s outcome than it would have if the at-large system had not been adopted. . . . Although the legislative history materials can be read in different ways, one committee analysis recognized that the CVRA targets racially polarized voting in at-large elections only if it Impairs the Right of Protected Groups to elect their preferred candidates or influence the outcome of an election. After all, ‘the very concept of vote dilution implies—and, indeed, necessitates—the existence of an “undiluted” practice against which the fact of dilution may be measured.’ (*Reno v. Bossier Parish School Bd.* (1997) 520 U.S. 471, 480 [137 L. Ed. 2d 730, 117 S. Ct. 1491].)

“Plaintiffs’ construction would allow a party to prevail based solely on proof of racially polarized voting that could not be remedied or ameliorated by any other electoral system. Moreover, such a construction would render the word ‘dilution’ in Elections Code section 14027 surplusage. Accordingly, we agree with the Court of Appeal that dilution is a separate element under the CVRA. To establish the dilution element, a plaintiff in a CVRA action must identify a reasonable alternative voting practice to the existing at-large electoral system that will ‘serve as the benchmark “undiluted” voting practice.’ (*Reno v. Bossier Parish School Bd.*, supra, 520 U.S. at p. 480)” (*Pico Neighborhood Assn. v City of Santa Monica*, 15 Cal 5th at 314-315, 534 P3d at 64-65, 312 Cal Rptr 3d at 330-331 [citations and internal quotation marks omitted]).

The plaintiffs in this case interpret the NYVRA as similarly requiring plaintiffs to demonstrate a reasonable alternative practice before obtaining relief.

IV. This Action

The Town of Newburgh is a political subdivision in Orange County with a population of about 32,000. The Town Board is the Town’s legislative and policy-making authority, and the

five members of the Town Board⁸ are chosen through at-large elections, meaning that every registered voter residing within the Town is eligible to vote for each Town Board member position.

In March 2024, the plaintiffs commenced this action against the Town and the Town Board alleging vote dilution in violation of Election Law § 17-206 and seeking a judgment ordering the implementation of a new method of election for the Town Board that includes either a districting plan or an alternative method of election. The complaint alleges that Black and Hispanic communities comprise approximately 25 percent and 15 percent, respectively, of the Town’s population, yet every person ever elected to the Town Board has been white. The defendants moved for summary judgment dismissing the complaint, arguing that the NYVRA’s vote dilution provisions violate the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and the New York Constitution or, in the alternative, that the Town’s at-large voting system complied with the NYVRA. In opposition, the plaintiff contended, *inter alia*, that the defendants lacked the capacity to challenge the constitutionality of the NYVRA.

The Supreme Court granted the defendants’ motion, concluding that the NYVRA was facially unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The court also directed that the NYVRA was “stricken in its entirety from further enforcement and application to these Defendants and to any other political subdivision in the State of New York.” The plaintiffs appeal. The Attorney General of the State of New York (hereinafter the AG) has also intervened as an appellant (*see* Executive Law § 71; 22 NYCRR 1250.9[i]).

V. Capacity

The plaintiffs and the AG contend that the defendants lack the capacity to challenge the constitutionality of the NYVRA’s vote dilution provisions.

“Capacity ‘concerns a litigant’s power to appear and bring its grievance before the court’” (*Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d 377, 384, quoting *Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155). “[T]he traditional principle throughout the United States has been that municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation. . . . Constitutionally as well as a matter of historical fact, municipal corporate bodies . . . are merely subdivisions of the State, created by the State for the

⁸ The Town Board consists of a Town Supervisor and four other members.

convenient carrying out of the State’s governmental powers and responsibilities as its agents. Viewed, therefore, by the courts as purely creatures or agents of the State, it follow[s] that municipal corporate bodies cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants” (*City of New York v State of New York*, 86 NY2d 286, 289-290). This rule has been applied to municipal entities raising a constitutional challenge in defense of a lawsuit (*see Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d at 393; *In re World Trade Center Lower Manhattan Disaster Site Litigation*, 892 F3d 108, 109-111 [2d Cir]).

However, as the Court of Appeals has stated, “[t]he capacity rule is not absolute. . . . [T]he assertion of some constitutional rights may, by their nature, present special circumstances to which the general rule must yield. To date, we have identified a limited number of situations presenting such special circumstances, such as . . . where a public entity asserts that if it is obligated to comply with a statute it ‘will by that very compliance be forced to violate a constitutional proscription’” (*Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d at 386, quoting *City of New York v State of New York*, 86 NY2d at 292 [citations and internal quotation marks omitted]). “[T]he exceptions we have recognized to date are narrow. Under the general rule, we have barred public entities from challenging a wide variety of state actions, such as, e.g., the allocation of state funds amongst various localities, the modification of a village-operated hospital’s operating certificate, the closure of a local jail by the State, special exemptions from local real estate tax assessments, state land use regulations, and state laws requiring electric voting systems to be installed at polling places in lieu of lever-operated machines” (*id.* at 387 [citations omitted]).

The only exception to the general rule that the defendants invoke is for circumstances where a municipality’s compliance with a state statute would force it to violate a constitutional proscription. Accordingly, to succeed on their constitutional argument, the defendants must establish that compliance with the NYVRA would force them to violate the Equal Protection Clause (*see Board of Educ. of Mt. Sinai Union Free Sch. Dist. v New York State Teachers Retirement Sys.*, 60 F3d 106, 112 [2d Cir]; *Blakeman v James*, 2024 WL 3201671, *14, 2024 US Dist LEXIS 115441, *36-38 [ED NY, No. 2:24-cv-1655 (NJC) (LGD)]; *Merola v Cuomo*, 427 F Supp 3d 286, 293 [ND NY]). For the reasons discussed below, it cannot be said as a matter of law on this record that compliance with the NYVRA would force the defendants to violate the Equal Protection Clause.

VI. The Equal Protection Clause

“A statute enjoy[s] a strong presumption of constitutionality. To rebut that presumption, the party attempting to strike down a statute as facially unconstitutional bears the heavy burden of proving beyond a reasonable doubt that the statute is in conflict with the Constitution” (*People v Viviani*, 36 NY3d 564, 576 [citations and internal quotation marks omitted]). Courts strike statutes down “only as a 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” (*White v Cuomo*, 38 NY3d 209, 216 [citation and internal quotation marks omitted]). A party making a facial challenge must “demonstrate that ‘in any degree and in every conceivable application,’ the law suffers wholesale constitutional impairment” (*Cohen v State of New York*, 94 NY2d 1, 8, quoting *McGowan v Burstein*, 71 NY2d 729, 733). “A successful facial challenge means that the law is ‘invalid *in toto*—and therefore incapable of any valid application’” (*People v Stuart*, 100 NY2d 412, 421, quoting *Hoffman Estates v Flipside, Hoffman Estates, Inc.*, 455 US 489, 494 n 5). “Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. [Courts] must keep in mind that [a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people” (*Washington State Grange v Washington State Republican Party*, 552 US 442, 450-451 [citations and internal quotation marks omitted]).

While Congress has the authority to enact anti-discrimination laws under section 5 of the Fourteenth Amendment of the United States Constitution and section 2 of the Fifteenth Amendment of the United States Constitution, the New York State Legislature has the authority to enact statutes that protect against racial discrimination pursuant to its general police power (*see* Executive Law § 290[2]; *Roberts v United States Jaycees*, 468 US 609, 624; *Matter of Holland v Edwards*, 282 App Div 353, 357, *affd* 307 NY 38), and has “broad powers to determine the

conditions under which the right of suffrage may be exercised” (*Shelby County v Holder*, 570 US at 543, quoting *Carrington v Rash*, 380 US 89, 91). However, in exercising that authority, the New York State Legislature must comply with the Equal Protection Clause of the Fourteenth Amendment.

The Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws” (US Const, 14th Amend, § 1). “Alleged equal protection violations are primarily evaluated using either a ‘strict scrutiny’ or ‘rational basis’ standard of review” (*People v Aviles*, 28 NY3d at 502). “It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny” (*Parents Involved in Community Schools v Seattle School Dist. No. 1*, 551 US 701, 720). “[A]ll racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny” (*Johnson v California*, 543 US 499, 505, quoting *Adarand Constructors, Inc. v Peña*, 515 US 200, 227). “[R]acial classifications receive close scrutiny even when they may be said to burden or benefit the races equally” (*Johnson v California*, 543 US at 506, quoting *Shaw v Reno*, 509 US 630, 651; see *Brown v Board of Education*, 347 US 483). The United States Supreme Court has “insisted on strict scrutiny in every context, even for so-called benign racial classifications, such as race-conscious university admissions policies, race-based preferences in governmental contracts, and race-based districting intended to improve minority representation” (*Johnson v California*, 543 US at 505 [citations and internal quotation marks omitted]).

Strict scrutiny “ask[s], first, whether the racial classification is used to further compelling governmental interests” and “[s]econd, . . . whether the government’s use of race is narrowly tailored —meaning necessary— to achieve that interest” (*Students for Fair Admissions, Inc. v President and Fellows of Harvard College*, 600 US 181, 206-207 [citation and internal quotation marks omitted]). If there is no basis for imposing a heightened level of scrutiny, “then the provision may be sustained if there is a rational basis for its enactment,” meaning that the governmental action must be “rationally related to [a] legitimate State interest” (*Golden v Clark*, 76 NY2d 618, 624).

Here, the defendants contend that any change of its at-large electoral system to comply with the NYVRA would violate the Equal Protection Clause because it would be done with the express purpose of giving citizens statutorily grouped together by race greater electoral success than its at-large system, and that the NYVRA, unlike the FVRA, is not narrowly tailored to achieve

a compelling governmental interest.

Initially, we agree with the plaintiffs and the AG that strict scrutiny does not apply to all applications of the vote dilution provisions of the NYVRA. The statute gives rights to “members of a race, color, or language-minority group” (Election Law § 17-204[5]; *see id.* § 17-206[2]) in order 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]). “[I]t is familiar law that a statute should be construed so as to avoid doubts concerning its constitutionality” (*Matter of Lorie C.*, 49 NY2d 161, 171). Bearing this maxim in mind, we agree with the plaintiffs and the AG that the statute should be construed as allowing members of all racial groups, including white voters, to bring vote dilution claims, including when white voters constitute a minority in a political subdivision, as is the case in certain jurisdictions in New York (*see Portugal v Franklin County*, 1 Wash 3d at 648, 530 P3d at 1006 [stating that the Washington Voting Rights Act, which similarly allows “voters who are members of a race, color, or language minority group in the state of Washington, as this class is referenced and defined in the [FVRA]” (Wash. Rev. Code § 29A.92.010[6]) to bring vote dilution claims, “on its face, . . . requires equal opportunit[ies] for voters of all races, colors, and language minority groups” (internal quotation marks omitted)]; *Sanchez v City of Modesto*, 145 Cal App 4th 660, 666, 51 Cal Rptr 3d 821, 826 [stating that the CVRA, which similarly allows “voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act of 1965” (Cal Elec Code § 14026[d]) to bring vote dilution claims, “gives a cause of action to members of *any* racial or ethnic group that can establish that its members’ votes are diluted through the combination of racially polarized voting and an at-large election system” and that “*any* racial group can experience the kind of vote dilution the CVRA was designed to combat, including Whites. Just as non-Whites in majority-White cities may have a cause of action under the CVRA, so may Whites in majority-non-White Cities. Both demographic situations exist in California . . . , and the CVRA applies to each in exactly the same way”]; *see also United States v Brown*, 494 F Supp 2d 440, 444 [SD Miss] [“Section 2 [of the FVRA] provides no less protection to white voters than any other class of voters”], *aff’d* 561 F3d 420 [5th Cir]).

In upholding the California and Washington vote dilution statutes, courts have held that they were neither subject to strict scrutiny nor facially in violation of the Equal Protection Clause. In *Sanchez v City of Modesto* (145 Cal App 4th at 666, 51 Cal Rptr 3d at 826), the January 30, 2025

California Court of Appeal for the Fifth Appellate District explained: “The CVRA is race neutral. It does not favor any race over others or allocate burdens or benefits to any groups on the basis of race. It simply gives a cause of action to members of *any* racial or ethnic group that can establish that its members’ votes are diluted through the combination of racially polarized voting and an at-large election system In this respect, it is similar to other long-standing statutes that create causes of action for racial discrimination, such as the federal Civil Rights Act or California’s Fair Employment and Housing Act.” The court further noted that the defendants’ argument “collapses as soon as it is applied to the FVRA. . . . [S]ection 2 of the FVRA does not require a showing of intentional discrimination. No court has ever suggested, to our knowledge, that strict scrutiny applies to section 2 of the FVRA and that it would fail for this reason” (*Sanchez* 145 Cal App 4th at 682, 51 Cal Rptr 3d at 839). Similarly, in *Higginson v Becerra* (786 Fed Appx 705), the United States Court of Appeals for the Ninth Circuit affirmed the dismissal of a complaint brought by a resident of the City of Poway who alleged that he resided in a racially gerrymandered electoral district because of the CVRA, explaining that the complaint “does not allege that the City or the CVRA distribute[d] burdens or benefits on the basis of individual racial classifications. Although a finding of racially polarized voting triggers the application of the CVRA, it is well settled that governments may adopt measures designed ‘to eliminate racial disparities through race-neutral means’” (*id.* at 706-707, quoting *Texas Dept. of Housing and Community Affairs v Inclusive Communities Project, Inc.*, 576 US 519, 545 [citation and internal quotation marks omitted]). The United States Supreme Court denied certiorari (*see Higginson v Becerra*, 140 S Ct 2807). Finally, in *Portugal v Franklin County* (Wash 3d at 658, 530 P3d at 1011), the Supreme Court of Washington held that the Washington Voting Rights Act (hereinafter WVRA) “on its face does not classify voters on the basis of race, nor does it deprive anyone of the fundamental right to vote. Instead, the WVRA mandates *equal* voting opportunities for members of every race, color, and language minority group,” thus triggering rational basis review and not strict scrutiny (*see Coads v Nassau County*, __ Misc 3d __, 2024 NY Slip Op 24314 [Sup Ct, Nassau County] [concluding that the vote dilution provisions of the NYVRA do not facially violate the Equal Protection Clause]).

It is true that “[u]nder the Equal Protection Clause, districting maps that sort voters on the basis of race are by their very nature odious” and “cannot be upheld unless they are narrowly tailored to achieving a compelling state interest” (*Wisconsin Legislature v Wisconsin Elections Comm’n*, 595 US 398, 401 [internal quotation marks omitted]). “Racial gerrymandering, even for

January 30, 2025

remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire” (*Bartlett v Strickland*, 556 US at 21, quoting *Shaw v Reno*, 509 US at 657). “When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, ‘think alike, share the same political interests, and will prefer the same candidates at the polls’” (*Miller v Johnson*, 515 US 900, 911-912, quoting *Shaw v Reno*, 509 US at 647). “The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole” (*Shaw v Reno*, 509 US at 648). The United States Supreme Court has “assumed” that complying with section 2 of the FVRA is a compelling interest, but also held that “when a State invokes § 2 to justify race-based districting, ‘it must show (to meet the narrow tailoring requirement) that it had a strong basis in evidence for concluding that the statute required its action’” (*Wisconsin Legislature v Wisconsin Elections Comm’n*, 595 US at 402 [internal quotation marks omitted], quoting *Cooper v Harris*, 581 US 285, 292; see *Bush v Vera*, 517 US 952, 979-982; *Shaw v Hunt*, 517 US 899, 908-918; *Miller v Johnson*, 515 US at 921).

However, race-based districting is only one of the possible remedies under the NYVRA; the NYVRA also contemplates remedies that do not sort voters based on race, such as ranked-choice voting, cumulative voting, limited voting, and the elimination of staggered terms (see Election Law §§ 17-204[3]; 17-206[5][a][ii],[iv]; *Collins v City of Norfolk, Va.*, 883 F2d 1232, 1236 [4th Cir] [noting that the potential for vote dilution in an at-large system “may be enhanced by staggered terms”]; Theodore S. Arrington & Gerald L. Ingalls, *The limited vote alternative to affirmative districting*, 17 Political Geography 6, 701-728 [August 1998] [presenting evidence that the number of minority candidates and their chance of winning increased when limited voting replaced simple at-large systems]). Even if a district-based system is used as a remedy, strict scrutiny would only apply if race is the “predominant factor in drawing district lines” (*Allen v Milligan*, 599 US at 31 [Opinion of Roberts, C.J., joined by Justices Sotomayor, Kagan, and Jackson] [concluding that a remedial map drawn to remedy a violation of section 2 of the FVRA was not subject to strict scrutiny because the plaintiffs’ expert mapmaker testified that although race was

January 30, 2025

a consideration, it did not predominate over other factors in drawing district lines], quoting *Cooper v Harris*, 581 US at 291; see *Bethune-Hill v Virginia State Bd. of Elections*, 580 US 178, 189-190 [race may predominate even when a reapportionment plan respects traditional districting principles if race-neutral considerations came into play only after the race-based decision had been made, or if race for its own sake is the overriding reason for choosing one map over others]; *Miller v Johnson*, 515 US at 916 [although redistricting legislatures will almost always be aware of racial demographics, it does not follow from that that race predominates in the redistricting process]; *Pico Neighborhood Assn. v City of Santa Monica*, 15 Cal 5th at 323, 534 P3d at 70, 312 Cal Rptr 3d at 337 [rejecting a contention that a majority-minority requirement—or something close to it in the form of a near-majority requirement—was necessary to avoid difficult constitutional questions under the Equal Protection Clause, and noting that “nothing in the CVRA requires a municipality or a court to select a district-based remedy or, even if it chooses to do so, to draw district lines, as the City contends, based ‘principally on race’” rather than other statutorily-prescribed redistricting factors]].

As the California Court of Appeal for the Fifth Appellate District explained in rejecting a facial challenge to the CVRA: “The city may . . . use similar arguments to attempt to show *as-applied* invalidity later if liability is proven and a specific application or remedy is considered that warrants the attempt. For example, if the court entertains a remedy that uses race, such as a district-based election system in which race is a factor in establishing district boundaries, defendants may again assert the meaty constitutional issues they have raised here. In doing so, at that time they can ask the court to decide whether the particular application or remedy is discriminatory” (*Sanchez v City of Modesto*, 145 Cal App 4th at 665, 51 Cal Rptr 3d at 825-826). The State of Washington’s highest court has made a similar determination (see *Portugal v Franklin County*, 1 Wash 3d at 659, 530 P3d at 1012 [“Without a doubt, the WVRA could be applied in an unconstitutional manner, and it is subject to as-applied challenges. However, . . . the WVRA, on its face, does not require unconstitutional actions”]).

Further, we conclude that the NYVRA need not contain the first *Gingles* precondition, that the “minority group . . . be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district” (*Allen v Milligan*, 599 US at 18 [internal quotation marks omitted]), to survive a facial challenge to its constitutionality under the Equal Protection Clause. The United States Supreme Court has never said that the *Gingles* test was required by the constitution, as opposed to resulting from a statutory interpretation of section 2 of

the FVRA (*see Portugal v Franklin County*, 1 Wash 3d at 659, 530 P3d at 1011-1012). The only time the Fourteenth Amendment is mentioned in the majority opinion in *Gingles* is in the background section where the court noted that the plaintiffs' lawsuit challenged the subject districts as violating the Fourteenth and Fifteenth Amendments in addition to violating section 2 of the FVRA (*see Thornburg v Gingles*, 478 US at 35). The reason that the United States Supreme Court included the first *Gingles* precondition was because of its conclusion that if the minority group were unable to demonstrate that it was sufficiently large and geographically compact to constitute a majority in a single-member district, "the *multi-member form* of the district [could not] be responsible for minority voters' inability to elect its candidates" (*id.* at 50). *Gingles* was not contemplating influence districts or remedies such as ranked-choice voting, cumulative voting, limited voting, or the elimination of staggered terms. As the United States Supreme Court noted in *Voinovich v Quilter* (507 US at 158), "[o]f course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." Since the NYVRA specifically allows for remedies that might allow for minorities to elect their candidates of choice or influence the outcome of elections without their constituting a majority in a single-member district, it was rational for the New York Legislature to not include the first *Gingles* precondition as a precondition to liability under the NYVRA (*see Portugal v Franklin County*, 1 Wash 3d at 640-641, 530 P3d at 1003 ["Because the WVRA contemplates a broader range of remedies than Section 2, a WVRA plaintiff can state a redressable injury under a broader range of circumstances than a Section 2 plaintiff."]; *Pico Neighborhood Assn. v City of Santa Monica*, 15 Cal 5th at 317, 534 P3d at 66, 312 Cal Rptr 3d at 332 ["It would make little sense to require CVRA plaintiffs to show that the protected class could constitute a majority of a hypothetical district, given that the CVRA is not limited to ability-to-elect claims nor are its remedies limited to district elections."]; *Sanchez v City of Modesto*, 145 Cal App 4th at 670, 51 Cal Rptr 3d at 829).

Further, while the text of the NYVRA is unlike the FVRA in that it does not require the plaintiff in every vote dilution case to show that "under the 'totality of the circumstances,' . . . the political process is not 'equally open' to minority voters" (*Allen v Milligan*, 599 US at 18, quoting *Thornburg v Gingles*, 478 US at 45-46; *see* 52 USC § 10301), in order to obtain a remedy under the NYVRA, a plaintiff still must show that "vote dilution" has occurred (Election Law § 17-206[2][a]), and that there is an alternative practice that would allow the minority group to "have equitable access to fully participate in the electoral process" (*id.* § 17-206[5][a]; *see Pico Neighborhood Assn. v City*

January 30, 2025

of *Santa Monica*, 15 Cal 5th at 314-315, 534 P3d at 64-65, 312 Cal Rptr 3d at 330-331). Thus, the NYVRA does not significantly differ from the FVRA in this respect.

Finally, even if it were unconstitutional to apply the NYVRA in situations where the *Gingles* test has not been satisfied, the NYVRA could still be constitutionally applied in situations where the *Gingles* test has been satisfied. All parties agree that the FVRA as interpreted by *Gingles* is constitutional (see *Allen v Milligan*, 599 US at 41). Here, the plaintiffs contend that the evidence they submitted in opposition to the defendants' motion demonstrates that each element of the *Gingles* test has been satisfied.

Accordingly, the defendants failed to establish as a matter of law that compliance with the vote dilution provisions of the NYVRA would force them to violate the Equal Protection Clause.

VII. The Provisions of the NYVRA Other Than the Vote Dilution Provisions

Although the parties in this case only made arguments regarding the vote dilution provisions of the NYVRA, the Supreme Court's order directed that the NYVRA was "stricken in its entirety from further enforcement and application to these Defendants and to any other political subdivision in the State of New York." As noted above, the NYVRA contains other provisions, not at issue in this action, mandating preclearance of certain changes in voting laws and prohibiting voter suppression, intimidation, deception, and obstruction (see Election Law §§ 17-206[1]; 17-210; 17-212). The NYVRA also contains a severability clause stating that "[i]f 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" (*id.* § 17-222; see *Town of Islip v Caviglia*, 141 AD2d 148, 167-168). As the defendants do not dispute, even if the vote dilution provisions of the NYVRA did violate the Equal Protection Clause, the Supreme Court had no authority to invalidate the remaining portions of the NYVRA (see *T.D. New York State Off. of Mental Health*, 91 NY2d 860, 862; *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713). The Supreme Court also had no authority to bind entities that are not parties to this action or to bind courts in other judicial districts deciding actions brought pursuant to the NYVRA (see *D'Alessandro v Carro*, 123 AD3d 1, 6; *Riverside Capital Advisors, Inc. v First Secured Capital Corp.*, 28 AD3d 457, 460).

VIII. The Defendants' Alternative Ground for Summary Judgment

In the Supreme Court, the defendants alternatively argued that they were entitled to summary judgment on the ground that the Town's at-large voting system complied with the

NYVRA. However, on appeal, the defendants do not mention this argument or advance it as an alternative ground for affirmance (*cf. Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546; *Olden Group, LLC v 2890 Review Equity, LLC*, 209 AD3d 748, 750).

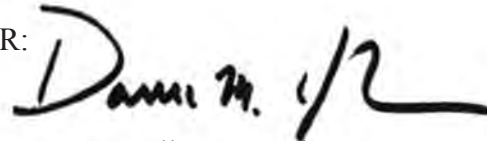
IX. Conclusion

Accordingly, the order is reversed, on the law, and the defendants' motion for summary judgment dismissing the complaint is denied.

CHAMBERS, TAYLOR and GOLIA, JJ., concur.

ORDERED that the order is reversed, on the law, with one bill of costs payable by the defendants to the plaintiffs, and the defendants' motion for summary judgment dismissing the complaint is denied.

ENTER:

A handwritten signature in black ink, appearing to read "Darrell M. Joseph", followed by a large, stylized flourish.

Darrell M. Joseph
Clerk of the Court

Decision and Order of the Honorable Maria S. Vazquez-Doles,
dated November 7, 2024, Appealed From, with Notice of Entry
[pp. A26 - A52]

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

FILED: ORANGE COUNTY CLERK 11/08/2024 10:32 AM

NYSCEF DOC. NO. 148

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/08/2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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

Plaintiffs,

v.

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

Defendants.

NOTICE OF ENTRY

Index No.: EF002460-2024

Hon. Maria S. Vazquez-Doles, J.S.C.

PLEASE TAKE NOTICE, that the attached is a true copy of the Decision and Order of the
Hon. Maria S. Vazquez-Doles, dated November 7, 2024, that was entered in the office of the Clerk
of the Supreme Court of the State of New York, Orange County, on the 8th day of November,
2024.

Dated: November 8, 2024

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NYSCEF DOC. NO. 148

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/08/2024

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and Town Board of the Town of Newburgh*

TO: All Counsel of Record Via NYSCEF

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

FILED: ORANGE COUNTY CLERK 11/08/2024 09:24 AM

NYSCEF DOC. NO. 143

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/08/2024

At a term of the JAS Part of the Supreme Court of the State of New York,
held in and for the County of Orange located at 285 Main Street,
Goshen, New York 10924 on the 7th day of November 2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

ORAL CLARKE et al.,

Plaintiffs,

-against-

TOWN OF NEWBURGH et al.,

Defendants.

VAZQUEZ-DOLES, J.S.C.

To commence the statutory
time for appeals as of right
(CPLR 5513 (a)), you are
advised to serve a copy of this
order, with notice of entry, on
all parties.

DECISION & ORDER
Index No.: EF002460-2024
Motion date: 10/13/2024
Motion Seq. No.: 5

The following papers were read on this motion by Defendants for summary judgement
pursuant to CPLR §3212:

Notice of Motion/Memo of Law/Affirmations/Ex. A-J.....1-14
Opposition Affirmation/Memo of Law/Statement Material Facts/Ex. A-DD.....15-47
Amicus Brief of the ACLU et al.....48
Reply/Memo of Law/Response to Material Facts/Affirmation/Ex. K-L.....49-53

I. SUMMARY OF THE DECISION

Defendants assert that no issue of fact exists as to whether the John Lewis Voting Rights Act of New York ("the NYVRA"), pled as the basis for the claims in the Complaint, violates the Equal Protection Clause of the 14th Amendment to the United States Constitution. Where race or national origin is the basis for unequal treatment by the State, as here, the NYVRA must satisfy strict scrutiny, i.e. it must both serve a compelling state interest and be narrowly tailored. The NYVRA does not satisfy either part of that exacting standard.

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/03/2024 09:11 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/03/2024

Defendants have capacity to assert this challenge herein on the basis that compliance with the NYVRA will force them to violate the constitutional proscription against unequal protection under the law. Under the requisite strict scrutiny analysis, no compelling interest of the State in this instance justifies the use of extremely broad race and national origin-based legislation, which opens the door to an overhaul of the electoral system of Defendant Town of Newburgh ("Defendant Town") that could be imposed by the Court. Additionally, there is no compelling State interest in allowing multiple protected classes (here, Black and Spanish heritage) to aggregate as a single group for purposes of determining whether voter dilution exists in the Defendant Town.

Moreover the process for reaching a determination of voter dilution is not narrowly tailored and can rest on the slightest of impairments in Plaintiffs' ability to influence an election. The explicit and intentional omission from the NYVRA of a requirement of past discrimination against the putative protected class(es), and of the guardrails created by the US Supreme Court when determining the permissible scope of the bases for reform when using race in voting rights cases, cannot be reconciled with US Supreme Court precedent. This Court must adhere to that precedent on issues of potential federal constitutional violations.

For these many reasons, the NYVRA is violative of the Equal Protection Clause of the 14th Amendment to the US Constitution, which is supreme to any law of New York. Therefore, the NYVRA is hereby STRICKEN in its entirety from further enforcement and application to these Defendants and to any other political subdivision in the State of New York. Defendants' motion for summary judgment is GRANTED and the Complaint is DISMISSED.

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

FILED: ORANGE COUNTY CLERK 11/08/2024 09:11 AM

NYSCEF DOC. NO. 148

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/08/2024

II. PROCEDURAL HISTORY

Plaintiffs sent a letter to Defendant Town and Defendant Town Board of Town of Newburgh ("Defendant Board") on January 26, 2024. The letter notified the Defendants of Plaintiffs' intention to file a lawsuit for violations of the NYVRA. Defendant Board passed a resolution concerning the letter from Plaintiffs on March 15, 2024 ("the Board Resolution") in which Defendant Town included a plan to investigate whether a violation of the Act is ongoing there. After the Board Resolution was enacted, less than 90 days passed before Plaintiffs filed the instant lawsuit.

Plaintiffs commenced the instant lawsuit by filing a Summons and Complaint on March 26, 2024. The Complaint asserts facts as to the composition of the population in Defendant Town, voting history and trends, community issues that have established a pattern of alleged racially motivated behavior by the Defendants, and other data related to the alleged disenfranchisement. The Complaint pleads two causes of action that allege illegal "vote dilution" in Defendant Town. The first cause of action asserts that racially polarized voting ("RPV") has caused vote dilution. The second cause of action asserts that under a totality of the circumstances, the ability of Plaintiffs to elect candidates of their choice "or" to influence the outcome of elections is impaired¹, regardless of proof of RPV.

Defendants filed a motion to dismiss (Seq. #1) in lieu of an Answer. The sole predicate for the motion was that Plaintiffs allegedly were prohibited by the NYVRA from filing this

¹ Notably, Count Two is pled in the disjunctive, an apparent recitation of the statutory wording. Neither the Complaint nor the Opposition to the instant motion clarify whether Plaintiffs assert that, under the totality standard, their votes were diluted on both bases for impairment (election of chosen candidate *and* ability to influence election). For purposes of the instant summary judgment motion, viewing the facts in the light most favorable to the non-movant, the Court addresses the Complaint as having pled both.

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/08/2024 09:11 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/08/2024

lawsuit until the expiration of the 90 day "safe harbor" provision, NY Election Law 17-206(7).

The Court denied the motion on May 17, 2024. Defendants filed an Answer on May 28, 2024.

The NYVRA requires that "actions brought pursuant to this title shall be subject to expedited pretrial and trial proceedings and receive an automatic calendar preference". NY Election Law 17-216. A Preliminary Conference Order was entered on May 10, 2024 that required Plaintiffs to disclose expert reports by June 28, 2024 and Defendants to do so by July 2, 2024.

The parties each disclosed two experts, whose reports and depositions are appended as exhibits to the instant motion. In sum, Plaintiff's experts assert the two protected classes of Black and Hispanic voters can – in the aggregate – be configured within four or five newly created single-member districts that will render likely the election of one or two chosen candidates. The experts assert that RPV exists in Defendant Town based on a statistical analysis of voting trends. They also assert that the ability of voters in the two protected classes to influence the elections and elect their candidate of choice has been impaired by the current at-large system.

Defendants' experts contest these findings. They assert that the statistical analysis has a significant margin of error due to its reliance on numerous vaguely defined variables, such as whether voters with particular surnames or who live on a particular residential block are actually Black or Hispanic. They contest whether RPV does exist and also whether the creation of districts would have an effect on the alleged impairment of the protected classes.

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/08/2024 10:17 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/08/2024

A briefing schedule for the instant motion was set in an Order docketed on September 24, 2024 (letter endorsed by the Court). The Court had set this trial to begin on October 31, 2024 but that date was adjourned *sine die* in the Decision and Order on Motion Seq. #7.²

III. FACTS UNDERLYING THE COMPLAINT

Plaintiffs are six residents of Defendant Town. Defendant Town is a political subdivision of the State of New York. Three of the Plaintiffs assert that they identify as Black and three other Plaintiffs assert that they identify as Hispanic. The Complaint asserts that as of 2020, Defendant Town was comprised of a population that was 15% "black", 25% "Hispanic" and 61% "white". On the instant motion, Plaintiff slightly changed their position to assert that as of 2022, 15.4% identified as "non-Hispanic Black" and 25.2% as "Hispanic". Compare Complaint at Par. 32 with Plaintiff Statement of Facts at Par. 39. Defendants do not contest that the 2022 data Plaintiff rely upon provides these percentages.

Defendant Town holds elections on a periodic basis for voters to choose members of Defendant Board. The election process provides that voters living anywhere in Defendant Town may vote for each of the open seats in a given election ("at-large voting"). Defendant Board has four elected positions, with four years terms, that are voted upon in staggered two years intervals. A fifth member, the Town Supervisor, is not elected.

² Motion Seq. #7 concerned whether the untimely disclosure of an addendum by one of Plaintiff's experts should cause the exclusion of that document and his related testimony at trial. Motion Seq. #7 was not directed to the consideration of the expert addendum on the instant Motion Seq. #5.

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/08/2024 10:11 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/08/2024

IV. ANALYSIS

A. Summary Judgment Standard

CPLR §3212(b) states, in pertinent part, that a motion for summary judgment “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” Section §3212(b) further states that “the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” “Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact” *Anyanwu v Johnson*, 276 A.D.2d 572 (2nd Dept. 2000). Issue finding, not issue determination, is the key to summary judgment. *Krupp v Aetna Casualty Co.*, 103 A.D.2d 252 (2nd Dept. 1984). In deciding the motion, the court must view the evidence in the light most favorable to the non-moving party. *Kuticovicz v Horton*, 83 A.D.2d 904 (2nd Dept. 2011).

The facts at issue regarding RPV and diminished ability of the protected classes at issue to influence an election outcome are not material to the legal issue of whether the NYVRA violates the Equal Protection Clause. Those few facts that are material to a review of the NYVRA for constitutionality are not contested: Defendant Town is a political subdivision with at-large voting; Plaintiffs are members of two different protected classes; Plaintiffs have claimed RPV against them and/or impairment of their influence on election outcomes; and the Court is authorized to impose certain remedies in the NYVRA, including a mandate for new single-member districts, if Plaintiffs were to prevail at a trial.

Thus, viewing the facts most favorably for Plaintiffs, and assuming arguendo that the aforementioned factual disputes would be resolved in their favor at trial, remedies imposed

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/03/2024 09:11 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/03/2024

pursuant to the NYVRA could nonetheless require Defendants to violate the Equal Protection Clause. For that reason, the Court proceeds to review Defendants' challenge to the NYVRA.

B. Purpose of the NYVRA

The New York State Senate proposed Senate Bill 2021-S1046 in the 2021-2022 session. The bill was amended five times, passed by both the Senate and Assembly, and signed into law as version S1046E by the Governor in 2022 as NY Election Law 17-200 et seq.

The NYVRA states that its purposes are:

1. Encourage participation in the elective franchise by all eligible voters to the maximum extent; and
2. Ensure 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.

NY Election Law 17-200.

The legislative history of the NYVRA corroborates this intention of the NYVRA, as well as states the justification for the breadth of the legislation:

PURPOSE:

The purpose of the NYVRA is to encourage participation in the elective franchise by all eligible voters to the maximum extent, to ensure that eligible voters who are members of racial, ethnic, 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; to improve the quality and availability of demographic and election data; and to protect eligible voters against intimidation and deceptive practices.

JUSTIFICATION

... But both the Washington and California state voting rights NYVRAs are limited to addressing vote dilution in at-large elections. The New York Voting rights NYVRA builds upon the demonstrated track record of success in California and Washington, as well as the historic success of the federal voting rights NYVRA by offering the most comprehensive state law protections for the right to vote in the United States. The law will

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/08/2024 09:32 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/08/2024

address both a wide variety of long-overlooked infringements on the right to vote and also make New York a robust national leader in voting rights at a time when too many other states are trying to restrict access to the franchise.

Senate Bill 2021-S1046E, Sponsor (Myrie) Memorandum (Version E – final) within Ex. G to the Opposition.

The Governor signed a memorandum on June 20, 2022 that states in no uncertain terms that the NYVRA is intended to extend beyond the FVRA and provide greater protections:

As the federal government fails to fulfill its duty to uphold voting rights across the nation, it is now incumbent upon states to step-up and step-in, and this legislation ensures voting rights will be protected in New York . . . It also builds upon the federal Voting Rights act's vital preclearance scheme, which was gutted by the U.S Supreme Court in Shelby County v. Holder.

Governor's Bill Jacket (Ex. G to the Opposition).

C. Prohibitions and Remedies Created by the NYVRA

The NYVRA prohibits certain actions, or the effects of such actions, in the voting process within a "political subdivision". NY Election Law 17-206(1). "Political subdivision" is defined to include any town in New York. NY Election Law 17-204(4). Defendant Town is a "political subdivision" encompassed by the NYVRA.

The NYVRA makes it unlawful for Defendant Town to "use any method of election, having the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution" (hereafter collectively, "Unlawful Vote Dilution"). NY Election Law 17-206(2)(a). A "protected class" (singular) is defined as "members of a race, color or language-minority group". NY Election

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/08/2024 09:11 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/08/2024

Law 17-204 (5). The use of “race, color or language-minority³” as the statutory definition of “protected class”, and thus the universe of people who can claim “vote dilution”, encompasses literally every person in the State of New York - because every person is a member of some race or is of some color.

The NYVRA refers to ‘protected class’ repeatedly in the singular in Section 17-206(2) with respect to prohibited practices. However, the NYVRA later allows the aggregation of an unlimited number of protected classes, in two instances. First, aggregation is allowed where “there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision.” NY Election Law 17-206(2)(c)(vi). Later in the same subsection 17-206, aggregation is allowed for a different reason, to wit, “in the event that they demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate.” NY Election Law 17-206(8). There is no explanatory wording in the NYVRA to address i) why protections extend to only a single class but are subsequently extended to multiple classes, and ii) if aggregation is authorized, whether both requirements (i.e., 206(2)(c)(vi) and 206(8)) must be satisfied.

The NYVRA provides that Unlawful Vote Dilution exists where a town: “(i) used⁴ an at-large method of election and either: (A) voting patterns of members of the protected class within⁵

³ The definition of “language-minorities” is the same as set forth in federal law, to wit, “persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage”. 52 USC § 10310(c)(3). Three of the Plaintiffs have described themselves as “Hispanic.”

⁴ The legislation provides no explanation for why the voting system is assessed retrospectively but R²V and impairment of ability are reviewed in real time. Thus, it is unclear whether *past* R²V or *past* impairment of the protected class is a basis for relief.

⁵ The legislation does not clarify why a polarization of members of the protected class *from each other* is a criteria for relief, versus polarization of that class from the rest of the electorate.

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/03/2024 09:12 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/03/2024

the political subdivision are racially polarized; or⁶ (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;" NY Election Law 17-206(2)(b). "At-large" method of election includes "a method of electing members to the governing body of a political subdivision: (a) in which all of the voters of the entire political subdivision elect each of the members to the governing body;" NY Election Law 17-204(1). There is no issue of fact herein that Defendant Town employs "at-large" voting.

"Racially polarized voting" means voting in which "there is a divergence in the candidate, political preferences⁷, or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate." NY Election Law 17-204(6). However, the descriptive wording of subsection 17-206(2)(b) ("racially polarized") does not employ that three word definition of RPV as a noun. Moreover, subsection 17-206(2)(b) refers to racial polarization *among* the protected class, not in comparison to the majority.

The NYVRA lists 11 factors that a court *may* consider when deciding whether Unlawful Vote Dilution has occurred. NY Election Law 17-206(3)(a)-(k). This list is not exclusive. *Id.* The NYVRA specifies nine ways in which a reviewing court must weigh and consider evidence of Unlawful Vote Dilution. NY Election Law 17-206(2)(c)(i)-(ix).

⁶ Notably, in each of the Senate sponsor memoranda that accompanied the earlier versions (Original and A-D) of the Senate Bill, the word "and" appeared between subsections (A) and (B). Had the final bill used "and", then the NYVRA would have required RPV for any violation. But the final bill (and perhaps some or all of the earlier bills, the text of which are not available) used "or", thereby making proof of RPV merely optional. As discussed *infra*, this significant change of removing the RPV requirement, in comparison to RPV being required by the FVRA (as well as the California and Washington legislation), is one of the reasons why the NYVRA does not satisfy the strict scrutiny standard.

⁷ The legislation does not explain how "political preferences" can be a factor for comparison when it is listed only in respect to the protected class but not for the rest of the electorate.

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/08/2024 09:12 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/08/2024

A court that finds in favor of a Plaintiff has extremely broad authority to change in virtually every respect how elections are conducted in the affected political subdivision. A court “shall implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process, which may include, but shall not be limited to:

- (i) a district-based method of election;
- (ii) an alternative method of election;
- (iii) new or revised districting or redistricting plans; . . .

NY Election Law 17-206(5).

D. Capacity of Defendants to Seek Summary Judgment

Plaintiffs oppose the motion initially on the basis that Defendants do not have capacity to challenge the NYVRA on the basis of its constitutionality, because Defendants are part of the very government that enacted the NYVRA. They also assert that the time for such a challenge comes only after the Court has adjudicated the case on the merits and imposed a remedy that Defendants must implement. Plaintiffs summarize the general rule but do not accurately capture the scope and application of the exceptions.

“[P]olitical power conferred by the Legislature confers no vested right as against the government itself.” *City of New York v State of New York*, 86 NY2d 286 (1995). “The concept of the supreme power of the Legislature over its creatures has been respected and followed in many decisions . . . counties are mere political subdivisions of the State, created by the State Legislature and possessing no more power save that deputed to them by that body.” *Id.* The Court of Appeals has extended the doctrine of no capacity to sue by municipal corporate bodies

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/08/2024 09:12 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/08/2024

to a wide variety of challenges based as well upon claimed violations of the State Constitution, not just the federal Constitution. *Id.* However, this rule is not without exceptions.

Four distinct instances have been defined by the Court of Appeals for when a municipality may challenge the constitutionality of a law that it is required to enforce. Those exceptions are as follows:

(1) an express statutory authorization to bring such a suit (*County of Albany v Hooker*, 204 NY, at 9, *supra*); (2) where the State legislation adversely affects a municipality's proprietary interest in a specific fund of moneys (*County of Rensselaer v Regan*, 173 AD2d 37, *aff'd* 80 NY2d 988; *Matter of Town of Moreau v County of Saratoga*, 142 AD2d 864); (3) where the State statute impinges upon "Home Rule" powers of a municipality constitutionally guaranteed under article IX of the State Constitution (*Town of Black Brook v State of New York*, 41 NY2d 486); and (4) where "the municipal challengers assert that if they are obliged to comply with the State statute they will by that very compliance be forced to violate a constitutional proscription" (*Matter of Jeter v Ellenville Cent. School Dist.*, 41 NY2d 283, 287 [citing *Board of Educ. v Allen*, 20 NY2d 109, *aff'd* 392 US 236]). *City of New York*, 86 NY2d at 291-292.

Here, Defendants rely upon and fall squarely within the ambit of the fourth of these exceptions, namely that compliance with the NYVRA will force them to violate the constitutional proscription against unequal protection under the law. The Court of Appeals in *Matter of Jeter* held that certain parties lacked capacity because they did not assert that "if they are obliged to comply with the State statute," said compliance would violate the constitution. 41 NY2d at 287 (emphasis added). The wording of the decision in the future tense ("if they are") confirms that an actual mandated violation is not a prerequisite to a challenge. Here, Defendants assert that if they are required to comply with the NYVRA, through a mandate of this Court that

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/08/2024 09:32 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/08/2024

alters their electoral system, it will require them to violate the Equal Protection Clause. Under these circumstances, Defendants have capacity to assert their constitutional challenge of the NYVFLA now, in the instant motion, which is ripe for review.

E. The Equal Protection Clause

In the wake of the Civil War, Congress proposed and the States ratified the Fourteenth Amendment. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." US Constitution, Amend. XIV, Sec. 1. The last clause of Section 1 is commonly referred to as the "Equal Protection Clause." It is this provision of law that is the basis for the constitutional challenge of the Defendants.

The US Supreme Court summarized the monumental passage of this amendment in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 US 181, 201-202 (2023):

To its proponents, the Equal Protection Clause represented a 'foundation[al] principle'—the absolute equality of all citizens of the United States politically and civilly before their own laws The Constitution, they were determined, should not permit any distinctions of law based on race or color . . . because any "law which operates upon one man [should] operate *equally* upon all As soon-to-be President James Garfield observed, the Fourteenth Amendment would hold 'over every American citizen, without regard to color, the protecting shield of law.' *Id.* (citations omitted).

The New York Constitution includes a provision with similar wording: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/08/2024 09:17 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/08/2024

shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." NY Constitution, Art. 1, Sec. 11. Defendants also rely upon that state authority for their challenge to the NYVRA.

The US Constitution provides that it and all federal law is the supreme law of the United States. US Constitution, Art. VI. While no state can pass and enforce legislation that limits the rights of citizens in contravention of federal law, there is no bar to a state passing a law that provides enhanced rights to its citizens that exceeds the protections of federal law. For that reason, the Court reviews the instant motion for its compliance with the potentially narrower protections afforded Defendants by the US Constitution. To the extent that the NYVRA unlawfully exceeds the limits of the Equal Protection Clause, *a fortiori* it will also exceed the potentially more generous protections afforded by the New York Constitution.

F. Strict Scrutiny Standard

The US Supreme Court issued its first majority decision requiring "strict scrutiny" in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). See *Adarand Constructors v. Peña*, 515 US 200 (1995) (recounting the history of the heightened standard of review). In *Croson*, it considered whether a city's determination that 30% of its contracting work should go to minority-owned businesses was constitutional. *Croson* held that "the single standard of review for racial classifications should be "strict scrutiny." *Id.*, at 493-494. That standard has not changed since 1989 with regard to the review of a state or federal law that classifies the rights of differing people on the basis of race or national origin.

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/08/2024 09:12 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/08/2024

Notably, the Supreme Court has repeatedly held that “the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination.” *Adarand*, 515 US, at 273. “Racial classifications of any sort must be subjected to ‘strict scrutiny.’” *Id.* at 285. The Court in *Croson* affirmed its adherence to requiring strict scrutiny in *all* instances of race-based legislation, regardless of the demographics in the protected class or the majority group: “The standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification”. *Croson* at 493-494.

Thirty-five years later, the Supreme Court reaffirmed its precedent of requiring that the Equal Protection Clause prohibits discrimination against all people, not just those classes who have experienced historic discrimination or who experienced such morally repugnant treatment to a degree greater than other people:

Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies “without regard to any differences of race, of color, or of nationality”—it is “universal in [its] application.” *Yick Wo*, 118 U.S. at 359, 6 S.Ct. 1064. For “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–290, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.). “If both are not accorded the same protection, then it is not equal.” *Id.*, at 290.

Students for Fair Admissions, 600 US at 206. *See Johnson v California*, 543 US 499, 505-506 (2005) (“We therefore apply strict scrutiny to *all* racial classifications to ‘smoke out’ illegitimate uses of race . . .”).

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/03/2024 09:12 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/03/2024

Here, the text of the NYVRA, on its face, classifies people according to their race, color and national origin. These are not mere passing references in the legislation. These classes of people are not simply mentioned as part of the justification for its passage, or as part of some broader plan for electoral reform by which these classes might derive some tangential benefit. Instead classification based on race, color and national origin is the *sine qua non* for relief under the NYVRA. A person can only seek relief on the basis of their race, color or national origin and remedies are likewise created based upon those classifications. For Plaintiffs to suggest that the NYVRA is not a race-based (or national origin-based) statute is simply to deny the obvious.

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent." *Affiliated Brothman Civic Org. v Planning Board of Town of Brookhaven*, 209 AD3d 854 (2d Dept. 2022) (citations omitted). "[T]he clearest indicator of legislative intent is the statutory text". *Id.* "It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.' " *Lamta v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

That being said, the inclusion of a race-based criteria does not, in and of itself, foreclose the possibility for enforcement of the NYVRA. Whether statutes are violative of the Equal Protection Clause can only be determined after the analysis required by US Supreme Court precedent. Thus, the strict scrutiny standard will be the basis upon which this Court will decide whether the NYVRA's prohibitions and remedies can satisfy the bar that the US Supreme Court has established for such state action.

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/03/2024 09:14 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/03/2024

G. Compelling Interest and Narrowly Tailored Legislation**I. Compelling Interest**

The NYVRA must satisfy one of the very few identifiable bases for race-based government action. *See Students for Fair Admissions*, 600 US at 203 (e.g. education, housing covenants, buses, golf courses, remediating specific, identified instances of past discrimination that violated the Constitution or a statute). Yet, the Court is unable to find within its text any of those enumerated justifications. In voting rights cases, past discrimination against the protected class has been the justification for race-based statutes, such as the FVR/A.

Yet, the wording of the NYVRA is devoid of any requirement of proving past discrimination by a protected class. Section 17-206, as discussed in detail *supra*, includes no such requirement. Voter dilution can be established simply by a showing that a protected class has an impaired ability to influence an election. Moreover, “protected class” is not defined by reference to historic discrimination. Instead, persons of any “race, color or language minority” have standing to seek redress. Thus, a minority (or even a majority) in a political subdivision comprised of persons who identify as White can seek electoral changes if they establish any impairment of their ability to affect an election, *absent any evidence of historic discrimination against people of that color* in that political subdivision.

The only wording related to the NYVRA with regard to past discrimination is in the Senate Sponsor Memorandum, which is not part of the NYVRA. Moreover, that wording does not even go as far as stating that the NYVRA was enacted to remedy historic discrimination, only mentioning discrimination. *See* Senate Bill 2021-S1046E, Sponsor (Myrie) Memorandum (Version E – final) within Ex. G to the Opposition.

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/08/2024 09:11 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/08/2024

More importantly, the NYVRA lists discrimination among the factors that a Court may, *but need not necessarily*, consider when deciding if voter dilution has occurred. See NY Election law 17-206(3)(a) (“the history of discrimination in or affecting the political subdivision; . . .”). A Court can grant relief pursuant to the NYVRA absent a history of *any* discrimination against the “protected class”. This intent to exclude historic discrimination from the NYVRA requirements is also manifest in its omission of requiring RPV. Unlike the Washington and California voting rights acts that Plaintiffs rely upon so heavily to support their position, those acts do require RPV to prove vote dilution. Cal. Election Code 14028(a) (“A violation of Section 14027 is established if it is shown that racially polarized voting occurs . . .”); Wash. Elections Stat. Ann. 29A.92.030(1) (proof of a violation when it is shown that: “(a) Elections in the political subdivision exhibit polarized voting; and (b) Members of a protected class or classes do not have an equal opportunity to elect candidates of their choice . . .”) (emphasis added). As noted *supra*, fn. 6, the passage of the NYVRA used “or” to join RPV with other means of proving vote dilution, resulting in RPV being merely optional in New York to prove a violation.

As a result, the NYVRA fails to satisfy the first part of the strict scrutiny standard. No compelling interest -as that term has been defined by the US Supreme Court’s interpretation of the Equal Protection Clause – exists in protecting the voting rights of any group that has historically never been discriminated against in a political subdivision. Here, while Plaintiffs’ Opposition discusses alleged past discrimination against persons who are Black and of Spanish Heritage in Defendant Town, that is not a requirement for their cause of action. They can decline to offer such proof at trial. If they do offer such proof, there is no standard for this Court

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/08/2024 09:34 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/08/2024

to use in determining the sufficiency of that evidence because proof of discrimination is not required to any degree by the NYVRA. While the two groups herein might establish some impairment of their ability to influence an election, the US Supreme Court has held that such impairment – without a history of discrimination - is not sufficiently compelling to justify a state mandate based on race or national origin.

Additionally, no compelling interest exists in allowing multiple protected classes to aggregate for purposes of proving vote dilution. Aggregation is raised by the instant motion because the Complaint asserts that each group of Plaintiffs (Black and Spanish heritage) comprise less than a majority of the population of Defendant Town but cannot independently form a majority in a reasonably configured district. Therefore they seek to aggregate the two groups into a single group for purposes of proving vote dilution.

Even if such aggregation were permissible as a compelling interest, its boundaries must be defined. Here, the NYVRA states aggregation is allowed where “there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision.” NY Election Law 17-206(2)(c)(vi). But in the same subsection 17-206, aggregation is allowed for a different reason, to wit, “in the event that they demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate.” NY Election Law 17-206(8).

ii. Narrowly Tailored

Even if the Court assumes, arguendo, that the NYVRA does serve a compelling interest, Plaintiffs must also prove that the prohibitions and remedies are narrowly tailored. “Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.” *Gruiter v*

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/08/2024 09:32 AM

NYSCEF DOC. NO. 149

RECEIVED NYSCEF: 11/08/2024

Bollinger, 593 US 306, 26 (2003). “When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.” *Id.* See *Parents Involved v Seattle School District No. 1*, 551 US 701, 704 (2007) (“Narrow tailoring requires ‘serious, good faith consideration of workable race-neutral alternatives’”).

Here, the breadth of remedies that a Court can impose for the most minimal of impairments of a class of voters’ ability to influence an election cannot be described as “narrow” in any sense of that word. The NYVRA sets no minimum bar on the extent of any such impairment of voter ability to influence an election and does not require RPV or impairment of the ability of a protected class to elect a candidate of choice.

Moreover, the review standard is lax to the point of explicitly allowing a court to find voter dilution exists without citing any basis. The NYVRA allows a finding of vote dilution based upon a “totality of circumstances”, which lacks any defined criteria because the NYVRA

lists 11 factors that may be considered. Thus, a court is free to find voter dilution based on any criteria that the court itself creates, or no criteria at all. NY Election Law 17-205(3) (“Nothing in this subdivision shall preclude any additional factors from being considered, nor shall any specified number of factors be required in establishing that such a violation has occurred.”).

Plaintiffs are quick to compare the NYVRA to the FVRA when it suits their purposes. However, that is not entirely, but is largely a two way street. Attempts to extend the FVRA to the degree that Plaintiffs assert here have been soundly rejected. In *LULAC v. Perry*, 548 U.S. 399 (2006), the Supreme Court held that Section 2 of the FVRA does not require the creation of

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/08/2024 09:22 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/08/2024

"influence districts," where a minority group cannot elect the candidate of its choice because of its sub-majority numbers but the group may still play an influential role in the electoral process. The Court held that the ability of members of a minority group to influence an election in a district was insufficient to state a claim for vote dilution. "The opportunity 'to elect representatives of their choice,' *requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice.*" *Id.*

H. Precedent for Judicial Review of Voting Rights Legislation

In the context of voting rights, the Equal Protection Clause forbids "racial gerrymandering," that is, intentionally assigning citizens to a district on the basis of race without sufficient justification. *Abbott v Perez*, 585 US 579, 585 (2018), *citing Shaw v. Reno*, 509 U.S. 630, 641 (1993). "At the same time that the Equal Protection Clause restricts the consideration of race in the districting process, compliance with the [Federal] Voting Rights Act of 1965 . . . pulls in the opposite direction: it often insists that districts be created precisely because of race."

Id. "Since the Equal Protection Clause restricts consideration of race and the [F]VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to " 'competing hazards of liability.' " *Id.* at 587, citing *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion).

As a result of this tension between the Equal Protection Clause and the FVRA, a significant body of law developed over the past 60 years whereby the FVRA could be applied as intended by Congress, but not without limitation. Plaintiffs on this score turn away from the FVRA and urge this Court to disregard that precedent, holding that the NYVRA is constitutional, despite its explicit rejection of certain guardrails so firmly created over decades to prevent undue

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/08/2024 09:11 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/08/2024

infringement on the Equal Protection Clause. The Court declines this invitation to ignore binding US Supreme Court precedent and apply the NYVRA in a manner by which it would become supreme over the guarantees provided by the US Constitution.

Thornburg v. Gingles, 478 U.S. 30 (1986) created the framework for analyzing vote dilution claims under the FVRA. *Gingles* specified three preconditions that a minority group must prove to succeed on a vote dilution claim: the minority group is i) sufficiently large and geographically compact to constitute a majority in a [reasonably configured] single-member district; ii) politically cohesive, and iii) able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... to defeat the minority's preferred candidate." *Id.* If these three preconditions are established, the minority group must then show that, "based on the totality of circumstances," the electoral process is not "equally open" to its members. This final step of the analysis entails considering several factors, often called 'the Senate factors' because they originated from the Senate Judiciary Committee Report accompanying the 1982 Amendments. *Id.* at 36-37.

That process has been followed in an unbroken line of Supreme Court decisions over four decades, regardless of the composition of that Court and the philosophies of its members. In some unusual instances, principles of law ring so true, and are established over time with repeated confirmation, that the doctrine of stare decisis overcomes the inclination of any member or faction of a court to disturb decades of precedent. The *Gingles* preconditions have been one of these rare examples.

The NYVRA mandates that a reviewing court *not* consider the first of the *Gingles* preconditions in determining a vote dilution claim. NY Election Law 17-206(c) "For the

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/08/2024 09:11 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/08/2024

purposes of demonstrating that a violation of paragraph (a) of this subdivision has occurred, evidence shall be weighted and considered as follows: . . . (viii) evidence concerning whether members of a protected class are geographically compact or concentrated *shall not be considered*, but may be a factor in determining an appropriate remedy . . .” Plaintiffs urge this Court to cast aside 40 years of jurisprudence and decline to apply *Gingles* to the analysis of the NYVRA, with no legal authority.

The Court is mindful that *Gingles* determines claims under the FVRA and this case presents a claim under the NYVRA. However, the analysis of *Gingles* is one by which the Supreme Court created a balance of the aforementioned tension between the Equal Protection Clause and voting rights legislation. Assuming arguendo that New York has authority equal to Congress to pass voting rights legislation that is race-based, a principle that is itself controversial, the NYVRA still must satisfy judicial precedent that permits a rare state-sanctioned infringement on the rights of persons not in the protected class. The Court is not aware of, and no party has provided upon its request, any case from the Supreme Court or any other federal court that determined that the first precondition of *Gingles* is not applicable to the issue of whether a state voting rights act is violative of the US Constitution.

The NYVRA’s elimination of the first *Gingles* factor effectively creates a right to proportional representation. Where one class cannot establish that it can elect a candidate of choice - even if new districts are created -- then the aggregation of many such classes into one will result in a *de jure* mandate of representation in proportion to these innumerable classes, each of which has no minimum percentage of voting population. When the FVRA was amended, the Senate included wording to explicitly *reject* such a requirement. 52 USC 10301(b) (“nothing in

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

FILED: ORANGE COUNTY CLERK 11/08/2024 09:12 AM

NYSCEF DOC. NO. 148

RECEIVED NYSCEF: 11/08/2024

this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population”).

In *Bartlett v State Board of Elections*, 556 US 1, 15 (2009), the Supreme Court rejected Plaintiff's argument herein, declining to hold that the FVRA “grants special protection to a minority group's right to form political coalitions.” *Bartlett* rejected the argument that ‘opportunity’ under the FVRA includes the opportunity to form a majority with other voters—whether those other voters are other racial minorities, whites, or both. *Id.* When a minority group cannot constitute a majority in a single-member district without combining with members of another minority group, the FVRA does not provide protection because there neither has been a wrong nor can there be a remedy. *Grove v. Emison*, 507 U.S. 25, 41 (1993); see *Allen v. Milligan*, 599 U.S. 1, 23 (2023) (“Forcing proportional representation is unlawful and inconsistent with this Court’s approach to implementing § 2 [of the FVRA].”).

A similar argument was recently raised and rejected in a federal appellate case, *Petway v. Galveston County*, 11 F4th 596 (5th Cir 2024) (en banc). In *Petway*, the protected class asked for new “crossover districts” in which they could elect the candidate of their choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate. The court rejected the proposal because when “a minority group constitutes less than a majority of the citizen voting-age population in a reasonably configured district, it has no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength.” *Id.* at 610.

Coalition claims pose the same practical problems as crossover claims in determining the existence of the *Cingles* preconditions, especially whether the distinct minority groups are

FILED: ORANGE COUNTY CLERK 11/11/2024 04:18 PM

NYSCEF DOC. NO. 151

FILED: ORANGE COUNTY CLERK 11/08/2024 10:32 AM

NYSCEF DOC. NO. 145

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/11/2024

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 11/08/2024

politically cohesive. *Perbury*, 11 F.4th at 610-611. Coalition claims create questions of “judicially unmanageable complexity”. *Id.* “[C]ontemporary demographics suggest there is no stopping point if minority coalitions may be formed out of any minority racial or language groups. *Id.* The factual complexity of coalition claims only increases as the number of minority groups within the coalition increases. *Id.*

Based on this history of cases rejecting the coalition claim that Plaintiffs herein plead as their basis for sweeping electoral reform in Defendant Town, this Court holds that such claims do not satisfy the clear standards set forth in *Gingles* and its progeny. For that additional reason, the NYVRA is in violation of federal law and therefore cannot stand.

Conclusion

For all the foregoing reasons, it is hereby

ORDERED that Defendants' Motion Seq. #5 for summary judgment is GRANTED and it is further

ORDERED that the Complaint is DISMISSED, and it is further

ORDERED that the NYVRA is hereby STRICKEN in its entirety from further enforcement and application to these Defendants and to any other political subdivision in the State of New York.

The foregoing constitutes the Decision and Order of this Court.

Dated: November 7, 2024
Goshen, New York

ENTER:


HON. MAUNA S. VAZOUSS-DOLES, J.S.C.

**Affirmation of Bennet J. Moskowitz, for Defendants,
in Support of Motion for Summary Judgment,
dated September 25, 2024
[pp. A53 - A56]**

FILED: ORANGE COUNTY CLERK 09/25/2024 05:56 PM

NYSCEF DOC. NO. 59

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 09/25/2024

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,

Index No.: EF002460-2024

v.

**AFFIRMATION OF BENNET J.
MOSKOWITZ**

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

Defendants.

BENNET J. MOSKOWITZ, an attorney duly admitted to practice before the Courts of the
State of New York, hereby affirms the following under penalty of perjury:

1. I am a Partner at Troutman Pepper Hamilton Sanders LLP, counsel for Defendants
Town of Newburgh and Town Board of the Town of Newburgh.
2. I submit this Affirmation solely to present to the Court certain materials cited in
Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment,
which materials are attached hereto as described below.
3. Attached hereto as Exhibit A is a copy of the expert report of Dr. Donald T.
Critchlow, dated July 26, 2024.
4. Attached hereto as Exhibit B is a copy of the transcript from the deposition of
Gilbert Piaquadio, deposed in his capacity as a representative of Defendant Town of Newburgh on
September 23, 2024.
5. Attached hereto as Exhibit C is a copy of the expert report of Dr. Brad Lockerbie,
dated July 26, 2024.

6. Attached hereto as Exhibit D is a copy of the transcript from the deposition of Dr. Matt A. Barreto, held on September 13, 2024.
7. Attached hereto as Exhibit E is a copy of Plaintiffs' Summons and Complaint, dated March 26, 2024 [NYSCEF No. 1].
8. Attached hereto as Exhibit F is a copy of Defendants' Motion to Dismiss, dated April 16, 2024 [NYSCEF No. 9].
9. Attached hereto as Exhibit G is a copy of the Decision and Order denying Defendants' Motion to Dismiss, dated May 17, 2024 [NYSCEF No. 31].
10. Attached hereto as Exhibit H is a copy of the Preliminary Scheduling Order entered in this case, dated May 9, 2024 [NYSCEF No. 29].
11. Attached hereto as Exhibit I is a copy of the expert report of Dr. Matt A. Barreto, dated June 28, 2024.
12. Attached hereto as Exhibit J is a copy of NYSCEF No. 60, Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgment, dated August 13, 2024, in *Serrato v. Town of Mount Pleasant*, Sup. Ct. Westchester Cnty., Index No. 55442/2024.

Dated: New York, New York
September 25, 2024

Respectfully submitted,

**TROUTMAN PEPPER HAMILTON
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Affirmation complies with the word count limitations set forth in Uniform Rule 202.8-b for the Supreme Court. This Affirmation uses Times New Roman 12-point typeface and contains 346 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

**Exhibit A to Moskowitz Affirmation -
Expert Report of Donald T. Critchlow, Ph.D., M.A.,
dated July 26, 2024
[pp. A57 - A110]**

FILED: ORANGE COUNTY CLERK 09/25/2024 05:56 PM

NYSCEF DOC. NO. 60

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 09/25/2024

Expert Report of Donald T. Critchlow, Ph.D., M.A.

***Oral Clarke, Romance Reed, Grace Perez, Peter Ramon, Ernest Tirado, and Dorothy
Flournoy v. Town of Newburgh and Town Board of the Town of Newburgh***

I, Donald T. Critchlow, have been retained as a historical consultant by the Town of Newburgh and the Town Board of the Town of Newburgh (the “Town” or “Defendants”) to reply to assertions raised in the expert report of Professor A.K. Sandoval-Strausz concerning the application of the “the totality of the circumstances,” as defined by the New York John R. Lewis Voting Rights Act (“NYVRA”), to the Town. In particular, I was asked to analyze whether the evidence cited in the Sandoval-Strausz Report supports the claim that under the totality of the circumstances, the ability of Hispanics within the Town to elect representatives of their choice to public office or the Town Board is impaired.

I have testified either at trial or in a deposition in *Feldman v. Reagan*, D. Ariz. No. 2:16-cv-01065 (DLR) and served as an expert witness in *Darlene Yazzie, et al. v. Katie Hobbs*, D. Ariz. No. 20-cv-08222-PCT-GMS. Both cases were won by the State of Arizona. I am also serving as an expert witness in *New York Communities for Change et al. v. County of Nassau, Maria Jordan Awalom, Monica Diaz Ortiz, and Guillermo Vanetten v. County of Nassau, the Nassau Legislature, the Nassau County Board of Election, Bruce Blackman, et al.*, Index Nos. 611872/2023 & Index No. 602316/2024, Supreme Court of the State of New York, Nassau County; *Sergio Serratto, Anthony Aquirre, Ida Michael, Kathleen Siguenz, Silvana against the Town of Mount Pleasant and Town Board of the Town of Mount Pleasant* and *Rodey D. Pierce et al. v. North Carolina State Board of Elections*. My rate of compensation is \$350/hour and my compensation is not based upon reaching any particular conclusions in this case.

I. Qualifications

In addition to the experience and education described in my curriculum vitae (attached as **Appendix A**), I have published nine monographs with major university presses, including Harvard University Press, Oxford University Press, Princeton University Press, Cambridge University Press, University of Pennsylvania Press, as well as other academic and commercial publishers. Most relevant to this report, my most recent academic publications include *Republican Character: From Nixon to Reagan*, published by University of Pennsylvania Press in 2018, which includes two chapters on Nelson Rockefeller, governor of New York from 1959-1973, specifically the Nelson Rockefeller Papers located in Tarrytown, New York. Also relevant to my scholarly work in American political history is the co-edited book, *The Oxford Handbook of Political History* in 2020, which included essays by thirty leading historians and political scientists who examine political and policy history. These books have undergone extensive peer review.

I am also the editor of the *Journal of Policy History*, a quarterly journal published by Cambridge University Press. Published authors include historians, political scientists, and social scientists from the United States, Europe, and Japan. I have earned two fellowships from the Woodrow Wilson International Scholars Center in Washington, D.C., served as a Guest Scholar at the Brookings Institution in Washington, D.C., and a Distinguished Lecturer for the U.S. Department of State. I have lectured throughout Europe, China, and Australia.

II. Summary of Expert Opinions

Professor A. K. Sandoval-Strausz provides an opinion on the “Totality of Circumstances” factors contained in the NYVRA, §17-206(3)(a) through (k), however, Professor Sandoval-Strausz interpretation of New York and the Town of Newburgh’s history, and his description of past and

current racial disparities, is problematic and deficient. Specifically, each of the factors included in “Totality of Circumstances” are challenged as follows:

a. Professor Sandoval-Strausz’s use of history is monochromatic, linear, and exclusionary of facts that do not fit his narrative. The State of New York has a long history, not discussed by Professor Sandoval-Strausz, of anti-slavery activity prior to the Civil War; and a history of civil rights activism in the post-World-War II period. This raises the question: If slavery is to be included in the “Totality of Circumstances,” why is the history of opposition to slavery and post-World War II civil rights activism not included? Indeed, New York was often on the forefront of efforts countering discrimination and unequal treatment of minorities. Professor Sandoval-Strausz likewise examines federal housing policy, but excludes an extensive literature that challenges this narrative. Furthermore, his examination of the suppression of minority rights fails to discuss immense progress in voter protection on federal and state levels. His opinion is thus incomplete.

b. Professor Sandoval-Strausz’s examination of the election of minority members to public office in the Town of Newburgh distorts the history of a small municipality that did not have a large minority population and still does not.

c. Professor Sandoval-Strausz maintains that protected classes were structurally prevented from voting yet presents little evidence for this assertion. In his report, he misinterprets the history and use of literacy tests for voting by failing to note that this test was aimed against machine politics by “good government” forces, including immigrant groups. Furthermore, the enactment of the Voting Rights Act of 1975 that made Spanish speakers a protected class, and outlawed literacy tests, was a result of Hispanic political activism and was overwhelmingly passed by Congress and signed into law by President Gerald Ford.

d. In claiming that eligible voters, in this case Spanish-speaking voters in the Town of Newburgh, were denied access to voting, Professor Sandoval-Strausz fails to consider the expansion of language services.

e. Professor Sandoval-Strausz's examination of turnout rates as an indication of minority voter suppression ignores that nationally, low voter turnout rates are lower for lower income groups, including whites. Turnout rates in Newburgh show relatively high rates in 2020, a presidential election year, and low turnout rates for a local election in 2023. This is not isolated to the Town of Newburgh; it is a typical pattern for municipalities, large and small, nationally.

f. Professor Sandoval-Strausz ignores evidence that the state, Orange County, and town have provided Spanish- language ballots and public services to the protected class.

g. Professor Sandoval-Strausz's examination of disadvantages faced by minorities in education, housing, and land use is often without empirical foundation and often reaches conclusions based on conjecture. For example, he introduces figures for educational attainment in the Town of Newburgh, without citing where these figures are derived. These figures could not be reproduced after thorough searches of U.S. Census Bureau, New York State Department of Education, or the town of Newburgh's website. The town does not have its own school district, and its students attend one of four districts (Wallkill, Newburgh Enlarged, Valley Central, and Marlboro).

h. He finds, contrary to his claim of employment disparity, that the rate of unemployment in the town remains below state or county rates.

i. In housing disparity, he writes "In the category of housing, conditions in Newburgh also differ meaningfully by race, *probably* [italics added] due both to past patterns of

discrimination in homeownership and disparities in employment” (p. 35). This wording, “probably,” is conjecture not analysis.

j. His discussion of land use policy and environmental protection challenges that prevented the development of a power plant concedes that the opposition to development and strengthening the power grid was led by influential environmental organizations (p. 37). His contention that this evidences a disadvantage to Blacks and Latinos is attenuated. It is far from clear that Blacks and Latinos are against the power plant, as the plant could provide more jobs and New York electrical utility prices are in the top ten highest states in the nation, and that high utility prices especially hurt low-income households.

k. Professor Sandoval-Strausz combines sections g/h.

l. Professor Sandoval-Strausz claims there was overt or subtle racial appeals in political campaigns by pointing to a fabrication about immigrants created by an individual citizen. He does not explain why this was a racist campaign message. Indeed, the woman who created the fabrication, Sharon Toney-Finch, was Black. He further finds subtle or outright racial appeals in anti-immigration language, apparently contending that an expression of concern about border security is by itself racist in nature. In doing so, he downplays the widespread concern among all voters, including blacks and Hispanics, about mass immigration.

m. Professor Sandoval-Strausz concludes his report with the claim that voter redistricting in the small Town of Newburgh is called for by this alleged record of racism. His report overlooks residential distribution and differences within the community, especially among Blacks and Hispanics.

Professor Sandoval-Strausz's claims are explored in detail to show his tendency to cherry pick facts, obscure context, ignore progress, and disregard good intentions of public officials in

national, state, county, and town seeking to address serious and complex social and economic problems.

III. Expert Opinions

A. History of Racial Discrimination Affecting Political Subdivision

Professor Sandoval-Strusz's report begins with a history of discrimination against Blacks and Hispanics nationally, in New York State, and to a much lesser extent, in the Town of Newburgh. The plaintiff's report asserts that "New York has a long and sad history" of suppressing the political power of people of color. This discussion lacks context and ignores significant civil rights legislation.

While slavery, Jim Crow, and discrimination against non-English speakers in voting are certainly part of American history, so are anti-slavery movements, the Black civil rights movement, and increased access to the ballot. Professor Sandoval-Strausz emphasizes part of the history, but entirely ignores the wider history, one which includes active anti-slavery mobilization in the State of New York and the Hudson Valley, as well as Black and minority civic rights activism, and legislative progress, in the 20th century. As a result, his report is one-sided and thus, unreliable.

Recounting our national history of the abolition and civil rights movements at the national level—vast and complex movements—would be overkill and beside the point in a case focused on the Town of Newburgh. This response will largely focus on the State, the Hudson Valley region, and the town.

Historian Richard S. Newman wrote in his history of abolitionism that the movement "was born with the American republic," or perhaps even earlier.¹ New York was an important part of

¹ Richard S. Newman, *The Transformation of American Abolitionism: Fighting Slavery in the Early Republic* 2 (Univ. of N.C. Press 2002).

that story, both as it developed at the national level and in a state that had deep economic ties to the Southern slave economy, a sizeable population of free Blacks and slaves, and more than its share of virulent racists.

New York, with a relatively large slave population, tried to balance freedom and property rights. Following Pennsylvania, Connecticut, and Rhode Island, New York voted for gradual emancipation in 1799. The law was passed after the New York Manumission Society's steady agitation. Founded in 1783, its membership included slaveowners such as John Jay, who introduced abolition laws in 1777 and 1785.² In addition to trying to change state law, the New York Manumission Society organized a national convention to explore how to persuade Congress to pass anti-slavery legislation and to coordinate efforts to prevent free Blacks from kidnapping by slave traders.³ It also focused on education: removing the "cloud of prejudice" that hung over whites about the capabilities of Blacks for citizenship and providing education to Blacks to equip them for citizenship.⁴

The American Anti-Slavery Society, founded in 1833 and counting women and free Blacks among its members, was active in the Hudson Valley, especially in areas where Quakers settled. Abolitionists in the Hudson Valley "played a significant role in the Underground Railroad."⁵ Calling for immediate abolition, it had an immense presence in New York. By 1836, one-fifth of

² Both Aaron Burr and Alexander Hamilton were members, as were three future governors. David N. Gellman, *Liberty's Chain: Slavery, Abolition, and the Jay Family of New York* (Cornell Univ. Press, Three Hills, 2022) explores the tension in John Jay's advocacy while still owning human beings.

³ Paul Polgar, "To Raise Them to an Equal Participation": *Early National Abolitionism, Gradual Emancipation, and the Promise of African American Citizenship*, 31(2) *J. of the Early Republic* 229, 239–240 (2011).

⁴ *Id.* at 240.

⁵ Amy Jacaruso, *The Mid-Hudson Antislavery Project*, Hudson River Valley Institute, <https://www.hudsonrivervalley.org/mid-hudson-antislavery-history-project>; Rebecca Edwards, Torrie Williams, Kristina Poznan, *Mid-Hudson Antislavery History Project June 2007 Research Report*, Vassar College (2007), available at <http://mhantislaveryhistoryproject.org/documents/2007%20Research%20Report.pdf>; A.J. Williams-Myers, *The Underground Railroad in the Hudson River Valley: A Succinct Historical Composite*, 27(1) *Afro-Americans in New York Life and History* 1–12 (2003).

the chapters in the nation were in New York.⁶ Their activism, often in the face of opposition, kept abolitionism in the consciousness of the state and nation, even amid internal divisions.

The Liberty Party emerged from a meeting in upstate New York involving Anti-Slavery Society members who were frustrated with the Whig and Democratic parties for their unwillingness to take a stand on slavery. With two slaveowners running in 1844, the Liberty Party hoped for a breakthrough, but the party won only 2.3% of the vote nationally and 3.25% in New York, which the Democrat Polk carried with 48.9% of the vote.⁷

Nationally, Black suffrage faced headwinds everywhere in the 19th-century North. Only Iowa managed to pass one.⁸ However, the New York state legislature proved to be a more reliable venue for progress on civil rights. In 1873, New York was one of the first states to pass a civil rights statute—a state version of the 14th Amendment. It banned racial discrimination in public accommodations, including public schools. By World War II, “the nation viewed New York courts and legislature as leading agencies in the broader advocacy of civil rights.”⁹

The postwar reputation for progress in civil rights legislation was cemented by the passage of the Ives-Quinn Act in 1945 with broad bipartisan support.¹⁰ It aimed to prevent discrimination in employment, which it declared was a civil right. It created a state commission with broad powers

⁶ John L. Myers, *The Beginning of Anti-Slavery Agencies in New York State, 1835-1836*, 43(2) *New York History* 149, 150 (1962).

⁷ *1844 Presidential General Election Results*, U.S. Election Atlas, available at <https://uselectionatlas.org/RESULTS/national.php?year=1844>.

⁸ Robert R. Dykstra, *Bright Radical Star: Black Freedom and White Supremacy on the Hawkeye Frontier* (Harv. Univ. Press 1993).

⁹ David McBride, *Fourteenth Amendment Idealism: The New York State Civil Rights Law, 1873–1918*, 207–233, 208, *N.Y. History*, April 1990, Vol. 71, No. 2.

¹⁰ Leo Egan, *ANTI-RACIAL BILL PASSED BY SENATE AND SENT TO DEWEY; Ives-Quinn Measure Wins by 49-to-6 Vote in Late Session at Albany A LAST-MINUTE BATTLE Amendment for Referendum Rejected--Governor's Support Commended Dewey Corralled Votes Structure of Law Praised Functions of Commission*, *N.Y. Times* (Mar. 6, 1945), <https://www.nytimes.com/1945/03/06/archives/antiracial-bill-passed-by-senate-and-sent-to-dewey-ivesquinn.html>.

to investigate claims, formulate policy, and create local and regional boards to implement policy.

New York was the first state to establish such an agency.¹¹

The state Commission against Discrimination was renamed the Division of Human Rights in 1968 which better reflected its wider and growing scope. New York counties, including Orange County, have replicated this model, creating their own Human Rights Commissions and procedures for filing complaints.¹²

Professor Sandoval-Strausz unsuccessfully attempts to demonstrate a link between his “sad history” of New York and the status of Blacks and Hispanics in New York today. For example, finds a 1992 neo-Nazi picnic/rally held in the town of Newburgh an example of the continued history of racism in the town (pp. 22-23). He writes, “In the most widely-reported incident in the early decades of the town’s and county’s ethnoracial diversification, in September 1992 assorted groups of neo-Nazis and Ku Klux Klan members and supporters gathered for a picnic in the Town of Newburgh. ... About 100 people attended the event....” The event sparked the organization of a much larger counter-march in the neighboring City of Newburgh in which some 3,000 people—including representatives from the NAACP, white and Black Christian ministers, local Jewish congregations, a mayor, and New York’s attorney general—rallied for “racial and religious unity and against demagoguery.”

Professor Sandoval-Strausz’s evidence, however, demonstrates that relatively few people attended the neo-Nazi rally. Newspaper reports from The New York Times and the Star-Gazette suggest that many of those who attended the rally were not citizens of the Town of Newburgh, but instead came from New Jersey, Maine, Connecticut, and Delaware. Moreover, the counter protest

¹¹ N.Y. State Div. of Hum. Rts., *Agency History*, N.Y. State Div. of Hum. Rts., <https://dhr.ny.gov/agency-history>.

¹² Orange Cnty. Gov’t, *Human Rights*, Orange Cnty. Gov’t, <https://www.orangecountygov.com/1108/Human-Rights>.

to the KKK rally drew over 30 times more protesters. Although this was held in the adjoining City of Newburgh, reports of the county rally do not reveal how many attendees were residents of the town of Newburgh. Professor Sandoval-Strausz's lengthy report of this incident in 1992 is a small event in a longer history of great progress being made in civil rights legislation protecting minority voters."¹³

Professor Sandoval-Strausz finds that literacy tests were used as instruments of discrimination (p. 9). This history of literacy testing in New York is considerably more complex than portrayed by Professor Sandoval-Strausz. For example, He overlooks that state-funded evening programs, public schools, and community centers undertook an extensive educational campaign to ensure an expanded electorate prepared to pass the literacy tests. From 1923 through 1929, the fail rate for the exam fell from 21.4% to 10.8%. Those taking the test rose from 25,199 to 46,433. The high-water mark for taking the test was 1928, a presidential election year that featured Catholic New Yorker Al Smith as the Democratic candidate, in which 129,000 people took the exam.

More importantly, as Professor Sandoval-Strausz concedes, literacy tests were banned nationally by the 1975 Voting Rights Act, largely due to the efforts of Mexican American and Puerto Rican legal activists. The Voting Rights Act of 1975, and the banning of literacy tests in the nation, provides further evidence of progress in protecting legal rights—progress that Professor Sandoval-Strausz neglects to consider in his analysis. Indeed, today, Orange County has vigorous programs to ensure Spanish speakers' access to voting and educational resources to encourage civic participation and access. On the county's website, orangecountygov.com, when searching

¹³ Robert W. Dalton, "Go Upstate," *Spartanburg Herald-Journal*, Apr. 15, 2007.

“Spanish” over 100 documents come up. This includes early voter registration available in Spanish.¹⁴

Further, Professor Sandoval-Strausz fails to explain how literacy tests from the 1920s impair Hispanics’ ability to elect a candidate to the Town Board 100 years later and nearly 50 years after such tests were abolished. Placed into a larger historical context and the current environment, Professor Sandoval-Strausz’ historical narrative of persistent racism in the Hudson Valley, Orange County, and Newburgh appears cherry-picked and monochromatic. Furthermore, today Newburgh is a stable town, with a generally well-educated population, a town concerned with inclusion and diversity, and a town committed to policy transparency, open public hearings, and elected officials representative of the entire community.

B. The Town of Newburgh Today

The Town of Newburgh, a small municipality, is one of the oldest towns in the state, chartered in 1788. The Village of Newburgh was incorporated in 1800; it gained a city charter in 1865 and was split from the town. The town was largely agricultural, providing produce locally and sent to market in New York City and elsewhere. Dairy farms—Orange County became well-known for its butter, and when that market collapsed, milk—predominated.¹⁵ Orchards and truck farms were also common. Industry, such as the manufacturing of bricks, took advantage of local resources and markets.

Today the Town of Newburgh has been transformed from a once sparsely-settled farming community into more of a “bedroom” community. Many of the Town’s residents, as Les Cornell,

¹⁴ Orange Cnty. Gov’t, Early Vote by Mail (Spanish) Revised Primary Only, Orange Cnty. Gov’t, <https://www.orangecountygov.com/DocumentCenter/View/31201/early-vote-by-mail-spanish-revised-primary-only?bidId=>.

¹⁵ Alex Prizgintas, *Dairy Farming History*, <https://alexprizgintas.com/dairy-farming-history/>.

the town historian observes, “work in more metropolitan areas, but chose to move to this area and to raise their families here because of its affordability and its rural setting.”¹⁶

The current population stands today at 31,987, a slight increase from the 2010 population of 29,801. Of this population, 61% are white, 15.4% are black, 10.7% are mixed race, and 25.2% are Hispanic. Thirteen percent (13%) of the population is foreign born. The population is well educated with 92.2% of persons over the age of 25 with a high school diploma, and 32.8% with a Bachelor’s degree or higher. Ninety-six percent (96%) of households have a computer, and 93% have a broadband internet subscription.¹⁷ This allows greater education access for on-line education, as well as opportunities for political education and political involvement.

The town today operates with an annual budget of \$55.6 million. Town Supervisor Gil Piaquadio announced that the town has received a financial stress score of zero from the State Comptroller’s Office and has a AA2 bond rating. The new budget will be used to maintain roads and provide timely public services, enjoyable recreation areas, and clean water. The town employs 165 full-time employees and 101 part-time and seasonal workers. The budget includes 49 full time public safety officers, as well as 13 budgeted-parttime offices to continue such educational programs as D.A.R.E.¹⁸

In March 2021 the city adopted an extensive plan for police innovation, in response to an executive order by Governor Andrew Cuomo requiring each local government to adopt police reform. Through virtual public meetings open to the entire community, the Town of Newburgh described a program to ensure inclusivity of the police force, further training of police officers in

¹⁶ Town of Newburgh, *History of the Town of Newburgh*, <https://www.townofnewburgh.org/cn/webpage.cfm?tpid=4844>.

¹⁷ U.S. Census Bureau, *QuickFacts: Newburgh town, Orange County, New York*, <https://www.census.gov/quickfacts/fact/table/newburghtownorangecountynewyork/PST045222>.

¹⁸ Alberto Gilman, *Town of Newburg*, Hudson Valley Times (Oct. 25, 2023), <https://www.timeshudsonvalley.com/stories/town-of-newburgh-adopts-556-million-budget,103819>.

the use of force and defensive tactics, and greater legal awareness. Additional training was initiated for anti-discrimination/anti-racism, procedural justice/implicit bias, and de-escalation. Every officer will undergo “implicit and anti-discrimination training.”

C. Factors B-D Minority Political Participation and Hispanic Attainment

Professor Sandoval-Strausz spends considerable time showing discrimination against Hispanics more generally in the nation and the State. He provides very little about the town of Newburgh, however. He also ignores major advances in education and other areas made by Spanish speaking people nationally and in the state of New York. These advances, which can be empirically shown, are crucial to understanding the status of Hispanics in Newburgh today.

The historical context is important. Puerto Rican migration to New York City rose 50% from 1930 to 1940 and then quadrupled from 1940 to 1950. Political activism paralleled this migration. Between the two world wars, approximately 36 Puerto Rican political and social organizations were formed. Voter registration for Puerto Ricans rose to nearly 5%. Puerto Ricans found a voice in an Italian congressman from East Harlem, Vito Marcantonio, who was recognized as the de facto congressman from Puerto Rico.¹⁹ In 1937, the first Puerto Rican official, Oscar García Rivera, was elected to the New York State Assembly on a Republican and American Party line ticket. In 1971 Herman Badillo, a Democrat, was elected as the first Puerto Rican to Congress. In 1992 Nydia Valázquez was elected to Congress. By the 1990s Puerto Rican activism solidified in New York as Puerto Ricans won congressional seats from Brooklyn and the Bronx. Puerto Rican activism, active participation in American politics, bipartisan support for legal and legislative protections have opened opportunities for advancement of protected Spanish speaking minorities.

¹⁹ Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, https://www.national-consortium.org/__data/assets/pdf_file/0025/8467/latininos.pdf

This progress is misrepresented by Professor Sandoval-Strausz. For example, he submits as evidence of discrimination the fact that Orange County entered a consent agreement to provide bilingual ballots and linguistic support for Spanish speaking minorities in 2013. (He misdates the consent agreement as occurring in 2012). However, the initial suit was brought by Puerto Rican organizations, which demonstrates not only Hispanic political activism and participation in civic life, but also their successes.²⁰ Professor Sandoval-Strausz's failure to consider such meaningful and successful achievements of Hispanic political activism weakens his conclusions.

As mentioned above, Professor Sandoval-Strausz also fails to consider Orange County's efforts to ensure Spanish speakers have access to voting and educational resources and to encourage civic participation and access. The county's website, orangecountygov.com, has over 100 "Spanish" documents, including early voter registration, available in Spanish.²¹

Orange County similarly ensures proper resources for and participation from Spanish speakers in other areas. The Orange County Citizen Participation Plan relating to the administration of grant programs provided to Orange County by federal Housing and Urban Development states, "The county will take reasonable steps to provide language assistance to ensure meaningful access to participation by non-English-speaking residents of the community." According to American Community Survey data, 3.9% of County residents are native Spanish speakers. To accommodate these individuals, "[t]he County will provide a Spanish version of meeting agendas, handouts and surveys at meetings and stakeholder interviews conducted for each planning process upon request and provide written translation to Spanish of all vital documents

²⁰ Press Release, U.S. Dep't of Justice, *Justice Department Announces Agreement with Orange County, New York, to Protect the Rights of Spanish-speaking Puerto Rican Voters* (Apr. 19, 2012), <https://www.justice.gov/opa/pr/justice-department-announces-agreement-orange-county-new-york-protect-rights-spanish-speaking>.

²¹ Orange Cnty. Gov't, *Solicitud de boleta anticipada por correo del estado de N.Y.*, <https://www.orangecountygov.com/DocumentCenter/View/31201/early-vote-by-mail-spanish-revised-primary-only?bidId=>.

identified in the County's Language Access Plan, including all public notices related to the development of the documents."²² The county also provides oral interpretation at public hearings upon request and ensures web content will be available in Spanish.

Orange County likewise has a Human Rights Commission, which handles complaints and publicizes the applicable laws. In 2022, it also ran a conference featuring topics including "Intentional Inclusion" and turning anti-bias views into action.²³

As for housing and segregation, Professor Sandoval-Strausz claims "[a]cross the Town of Newburgh there are large ethnoracial gaps in income and housing." (p. 34.) His evidence is unconvincing. This assertion is belied by a U.S. Census Bureau measure through an "Index of Racial Dissimilarity." This index measures racial diversity, specifically measuring black and white residences. The higher the score the more one racial group dominates a city, county, or state; the lower the score reveals greater ethnic diversity. The 2022 Index for Orange County shows over 5% decline from a high in 2012 to today. Racial dissimilarity has fallen and serious progress on racial relations between non-whites and whites has been made. This five-year index included whites and non-whites including Hispanics.²⁴ While the index does not separate Hispanics in the category of "non-whites," the index reveals general racial progress in terms of racial distribution.



²² Orange Cnty. Gov't, *Citizen Participation Plan 6* (Dec. 15, 2022), <https://www.orangecountygov.com/DocumentCenter/View/29427/Orange-County-Citizen-Participation-Plan-?bidId=>.

²³ Orange Cnty. Gov't, *Human Rights, Orange Cnty. Gov't*, <https://www.orangecountygov.com/1108/Human-Rights>.

²⁴ Fed. Rsr. Bank of St. Louis, *White to Non-White Racial Dissimilarity (5-year estimate) Index for Orange County, NY* (Dec. 7, 2023), <https://fred.stlouisfed.org/series/RACEDISPARITY036071>.

Professor Sandoval-Strausz posits that there are dramatic disparities between Latinos and non-Hispanic whites in campaign contributions and voting rates. But he cites no data or evidence regarding Hispanic campaign contributions or voting rates in the Town of Newburgh. And he generally ignores the increased political participation by Spanish speaking voters in recent years in the State.

Professor Sandoval-Strausz does not cite any evidence regarding Hispanic voter turnout in the town or county, because such data has been collected. Therefore, his claim cannot be substantiated empirically.

Data that is available is on a state level in fact shows increased Hispanic participation in voting. The National Association of Latino Elected and Appointed Officials (NALEO) fund estimates just shy of 1 million Latinos (992,900) will be voting in November of 2024 in New York.²⁵ According to Table 3, vote change between 2016 and 2020 along with 2016 and 2024 shows the *increasing* participation of Latinos in the electoral process. Furthermore, as Tables 4 and 5 show, based on surveys from City University of New York, Spanish speaking voters are increasingly involved in politics.

²⁵ Nat'l Ass'n of Latino Elected Offs. Educ. Fund, *2024 Primary Election Profile: New York 2*, https://naleo.org/COMMS/PRA/2024/New_York_Primary_Pofile_FINAL.pdf.

Table 3



NALEO's data shows the Presidential turnout change. Tables 4 and 5 display the registration and turnout discrepancies within all communities, particularly the Hispanic community. According to the Center for Latin American, Caribbean and Latino Studies (CLALS), in 2018, there was about a 13% difference in Hispanic voter registration and turnout. In 2022, Hispanic voter registration had increased by 4%. It is worth noting that voter participation of Hispanics declined nationally by 2% compared to 2018, with an approximately 20% difference in Hispanic voter registration and turnout in 2022.

Table 4

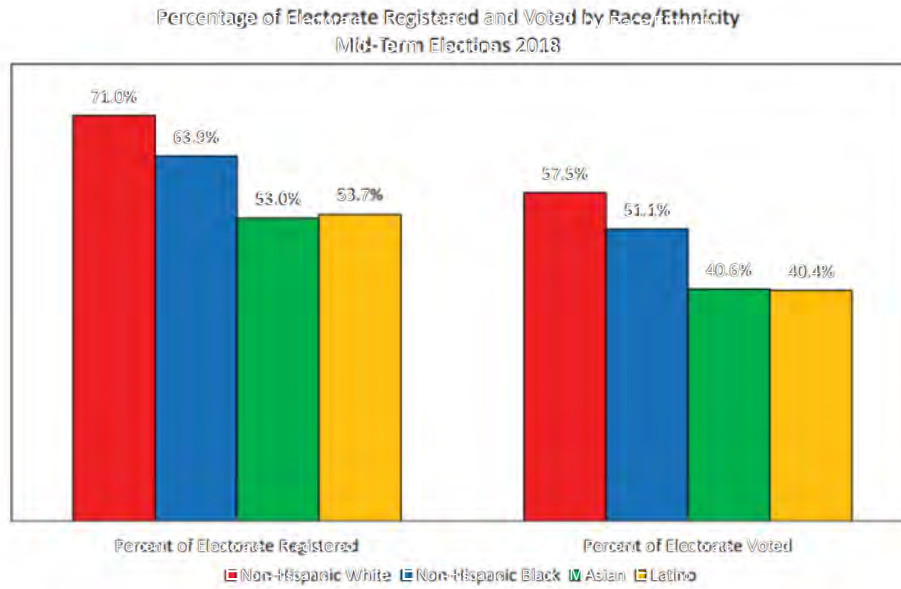
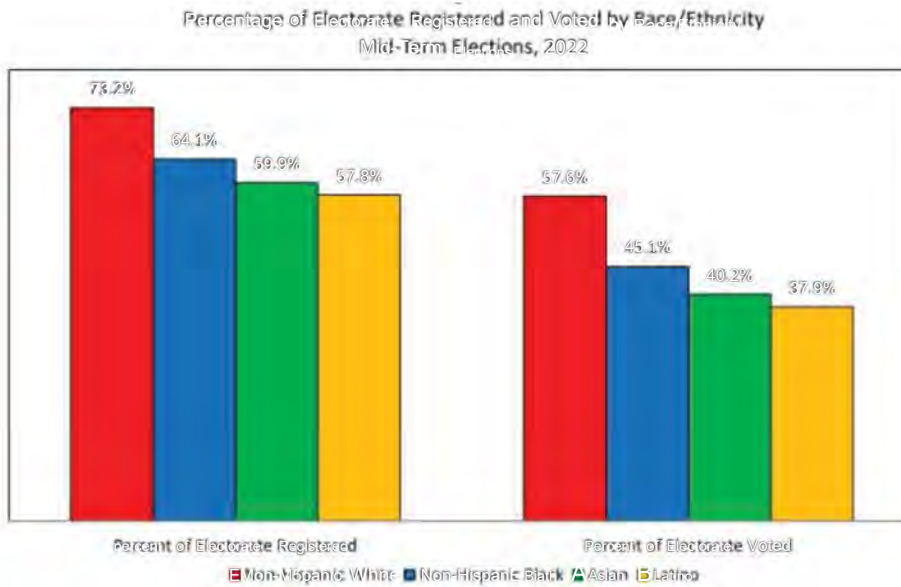


Table 5



A report by CUNY Center of for Latin American, Caribbean and Latino Studies concludes that Hispanic voters are registering and voting more nationally and in the state of New York more than ever before.²⁶

Prior to the 1992 election, Latino registration rates rarely surpassed 58% and the voting rate was never greater than half of eligible Latino voters. Both rates after 1992 have increased steadily through the 2020 presidential election and the 2022 midterm election and are projected to rise even further in the 2024 presidential election. The conclusion is one of immense progress, not racial suppression.

D. Examination of turnout rates in Newburgh

Particular attention should be given to Dr. Sandoval-Stausz's claim that voter suppression of minority voters is taking place due to discrimination and the member-at-large system of voting. In 2020, 15,955 Newburgh voters cast their ballot, comprising a 70.8% voter turnout for the Presidential election.²⁷ At the local level, 1,092 voters left their town councilman vote blank, resulting in a roughly 67% turnout for that election.²⁸ While these official figures do not include racial or ethnic characteristics, such turnout numbers display that democratic participation is alive and well in the town of Newburgh. What can be ascertained is how Newburgh's voter turnout was above the national average in 2020 by 1%.

Turnout rates in the city, however, were considerably lower in 2023 local elections. In looking at the most recent 2023 town council election, 4,156 votes were cast in comparison to

²⁶ Laird W. Bergad, Latino Data Project, Center for Latin American, Caribbean, and Latino Studies, City University of New York, *Latino Voter Participation in the 2018 and 2022 Midterm Elections* (Sept. 2023), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1121&context=clacls_pubs.

²⁷ Orange Cnty. Gov't, *Orange County General Election November 3, 2020: Presidential Electors for President, Vote Once, Official Results 7* (Mar. 9, 2021), <https://www.orangecountygov.com/DocumentCenter/View/20657/GE20-Presidential-PDF>.

²⁸ Orange Cnty. Gov't, *Orange County General Election November 3, 2020: Newburgh Town Councilman (TFV) Vote for One, Official Results 7* (Mar. 9, 2021), <https://www.orangecountygov.com/DocumentCenter/View/20655/GE20-Newburgh-Town-Councilman-TFV-PDF>.

22,380 active voters in Newburgh.²⁹ A turnout rate of 20.8% is indicative of trends seen in non-Presidential elections: voter turnout is low in any race not held in a presidential election year.

Furthermore, the school board elections in June of 2024 had even lower turnout; as it pertains to the NECSD school budget, only 2,118 voters engaged in Proposition 1 for the Newburgh Enlarged City School District. Christine Bello received 1,161 votes, the highest of any school board candidate in the 2024 election.³⁰ Importantly, the school board ballot presented the budget question in both English and Spanish, in line with expanding voter accessibility to non-English speakers.³¹

E. Disadvantages in Housing, Education, and Environmental Protection

Professor Sandoval-Strauss claims that “there are large ethnoracial gaps in income and housing” and that “these conditions are relevant to political participation because nearly every aspect of socioeconomic status ... [is] correlated with voting.” The expert further posits that housing differences exist “*probably* due both to past patterns of discrimination in homeownership and disparities in employment” (p. 34, emphasis added). He finds that non-Hispanic whites are less likely to rent their homes and do not live in overcrowded conditions.

In concluding this, Professor Sandoval-Strauss ignores programs intended to improve housing accessibility. In 2022, for example, Councilman Ruggiero presented and passed an affirmation of Title VIII of the Civil Rights Act of 1968 (the Federal Fair Housing Law) and New York State Human Rights Law, which led to the resolution “that within available resources, the

²⁹ Orange Cnty. Gov’t, *Orange County 2023 General Election November 07, 2023: Town of Newburgh Council Member / Miembro del Concejo Vote For 2 2*, <https://www.orangecountygov.com/DocumentCenter/View/29653/Town-of-Newburgh-Council-Member---November-2023-General-Election-Results>.

³⁰ Newburgh Enlarged City Sch. Dist., *District Budget Information*, <https://www.newburghschools.org/page.php?page=32>.

³¹ Newburgh Enlarged City Sch. Dist., *Sample Ballot: Proposition 1 – The School Budget*, <https://www.newburghschools.org/files/Sample%20June%2018%202024%20Ballot%20Newburgh%20Enlarged%20City%20School%20District.pdf>.

Town of Newburgh will assist all persons who feel they have been discriminated against under one of the aforementioned categories [including race, color, ancestry, national origin, nationality and more], to seek equity under federal and state laws by filing a complaint with the New York State Human Rights Law and the U.S. Department of Housing and Urban Development, as appropriate.

The resolution further states “that the Town of Newburgh shall publicize this resolution and through this publicity shall cause owners of real estate, developers, and builders to become aware of their respective responsibilities and rights.”³² The resolution passed unanimously by those present. As shown in this resolution, the Town of Newburgh is following the law and taking the requisite steps needed to protect their minority populations from housing discrimination.

Professor Sandoval-Strausz finds a remarkable figure on computers found in minority households: 99.1% of Latino families had a computer, while 98.1% of Black families has a computer in their household. Near parity, but still lower, 97. 1% of white households had a computer. Moreover, 94.7% of Latino families had broadband service, as did 95.7% of whites and 87.9% of Blacks” (p. 36). Accordingly, Hispanic and Black households actually have a higher percentage of access to computers than do whites. Yet in his discussing of education, he fails to draw the importance of household access to opportunities for on-line education. Computer access allows minority groups to extend educational attainment through on-line courses, as well as gain employment credentials for many professions in which certification is needed. Black students are no stranger to on-line education. Currently Black students make up 23.3% of students at primarily online colleges, versus just 12.5% of all college students and about 10 million college students

³² The Town Board of The Town of Newburgh, *Resolution In Support Of Title VIII Of The Civil Rights Act of 1968 (Federal Fair Housing Law) And The New York State Human Rights Law* 1–2 (May. 23, 2022), [https://www.townofnewburgh.org/documents/Title%20VIII%20of%20The%20Civil%20Rights%20ACT%20of%201968%20\(Federal%20Fair%20Housing%20Law\)%20and%20the%20New%20York%20State%20Human%20Rights%20Law%20%20%20.pdf](https://www.townofnewburgh.org/documents/Title%20VIII%20of%20The%20Civil%20Rights%20ACT%20of%201968%20(Federal%20Fair%20Housing%20Law)%20and%20the%20New%20York%20State%20Human%20Rights%20Law%20%20%20.pdf).

take distance education courses. Approximately 54% of college students took distance education courses in fall 2022.

With respect to education, Professor Sandoval-Strausz claims that educational disparities are evident in the Town of Newburgh (p. 35). He finds that educational discrepancies are most notable among men: non-Hispanic whites have the lowest high-school non-completion rates (2.1%) as compared with Blacks (3.4%) and especially Hispanics, whose rate is more than five times higher (10.6%). Similarly, the rate of college completion among white Anglos (15.8%) is higher than for Hispanic men (13.5%) or Black men (10.7%).

He finds that Latinas have the highest rate of high school noncompletion at 3%, however, this is barely different from white girls at 3.2% and lower than for Black girls at 5.6%. In terms of completing college, Latinas show the highest rate of any ethnoracial group or sex: 19.2% have bachelor's degrees, again little different from non-Hispanic white women at 18.7% and only lightly higher than Black women at 16.7%.

Professor Sandoval-Strausz does not provide a citation for these statistics. A thorough search of the U.S. Census Bureau, Community Survey does not provide such data. Students from the Town of Newburgh are divided among four districts, as it does not have its own school district. Yet accepting his figures as accurate, females of all races have higher drop out rates compared to male students. This fact alone, high drop out rates for female students of all races and ethnicities might suggest a more complex problem than only racial disparities..

Professor Sandoval-Strausz does not acknowledge that the Newburgh Expanded School District, one of the districts Town of Newburgh students attend, is distinct from the City of Newburgh. The graduation rate for this district is 92.2% and the district does not give a racial breakdown. In any case this is an extraordinarily high graduation rate. As noted earlier in this

report, the Town of Newburgh has a high percentage of its residents with higher education degrees (32.8%), about one third of the population.

His uncited statistics show that there is a higher dropout rate for all females (white, black, and Hispanic) than among males of all races. Using his uncited statistics, the most salient conclusion is that Latinos have a significantly higher drop out percentage than Latinas. In general, the difference between Hispanic, black, and white drop-out rates does not display a radical disparity among ethnic/racial groups.

Professor Sandoval-Strausz overlooks great progress in incorporating Spanish speaking students into Newburgh schools. For example, Professor Sandoval-Strausz's examination of disadvantages faced by minorities in Orange County ignores the expenditures for students by Newburgh school boards. For instance, in October of 1976, a series of budget cuts resulted in significant downsizing by the Newburgh School Board of education programs. For the Chestnut Street School of the City of Newburgh, this meant losing a full-time principal. However, a "bi-lingual education program for Spanish-speaking students," was preserved.³³ The fact that an \$88,000 federal grant kept language programs open for minority students in the midst of a major budgetary crisis that cost one school a principal contradicts Professor Sandoval-Strausz's assertion that such minority students are marginalized by the Newburgh education system.

Further complicating his claims is the fact that a local political leader and spokesman for Puerto Ricans living in City of Newburgh, Oscar Nieves, was a major force behind the bilingual education programs. An earlier article also from The Times Herald writes that Nieves "was a prime mover in a bilingual education program that exists in Middletown, Newburgh, and New Paltz

³³ *Principal Lost in Budget Cut, The Times Herald*, Oct. 13, 1976.

schools with federal funds.”³⁴ The article also describes Nieves’ immediate plunge into politics as a representative of the Hispanic community, Nieves’ efforts in a lawsuit that resulted in a court order mandating the hiring of six minority police officers, and his service on the Orange County Board of Health. Based on Oscar Nieves’ active and rigorous presence as a political figure and the language education services he promoted and preserved, Professor Sandoval-Strausz’s analysis of minority students plainly overlooks key historical events and actors.

In addition, according to the Newburgh Expanded School District (NESD) 2023 accomplishments report, there is a great deal of attention paid to Black History in the school district. The report notes “The [Newburgh Free Academy] Black History Club celebrates 50 years! This club was founded in 1972 and continues strong to this present time. The club’s focus is to encourage academic achievement, increase cultural awareness, and foster personal growth. Many of our members, both young and old, have made major impacts on our community.”

Additionally, the report highlights how “Meadow Hill School celebrated their Annual Culture Fair with over 120 student participants, the highest number since its inception. Students present to our faculty, staff, students and families about their family culture, typically while dressing in customary clothing and sharing food from their native country.” Students in the NESD regularly take the lead to create a more inclusive environment. One student, Allison Shaprio, shared her submission for the NFA North Campus’ motto: “Upward and Together because it is a reflection of our entire district working together to achieve the best possible outcome for students.”³⁵

³⁴ Robert Perry, *Nieves Vows to Stay on as Puerto Rican Envoy*, *The Times Herald*, Sept. 8, 1976.

³⁵ Newburgh Enlarged City Sch. Dist., *2022-2023 Accomplishments Report 5*, <https://newburghschools.org/files/departments/communications/accomplishmentreport2223-FinalDigital.pdf>.

Staff and faculty are also contributing to inclusion and excellence in NESD. School social workers presented at the 28th Annual Multicultural Education Conference. Members of the school district led a workshop entitled, “‘Self Compassion for Educators,’ which explored the impacts of unprocessed trauma in the context of cultural, environmental, and societal factors, and discussed ways of nurturing resiliency factors within the educational community.” The NESD further touted a Diversity Recruitment Fair, new National Board-Certified teachers, and their Dr. Manning Campbell being named the first African American Female to the Montefiore St. Luke’s Cornwall Hospital to represent children related to health and wellness. Dr. Campbell also joined the Section 9 Diversity, Equity, and Inclusion committee as the Section 9 representative.

Turning to housing considerations, Professor Sandoval-Strausz finds racial and ethnic disparities in housing. Specifically, he finds a small percentage of Black families (4%) and Hispanic families (2.9%) live in overcrowded housing, defined by more than one person living in a bedroom. Similarly, he finds racial disparities in income and types of employment for whites, Blacks, and Hispanics in Orange County and the Town of Newburgh. He pronounces that these disparities reflect historical racism and then, without analysis, reaches a conclusion that these racial disparities affect voter turnout and participation.

Professor Sandoval-Strausz maintains that racial disparities are found in opposition to rebuilding the Danskammer power plant, which generates electricity using natural gas. How this controversy relates to racial discrimination remains unclear. While he contends that “the disproportionate impact of pollution on communities of color was a recurrent theme” of the opposition to the plant, he fails to explain why rebuilding a power plant is inherently racist. Indeed, Professor Sandoval-Strausz frames the debate as one of “racial justice” without noting that proponents of the Danskammer project are concerned about affordable energy costs for low-

income households. The costs of electricity are only projected to increase, which will disproportionately hike home heating and cooling costs for low-income households and apartment complexes for low-income renters.

This is an especially urgent issue since state policy seeks to move away from fossil fuels for household heating and cooking and the generation of electricity. The Climate Leadership and Community Protection Act, signed by then Governor Andrew Cuomo in 2019, set goals for 70% electricity from renewables and 40% economic wide reduction in emissions by 2030, with an electric grid that uses only “zero emission” technology by 2040 and an economy that has effectively zero emissions by 2050.³⁶ Opponents of the Danskammer project who support renewable energy sources realize that cost will fall on low-income households. They propose raising business taxes, which include small businesses, as well as providing federal and state subsidies for converting households from natural gas and propane to electricity and subsidies for home renovation and heat pumps.

Newburgh’s then state senator James Skoufis, then a senator representing the 39th District, remained mostly silent on the controversy. But at a town hall meeting in 2019 concerning the closing the plant, he said closing might spell “financial calamity” for the Marlboro Central School District in which part of the town of Newburgh falls. School taxes paid by the plant would be wiped out. Later, Skoufis voted against a Senate bill proposed by Senator Jabari Brisport, a Democrat from Brooklyn, that would have halted permitting “peaker plants” like Danskammer until these plants submitted plans to switch to battery storage and renewables on within five years. Skoufis warned that the bill could “cause a domino effect with the loss of property tax.”³⁷

³⁶ Lee Harris, N.Y. Focus, *Gas plant in Newburgh tests limits of NY’s landmark climate law* (Apr. 22, 2021), <https://nysfocus.com/2021/04/22/fracked-gas-plant-tests-climate-law>.

³⁷ *Id.*

In addition, Jen Metzger, the former Democratic state senator from Ulster and Orange counties, who helped draft the Climate Leadership and Community Protection Act, warned that “We going to have to make sure that as these fossil fuel plants start to close, we have to address the local tax issue, because otherwise, potentially school taxes going to take a real hit.”³⁸ In June 2023, the appeal prohibiting the conversion of the Danskammer power plant was withdrawn.

Simply to maintain that progressive environmental and social justice groups oppose the Danskammer power plant conversion, as Professor Sandoval-Strausz does, is to overlook other potential damages including higher household energy costs and higher taxes that would fall disproportionately on low- and middle-income groups, and small businesses, including minority owned businesses.³⁹

Professor Sandoval-Strausz’s claims that environmental injustice is synonymous with racial injustice simply because social and racial justice groups opposed the project provides another example of cherry-picked, simplified evidence presented in a circular argument, “Racial justice groups oppose the rebuilding of a utility plant and therefore it is racial injustice.”

F. Disadvantaged Minority Voters

The jump from alleged historical and structural racism in employment, housing, and education is critical to Professor Sandoval-Strausz’s opinion on district voting. His opinion ignores a substantial and extensive literature on American political behavior that shows that

³⁸ *Id.*

³⁹ For current and projected energy costs, see U.S. Bureau of Lab. Stat., *Average Energy Prices, New York-Newark-Jersey City – June 2024* (July 19, 2024), https://www.bls.gov/regions/northeast/news-release/averageenergyprices_newyork.htm; Energysage, *Cost of Electricity in NY*, <https://www.energysage.com/local-data/electricity-cost/ny/>; James E. Hanley, Empire Ctr., *Cold and Dark? New York’s Risky Energy Future* (May 3, 2022) <https://www.empirecenter.org/publications/cold-and-dark/>; Ken Girardin, Empire Ctr., *Green Guardrails: Guiding New York’s Drive to Lower Emissions* (Feb. 27, 2024), <https://www.empirecenter.org/publications/green-guardrails/>; James E. Hanley, Empire Ctr., *Propane and Gas Heating in Crosshairs of Climate Council’s Scoping Plan* (Dec. 20, 2022) <https://www.empirecenter.org/publications/propane-and-gas-heating-in-crosshairs-of-climate-councils-scoping-plan/>.

income/educational attainment determines voter registration, voter turnout, financial contributions, and campaign involvement.

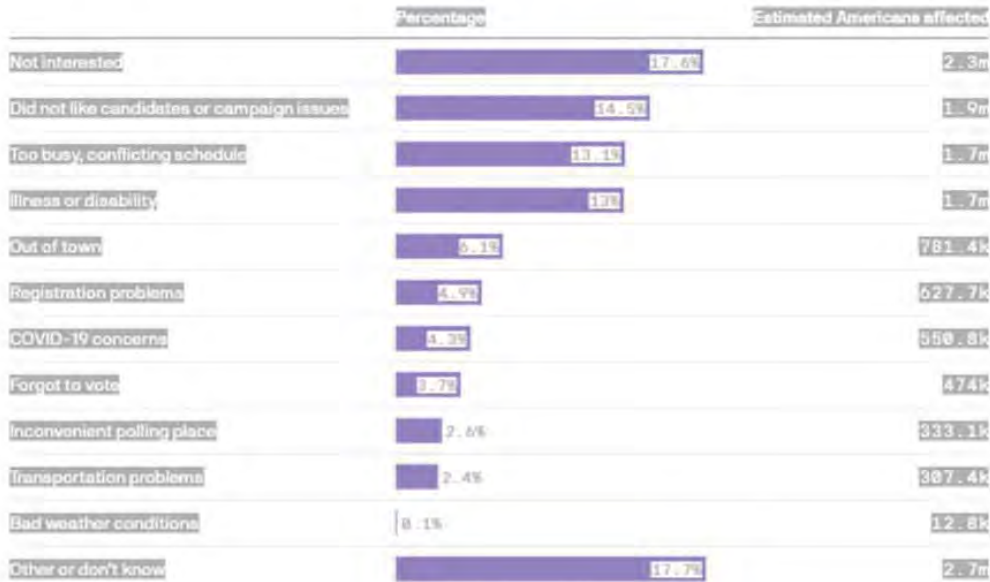
American voting behavior is a complex topic—a entire field in the Political Science discipline—but there is universal agreement that voter turnout is determined by economic status and educational attainment, not ethnicity or race. More affluent and better educated eligible citizens vote at a higher rate than less affluent and less well educated. This pattern affects white, Black, Hispanic and Asian American voters.

Voter turnout in the United States compared to other democratic nations remains low. There are many reasons why people do not vote. The U.S. Census Bureau asked eligible voters why they did not vote in the 2020 presidential election. Contrary to a narrative that voter rights are restricted, most voters explained that they simply were not interested in voting, did not like the candidates, were too busy, were ill, simply forgot, had transportation problems, or experienced weather problems.⁴⁰

⁴⁰ Steph W. Kight, Axios, *The top reasons people didn't vote* (Nov. 15, 2021), <https://www.axios.com/2021/11/16/elction-voting-rights-congress>; Lynne M. Casper & Loretta E. Bass, U.S. Census Bureau, *Voting and Registration in the Election of November 1996* (July 1998), <https://www.census.gov/content/dam/Census/library/publications/1998/demo/p20-504.pdf>.

Reasons given for not voting by registered voters

2020



The U.S. Census Bureau revisited turnout in the 2022 congressional elections. Voter turnout in this nonpresidential election year was the highest since 2002, with 52.2% of eligible voters casting ballots, a third of them by mail. Yet many did not vote. The most common explanation for not voting was “Too busy, conflicting work or school schedule.”⁴¹ This survey presents contrary evidence to the theory that lower minority voter turnout is a result of systemic suppression of minority voters.

Professor Sandoval-Strausz implies that at-large voting systems are inherently racist. Yet, he provides no support for this accusation. Indeed, his opinion exposes a lack of knowledge about such systems. In New York, “state law makes at-large election the prescribed process for choosing

⁴¹ Press Release, U.S. Census Bureau, *2022 Voting and Registration Data Now Available* (Apr. 19, 2012), <https://www.census.gov/newsroom/press-releases/2023/2022-voting-registration.html>.

board members in towns, villages, and school districts.”⁴² The system has roots back to 1676 and as far back as 1875, candidates were selected by town-wide elections.⁴³ While State law allows towns to adopt a ward system, most have not. In 2012, only 13 of 932 towns had elected a ward system.⁴⁴ The Legal Defense Fund, which organizes against at-large voting systems, admits that 99% of New York school boards employ an at-large voting system.⁴⁵ Indeed, “[a]t-large elections continue to be valued for their presumed tendency to encourage elected officials to act in accord with the general interest of the entire community.”⁴⁶

Professor Sandoval-Strausz’s claims that “[t]he people who created most at-large voting systems in American cities and towns did so in order to reduce the influence of voters whom they saw as inferior, whether socially, racially, or culturally” (pp. 23-24). Yet there is no citation for this wild assumption. He then concedes he does not know whether the Town of Newburgh enacted the at-large system for racist reasons (p. 25), acknowledging the dearth of any evidence to support such a theory. (Indeed, as explained above, *New York state law* enacted the at-large system of voting, at a time when the Town of Newburgh, according to Professor Sandoval-Strausz, was “a virtually all-white town.” (p.13).) He further cites two scholars to support his argument that many cities adopted at large voting districts that affected minority turnout. However, these scholars show that most of these at-large voting systems were seen as progressive measures at the time designed to break up corrupt city machines that relied on ethnic district voting to win election.

⁴² Benjamin, Gerald, *At-Large Elections in N.Y.S. Cities, Towns, Villages, and School Districts and the Challenge of Growing Population Diversity*, 5(3) Albany Government Law Review 735 (2012).

⁴³ *Id.* at 734.

⁴⁴ *Id.*

⁴⁵ *How The NYVRA Takes Action About At-Large Elections*, <https://www.naacpldf.org/wp-content/uploads/NYVRA-Fact-Sheet-At-Large-Elections.pdf>.

⁴⁶ Benjamin, Gerald, *At-Large Elections in N.Y.S. Cities, Towns, Villages, and School Districts and the Challenge of Growing Population Diversity*, 5(3) Albany Government Law Review 744 (2012).

G. Use of Overt or Subtle Racial Appeals

Professor Sandoval-Strausz spends four pages (pp. 40-44) describing a June 2024 event in which a Black woman fabricated a story about immigrants who were bussed from New York City to the Town of Newburgh and displaced veterans in a hotel. He perplexingly finds this as an example of the “subtle or overt racial appeals in a political campaign.” He supports this theory with evidence that certain politicians commented on the story before anyone knew it was false. He calls this an example of “Latino Threat.” He accuses Brian Maher, Assemblyman for a neighboring State Assembly District, Steven Neuhaus, County Executive of Orange County, and New York State Senator Rob Rolison as being “key players in the 2023 hoax.”

Yet, Professor Sandoval-Strausz’s recounting of the story excludes key salient facts: 1) the story of displaced veterans was part of a scam by Sharon Toney-Finch, a 43-year-old-Black woman, to raise funds for a fraudulent foundation; 2) she carefully crafted a newsworthy event, in which she told the New York Post that two dozen struggling veterans were kicked out of upstate hotels to make way for migrants being bused from New York by the Eric Adams administration; 3) the story was as much about veterans as immigrants; 4) Steven Neuhaus went on “Varney and Company” and in the brief interview he called for the immigrants to be housed....” He did not call for deporting the immigrants who had allegedly displaced these veterans; 5) Brian Maher and Steven Neuhaus are military veterans who have made veteran issues one of their major concerns; 6) all three politicians Professor Sandoval-Strausz derided are on record as supporting diversity in Orange County and the Town of Newburgh.

The story was plausible at the time, but within days the story was debunked, leaving many who believed it embarrassed. Attacking everyone as racist because they expressed concern for veterans who they thought were kicked out of hotel rooms and now homeless has no place in an

expert report. Indeed, Professor Sandoval-Strausz falsely claimed Assemblyman Maher was a “source” for the story (p. 41), but he was not. He simply commented on the story (before learning it was false), explaining that “[s]hining a light on this is important because we need to make sure these hotels know how important it is to respect the service of our veterans before they kick [them] out of hotels to make room.”⁴⁷

The other men simply commented on the story, as well (before they knew it was false). In an interview with Fox Business, Neuhaus discussed the migrant bussing situation and stated, “I had two conversations with the Governor today; her proposal is to activate the old military site of Floyd Bennett Field. I’m a military commander in the reserves, I was a lieutenant during Hurricane Sandy on that site where we ran operations. It’s a great site to run refugee operations.”⁴⁸ As this quote indicates, Neuhaus was not perpetuating a Latino threat narrative, but rather discussing the situation from his perspective as County Executive and *agreeing* with a *Democratic* governor that housing immigrants at the Floyd Bennett site would be a humane solution.

Furthermore, a story eight months earlier showed footage of migrants being moved from a private flight into Orange County airport to buses. Neuhaus’ primary concern was not with a “Latino Threat,” but rather concern with 17 young immigrant children on the bus and whether they were being trafficked or receiving the care they needed. He declared on Fox Business News that “I looked at these young kids. I went on the bus, and they went from El Paso, stopped somewhere in Missouri ... and they are going to different locations. I handed all these kids Happy Meals. The United States is a compassionate place. If [Immigration and Customs Enforcement] were just more

⁴⁷ Bernadette Hogan and Kate Sheehy, *Homeless Vets Are Being Booted From NY Hotels To Make Room For Migrants: Advocates*, New York Post (May 12, 2023), <https://nypost.com/2023/05/12/homeless-vets-are-being-booted-from-ny-hotels-to-make-room-for-migrants-advocates/>

⁴⁸ Fox Bus., *This proves we ‘cannot trust’ Mayor Eric Adams: NY county leader* (May 12, 2023), <https://www.foxbusiness.com/video/6327331883112>.

transparent about this is what's being done, this isn't what we've seen."⁴⁹ Contrary to Dr. Sandoval-Strausz's claim of fearmongering a Latino Threat Narrative, many officials approach the spike in migrants from a place of compassion and concern, both for their own citizens and the migrants themselves. Dr. Sandoval-Strausz has no evidence otherwise.

Professor Sandoval-Strausz fails to mention that Neuhaus, a son of immigrants, is a Commander in the U.S. Navy Reserves, and as an Orange County Executive, he has focused on economic development, enhancing public health and safety, improving infrastructure, lowering the tax rate, and stabilizing the budget. On his official government website, he does **not** mention solving the migrant issue in the county.⁵⁰

Professor Sandoval-Strausz also disingenuously mischaracterizes New York State Senator Rob Rolison as promulgating the "Latino Threat." After describing the hoax by Ms. Toney-Finch, Professor Sandoval-Strausz states "[f]or his part, State Senator Rolison nominated Ms. Toney-Finch for the State Senate's Women of Distinction award." (p. 42.) This statement is meant to read as though Senator Rolison had "a part" in the hoax and gave Ms. Toney-Finch the "Woman of Distinction" award **after** the hoax was perpetrated. That is false. Senator Rolison nominated Ms. Toney-Finch for this award **before** the hoax and the honor was stripped after it came to light.⁵¹ What irony: Senator Rolison nominated a prominent black woman for an award (thinking she was a distinguished Army veteran, running a nonprofit to raise funds for veterans) and that action is

⁴⁹ Fox Bus., *New York community burdened by Biden's secret migrant flights* (Oct. 6, 2022), <https://www.foxbusiness.com/video/6313346869112>.

⁵⁰ Orange Cnty. Gov't, *Steven M. Neuhaus – Biography*, <https://orangecountygov.com/1560/Steven-M-Neuhaus---Biography>.

⁵¹ Matt Young, *Army Vet Who Told Fake Migrant Story Stripped of Honor*, Daily Beast (May 24, 2023), <https://www.thedailybeast.com/army-vet-who-told-fake-migrant-story-sharon-toney-finch-stripped-of-women-of-distinction-honor>

now being criticized—and he is accused of being racist—because Ms. Toney-Finch turned out to be a fraud.

Professor Sandoval-Strausz similarly fails to note that Rolison, as mayor of Poughkeepsie, was elected to two terms after successfully saving a city on the brink of economic disaster. He serves in the state as a ranking member of the Committee on Children and Families, a member of the Committee on Alcoholism and Substance Use Disorders, on the Committee on Drug Overdose Prevention, and the Committee on Crime Victims, Crime, and Correction. These committees are noted for their concerns with justice. The personal attack on these men as promulgating “Latino Threat” simply because of their concerns for veterans and without any other evidence is unwarranted.

At bottom, Professor Sandoval-Strausz inaccurately portrays any concern with undocumented migrant crossings at our Southern border, or the financial costs and of housing and educating migrants, as proof of a “Latino Threat.” Such concerns are also not limited to non-Hispanic whites or conservative voters. Concerns with border security and undocumented immigration encompass a broad range of voters, including Blacks and Hispanics.

Indeed, a June 2024 CBC/YouGov survey found that most of the Hispanics in the United States support the mass deportation of undocumented immigrants.⁵² The survey found that 53% of Hispanics said they favored a program of mass deportation, while 47% said they would oppose it. White people were more supportive of mass deportations, with 67% saying they would back the program, and 33% saying they would oppose it. The report’s inclusion of Professor Sandoval-

⁵² Khaleda Rahman, Newsweek, *Majority of Hispanics Now Favor Mass Deportation* (June 17, 2024), <https://www.newsweek.com/majority-hispanics-favor-mass-deportation-1913510>.

Strausz's unsupported assumptions about what Blacks and Latino voters care about renders his report unreliable.

IV. Conclusions

In making his argument for "Totality of Circumstances" as a foundation for redistricting in the town of Newburgh, Professor Sandoval-Strausz tends to cherry-pick facts; often fails to provide full context for events and data he cites; is inclined to exaggerate certain events; and cites evidence that does not support his argument.

The history of racism in New York State and Orange County, while not inaccurate, fails to discuss the other side of the story: antebellum anti-slavery movements and agitation in the state of New York and the Hudson Valley. While the anti-slavery, abolitionist movements, were not always successful in their goal of abolishing slavery before the Civil War, they show that opinion in the state and Hudson Valley was not uniform.

He similarly neglects the history of post-Civil War attempts to secure voting rights for blacks in the State. While black suffrage met headwinds in the state in the late 19th century, New York made considerable progress as one of the first states to enact a civil rights statute in 1873. Moreover, in the post-World War II period the state enacted the Ives-Quinn Act (1945) to prevent discrimination in the workplace. The state established state, regional, and state boards to implement policy.

Similarly, in presenting a monochromatic history of the state literacy test, Professor Sandoval-Strausz ignores the context for the origins of the legislation, the implementation of statewide literacy education efforts, the ascendent pass-rate of the test, the mobilization of Hispanic activists to ban the test and minority group and organizational involvement in the enactment of the Voting Rights Act of 1975.

He likewise neglects the development in Orange County to ensure and protect Spanish speakers in housing, social services, and voting. Furthermore, the Index for Dissimilarity, a major U.S. Census instrument for measuring residential segregation, shows steady improvement for the County.

In addition, Hispanic voters are increasingly involved in voting and political participation. Turnout rates for Hispanic voters are little different for white low-income voters. Turnout rates in voting in Newburgh specifically are relatively high for presidential elections, and low for local elections and school board elections for all voters.

Professor Sandoval-Strausz finds “large ethnoracial” gaps in housing and education for protected classes. Yet he ignores the town’s efforts to ensure fair housing. He similarly overlooks the great efforts by school and town officials to promote Spanish speaking classes and programs in primary, middle, and high schools. While he does show the combined/expanded Newburgh school district has a serious problem with many young women (Hispanics, blacks, and whites) failing to complete high-school, fails to tie it to racism or discrimination.

Professor Sandoval-Strausz cites figures that show Hispanic and black households have parity (actually slightly above) with access to computers. Yet he fails to observe that computer access allows for educational attainment through on-line courses.

Professor Sandoval-Strausz spends considerable time on an attempt to convert the local power plant to a natural gas facility. Opposition to this conversion came primarily from environmentalist groups, often led by whites. New York State is facing higher utility rates, among the highest in the country. However laudable the goals of green energy, the fact remains that high utility rates affect low-income uses. He provides no evidence that the majority of Hispanics or Blacks opposed the power plant.

Professor Sandoval-Strausz claims that appeals to racial prejudice are pervasive among county and local officials. He zeros in on a hoax perpetrated by a scammer trying to raise money for her veteran's charity. The hoax was repeated by a few county officials on national television, but when the hoax was revealed to be fabricated, public officials immediately repudiated the claim. In asserting that these officials were using what Professor Sandoval-Strausz calls the "Latino Threat," he neglects to mention 1) the humanitarian sentiments and real concerns expressions and concerns of these officials expressed by these officials; 2) their public campaigns for office that showed no indication of anti-immigration or racial appeals; and 3) border security in itself is not nativist or racist. Surveys show that the Hispanics voters support greater border security and a near majority call for stricter measures to address what many see as a crisis at our southern border.

Professor Sandoval-Strausz's opinions on the "Totality of Circumstances" factors contained in the NYVRA are one-sided and incomplete. He ignores much accessible data and makes assumptions that are unsupported. His opinions and the report that contains them are therefore unreliable.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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

Index No.: EF002460-2024

Plaintiffs,

v.

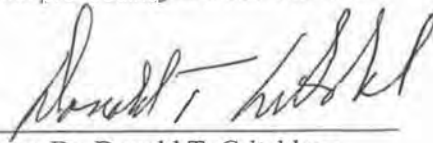
TOWN OF NEWBURGH and TOWN BOARD
OF THE TOWN OF NEWBURGH,

Defendants.

VERIFICATION

Donald T. Critchlow, being duly sworn, deposes and says:

1. I over 18 years of age and am not a party to this case.
2. I swear under penalty of perjury to the faithfulness of the opinions expressed in the foregoing Expert Report of Donald T. Critchlow, and, to the best of my knowledge, to the truth and accuracy of the factual statements made therein.
3. If asked to testify on these matters, I could and would testify to under oath to their contents, under penalty of perjury.
4. I affirm this 26th day of July, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.


Name: Dr. Donald T. Critchlow

Appendix A

Donald T. Critchlow

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HONORS/FELLOWSHIPS/APPOINTMENTS

Zebulon Pearce Distinguished Teacher in Humanities Award (2021)

Founding President, Institute for Political History, (Endowed Public Non-Profit Foundation to promote the study of American history and graduate education, (501C) (2001-present)

Panelist, NEH Public Scholars Fellowship, (2020)

External Reviewer, NEH Teaching History Program, Stillman College History Academy for Hale County (2008)

Panelist, National Humanities Endowment, Year-Fellowship Program (2004)

Fellow, Fulbright Scholars Program, University of Hong Kong (1997-98)

Fellow, Woodrow Wilson International Center for Scholars (1996-97)

USIA grant for a five volume history of the U. S. published in Polish (1995)

University Faculty Exchange Program, University of Warsaw (1988-1989)

USIA, AmParts Distinguished Lecturer (1988-1989)

Panel, Employment and Technology, National Academy of Sciences (1986)

Guest Scholar, Woodrow Wilson International Center for Scholars (1984)

Rockefeller Summer Fellow (1983) (1994)

NEH Summer Fellow (1980)

Guest Scholar, The Brookings Institution (1976-1977)

Administrative and Leadership Positions

Director, Center for Political Thought and Leadership, 2014-present

Chair, Department of History Saint Louis University, 1991-96

Director of Graduate Studies in History, University of Notre Dame, 1989-91

PUBLICATIONS

Books (Monographs).

Revolutionary Monsters: Five Men Who Turned Liberation into Tyranny (Regnery Press, 2021).

In Defense of Populism: Protest and Democratic Change (Philadelphia: University of Penn Press, 2020).

Republican Character: From Nixon to Reagan (Philadelphia: University of Pennsylvania Press, 2017).

Future Right: Forging a New Republican Majority (New York: St Martins, 2016).

A Very Short Introduction to American Political History (New York: Oxford University Press January 2015).

When Hollywood Was Right: How Movie Moguls, Celebrities, and Big Business Remade American

Politics (New York: Cambridge University Press, 2013) 224 pp.

The Conservative Ascendancy: How the GOP Right Made Political History

(Harvard University Press, 2007; University Press of Kansas, 2011 pap.) 315 pp.

Phyllis Schlafly and the Republican Right: A Woman's Crusade

(Princeton University Press, 2005) 422 pp.

Intended Consequences: Birth Control, Abortion and the Federal Government in Modern America

(Oxford University Press, 1999; paperback edition, 2001).

Studebaker: The Life and Death of an American Corporation, 1852-1963

(Indiana University Press, 1997) 272 pp. 304 pp.

The Brookings Institution, 1916-1952 Expertise and the Public Interest in a Democratic Society

(Northern Illinois University Press, 1985) 242 pp.

Books (Textbooks and Edited):

Co-editor with Paula Baker, *Oxford Handbook of American Political History*, (New York:

Oxford University Press, 2020).

Co-editor, "The Election of 1964," *Journal of Arizona History*, (special issue, Spring 2020).

Co-editor-in-chief with Philip VanderMeer *Oxford Encyclopedia of American Political and Legal*

History (New York, Oxford University Press, 2012), part of a five volume project

Encyclopedia of American History, Paul Boyer, general editor.

Co-authored/edited with Nancy MacLean, *Debating the Conservative Movement* (Washington, D.C.

Rowman and Littlefield, 2009).

Co-edited with Emilie Raymond, *Hollywood and Politics: A Documentary History* (New York:

Routledge, 2009).

Co-edited, *American Conspiracy Revealed: From the Founding to Today* (Indiana University Press, 2007).

Co-authored with Paula Baker and William Rorabaugh, *America's Promise* (Revised and expanded edition) (Rowman and Littlefield Press, 2003); initially published as *America!: A Concise History* with William Rorabaugh, (Belmont, CA: Wadsworth Publishing, 1993).

Co-edited with Agnieszka Critchlow, *Enemies of the State: Personal Stories of Survival in the Gulag* (Chicago: Ivan Dee Publishers, 2002; paper 2003).

Encyclopedia of American History, Volume X, 1968 to the Present, Volume editor, Donald T. Critchlow, Gary Nash, general editor, (New York: Facts on File, 2002).

Co-edited with Charles Parker, *With Us Always: Private Charity and Public Welfare in Historical Perspective* (Lanham, MD: Rowman & Littlefield, 1998).

Edited, *The Politics of Abortion and Birth Control in Historical Perspective* (University Park, PA: Pennsylvania State University Press, 1996).

Edited, *A History of the United States, I-V*, a five volume history including with essays contributed by thirty Polish and American scholars (Warsaw, Poland: Polish Academic Press, 1995).

Co-edited with Ellis Hawley, *Poverty and Public Policy in Modern America* (Belmont, CA: Wadsworth Publishing, 1989).

Co-edited with Ellis Hawley, *Federal Social Policy: The Historical Dimension* (University Park, PA: Penn State University Press 1989).

Edited, *Socialism in the Heartland: The Midwestern Experience, 1890-1920* An anthology of eight original essays (Notre Dame, Indiana: University of Notre Dame Press, 1986).

Articles/Chapters/Essays:

In Print:

“A Somewhat Reassuring Defense of Populism,” *Athenaeum Review*, (October, 2019), 84-91.

“Nationalism, Populism, and Fear,” *Journal of World Complexity and Science* (Spring, 2020)

“Ronald Reagan,” *Conservative Moments*, edited Mark Garnet (Bloomsbury 2018), 219-226.

“Humanae Vitae in Historical Perspective,” in *Humanae Vita: 50 Years Later*, edited, Therese Notare, (Catholic University Press, 2019), 3-29.

“Silent Majority: Richard Nixon and Law and Order,” in Britta Walddschmidt and Anna Vandergoltz, *Inventing the Silent Majority in Western Europe and the United States* (New York: Cambridge University Press, 2017).

“Understanding American Conservatism,” *Cairo Review of Global Affairs* (Autumn, 2016).

“The Rise of Conservative Republicans: A History of Fits and Starts,” in Iwan Morgan and Robert Mason, *Seeking a New Majority: The Republican Party and American Politics, 1960-1980 Revival*, (Nashville, TN., Vanderbilt University Press).

“On a Darkling Plain,” *Historically Speaking* (Spring, 2001)

“Rethinking American Conservatism: Towards a New Narrative,” *Journal of American History* (December 2011).

“Reconsidering ERA: Social Mobilization, Public Opinion, and State Ratification,” *Journal of Policy History*, Special Issue, Julian Zelizer and Bruce Schulman, (Fall 2008)

“Mobilizing Women: The Social Issues and the Reagan Presidency,” *The Reagan Presidency*, edited Hugh Graham and Elliot Brownlee, (Lawrence: University of Kansas Press, 2003).

“Phyllis Schlafly and Reconsidering Postwar American Conservatism,” *Conservatism in the 1960s*, edited David Farber, (London: Peter Lang, 2003).

“Conservatives in Congress,” *Congress: An Historical Perspective*, edited Julian Zelzer, (New York: Houghton Mifflin, 2004).

“Innovation in the Classroom: Teaching Policy History,” *The History Teacher*, 31, (August, 1999), 469-476.

“Implementing Family Planning Policy in Postwar America,” in Charles Parker and Donald T. Critchlow, eds., *With Us Always: Private Charity and Public Welfare in Historical Perspective* (Lanham, Md., 1998), 211-241.

“Birth Control, Population Control, and Family Planning: An Overview,” *Journal of Policy History*, 7, (March 1995), 1-21.

“Think Tanks, Antistatism, and American Democracy,” in Michael Lacey and Mary Furner, eds., *Knowledge and Social Science Research* (Cambridge University Press, 1993), 279-322.

“A Prognosis of Policy History: Stunted--Or Deceivingly Vital?” *The Public Historian*, 15, (Fall 1993), 51-61.

“The Presidential Commission on Employment and Technology, 1966: An Historical Perspective,” in National Academy of Sciences Panel on *Employment and Technology Employment and Technology in the United States* (N. Y. Ballinger, December 1988). Reprints of essay on file at the National Academy of Sciences.

“Robert S. Brookings: The Man and His Vision,” *Review of Politics*, 46 (October, 1984), 561-580.

“Wheels of Fortune: Studebaker in the Early Years,” *Timeline*, 4 (March/April 1987), 16-30.

“Industrial Relations at Studebaker, 1905-1935, Paternalism and Corporate Identity Within An Auto Company,” *American Studies*, 11 (1991), 83-95.

“Communist Unions and Racism: A Comparative Study of Responses of the United Electrical Radio and Machine Workers and the National Maritime Union to the Black Question During World War II,”

Labor History 17, (Spring 1976), 230-244; also see August Meier and Elliot Rudwick, "Communist Unions and the Black Community," *Labor History* (Spring 1982).

"Lewis Meriam, Expertise, and Indian Reform," *The Historian*, 23, (Spring, 1981), 325-344.

"The Political Control of the Economy: Deficit Spending as Political Belief, 1932-1952," *The Public Historian*, 3, (Fall, 1981), 5-22.

Selected Review Essays/Encyclopedia Articles

"Policy Knowledge: Non-Profit Institutions," *International Encyclopedia of the Social and Behavioral Sciences*, Neil J. Smelser and Paul B. Baltes, editors, (Oxford, England: Elsevier Science, 2002) 5000 word essay.

"Government," *Encyclopedia of American and Intellectual History*, edited Mary Kupiec Cayton and Peter W. Williams, (N.Y.: Charles Scribner's Sons, 2001) 5000 word essay.

"Galling Wasp: Sexual Misbehavior in the Human Scientist," *Reviews in American History* (October, 1999).

"What's In and What's Out," *Reviews in American History* (September 1997).

"*Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* by David Garrow," extended review essay *Journal of American History* (March, 1995).

"Keeping the Life Stream Pure," *Reviews in American History* (1992).

"Knowledge for What? Private Philanthropy in American History," *Reviews in American History* (1991).

INVITED ADDRESSES AND LECTURES/CONFERENCE PAPERS

Invited Lecture: "Intended Consequences: Abortion and Family Planning Policy in the United States," Rio de Janeiro, Brazil, November 2019

Invited Lecture: Keynote Panel, “Preserving Women of the Right,” Radcliffe College/Harvard University (2017)

Invited Lecture *The Conservative Ascendancy*: George McGovern Center, South Dakota; North Carolina History Forum, Raleigh, North Carolina, public lectures in Washington, D.C., New York City, Portland, Oregon, and Gainesville, Florida,

Invited Lectures for *Phyllis Schlafly and Grassroots Conservatism* book tour: Seattle Town Hall Lecture Series; University of Washington, Seattle; George Washington University; Fordham University; Henry Salvatori Distinguished Lecture Series, Claremont College; Public Lecture, La Jolla, California

Selected Invited University Lecture: University of London (2009); University of Missouri Public Lecture (2007); Iowa State University College Distinguished Lecture Series, (2004); University of Arkansas College Lecture Series (2003); Oxford University and Cambridge University, June, 2001; Keynote Address, “Family Planning Policy: Successes and Failures,” Title X Federal Family Planning Regional Conference, Lake Geneva, WI, 2000; Beijing Foreign Language University (2000); University of Oregon (2000); University of Virginia (2000); Vanderbilt University (2000); Dartmouth College (1999).

USIA Am Parts Program, “Think Tanks and the Washington Establishment in Historical Perspective,” Lectures at United States Embassies in Barcelona, Madrid, Rome, Bonn, Frankfurt, Helsinki, and Luxemburg, 1988-1989.

“American Conspiracy Revealed,” State of the Field panel, Organization of American Historians Meeting, April 2008.

“What’s Wrong with the New Conservative History?” State of the Field panel, Organization of American Historians Meeting, March 2007

“The New History of Conservatism,” American Historical Association Meeting, January 2007

“Reconsidering the History of Postwar Conservatism: Phyllis Schlafly and the Grassroots,”

American Historical Association Meeting, January 2001

“Integrating Social History and Policy History in the Classroom,” Organization of American Historians Meeting, April 1996

“The Quiet Revolution: Family Planning Policy in the 1960s,” Organization of American Historians Meeting, April 1995

“The Current State of Political History,” Western Political Science Meeting, March 1995

“The Work Ethic and Welfare Reform in Modern America,” American Historical Meeting, December 1987

“Social Policy as History,” Organization of American Historians Annual Meeting, April 1986.

“The Emergence of Think Tanks in Modern America: Antistatism and Expertise in a Democratic Society, 1916-present,” American Historians Association Annual Meeting, December 1985.

“The Evolution of the Studebaker Company, 1900-1920 from a Wagon Company to an Automobile Corporation,” the Organization of American Historians Annual Meeting, April 1985,

“Think Tanks, Anti-Statism, and American Public Policy,” Evening Dialogue, Woodrow Wilson Center for International Scholars, December 17, 1984.

“Robert S. Brookings: The Man, His Vision and His Institution,” American Historical Association Annual Meeting, 1983.

“American Businessmen, Class-Consciousness, and the State, 1941-1976,” Organization of American Historians Annual Meeting, April, 1983.

“Fear of the Leviathan: Anti-Statist Thought in Corporate Political Consciousness,” Pacific Historical Conference, August, 1982.

“Harold G. Moulton, Keynes, and the Public Interest,” Missouri Valley Historical Conference, March, 1982.

“Science, Morality, and Prostitution: Public Policy During World War II,” Brown Conference, University of Alabama, December, 1981.

“Economic Public Policy Formulation: The Political Control of the Economy, 1932-Present,” the Organization of American Historians Annual Meeting, Detroit, April, 1981

“Leo Pasvolsky, Bureaucracy, and the Founding of the United Nations,” Society of American Historians of Foreign Relations Annual Meeting, Lawrence, Kansas, August, 1979.

PROFESSIONAL ACTIVITIES

Founding President, Institute for Political History (501c educational foundation), 2004-

Editor, *Journal of Policy History*.

Organizer, Policy History Conference for St. Louis 2002-2020; Conferences have been held in St. Louis, MO; Columbus, Ohio; Charlottesville, VA.; Nashville, TN; and Tempe, AZ. (This conference draws approximately 200-350 participants from History, Political Science, Sociology, and Law.

Member of Board of Directors, Truman Library Institute, 1991-1996.

Series Editor, “Critical Issues in European and American History,” Rowman & Littlefield Press.

Reader for Cambridge University Press; Columbia University Press; Johns Hopkins University Press; Cornell University Press; Kansas University Press; Princeton University Press; Northern Illinois University Press; Temple University Press; Bedford-St. Martins Press; Pennsylvania State University Press; and Houghton-Mifflin, *Journal of American History* and *Review of Politics*.

Member of Planning Committee, National Public Policy Conference, Bowling Green State University, Bowling Green, Ohio, August, 1997.

Program Co-Director, Conference on Private Charity and Public Welfare, Saint Louis University,

St. Louis, Missouri, June, 1996.

Program Co-Director, Conference on the Evolution of Federal Social Policy, University of Notre Dame, South Bend, Indiana, October, 1985.

Program Chairman, Conference on the History of the Small Town, North Central College, Naperville, Illinois, April 1981.

Member of Illinois Steering Committee, OAH Conference on the Promotion of History held at Wesleyan University, Bloomington, Illinois, April, 1980.

Faculty Advisor, Phi Alpha Theta, University of Dayton, Dayton, Ohio.

Faculty Advisor, Phi Alpha Theta, University of Notre Dame, Notre Dame, Indiana.

DIRECTED DISSERTATIONS

Mariann Scholte, "The Political Economy of Banking Reform: The Monetary and Banking Acts of 1880 and 1892," University of Notre Dame, Department of Economics (1988).

David Hay, "The Military-Intellectual Complex: The U.S. Army Air Forces and the Ascendancy of Quantitative Management Control, 1940-1946" University of Notre Dame, Department of History (1993).

Thomas F. Curran, "The Weapons of our Warfare are not Carnal: The Ideological Origins of Pacifism in the Civil War Era," University of Notre Dame, Department of History (1993).

John Korasick, "Imaging Africa: The Collection of African Art in America and the Failure of Postcolonial Theory," Saint Louis University, Department of History, (2004).

Aharon Zorea, "RICO: From Organized Crime to Terrorism," Saint Louis University, Department of History, (2004).

Stephen Randall, "Public Health, Epidemics, and Civil Liberties in Chicago, 1950-1920," (2009)).

Matthew Sherman, "Protecting the President: From Abraham Lincoln through Theodore Roosevelt," (2009).

Cindy Stachecki, "ERA Ratification in Illinois," (2008).

Amy Wallhermfecht, "Cecile B. DeMille and the Right-to-Work Campaign," (2015).

DISSERTATION

"The Brookings Institution: The Early Years, 1916-1952: Expertise and Influence in a Democratic Society" (University of California 1978).

Professor Samuel Haber, Chairman

Professor Charles G. Sellers, Reader

Dr. Clark Kerr, Reader

Ph.D. EXAMINATION FIELDS

United States History

History of Science

Political Science

TEACHING AND RESEARCH EXPERIENCE

2013-2020 Professor of History, Arizona State University

1992-2012 Professor of History, Saint Louis University

1992-96 Chair, Department of History, Saint Louis University

1983-91 Assistant/Associate Professor (1987), Department of History, Director of Graduate Studies
(1980-92) University of Notre Dame

1981-83 Assistant Professor, Department of History, Grants Office, Social Sciences, Research
Institute University of Dayton

1978-81 Assistant Professor, Department of History, North Central College, Naperville, Illinois

1977 Acting Instructor, Environmental Studies, University of California, Berkeley

1976 Acting Instructor, Department of History, San Francisco State University

1975 Research Assistant, Institute of Industrial Relations, University of California

1974 Teaching Assistant, Department of History, University of California, Berkeley

*For additional biographical information see *Who's Who in America*; *Who's Who in the World*

APPENDIX

Selected Book Reviews:

The American Religious Debate over Birth Control, 1907-1937 by Kathleen Tobin, *Journal of American History*. (June, 2003).

More Than They Promised: The Studebaker Story by Thomas E. Bonsall, (Stanford University Press, 1999), *Business History Review* (Summer, 2002).

Sexual Chemistry: A History of the Contraceptive Pill by Lara V. Marks, (Yale University Press, 2001), *American Historical Review*, (December 2002).

Coping with Sickness, Medicine, Law, and Human Rights--Historical Perspectives, edited by John Woodward and Robert Jutte, (Association of European History of Medicine, 2001), *Isis*, (June, 2002).

Bold Relief: Institutional Politics and the Origins of American Social

Policy by Edwin Amenta, *American Historical Review*, (February, 2001)

“Socializing Security: Progressive-Era Economists and the Origins of American Social Policy” by David A. Moss,” *Business History Review* (Autumn, 1998).

“Minneapolis Teamsters Strike of 1934 by Philip Korth,” *Journal of American History* (September 1996).

“Losing Time by Otis Graham,” *Business History* (February 1994).

“The Transformation of American Politics by David Ricci,” *American Historical Review* (October 1994).

“The Politics of Immigrant Workers: Labor Activism and Migration in the World Economy since 1830 by Camille Guerin-Gonzales and Carl Strikwerda,” *Journal of American History* (September 1994).

“Red or Rackets? The Making of Radical and Conservative Unions on the Waterfront by Howard Kimeldorf,” *Labor History* (Fall, 1994).

“American Automobile Workers, 1900-1933 by Joyce Shaw Peterson,” *Journal of American History* (November 1988).

“Auto Slavery: The Labor Process in the American Automobile Industry, 1897-1950 by David Gartman,” *Journal of American History* (March, 1985).

“Union Power and American Democracy: The UAW and the Democratic Party, 1935-72 by Dudley W. Buffa,” *Journal of American History* (March, 1985).

“Corporate Liberalism: The Origins of Modern American Political Theory, 1890-1920 by R. Jeffrey Lustig,” *Public Historian* (Spring, 1985).

“Model Research: The National Advisory Committee for Aeronautics Vol. I and II by Alex Roland,” *Science* (November 29, 1985).

“Workingmen’s Democracy: The Knights of Labor and American Policies by Leon Fink,” *The Journal of Economic History* (September, 1984).

“Unrepentant Radical: An American Activist’s Account of His Five Turbulent Decades by Sidney Lens,” *Labor History* (Summer, 1984).

“The Business Response to Keynes by Robert M. Collins,” *The Public Historian* (Summer, 1983).

“The Dynamics of Business--Government Relations, 1893-1921 by William H. Becker,” *Journal of Economic History* (September, 1982).

“Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy by Henry Shue,” *Annals of the Academy of American Political and Social Science* (March, 1983).

"The Office of Management and Budget and the Presidency, 1921-1979 by Larry Berman," *Business History Review* (Autumn, 1982).

"Political Control of the Economy by Edward Tufte," *Labor History* (Winter, 1982).

"The Speculator: Bernard M. Baruch in Washington, 1917-1965 by Jordan M. Schwarz," *The Journal of Economic History* (December, 1981).

"The American Establishment by Leonard and Mark Silk," *Annals of the Academy of American Political and Social Science* (Fall, 1981).

"Friend and Foe in the U.S. Senate by Ross K. Baker," *Annals of American Political and Social Science* (November, 1980).

"James M. Landis: Dean of Regulators by Donald A. Ritchie," *American Historical Review* (October, 1981).

"Henry Cabot Lodge and the Search for An American Foreign Policy by William C. Widenor," *Annals of the Academy of American Political and Social Science* (June 1981).

"Herbert Hoover, The Great War and its Aftermath, 1914-1923 by Lawrence E. Gelfand," *Business History* (Winter, 1980).

"Edwin G. Nourse: Economist for the People by Joseph G. Knapp," *American Historical Review* (December, 1980).

"Mexican Workers in the United States: Historical and Political Perspective, edited by George C. Kiser," *The Journal of Economic History* (December 9, 1979).

Exhibit B to Moskowitz Affirmation -
Deposition Testimony of Gilbert Piaquadio,
taken September 23, 2024
[pp. A111 - A280]

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NYSCEF DOC. NO. 61

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 09/25/2024

Page 1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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

v.

TOWN OF NEWBURGH and TOWN BOARD
OF THE TOWN OF NEWBURGH,
Defendants.

Index No.
EF002460-
2024

DEPOSITION OF 30(b)(6) CORPORATE REPRESENTATIVE FOR
TOWN OF NEWBURGH - GILBERT PIAQUADIO

DATE: Monday, September 23, 2024
TIME: 9:08 a.m.
LOCATION: Town of Newburgh Town Clerk
1496 Route 300
Newburgh, NY 12550
REPORTED BY: Jaz R. Ramos

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A P P E A R A N C E S

ON BEHALF OF PLAINTIFFS ORAL CLARKE, ROMANCE REED,
GRACE PEREZ, PETER RAMON, ERNEST TIRADO, AND DOROTHY
FLOURNOY:

DAVID IMAMURA, ESQUIRE (by videoconference)
Abrams Fensterman, LLP
81 Main Street
White Plains, NY 10601
dimamura@abramslaw.com
(914) 607-7065

SAMUEL DAVIS, ESQUIRE (by videoconference)
RUTH GREENWOOD, ESQUIRE (by videoconference)
DANIEL HESSEL, ESQUIRE (by videoconference)
Election Law Clinic, Harvard Law School
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Cambridge, MA 02138
sadavis@law.harvard.edu
rgreenwood@law.harvard.edu
dhessel@law.harvard.edu
(617) 495-5202

1 A P P E A R A N C E S (cont'd)
2 ON BEHALF OF DEFENDANTS TOWN OF NEWBURGH AND TOWN
3 BOARD OF THE TOWN OF NEWBURGH:

4 DANIEL GORMAN, ESQUIRE (by videoconference)
5 Troutman Pepper Hamilton Sanders LLP
6 875 Third Avenue
7 New York, NY 10022
8 daniel.gorman@troutman.com
9 (212) 704-6333

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Page 4

1
2
3
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5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

EXAMINATION:	PAGE
By Mr. Davis	12
By Mr. Gorman	132

E X H I B I T S

NO.	DESCRIPTION	PAGE
Exhibit 1	Notice of Deposition	17
Exhibit 2	Defendants' Responses to Plaintiffs' First Request for Discovery and Information	37
Exhibit 3	Defendants' Responses to Plaintiffs' Interrogatories	50
Exhibit 4	Town of Newburgh Special Meeting Agenda	62
Exhibit 5	Town of Newburgh Press Release Regarding Elections	69
Exhibit 6	Defendants' Verified Answer and Affirmative Defenses	84
Exhibit 7	Expert Report of Dr A.K. Sandoval-Strausz	88

QUESTIONS INSTRUCTED NOT TO ANSWER

PAGE	LINE
40	20

1	I N D E X (Cont'd)	
2	QUESTIONS INSTRUCTED NOT TO ANSWER (Cont'd)	
3	PAGE	LINE
4	42	17
5	43	24
6	44	13
7	45	3
8	46	4
9	46	19
10	47	10
11	47	23
12	54	19
13	55	20
14	56	9
15	60	18
16	61	8
17	63	22
18	64	21
19	66	8
20	67	15
21	68	4
22	68	16
23	68	25
24	71	22
25	72	19

Page 6

1	I N D E X (Cont'd)	
2	QUESTIONS INSTRUCTED NOT TO ANSWER (Cont'd)	
3	PAGE	LINE
4	74	2
5	74	15
6	75	7
7	76	19
8	78	2
9	79	6
10	79	22
11	81	8
12	82	4
13	82	11
14	82	19
15	83	7
16	83	23
17	84	9
18	84	16
19	86	22
20	87	7
21	87	18
22	87	25
23	91	12
24	92	14
25	92	25

Page 7

1	I N D E X (Cont'd)	
2	QUESTIONS INSTRUCTED NOT TO ANSWER (Cont'd)	
3	PAGE	LINE
4	93	16
5	93	25
6	94	11
7	95	10
8	95	24
9	96	9
10	97	8
11	98	4
12	99	9
13	99	18
14	100	18
15	101	16
16	102	8
17	102	17
18	105	5
19	105	15
20	108	3
21	109	19
22	110	15
23	110	24
24	111	10
25	112	10

1	I N D E X (Cont'd)	
2	QUESTIONS INSTRUCTED NOT TO ANSWER (Cont'd)	
3	PAGE	LINE
4	112	20
5	113	19
6	114	6
7	115	4
8	117	16
9	118	8
10	119	4
11	122	4
12	123	5
13	124	4
14	126	3
15	126	22
16	127	20
17	129	14
18	130	5
19		
20	QUESTIONS REFUSED TO ANSWER	
21	PAGE	LINE
22	54	14
23	64	17
24	68	13
25	81	19

Page 9

1	I N D E X (Cont'd)	
2	QUESTIONS REFUSED TO ANSWER (Cont'd)	
3	PAGE	LINE
4	89	15
5	116	16
6	130	12
7		
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Page 10

1 G. PIAQUADIO

2 THE REPORTER: Good morning. My name
3 is Jaz Ramos, and I am the court reporter
4 assigned by Veritext to take the record of
5 this proceeding. We are now on the record
6 at 9:08 a.m.

7 This is the deposition of Gilbert
8 Piaquadio taken in the matter of Oral
9 Clarke, et al., vs. the Town of Newburgh,
10 et al., on Monday, September 23, 2024.
11 Our witness is located at 1496 Route 300
12 in Newburgh, New York 12550.

13 I am a notary authorized to take
14 acknowledgements and administer oaths in
15 New York. Parties agree that I will swear
16 in this witness remotely.

17 Additionally, absent an objection on
18 the record before the witness is sworn,
19 all parties and the witness understand and
20 agree that any certified transcript
21 produced from the recording of this
22 proceeding:

23 - is intended for all uses permitted
24 under applicable procedural and
25 evidentiary rules and laws in the same

Page 11

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G. PIAQUADIO

manner as a deposition recorded by
stenographic means; and

- shall constitute written
stipulation of such.

At this time, will everyone in
attendance please identify themselves for
the record and which party they're here to
represent. We're going to start with
Counselor Davis.

MR. DAVIS: Samuel Davis. I'm with
the Harvard Election Law Clinic. I'm here
for the plaintiffs.

MS. GREENWOOD: Ruth Greenwood with
the Harvard Election Law Clinic for the
plaintiffs.

MR. IMAMURA: David Imamura, Abrams
Fensterman, A-B-R-A-M-S, Fensterman,
F-E-N-S-T-E-R-M-A-N, for the plaintiffs.

MR. GORMAN: Daniel Gorman, Troutman
Pepper for Defendants.

THE REPORTER: Thank you --

MR. PIAQUADIO: Gilbert Piaquadio,
supervisor, Town of Newburgh, witness.

THE REPORTER: Thank you. Thank you.

Page 12

1 G. PIAQUADIO
2 Hearing no objection, I will now swear in
3 this witness.

4 Mr. Piaquadio, please raise your
5 right hand for me, sir. Thank you.

6 WHEREUPON,

7 GILBERT PIAQUADIO,
8 called as a witness and having been first
9 duly sworn to tell the truth, the whole
10 truth, and nothing but the truth, was
11 examined and testified as follows:

12 THE REPORTER: Counsel, please
13 proceed.

14 EXAMINATION

15 BY MR. DAVIS:

16 Q Good morning, Supervisor
17 Piaquadio. We just met, but for the
18 record, my name's Sam Davis, and I
19 represent the Clarke Plaintiffs in this
20 case. I'm going to be asking you some
21 questions today. Have you ever been
22 deposed before?

23 A Yes.

24 Q Okay. So you're probably
25 already familiar with these, but I'm just

Page 13

1 G. PIAQUADIO
2 going to go over some ground rules before
3 we start so that we all have the same
4 understanding of how this will work. So
5 I'll be asking you some questions, and the
6 court reporter is transcribing everything
7 we say.

8 So the court reporter is able to
9 get everything on the record, please wait
10 for me to finish asking my question before
11 you give an answer, and I'll try to do the
12 same so that we're not talking over each
13 other. Does that make sense?

14 A Yes, it does.

15 Q The court reporter can only
16 record verbal responses, so it's important
17 that you answer out loud with words rather
18 than nodding your head or saying "Uh-huh."
19 Does that make sense?

20 A Yes.

21 Q If you don't understand a
22 question for any reason or need
23 clarification, please tell me, and I'll do
24 my best to clarify. If you answer the
25 question, I'm going to assume that you

1 G. PIAQUADIO

2 understood what I was asking. Does that
3 make sense?

4 A Yes.

5 Q Your counsel, Mr. Gorman, may
6 object at some points today. Even if he
7 objects, you should still answer the
8 question unless he instructs you not to
9 answer. Does that make sense?

10 A Yes.

11 Q Okay. And then we can take a
12 break anytime you feel like you need one.
13 I'll also try to build in breaks as we're
14 going through the day. I just ask that if
15 you do need to take a break, don't do it
16 while a question is pending. Does that
17 sound good?

18 A Yes.

19 Q Thank you. Do you understand
20 that you're under oath today?

21 A Yes.

22 Q Is there any reason why you
23 can't give truthful answers to my
24 questions?

25 A No.

Page 15

1 G. PIAQUADIO

2 Q Are you taking any medications
3 or do you have any conditions that would
4 impair your memory?

5 A No.

6 Q Part of the oath you took today
7 was to tell the whole truth, which means
8 providing full and complete answers to my
9 questions. Do you understand that?

10 A Yes.

11 Q Is there any reason why you
12 cannot give full, complete, and accurate
13 testimony today?

14 A No.

15 Q In today's deposition, I'll be
16 using the terms Hispanic and Latino
17 interchangeably. Do you understand that
18 if I refer to Hispanic residents or to
19 Latino residents, I'm referring to the
20 same group of people?

21 A Yes.

22 Q Okay. And when I refer to White
23 residents, I'm referring to White
24 residents who do not identify as Hispanic
25 or Latino. Does that make sense?

Page 16

1 G. PIAQUADIO

2 A Yes.

3 Q I'll also be using the terms
4 Black and African American
5 interchangeably. Do you understand that
6 if I refer to Black voters or to African
7 American voters or Black residents or
8 African American residents, I'm referring
9 to the same group of people?

10 A Yes.

11 Q And if I say "the Town" today,
12 will you understand that unless I specify
13 otherwise, I'm referring to the Town of
14 Newburgh?

15 A Yes.

16 Q And if I say the town council or
17 the town board, will you understand that
18 I'm referring to the town council of the
19 Town of Newburgh unless I specify
20 otherwise?

21 A Yes.

22 Q Okay. And then if I refer to
23 the NYVRA or the New York Voting Rights
24 Act, will you understand that unless I
25 specify otherwise, I'm referring to the

Page 17

1 G. PIAQUADIO

2 John R. Lewis Voting Rights Act?

3 A Yes.

4 Q Great. I'm going to introduce
5 and mark the first exhibit. Just give one
6 second. Okay. I just introduced it, so
7 let me know when you see it in the folder
8 on your screen.

9 (Exhibit 1 was marked for
10 identification.)

11 A Okay.

12 Q You see the document with the
13 header, "Notice to take deposition upon
14 oral examination"?

15 A Yes, I do.

16 Q Have you seen this document
17 before?

18 A I would say no.

19 Q Was that no?

20 A Well, I didn't want to give the
21 answer, "I'm not sure." I believe I did
22 see it, but I'm not a hundred percent
23 sure.

24 Q That's okay. "I'm not sure" is
25 a perfectly acceptable answer. I'll

Page 18

1 G. PIAQUADIO
2 represent to you that this is the notice
3 that Plaintiff's counsel sent to take the
4 deposition of the Town of Newburgh. Can
5 we scroll down? If you scroll down on the
6 first page, second page and the third
7 page, do you see it lists 22 different
8 topics?

9 A Yes.

10 Q Have you seen this list before?

11 A Not sure.

12 Q Okay. Which of these topics are
13 you prepared to talk about today?

14 A Just about all of them.

15 Q Okay. Are there any that you're
16 not prepared to talk about today as you're
17 looking at the list?

18 A Well, if you ask and if I'm not
19 prepared, I'll tell you. Let's do it that
20 way rather than me try to scan through 22
21 right now.

22 Q Okay. We'll go through them, so
23 that's fair. Do you understand that you
24 are testifying today as the corporate
25 representative on behalf of the Town with

1 G. PIAQUADIO

2 respect to these topics?

3 A Yes.

4 Q Okay. So if I ask questions
5 where I refer to you or I ask for your
6 opinion, I'm asking for your testimony as
7 the Town's corporate representative, not
8 you personally, unless I specify
9 otherwise. Does that make sense?

10 A Yes.

11 Q Okay. Thank you. What did you
12 do to prepare for today's deposition?

13 A Probably the same as all
14 these -- the questions you're going to ask
15 me, whatever I know from experience or
16 talking with the attorneys over time.

17 Q Did you have any meetings to
18 prepare for this deposition?

19 A No.

20 Q Did you review any documents to
21 prepare for this deposition?

22 A No.

23 Q Did you speak to anyone to
24 gather information in order to testify on
25 behalf of the Town?

1 G. PIAQUADIO

2 A No.

3 Q So how much time did you spend
4 preparing for this deposition?

5 A I didn't prepare any time.
6 Prior from the notice that we were going
7 to have it until now, I have not prepared
8 at all.

9 Q Okay. Let's go through the
10 deposition topics, and I'll do this as
11 quickly as we can. I know there's a lot
12 of them. Okay, so do you see the first
13 item listed? It says, "The history of
14 discrimination in or affecting Hispanics
15 and/or Latinos in the Town of Newburgh."
16 Did I read that correctly?

17 A Yes.

18 Q Are you prepared to testify on
19 this topic today?

20 MR. GORMAN: Let me caution the
21 witness to the extent the answer to the
22 question is not public, don't reveal any
23 information based on the legislative
24 privilege and the First Amendment
25 associational privilege.

Page 21

1 G. PIAQUADIO

2 THE WITNESS: All right. So no
3 response.

4 BY MR. DAVIS:

5 Q So you will not testify on this
6 topic today because anything you would
7 testify to is covered by the legislative
8 privilege. Is that your answer?

9 MR. GORMAN: Objection.
10 Misconstruing the response.

11 MR. DAVIS: My apologies. Can you
12 just clarify your position?

13 MR. GORMAN: My position is that he
14 can testify about any of these topics
15 except to the extent that they're subject
16 to both of those privileges. And so he
17 could respond to them, but if any of the
18 information is not public, then he's not
19 going to based on those privileges.

20 MR. DAVIS: Okay. Thank you.

21 BY MR. DAVIS:

22 Q Did you prepare to testify on
23 topic number 1, Mr. Piaquadio?

24 A No.

25 Q Okay. Let's turn to topic 2.

Page 22

1 G. PIAQUADIO

2 It says, "The extent to which African
3 Americans and/or Hispanics have been
4 elected to office in the Town of
5 Newburgh." Did I read that correctly?

6 A Yes.

7 Q Are you prepared to testify as
8 the Town's representative as to this
9 topic?

10 MR. GORMAN: I'm going to give the
11 same direction. Yeah. For each of
12 them -- and I won't repeat it for each of
13 them as you walk through, assuming you're
14 going to ask the exact same question for
15 each of them, but I'm going to caution the
16 witness the same. To the extent that the
17 questions are invoking anything that is
18 not in public, let's not reveal it.

19 MR. DAVIS: Daniel, I'll just say,
20 "Subject to Mr. Gorman's previous
21 response," if that's okay?

22 MR. GORMAN: Sure. Thank you.

23 MR. DAVIS: Yeah.

24 BY MR. DAVIS:

25 Q Did you prepare to testify with

1 G. PIAQUADIO

2 respect to topic 2?

3 A No.

4 Q Okay. Topic 3, "The Town of
5 Newburgh's efforts to increase the
6 political participation of African
7 Americans and/or Hispanics." Did I read
8 that correctly?

9 A Yes.

10 Q And are you prepared to testify
11 today as the Town's representative with
12 respect to this topic subject to your
13 counsel's objections?

14 MR. GORMAN: Yeah, not objections;
15 direction.

16 MR. DAVIS: Directions. My
17 apologies. Yup. I'll restate the
18 question.

19 BY MR. DAVIS:

20 Q Are you prepared to testify
21 today on this topic subject to your
22 attorney's instructions?

23 A Yes.

24 Q Did you do anything to prepare
25 to testify on this topic?

Page 24

1 G. PIAQUADIO

2 A No.

3 Q Topic 4, "The Town of Newburgh's
4 efforts to address disparities between
5 non-Hispanic Whites and African Americans
6 and/or Hispanics." Did I read that
7 correctly?

8 A Yes.

9 Q And are you prepared to testify
10 today as the Town's representative on this
11 topic subject to your attorney's
12 instructions?

13 A No.

14 MR. GORMAN: I think the questions
15 are becoming confusing, because my
16 instruction to him is that he shouldn't be
17 answering subject to the legislative and
18 first amendment associational privilege to
19 the extent that it's not public. And so
20 when you say, "Subject to your attorney's
21 instructions," I think it's confusing the
22 witness.

23 So the standing objection, just to
24 make the record very clear, is that to the
25 extent he says -- yes, he's prepared to

Page 25

1 G. PIAQUADIO
2 testify to the extent it is not subject to
3 those privileges. I think that's what he
4 is trying to convey.

5 Is that accurate?

6 THE WITNESS: Correct.

7 MR. DAVIS: Understood. Let's just
8 note the standing objection. I'll just
9 read the questions, and we can proceed
10 like that.

11 MR. GORMAN: Yeah. And after we get
12 through the topic area, I'll resume my
13 objections, but just for purposes of
14 reading through the topics in the
15 30(b)(6), there's a standing objection to
16 each of them. And he'll testify to the
17 extent that it's in the public record.

18 THE WITNESS: All right. So --

19 MR. DAVIS: Understood.

20 THE WITNESS: So my answer will be no
21 or yes?

22 MR. GORMAN: Your answer is, yes,
23 you're going to testify if you're going to
24 testify about it. But it will be subject
25 to my objection or my instruction to you

1 G. PIAQUADIO

2 not to testify to the extent that it is
3 subject to those privileges.

4 THE WITNESS: Okay.

5 MR. GORMAN: Sorry. I think it was
6 just confusing with the --

7 MR. DAVIS: No. I hear you. I hear
8 you.

9 BY MR. DAVIS:

10 Q Let's go back. We're on topic
11 4, I believe. So "The Town of Newburgh's
12 efforts to address disparities between
13 non-Hispanic Whites and African Americans
14 and/or Hispanics." Did I read that
15 correctly?

16 A Yes.

17 Q Are you prepared to testify on
18 that topic today?

19 A No.

20 MR. GORMAN: I think the question's,
21 "Are you prepared to testify on the topic
22 subject to my objections."

23 MR. DAVIS: Yes.

24 BY MR. DAVIS:

25 Q So you will testify on that --

Page 27

1 G. PIAQUADIO

2 A -- objections. Yes, I got it.

3 Q Will you testify on that topic
4 today?

5 A No.

6 THE REPORTER: Counsel, just please
7 if we could all just talk one at a time,
8 I'd appreciate it. Thank you.

9 BY MR. DAVIS:

10 Q Okay. Topic 5, "The Town of
11 Newburgh's efforts to address disparities
12 between non-Hispanic Whites and African
13 Americans and/or Hispanics and criminal
14 justice outcomes." Did I read that
15 correctly?

16 A Yes.

17 Q Will you testify on this topic
18 subject to your counsel's instructions?

19 A Yes.

20 Q Did you do anything to prepare
21 to testify on this topic today?

22 A No.

23 Q Topic 6, "The Town of Newburgh's
24 efforts to address disparities between
25 non-Hispanic Whites and African Americans

Page 28

1 G. PIAQUADIO

2 and/or Hispanics and housing and land
3 use." Did I read that correctly?

4 A Yes.

5 Q And will you testify on this
6 topic subject to your attorney's
7 instructions?

8 A Yes.

9 Q Did you do anything to prepare
10 to testify on this topic today?

11 A No.

12 Q Topic 7, "The Town of Newburgh's
13 efforts to address disparities between
14 non-Hispanic Whites and African Americans
15 and/or Hispanics in income and
16 socioeconomic status." Did I read that
17 correctly?

18 A Yes.

19 Q Will you testify on this topic
20 subject to your attorney's instructions?

21 A Yes.

22 Q And did you do anything to
23 prepare to testify on this topic today?

24 A No.

25 Q Okay. Topic 8, "The Town of

Page 29

1 G. PIAQUADIO

2 Newburgh's response to the use of overt or
3 subtle racial appeals in political
4 campaigns." Did I read that correctly?

5 A Yes.

6 Q And will you testify on this
7 topic subject to your attorney's
8 instructions?

9 A Yes.

10 Q And did you do anything to
11 prepare to testify on this topic today?

12 A No.

13 Q Topic 9, "The Town of Newburgh's
14 responsiveness to the particularized needs
15 of African Americans and/or Hispanic
16 residents." Did I read that correctly?

17 A Yes.

18 Q And will you testify on this
19 topic today subject to your attorney's
20 instructions?

21 A Yes.

22 Q Did you do anything to prepare
23 to testify on this topic today?

24 A No.

25 Q Topic 10, "The Town of

1 G. PIAQUADIO

2 Newburgh's interest in maintaining an
3 electoral system in which the supervisor
4 and town board members are elected at
5 large." Did I read that correctly?

6 A Yes.

7 Q Will you testify on this topic
8 today subject to your attorney's
9 instructions?

10 A Yes.

11 Q Did you do anything to prepare
12 to testify on this topic today?

13 A No.

14 Q Topic 11, "The Town of Newburgh
15 lawsuit: Town of Newburgh, New York, v.
16 Newburgh UM, LLC, Orange County index
17 number EF003105-2023." Did I read that
18 correctly?

19 A Yes.

20 Q Will you testify on this
21 subject -- strike that. Will you testify
22 on that topic subject to your attorney's
23 instructions?

24 A Yes.

25 Q Did you do anything to prepare

1 G. PIAQUADIO

2 to testify on this topic today?

3 A No.

4 Q Topic 12, "The Town of
5 Newburgh's participation in a lawsuit
6 challenging moving town elections to even
7 years." Did I read that correctly?

8 A Yes.

9 Q Will you testify on that topic
10 today subject to your attorney's
11 instructions?

12 A Yes.

13 Q Did you do anything to prepare
14 to testify on that topic today?

15 A No.

16 Q Topic 13, "The Town of
17 Newburgh's state of emergency declared in
18 response to the housing of migrants in the
19 Town." Did I read that correctly?

20 A Yes.

21 Q Will you testify on this topic
22 today subject to your attorney's
23 instructions?

24 A Yes.

25 Q And did you do anything to

Page 32

1 G. PIAQUADIO
2 prepare to testify on that topic today?

3 A No.

4 Q Item 14, "Any and all other
5 declarations of the Town of Newburgh
6 regarding migration." Did I read that
7 correctly?

8 A Yes.

9 Q And will you testify on this
10 topic today subject to your attorney's
11 instructions?

12 A Yes.

13 Q And did you do anything to
14 prepare to testify on this topic today?

15 A No.

16 Q Okay. Topic 15, "The Town of
17 Newburgh's response to the alleged
18 displacement of veterans by asylum
19 seekers." Did I read that correctly?

20 A Yes.

21 Q Will you testify on this topic
22 today subject to your attorney's
23 instructions?

24 A Yes.

25 Q Did you do anything to prepare

Page 33

1 G. PIAQUADIO

2 to testify on that topic today?

3 A No.

4 Q Item 16, "The Town of Newburgh's
5 support of the expansion of the Danskammer
6 Power Plant." Did I read that correctly?

7 A Yes.

8 Q Will you testify on that topic
9 today subject to your attorney's
10 instructions?

11 A Yes.

12 Q Did you do anything to prepare
13 to testify on that topic?

14 A No.

15 Q Item 17, "The absence of Spanish
16 translations on the Town of Newburgh's
17 website." Did I read that correctly?

18 A Yes.

19 Q Will you testify on that topic
20 today subject to your attorney's
21 instructions?

22 A Yes.

23 Q Did you do anything to prepare
24 to testify on that topic today?

25 A No.

Page 34

1 G. PIAQUADIO

2 Q Item 18, "The Town of Newburgh's
3 response to the January 26, 2024, notice
4 letter regarding a violation of the New
5 York Voting Rights Act sent on behalf of
6 Plaintiffs in this case pursuant to the
7 New York Voting Rights Act." Did I read
8 that correctly?

9 A Yes.

10 Q Will you testify on this topic
11 today subject to your attorney's
12 instructions?

13 A Yes.

14 Q Did you do anything to prepare
15 to testify on this topic today?

16 A No.

17 Q Item 19, "The Town of Newburgh's
18 response to this lawsuit and its retention
19 of Sokoloff Stern and Troutman Pepper."
20 Did I read that correctly?

21 A Yes.

22 Q Will you testify on these topics
23 today subject to your attorney's
24 instructions?

25 A Yes.

1 G. PIAQUADIO

2 Q Did you do anything to prepare
3 to testify on this topic today?

4 A No.

5 Q Item 20, "The Town of Newburgh's
6 hiring or lack thereof of racial
7 minorities for town positions." Did I
8 read that correctly?

9 A Yes.

10 Q Will you testify on that subject
11 today subject to your attorney's
12 instructions?

13 A Yes.

14 Q Did you do anything to prepare
15 to testify on that topic today?

16 A No.

17 Q Item 21, "The impact of features
18 of the Town of Newburgh's elections on
19 racial minority residence of the Town."
20 Did I read that correctly?

21 A Yes.

22 Q Will you testify on this topic
23 today subject to your attorney's
24 instructions?

25 A Yes.

1 G. PIAQUADIO

2 Q Did you do anything to prepare
3 to testify on this topic today?

4 A No.

5 Q Finally, item 22, "Defendant's
6 responses to the interrogatories and
7 requests for production served by
8 Plaintiffs in this action, including
9 responsive documents produced." Did I
10 read that correctly?

11 A Yes.

12 Q Will you testify on this topic
13 today subject to your attorney's
14 instructions?

15 A Yes.

16 Q And did you do anything to
17 prepare to testify with respect to this
18 topic?

19 A No.

20 Q Okay. Thank you for bearing
21 with me. Is there anything else you did
22 to prepare for this deposition that we
23 haven't already covered?

24 A No.

25 Q Okay. Thank you. I am going to

Page 37

1 G. PIAQUADIO

2 introduce another exhibit. Let me know
3 when Exhibit 2 pops up in your folder.

4 (Exhibit 2 was marked for
5 identification.)

6 MR. GORMAN: Yeah. Just let us know
7 once it's fully uploaded because we have
8 to refresh it.

9 MR. DAVIS: Okay. I believe it
10 should be uploaded.

11 MR. GORMAN: Sure. We have it.
12 Thanks.

13 MR. DAVIS: Yup.

14 BY MR. DAVIS:

15 Q Have you seen this document
16 before?

17 A Yes.

18 Q What is it?

19 A This is stating in the lawsuit,
20 the plaintiffs versus the
21 defendants -- Town of Newburgh. This is
22 Newburgh's responses and objections to
23 Plaintiff's first request for discovery
24 and information.

25 THE REPORTER: Sorry. Mr. Piaquadio,

Page 38

1 G. PIAQUADIO

2 please speak up if you can. Thank you.

3 THE WITNESS: Okay.

4 BY MR. DAVIS:

5 Q Were you involved in responding
6 to these requests for information and
7 documents?

8 A Which ones are you referring to?

9 Q Any of them.

10 A Whatever I did,
11 would -- would've been with the attorney.

12 Q Did you conduct any searches to
13 comply with these requests?

14 MR. GORMAN: I'm going to caution the
15 witness to the extent the answer to the
16 question's not public, do not reveal
17 information based on the legislative
18 privilege and First Amendment
19 associational privilege. That being said,
20 you could answer what you did, if
21 anything.

22 THE WITNESS: I don't have much to
23 answer.

24 BY MR. DAVIS:

25 Q So is it fair to say you did

1 G. PIAQUADIO

2 nothing to comply with these requests?

3 A Any discussions would've been
4 with the -- the Town's attorney.

5 Q I appreciate that. I just want
6 to be clear. I'm not asking for your
7 discussions with your attorneys. I'm just
8 asking if you conducted a search to comply
9 with this request.

10 A Do not recall.

11 Q Do you recall if you did
12 anything to comply with these requests?

13 A Do not recall.

14 Q Did you search your emails?

15 A Was a search of emails done?

16 Yes.

17 Q Did you do the search?

18 A I performed the search.

19 Q Did you search your text
20 messages?

21 A I know -- I remember searching
22 emails. I don't -- there was almost
23 nothing -- nothing down, I believe, on
24 text messages.

25 Q Did you do anything else to

Page 40

1 G. PIAQUADIO

2 comply with these requests?

3 A Not that I recall.

4 Q Do you ever use your personal
5 email address for work business?

6 A No.

7 Q Did you search your personal
8 email address for work-related messages?

9 A No.

10 Q Do you ever exchange text
11 messages with members of the town board?

12 A Yes.

13 Q Did you search your text message
14 exchanges for information that may have
15 been relevant to this request?

16 A Not that I recall.

17 Q Did you ask anyone else for
18 assistance in complying with these
19 requests?

20 MR. GORMAN: I'm going to caution the
21 witness that to the extent the answer to
22 the question is going to reveal
23 information based on non-public
24 communications, don't reveal it based on
25 the legislative privilege and the First

Page 41

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G. PIAQUADIO

Amendment associational privilege.

THE WITNESS: So no response.

BY MR. DAVIS:

Q Is there anything else you did
to comply with these requests?

A Not that I recall.

Q Who's your current employer?

A Town of Newburgh.

Q And what's your role at the
Town?

A Supervisor.

Q When did you become the
supervisor?

A 2013.

Q Have you been the supervisor
ever since?

A Yes.

Q Do you report to anyone?

A Probably every resident in this
town and about 220 employees.

Q What are your responsibilities
as town supervisor?

A Create the budget from the Town
on a day-to-day basis.

Page 42

1 G. PIAQUADIO

2 Q Anything else?

3 A Probably others, but I think
4 running the Town on a day-to-day basis
5 includes them.

6 Q Fair enough. Are those
7 responsibilities different from the
8 responsibilities of other members of the
9 town board?

10 A Probably. Supervisor puts in
11 many more hours, sets the agenda, and that
12 type of thing. So there are some more
13 responsibilities, supervisor than council.

14 Q Is it fair to say that the
15 Town's Latino community has grown in the
16 past few decades?

17 MR. GORMAN: I'm going to caution the
18 witness to the extent the answer to the
19 question is not public, do not reveal it
20 based on that the information is both
21 subject to the legislative privilege and
22 the First Amendment Associational
23 Privilege.

24 THE WITNESS: No response.

25 //

Page 43

1 G. PIAQUADIO

2 BY MR. DAVIS:

3 Q So just to confirm, you will not
4 testify on whether whether the Latino
5 population has grown because of
6 legislative privilege?

7 MR. GORMAN: And the First Amendment
8 associational privilege. To the extent
9 there's no non-public information that he
10 could share on the growth of the
11 population. Assuming that was the
12 question. Do you want to rephrase the
13 question?

14 BY MR. DAVIS:

15 Q Do you have any testimony on
16 this topic; the question of the growth of
17 the Latino community that is not subject
18 to the legislative or First Amendment
19 privilege?

20 A No.

21 Q Is it fair to say that the
22 Town's Black community has grown in the
23 last few decades?

24 MR. GORMAN: Same caution. To the
25 extent the answer to the question is not

Page 44

1 G. PIAQUADIO
2 public, do not reveal information based on
3 the legislative privilege and the First
4 Amendment associational privilege.

5 BY MR. DAVIS:

6 Q Is it fair to say you have no
7 testimony on this topic that is not
8 covered by the legislative or First
9 Amendment privilege?

10 A Yes.

11 Q Do you know what percentage of
12 the Town identifies as Latino?

13 MR. GORMAN: Same direction. With
14 respect to anything that's not public, I
15 caution you not to reveal it based on the
16 legislative privilege and First Amendment
17 associational privilege?

18 THE WITNESS: No comment.

19 BY MR. DAVIS:

20 Q So you have no testimony on this
21 topic that is not covered by the
22 legislative or First Amendment privilege?

23 A Yes.

24 Q Is the Latino community
25 concentrated anywhere geographically

Page 45

1 G. PIAQUADIO

2 within the Town of Newburgh?

3 MR. GORMAN: Same direction. I
4 caution the witness not to reveal any
5 information that's not public based on the
6 legislative privilege.

7 THE WITNESS: No response.

8 BY MR. DAVIS:

9 Q So you have no testimony on this
10 topic that is not subject to the First
11 Amendment or legislative privilege?

12 MR. GORMAN: Objection to the
13 question. Lacks Foundation. If you have
14 specific questions about the topic, you
15 could ask it, but --

16 MR. DAVIS: My question was whether
17 the Latino community was concentrated
18 anywhere geographically. You instructed
19 him on the privilege. He said, "No
20 response." So I'm just confirming that he
21 has no testimony that is not covered by
22 any of the privileges you invoked.

23 THE WITNESS: No testimony.

24 BY MR. DAVIS:

25 Q Do you know if there are any

Page 46

1 G. PIAQUADIO
2 leaders in the Latino community in
3 Newburgh?

4 MR. GORMAN: Same caution to the
5 witness. If the answer's not public,
6 don't reveal it based on the First
7 Amendment associational privilege and
8 legislative privilege.

9 THE WITNESS: No response.

10 BY MR. DAVIS:

11 Q So just confirming, you have no
12 testimony on the question of whether there
13 are leaders of the Latino community that
14 is not covered by the legislative First
15 Amendment privilege?

16 A Yes.

17 Q Do you know what percentage of
18 the Town identifies as Black?

19 MR. GORMAN: Same direction. Caution
20 the witness only to answer to the extent
21 that he has public information on that
22 based on the privileges.

23 THE WITNESS: No response.

24 BY MR. DAVIS:

25 Q So just confirming that you have

Page 47

1 G. PIAQUADIO
2 no testimony on the question of what
3 percentage of the Town identifies as Black
4 that's not covered by the First Amendment
5 or legislative privilege?

6 A Yes.

7 Q Is the Black community
8 concentrated anywhere geographically
9 within the Town of Newburgh?
10 MR. GORMAN: Same direction. You can
11 answer if that information is public.

12 THE WITNESS: No response.

13 BY MR. DAVIS:

14 Q So you have no testimony on the
15 question of where the Black community is
16 concentrated that is not covered by the
17 legislative or First Amendment privilege?

18 A Yes.

19 Q Do you know any of the leaders
20 of the Black community in the Town of
21 Newburgh?

22 MR. GORMAN: Objection.

23 And I caution the witness moreover
24 not to answer based on the legislative
25 privilege. To the extent there's any

Page 48

1 G. PIAQUADIO

2 public information, you can answer

3 THE WITNESS: No response.

4 BY MR. DAVIS:

5 Q So to confirm, you have no
6 testimony on the question of whether there
7 are Black leaders in the community in
8 Newburgh that is not subject to the First
9 Amendment or legislative privilege?

10 A Yes.

11 Q How many members are there on
12 Newburgh's Town Council?

13 A Five: four councilmen, one
14 supervisor.

15 Q Do you consider yourself part of
16 the town board as supervisor?

17 A Yes.

18 Q That was a yes?

19 A Yes.

20 Q Thank you. Who are the current
21 members of the town board?

22 A You got to repeat that. Who are
23 the appointed members?

24 Q Who are the current members of
25 the town board?

Page 49

1 G. PIAQUADIO

2 A Scott Manley, Anthony LoBiondo,
3 Paul Ruggiero, and myself.

4 Q Is there currently a vacancy on
5 the town board?

6 A Yes.

7 Q Who previously held that seat?

8 A Elizabeth Green.

9 Q And how will that vacancy be
10 filled?

11 MR. GORMAN: Objection. Compound.
12 Can you re-ask the question? I may have
13 missed a question.

14 MR. DAVIS: That's okay. I'll run
15 back a second.

16 BY MR. DAVIS:

17 Q So there's a vacancy on the town
18 board; correct?

19 A Yes.

20 Q Will that vacancy be filled?

21 A Yes.

22 Q How will that vacancy be filled?

23 A In the November election.

24 Q How is the town supervisor of
25 the Town of Newburgh elected?

Page 50

1 G. PIAQUADIO

2 A At large.

3 Q Are council members also elected
4 at large?

5 A Yes.

6 Q Okay. I'd like to introduce
7 another exhibit. I'll let you know when
8 it's uploaded. Okay. It should be
9 uploaded.

10 (Exhibit 3 was marked for
11 identification.)

12 MR. GORMAN: It's open.

13 BY MR. DAVIS:

14 Q Do you recognize this document?

15 A Yes.

16 Q What is it?

17 A Responses and objections to the
18 plaintiffs' first set of interrogatories.

19 Q So without revealing the
20 substance of any of your conversations
21 with counsel, were you involved in
22 responding to these interrogatories?

23 A So your question was other than
24 speaking with the attorney?

25 Q So without revealing the

Page 51

1 G. PIAQUADIO

2 substance of any conversations you had
3 with your attorneys, were you involved in
4 responding to these interrogatories?

5 A Only after -- with conversation
6 with attorney.

7 Q Did you review the final version
8 of these responses before they were
9 submitted?

10 A I don't recall.

11 Q Okay. Can you scroll down to
12 the final page, page 11, and let me know
13 when you get there

14 A I'm there.

15 Q Okay. I'm going to read the
16 text next to the number 2. Quote, "I have
17 read the foregoing responses and
18 objections to Plaintiffs' first set of
19 interrogatories and know the contents
20 thereof, and the same are true to the best
21 of my knowledge, information, and belief."
22 Did I read that correctly?

23 A Yes, you did.

24 Q Okay. And then the text next to
25 number 3, "I affirm this 1st day of July

Page 52

1 G. PIAQUADIO
2 2024, under the penalties of perjury under
3 the laws of New York, which may include a
4 fine or imprisonment, that the foregoing
5 is true, and I understand that this
6 document may be filed in an action or
7 proceeding in a court of law." Did I read
8 that correctly?

9 A Yes.

10 Q And is that your name and
11 signature at the bottom of the page?

12 A Yes, it is.

13 Q Does that refresh your
14 recollection as to whether you reviewed
15 these answers before they were submitted?

16 A I definitely did.

17 Q Okay. So there aren't page
18 numbers, but can we scroll to what should
19 be the 8th page of the PDF, and then
20 you'll see interrogatory number 8. And
21 just let me know when you get there.

22 A Is that, "Please describe any
23 policy justification"?

24 Q Correct. So I'll just read the
25 whole interrogatory. It's number 8.

Page 53

1 G. PIAQUADIO

2 "Please describe any policy justification
3 for adopting and maintaining the current
4 method of electing methods at" -- strike
5 that. "Please describe any policy
6 justification for adopting and maintaining
7 the current method of electing members of
8 the town board." Did I read that
9 correctly?

10 A Yes.

11 Q And you said earlier that the
12 board is elected in at-large elections.
13 Is that correct?

14 A Repeat that question.

15 Q You testified earlier that
16 members of the board are elected at large.
17 Is that correct?

18 A Yes.

19 Q What is an at-large election?

20 A It includes all registered
21 voters within the Town.

22 Q So all registered voters in the
23 Town vote for the candidates. Is that
24 correct?

25 A Yes.

Page 54

1 G. PIAQUADIO

2 Q Okay. And then in the response,
3 it says -- I'm reading on the third
4 line -- "Defendants also object to this
5 interrogatory on the grounds that the
6 current at-large method of electing
7 members of the town board was not," quote,
8 "'Adopted.'" Did I read that correctly?

9 A Yes.

10 Q Do you agree with that
11 statement?

12 MR. GORMAN: Objection.

13 You can answer.

14 THE WITNESS: No comment.

15 BY MR. DAVIS:

16 Q Do you know one way or the other
17 whether the Town ever adopted an at-large
18 method of elections?

19 MR. GORMAN: I caution the witness to
20 the extent the answer to the question is
21 not public, don't reveal the information
22 based on a legislative privilege and the
23 First Amendment associational privilege.

24 THE WITNESS: No comment.

25 //

1 G. PIAQUADIO

2 BY MR. DAVIS:

3 Q Do you agree that the Town
4 maintains an at-large method of election?

5 A If it agrees to maintain an at-
6 large election? Is that the question?

7 Q Yes.

8 A Yes.

9 Q Okay. And then in the last line
10 of the response or the third to last line,
11 it states, quote, "Defendants state that
12 no petition has ever been submitted to the
13 town board to hold a referendum to change
14 the current at-large method of electing
15 members of the town board to award
16 system." Did I read that correctly?

17 A Yes.

18 Q Do you agree with that
19 statement?

20 MR. GORMAN: Let me caution the
21 witness to the extent the answer to the
22 question is not public, do not reveal the
23 information based on legislative
24 privilege.

25 THE WITNESS: No comment.

1 G. PIAQUADIO

2 BY MR. DAVIS:

3 Q So you have no testimony on the
4 topic of whether anyone has submitted a
5 referendum to change the current at-large
6 method of elections that is not covered by
7 the First Amendment or legislative
8 privilege. Is that correct?

9 MR. GORMAN: Objection. The
10 direction was to the extent that it's not
11 public. If he has non-public information,
12 he could provide it.

13 THE WITNESS: No comment.

14 BY MR. DAVIS:

15 Q Okay. I'm going to give you a
16 second to read the entire answer to the
17 interrogatory number 8. Can you let me
18 know when you've had a chance to read it?

19 A That's just number 8 I read;
20 yes?

21 Q Correct.

22 A Okay. I read it.

23 Q Is there anything else you'd add
24 in response to this interrogatory?

25 A No.

1 G. PIAQUADIO

2 Q Where do you live?

3 A Town of Newburgh.

4 Q What's your address?

5 A 2 Mace, M-A-C-E, Circle,
6 Newburgh, New York.

7 Q What area of the Town is that
8 in?

9 MR. GORMAN: Objection.

10 You can answer if you know what he
11 means.

12 THE WITNESS: I would say it's the
13 southern section of town.

14 BY MR. DAVIS:

15 Q Is there an area of Newburgh
16 called Orange Lake?

17 A Yes.

18 Q Is it fair to say that you live
19 in Orange Lake?

20 A Along the shore, yes, on the
21 south side.

22 Q Do you know where in Newburgh
23 Councilmember Ruggiero lives?

24 A Yes.

25 Q Where does he live?

1 G. PIAQUADIO

2 A Sylvan Drive.

3 Q Is that also in Orange Lake?

4 A It'd be further away to the
5 east.

6 Q What neighborhood is that in?

7 A Southeast section of town.

8 Q Do you know where Newburgh
9 Councilmember Manley lives?

10 A More in the center of town,
11 Kentucky Drive.

12 Q Does he live in a neighborhood
13 or area of the Town of Newburgh?

14 MR. GORMAN: Objection.

15 You can answer.

16 THE WITNESS: I'm not sure of the
17 question either.

18 BY MR. DAVIS:

19 Q Does Councilmember Manley live
20 in a neighborhood within the Town of
21 Newburgh?

22 MR. GORMAN: Same objection.

23 You can answer.

24 THE WITNESS: He lives on Kentucky
25 Drive. I don't know what neighborhood

1 G. PIAQUADIO

2 that really is.

3 BY MR. DAVIS:

4 Q Is there a neighborhood in
5 Newburgh called Balmville?

6 A Yes.

7 Q Does council member Manley live
8 in Balmville?

9 A No.

10 Q Where does he live?

11 A Kentucky Drive. There's another
12 councilman lives in Balmville.

13 Q Is that Mr. LoBiondo?

14 A Yes.

15 Q Okay. So you don't know what
16 neighborhood Mr. Manley lives in. Is that
17 correct?

18 A When you say neighborhood, I
19 don't understand that question: "What
20 neighborhood do you live in?"

21 Q Is Balmville a neighborhood in
22 the Town of Newburgh?

23 A It's -- I think that would be
24 considered one of the original hamlets,
25 Balmville. A hamlet, yes.

Page 60

1 G. PIAQUADIO

2 Q Okay. Does Mr. Manley live in a
3 hamlet in the Town of Newburgh?

4 A I do not know the name.

5 Q Okay. Is there an area of
6 Newburgh known as the Historic District?

7 A No.

8 Q Does the town board have the
9 authority to fill a vacant seat on the
10 town board?

11 A Yes.

12 Q Does the town board have the
13 authority to appoint someone to fill that
14 seat?

15 A Yes.

16 Q How does the town board appoint
17 members to a vacancy?

18 MR. GORMAN: Let me caution the
19 witness to the extent the answer to the
20 question is not public, do not reveal the
21 information based on legislative
22 privilege.

23 THE WITNESS: No response.

24 BY MR. DAVIS:

25 Q So you have no testimony on the

Page 61

1 G. PIAQUADIO

2 topic of how the board appoints members to
3 vacant seats that is not covered by the
4 legislative or First Amendment privilege?

5 A Yes.

6 Q Does the town council set any
7 goals for the Town of Newburgh?

8 MR. GORMAN: Same direction. Don't
9 answer to the extent that there's any
10 information that -- unless to the extent
11 it's public.

12 THE WITNESS: No response.

13 BY MR. DAVIS:

14 Q Do you have any non-public
15 information with respect to whether the
16 town council has goals for the Town of
17 Newburgh?

18 A No.

19 Q Okay. I'm going to introduce
20 one more exhibit. Actually, let's strike
21 that. We've been going for about an hour.
22 Do you want to take a short break?

23 A Sounds good to me.

24 THE REPORTER: All right. Off the
25 record, 10:03.

Page 62

1 G. PIAQUADIO

2 (Off the record.)

3 THE REPORTER: All right. We are
4 back on the record, 10:18.

5 BY MR. DAVIS:

6 Q Okay. Do you understand you're
7 still under oath?

8 A Yes, I do.

9 Q Okay. I'm going to introduce
10 another exhibit. Bear with me. Okay. It
11 says it's uploaded. Are you able to see
12 the document marked Exhibit 4?

13 (Exhibit 4 was marked for
14 identification.)

15 A Yes.

16 Q Do you recognize this document?

17 A Yes.

18 Q What is it?

19 A It'd be the agenda of a special
20 meeting.

21 Q Okay. Can you scroll down to
22 the 5th page in the PDF that has the
23 Abrams Fensterman letterhead on the top.
24 You let me know when you get there.

25 A Is it the sixth page; right?

Page 63

1 G. PIAQUADIO

2 Abrams; yes?

3 Q Yeah, it has their letterhead at
4 the top, and then it says, "Via certified
5 mail."

6 A Yes.

7 Q Okay. Do you recognize this
8 document?

9 A Yes.

10 Q What is it?

11 A It's a letter from the Abrams
12 firm saying that we're in violation of the
13 Voting Rights Act.

14 Q If I refer to the notice letter,
15 do you understand that I'm referring to
16 this document?

17 A Yes.

18 Q Have you read the notice letter?

19 A Yes.

20 Q What do you understand
21 Plaintiffs' complaint to be in the letter?

22 MR. GORMAN: Let me caution the
23 witness to the extent the answer reveals
24 anything that's not public, don't reveal
25 that information based on the legislative

1 G. PIAQUADIO

2 privilege.

3 THE WITNESS: I have no comment.

4 BY MR. DAVIS:

5 Q Do you have any non-public
6 information regarding plaintiffs'
7 complaint in this letter?

8 MR. GORMAN: Objection.

9 You can answer.

10 THE WITNESS: No.

11 BY MR. DAVIS:

12 Q So you have no understanding of
13 what Plaintiffs' complaints are in this
14 letter?

15 MR. GORMAN: Objection.

16 You can answer.

17 THE WITNESS: No comment.

18 BY MR. DAVIS:

19 Q Do you think Plaintiffs'
20 complaints are valid?

21 MR. GORMAN: Let me caution the
22 witness to the extent the answer to your
23 question is not in the public record,
24 don't reveal it based on legislative
25 privilege.

Page 65

1 G. PIAQUADIO

2 THE WITNESS: No comment.

3 BY MR. DAVIS:

4 Q So you have no opinions on
5 Plaintiffs' complaints that are not
6 covered by the legislative or First
7 Amendment privilege. Is that correct?

8 A Yes.

9 Q Okay. I want to turn to the
10 second paragraph under the section, "New
11 York State Voting Rights Act." I'm going
12 to read from that second paragraph, the
13 second line.

14 Quote, "An analysis of election
15 data and demographic patterns in the Town
16 of Newburgh utilizing Bayesian Improved
17 Surname Geocoding among other statistical
18 methods reveal significant and persistent
19 patterns of racially polarized voting with
20 respect to African American and Hispanic
21 voters, and demonstrates that the voting
22 preferences and choices of African
23 American and Hispanic voters differ
24 markedly from those of White voters within
25 the jurisdiction." Did I read that

Page 66

1 G. PIAQUADIO

2 correctly?

3 A Yes.

4 Q Do you think the allegation that
5 there's racially polarized voting in the
6 Town of Newburgh is valid?

7 MR. GORMAN: Objection.

8 I'm going to direct the witness not
9 to answer based on legislative provision
10 and First Amendment associational
11 privilege.

12 THE WITNESS: No comment.

13 BY MR. DAVIS:

14 Q So you have no testimony
15 regarding the allegation of racially
16 polarized voting that is not covered by
17 the legislative or First Amendment
18 privilege?

19 MR. GORMAN: Objection.

20 You can answer.

21 THE WITNESS: Yes.

22 BY MR. DAVIS:

23 Q Okay. And then turning to the
24 next paragraph, starting in the second to
25 last line, it says, quote, "Among other

Page 67

1 G. PIAQUADIO
2 things, not once has Newburgh ever elected
3 an African American or Hispanic candidate
4 to Town office despite the fact that
5 African Americans and Hispanics represent
6 14.6 percent and 23.6 percent of the
7 Town's populations respectively." Did I
8 read that correctly?

9 A Yes.

10 Q Do you think that the allegation
11 that Newburgh has never elected an African
12 American or Hispanic candidate to Town
13 office is valid?

14 MR. GORMAN: Objection.

15 I'm going to direct the witness not
16 to answer to the extent that he has known
17 no non-public information subject to the
18 legislative privilege.

19 THE WITNESS: No response.

20 BY MR. DAVIS:

21 Q So to confirm, you have no
22 testimony on this topic that is not
23 covered by the First Amendment or
24 legislative privilege. Is that correct?

25 A Yes.

Page 68

1 G. PIAQUADIO

2 Q What were your initial
3 impressions when you received this letter?

4 MR. GORMAN: Same direction. Caution
5 the witness not to answer to the extent
6 that anything that you may testify about
7 would be subject to legislative privilege.

8 THE WITNESS: No comment.

9 BY MR. DAVIS:

10 Q After you received the notice
11 letter, did you share it with anyone?

12 MR. GORMAN: Objection.

13 A No comment.

14 Q Did you discuss the notice
15 letter with anyone?

16 MR. GORMAN: Same direction. I'll
17 caution the witness not to answer to the
18 extent that the answer to your question
19 would be subject to the First Amendment
20 associational privilege.

21 THE WITNESS: No comment.

22 BY MR. DAVIS:

23 Q What did the Town do in response
24 to the letter?

25 MR. GORMAN: Same direction. To the

Page 69

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G. PIAQUADIO

extent the answer invokes anything that
would be subject to the legislative
privilege and First Amendment
associational privilege, I direct the
witness not to answer.

THE WITNESS: No comment.

BY MR. DAVIS:

Q Okay. I'm going to introduce an
exhibit. It should be uploaded. Let me
know when you see it. Can you see the
document marked Exhibit 5?

(Exhibit 5 was marked for
identification.)

A Yes.

Q Do you recognize this document?

A Yes.

Q What is it?

A It's a press release that I put
out.

Q What is the topic of the press
release?

MR. GORMAN: Objection. The document
speaks for itself.

You can answer.

Page 70

1 G. PIAQUADIO

2 THE WITNESS: Yeah, I think the
3 document does speak for itself.

4 BY MR. DAVIS:

5 Q Okay. But I asked you what the
6 topic was. I note the objection, but you
7 can answer.

8 MR. GORMAN: You can answer.

9 THE WITNESS: Okay. The fact that
10 we -- a letter was received, that our
11 election system -- work with minorities to
12 be elected. And this was -- we're going
13 to look into the matter.

14 BY MR. DAVIS:

15 Q What do you mean by look into
16 the matter?

17 MR. GORMAN: Objection to the extent
18 that it's going to call for attorney-
19 client privileged communications or which
20 would be subject to the legislative
21 privilege.

22 You can answer to the extent that you
23 could provide public information
24 available.

25 THE WITNESS: I think the last

Page 71

1 G. PIAQUADIO

2 paragraph sums it up there on my press
3 release.

4 BY MR. DAVIS:

5 Q It says in the last paragraph,
6 "The town board will consider available
7 alternative courses of action." Is that
8 correct?

9 A I think the last one, "Once it
10 is consulted with attorneys." That's the
11 what I'm talking about.

12 Q Right. And so in that
13 sentence -- I'll read the whole sentence.
14 It says, "Once it is consulted with the
15 attorneys regarding the results of the
16 review, the town board will consider
17 available alternative courses of action."
18 Is that correct?

19 A Yes.

20 Q What did you mean by available
21 alternative courses of action?

22 MR. GORMAN: Same caution to the
23 witness. To the extent the answer to the
24 question would reveal information that is
25 not public, don't do so based on

Page 72

1 G. PIAQUADIO

2 legislative privilege.

3 THE WITNESS: No comment.

4 BY MR. DAVIS:

5 Q So you have no testimony on what
6 you meant by available alternative courses
7 of action that is not covered by the
8 legislative or First Amendment privilege.
9 Is that correct?

10 A Yes.

11 Q Okay. And then the next
12 sentence said, "These may include an
13 alternative method of electing town board
14 members in future elections." Did I read
15 that correctly?

16 A Yes.

17 Q What did you mean by that?

18 MR. GORMAN: Same objection.

19 Don't answer to the extent that you
20 have no non-public information that would
21 not be subject to the legislative
22 privilege.

23 THE WITNESS: No comment.

24 BY MR. DAVIS:

25 Q So you have no testimony as to

Page 73

1 G. PIAQUADIO

2 what alternative method of electing town
3 board members in future elections the Town
4 considered that is not covered by the
5 legislative or First Amendment privilege.
6 Is that correct?

7 A Yes.

8 Q Okay. I'd like to turn to the
9 fourth paragraph. I'll read from it. It
10 says, quote, "The town board nevertheless
11 takes the allegations very seriously and
12 has retained a law firm that has worked
13 with the Town in the past, Sokoloff Stern
14 LLP, to provide legal services for a
15 review of the Town's compliance with the
16 NYVRA and the allegations contained in the
17 Abrams Fensterman letter, and to retain
18 experts approved by the town board who are
19 required in connection with that ongoing
20 review." Did I read that correctly?

21 A Yes.

22 Q What steps did the Town take to
23 investigate the allegations?

24 MR. GORMAN: Objection. Legislative
25 privilege. Attorney-client privilege.

1 G. PIAQUADIO

2 I direct you not to answer.

3 THE WITNESS: No comment.

4 BY MR. DAVIS:

5 Q So you have no testimony on the
6 steps the Town took to investigate the
7 allegations that is not covered by the
8 legislative, attorney-client, or First
9 Amendment privilege. Is that correct?

10 A Yes.

11 Q Did the Town do anything to
12 investigate the claim that Newburgh has
13 never elected an African American or
14 Hispanic candidate to Town office?

15 MR. GORMAN: Same objection.

16 Attorney client-privilege, legislative
17 privilege, First Amendment associational
18 privilege.

19 THE WITNESS: No comment.

20 BY MR. DAVIS:

21 Q So you have no testimony
22 regarding any investigation the Town of
23 Newburgh conducted into whether it had
24 elected an African American or Hispanic
25 candidate that's not covered by any of the

Page 75

1 G. PIAQUADIO
2 privileges your attorney just referenced?

3 A Yes.

4 Q Did the Town investigate the
5 claim that there was racially polarized
6 voting in the Town of Newburgh?

7 MR. GORMAN: Same direction. Caution
8 the witness not to answer unless there's
9 public information available that would
10 not be subject to privileges previously
11 just noted.

12 THE WITNESS: No comment.

13 BY MR. DAVIS:

14 Q So you have no non-privileged
15 testimony regarding whether there's
16 racially polarized voting -- strike that.
17 You have no testimony regarding any steps
18 the Town took to investigate the claim of
19 racially polarized voting that's not
20 covered by one of the privileges your
21 attorney just referenced?

22 A Yes.

23 Q Okay. Can we go back to exhibit
24 4? That was the special meeting agenda.

25 A Got it.

Page 76

1 G. PIAQUADIO

2 Q You see the document marked
3 Exhibit 4 on your screen?

4 A Yes.

5 Q Can you scroll to page 2, or it
6 says at the top, "Resolution of the town
7 board of the Town of Newburgh"?

8 A Yes.

9 Q What is this document?

10 A This is a resolution pertaining
11 to the New York State election law.

12 Q Was there a vote held on this
13 resolution?

14 A Yes.

15 Q Did the resolution pass?

16 A Yes.

17 Q Why did the Town pass this
18 resolution?

19 MR. GORMAN: Let me caution the
20 witness to the extent the answer to the
21 question would reveal information is not
22 public, I direct you not to answer based
23 on the legislative privilege.

24 THE WITNESS: No comment.

25 //

Page 77

1 G. PIAQUADIO

2 BY MR. DAVIS:

3 Q So you have no testimony as to
4 why the Town passed this resolution that's
5 not covered by the First Amendment or
6 legislative privilege. Is that correct?

7 A Yes.

8 Q Okay. Let's go to, I believe,
9 the 5th whereas clause at the bottom of
10 that page and at the top of the next page.
11 And then in the first paragraph on the 3rd
12 page, it says in the third line:

13 "Including, without limitation, any
14 analysis that Abram Fensterman may provide
15 following the adoption of this resolution,
16 the town board concludes that there may be
17 a violation of the NYVRA. The town board
18 affirms that the Town intends to enact and
19 implement the appropriate remedy or
20 remedies." Did I read that correctly?

21 A Yes.

22 Q What did you mean -- or strike
23 that. What did the Town mean by it
24 "Concludes that there may be a violation
25 of the NYVRA"?

Page 78

1 G. PIAQUADIO

2 MR. GORMAN: I caution the witness to
3 answer only to the extent that the
4 information will be public and not subject
5 to the legislative privilege.

6 THE WITNESS: No comment.

7 BY MR. DAVIS:

8 Q So you have no testimony on this
9 question that's not covered by one of the
10 privileges your attorney just referenced?

11 MR. GORMAN: Objection. Just to be
12 clear, each time you make that statement,
13 you mean non-public; correct?

14 MR. DAVIS: Correct.

15 MR. GORMAN: Okay. As long as we're
16 in agreement on that, then you can answer.

17 MR. DAVIS: And I'm assuming if he
18 had public information, you are directing
19 him to testify on that. Is that correct?

20 MR. GORMAN: Yes.

21 MR. DAVIS: Okay. Thank you.

22 BY MR. DAVIS:

23 Q Okay. And then in that last
24 line, it says, "Town board affirms that
25 the Town intends to enact and implement

Page 79

1 G. PIAQUADIO

2 the appropriate remedy or remedies." Did

3 I read that correctly?

4 A Yes.

5 Q What did the Town mean by that?

6 MR. GORMAN: I caution the witness

7 only to answer the extent that he has

8 public information.

9 THE WITNESS: No comment.

10 BY MR. DAVIS:

11 Q And so you have no testimony on

12 this topic that's not covered by one of

13 the applicable privileges or one of the

14 relevant privileges that your attorney

15 just referenced. Is that correct?

16 A Yes.

17 Q You said this resolution was

18 adopted. Is that correct?

19 A Yes.

20 Q What actions did the board take

21 after adopting this resolution?

22 MR. GORMAN: I caution the witness

23 only to answer to the extent that the

24 steps taken or the response is public.

25 THE WITNESS: No response.

1 G. PIAQUADIO

2 BY MR. DAVIS:

3 Q Did the board retain Sokoloff
4 Stern LLP?

5 A Yes.

6 Q Did the board retain an expert
7 to assess Plaintiffs' allegations?

8 A No.

9 Q Did the board hold any further
10 town meetings or public meetings to
11 discuss Plaintiffs' allegations?

12 A No.

13 Q Did the board ever present to
14 the public possible options to remedy the
15 alleged NYVRA violations?

16 A No.

17 Q Did the board subsequently
18 retain Troutman Pepper?

19 A Yes.

20 Q When did the board retain
21 Troutman Pepper?

22 A I don't recall.

23 Q Can you give me a rough
24 estimate?

25 A Around June of 2024.

Page 81

1 G. PIAQUADIO

2 Q Did the Town reach out to
3 Troutman?

4 A Yes.

5 Q Why did the Town reach out to
6 Troutman?

7 MR. GORMAN: Objection.

8 I'll caution the witness to answer
9 only to the extent that it doesn't reveal
10 confidential communications, attorney-
11 client privilege or subject to the
12 legislative privilege.

13 THE WITNESS: No comment.

14 BY MR. DAVIS:

15 Q Is the Town planning to pay
16 Troutman for its services in defending
17 this lawsuit?

18 MR. GORMAN: Same objection.

19 A No comment.

20 Q Has Troutman submitted any
21 invoices to the Town?

22 A Yes.

23 MR. GORMAN: Same objection.

24 You can answer.

25 THE WITNESS: Yes.

Page 82

1 G. PIAQUADIO

2 BY MR. DAVIS:

3 Q Did the Town pay those invoices?

4 MR. GORMAN: I direct the witness not
5 to answer based on legislative privilege
6 and attorney-client privilege.

7 THE WITNESS: No comment.

8 BY MR. DAVIS:

9 Q Is there a line item in the town
10 budget for Troutman's work on this case?

11 MR. GORMAN: I direct you not to
12 answer except to the extent that it's
13 public.

14 THE WITNESS: No comment.

15 BY MR. DAVIS:

16 Q Is there a publicly accessible
17 way to see the Town's payments to
18 Troutman?

19 MR. GORMAN: Same direction. I
20 direct the witness not to answer to the
21 extent that it's subject to legislative
22 privilege.

23 THE WITNESS: No comment.

24 BY MR. DAVIS:

25 Q Has the Town received money from

Page 83

1 G. PIAQUADIO

2 any outside entity to pay for Troutman's
3 services in defending against this
4 lawsuit?

5 MR. GORMAN: Objection. Lacks
6 foundation.

7 I direct the witness not to answer,
8 legislative privilege.

9 THE WITNESS: No comment.

10 BY MR. DAVIS:

11 Q Are the Town's finances public?

12 A Yes.

13 Q If the Town makes an
14 expenditure, does it have to report that
15 expenditure to the public?

16 A There's a budget made in
17 January -- by January for that year, and
18 all items are in that budget.

19 Q Is there a line item in the
20 budget for Troutman's work on this case?

21 MR. GORMAN: Objection. Lacks
22 foundation.

23 I direct the witness not to answer
24 based on legislative privilege, unless you
25 have public information responsive.

Page 84

1 G. PIAQUADIO

2 THE WITNESS: No comment.

3 BY MR. DAVIS:

4 Q If the Town receives money from
5 an outside group to pay its litigation
6 expenses, would that appear in the town
7 budget?

8 MR. GORMAN: Same objection.

9 I direct the witness not to answer,
10 legislative privilege.

11 THE WITNESS: No comment.

12 BY MR. DAVIS:

13 Q Is the Town authorized to spend
14 money on something that doesn't appear in
15 the town budget?

16 MR. GORMAN: I direct the witness not
17 to answer, legislative privilege.

18 THE WITNESS: No comment.

19 BY MR. DAVIS:

20 Q Okay. I'm going to introduce
21 another exhibit. It should be uploaded.

22 (Exhibit 6 was marked for
23 identification.)

24 A Yup.

25 Q Do you see the document marked

1 G. PIAQUADIO

2 Exhibit 6 on your screen?

3 A Yes.

4 Q Okay. Reading from that
5 document, it states, quote, "Please take
6 notice pursuant to New York Civil Practice
7 Law and Rules 1012(b), that Defendants
8 Town of Newburgh and Town Board of the
9 Town of Newburgh's," parenthesis,
10 "Defendants' verified answer and
11 affirmative defenses," parenthesis,
12 "NYSCEF number 34," parenthesis, "Answer,
13 challenges the constitutionality of the
14 New York Voting Rights Act." Did I read
15 that correctly?

16 A Am I in the right place here?

17 MR. GORMAN: Yeah. I think you just
18 skipped a little bit of the document,
19 so --

20 THE WITNESS: Oh, is that what it is,
21 further down?

22 MR. GORMAN: Yeah.

23 BY MR. DAVIS:

24 Q Oh, I apologize. It's from the
25 first paragraph of text. Do you see where

Page 86

1 G. PIAQUADIO

2 it says in the document that "Defendants
3 are challenging the constitutionality of
4 the New York Voting Rights Act"?

5 MR. GORMAN: Yeah, it's just because
6 you're not reading the full text. Scroll
7 up. When it says Defendants, you're not
8 saying -- keep going -- pursuant to New
9 York's Civil Practice Law --

10 THE WITNESS: Okay.

11 MR. GORMAN: Right there.

12 THE WITNESS: Okay. I got it.

13 MR. GORMAN: Go ahead.

14 BY MR. DAVIS:

15 Q So then in the fourth line, it
16 says, "Challenges the constitutionality of
17 the New York Voting Rights Act." Is that
18 correct?

19 A Yes.

20 Q What do you understand that to
21 mean?

22 MR. GORMAN: I direct the witness not
23 to answer to the extent it reveals
24 information that is not public based on
25 legislative privilege and attorney-client

1 G. PIAQUADIO

2 privilege.

3 THE WITNESS: No comment.

4 BY MR. DAVIS:

5 Q What is your understanding of
6 why the NYVRA is unconstitutional?

7 MR. GORMAN: Same direction.

8 Legislative privilege, First Amendment
9 associational privilege.

10 THE WITNESS: No comment.

11 BY MR. DAVIS:

12 Q Do you know what the
13 consequences are for the Town if the
14 laws -- strike that. Do you know what the
15 consequences are for the Town in this
16 lawsuit if the NYVRA is found
17 unconstitutional?

18 MR. GORMAN: Same objection. Same
19 direction.

20 THE WITNESS: No comment.

21 BY MR. DAVIS:

22 Q Did the Town enter into a
23 contract with Troutman Pepper for its
24 services in this lawsuit?

25 MR. GORMAN: I direct the witness not

Page 88

1 G. PIAQUADIO

2 to answer, legislative privilege.

3 THE WITNESS: No comment.

4 BY MR. DAVIS:

5 Q Are contracts the Town enters
6 into publicly available?

7 A Yes.

8 Q Okay. Have you reviewed any of
9 the expert reports disclosed in this case?

10 A Not that I recall.

11 Q Okay. I'm going to introduce
12 another exhibit. Okay. Can you let me
13 know when you see the document marked
14 Exhibit 7? It should be uploaded.

15 (Exhibit 7 was marked for
16 identification.)

17 A Go ahead.

18 Q Have you seen this document
19 before?

20 A Not that I recall.

21 Q Okay. I'll represent to you
22 that this is the expert report of Dr. A.K.
23 Sandoval-Strausz, who is an expert
24 retained by the plaintiffs in this matter.
25 Could you please turn to page 32 of the

Page 89

1 G. PIAQUADIO

2 report?

3 A Okay.

4 Q I apologize. Could you actually
5 scroll down to page 33, and the header is,
6 G, "The extent to which members of the
7 protected class." Could you let me know
8 when you get there?

9 MR. GORMAN: I'm just going to put on
10 the record a standing objection. The
11 witness testified that he has never seen
12 this document before. And he is now just
13 looking at a single page, but he could
14 testify to that extent.

15 THE WITNESS: No comment.

16 BY MR. DAVIS:

17 Q All right. I'm just asking if
18 you are on page 33 and see the header I
19 was referring to.

20 MR. GORMAN: I think the pending
21 question is are you on the right page.

22 THE WITNESS: On page 33?

23 MR. GORMAN: Yes.

24 You want to ask again? Maybe

25 it'll --

Page 90

1 G. PIAQUADIO

2 MR. DAVIS: Yeah. Sure.

3 BY MR. DAVIS:

4 Q Do you see the header? I'll
5 read it out. "G: The extent to which
6 members of the protected class are
7 disadvantaged in areas including but not
8 limited to education, employment, health,
9 criminal justice, housing, land use, or
10 environmental protection." Do you see
11 that header?

12 A Yes.

13 Q And do you see right below the
14 header it says, quote: "The Town of
15 Newburgh consists of seven tracks defined
16 by the United States Census Bureau. The
17 data in this section," parenthesis, "From
18 the most recently tabulated surveys in
19 2022 were accessed through Social
20 Explorer, the widely used geodata site
21 that maps census data." Did I read that
22 correctly?

23 A Yes.

24 Q Okay. Can you scroll down to
25 page 34?

1 G. PIAQUADIO

2 A Okay.

3 Q At the beginning of the second
4 paragraph, it says, quote, "Across the
5 Town of Newburgh, there are large ethno-
6 racial gaps in income and housing and
7 smaller ones in education and employment."
8 Did I read that correctly?

9 A Yes.

10 Q Do you agree with that
11 statement?

12 MR. GORMAN: I'm going to direct the
13 witness not to answer the question based
14 on legislative privilege and First
15 Amendment associational privilege.

16 THE WITNESS: No comment.

17 BY MR. DAVIS:

18 Q So you have no testimony
19 regarding the existence of ethno-racial
20 gaps in income and housing and education
21 and employment in the Town of Newburgh
22 that's not covered by the privileges that
23 your attorney just referenced?

24 A Yes.

25 Q Okay. Then in the third

Page 92

1 G. PIAQUADIO

2 paragraph on page 34, it says, quote, "At
3 the basic level of annual per capita
4 income, the average among Newburgh's non-
5 Hispanic Whites is 50,839, with Black
6 people earning on average more than one-
7 third less at 33,870 per capita, and
8 Hispanics earning just under one-third
9 less at 35,022 individually." Did I read
10 that correctly?

11 A Yes.

12 Q Do you have any basis to dispute
13 these figures?

14 MR. GORMAN: Caution the witness not
15 to answer unless there's public
16 information available that would not be
17 subject to the legislative privilege or
18 the First Amendment associational
19 privilege.

20 THE WITNESS: No comment.

21 BY MR. DAVIS:

22 Q So you're not aware of any
23 public information that would dispute
24 these figures. Is that correct?

25 MR. GORMAN: Same objection. Same

1 G. PIAQUADIO

2 direction.

3 THE WITNESS: No comment.

4 BY MR. DAVIS:

5 Q I'm only asking about public
6 information. I'm asking if you have any
7 public information that would refute these
8 figures.

9 A I -- I have no information.

10 Q Okay. Is the Town aware that
11 there are disparities in the unemployment
12 rate -- excuse me. Strike that. Is the
13 Town aware of disparities in income
14 between Hispanic and White residents of
15 the Town of Newburgh?

16 MR. GORMAN: To the extent they
17 answer the question's not public, do not
18 reveal the information based on the
19 legislative and First Amendment
20 associational privilege.

21 THE WITNESS: No comment.

22 BY MR. DAVIS:

23 Q Has the Town taken any steps to
24 address these disparities?

25 MR. GORMAN: Same direction. Caution

Page 94

1 G. PIAQUADIO

2 the witness not to answer unless there's
3 public information that's available that
4 wouldn't be subject to legislative
5 privilege.

6 THE WITNESS: No comment.

7 BY MR. DAVIS:

8 Q Do you have any public
9 information regarding steps that the Town
10 has taken to address these disparities?

11 MR. GORMAN: Same direction. To the
12 extent the answer to the question is not
13 public, don't reveal the information based
14 on the privileges just stated.

15 THE WITNESS: No comment.

16 BY MR. DAVIS:

17 Q I'm just asking about public
18 information. Do you have any public
19 information regarding steps that the Town
20 has taken to address these disparities?

21 A No.

22 Q Okay. And then moving to the
23 third to last line in that last paragraph
24 on page 34, quote, "The unemployment rate
25 among the Town's Latinos, 5.9 percent, was

Page 95

1 G. PIAQUADIO
2 almost twice as high as for non-Hispanic
3 Whites, 3.1 percent, and for the Town's
4 Black people, their rate was almost 75
5 percent higher at 5.4 percent." Did I
6 read that correctly?

7 A Yes.

8 Q Do you have any basis dispute
9 these figures?

10 MR. GORMAN: Caution the witness to
11 the extent the answer to the question is
12 not public, don't reveal that information
13 based on legislative privilege.

14 THE WITNESS: No comment.

15 BY MR. DAVIS:

16 Q Are you aware of any public
17 information that is available that would
18 refute these figures?

19 A No.

20 Q Is the Town previously aware of
21 disparities in the unemployment rate
22 between Hispanic and Black people and
23 White residents of Newburgh?

24 MR. GORMAN: Caution the witness to
25 the extent the answer to the question is

1 G. PIAQUADIO
2 not public, don't reveal that information.
3 THE WITNESS: No comment.
4 BY MR. DAVIS:
5 Q Has the Town taken any steps to
6 address disparities in employment between
7 Black and Hispanic and White residents of
8 the Town of Newburgh?
9 MR. GORMAN: Same objection and
10 direction. Legislative privilege, First
11 Amendment associational privilege.
12 THE WITNESS: No comment.
13 BY MR. DAVIS:
14 Q Do you have any public
15 information regarding steps the Town has
16 taken to address these disparities?
17 A No.
18 Q Okay. Can you turn to page 35,
19 and then I'm looking in the middle of the
20 second paragraph. And it states, quote:
21 "Across the Town of Newburgh, there are
22 unequal rates of homeownership versus
23 renting. By race, non-Hispanic Whites are
24 less likely to rent their homes. Across
25 the entire town, only 14.7 percent of them

Page 97

1 G. PIAQUADIO
2 are renters, as compared with 25.7 percent
3 of Latinos and 24.9 percent of Blacks."
4 Did I read that correctly?

5 A Yes.

6 Q Do you have any basis to dispute
7 these figures?

8 MR. GORMAN: Caution the witness to
9 the extent the answer to the question is
10 not public, don't reveal that information
11 based on the legislative privilege and
12 First Amendment associational privilege.

13 THE WITNESS: No comment.

14 BY MR. DAVIS:

15 Q Is there any public information
16 that would refute these figures?

17 MR. GORMAN: Objection. Lacks
18 foundation. Same objections as before.
19 Are you asking him to testify as an expert
20 or his personal knowledge?

21 MR. DAVIS: Asking him to testify as
22 the representative of the Town. Let me
23 rephrase.

24 BY MR. DAVIS:

25 Q Is the Town aware of any public

1 G. PIAQUADIO
2 figures or data that would dispute the
3 figures reported in that paragraph?

4 MR. GORMAN: Same objection to the
5 extent that the answer to the question is
6 not public.

7 A No comment.

8 Q I am only asking for public
9 information. Do you have any public
10 information --

11 MR. GORMAN: Can you read back the
12 question? I don't think that question
13 said public in it.

14 MR. DAVIS: I'm happy to just ask the
15 question again if that's okay.

16 MR. GORMAN: Even better. Thank you.

17 MR. DAVIS: Yeah. No problem.

18 BY MR. DAVIS:

19 Q Do you have any public
20 information to dispute the figures
21 reported in this paragraph regarding
22 disparate rates of homeownership in the
23 Town of Newburgh?

24 A No.

25 Q I'm sorry. I couldn't hear you.

1 G. PIAQUADIO

2 A There was no.

3 Q Thank you. Was the Town aware
4 of these disparities in homeownership
5 rates between Hispanic and Black and White
6 residents at the Town of Newburgh?

7 MR. GORMAN: Objection. Lacks
8 foundation. Timeframe.

9 And directing the witness not to
10 answer unless there's public information
11 available that wouldn't be subject to the
12 legislative privilege.

13 THE WITNESS: No comment.

14 BY MR. DAVIS:

15 Q Has the Town taken any steps to
16 address disparities in homeownership rates
17 within the Town of Newburgh?

18 MR. GORMAN: Direct the witness to
19 answer only to the extent that there's
20 public information that wouldn't be
21 subject to the legislative privilege.

22 THE WITNESS: No comment.

23 BY MR. DAVIS:

24 Q Is there any public information
25 regarding steps the Town has taken to

Page 100

1 G. PIAQUADIO

2 address these disparities that you are
3 aware of?

4 A No.

5 Q Okay. And turning now to the
6 bottom of page 35 and to the top of page
7 36. It says, quote: "The discrepancies
8 are most notable among men. Non-Hispanic
9 Whites have the lowest high school non-
10 completion rate, 2.1 percent, as compared
11 with Black youngsters, 3.4 percent, and
12 especially Hispanic ones whose rate is
13 more than five times higher, 10.6
14 percent." Did I read that correctly?

15 A Yes.

16 Q Do you have any basis to dispute
17 these figures?

18 MR. GORMAN: I direct the witness not
19 to answer to the extent the answer to the
20 question is not public. Don't reveal
21 information based on both legislative
22 privilege and First Amendment
23 associational privilege.

24 THE WITNESS: No comment.

25 //

1 G. PIAQUADIO

2 BY MR. DAVIS:

3 Q Are you aware of any public
4 information that would dispute these
5 figures?

6 A No.

7 Q Okay. And then moving down, it
8 says, "Similarly, the rate of college
9 completion among White Anglos, 15.8
10 percent, is higher than for Hispanic men,
11 13.5 percent, or Black men, 10.7 percent."
12 Did I read that correctly?

13 A Yes.

14 Q Do you have any basis to dispute
15 these figures?

16 MR. GORMAN: Caution the witness and
17 direct the witness to limit your response
18 to what is publicly available. Otherwise,
19 the information is subject to the
20 legislative privilege.

21 THE WITNESS: No response.

22 BY MR. DAVIS:

23 Q Are you aware of any public
24 information that would refute these
25 figures?

1 G. PIAQUADIO

2 A No.

3 Q Prior to this deposition, were
4 you aware of the disparities in
5 educational attainment between Hispanic
6 and Black and White residents of the Town
7 of Newburgh?

8 MR. GORMAN: I caution the witness if
9 the answer to that question reveals non-
10 public information, don't provide it,
11 because it's protected by the legislative
12 privilege.

13 THE WITNESS: No response.

14 BY MR. DAVIS:

15 Q Has the Town taken any steps to
16 address these educational disparities?

17 MR. GORMAN: Same direction. Caution
18 the witness that if the answer to the
19 question reveals non-public information,
20 don't provide it. It's protected by the
21 legislative privilege and the first
22 amendment associational privilege.

23 THE WITNESS: No response.

24 BY MR. DAVIS:

25 Q Are you aware of any public

1 G. PIAQUADIO

2 information regarding steps the Town has
3 taken to address these disparities?

4 A No.

5 Q Okay. And then scrolling down
6 to page 37, and the last paragraph
7 beginning with, "In the area of
8 environmental protection."

9 A Okay.

10 Q I'm going to give you a moment
11 to read this paragraph. It's the bottom
12 of this page and the first two lines of
13 the next page. Can you read that and then
14 let me know when you're done.

15 A Okay. I read it.

16 Q Thank you. The paragraph you
17 just read is about a project at the
18 Danskammer Plant. Is that correct?

19 A Yes.

20 Q What is your understanding of
21 the controversy surrounding the Danskammer
22 project?

23 MR. GORMAN: I direct the witness to
24 the extent the answer to the question
25 involves non-public information, you

Page 104

1 G. PIAQUADIO
2 should not provide that information. It's
3 protected by the First Amendment
4 associational privilege and legislative
5 privilege. You could answer to the extent
6 you have public information.

7 THE WITNESS: Well, I do want to
8 answer on behalf of the public information
9 as I did have a press release. The power
10 plants currently in the Town were built in
11 the '50s or '60s, highly inefficient power
12 plants. My statement was, and I still
13 stand by it, if a new plant came to town,
14 I would say no.

15 But this was a chance to increase and
16 make the existing plant, Danskammer, more
17 efficient and put out less fluorocarbons.
18 So that was my position. And it was not a
19 town board position, but just mine. It
20 was never a resolution, just mind. And
21 making an old plant more efficient, that
22 was my statement, and that's where I
23 stand. Thank you.

24 BY MR. DAVIS:

25 Q Thank you for clarifying. Did

1 G. PIAQUADIO

2 the Town consider the impact of
3 redeveloping the plant on Black and
4 Hispanic residents in Newburgh?

5 MR. GORMAN: Same objection. Caution
6 the witness to the extent that the
7 question involved non-public information
8 in your answer, you should not provide
9 that information.

10 THE WITNESS: No comment.

11 BY MR. DAVIS:

12 Q Did the Town discuss the project
13 with any Black or Hispanic residents of
14 the Town of Newburgh?

15 MR. GORMAN: Same direction not to
16 answer based on the First Amendment
17 associational privilege, legislative
18 privilege. But if you have public
19 information, you could share.

20 THE WITNESS: No comment.

21 BY MR. DAVIS:

22 Q Are you aware of any public
23 information regarding efforts the Town
24 made to engage Black or Hispanic residents
25 on this project?

1 G. PIAQUADIO

2 A No.

3 MR. DAVIS: Okay. That's been
4 another hour about. Do you want to take
5 just a five-minute break?

6 MR. GORMAN: Sure.

7 THE REPORTER: Off the record, 11:02.
8 (Off the record.)

9 THE REPORTER: We are back on the
10 record, 11:12.

11 BY MR. DAVIS:

12 Q Okay. Do you understand you're
13 still under oath?

14 A Yes, I do.

15 Q Okay. I'd like you to pull up
16 the Town's responses to Plaintiffs'
17 interrogatories. I believe that was
18 marked Exhibit 3. Can you just let me
19 know when you have that up on your screen?

20 MR. GORMAN: Okay. We got it.

21 BY MR. DAVIS:

22 Q Thank you. And there aren't
23 page numbers, but if you could scroll down
24 to what is the 6th page of the PDF,
25 interrogatory number 7. It's at the

Page 107

1 G. PIAQUADIO

2 bottom of the page. Could you just let me
3 know when you're there?

4 A Yup. I got it.

5 Q Thank you. And it reads, quote,
6 "Please identify any efforts made or
7 measures adopted by the town board from
8 2010 to present to address national
9 origin, racial, and/or ethnic disparities
10 in income, educational attainment,
11 employment opportunities, health, criminal
12 justice, housing, land use, and
13 environmental impacts between
14 Hispanic/Black residents and White
15 residents." Did I read that correctly?

16 A Yes.

17 Q Okay. And then there are some
18 objections. And then scrolling down to
19 the next page, you reference the April
20 2009 tri-county affordable housing study.
21 Is that correct?

22 A Yes.

23 Q And how is that housing study
24 related to disparities between Black and
25 Hispanic and White residents of the Town

1 G. PIAQUADIO

2 of Newburgh?

3 MR. GORMAN: I caution the witness to
4 answer only to the extent that the answer
5 is going to be in the public record.
6 Don't reveal information based on
7 legislative privilege.

8 THE WITNESS: No response.

9 BY MR. DAVIS:

10 Q So you have no testimony on the
11 relation between this affordable housing
12 study and disparities in the Town of
13 Newburgh that is not covered by those
14 privileges. Is that correct?

15 A Yes.

16 Q Okay. And then scrolling down a
17 little bit, the seventh line from the
18 bottom of the paragraph, it says, quote,
19 "The Town has also proactively sought the
20 participation of minority and women-owned
21 business contractors in connection with
22 certain town construction projects." Did
23 I read that correctly?

24 A I can't find where you are. Are
25 you on page --

1 G. PIAQUADIO

2 Q I apologize. It's on the same
3 page. If you see where it says the tri-
4 county affordable housing study, if you go
5 down four lines. And then in the middle.
6 It starts with -- and I'll read it again
7 just so we have the same thing in front of
8 us. It says, quote, "The Town has also
9 proactively sought the participation of
10 minority and women-owned business
11 contractors in connection with certain
12 town construction projects." Is that
13 correct?

14 A Yes.

15 Q What has the Town done to
16 proactively seek the participation of
17 minority and women-owned business
18 contractors?

19 MR. GORMAN: I caution the witness to
20 the extent the answer to the question is
21 not public, don't reveal that information
22 based on both the legislative privilege
23 and the First Amendment associational
24 privilege.

25 THE WITNESS: No response.

Page 110

1 G. PIAQUADIO

2 BY MR. DAVIS:

3 Q Are you aware of any public
4 information regarding efforts the Town has
5 made to proactively seek the participation
6 of minority and women-owned business
7 contractors?

8 A No.

9 Q Okay. And then it says, "In
10 connection with certain town construction
11 projects." Did I read that right?

12 A Yes.

13 Q What did you mean by certain
14 town construction projects?

15 MR. GORMAN: Caution the witness not
16 to answer to the extent the answer to the
17 question is not public. Same direction.

18 THE WITNESS: No response.

19 BY MR. DAVIS:

20 Q Can you identify any town
21 construction projects where the Town
22 proactively sought the participation of
23 minority-owned business contractors?

24 MR. GORMAN: Same direction. Caution
25 the witness to answer only to the extent

Page 111

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G. PIAQUADIO

the answer to the question is public.

THE WITNESS: No response.

BY MR. DAVIS:

Q Are you aware of any public information regarding which town construction projects the Town proactively sought the participation of minority-owned business contractors on?

MR. GORMAN: Same direction. The questions have modified a little bit as the follow up as we've seen. And so it's not just not public, but it's also that it would not be subject to the legislative and First Amendment associational privilege.

As long as we have that same assumption, then you can answer.

MR. DAVIS: Understood.

BY MR. DAVIS:

Q I'm just asking about public information that you believe is not covered by the privilege.

A No response and no information.

Q Okay. And then it states, going

Page 112

1 G. PIAQUADIO
2 back to the paragraph, quote, "The Town
3 provides essential water and sewer
4 services primarily to higher density
5 population areas in which minority
6 populations reside." Did I read that
7 correctly?

8 A Yes.

9 Q What did you mean by that?

10 MR. GORMAN: I caution you not to
11 answer to the extent that the answer to
12 the question is not public. Don't reveal
13 that information based on both privileges.

14 THE WITNESS: No response.

15 BY MR. DAVIS:

16 Q Where are the higher density
17 population areas in which minority
18 populations reside in the Town of
19 Newburgh?

20 MR. GORMAN: Direct the witness not
21 to answer to the extent that it's subject
22 to the legislative privilege.

23 THE WITNESS: No response.

24 BY MR. DAVIS:

25 Q Are you aware of any non-public

1 G. PIAQUADIO
2 or non-privileged information -- excuse
3 me. Strike that. Are you aware of any
4 public or non-privileged information
5 regarding which areas of the Town are
6 higher density where minority populations
7 reside?

8 A No.

9 Q Does the Town provide water and
10 sewer services to all residents?

11 A No.

12 Q What residents does the Town
13 provide sewer and water services to?

14 A Provide service to 11,000
15 customers.

16 Q How does the Town determine
17 which customers it provides water and
18 sewer services to?

19 MR. GORMAN: I caution the witness to
20 answer only to the extent that the answer
21 to that question is available to the
22 public. To the extent that it's subject
23 to the legislative privilege, I direct you
24 not to answer.

25 THE WITNESS: No response.

Page 114

1 G. PIAQUADIO

2 BY MR. DAVIS:

3 Q Do you know the racial breakdown
4 of the 11,000 customers who receive water
5 and sewer services from the Town?

6 MR. GORMAN: Caution the witness to
7 the extent the answer to that question is
8 not public, don't reveal that information.

9 THE WITNESS: No comment.

10 BY MR. DAVIS:

11 Q So you have no public
12 information or non-privileged information
13 regarding the racial breakdown of the
14 customers who receive water and sewer
15 services from the Town. Is that correct?

16 A Yes.

17 Q Okay. I'm going to give you a
18 moment to read the entire response to
19 interrogatory number; that starts with the
20 last paragraph on the proceeding page and
21 then runs up until the next page where it
22 gets into interrogatory number 8. Can you
23 just give me a heads up when you finished
24 reading those paragraphs?

25 A Okay.

Page 115

1 G. PIAQUADIO

2 Q Thank you. Do you have anything
3 to add to that response?

4 MR. GORMAN: Caution the witness only
5 to answer to the extent that any
6 additional information you'd be adding
7 would be not subject to the legislative
8 privilege or the First Amendment
9 associational privilege.

10 THE WITNESS: No response.

11 BY MR. DAVIS:

12 Q So you have no public or non-
13 privileged information to add to the
14 response to interrogatory number 7. Is
15 that correct?

16 A Yes.

17 Q Okay. Let's scroll down to page
18 8, interrogatory number 9. You let me
19 know when you get there.

20 A Okay. I'm there.

21 Q It says, quote, "Please identify
22 every source by which Newburgh
23 communicates information to residents,
24 i.e. newspaper, newsletter, mailings,
25 telephone, website, social media sites, et

Page 116

1 G. PIAQUADIO
2 cetera, and state the language in which
3 those communications are made." Did I
4 read that correctly?

5 A Yes.

6 Q And then after noting some
7 objections, at the bottom of the
8 paragraph, it says, quote, "These
9 communications are in English." Is that
10 correct?

11 A Yes.

12 Q Does the Town provide any
13 information to its residents in Spanish?

14 MR. GORMAN: Objection to form.
15 You can answer.

16 THE WITNESS: No comment.

17 BY MR. DAVIS:

18 Q Are you aware of whether the
19 Town provides any information to its
20 residents in any language other than
21 English?

22 A Yes.

23 Q And does the Town provide
24 information to its residents in any
25 language other than English?

Page 117

1 G. PIAQUADIO

2 A Yes.

3 Q What information does it provide
4 in a language other than English?

5 A Spanish.

6 Q What information is provided in
7 Spanish?

8 A We had a mosquito infestation
9 that's being put out in Spanish as well as
10 English for the equine virus.

11 Q Anything else?

12 A Not that I can remember.

13 Q Why is the Town publishing that
14 information in Spanish?

15 MR. GORMAN: Objection.

16 I'd caution the witness not to answer
17 to the extent that the information and
18 that answer would be not available to the
19 public subject to the legislative
20 privilege.

21 THE WITNESS: No comment.

22 BY MR. DAVIS:

23 Q So you have no public or non-
24 privileged testimony regarding why the
25 Town has chosen to publish information in

1 G. PIAQUADIO

2 Spanish regarding the mosquito
3 infestation. Is that correct?

4 A Yes.

5 Q Why doesn't the Town provide
6 communications in languages other than
7 English?

8 MR. GORMAN: Caution the witness to
9 the extent the answer to that question is
10 not public, don't reveal that information
11 based on both the legislative privilege
12 and associational privilege.

13 THE WITNESS: No comment.

14 BY MR. DAVIS:

15 Q So you have no public
16 information or non-privileged information
17 regarding the Town's decision to not
18 provide communications in languages other
19 than English. Is that correct?

20 A Yes.

21 Q Do you know whether there are
22 residents of the Town who do not speak
23 English?

24 A Yes.

25 Q Okay. Has the Town ever

Page 119

1 G. PIAQUADIO
2 considered creating materials to reach
3 those residents who do not speak English?

4 MR. GORMAN: I caution the witness to
5 the extent the answer to that question is
6 not public, don't reveal the information,
7 legislative privilege, First Amendment
8 associational privilege.

9 THE WITNESS: No comment.

10 BY MR. DAVIS:

11 Q So you have no public
12 information or non-privileged testimony
13 regarding whether the Town has considered
14 creating Spanish language materials or any
15 other language materials. Is that
16 correct?

17 A Yes.

18 Q Okay. I'd like to go back to
19 the notice of deposition, which I believe
20 was marked as Exhibit 1. Let know when
21 you have that up on your screen.

22 MR. GORMAN: Yeah. Yup. I'm pulling
23 mine up, and then I'll pull yours up for
24 you. I'm a computer whiz.

25 THE WITNESS: I see that. You're an

Page 120

1 G. PIAQUADIO

2 I.T. guy.

3 MR. DAVIS: As long as that's on the
4 record, we're good. I won't even strike
5 that. I'll let it lie.

6 BY MR. DAVIS:

7 Q Okay. Do you have the document
8 marked Exhibit 1 up on the screen?

9 A Yes.

10 Q Okay. And I just want to go
11 back to something we covered at the very
12 beginning. And I apologize. This was my
13 fault for where I marked the exhibit, but
14 I think as you can see, the exhibit stamp
15 actually covers part of the language in
16 topic 1. Do you see that?

17 A I'm lost here. Hang on a
18 second.

19 Q Just on that first page.

20 A Yup. Okay. Oh, number 1?
21 Yeah.

22 Q Okay. So I'm going to read
23 what's actually in topic 1 that is
24 obscured. So it says, quote, "The history
25 of discrimination in or affecting African

Page 121

1 G. PIAQUADIO
2 Americans and/or Hispanics in the Town of
3 Newburgh." And I think I'll ask the same
4 question I did at the beginning. Are you
5 prepared to testify on that topic as I've
6 read it?

7 MR. GORMAN: Subject to my objections
8 on those topics, you can answer. The
9 question was, were you prepared to talk
10 about it subject to privileges?

11 THE WITNESS: No.

12 BY MR. DAVIS:

13 Q Okay. And did you do anything
14 to prepare to testify on that topic?

15 A No.

16 Q Okay. Let's scroll down to
17 topic 3. It's on the second page. And it
18 says, quote, "The Town of Newburgh's
19 efforts to increase the political
20 participation of African Americans and/or
21 Hispanics." Did I read that correctly?

22 A Yes.

23 Q What steps has the Town taken to
24 increase -- strike that. Has the Town
25 taken any steps to increase the political

Page 122

1 G. PIAQUADIO

2 participation of Hispanics and/or African
3 Americans?

4 MR. GORMAN: I caution the witness to
5 the extent the answer to the questions not
6 public, don't reveal that information
7 based on both the legislative privilege
8 and association privilege.

9 THE WITNESS: No comment.

10 BY MR. DAVIS:

11 Q So you have no public or non-
12 privileged information regarding steps the
13 Town has taken to increase the political
14 participation of African Americans or
15 Hispanics. Is that correct?

16 A Yes.

17 Q Okay. And then topic 5 on the
18 same page. It says, quote, "The Town of
19 Newburgh's efforts to address disparities
20 between non-Hispanic Whites and African
21 Americans and/or Hispanics in criminal
22 justice outcomes." Did I read that
23 correctly?

24 A Yes.

25 Q Has the Town taken any steps to

Page 123

1 G. PIAQUADIO
2 address the disparities between non-
3 Hispanic Whites and Hispanics and African
4 Americans in criminal justice outcomes?

5 MR. GORMAN: Caution the witness to
6 the extent the answer to the question is
7 not public, to not provide that,
8 legislative privilege, First Amendment
9 associational privilege.

10 THE WITNESS: No comment.

11 BY MR. DAVIS:

12 Q So just to confirm, you have no
13 public or non-privileged information
14 regarding steps the Town has taken to
15 address criminal justice disparities. Is
16 that correct?

17 A Yes.

18 Q Okay. And then topic 6 says,
19 quote, "The Town of Newburgh's efforts to
20 address disparities between non-Hispanic
21 Whites and African Americans and/or
22 Hispanics in housing and land use." Did I
23 read that correctly?

24 A Yes.

25 Q Has the Town taken any steps to

1 G. PIAQUADIO
2 address disparities in housing and land
3 use?

4 MR. GORMAN: Caution the witness to
5 the extent the answer to the question is
6 not public, don't reveal that information,
7 legislative privilege, associational
8 privilege.

9 THE WITNESS: No response.

10 BY MR. DAVIS:

11 Q And just to confirm, you have no
12 public or non-privileged information
13 regarding efforts the Town has made to
14 address disparities in housing and land
15 use. Is that correct?

16 A Yes. But, Counsel, didn't we go
17 over all these originally? We went over
18 all 22.

19 MR. GORMAN: He's reframing his
20 questions.

21 THE WITNESS: Okay. I'm sorry.

22 MR. GORMAN: You can proceed. It's
23 okay.

24 THE WITNESS: Go ahead.

25 MR. DAVIS: I apologize if it's

Page 125

1 G. PIAQUADIO
2 repetitive, but we're getting towards the
3 end.

4 MR. GORMAN: I'm not going to give
5 you a hard time about it.

6 MR. DAVIS: Thank you. But I think
7 we're all sounding like broken records a
8 little bit today. But, okay, we're
9 getting towards the end. Okay. If you
10 look at topic 7 --

11 MR. GORMAN: You speak for yourself,
12 Sam.

13 BY MR. DAVIS:

14 Q All right. If we look at topic
15 7, it reads, quote, "The Town of
16 Newburgh's efforts to address disparities
17 between non-Hispanic Whites and African
18 Americans and/or Hispanics in income and
19 socioeconomic status." Did I read that
20 correctly?

21 A Yes.

22 Q Has the Town taken any efforts
23 to address disparities between non-
24 Hispanic Whites and Black and Hispanic
25 residents in income and socioeconomic

1 G. PIAQUADIO

2 status?

3 MR. GORMAN: Caution the witness not
4 to answer to the extent the response is
5 not public. Don't reveal that information
6 based on legislative privilege.

7 THE WITNESS: No response.

8 BY MR. DAVIS:

9 Q And to confirm, do you have any
10 public or non-privileged information
11 regarding efforts the Town has taken to
12 address these disparities?

13 A I have none.

14 Q Topic 8 reads, quote, "The Town
15 of Newburgh's response to the use of overt
16 or subtle racial appeals in political
17 campaigns." Did I read that correctly?

18 A Yes.

19 Q Has the "Town taken any steps to
20 respond to the use of overt or subtle
21 racial appeals in political campaigns?

22 MR. GORMAN: I direct the witness not
23 to answer to the extent the answer to the
24 question is not public, legislative
25 privilege, associational privilege.

Page 127

1 G. PIAQUADIO

2 THE WITNESS: No response.

3 BY MR. DAVIS:

4 Q To confirm, you have no public
5 or non-privileged information regarding
6 efforts the Town has taken to address the
7 use of subtle or overt racial appeals in
8 political campaigns. Is that correct?

9 A Yes.

10 Q Okay. And then topic 9, quote,
11 "Town of Newburgh's responsiveness to the
12 particularized needs of African Americans
13 and/or Hispanic residents." Did I read
14 that correctly?

15 A Yes.

16 Q Has the Town taken any steps to
17 respond to the particularized needs of the
18 African American and Hispanic communities
19 in the Town of Newburgh?

20 MR. GORMAN: I direct the witness not
21 to answer to the extent the answer to the
22 question is not public. Don't reveal
23 information, legislative privilege,

24 THE WITNESS: No response.

25 //

1 G. PIAQUADIO

2 BY MR. DAVIS:

3 Q Okay. Then to confirm, you have
4 no public or non-privileged information
5 regarding what the Town has done to
6 respond to the particularized needs of
7 African American or Hispanic residents.
8 Is that correct?

9 A Yes.

10 Q Okay. You referenced earlier
11 the Town providing mosquito information in
12 Spanish. Is that correct?

13 A Yes.

14 Q When approximately did the Town
15 provide that information to the public?

16 MR. GORMAN: Yeah, you can answer.

17 THE WITNESS: About a month ago.

18 MR. DAVIS: Okay. Let's take our
19 five-minute break and then we can come
20 back and hopefully wrap up. Does that
21 sound good?

22 MR. GORMAN: Yeah. I might have a
23 handful of questions and redirect, but not
24 more than five, ten minutes.

25 MR. DAVIS: That's fair. Okay.

Page 129

1 G. PIAQUADIO

2 THE REPORTER: Off the record, 11:34.

3 (Off the record.)

4 THE REPORTER: We are back on the
5 record, 11:42.

6 BY MR. DAVIS:

7 Q Okay. I just have a couple more
8 questions. So your counsel has invoked
9 the First Amendment associational
10 privilege a number of times today. Can
11 you tell me the name of the person or
12 group you're associating with over which
13 you're claiming privilege?

14 MR. GORMAN: Objection. To the
15 extent that that question in and of itself
16 asks for him to define who he's associated
17 with. I direct him not to answer unless
18 there's anything you want to identify
19 there.

20 THE WITNESS: No response.

21 BY MR. DAVIS:

22 Q So to confirm, you will not name
23 who you're associating with over which
24 you're claiming the privilege?

25 A Yes.

Page 130

1 G. PIAQUADIO

2 Q Is the group you're associating
3 with a non-profit organization?

4 MR. GORMAN: Same objection.

5 Direct the witness not to answer.

6 THE WITNESS: No response.

7 BY MR. DAVIS:

8 Q Okay. Is there anything else we
9 did not talk about today that you intend
10 to testify about at trial?

11 MR. GORMAN: Objection.

12 THE WITNESS: No response.

13 MR. GORMAN: You can answer, I mean.

14 BY MR. DAVIS:

15 Q Is that a no?

16 MR. GORMAN: Well, the answer is,
17 you're not asking him a complete question.
18 I mean, he could answer however he wants.
19 But, candidly, your question is, is there
20 anything else you're going to testify
21 about at trial?

22 It depends on who's going to ask him
23 what questions and whether information's
24 going to be elicited. A deposition is an
25 opportunity for you to ask whatever

Page 131

1 G. PIAQUADIO

2 questions you want. You can ask him

3 whatever you want.

4 MR. DAVIS: I'm aware. Thank you.

5 Yup. I'm aware. Thank you.

6 MR. GORMAN: No problem. Feel free
7 to ask him whatever you want. We're here
8 the rest of the day.

9 MR. DAVIS: Okay.

10 MR. GORMAN: If you have other
11 questions for him.

12 THE WITNESS: Yes. Okay.

13 BY MR. DAVIS:

14 Q Do you fear retaliation
15 regarding your association with any person
16 or group if you reveal information about
17 any of the topics we discussed today?

18 MR. GORMAN: I caution the witness
19 not to answer to the extent that the
20 answer would reveal anything subject to
21 the associational privilege.

22 THE WITNESS: No response.

23 MR. DAVIS: Okay. All right. I
24 think that's all we have.

25 THE WITNESS: Excellent.

Page 132

1 G. PIAQUADIO

2 MR. GORMAN: Thanks, Sam. I just
3 have a few follow-up questions.

4 MR. DAVIS: Yeah. I'll just ask. I
5 know we said that we would stop, but if
6 you're asking redirect, we might just want
7 to take a minute to follow up after.

8 MR. GORMAN: Yeah, that's totally
9 fine. And I don't think it's actually
10 going to be controversial, so if you have
11 follow up actually, no problem at all.

12 MR. DAVIS: Appreciate it.

13 EXAMINATION

14 BY MR. GORMAN:

15 Q How long has the Town of
16 Newburgh used an at-large election system?

17 A Since 1865.

18 Q How many seats are there on the
19 Newburgh Town Board?

20 A Five: four council and one
21 supervisor.

22 Q And how long is each board
23 member's term?

24 A Councilman, four. Supervisor,
25 two.

Page 133

1 G. PIAQUADIO

2 Q Who are the current board
3 members?

4 A Anthony LoBiondo, Scott Manley,
5 Paul Ruggiero, and myself as supervisor.

6 Q When did Councilman Ruggiero's
7 term expire?

8 A Will expire December 31, 2025.

9 Q And when does Councilman
10 Manley's term expire?

11 A December 31st, 2027.

12 Q And when does Councilman
13 LoBiondo's term expire?

14 A December 31, 2027.

15 Q And when will the fourth board
16 seat be filled?

17 A November '24 -- November 2024
18 election.

19 Q And how long will the term be
20 for the board member that's elected in
21 November?

22 A It'll be to fill a -- fill a
23 vacancy. It'll be one year. Just a full
24 year of 2025.

25 MR. GORMAN: I don't have any further

Page 134

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G. PIAQUADIO

questions.

MR. DAVIS: I don't think we have
anything further.

MR. GORMAN: Okay. We can go off the
record. Thank you very much.

THE WITNESS: Thank you.

THE REPORTER: Off the record, 11:46.
(Off the record.)

THE REPORTER: And then, Counselor
Imamura, just quickly on the record, did
you need a copy of today's transcript?

MR. IMAMURA: Yes, we do.

THE REPORTER: Okay. Thank you. Off
the record, 11:48.

(Whereupon, at 11:48 a.m., the
proceeding was concluded.)

GILBERT PIAQUADIO

Subscribed and sworn to before me

this ____ day of _____, 2024.

Notary public

Page 135

1 CERTIFICATE OF DEPOSITION OFFICER

2 I, JAZ R. RAMOS, the officer before whom the
3 foregoing proceedings were taken, do hereby certify that
4 any witness(es) in the foregoing proceedings, prior to
5 testifying, were duly sworn; that the proceedings were
6 recorded by me and thereafter reduced to typewriting by a
7 qualified transcriptionist; that said digital audio
8 recording of said proceedings are a true and accurate
9 record to the best of my knowledge, skills, and ability;
10 that I am neither counsel for, related to, nor employed by
11 any of the parties to the action in which this was taken;
12 and, further, that I am not a relative or employee of any
13 counsel or attorney employed by the parties hereto, nor
14 financially or otherwise interested in the outcome of this
15 action.

16
17
18
19  <%28485,Signature%>

20 JAZ R. RAMOS

21 Notary Public in and for the
22 State of New York
23
24
25

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I, RONALD MOORE, do hereby certify that this transcript was prepared from the digital audio recording of the foregoing proceeding, that said transcript is a true and accurate record of the proceedings to the best of my knowledge, skills, and ability; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.


<%30626,Signature%>

RONALD MOORE

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ERRATA SHEET
VERITEXT/NEW YORK REPORTING, LLC

CASE NAME: Clarke, Oral, Et Al. v. Town Of Newburgh, Et Al.
DATE OF DEPOSITION: 9/23/2024
WITNESSES' NAME: Gilbert Piaquadio

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Gilbert Piaquadio

SUBSCRIBED AND SWORN TO BEFORE ME
THIS ____ DAY OF _____, 20__.

(NOTARY PUBLIC)

MY COMMISSION EXPIRES:

[02138 - 3rd]

Page 1

0	119 8:10	33:4	220 41:21
02138 2:17	11:02 106:7	17 4:8 5:4 7:17	23 1:15 5:11
1	11:12 106:10	8:23 33:15	6:16 10:10
1 4:8 17:9	11:34 129:2	18 5:15 6:21	23.6 67:6
21:23 119:20	11:42 129:5	7:13,14 34:2	24 5:5 7:8,23
120:8,16,20,23	11:46 134:8	1865 132:17	133:17
10 5:10 7:7,24	11:48 134:15	19 5:9,12,25	24.9 97:3
7:25 29:25	134:16	6:7,14 7:21 8:5	25 5:23 6:22,25
10.6 100:13	12 4:3 6:23 9:6	8:25 34:17	7:5
10.7 101:11	31:4	1st 51:25	25.7 97:2
100 7:14	122 8:11	2	26 34:3
10022 3:7	123 8:12	2 4:9 6:4,8	28485 135:19
101 7:15	124 8:13	21:25 23:2	3
1012 85:7	12550 1:19	37:3,4 51:16	3 4:12 5:7 7:20
102 7:16,17	10:12	57:5 76:5	8:14 23:4
105 7:18,19	126 8:14,15	2.1 100:10	50:10 51:25
10601 2:8	127 8:16	20 4:25 5:13	106:18 121:17
108 7:20	129 8:17	8:4,16 35:5	3.1 95:3
109 7:21	13 5:6 8:24	137:22	3.4 100:11
10:03 61:25	31:16	2009 107:20	30 1:13 25:15
10:18 62:4	13.5 101:11	2010 107:8	300 1:18 10:11
11 6:13 7:6	130 8:18 9:6	2013 41:15	30626 136:14
30:14 51:12	132 4:4	2022 90:19	31 133:8,14
11,000 113:14	14 6:24 8:17,22	2024 1:10,15	31st 133:11
114:4	32:4	10:10 34:3	32 88:25
110 7:22,23	14.6 67:6	52:2 80:25	33 89:5,18,22
111 7:24	14.7 96:25	133:17 134:22	33,870 92:7
112 7:25 8:4	1496 1:18	2025 133:8,24	34 85:12 90:25
113 8:5	10:11	2027 133:11,14	92:2 94:24
114 8:6	15 5:20 6:5	21 5:18 35:17	35 96:18 100:6
115 8:7	7:19,22 9:4	212 3:9	35,022 92:9
116 9:5	32:16	22 5:17,24 6:10	36 100:7
117 8:8	15.8 101:9	6:19 8:15 18:7	37 4:11 103:6
118 8:9	16 5:22 6:18	18:20 36:5	3rd 77:11
	7:4,15 8:8 9:5	124:18	

[4 - actually]

Page 2

4	123:18	114:22 115:18	ability 135:9
4 4:14 5:8,21	60 5:15	126:14	136:6
6:12 7:11 8:7	607-7065 2:10	81 2:7 6:11	able 13:8 62:11
8:10,11,13	60s 104:11	8:25	abram 77:14
24:3 26:11	61 5:16	82 6:12,13,14	abrams 2:6
62:12,13 75:24	617 2:21	83 6:15,16	11:17 62:23
76:3	62 4:15	84 4:19 6:17,18	63:2,11 73:17
40 4:25	63 5:17	86 6:19	abramslaw.c...
42 5:4	64 5:18 8:23	87 6:20,21,22	2:9
43 5:5	66 5:19	875 3:6	absence 33:15
44 5:6	67 5:20	88 4:21	absent 10:17
45 5:7	68 5:21,22,23	89 9:4	acceptable
46 5:8,9	8:24	8th 52:19	17:25
47 5:10,11	69 4:17	9	accessed 90:19
495-5202 2:21	6th 106:24	9 5:14 6:17 7:9	accessible
5	7	7:12 29:13	82:16
5 4:16 7:18	7 4:20 6:6,15	115:18 127:10	accurate 15:12
8:12,18 27:10	6:20 28:12	9/23/2024	25:5 135:8
69:12,13	88:14,15	137:3	136:5
122:17	106:25 115:14	91 6:23	acknowledge...
5.4 95:5	125:10,15	914 2:10	10:14
5.9 94:25	704-6333 3:9	92 6:24,25	act 16:24 17:2
50 4:13	71 5:24	93 7:4,5	34:5,7 63:13
50,839 92:5	72 5:25	94 7:6	65:11 85:14
50s 104:11	74 6:4,5	95 7:7,8	86:4,17
54 5:12 8:22	75 6:6 95:4	96 7:9	action 36:8
55 5:13	76 6:7	97 7:10	52:6 71:7,17
56 5:14	78 6:8	98 7:11	71:21 72:7
5th 62:22 77:9	79 6:9,10	99 7:12,13	135:11,15
6	8	9:08 1:16 10:6	136:8,11
6 1:13 2:16	8 5:16,19 6:11	a	actions 79:20
4:18 6:9 8:6	7:10,16 8:9	a.k. 4:20 88:22	actually 61:20
25:15 27:23	28:25 52:20,25	a.m. 1:16 10:6	89:4 120:15,23
84:22 85:2	56:17,19	134:16	132:9,11

[add - answer]

Page 3

add 56:23 115:3,13	affordable 107:20 108:11 109:4	alleged 32:17 80:15	67:5 121:2,20 122:3,14,21 123:4,21 125:18 127:12
adding 115:6	african 16:4,6 16:8 22:2 23:6 24:5 26:13 27:12,25 28:14 29:15 65:20,22 67:3,5,11 74:13,24 120:25 121:20 122:2,14,20 123:3,21 125:17 127:12 127:18 128:7	alternative 71:7,17,21 72:6,13 73:2	analysis 65:14 77:14
additional 115:6	agenda 4:15 42:11 62:19 75:24	amendment 20:24 24:18 38:18 41:2 42:22 43:7,18 44:4,9,16,22 45:11 46:7,15 47:4,17 48:9 54:23 56:7 61:4 65:7 66:10,17 67:23 68:19 69:4 72:8 73:5 74:9 74:17 77:5 87:8 91:15 92:18 93:19 96:11 97:12 100:22 102:22 104:3 105:16 109:23 111:15 115:8 119:7 123:8 129:9	anglos 101:9 annual 92:3 answer 4:18,23 5:2 6:2 7:2 8:2 8:20 9:2 13:11 13:17,24 14:7 14:9 17:21,25 20:21 21:8 25:20,22 38:15 38:20,23 40:21 42:18 43:25 46:20 47:11,24 48:2 54:13,20 55:21 56:16 57:10 58:15,23 60:19 61:9 63:23 64:9,16 64:22 66:9,20 67:16 68:5,17 68:18 69:2,6 69:25 70:7,8 70:22 71:23 72:19 74:2 75:8 76:20,22 78:3,16 79:7 79:23 81:8,24 82:5,12,20 83:7,23 84:9 84:17 85:10,12
address 24:4 26:12 27:11,24 28:13 40:5,8 57:4 93:24 94:10,20 96:6 96:16 99:16 100:2 102:16 103:3 107:8 122:19 123:2 123:15,20 124:2,14 125:16,23 126:12 127:6	ago 128:17	american 16:4 16:7,8 65:20 65:23 67:3,12 74:13,24 127:18 128:7	
administer 10:14	agree 10:15,20 54:10 55:3,18 91:10	americans 22:3 23:7 24:5 26:13 27:13,25 28:14 29:15	
adopted 54:8 54:17 79:18 107:7	agreement 78:16		
adopting 53:3 53:6 79:21	agrees 55:5		
adoption 77:15	ahead 86:13 88:17 124:24		
affecting 20:14 120:25	al 10:9,10 137:2,2		
affirm 51:25	allegation 66:4 66:15 67:10		
affirmative 4:19 85:11	allegations 73:11,16,23 74:7 80:7,11		
affirms 77:18 78:24			

[answer - available]

Page 4

86:23 88:2 91:13 92:15 93:17 94:2,12 95:11,25 97:9 98:5 99:10,19 100:19,19 102:9,18 103:24 104:5,8 105:8,16 108:4 108:4 109:20 110:16,16,25 111:2,18 112:11,11,21 113:20,20,24 114:7 115:5 116:15 117:16 117:18 118:9 119:5 121:8 122:5 123:6 124:5 126:4,23 126:23 127:21 127:21 128:16 129:17 130:5 130:13,16,18 131:19,20 answer's 46:5 answering 24:17 answers 14:23 15:8 52:15 anthony 49:2 133:4 anytime 14:12 apologies 21:11 23:17	apologize 85:24 89:4 109:2 120:12 124:25 appeals 29:3 126:16,21 127:7 appear 84:6,14 applicable 10:24 79:13 appoint 60:13 60:16 appointed 48:23 appoints 61:2 appreciate 27:8 39:5 132:12 appropriate 77:19 79:2 approved 73:18 approximately 128:14 april 107:19 area 25:12 57:7 57:15 58:13 60:5 103:7 areas 90:7 112:5,17 113:5 asked 70:5 asking 12:20 13:5,10 14:2 19:6 39:6,8 89:17 93:5,6 94:17 97:19,21 98:8 111:21	130:17 132:6 asks 129:16 assess 80:7 assigned 10:4 assistance 40:18 associated 129:16 associating 129:12,23 130:2 association 122:8 131:15 associational 20:25 24:18 38:19 41:2 42:22 43:8 44:4,17 46:7 54:23 66:10 68:20 69:5 74:17 87:9 91:15 92:18 93:20 96:11 97:12 100:23 102:22 104:4 105:17 109:23 111:15 115:9 118:12 119:8 123:9 124:7 126:25 129:9 131:21 assume 13:25 assuming 22:13 43:11 78:17	assumption 111:18 asylum 32:18 attainment 102:5 107:10 attendance 11:7 attorney 38:11 39:4 50:24 51:6 70:18 73:25 74:8,16 75:2,21 78:10 79:14 81:10 82:6 86:25 91:23 135:13 136:9 attorney's 23:22 24:11,20 28:6,20 29:7 29:19 30:8,22 31:10,22 32:10 32:22 33:9,20 34:11,23 35:11 35:23 36:13 attorneys 19:16 39:7 51:3 71:10,15 audio 135:7 136:3 authority 60:9 60:13 authorized 10:13 84:13 available 70:24 71:6,17,20

[available - candidates]

Page 5

72:6 75:9 88:6 92:16 94:3 95:17 99:11 101:18 113:21 117:18 avenue 3:6 average 92:4,6 award 55:15 aware 92:22 93:10,13 95:16 95:20 97:25 99:3 100:3 101:3,23 102:4 102:25 105:22 110:3 111:5 112:25 113:3 116:18 131:4,5	60:21 63:25 64:24 66:9 71:25 76:22 82:5 83:24 86:24 91:13 93:18 94:13 95:13 97:11 100:21 105:16 108:6 109:22 112:13 118:11 122:7 126:6 basic 92:3 basis 41:25 42:4 92:12 95:8 97:6 100:16 101:14 bayesian 65:16 bear 62:10 bearing 36:20 becoming 24:15 beginning 91:3 103:7 120:12 121:4 behalf 2:2 3:2 18:25 19:25 34:5 104:8 belief 51:21 believe 17:21 26:11 37:9 39:23 77:8 106:17 111:22 119:19 best 13:24 51:20 135:9	136:5 better 98:16 bit 85:18 108:17 111:11 125:8 black 16:4,6,7 43:22 46:18 47:3,7,15,20 48:7 92:5 95:4 95:22 96:7 99:5 100:11 101:11 102:6 105:3,13,24 107:14,24 125:24 blacks 97:3 board 1:9 3:3 16:17 30:4 40:11 42:9 48:16,21,25 49:5,18 53:8 53:12,16 54:7 55:13,15 60:8 60:10,12,16 61:2 71:6,16 72:13 73:3,10 73:18 76:7 77:16,17 78:24 79:20 80:3,6,9 80:13,17,20 85:8 104:19 107:7 132:19 132:22 133:2 133:15,20	bottom 52:11 77:9 100:6 103:11 107:2 108:18 116:7 break 14:12,15 61:22 106:5 128:19 breakdown 114:3,13 breaks 14:13 broken 125:7 budget 41:24 82:10 83:16,18 83:20 84:7,15 build 14:13 built 104:10 bureau 90:16 business 40:5 108:21 109:10 109:17 110:6 110:23 111:9
b			c
b 1:13 4:6 11:18 25:15 85:7 back 26:10 49:15 62:4 75:23 98:11 106:9 112:2 119:18 120:11 128:20 129:4 balmsville 59:5 59:8,12,21,25 based 20:23 21:19 38:17 40:23,24 42:20 44:2,15 45:5 46:6,22 47:24 54:22 55:23			c 2:1 3:1 57:5 call 70:18 called 12:8 57:16 59:5 cambridge 2:17 campaigns 29:4 126:17,21 127:8 candidate 67:3 67:12 74:14,25 candidates 53:23

[candidly - compound]

Page 6

candidly 130:19	certificate 135:1 136:1	clear 24:24 39:6 78:12	commission 137:25
capita 92:3,7	certified 10:20 63:4	clerk 1:17	communicates 115:23
case 12:20 34:6 82:10 83:20 88:9 137:2	certify 135:3 136:2	client 70:19 73:25 74:8,16 81:11 82:6 86:25	communicati... 40:24 70:19 81:10 116:3,9 118:6,18
caution 20:20 22:15 38:14 40:20 42:17 43:24 44:15 45:4 46:4,19 47:23 54:19 55:20 60:18 63:22 64:21 68:4,17 71:22 75:7 76:19 78:2 79:6,22 81:8 92:14 93:25 95:10,24 97:8 101:16 102:8,17 105:5 108:3 109:19 110:15,24 112:10 113:19 114:6 115:4 117:16 118:8 119:4 122:4 123:5 124:4 126:3 131:18	cetera 116:2	clinic 2:15 11:12,15	communities 127:18
	challenges 85:13 86:16	college 101:8	community 42:15 43:17,22 44:24 45:17 46:2,13 47:7 47:15,20 48:7
	challenging 31:6 86:3	come 128:19	compared 97:2 100:10
	chance 56:18 104:15	comment 44:18 54:14,24 55:25 56:13 64:3,17 65:2 66:12 68:8,13,21 69:7 72:3,23 74:3,19 75:12 76:24 78:6 79:9 81:13,19 82:7,14,23 83:9 84:2,11 84:18 87:3,10 87:20 88:3 89:15 91:16 92:20 93:3,21 94:6,15 95:14 96:3,12 97:13 98:7 99:13,22 100:24 105:10 105:20 114:9 116:16 117:21 118:13 119:9 122:9 123:10	complaint 63:21 64:7
	change 55:13 56:5 137:5		complaints 64:13,20 65:5
	choices 65:22		complete 15:8 15:12 130:17
	chosen 117:25		completion 100:10 101:9
	circle 57:5		compliance 73:15
	civil 85:6 86:9		comply 38:13 39:2,8,12 40:2 41:6
	claim 74:12 75:5,18		complying 40:18
	claiming 129:13,24		compound 49:11
	clarification 13:23		
	clarify 13:24 21:12		
	clarifying 104:25		
census 90:16,21	clarke 1:4 2:2 10:9 12:19 137:2		
center 58:10	class 89:7 90:6		
certain 108:22 109:11 110:10 110:13	clause 77:9		

[computer - court]

Page 7

computer 119:24	consists 90:15	correct 25:6	101:12 107:15
concentrated 44:25 45:17 47:8,16	constitute 11:4	49:18 52:24	108:23 112:7
concluded 134:17	constitutional... 85:13 86:3,16	53:13,17,24	116:4 121:21
concludes 77:16,24	construction 108:22 109:12	56:8,21 59:17	122:23 123:23
conditions 15:3	110:10,14,21	65:7 67:24	125:20 126:17
conduct 38:12	111:7	71:8,18 72:9	127:14
conducted 39:8 74:23	consulted 71:10,14	73:6 74:9 77:6	council 16:16
confidential 81:10	cont'd 3:1 5:1,2 6:1,2 7:1,2 8:1 8:2 9:1,2	78:13,14,19	16:18 42:13
confirm 43:3 48:5 67:21 123:12 124:11 126:9 127:4 128:3 129:22	contained 73:16	79:15,18 86:18	48:12 50:3
confirming 45:20 46:11,25	contents 51:19	92:24 103:18	59:7 61:6,16
confusing 24:15,21 26:6	contract 87:23	107:21 108:14	132:20
connection 73:19 108:21 109:11 110:10	contractors 108:21 109:11 109:18 110:7 110:23 111:9	109:13 114:15	councilman 59:12 132:24 133:6,9,12
consequences 87:13,15	contracts 88:5	115:15 116:10	councilmember 57:23 58:9,19
consider 48:15 71:6,16 105:2	controversial 132:10	118:3,19	councilmen 48:13
considered 59:24 73:4 119:2,13	controversy 103:21	119:16 122:15	counsel 12:12 14:5 18:3 27:6 50:21 124:16 129:8 135:10 135:13 136:6,9
	conversation 51:5	123:16 124:15	counsel's 23:13 27:18
	conversations 50:20 51:2	127:8 128:8,12	counselor 11:10 134:10
	convey 25:4	correctly 20:16 22:5 23:8 24:7 26:15 27:15 28:3,17 29:4 29:16 30:5,18 31:7,19 32:7 32:19 33:6,17 34:8,20 35:8 35:20 36:10 51:22 52:8 53:9 54:8 55:16 66:2 67:8 72:15 73:20 77:20 79:3 85:15 90:22 91:8 92:10 95:6 97:4 100:14	county 1:2 30:16 107:20 109:4
	copy 134:12		couple 129:7
	corporate 1:13 18:24 19:7		courses 71:7,17 71:21 72:6
			court 1:1 10:3 13:6,8,15 52:7

[covered - demonstrates]

Page 8

covered 21:7 36:23 44:8,21 45:21 46:14 47:4,16 56:6 61:3 65:6 66:16 67:23 72:7 73:4 74:7 74:25 75:20 77:5 78:9 79:12 91:22 108:13 111:23 120:11	daniel.gorman 3:8 danskammer 33:5 103:18,21 104:16 data 65:15 90:17,21 98:2 date 1:15 137:3 david 2:5 11:17 davis 2:12 4:3 11:10,11,11 12:15,18 21:4 21:11,20,21 22:19,23,24 23:16,19 25:7 25:19 26:7,9 26:23,24 27:9 37:9,13,14 38:4,24 41:4 43:2,14 44:5 44:19 45:8,16 45:24 46:10,24 47:13 48:4 49:14,16 50:13 54:15 55:2 56:2,14 57:14 58:18 59:3 60:24 61:13 62:5 64:4,11 64:18 65:3 66:13,22 67:20 68:9,22 69:8 70:4,14 71:4 72:4,24 74:4 74:20 75:13	77:2 78:7,14 78:17,21,22 79:10 80:2 81:14 82:2,8 82:15,24 83:10 84:3,12,19 85:23 86:14 87:4,11,21 88:4 89:16 90:2,3 91:17 92:21 93:4,22 94:7,16 95:15 96:4,13 97:14 97:21,24 98:14 98:17,18 99:14 99:23 101:2,22 102:14,24 104:24 105:11 105:21 106:3 106:11,21 108:9 110:2,19 111:4,19,20 112:15,24 114:2,10 115:11 116:17 117:22 118:14 119:10 120:3,6 121:12 122:10 123:11 124:10 124:25 125:6 125:13 126:8 127:3 128:2,18 128:25 129:6 129:21 130:7 130:14 131:4,9	131:13,23 132:4,12 134:3 day 14:14 41:25,25 42:4 42:4 51:25 131:8 134:22 137:22 decades 42:16 43:23 december 133:8,11,14 decision 118:17 declarations 32:5 declared 31:17 defendant's 36:5 defendants 1:11 3:2 4:9,12 4:18 11:21 37:21 54:4 55:11 85:7,10 86:2,7 defending 81:16 83:3 defenses 4:19 85:11 define 129:16 defined 90:15 definitely 52:16 demographic 65:15 demonstrates 65:21
covers 120:15 create 41:24 creating 119:2 119:14 criminal 27:13 90:9 107:11 122:21 123:4 123:15 current 41:8 48:20,24 53:3 53:7 54:6 55:14 56:5 133:2 currently 49:4 104:10 customers 113:15,17 114:4,14	d		
d 4:1 5:1 6:1 7:1 8:1 9:1 daniel 2:14 3:4 11:20 22:19			

[density - elected]

Page 9

density 112:4 112:16 113:6	126:22 127:20 129:17 130:5	28:13 93:11,13 93:24 94:10,20	drive 58:2,11 58:25 59:11
depends 130:22	directing 78:18	95:21 96:6,16	duly 12:9 135:5
deposed 12:22	99:9	99:4,16 100:2	e
deposition 1:13	direction 22:11	102:4,16 103:3	e 2:1,1 3:1,1 4:1
4:8 10:7 11:2	23:15 44:13	107:9,24	4:6 5:1 6:1 7:1
15:15 17:13	45:3 46:19	108:12 122:19	8:1 9:1 11:19
18:4 19:12,18	47:10 56:10	123:2,15,20	11:19 57:5
19:21 20:4,10	61:8 68:4,16	124:2,14	earlier 53:11
36:22 102:3	68:25 75:7	125:16,23	53:15 128:10
119:19 130:24	82:19 87:7,19	126:12	earning 92:6,8
135:1 137:3	93:2,25 94:11	displacement	east 58:5
describe 52:22	96:10 102:17	32:18	education 90:8
53:2,5	105:15 110:17	dispute 92:12	91:7,20
description 4:7	110:24 111:10	92:23 95:8	educational
despite 67:4	directions	97:6 98:2,20	102:5,16
determine	23:16	100:16 101:4	107:10
113:16	disadvantaged	101:14	ef002460 1:9
dhessel 2:20	90:7	district 60:6	ef003105-2023
differ 65:23	disclosed 88:9	document	30:17
different 18:7	discovery 4:11	17:12,16 37:15	efficient 104:17
42:7	37:23	50:14 52:6	104:21
digital 135:7	discrepancies	62:12,16 63:8	efforts 23:5
136:3	100:7	63:16 69:12,16	24:4 26:12
dimamura 2:9	discrimination	69:23 70:3	27:11,24 28:13
direct 66:8	20:14 120:25	76:2,9 84:25	105:23 107:6
67:15 69:5	discuss 68:14	85:5,18 86:2	110:4 121:19
74:2 76:22	80:11 105:12	88:13,18 89:12	122:19 123:19
82:4,11,20	discussed	120:7	124:13 125:16
83:7,23 84:9	131:17	documents	125:22 126:11
84:16 86:22	discussions	19:20 36:9	127:6
87:25 91:12	39:3,7	38:7	either 58:17
99:18 100:18	disparate 98:22	dorothy 1:6 2:3	elected 22:4
101:17 103:23	disparities 24:4	dr 4:20 88:22	30:4 49:25
112:20 113:23	26:12 27:11,24		50:3 53:12,16

[elected - extent]

Page 10

67:2,11 70:12 74:13,24 133:20 electing 53:4,7 54:6 55:14 72:13 73:2 election 2:15 11:12,15 49:23 53:19 55:4,6 65:14 70:11 76:11 132:16 133:18 elections 4:17 31:6 35:18 53:12 54:18 56:6 72:14 73:3 electoral 30:3 elicited 130:24 elizabeth 49:8 email 40:5,8 emails 39:14,15 39:22 emergency 31:17 employed 135:10,13 136:7,9 employee 135:12 136:9 employees 41:21 employer 41:8 employment 90:8 91:7,21	96:6 107:11 enact 77:18 78:25 engage 105:24 english 116:9 116:21,25 117:4,10 118:7 118:19,23 119:3 enter 87:22 enters 88:5 entire 56:16 96:25 114:18 entity 83:2 environmental 90:10 103:8 107:13 equine 117:10 ernest 1:5 2:3 errata 137:1 es 135:4 especially 100:12 esquire 2:5,12 2:13,14 3:4 essential 112:3 estimate 80:24 et 10:9,10 115:25 137:2,2 ethnic 107:9 ethno 91:5,19 everett 2:16 evidentiary 10:25	exact 22:14 examination 4:2 12:14 17:14 132:13 examined 12:11 excellent 131:25 except 21:15 82:12 exchange 40:10 exchanges 40:14 excuse 93:12 113:2 exhibit 4:8,9,12 4:14,16,18,20 17:5,9 37:2,3,4 50:7,10 61:20 62:10,12,13 69:10,12,13 75:23 76:3 84:21,22 85:2 88:12,14,15 106:18 119:20 120:8,13,14 existence 91:19 existing 104:16 expansion 33:5 expenditure 83:14,15 expenses 84:6 experience 19:15	expert 4:20 80:6 88:9,22 88:23 97:19 experts 73:18 expire 133:7,8 133:10,13 expires 137:25 explorer 90:20 extent 20:21 21:15 22:2,16 24:19,25 25:2 25:17 26:2 38:15 40:21 42:18 43:8,25 46:20 47:25 54:20 55:21 56:10 60:19 61:9,10 63:23 64:22 67:16 68:5,18 69:2 70:17,22 71:23 72:19 76:20 78:3 79:7,23 81:9 82:12,21 86:23 89:6,14 90:5 93:16 94:12 95:11,25 97:9 98:5 99:19 100:19 103:24 104:5 105:6 108:4 109:20 110:16 110:25 112:11 112:21 113:20 113:22 114:7

[extent - g]

Page 11

115:5 117:17 118:9 119:5 122:5 123:6 124:5 126:4,23 127:21 129:15 131:19	finances 83:11 financially 135:14 136:10 find 108:24 fine 52:4 132:9 finish 13:10 finished 114:23 firm 63:12 73:12 first 4:10 12:8 17:5 18:6 20:12,24 24:18 37:23 38:18 40:25 42:22 43:7,18 44:3,8 44:16,22 45:10 46:6,14 47:4 47:17 48:8 50:18 51:18 54:23 56:7 61:4 65:6 66:10,17 67:23 68:19 69:4 72:8 73:5 74:8 74:17 77:5,11 85:25 87:8 91:14 92:18 93:19 96:10 97:12 100:22 102:21 103:12 104:3 105:16 109:23 111:15 115:8 119:7 120:19 123:8 129:9	five 48:13 100:13 106:5 128:19,24 132:20 flournoy 1:6 2:4 fluorocarbons 104:17 folder 17:7 37:3 follow 111:12 132:3,7,11 following 77:15 follows 12:11 foregoing 51:17 52:4 135:3,4 136:4 form 116:14 found 87:16 foundation 45:13 83:6,22 97:18 99:8 four 48:13 109:5 132:20 132:24 fourth 73:9 86:15 133:15 free 131:6 front 109:7 full 15:8,12 86:6 133:23 fully 37:7 further 58:4 80:9 85:21 133:25 134:4	135:12 136:8 future 72:14 73:3
f		g	
f 11:19 fact 67:4 70:9 fair 18:23 38:25 42:6,14 43:21 44:6 57:18 128:25 familiar 12:25 fault 120:13 fear 131:14 features 35:17 feel 14:12 131:6 fensterman 2:6 11:18,18 62:23 73:17 77:14 figures 92:13 92:24 93:8 95:9,18 97:7 97:16 98:2,3 98:20 100:17 101:5,15,25 filed 52:6 fill 60:9,13 133:22,22 filled 49:10,20 49:22 133:16 final 51:7,12 finally 36:5		g 10:1 11:1 12:1 13:1 14:1 15:1 16:1 17:1 18:1 19:1 20:1 21:1 22:1 23:1 24:1 25:1 26:1 27:1 28:1 29:1 30:1 31:1 32:1 33:1 34:1 35:1 36:1 37:1 38:1 39:1 40:1 41:1 42:1 43:1 44:1 45:1 46:1 47:1 48:1 49:1 50:1 51:1 52:1 53:1 54:1 55:1 56:1 57:1 58:1 59:1 60:1 61:1 62:1 63:1 64:1 65:1 66:1 67:1 68:1 69:1 70:1 71:1 72:1 73:1 74:1 75:1 76:1 77:1 78:1 79:1 80:1 81:1 82:1 83:1 84:1 85:1 86:1 87:1 88:1 89:1 89:6 90:1,5 91:1 92:1 93:1 94:1 95:1 96:1 97:1 98:1 99:1	

[g - group]

Page 12

100:1 101:1	103:10 114:17	gorman 3:4 4:4	97:8,17 98:4
102:1 103:1	114:23 125:4	11:20,20 14:5	98:11,16 99:7
104:1 105:1	go 13:2 18:22	20:20 21:9,13	99:18 100:18
106:1 107:1	20:9 26:10	22:10,22 23:14	101:16 102:8
108:1 109:1	75:23 77:8	24:14 25:11,22	102:17 103:23
110:1 111:1	86:13 88:17	26:5,20 37:6	105:5,15 106:6
112:1 113:1	109:4 119:18	37:11 38:14	106:20 108:3
114:1 115:1	120:10 124:16	40:20 42:17	109:19 110:15
116:1 117:1	124:24 134:5	43:7,24 44:13	110:24 111:10
118:1 119:1	goals 61:7,16	45:3,12 46:4	112:10,20
120:1 121:1	going 11:9	46:19 47:10,22	113:19 114:6
122:1 123:1	12:20 13:2,25	49:11 50:12	115:4 116:14
124:1 125:1	14:14 17:4	54:12,19 55:20	117:15 118:8
126:1 127:1	19:14 20:6	56:9 57:9	119:4,22 121:7
128:1 129:1	21:19 22:10,14	58:14,22 60:18	122:4 123:5
130:1 131:1	22:15 25:23,23	61:8 63:22	124:4,19,22
132:1 133:1	36:25 38:14	64:8,15,21	125:4,11 126:3
134:1	40:20,22 42:17	66:7,19 67:14	126:22 127:20
gaps 91:6,20	51:15 56:15	68:4,12,16,25	128:16,22
gather 19:24	61:19,21 62:9	69:23 70:8,17	129:14 130:4
geocoding	65:11 66:8	71:22 72:18	130:11,13,16
65:17	67:15 69:9	73:24 74:15	131:6,10,18
geodata 90:20	70:12,18 84:20	75:7 76:19	132:2,8,14
geographically	86:8 88:11	78:2,11,15,20	133:25 134:5
44:25 45:18	89:9 91:12	79:6,22 81:7	gorman's 22:20
47:8	103:10 108:5	81:18,23 82:4	grace 1:4 2:3
getting 125:2,9	111:25 114:17	82:11,19 83:5	great 17:4
gilbert 1:14	120:22 125:4	83:21 84:8,16	green 49:8
10:7 11:23	130:20,22,24	85:17,22 86:5	greenwood
12:7 134:19	132:10	86:11,13,22	2:13 11:14,14
137:3,21	good 10:2	87:7,18,25	ground 13:2
give 13:11	12:16 14:17	89:9,20,23	grounds 54:5
14:23 15:12	61:23 120:4	91:12 92:14,25	group 15:20
17:5,20 22:10	128:21	93:16,25 94:11	16:9 84:5
56:15 80:23		95:10,24 96:9	129:12 130:2

[group - inefficient]

Page 13

131:16 grown 42:15 43:5,22 growth 43:10 43:16 guy 120:2	high 95:2 100:9 higher 95:5 100:13 101:10 112:4,16 113:6 highly 104:11 hiring 35:6 hispanic 15:16 15:18,24 24:5 26:13 27:12,25 28:14 29:15 65:20,23 67:3 67:12 74:14,24 92:5 93:14 95:2,22 96:7 96:23 99:5 100:8,12 101:10 102:5 105:4,13,24 107:14,25 122:20 123:3 123:20 125:17 125:24,24 127:13,18 128:7 hispanics 20:14 22:3 23:7 24:6 26:14 27:13 28:2,15 67:5 92:8 121:2,21 122:2,15,21 123:3,22 125:18 historic 60:6 history 20:13 120:24	hold 55:13 80:9 homeowners... 96:22 98:22 99:4,16 homes 96:24 hopefully 128:20 hour 61:21 106:4 hours 42:11 housing 28:2 31:18 90:9 91:6,20 107:12 107:20,23 108:11 109:4 123:22 124:2 124:14 huh 13:18 hundred 17:22	134:11,13 impact 35:17 105:2 impacts 107:13 impair 15:4 implement 77:19 78:25 important 13:16 impressions 68:3 imprisonment 52:4 improved 65:16 include 52:3 72:12 includes 42:5 53:20 including 36:8 77:13 90:7 income 28:15 91:6,20 92:4 93:13 107:10 125:18,25 increase 23:5 104:15 121:19 121:24,25 122:13 index 1:8 30:16 individually 92:9 inefficient 104:11
h			
h 4:6 hamilton 3:5 hamlet 59:25 60:3 hamlets 59:24 hand 12:5 handful 128:23 hang 120:17 happy 98:14 hard 125:5 harvard 2:15 11:12,15 he'll 25:16 head 13:18 header 17:13 89:5,18 90:4 90:11,14 heads 114:23 health 90:8 107:11 hear 26:7,7 98:25 hearing 12:2 held 49:7 76:12 hereto 135:13 136:10 hessel 2:14			
		i	
		i.e. 115:24 i.t. 120:2 identification 17:10 37:5 50:11 62:14 69:14 84:23 88:16 identifies 44:12 46:18 47:3 identify 11:7 15:24 107:6 110:20 115:21 129:18 imamura 2:5 11:17,17	

[infestation - know]

Page 14

infestation 117:8 118:3	114:12,12 115:6,13,23	interchangea... 15:17 16:5	105:7
information 4:11 19:24 20:23 21:18 37:24 38:6,17 40:14,23 42:20 43:9 44:2 45:5 46:21 47:11 48:2 51:21 54:21 55:23 56:11 60:21 61:10,15 63:25 64:6 67:17 70:23 71:24 72:20 75:9 76:21 78:4,18 79:8 83:25 86:24 92:16,23 93:6,7,9,18 94:3,9,13,18,19 95:12,17 96:2 96:15 97:10,15 98:9,10,20 99:10,20,24 100:21 101:4 101:19,24 102:10,19 103:2,25 104:2 104:6,8 105:7 105:9,19,23 108:6 109:21 110:4 111:6,22 111:24 112:13 113:2,4 114:8	116:13,19,24 117:3,6,14,17 117:25 118:10 118:16,16 119:6,12 122:6 122:12 123:13 124:6,12 126:5 126:10 127:5 127:23 128:4 128:11,15 131:16 information's 130:23 initial 68:2 instructed 4:23 5:2 6:2 7:2 8:2 45:18 instruction 24:16 25:25 instructions 23:22 24:12,21 27:18 28:7,20 29:8,20 30:9 30:23 31:11,23 32:11,23 33:10 33:21 34:12,24 35:12,24 36:14 instructs 14:8 intend 130:9 intended 10:23 intends 77:18 78:25	interest 30:2 interested 135:14 136:11 interrogatories 4:13 36:6 50:18,22 51:4 51:19 106:17 interrogatory 52:20,25 54:5 56:17,24 106:25 114:19 114:22 115:14 115:18 introduce 17:4 37:2 50:6 61:19 62:9 69:9 84:20 88:11 introduced 17:6 investigate 73:23 74:6,12 75:4,18 investigation 74:22 invoices 81:21 82:3 invoked 45:22 129:8 invokes 69:2 invoking 22:17 involved 38:5 50:21 51:3	involves 103:25 it'd 58:4 62:19 it'll 89:25 133:22,23 item 20:13 32:4 33:4,15 34:2 34:17 35:5,17 36:5 82:9 83:19 items 83:18
j			
january 34:3 83:17,17 jaz 1:20 10:3 135:2,20 john 17:2 july 51:25 june 80:25 jurisdiction 65:25 justice 27:14 90:9 107:12 122:22 123:4 123:15 justification 52:23 53:2,6			
k			
keep 86:8 kentucky 58:11 58:24 59:11 know 17:7 19:15 20:11 37:2,6 39:21			

[know - llc]

Page 15

44:11 45:25 46:17 47:19 50:7 51:12,19 52:21 54:16 56:18 57:10,22 58:8,25 59:15 60:4 62:24 69:11 87:12,14 88:13 89:7 103:14 106:19 107:3 114:3 115:19 118:21 119:20 132:5 knowledge 51:21 97:20 135:9 136:6 known 60:6 67:16	large 30:5 50:2 50:4 53:12,16 53:19 54:6,17 55:4,6,14 56:5 91:5 132:16 latino 15:16,19 15:25 42:15 43:4,17 44:12 44:24 45:17 46:2,13 latinos 20:15 94:25 97:3 law 2:15,15 11:12,15 52:7 73:12 76:11 85:7 86:9 law.harvard.e... 2:18,19,20 laws 10:25 52:3 87:14 lawsuit 30:15 31:5 34:18 37:19 81:17 83:4 87:16,24 leaders 46:2,13 47:19 48:7 legal 73:14 legislative 20:23 21:7 24:17 38:17 40:25 42:21 43:6,18 44:3,8 44:16,22 45:6 45:11 46:8,14 47:5,17,24	48:9 54:22 55:23 56:7 60:21 61:4 63:25 64:24 65:6 66:9,17 67:18,24 68:7 69:3 70:20 72:2,8,21 73:5 73:24 74:8,16 76:23 77:6 78:5 81:12 82:5,21 83:8 83:24 84:10,17 86:25 87:8 88:2 91:14 92:17 93:19 94:4 95:13 96:10 97:11 99:12,21 100:21 101:20 102:11,21 104:4 105:17 108:7 109:22 111:14 112:22 113:23 115:7 117:19 118:11 119:7 122:7 123:8 124:7 126:6,24 127:23 letter 34:4 63:11,14,18,21 64:7,14 68:3 68:11,15,24 70:10 73:17	letterhead 62:23 63:3 level 92:3 lewis 17:2 lie 120:5 likely 96:24 limit 101:17 limitation 77:13 limited 90:8 line 4:24 5:3 6:3 7:3 8:3,21 9:3 54:4 55:9 55:10 65:13 66:25 77:12 78:24 82:9 83:19 86:15 94:23 108:17 137:5 lines 103:12 109:5 list 18:10,17 listed 20:13 lists 18:7 litigation 84:5 little 85:18 108:17 111:11 125:8 live 57:2,18,25 58:12,19 59:7 59:10,20 60:2 lives 57:23 58:9 58:24 59:12,16 llc 30:16 137:1
I			
lack 35:6 lacks 45:13 83:5,21 97:17 99:7 lake 57:16,19 58:3 land 28:2 90:9 107:12 123:22 124:2,14 language 116:2 116:20,25 117:4 119:14 119:15 120:15 languages 118:6,18			

[llp - money]

Page 16

llp 2:6 3:5 73:14 80:4 lobiondo 49:2 59:13 133:4 lobiondo's 133:13 located 10:11 location 1:17 long 78:15 111:17 120:3 132:15,22 133:19 look 70:13,15 125:10,14 looking 18:17 89:13 96:19 lost 120:17 lot 20:11 loud 13:17 lowest 100:9	maintaining 30:2 53:3,6 maintains 55:4 make 13:13,19 14:3,9 15:25 19:9 24:24 78:12 104:16 makes 83:13 making 104:21 manley 49:2 58:9,19 59:7 59:16 60:2 133:4 manley's 133:10 manner 11:2 maps 90:21 mark 17:5 marked 17:9 37:4 50:10 62:12,13 69:12 69:13 76:2 84:22,25 88:13 88:15 106:18 119:20 120:8 120:13 markedly 65:24 materials 119:2 119:14,15 matter 10:8 70:13,16 88:24 mean 70:15 71:20 72:17 77:22,23 78:13	79:5 86:21 110:13 112:9 130:13,18 means 11:3 15:7 57:11 meant 72:6 measures 107:7 media 115:25 medications 15:2 meeting 4:15 62:20 75:24 meetings 19:17 80:10,10 member 59:7 133:20 member's 132:23 members 30:4 40:11 42:8 48:11,21,23,24 50:3 53:7,16 54:7 55:15 60:17 61:2 72:14 73:3 89:6 90:6 133:3 memory 15:4 men 100:8 101:10,11 message 40:13 messages 39:20 39:24 40:8,11 met 12:17	method 53:4,7 54:6,18 55:4 55:14 56:6 72:13 73:2 methods 53:4 65:18 middle 96:19 109:5 migrants 31:18 migration 32:6 mind 104:20 mine 104:19 119:23 minorities 35:7 70:11 minority 35:19 108:20 109:10 109:17 110:6 110:23 111:8 112:5,17 113:6 minute 106:5 128:19 132:7 minutes 128:24 misconstruing 21:10 missed 49:13 modified 111:11 moment 103:10 114:18 monday 1:15 10:10 money 82:25 84:4,14
m			
m 11:18,19 57:5 ma 2:17 mace 57:5 made 83:16 105:24 107:6 110:5 116:3 124:13 mail 63:5 mailings 115:24 main 2:7 maintain 55:5			

[month - nyvra]

Page 17

month 128:17	new 1:1 3:7	newburgh's	125:23 126:10
moore 136:2,15	10:12,15 16:23	23:5 24:3	127:5 128:4
morning 10:2	30:15 34:4,7	26:11 27:11,23	130:3
12:16	52:3 57:6	28:12 29:2,13	notable 100:8
mosquito 117:8	65:10 76:11	30:2 31:5,17	notary 10:13
118:2 128:11	85:6,14 86:4,8	32:17 33:4,16	134:24 135:20
moving 31:6	86:17 104:13	34:2,17 35:5	137:25
94:22 101:7	135:21 137:1	35:18 37:22	note 25:8 70:6
n	newburgh 1:9	48:12 85:9	noted 75:11
n 2:1 3:1 4:1	1:10,14,17,19	92:4 121:18	notice 4:8
5:1 6:1 7:1 8:1	3:2,3 4:14,16	122:19 123:19	17:13 18:2
9:1 11:19,19	10:9,12 11:24	125:16 126:15	20:6 34:3
name 10:2	16:14,19 18:4	127:11	63:14,18 68:10
52:10 60:4	20:15 22:5	newsletter	68:14 85:6
129:11,22	30:14,15,16	115:24	119:19
137:2,3	32:5 37:21	newspaper	noting 116:6
name's 12:18	41:9 45:2 46:3	115:24	november
national 107:8	47:9,21 48:8	nodding 13:18	49:23 133:17
need 13:22	49:25 57:3,6	non 24:5 26:13	133:17,21
14:12,15	57:15,22 58:8	27:12,25 28:14	number 21:23
134:12	58:13,21 59:5	40:23 43:9	30:17 51:16,25
needs 29:14	59:22 60:3,6	56:11 61:14	52:20,25 56:17
127:12,17	61:7,17 65:16	64:5 67:17	56:19 85:12
128:6	66:6 67:2,11	72:20 75:14	106:25 114:19
neighborhood	74:12,23 75:6	78:13 92:4	114:22 115:14
58:6,12,20,25	76:7 85:8	95:2 96:23	115:18 120:20
59:4,16,18,20	90:15 91:5,21	100:8,9 102:9	129:10
59:21	93:15 95:23	102:19 103:25	numbers 52:18
neither 135:10	96:8,21 98:23	105:7 112:25	106:23
136:6	99:6,17 102:7	113:2,4 114:12	ny 1:19 2:8 3:7
never 67:11	105:4,14 108:2	115:12 117:23	nyscef 85:12
74:13 89:11	108:13 112:19	118:16 119:12	nyvra 16:23
104:20	115:22 121:3	122:11,20	73:16 77:17,25
nevertheless	127:19 132:16	123:2,13,20	80:15 87:6,16
73:10	132:19 137:2	124:12 125:17	

[oath - page]

Page 18

o	objects 14:7	91:2,25 93:10	oral 1:4 2:2
oath 14:20 15:6	obscured	94:22 96:18	10:8 17:14
62:7 106:13	120:24	98:15 100:5	137:2
oaths 10:14	office 22:4 67:4	101:7 103:5,9	orange 1:2
object 14:6	67:13 74:14	103:15 106:3	30:16 57:16,19
54:4	officer 135:1,2	106:12,15,20	58:3
objection 10:17	oh 85:20,24	107:17 108:16	order 19:24
12:2 21:9	120:20	110:9 111:25	organization
24:23 25:8,15	okay 12:24	114:17,25	130:3
25:25 45:12	14:11 15:22	115:17,20	origin 107:9
47:22 49:11	16:22 17:6,11	118:25 119:18	original 59:24
54:12 56:9	17:24 18:12,15	120:7,10,20,22	originally
57:9 58:14,22	18:22 19:4,11	121:13,16	124:17
64:8,15 66:7	20:9,12 21:20	122:17 123:18	outcome
66:19 67:14	21:25 22:21	124:21,23	135:14 136:11
68:12 69:23	23:4 26:4	125:8,9 127:10	outcomes 27:14
70:6,17 72:18	27:10 28:25	128:3,10,18,25	122:22 123:4
73:24 74:15	32:16 36:20,25	129:7 130:8	outside 83:2
78:11 81:7,18	37:9 38:3	131:9,12,23	84:5
81:23 83:5,21	49:14 50:6,8	134:5,14	overt 29:2
84:8 87:18	51:11,15,24	old 104:21	126:15,20
89:10 92:25	52:17 54:2	once 37:7 67:2	127:7
96:9 97:17	55:9 56:15,22	71:9,14	owned 108:20
98:4 99:7	59:15 60:2,5	ones 38:8 91:7	109:10,17
105:5 116:14	61:19 62:6,9	100:12	110:6,23 111:8
117:15 129:14	62:10,21 63:7	ongoing 73:19	p
130:4,11	65:9 66:23	open 50:12	p 2:1,1 3:1,1
objections	69:9 70:5,9	opinion 19:6	page 4:2,7,24
23:13,14 25:13	72:11 73:8	opinions 65:4	5:3 6:3 7:3 8:3
26:22 27:2	75:23 77:8	opportunities	8:21 9:3 18:6,6
37:22 50:17	78:15,21,23	107:11	18:7 51:12,12
51:18 97:18	84:20 85:4	opportunity	52:11,17,19
107:18 116:7	86:10,12 88:8	130:25	62:22,25 76:5
121:7	88:11,12,21	options 80:14	77:10,10,12
	89:3 90:24		88:25 89:5,13

[page - piaquadio]

Page 19

89:18,21,22	122:14	100:11,14	37:1,25 38:1
90:25 92:2	particularized	101:10,11,11	39:1 40:1 41:1
94:24 96:18	29:14 127:12	percentage	42:1 43:1 44:1
100:6,6 103:6	127:17 128:6	44:11 46:17	45:1 46:1 47:1
103:12,13	parties 10:15	47:3	48:1 49:1 50:1
106:23,24	10:19 135:11	perez 1:5 2:3	51:1 52:1 53:1
107:2,19	135:13 136:7	perfectly 17:25	54:1 55:1 56:1
108:25 109:3	136:10	performed	57:1 58:1 59:1
114:20,21	party 11:8	39:18	60:1 61:1 62:1
115:17 120:19	pass 76:15,17	perjury 52:2	63:1 64:1 65:1
121:17 122:18	passed 77:4	permitted	66:1 67:1 68:1
137:5	past 42:16	10:23	69:1 70:1 71:1
paragraph	73:13	persistent	72:1 73:1 74:1
65:10,12 66:24	patterns 65:15	65:18	75:1 76:1 77:1
71:2,5 73:9	65:19	person 129:11	78:1 79:1 80:1
77:11 85:25	paul 49:3 133:5	131:15	81:1 82:1 83:1
91:4 92:2	pay 81:15 82:3	personal 40:4,7	84:1 85:1 86:1
94:23 96:20	83:2 84:5	97:20	87:1 88:1 89:1
98:3,21 103:6	payments	personally 19:8	90:1 91:1 92:1
103:11,16	82:17	pertaining	93:1 94:1 95:1
108:18 112:2	pdf 52:19 62:22	76:10	96:1 97:1 98:1
114:20 116:8	106:24	peter 1:5 2:3	99:1 100:1
paragraphs	penalties 52:2	petition 55:12	101:1 102:1
114:24	pending 14:16	piaquadio 1:14	103:1 104:1
parenthesis	89:20	10:1,8 11:1,23	105:1 106:1
85:9,11,12	people 15:20	11:23 12:1,4,7	107:1 108:1
90:17	16:9 92:6 95:4	12:17 13:1	109:1 110:1
part 15:6 48:15	95:22	14:1 15:1 16:1	111:1 112:1
120:15	pepper 3:5	17:1 18:1 19:1	113:1 114:1
participation	11:21 34:19	20:1 21:1,23	115:1 116:1
23:6 31:5	80:18,21 87:23	22:1 23:1 24:1	117:1 118:1
108:20 109:9	percent 17:22	25:1 26:1 27:1	119:1 120:1
109:16 110:5	67:6,6 94:25	28:1 29:1 30:1	121:1 122:1
110:22 111:8	95:3,5,5 96:25	31:1 32:1 33:1	123:1 124:1
121:20 122:2	97:2,3 100:10	34:1 35:1 36:1	125:1 126:1

[piaquadio - privilege]

Page 20

127:1 128:1	polarized 65:19	34:14 35:2,14	65:7 66:11,18
129:1 130:1	66:5,16 75:5	36:2,17,22	67:18,24 68:7
131:1 132:1	75:16,19	121:14	68:20 69:4,5
133:1 134:1,19	policy 52:23	prepared 18:13	70:21 72:2,8
137:3,21	53:2,5	18:16,19 20:7	72:22 73:5,25
place 85:16	political 23:6	20:18 22:7	73:25 74:9,16
plains 2:8	29:3 121:19,25	23:10,20 24:9	74:17,18 76:23
plaintiff's 18:3	122:13 126:16	24:25 26:17,21	77:6 78:5
37:23	126:21 127:8	121:5,9 136:3	81:11,12 82:5
plaintiffs 1:7	pops 37:3	preparing 20:4	82:6,22 83:8
2:2 4:10,13	population	present 80:13	83:24 84:10,17
11:13,16,19	43:5,11 112:5	107:8	86:25 87:2,8,9
12:19 34:6	112:17	press 4:16	88:2 91:14,15
36:8 37:20	populations	69:19,21 71:2	92:17,19 93:20
50:18 51:18	67:7 112:6,18	104:9	94:5 95:13
63:21 64:6,13	113:6	previous 22:20	96:10,11 97:11
64:19 65:5	position 21:12	previously 49:7	97:12 99:12,21
80:7,11 88:24	21:13 104:18	75:10 95:20	100:22,23
106:16	104:19	primarily	101:20 102:12
planning 81:15	positions 35:7	112:4	102:21,22
plant 33:6	possible 80:14	prior 20:6	104:4,5 105:17
103:18 104:13	power 33:6	102:3 135:4	105:18 108:7
104:16,21	104:9,11	privilege 20:24	109:22,24
105:3	practice 85:6	20:25 21:8	111:16,23
plants 104:10	86:9	24:18 38:18,19	112:22 113:23
104:12	preferences	40:25 41:2	115:8,9 117:20
please 11:7	65:22	42:21,23 43:6	118:11,12
12:4,12 13:9	prepare 19:12	43:8,19 44:3,4	119:7,8 122:7
13:23 27:6	19:18,21 20:5	44:9,16,17,22	122:8 123:8,9
38:2 52:22	21:22 22:25	45:6,11,19	124:7,8 126:6
53:2,5 85:5	23:24 27:20	46:7,8,15 47:5	126:25,25
88:25 107:6	28:9,23 29:11	47:17,25 48:9	127:23 129:10
115:21	29:22 30:11,25	54:22,23 55:24	129:13,24
points 14:6	31:13 32:2,14	56:8 60:22	131:21
	32:25 33:12,23	61:4 64:2,25	

[privileged - question]

Page 21

privileged 70:19 75:14 113:2,4 114:12 115:13 117:24 118:16 119:12 122:12 123:13 124:12 126:10 127:5 128:4	136:5 produced 10:21 36:9 production 36:7 profit 130:3 project 103:17 103:22 105:12 105:25 projects 108:22 109:12 110:11 110:14,21 111:7 protected 89:7 90:6 102:11,20 104:3 protection 90:10 103:8 provide 56:12 70:23 73:14 77:14 102:10 102:20 104:2 105:8 113:9,13 113:14 116:12 116:23 117:3 118:5,18 123:7 128:15 provided 117:6 provides 112:3 113:17 116:19 providing 15:8 128:11 provision 66:9 public 20:22 21:18 22:18	24:19 25:17 38:16 40:23 42:19 43:9 44:2,14 45:5 46:5,21 47:11 48:2 54:21 55:22 56:11,11 60:20 61:11,14 63:24 64:5,23 67:17 70:23 71:25 72:20 75:9 76:22 78:4,13,18 79:8,24 80:10 80:14 82:13 83:11,15,25 86:24 92:15,23 93:5,7,17 94:3 94:8,13,17,18 95:12,16 96:2 96:14 97:10,15 97:25 98:6,8,9 98:13,19 99:10 99:20,24 100:20 101:3 101:23 102:10 102:19,25 103:25 104:6,8 105:7,18,22 108:5 109:21 110:3,17 111:2 111:5,13,21 112:12,25 113:4,22 114:8 114:11 115:12	117:19,23 118:10,15 119:6,11 122:6 122:11 123:7 123:13 124:6 124:12 126:5 126:10,24 127:4,22 128:4 128:15 134:24 135:20 137:25 publicly 82:16 88:6 101:18 publish 117:25 publishing 117:13 pull 106:15 119:23 pulling 119:22 purposes 25:13 pursuant 34:6 85:6 86:8 put 69:19 89:9 104:17 117:9 puts 42:10
q			
qualified 135:7 question 13:10 13:22,25 14:8 14:16 20:22 22:14 23:18 40:22 42:19 43:12,13,16,25 45:13,16 46:12 47:2,15 48:6 49:12,13 50:23			

[question - record]

Page 22

53:14 54:20	quickly 20:11	100:10,12	121:21 122:22
55:6,22 58:17	134:11	101:8	123:23 125:19
59:19 60:20	quote 51:16	rates 96:22	126:17 127:13
64:23 68:18	54:7 55:11	98:22 99:5,16	reading 25:14
71:24 76:21	65:14 66:25	rather 13:17	54:3 85:4 86:6
78:9 89:21	73:10 85:5	18:20	114:24
91:13 94:12	90:14 91:4	reach 81:2,5	reads 107:5
95:11,25 97:9	92:2 94:24	119:2	125:15 126:14
98:5,12,12,15	96:20 100:7	read 20:16 22:5	really 59:2
100:20 102:9	107:5 108:18	23:7 24:6 25:9	reason 13:22
102:19 103:24	109:8 112:2	26:14 27:14	14:22 15:11
105:7 109:20	115:21 116:8	28:3,16 29:4	137:5
110:17 111:2	120:24 121:18	29:16 30:5,17	recall 39:10,11
112:12 113:21	122:18 123:19	31:7,19 32:6	39:13 40:3,16
114:7 118:9	125:15 126:14	32:19 33:6,17	41:7 51:10
119:5 121:4,9	127:10	34:7,20 35:8	80:22 88:10,20
123:6 124:5	r	35:20 36:10	receive 114:4
126:24 127:22	r 1:20 2:1 3:1	51:15,17,22	114:14
129:15 130:17	11:18,19 17:2	52:7,24 53:8	received 68:3
130:19	135:2,20	54:8 55:16	68:10 70:10
question's	race 96:23	56:16,18,19,22	82:25
26:20 38:16	racial 29:3 35:6	63:18 65:12,25	receives 84:4
93:17	35:19 91:6,19	67:8 71:13	recently 90:18
questions 4:23	107:9 114:3,13	72:14 73:9,20	recognize
5:2 6:2 7:2 8:2	126:16,21	77:20 79:3	50:14 62:16
8:20 9:2 12:21	127:7	85:14 90:5,21	63:7 69:16
13:5 14:24	racially 65:19	91:8 92:9 95:6	recollection
15:9 19:4,14	66:5,15 75:5	97:4 98:11	52:14
22:17 24:14	75:16,19	100:14 101:12	record 10:4,5
25:9 45:14	raise 12:4	103:11,13,15	10:18 11:8
111:11 122:5	ramon 1:5 2:3	103:17 107:15	12:18 13:9,16
124:20 128:23	ramos 1:20	108:23 109:6	24:24 25:17
129:8 130:23	10:3 135:2,20	110:11 112:6	61:25 62:2,4
131:2,11 132:3	rate 93:12	114:18 116:4	64:23 89:10
134:2	94:24 95:4,21	120:22 121:6	106:7,8,10

[record - respect]

Page 23

108:5 120:4 129:2,3,5 134:6,8,9,11,15 135:9 136:5 recorded 11:2 135:6 recording 10:21 135:8 136:3 records 125:7 redeveloping 105:3 redirect 128:23 132:6 reduced 135:6 reed 1:4 2:2 refer 15:18,22 16:6,22 19:5 63:14 reference 107:19 referenced 75:2 75:21 78:10 79:15 91:23 128:10 referendum 55:13 56:5 referring 15:19 15:23 16:8,13 16:18,25 38:8 63:15 89:19 reframing 124:19 refresh 37:8 52:13	refused 8:20 9:2 refute 93:7 95:18 97:16 101:24 regarding 4:17 32:6 34:4 64:6 66:15 71:15 74:22 75:15,17 91:19 94:9,19 96:15 98:21 99:25 103:2 105:23 110:4 111:6 113:5 114:13 117:24 118:2,17 119:13 122:12 123:14 124:13 126:11 127:5 128:5 131:15 registered 53:20,22 related 40:8 107:24 135:10 136:7 relation 108:11 relative 135:12 136:9 release 4:17 69:19,22 71:3 104:9 relevant 40:15 79:14 remedies 77:20 79:2	remedy 77:19 79:2 80:14 remember 39:21 117:12 remotely 10:16 rent 96:24 renters 97:2 renting 96:23 repeat 22:12 48:22 53:14 repetitive 125:2 rephrase 43:12 97:23 report 4:20 41:19 83:14 88:22 89:2 reported 1:20 98:3,21 reporter 10:2,3 11:22,25 12:12 13:6,8,15 27:6 37:25 61:24 62:3 106:7,9 129:2,4 134:8 134:10,14 reporting 137:1 reports 88:9 represent 11:9 12:19 18:2 67:5 88:21 representative 1:13 18:25 19:7 22:8	23:11 24:10 97:22 request 4:10 37:23 39:9 40:15 requests 36:7 38:6,13 39:2 39:12 40:2,19 41:6 required 73:19 reside 112:6,18 113:7 residence 35:19 resident 41:20 residents 15:18 15:19,23,24 16:7,8 29:16 93:14 95:23 96:7 99:6 102:6 105:4,13 105:24 107:14 107:15,25 113:10,12 115:23 116:13 116:20,24 118:22 119:3 125:25 127:13 128:7 resolution 76:6 76:10,13,15,18 77:4,15 79:17 79:21 104:20 respect 19:2 23:2,12 36:17 44:14 61:15

[respect - says]

Page 24

65:20 respectively 67:7 respond 21:17 126:20 127:17 128:6 responding 38:5 50:22 51:4 response 21:3 21:10 22:21 29:2 31:18 32:17 34:3,18 41:3 42:24 45:7,20 46:9 46:23 47:12 48:3 54:2 55:10 56:24 60:23 61:12 67:19 68:23 79:24,25 101:17,21 102:13,23 108:8 109:25 110:18 111:3 111:24 112:14 112:23 113:25 114:18 115:3 115:10,14 124:9 126:4,7 126:15 127:2 127:24 129:20 130:6,12 131:22	responses 4:9 4:12 13:16 36:6 37:22 50:17 51:8,17 106:16 responsibilities 41:22 42:7,8 42:13 responsive 36:9 83:25 responsiveness 29:14 127:11 rest 131:8 restate 23:17 results 71:15 resume 25:12 retain 73:17 80:3,6,18,20 retained 73:12 88:24 retaliation 131:14 retention 34:18 reveal 20:22 22:18 38:16 40:22,24 42:19 44:2,15 45:4 46:6 54:21 55:22 60:20 63:24 64:24 65:18 71:24 76:21 81:9 93:18 94:13 95:12 96:2 97:10 100:20	108:6 109:21 112:12 114:8 118:10 119:6 122:6 124:6 126:5 127:22 131:16,20 revealing 50:19 50:25 reveals 63:23 86:23 102:9,19 review 19:20 51:7 71:16 73:15,20 reviewed 52:14 88:8 rgreenwood 2:19 right 12:5 18:21 21:2 25:18 61:24 62:3,25 71:12 85:16 86:11 89:17,21 90:13 110:11 125:14 131:23 rights 16:23 17:2 34:5,7 63:13 65:11 85:14 86:4,17 role 41:10 romance 1:4 2:2 ronald 136:2 136:15	rough 80:23 route 1:18 10:11 ruggiero 49:3 57:23 133:5 ruggiero's 133:6 rules 10:25 13:2 85:7 run 49:14 running 42:4 runs 114:21 ruth 2:13 11:14 s s 2:1 3:1 4:6 11:18,19 137:5 sadavis 2:18 sam 12:18 125:12 132:2 samuel 2:12 11:11 sanders 3:5 sandoval 4:21 88:23 saying 13:18 63:12 86:8 says 20:13 22:2 24:25 54:3 62:11 63:4 66:25 71:5,14 73:10 76:6 77:12 78:24 86:2,7,16 90:14 91:4 92:2 100:7

[says - specify]

Page 25

101:8 108:18 109:3,8 110:9 115:21 116:8 120:24 121:18 122:18 123:18 scan 18:20 school 2:15 100:9 scott 49:2 133:4 screen 17:8 76:3 85:2 106:19 119:21 120:8 scroll 18:5,5 51:11 52:18 62:21 76:5 86:6 89:5 90:24 106:23 115:17 121:16 scrolling 103:5 107:18 108:16 search 39:8,14 39:15,17,18,19 40:7,13 searches 38:12 searching 39:21 seat 49:7 60:9 60:14 133:16 seats 61:3 132:18 second 17:6 18:6 49:15 56:16 65:10,12	65:13 66:24 91:3 96:20 120:18 121:17 section 57:13 58:7 65:10 90:17 see 17:7,12,22 18:7 20:12 52:20 62:11 69:11,11 76:2 82:17 84:25 85:25 88:13 89:18 90:4,10 90:13 109:3 119:25 120:14 120:16 seek 109:16 110:5 seekers 32:19 seen 17:16 18:10 37:15 88:18 89:11 111:12 sense 13:13,19 14:3,9 15:25 19:9 sent 18:3 34:5 sentence 71:13 71:13 72:12 september 1:15 10:10 seriously 73:11 served 36:7 service 113:14	services 73:14 81:16 83:3 87:24 112:4 113:10,13,18 114:5,15 set 50:18 51:18 61:6 sets 42:11 seven 90:15 seventh 108:17 sewer 112:3 113:10,13,18 114:5,14 share 43:10 68:11 105:19 sheet 137:1 shore 57:20 short 61:22 side 57:21 signature 52:11 135:19 136:14 significant 65:18 similarly 101:8 single 89:13 sir 12:5 site 90:20 sites 115:25 sixth 62:25 skills 135:9 136:6 skipped 85:18 smaller 91:7 social 90:19 115:25	socioeconomic 28:16 125:19 125:25 sokoloff 34:19 73:13 80:3 sorry 26:5 37:25 98:25 124:21 sought 108:19 109:9 110:22 111:8 sound 14:17 128:21 sounding 125:7 sounds 61:23 source 115:22 south 57:21 southeast 58:7 southern 57:13 spanish 33:15 116:13 117:5,7 117:9,14 118:2 119:14 128:12 speak 19:23 38:2 70:3 118:22 119:3 125:11 speaking 50:24 speaks 69:24 special 4:14 62:19 75:24 specific 45:14 specify 16:12 16:19,25 19:8

[spend - taken]

Page 26

spend 20:3 84:13	102:15 103:2 121:23,25	48:8 67:17 68:7,19 69:3	sure 17:21,23 17:24 18:11
stamp 120:14	122:12,25	70:20 72:21	22:22 37:11
stand 104:13 104:23	123:14,25 126:19 127:16	75:10 78:4 81:11 82:21	58:16 90:2 106:6
standing 24:23 25:8,15 89:10	stern 34:19 73:13 80:4	92:17 94:4 99:11,21	surname 65:17
start 11:9 13:3	stipulation 11:5	101:19 111:14 112:21 113:22	surrounding 103:21
starting 66:24	stop 132:5	115:7 117:19	surveys 90:18
starts 109:6 114:19	strausz 4:21 88:23	121:7,10 131:20	swear 10:15 12:2
state 1:1 31:17 55:11 65:11	street 2:7,16	submitted 51:9 52:15 55:12	sworn 10:18 12:9 134:21
76:11 116:2 135:21	strike 30:21 53:4 61:20	56:4 81:20	135:5 137:22
stated 94:14	75:16 77:22	subscribed 134:21 137:22	sylvan 58:2
statement 54:11 55:19	87:14 93:12 113:3 120:4	subsequently 80:17	system 30:3 55:16 70:11
78:12 91:11 104:12,22	121:24	substance 50:20 51:2	132:16
states 55:11 85:5 90:16	study 107:20 107:23 108:12	subtle 29:3 126:16,20	t
96:20 111:25	109:4	127:7	t 4:6 11:19
stating 37:19	subject 21:15 22:20 23:12,21	sums 71:2	tabulated 90:18
statistical 65:17	24:11,17,20 25:2,24 26:3	supervisor 11:24 12:16	take 10:4,13 14:11,15 17:13
status 28:16 125:19 126:2	26:22 27:18 28:6,20 29:7	30:3 41:12,14 41:16,23 42:10	18:3 61:22 73:22 79:20
stenographic 11:3	29:19 30:8,21 30:22 31:10,22	42:13 48:14,16 49:24 132:21	85:5 106:4 128:18 132:7
steps 73:22 74:6 75:17	32:10,22 33:9 33:20 34:11,23	132:24 133:5	taken 10:8 79:24 93:23
79:24 93:23 94:9,19 96:5	35:10,11,23 36:13 42:21	support 33:5 supreme 1:1	94:10,20 96:5 96:16 99:15,25
96:15 99:15,25	43:17 45:10		102:15 103:3 121:23,25 122:13,25

[taken - topic]

Page 27

123:14,25	32:2,9,14,21	78:21 98:16	tirado 1:6 2:3
125:22 126:11	33:2,8,13,19,24	99:3 103:16	today 12:21
126:19 127:6	34:10,15,22	104:23,25	14:6,20 15:6
127:16 135:3	35:3,10,15,22	106:22 107:5	15:13 16:11
135:11 136:8	36:3,12,17	115:2 125:6	18:13,16,24
takes 73:11	43:4 68:6	131:4,5 134:6	20:19 21:6
talk 18:13,16	78:19 89:14	134:7,14	23:11,21 24:10
27:7 121:9	97:19,21 121:5	thanks 37:12	26:18 27:4,21
130:9	121:14 130:10	132:2	28:10,23 29:11
talking 13:12	130:20	thereof 35:6	29:19,23 30:8
19:16 71:11	testifying 18:24	51:20	30:12 31:2,10
telephone	135:5	thing 42:12	31:14,22 32:2
115:25	testimony	109:7	32:10,14,22
tell 12:9 13:23	15:13 19:6	things 67:2	33:2,9,20,24
15:7 18:19	43:15 44:7,20	think 24:14,21	34:11,15,23
129:11	45:9,21,23	25:3 26:5,20	35:3,11,15,23
ten 128:24	46:12 47:2,14	42:3 59:23	36:3,13 125:8
term 132:23	48:6 56:3	64:19 66:4	129:10 130:9
133:7,10,13,19	60:25 66:14	67:10 70:2,25	131:17
terms 15:16	67:22 72:5,25	71:9 85:17	today's 15:15
16:3	74:5,21 75:15	89:20 98:12	19:12 134:12
testified 12:11	75:17 77:3	120:14 121:3	took 15:6 74:6
53:15 89:11	78:8 79:11	125:6 131:24	75:18
testify 19:24	91:18 108:10	132:9 134:3	top 62:23 63:4
20:18 21:5,7	117:24 119:12	third 3:6 18:6	76:6 77:10
21:14,22 22:7	text 39:19,24	54:3 55:10	100:6
22:25 23:10,20	40:10,13 51:16	77:12 91:25	topic 20:19
23:25 24:9	51:24 85:25	92:7,8 94:23	21:6,23,25
25:2,16,23,24	86:6	time 1:16 11:6	22:9 23:2,4,12
26:2,17,21,25	thank 11:22,25	19:16 20:3,5	23:21,25 24:3
27:3,17,21	11:25 12:5	27:7 78:12	24:11 25:12
28:5,10,19,23	14:19 19:11	125:5	26:10,18,21
29:6,11,18,23	21:20 22:22	timeframe 99:8	27:3,10,17,21
30:7,12,20,21	27:8 36:20,25	times 100:13	27:23 28:6,10
31:2,9,14,21	38:2 48:20	129:10	28:12,19,23,25

[topic - troutman.com]

Page 28

29:7,11,13,19	20:15 22:4	80:10 81:2,5	132:15,19
29:23,25 30:7	23:4 24:3	81:15,21 82:3	137:2
30:12,14,22	26:11 27:10,23	82:9,25 83:13	town's 19:7
31:2,4,9,14,16	28:12,25 29:13	84:4,6,13,15	22:8 23:11
31:21 32:2,10	29:25 30:4,14	85:8,8,9 87:13	24:10 39:4
32:14,16,21	30:15 31:4,6	87:15,22 88:5	42:15 43:22
33:2,8,13,19,24	31:16,19 32:5	90:14 91:5,21	67:7 73:15
34:10,15 35:3	32:16 33:4,16	93:10,13,15,23	82:17 83:11
35:15,22 36:3	34:2,17 35:5,7	94:9,19 95:20	94:25 95:3
36:12,18 43:16	35:18,19 37:21	96:5,8,15,21,25	106:16 118:17
44:7,21 45:10	40:11 41:9,11	97:22,25 98:23	tracks 90:15
45:14 56:4	41:21,23,24	99:3,6,15,17,25	transcriber
61:2 67:22	42:4,9 44:12	102:6,15 103:2	136:1
69:21 70:6	45:2 46:18	104:10,13,19	transcribing
79:12 120:16	47:3,9,20	105:2,12,14,23	13:6
120:23 121:5	48:12,16,21,25	107:7,25	transcript
121:14,17	49:5,17,24,25	108:12,19,22	10:20 134:12
122:17 123:18	53:8,21,23	109:8,12,15	136:3,4
125:10,14	54:7,17 55:3	110:4,10,14,20	transcriptionist
126:14 127:10	55:13,15 57:3	110:21 111:6,7	135:7
topics 18:8,12	57:7,13 58:7	112:2,18 113:5	translations
19:2 20:10	58:10,13,20	113:9,12,16	33:16
21:14 25:14	59:22 60:3,8	114:5,15	tri 107:20
34:22 121:8	60:10,12,16	116:12,19,23	109:3
131:17	61:6,7,16,16	117:13,25	trial 130:10,21
totally 132:8	65:15 66:6	118:5,22,25	troutman 3:5
towards 125:2	67:4,12 68:23	119:13 121:2	11:20 34:19
125:9	71:6,16 72:13	121:18,23,24	80:18,21 81:3
town 1:9,9,10	73:2,3,10,13,18	122:13,18,25	81:6,16,20
1:14,17,17 3:2	73:22 74:6,11	123:14,19,25	82:18 87:23
3:2,3 4:14,16	74:14,22 75:4	124:13 125:15	troutman's
10:9 11:24	75:6,18 76:6,7	125:22 126:11	82:10 83:2,20
16:11,13,16,17	76:17 77:4,16	126:14,19	troutman.com
16:18,19 18:4	77:17,18,23	127:6,11,16,19	3:8
18:25 19:25	78:24,25 79:5	128:5,11,14	

[true - whites]

Page 29

true 51:20 52:5 135:8 136:4 truth 12:9,10 12:10 15:7 truthful 14:23 try 13:11 14:13 18:20 trying 25:4 turn 21:25 65:9 73:8 88:25 96:18 turning 66:23 100:5 twice 95:2 two 103:12 132:25 type 42:12 typewriting 135:6	106:12 understanding 13:4 64:12 87:5 103:20 understood 14:2 25:7,19 111:19 unemployment 93:11 94:24 95:21 unequal 96:22 united 90:16 uploaded 37:7 37:10 50:8,9 62:11 69:10 84:21 88:14 use 28:3 29:2 40:4 90:9 107:12 123:22 124:3,15 126:15,20 127:7 used 90:20 132:16 uses 10:23 using 15:16 16:3 utilizing 65:16	vacant 60:9 61:3 valid 64:20 66:6 67:13 verbal 13:16 verified 4:18 85:10 veritext 10:4 137:1 version 51:7 versus 37:20 96:22 veterans 32:18 videoconfere... 2:5,12,13,14 3:4 violation 34:4 63:12 77:17,24 violations 80:15 virus 117:10 vote 53:23 76:12 voters 16:6,7 53:21,22 65:21 65:23,24 voting 16:23 17:2 34:5,7 63:13 65:11,19 65:21 66:5,16 75:6,16,19 85:14 86:4,17 vs 10:9	w wait 13:9 walk 22:13 want 17:20 39:5 43:12 61:22 65:9 89:24 104:7 106:4 120:10 129:18 131:2,3 131:7 132:6 wants 130:18 water 112:3 113:9,13,17 114:4,14 way 18:20 54:16 82:17 we've 61:21 111:12 website 33:17 115:25 went 124:17 white 2:8 15:22 15:23 65:24 93:14 95:23 96:7 99:5 101:9 102:6 107:14,25 whites 24:5 26:13 27:12,25 28:14 92:5 95:3 96:23 100:9 122:20 123:3,21 125:17,24
u			
uh 13:18 um 30:16 unconstitutio... 87:6,17 under 10:24 14:20 52:2,2 62:7 65:10 92:8 106:13 understand 10:19 13:21 14:19 15:9,17 16:5,12,17,24 18:23 52:5 59:19 62:6 63:15,20 86:20	v v 1:8 30:15 137:2 vacancy 49:4,9 49:17,20,22 60:17 133:23		

[whiz - yup]

Page 30

whiz 119:24	85:20 86:10,12	131:25 134:7	52:3 57:6
widely 90:20	86:22 87:3,10	135:4	65:11 76:11
witness 10:11	87:20,25 88:3	witnesses'	85:6,14 86:4
10:16,18,19	89:11,15,22	137:3	86:17 135:21
11:24 12:3,8	91:13,16 92:14	women 108:20	137:1
20:21 21:2	92:20 93:3,21	109:10,17	york's 86:9
22:16 24:22	94:2,6,15	110:6	youngsters
25:6,18,20	95:10,14,24	words 13:17	100:11
26:4 38:3,15	96:3,12 97:8	work 13:4 40:5	yup 23:17
38:22 40:21	97:13 99:9,13	40:8 70:11	37:13 84:24
41:3 42:18,24	99:18,22	82:10 83:20	107:4 119:22
44:18 45:4,7	100:18,24	worked 73:12	120:20 131:5
45:23 46:5,9	101:16,17,21	would've 38:11	
46:20,23 47:12	102:8,13,18,23	39:3	
47:23 48:3	103:23 104:7	wrap 128:20	
54:14,19,24	105:6,10,20	written 11:4	
55:21,25 56:13	108:3,8 109:19	x	
57:12 58:16,24	109:25 110:15	x 4:1,6 5:1 6:1	
60:19,23 61:12	110:18,25	7:1 8:1 9:1	
63:23 64:3,10	111:3 112:14	y	
64:17,22 65:2	112:20,23	yeah 22:11,23	
66:8,12,21	113:19,25	23:14 25:11	
67:15,19 68:5	114:6,9 115:4	37:6 63:3 70:2	
68:8,17,21	115:10 116:16	85:17,22 86:5	
69:6,7 70:2,9	117:16,21	90:2 98:17	
70:25 71:23	118:8,13 119:4	119:22 120:21	
72:3,23 74:3	119:9,25	128:16,22	
74:19 75:8,12	121:11 122:4,9	132:4,8	
76:20,24 78:2	123:5,10 124:4	year 83:17	
78:6 79:6,9,22	124:9,21,24	133:23,24	
79:25 81:8,13	126:3,7,22	years 31:7	
81:25 82:4,7	127:2,20,24	york 1:1 3:7	
82:14,20,23	128:17 129:20	10:12,15 16:23	
83:7,9,23 84:2	130:5,6,12	30:15 34:5,7	
84:9,11,16,18	131:12,18,22		

New York Code

Civil Practice Law and Rules

Article 31 Disclosure, Section 3116

(a) Signing. The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination.

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**Exhibit E to Moskowitz Affirmation -
Summons and Verified Complaint, dated March 26, 2024
[pp. A281 - A314]**

FILED: ORANGE COUNTY CLERK 09/26/2024 06:00 PM

NYSCEF DOC. NO. 64

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 09/26/2024

**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.

Date Summons Filed:

Basis for venue is Plaintiffs'
Residence, CPLR 503(a)

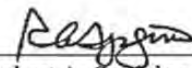
SUMMONS

To the above-named Defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or if the complaint is not served with this summons, to serve a notice of appearance on plaintiffs' attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: White Plains, New York
March 26, 2024

ABRAMS FENSTERMAN, LLP
Attorneys for Plaintiffs


Robert A. Spolzino, Esq.
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White Plains, New York 10601
(914)-607-7010

Defendants' Address:

Town of Newburgh
1496 Route 300
Newburgh, NY 12550
(845) 564-4554

Town of Newburgh Town Board
1496 Route 300
Newburgh, NY 12550
(845) 564-4554

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGEORAL 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.

Date Summons Filed:

VERIFIED COMPLAINT

Plaintiffs Oral Clarke, Romance Reed, Grace Perez, Peter Ramon, Ernest Tirado, and Dorothy Flournoy, by their attorneys, Abrams Fensterman, LLP, as and for their complaint against the defendants, allege as follows:

NATURE OF THE ACTION

1. This is an action to enforce the requirements of the John R. Lewis Voting Rights Act of New York ("NYVRA") in the Town of Newburgh, County of Orange (the "Town").
2. NYVRA was enacted by Chapter 226 of the Laws of 2022. It establishes the policy of the State of New York to (i) encourage participation in the elective franchise by all eligible voters to the maximum extent; and (ii) ensure 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. The NYVRA specifically allows lawsuits challenging municipal at-large elections.
3. The Town's "at-large" voting system violates NYVRA because it has for many years systematically prevented members of the Town's minority Black and Hispanic communities from electing any candidates of their choice to the Newburgh Town Board, thus denying the members of that community their most basic rights. Lacking any representation on the Town Board,

members of the Town's Black and Hispanic communities have been demoted to second class citizens whose concerns are ignored by the Town Board. Among other things, the Town Board has commenced litigation as part of its effort to prevent the housing of migrants in the Town and rejected calls to oppose a power plant whose emissions would disproportionately impact communities of color.

4. NYVRA requires that the Town's at-large voting system be promptly changed to remedy the inequitable treatment of Newburgh's Black and Hispanic communities and ensure that the members of those communities are no longer denied the adequate electoral representation they are guaranteed by law.

THE DEPRIVATION OF VOTING RIGHTS BY THE TOWN OF NEWBURGH

5. The Town was established in 1788.
6. The Town is a political subdivision of the State of New York that has its principal office at 1496 Route 300, Newburgh, Orange County, New York 12550
7. The Town Board is the Town's legislative and policy-making authority.
8. The Town's population has risen dramatically in recent decades. Nearly 32,000 individuals now call Newburgh home.
9. Much of that increase is attributable to a rapidly expanding Black and Hispanic communities which now comprise approximately 25 percent and 15 percent, respectively, of the Town's population.
10. The presence of the Black and Hispanic communities is particularly notable in areas immediately adjoining the City of Newburgh.
11. Despite the Town's significant Black and Hispanic populations, every person ever elected to the Newburgh Town Board, which is the Town's governing body, has, to plaintiffs'

knowledge, been white.

12. Voting in the Town is racially/ethnically polarized: Black and Hispanic voters together and non-Hispanic white voters consistently support different candidates and the candidates supported by non-Hispanic white voters usually prevail in Town elections.

13. It is no coincidence that the Town Board is unanimously white. It is the result of the Town's at-large voting system, under which every member of the Town Board is elected by vote of the entire voting population of the Town, and the presence of racially polarized voting. Black and Hispanic voters are politically cohesive and white voters are politically cohesive, but the Black and Hispanic voters typically prefer candidates other than the candidates preferred by white voters. Because white voters make up a majority of the electorate, racially polarized voting within Newburgh's at-large system invariably denies the Town's Black and Hispanic voters an opportunity to elect candidates of their choice to the Town Board.

14. "Slating" – the selection of candidates by party insiders – also contributes to the lack of electoral success by candidates preferred by Black and Hispanic voters. Upon information and belief, Republican candidates for Town Board are selected by the Town of Newburgh Republican Committee. Its approval is a golden ticket onto the ballot and, in almost all cases, onto the Town Board. Favored candidates are well-known to members of the committee, who have invariably been white. Because of the Town's racial polarization, prospective Black and Hispanic candidates are not able to develop the political connections that appear to be necessary to obtaining the nomination of the Republican party for Town office.

15. There has been no candidate of color for Town Board since 2011 because the at-large election system has created an environment in which the Black and Hispanic communities have lost hope that they will ever have a voice in Town government.

16. Because there is no Black or Hispanic representation on the Town Board, the Town routinely neglects the interests of the Black and Hispanic communities. Most recently, in response to the arrival of sixty asylum seekers from New York City, the Town Board sought an injunction preventing the housing of asylum seekers in the Town. This litigation has cost the Town's taxpayers substantial sums of money and continues to this day. *See Town of Newburgh, New York v. Newburgh EOM LLC, et al.*, Orange County Index No. EF003105-2023.

17. Meanwhile, the arrival of the asylum seekers set off a baseless media fire storm when a local not-for-profit group claimed that the migrants were displacing homeless veterans. It later came to light that these claims were false, and that the local not-for-profit had hired homeless men to pose as displaced veterans. This information came to light, however, only after local elected officials had sent out fundraising appeals for their campaigns attempting to capitalize on the false incident.

18. In addition to overt racial and ethnic hostility, the numerical advantage white voters enjoy under the at-large system forces the Town Board to favor the interests of predominantly white sections of the Town at the expense of communities of color. For example, in 2018 the Danskammer Power Plant attempted to expand its facility in the Town of Newburgh, an expansion that would have potentially emitted nearly two million tons of carbon emissions per year. In 2011, the Danskammer power plant was the third worst polluter in the entire state.¹ Unlike multiple surrounding municipalities, the leaders of the Town of Newburgh supported expansion of the Plant, despite the fact that the area around the power plant is disproportionately Black and Hispanic and that these populations generally suffer high rates of asthma and other similar diseases stemming

¹Adam Besch, RECORDONLINE.COM, *Danskammer Plant in Town of Newburgh is New York State's 3rd worst polluter*, <https://www.recordonline.com/story/business/2011/01/05/danskammer-plant-in-town-newburgh/51324876007/>.

from emissions.² Racial minority groups came out against the plant,³ but the Town's leadership ignored them and continued to support the plant's expansion.⁴ As a result, Black and Hispanic populations were not heard in opposing the power plant expansion.

19. Plaintiffs are members of the Town's Black and Hispanic communities who seek by this action to remedy this situation in which they are unable to elect candidates of their choice and denied an equal opportunity to elect candidates of their choice compared to the white majority because voting in the Town is racially polarized, preventing Black and Hispanic candidates from being elected to the Town Board.

20. At-large voting systems, like the one utilized by the Town, are illegal in one of two circumstances: either "voting patterns of members of the protected class within the political subdivision are racially polarized; or ... 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." N.Y. Elec. Law § 17-206(2)(b)(i).

21. That is exactly the situation in the Town of Newburgh.

22. There are several potential effective remedies for the dilution of Black and Hispanic voting strength that results from the at-large system. The Town Board could draw single-member districts or institute a modified at-large system, such as proportional ranked-choice voting or cumulative voting, in combination with expanding or "unstaggering" the membership of the Town Board.

² Hiroko Tabuchi & Nadja Popovich, THE NEW YORK TIMES, *People of Color Breathe More Hazardous Air. The Sources are Everywhere*, <https://www.nytimes.com/2021/04/28/climate/air-pollution-minorities.html>.

³ Arvind Dilawar, HUDSON VALLEY VIEWFINDER, *Danskammer Threatens Valley's Health and Environmental Justice*, <https://www.scenicudson.org/viewfinder/danskammer-threatens-valleys-health-and-environmental-justice/>.

⁴ Gil Piaquadio, TIMES HERALD-RECORD, *My View: Danskammer Repowering the Clear Option to Meet Energy Needs*, <https://web.archive.org/web/20201023092617/https://www.recordonline.com/opinion/20190616/my-view-danskammer-repowering-clear-option-to-meet-energy-needs>.

23. The Town Board has done nothing to implement any of these remedies.

THE PLAINTIFFS

24. Plaintiff Oral Clarke is a Black citizen and registered voter residing in the Town of Newburgh, New York.

25. Plaintiff Romance Reed is a Black citizen and registered voter residing in the Town of Newburgh, New York.

26. Plaintiff Grace Perez is a Hispanic American citizen and registered voter residing in the Town of Newburgh, New York.

27. Plaintiff Peter Ramon is a Hispanic American citizen and registered voter residing in the Town of Newburgh, New York.

28. Plaintiff Ernest Tirado is a Hispanic American citizen and registered voter residing in the Town of Newburgh, New York.

29. Plaintiff Dorothy Flournoy is a Black citizen and registered voter residing in the Town of Newburgh, New York.

JURISDICTION AND VENUE

30. The Court has jurisdiction over this matter by virtue of Election Law § 17-206(4).

31. Venue is proper in Orange County under Election Law § 17-206(4), CPLR 504(2), because the Town is situated in Orange County, and CPLR 503(a), because the plaintiffs reside in Orange County.

FACTS RELEVANT TO PLAINTIFFS' NYVRA CLAIMS

32. According to the most recent census, the racial composition of the Town's population is approximately 61 percent white, 25 percent Hispanic, and 15 percent black.⁵

⁵ 2020 Census, Town of Newburgh, <https://www.census.gov/quickfacts/fact/table/newburghtownorangedcountynewyork/PST045223>

33. Much of the Black and Hispanic population is concentrated in the southwest and eastern parts of the Town.

34. The map below shows the areas in which racial minorities are concentrated:



Source: <https://davesredistricting.org>

35. The Town has “at-large” elections, which means that every registered voter residing within the Town is eligible to vote for each Town office in every Town election.

36. The Town Board comprises five individuals: the Town Supervisor and four members of the Town Board.

37. The Town Supervisor is the chief elected official of the Town and serves a two-year term. Gil Piaquadio is the current Town Supervisor. Among other duties, the Town Supervisor sits as chairman of the Town Board.

38. The four Town Board members are elected to staggered, four-year terms. Thus, every two years, two seats on the Town Board are on the ballot. Betty Greene, Paul Ruggiero, Scott Manley, and Anthony LoBiondo are the current members of the Town Board.

39. The current members of the Town Board are all white Republicans.

40. The plaintiffs are not aware of any person of color who has ever been elected to the Town Board.

A. The John R. Lewis Voting Rights Act of New York.

41. NYVRA unequivocally declares that it is the public policy of the State of New York 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, and especially to exercise the elective franchise.” Election Law § 17-200.

42. To achieve that policy, the Legislature further provided that “all statutes, rules and regulations, and local laws or ordinances related to the elective franchise shall be construed liberally in favor of (a) protecting the right of voters to have their ballot cast and counted; (b) ensuring that eligible voters are not impaired in registering to vote, and (c) ensuring 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.

43. Under the NYVRA, an “at-large” method of election refers to “a method of electing members to the governing body of a political subdivision: (a) in which all of the voters of the entire political subdivision elect each of the members to the governing body; (b) in which candidates are required to reside within given areas of the political subdivision and all of the voters of the entire political subdivision elect each of the members to the governing body; or (c) that combines at-

large elections with district-based elections, unless the only member of the governing body of a political subdivision elected at-large holds exclusively executive responsibilities.” Election Law § 17-204(1).

44. A “political subdivision” is defined to include “a county, city, town, village, school district, or any other district organized pursuant to state or local law.” Election Law § 17-204(4).

45. The Town is a political subdivision under the NYVRA.

46. Because all voters in the Town elect the Town Supervisor and all four Town Board members, the Town utilizes an at-large method of election as defined in NYVRA.

47. The Town Board has the authority to change the Town’s at-large voting system but has thus far chosen not to do so.

48. Among other protections for voters, the NYVRA prohibits any political subdivision from using any method of election “having the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution.” Election Law § 17-206(2)(a).

49. The Town’s Black residents are a “protected class” because they are “a class of eligible voters who are members of a race, color, or language-minority group.” Election Law § 17-204(5).

50. The Town’s Hispanic residents are a “protected class” because they are “a class of eligible voters who are members of a race, color, or language-minority group.” Election Law § 17-204(5).

51. A political subdivision utilizing an at-large method of election violates the prohibition against vote dilution where “(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.” Election Law § 17-206(2)(b)(i).

52. “Racially polarized voting” is defined as “voting in which there is a divergence in the candidate, political preferences, or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate.” Election Law § 17-204(6).

53. Racially polarized voting “refers only to the existence of a correlation between the race of voters and the selection of certain candidates.” *Thornburg v. Gingles*, 478 U.S. 30, 74 (1986). “[E]vidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class is not required.” Election Law § 17-206(2)(c)(v).

54. Election Law § 17-206(8) states: “Coalition claims permitted. Members of different protected classes may file an action jointly pursuant to this title in the event that they demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate.” Thus, Black and Hispanic voters (who have voting preferences polarized against the rest of the electorate) bring this joint action.

B. NYVRA’s notification requirement.

55. Before commencing an action against a political subdivision under NYVRA, a prospective plaintiff must send a notification letter to the clerk of the political subdivision, asserting that the political subdivision may be in violation of NYVRA. Election Law § 17-206(7).

56. A prospective plaintiff cannot commence an action under NYVRA for at least 50 days after sending the notification letter. Election Law § 17-206(7)(a).

57. During that 50-day period, the governing body of the political subdivision may adopt a resolution affirming: “(i) the political subdivision’s intention to enact and implement a remedy for a potential violation of [the NYVRA]; (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." Election Law § 17-206(7)(b).

58. If the political subdivision timely adopts a resolution in response to a notification letter, the political subdivision has another 90 days to enact and implement a remedy before the prospective plaintiff may commence an action under the NYVRA. *Id.*

C. Plaintiffs' notification letter.

59. On January 26, 2024, counsel for the plaintiffs sent a NYVRA notification letter by certified mail to Lisa Vance-Ayers, Newburgh Town Clerk, at the Town Clerk's Office located at 1496 Route 300, Newburgh, New York 12550. A true and correct copy of the notification letter as well as the return receipt is attached as Exhibit A.

60. On March 15, 2024, within the 50-day period, the Town Board purportedly adopted a resolution providing that the Town Supervisor and the Town's counsel will review and investigate the current at-large election system to "determine whether any potential violation of the NYVRA may exist" without committing the Town Board to any action other than to consider those findings. A true and correct copy of the resolution is attached as Exhibit B.

61. Furthermore, while directing that an evaluation of the at-large system be provided to the Town Board within 30 days, the March 15 resolution contains no "schedule" by which the Town Board must act on such an evaluation, instead giving the Town Board an indefinite deliberation period.

62. The Town took no other action purporting to respond to the NYVRA notification letter within the 50-day period which expired on March 18, 2024.

63. The Town Board's March 15, 2024 resolution is void and of no effect because, upon information and belief, it was not duly adopted at a duly called meeting of the Town Board.

64. The Town Board's March 15, 2024 does not satisfy the requirements of Election

Law § 17-206(7).

65. The Town Board's March 15, 2024 resolution was insufficient to require the plaintiffs to wait an additional 90 days before commencing this action.

THE TOWN'S AT-LARGE ELECTION STRUCTURE VIOLATES NYVRA

A. The Town's voting patterns demonstrate racially polarized voting.

66. The Town's at-large method of electing members of the Town Board violates NYVRA's prohibition against vote dilution because it causes candidates or electoral choices preferred by Black and Hispanic voters to usually be defeated and "voting patterns of members of the protected class within the political subdivision are racially polarized." Election Law § 17-206(2)(b)(i).

67. Racially polarized voting occurs when there is a divergence in the electoral choices of members of a politically cohesive racial or language-minority group from the rest of the electorate.

68. Under the NYVRA, where multiple racial or language-minority groups are both internally politically cohesive and politically cohesive with each other, these groups may be combined for purposes of analyzing whether voting is racially polarized and for determining appropriate remedies.

69. Voting is consistently racially polarized in the Town of Newburgh.

70. Black voters in the Town of Newburgh consistently vote cohesively for the same candidates.

71. Hispanic voters in the Town of Newburgh consistently vote cohesively for the same candidates.

72. Black and Hispanic voters in the Town of Newburgh are also politically cohesive with each other.

73. White voters in the Town of Newburgh consistently vote cohesively for the same candidates, who are not the candidates preferred by Black and Hispanic voters.

74. The preferred candidates of Black and Hispanic candidates are usually defeated by the preferred candidates of a cohesive bloc of white voters.

75. No candidate preferred by Black and Hispanic voters has been elected to Town Office in recent memory.

76. Because Newburgh's Black and Hispanic communities are politically cohesive and because voting is racially polarized, the Town's at-large system violates the NYVRA's protections against racial vote dilution.

B. Under the totality of the circumstances, the Town violates the NYVRA.

77. The Town also violates NYVRA if "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." Election Law § 17-206(2)(b)(i)(B).

78. The totality of the circumstances demonstrates the presence of vote dilution in the Town.

79. Election Law § 17-206(3) sets forth a non-exhaustive list of factors to be considered in determining vote dilution claims but also states that "[n]othing in this subdivision shall preclude any additional factors from being considered, nor shall any specified number of factors be required in establishing that such a violation has occurred." *Id.*, see also *Gingles*, 478 U.S. at 45 ("[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.") (internal quotation marks omitted).

80. When evaluating whether the ability of a minority community to participate in the political process has been impaired, courts must look beyond discrimination within the political

subdivision to consider history, socioeconomic factors, and discrimination not directly attributable to the political subdivision itself. See *Goosby v. Town Bd. of Town of Hempstead*, 180 F.3d 476, 488 (2d Cir. 1999) (considering effect of discriminatory voting laws enacted by Nassau County and New York State on Town elections); *Gomez v. City of Watsonville*, 863 F.2d 1407, 1418 (9th Cir. 1988) (“The district court apparently believed that it was required to consider only the existence and effects of discrimination committed by the City of Watsonville itself. That conclusion is incorrect”) (emphasis in original), *cert. denied* 489 U.S. 1080 (1989).

81. Considering the factors defined in NYVRA, Black and Hispanic voters in the Town are not able to participate equally in the political process.

a. The history of discrimination in the subdivision.

82. There is a long history of discrimination against the Black and Hispanic communities in the Town.

83. Most recently, on May 8, 2023, the Town of Newburgh Town Board voted to launch a lawsuit in an attempt to halt the housing of migrants or asylum seekers at the Crossroads Hotel in the Town of Newburgh.⁶ Though ostensibly based on a zoning dispute specific to the Crossroads Hotel, the Town’s complaint also invokes an unrelated State of Emergency Order issued by the Orange County Executive prohibiting the housing of “asylum seekers” generally.⁷ Ultimately, approximately sixty migrants were housed at the Crossroads Hotel.

84. The two-page executive order refers to migrants not less than nineteen times. Among other things, it states that “there is no reason to believe that these migrants or asylum seekers will leave Orange County,” “there is reasonable apprehension of immediate danger of

⁶ *Town of Newburgh, New York v. Newburgh EGM LLC et al.*, Orange County Index No. EF003105-2023 dkt. 1, Paragraph 24.

⁷ *Id.* paragraph 23.

public emergency of potentially thousands of persons being transported to Orange County,” and that there is “reasonable apprehension of immediate danger thereof that public safety is imperiled thereby, for not only the migrant and asylum seekers, but also to the other affected residents of Orange County.”⁸

85. The Town of Newburgh also declared a State of Emergency in response to the housing of migrants in the Town⁹ and sought an injunction preventing the arrival of migrants in the Town.¹⁰ The litigation is still ongoing and has cost the Town substantial legal fees thus far.

86. After the Town filed its case seeking to prevent migrants from seeking shelter in the Town, sensational news stories emerged claiming that homeless veterans in Newburgh were being displaced to make room for asylum seekers.¹¹ The story quickly went viral, with State Assemblyman Brian Maher actively promoting the story. Local elected officials blasted the evictions. State elected officials introduced a bill in the New York State Legislature to outlaw the evictions. And Congressman Michael Lawler sent out a mass text attempting to raise money based on the allegations that veterans were being displaced by “unvetted migrants.”¹²

87. But the story was a complete fabrication. The alleged veterans were not veterans at all, but were simply homeless men who had been approached at a separate homeless shelter in

⁸ Orange County Government, Office of County Executive Steven M. Neuhaus, News Release dated May 8, 2023, <https://www.townofwoodbury.com/document-center/supervisor-s-office/town-of-woodbury-coronavirus-updates/2447-co-executive-neuhaus-orange-county-newburgh-emergency-order-5-8-2023/file.html>.

⁹ HUDSONVALLEYTIMES.COM, *Asylum Seekers Arrive in Town of Newburgh*, <https://www.timeshudsonvalley.com/stories/asylum-seekers-arrive-in-town-of-newburgh,80253>.

¹⁰ *Town of Newburgh, New York v. Newburgh EOM LLC et al.*, Orange County Index No. EF003105-2023 dkt. 1.

¹¹ Barnadette Hogan & Kate Sheehy, NEW YORK POST, *Homeless Vets are Being Booted from NY Hotels to Make Room for Migrants: Advocates*, <https://nypost.com/2023/05/12/homeless-vets-are-being-booted-from-ny-hotels-to-make-room-for-migrants-advocates/>.

¹² Chris McKenna, LOHUD, *Assemblyman Recants Tale that Newburgh Hotel Evicted Homeless Vets to Board Asylum Seekers*, <https://www.lohud.com/story/news/2023/05/18/crossroads-hotel-newburgh-ny-evicted-veterans-for-asylum-seekers-questioned/70230243007/>.

Poughkeepsie, in Dutchess County, and paid \$100 and a bag of toiletries each to pose as veterans displaced by migrants.¹³

88. Despite this stunning admission that local elected officials had touted a completely fabricated story used to inflame passions against migrants, the Town made no statement of contrition or apology. The Town instead continued to press its litigation to attempt to oust the migrants from the Town, an effort that continues to this day.

89. The decision to spend taxpayers' money in an active attempt to displace a mere sixty asylum seekers from the Town is an example of discrimination perpetrated by the Town government.

90. Black and Hispanic voters were also disenfranchised in the Town's decision not to oppose a \$500 million expansion of the Danskammer Power Plant. The Danskammer Power Plant is in the Town of Newburgh. The area around the Plant has a higher proportion of racial minorities than the region as a whole. The Danskammer Plant historically has been one of the state's top polluters. In 2000, the Plant was one of the state's top ten air polluters,¹⁴ in 2005 the plant was ranked one of the state's top releasers of mercury.¹⁵ And in 2009 the plant was ranked the third worst polluter in the entire state.¹⁶

91. In 2019, the owners of the Danskammer Power Plant filed an application to construct and operate an expanded natural gas fired power plant on the site. The proposal would

¹³ Corey Kilgannon, THE NEW YORK TIMES, *Ugly Tale of Migrants Displacing Veterans Makes Waves and Then Dissolves*, <https://www.nytimes.com/2023/05/20/nyregion/migrants-veterans-ny.html>.

¹⁴ Wayne A. Hall, TIMES HERALD-RECORD, *Newburgh Plant One of N.Y.'s Top 10 Polluters*, <https://www.recordonline.com/story/news/2002/07/11/newburgh-plant-one-n-y/51179462007/>.

¹⁵ John Ferro, POUGHKEEPSIE JOURNAL, *Danskammer: An Old Plant Breeds New Controversies*, <https://www.poughkeepsiejournal.com/story/tech/science/environment/2014/11/22/danskammer-riverkeeper-hudon-environment/19419773/>.

¹⁶ Bosch, *supra* note 1, <https://www.recordonline.com/story/business/2011/01/05/danskammer-plant-in-town-newburgh/51324876007/>.

have increased the emissions of harmful chemicals by over twenty-five times.¹⁷ Black and Hispanic groups quickly opposed the expansion, arguing that increased emissions would adversely impact disproportionately minority communities around the plant.¹⁸ Historically, Black and Hispanic populations on a national level suffer higher rates of asthma and other respiratory diseases due to higher levels of exposure to environmental pollutants.¹⁹ In the region, Newburgh City residents already currently visit the emergency room at higher rates for asthma than the statewide average.²⁰

92. However, despite this opposition from Black and Hispanic representatives, the Town openly supported the expansion of the Danskammer Power Plant. In June 2019, Newburgh Town Supervisor Gil Piaquadio authored an opinion piece in the Times Herald-Record supporting the expansion of the plant.²¹ The piece has only one line concerning emissions concerns and says nothing about the Black or Hispanic communities either in the Town or the surrounding communities, demonstrating an indifference to the groups that would bear the environmental and health costs from the expansion of the power plant.

93. Meanwhile, over twenty communities in the area around the plant opposed its expansion including the Cities of Newburgh and Poughkeepsie.²²

¹⁷ SCENICHUDSON.ORG, *What's Wrong with Danskammer in 9 Simple Words*, <https://www.scenichudson.org/news/whats-wrong-with-danskammer-in-9-simple-words/>.

¹⁸ Dilawar, *supra* note 3, <https://www.scenichudson.org/viewfinder/danskammer-threatens-valleys-health-and-environmental-justice/>.

¹⁹ Lara Morales, THE NEW PALTZ VOICE, *Hudson Valley Pushing Back Against a New Power Plants*, <https://www.newpaltzvoice.com/blog/laras-capstone>.

²⁰ SCENICHUDSON.ORG, *supra* note 17, <https://www.scenichudson.org/news/whats-wrong-with-danskammer-in-9-simple-words/>.

²¹ Gil Piaquadio, TIMES HERALD-RECORD, *My View: Danskammer Repowering the Clear Option to Meet Energy Needs*, <https://web.archive.org/web/20201023092617/https://www.recordonline.com/opinion/20190616/my-view-danskammer-repowering-clear-option-to-meet-energy-needs>.

²² MID HUDSON NEWS, *Communities Oppose Danskammer Fracked Gas Plant*, <https://midhudsonnews.com/2020/06/29/communities-oppose-danskammer-fracked-gas-plant/>.

94. The New York State Department of Environmental Conservation ultimately rejected the power plant expansion because of, among other things, the high emissions that would result from the plant.²³

95. In sum, the Town's decision to publicly support expansion of the power plant even though expansion would disproportionately impact communities of color is an example of the Town's failure to address the needs of its minority residents.

b. The extent to which members of the protected class have been elected to office in the political subdivision.

96. No Black or Hispanic person has ever been elected to Town office.

97. The absence of Black or Hispanic candidates seeking election to Town office is further evidence of vote dilution. *See Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1209 n.9 (5th Cir. 1989) ("While the district court seems to reject the argument that black candidates 'don't run because they can't win' as a basis for considering evidence drawn from nonaldermanic elections, it is precisely this concern that underpins the refusal of this court and of the Supreme Court to preclude vote dilution claims where few or no black candidates have sought offices in the challenged electoral system. To hold otherwise would allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress has sought to remove"). "The Court will begin its totality of the circumstances consideration with the two Senate factors identified by the Supreme Court as most important: (1) the "extent to which minority group members have been elected to public office in the jurisdiction" and (2) the "extent to which voting in the elections of the state or political subdivision is racially polarized." *Gingles*, 478 U.S. at 48 n. 15, 106 S.Ct. 2752 (citing Senate Report at 28-29, U.S.C.A.N.1982, p. 206). If those factors

²³ Chris McKenna, RECORDONLINE.ORG, *DEC Rejects Key Permit for Proposed Danskammer Power Plant in Newburgh*, <https://www.recordonline.com/story/news/local/2021/10/27/dec-rejects-crucial-permit-new-danskammer-power-plant-newburgh/8566737002/>.

are present, the other factors “are supportive of, but not essential to, a minority voter’s claim.”

United States v. Charleston Cnty., 316 F. Supp. 2d 268, 277 (D.S.C. 2003), *aff’d sub nom. United States v. Charleston Cnty., S.C.*, 365 F.3d 341 (4th Cir. 2004)

- c. The use of any voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy that may enhance the dilutive effects of the election scheme.*

98. The at-large method of election utilized by the Town ensures that the votes of the Black and Hispanic communities are diluted by those of the white majority.

99. This system prevents members of the Black and Hispanic communities in areas where they are more heavily concentrated from pooling their voting power to elect a candidate.

- d. Denying eligible voters or candidates who are members of the protected class to processes determining which groups of candidates receive access to the ballot, financial support, or other support in a given election.*

100. Republican and Democratic candidates for the Town Board are nominated by, respectively, the Newburgh Republican Committee and the Newburgh Democratic Committee.

101. Typically, the party approaches potential candidates for office or interested residents approach a member of a local party.

102. Black and Hispanic residents, many of whom are relative newcomers to the Town, do not have the institutional and political ties which many of the white residents enjoy, especially in the Newburgh Republican Committee.

103. Without those connections, potential Black and Hispanic candidates for public office are not even considered by the local parties for nomination.

104. The sentiment that it is not possible for a Black or Hispanic candidate even to be nominated for public office in the Town suppresses participation in government at the Town level, further decreasing the likelihood that Black or Hispanic residents will be considered for nomination in the future.

e. The extent to which members of the protected class contribute to political campaigns at lower rates.

105. The substantial barriers already identified prevent Black and Hispanic residents from fully participating in the Town's political process.

106. Upon information and belief, Black and Hispanic residents contribute to Town political campaigns at lower rates than their White counterparts.

f. The extent to which members of a protected class in the state or political subdivision vote at lower rates than other members of the electorate.

107. Upon information and belief, due to the substantial barriers already identified and the sense of futility caused by the at-large system, the Town's Black and Hispanic population votes at a substantially lower rate than the white population.

g. The extent to which members of the protected class are disadvantaged in areas including but not limited to education, employment, health, criminal justice, housing, land use, or environmental protection.

108. Across a wide array of socioeconomic factors, the Town's Black and Hispanic residents are worse-off than their white counterparts.

109. Upon information and belief, Black and Hispanic residents are more likely to work in the service industry or in other blue-collar occupations than white residents of the Town.

110. Black and Hispanic residents of Newburgh have lower educational outcomes than their white counterparts.²⁴

111. Similarly, Hispanic residents are more likely to have received food stamps than their white counterparts.²⁵

112. Black and Hispanic residents were particularly disadvantaged by the Town Board's

²⁴ ACS Educational Attainment, UNITED STATES CENSUS BUREAU (2021).

²⁵ ACS Receipt of Food Stamps/SNAP in the Past 12 Months by Race of Household, UNITED STATES CENSUS BUREAU.

support of expanding the Danskammer Power Plant, despite concerns raised by the Black and Hispanic communities that this would have a deleterious environmental impact particularly on minority groups which are highly concentrated near the plant.

h. The extent to which members of the protected class are disadvantaged in other areas which may hinder their ability to participate effectively in the political process.

113. Black and Hispanic residents are disadvantaged compared to white residents in areas affecting their ability to participate in the elective franchise.

114. Because of their disadvantaged economic status, Black and Hispanic residents are often not able to take time off work to vote.

115. In addition, information concerning political and other events in the Town is disseminated primarily through the Town's website, with which many Hispanic residents are unfamiliar.

116. Notices posted on the Town's website or sent via email are exclusively in English, and not in Spanish.

117. Upon information and belief, there are no Spanish speaking Town employees who work in Town Hall even though 25 percent of the Town's population is Hispanic.

118. For all of these reasons, Black and Hispanic voters, on average, receive less information concerning the issues at stake in Town elections and the candidates on the ballot than white voters.

i. The use of overt or subtle racial appeals in political campaigns.

119. Racial appeals are extremely common in the region's political campaigns.

120. As discussed, in response to the ultimately false reports that homeless veterans had been displaced by migrants in the Town of Newburgh, Congressman Michael Lawler sent

fundraising appeals attempting to exploit the incorrect claims.²⁶

121. Similarly, as recently as March 2024, in the nearby Village of Montgomery, the village board declared itself an “un-sanctuary community” with regards to migrants.²⁷ The village board took this action mere days before the village elections, at the behest of a board member who was also a candidate for mayor. The candidate said the resolution was necessary so residents would not “wake up in the morning and find out that our senior center or our teen center or our elementary school is filled with migrants.”

j. A significant lack of responsiveness on the part of elected officials to the particularized needs of members of the protected class.

122. The Town Board has shown little regard for the particularized concerns of the Black or Hispanic communities.

123. Upon information and belief, the Town routinely ignores concerns raised by Hispanic residents that the Town does not employ enough Spanish-speaking employees.

124. Upon information and belief, the Town has no Spanish speaking staff working in Town Hall even though 25 percent of the Town’s population is Hispanic.

125. Upon information and belief, Black and Hispanic residents make up a smaller portion of the Town’s boards and committees than their share of the Town population.

126. As discussed, Black and Hispanic groups openly opposed the Danskammer Power Plant expansion in part because of the expansion’s disproportionate impact on their communities, but despite this Town Board supported the expansion.

127. Similarly, as discussed, the Town has incurred substantial litigation expenses

²⁶ McKenna, *supra* note 12, <https://www.lohud.com/story/news/2023/05/18/crossroads-hotel-newburgh-ny-evicted-veterans-for-asylum-seekers-questioned/70230243007/>.

²⁷ Blaise Gomez, NEWS12, *Montgomery Mayoral Candidates at Odds Over ‘Un-sanctuary’ Resolution*, <https://westchesternews12.com/montgomery-mayoral-candidates-at-odds-over-un-sanctuary-resolution>.

attempting to block the housing of migrants in the Town.

k. Whether the political subdivision has a compelling policy justification that is substantiated and supported by evidence for adopting or maintaining the method of election or the voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy.

128. NYVRA requires that any burden on the right to vote be “narrowly tailored” and supported by a “compelling policy justification that must be supported by substantial evidence.” Election Law §17-202.

129. Upon information and belief, there is no compelling policy justification for maintaining the Town’s current at-large method of election.

130. Instead, it appears that the Town Board and its supporters cling to the current system because it preserves their stranglehold over Town government.

C. Remedies.

131. NYVRA requires that where the court finds that a political subdivision has engaged in vote dilution under the NYVRA, the court “shall 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).

132. These remedies may include, but are not limited to: “(i) a district-based method of election; (ii) an alternative method of election” Election Law § 17-206(5)(a).

133. Here, a district-based method of election or alternative method of election would best serve to correct the ongoing vote dilution in the Town.

134. A single-member districting plan would curtail the ongoing disenfranchisement of Black and Hispanic voters. It is possible to draw a map that adheres to traditional districting principles and includes a compact, single-member district (or districts). That district (or districts) would provide the Town’s Black and Hispanic voters the opportunity to elect a candidate of their

choice or influence the outcome of elections.

135. Cumulative or ranked choice voting would also remedy the violation and allow the members of the Black and Hispanic populations to elect a candidate of their choice.

D. The urgency of these proceedings and the need for expedited judicial review.

136. NYVRA specifically provides for expedited judicial proceedings: “Because of the frequency of elections, the severe consequences and irreparable harm of holding elections under unlawful conditions, and the expenditure to defend potentially unlawful conditions that benefit incumbent officials, actions brought pursuant to this title shall be subject to expedited pretrial and trial proceedings and receive an automatic calendar preference.” Election Law § 17-216.

137. The plaintiffs’ claim of vote dilution, which is brought subject to Election Law § 17-206(2), is accordingly entitled to expedited pretrial and trial proceedings as well as an automatic calendar preference.

138. Without expedited review, the plaintiffs, together with all Black and Hispanic voters in the Town, face the threat of irreparable harm.

139. The next scheduled election in the Town will take place in November 2025.

140. Under the existing system, the nomination process for candidates for Town office in November 2025 will begin in or around February 2025.

141. If the plaintiffs prevail in this action, the Court may order the Town to implement a districting plan.

142. Any districting plan would need to be implemented before the nomination process begins.

143. This action, including any appeals, must be decided with sufficient time to allow any court-ordered remedies to be implemented before February 2025.

144. If this action is not given expedited review, the 2025 election will continue to be tainted by the same NYVRA violations that are the subject of this action.

AS AND FOR PLAINTIFFS' FIRST CAUSE OF ACTION

Vote dilution in violation Election Law § 17-206(2) by reason of racially polarized voting

145. Plaintiffs repeat and reallege each and every allegation contained in the paragraphs above as if fully set forth here.

146. Election Law § 17-206(2)(a) prohibits every political subdivision from using 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 as a result of vote dilution.

147. Election Law § 17-206(2)(b)(i)(A) provides that a violation of Election Law § 17-206(2)(a) by a political subdivision which utilizes an at-large method of election is established by evidence demonstrating that "voting patterns of members of the protected class within the political subdivision are racially polarized."

148. The Town utilizes an at-large method of electing members of the Town Board.

149. Black and Hispanic voters residing within the Town, including Plaintiffs, are members of a protected class within the meaning of Election Law § 17-206(2)(a).

150. Election Law § 17-207(8) states: "Coalition claims permitted. Members of different protected classes may file an action jointly pursuant to this title in the event that they demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate."

151. The facts as set forth in this complaint establish the existence of racially polarized voting in that Black and Hispanic voters consistently support certain candidates different from the candidates supported by non-Hispanic white voters. Thus, Black and Hispanic voting preferences are polarized against the rest of the electorate.

152. Candidates or electoral choices preferred by members of the Black and Hispanic communities in the Town would usually be defeated as a result of racially polarized voting in the Town.

153. Pursuant to Election Law § 17-206(2)(b)(i), the Town's at-large method of electing Town Board members, combined with the presence of racially polarized voting in the Town, establishes vote dilution that is prohibited by NYVRA.

154. Plaintiffs are entitled to the relief provided for in Election Law §§ 17-206(5) and 17-218 for the Town's violation of NYVRA.

155. There are alternative methods of election which would enfranchise the Black and Hispanic communities in the Town.

AS AND FOR PLAINTIFFS' SECOND CAUSE OF ACTION

**Vote dilution in violation of Election Law § 17-206(2)
under the totality of the circumstances**

156. Plaintiffs repeat and reallege each and every allegation contained in the paragraphs above as if fully set forth here.

157. Election Law § 17-206(2)(b)(i)(B) provides that a violation of Election Law § 17-206(2)(a) by a political subdivision which utilizes an at-large method of election is established by evidence that "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." Election Law § 17-206(2)(b)(i)(B).

158. The Town utilizes an at-large method of electing members of the Town Board.

159. The facts as set forth in this complaint establish that the Town's at-large system of election for members of the Town Board violates NYVRA because, under the totality of the circumstances, that system impairs the ability of Black and Hispanic voters residing within the

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NYSCEF DOC. NO. 64

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 09/26/2024

Town to elect candidates of their choice or influence the outcome of elections.

160. Plaintiffs are entitled to the relief provided for in Election Law §§ 17-206(5) and 17-218 for the Town's violation of NYVRA.

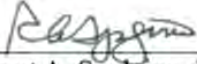
PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs respectfully request judgment:

- (a) declaring that the use of an at-large system to elect members of the Newburgh Town Board violates Election Law § 17-206;
- (b) ordering the implementation for the 2025 Town election of a new method of election for the Newburgh Town Board as authorized by Election Law § 17-206(5)(a) that includes either a districting plan or an alternative method of election for the 2025 Town election that remedies the Town's violation of NYVRA;
- (c) awarding Plaintiffs' the reasonable attorneys' fees and litigation expenses incurred in asserting the claims in this complaint, including, but not limited to, expert witness fees and expenses pursuant to Election Law § 17-218;
- (d) retaining jurisdiction to render any and all further orders that this Court may deem appropriate; and
- (e) granting such other and further relief that the Court deems just and appropriate.

ABRAMS FENSTERMAN, LLP
Attorneys for Plaintiffs

By: _____


Robert A. Spolzano, Esq.
Jeffrey A. Cohen, Esq.
David T. Imamura, Esq.
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Dated: White Plains, New York
March 26, 2024

FILED: ORANGE COUNTY CLERK 09/26/2024 06:00 PM

NYSCEF DOC. NO. 64

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 09/26/2024

VERIFICATION

State of New York)
) ss.:
County of Orange)

ORAL CLARKE, hereby affirms the following to be true under penalty of perjury,
pursuant to CPLR 2106:

I am one of the plaintiffs in this action. I have read the foregoing complaint and know its contents, and same is true to my knowledge, except for matters stated to be upon information and belief, which matters I believe to be true.

I affirm this 22nd day of March, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.



ORAL CLARKE

VERIFICATION

State of New York)
) ss.:
County of Orange)

ROMANCE REED, hereby affirms the following to be true under penalty of perjury, pursuant to CPLR 2106:

I am one of the plaintiffs in this action. I have read the foregoing complaint and know its contents, and same is true to my knowledge, except for matters stated to be upon information and belief, which matters I believe to be true.

I affirm this 24 day of March, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

 3/24/24
ROMANCE REED



VERIFICATION

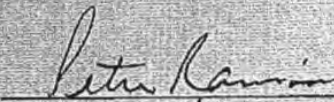
M

State of New York)
) cc:
 County of Orange)

PETER RAMÓN, hereby affirms the following to be true under penalty of perjury,
 pursuant to CPLR 2106. M

I am one of the plaintiffs in this action. I have read the foregoing complaint and know its contents, and same is true to my knowledge, except for matters stated to be upon information and belief, which matters I believe to be true. 6 1/2

I affirm this 26 day of March, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.


 PETER RAMÓN

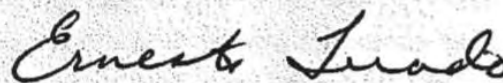
VERIFICATION

State of New York)
) cc.:
County of Orange)

ERNEST TIRADO, hereby affirms the following to be true under penalty of perjury, pursuant to CPLR 2106:

I am one of the plaintiffs in this action. I have read the foregoing complaint and know its contents, and same is true to my knowledge, except for matters stated to be upon information and belief, which matters I believe to be true.

I affirm this 23 day of March, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.



ERNEST TIRADO

VERIFICATION

State of New York)
) co.,
County of Orange)

DOROTHY FLOURNOY, hereby affirms the following to be true under penalty of perjury, pursuant to CPLR 2106:

I am one of the plaintiffs in this action. I have read the foregoing complaint and know its contents, and same is true to my knowledge, except for matters stated to be upon information and belief, which matters I believe to be true.

I affirm this 24 day of March, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Dorothy J. Flournoy
DOROTHY FLOURNOY

**Exhibit J to Moskowitz Affirmation -
Memorandum of Law by Plaintiffs in Support of Motion
for Summary Judgment, dated August 13, 2024
[pp. A315 - A353]**

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NYSCEF DOC. NO. 60

RECEIVED NYSCEF: 08/23/2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SERGIO SERRATTO, ANTHONY AGUIRRE, IDA
MICHAEL, and KATHLEEN SIGUENZA,

Plaintiffs,

Index No. 55442/2024

– against –

TOWN OF MOUNT PLEASANT and TOWN
BOARD OF THE TOWN OF MOUNT PLEASANT,

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
THEIR MOTION FOR SUMMARY JUDGMENT**

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Attorneys for Plaintiffs

Table of Contents

Table of Contents	I
Table of Authorities	III
Preliminary Statement.....	1
Summary of Argument	1
Factual Summary	4
A. The Parties	4
B. The Hispanic community in Mount Pleasant	5
C. The dilutive effects of at-large elections on Hispanic electoral power in Mount Pleasant.....	8
Procedural History	11
Legal Standard	11
Argument	12
I. Plaintiffs have established that Mount Pleasant’s at-large election system violates the NYVRA by diluting their electoral influence relative to reasonable alternative systems. 13	
A. The elements of a vote dilution claim based on racially polarized voting under Election Law § 17-206(2)(b)(i)(A).....	13
B. Plaintiffs have established unlawful vote dilution based on racially polarized voting.....	15
C. Plaintiffs have established that the ability of Hispanic voters to elect candidates of their choice in Mount Pleasant is impaired under the totality of the circumstances.	18
1. There is a history of discrimination against Hispanic voters in Mount Pleasant, Westchester County, and New York.	20
2. No Hispanic candidates have been elected to the Town Board or other Town office.....	22
3. Other features compound the dilutive effects of Mount Pleasant’s at-large election system.	22
4. Hispanic voters and candidates lack access to the processes of determining who appears on the ballot in Town elections.	22

5. Hispanic voters contribute to political campaigns at lower rates than white voters.	23
6. Hispanic voters vote at lower rates than other members of the electorate.	24
7. Hispanic residents are significantly disadvantaged across numerous socioeconomic indicators as compared to white residents.	24
8. Hispanic voters are disadvantaged in other areas which hinder their ability to participate in the political process.	25
9. Candidates and elected officials have deployed racial appeals reliant on anti-Hispanic stereotypes.	26
10. Elected officials in Mount Pleasant, including members of the Town Board, are unresponsive to the needs of Hispanic voters.	27
11. The Town has no compelling justification for maintaining at-large elections. ...	29
II. The NYVRA is a lawful exercise of the legislature’s authority to protect the voting rights of all New York citizens.	29
A. Defendants lack capacity and standing to argue that the NYVRA is unconstitutional.	29
B. The NYVRA is consistent with the federal constitution.	30
C. The Federal VRA does not preempt the NYVRA.	32
Conclusion	32

TABLE OF AUTHORITIES

Cases

<i>Allen v. Milligan</i> , 599 U.S. 1 (2023).....	14, 19, 31
<i>Alpha Phi Alpha Fraternity Inc. v. Raffensperger</i> , 587 F. Supp. 3d 1222 (N.D. Ga. 2022).....	17
<i>Alvarez v. Prospect Hosp.</i> , 68 N.Y.2d 320 (1986)	3, 11, 12
<i>Bone Shirt v. Hazeltine</i> , 336 F. Supp. 2d 976 (D.S.D. 2004)	17
<i>City of Mobile v. Bolden</i> , 446 U.S. 55 (1980).....	12
<i>City of New Rochelle v. Town of Mamaroneck</i> , 111 F. Supp. 2d 353, 364 (S.D.N.Y. 2000).....	30
<i>City of New York v. Richardson</i> , 473 F.2d 923, 929 (2d Cir. 1973).....	30
<i>City of New York v. State of New York</i> , 86 N.Y.2d 286, 291 (1995)	30
<i>City of Newark v. State of New Jersey</i> , 262 U.S. 192, 196 (1923)	30
<i>Cnty. of Chautauqua v. Shah</i> , 126 A.D.3d 1317, 1321 (4th Dep't 2015), <i>aff'd sub nom. Cnty. of Chemung v. Shah</i> , 28 N.Y.3d 244 (2016)	30
<i>Fink v. Lefkowitz</i> , 47 N.Y.2d 567 (1979).....	19
<i>Friedman v. Cuomo</i> , 39 N.Y.2d 81 (1976)	2
<i>Gade v. Nat'l Solid Wastes Mgmt. Ass'n</i> , 505 U.S. 88 (1992)	32
<i>Gomez v. City of Watsonville</i> , 863 F.2d 1407 (9th Cir. 1988).....	21
<i>Goosby v. Town Bd. of the Town of Hempstead</i> , 180 F.3d 476 (2d Cir. 1999)	21, 28
<i>Grove v. Emison</i> , 507 U.S. 25 (1993)	14
<i>Higginson v. Becerra</i> , 786 F. App'x 705 (9th Cir. 2019), <i>cert. denied</i> , 140 S. Ct. 2807 (2020) ...	3
<i>Holder v. Hall</i> , 512 U.S. 874 (1994).....	15
<i>Luna v. Cnty. of Kern</i> , 291 F. Supp. 3d 1088 (E.D. Cal. 2018).....	32
<i>Matter of Jeter v. Ellenville Cent. Sch. Dist.</i> , 41 N.Y.2d 283, 287 (1977)	30
<i>McCutcheon v. Fed. Election Comm'n</i> , 572 U.S. 185 (2014)	23
<i>McDaniels v. Mehfoud</i> , 702 F. Supp. 588 (E.D. Va. 1988).....	28
<i>Mississippi State Conf. of Nat'l Ass'n for Advancement of Colored People v. State Bd. of Election Commissioners</i> , 2024 WL 3275965 (S.D. Miss. July 2, 2024).....	17
<i>Nat'l Ass'n for Advancement of Colored People, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.</i> , 462 F. Supp. 3d 368 (S.D.N.Y. 2020), <i>aff'd sub nom. Clerveaux v. E. Ramapo Cent. Sch. Dist.</i> , 984 F.3d 213 (2d Cir. 2021).....	17, 25, 28
<i>Parents Involved in Community Schools v. Seattle School District No. 1</i> , 551 U.S. 701 (2007) .	30
<i>People v. Huggins</i> , 144 Misc.2d 49 (Sup. Ct. 1989)	15
<i>Pico Neighborhood Assn. v. City of Santa Monica</i> , 15 Cal. 5th 292 (2023)	15
<i>Pope v. Cnty. of Albany</i> , 94 F. Supp. 3d 302 (N.D.N.Y. 2015).....	23
<i>Sanchez v. City of Modesto</i> , 51 Cal. Rptr. 3d 821 (Cal. Ct. App. 2006).....	30
<i>Shaw v. Reno</i> , 509 U.S. 630 (1993)	32
<i>Soto Palmer v. Hobbs</i> , 686 F. Supp. 3d 1213 (W.D. Wash. 2023), <i>cert. denied before judgment sub nom. Trevino v. Palmer</i> , 144 S. Ct. 873 (2024)	27

<i>Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.</i> , 576 U.S. 519 (2015)	31
<i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986)	passim
<i>United States v. City of Euclid</i> , 580 F. Supp. 2d 584 (N.D. Ohio 2008)	17, 26
<i>United States v. Euclid City Sch. Bd.</i> , 632 F. Supp. 2d 740 (N.D. Ohio 2009)	18
<i>United States v. Vill. of Port Chester</i> , 704 F. Supp. 2d 411 (S.D.N.Y. 2010)	18, 22, 23
<i>Williams v. Mayor & City Council of Baltimore</i> , 289 U.S. 36, 40 (1933)	30
<i>Wright v. Sumter Cnty. Bd. of Elections & Registration</i> , 979 F.3d 1282 (11th Cir. 2020)	19
Statutes	
Election Law § 17-200	2, 31
Election Law § 17-204	8, 13
Election Law § 17-206	passim
Rules	
CPLR 3212(b)	11

PRELIMINARY STATEMENT

Plaintiffs Sergio Serratto, Anthony Aguirre, Ida Michael, and Kathleen Siguenza (collectively “Plaintiffs”) submit this memorandum of law in support of their motion for summary judgment granting Plaintiffs’ second and third causes of action, which allege that defendants the Town of Mount Pleasant (“the Town” or “Mount Pleasant”) and the Town Board of the Town of Mount Pleasant (“the Town Board”) (collectively “defendants”) unlawfully diluted the voting power of Hispanic voters in violation of the New York John R. Lewis Voting Rights Act (“NYVRA”), Election Law § 17-206(2)(i), and dismissing Defendants’ affirmative defenses.

SUMMARY OF ARGUMENT

Plaintiffs are Hispanic residents of, and registered voters in, Mount Pleasant. Despite comprising a substantial and growing portion of the Town’s population, Hispanics have been deprived of their right to participate in Town elections on equal terms with non-Hispanic white voters. Both Hispanic and white voters in Mount Pleasant exhibit a striking degree of political cohesion, but the candidates preferred by white voters virtually always prevail in the Town’s at-large elections. The Town has made no effort to engage Hispanic residents in its political processes and is largely unresponsive to their needs. No Hispanic resident has served on the Town Board or held Town-wide elected office. Candidates and elected officials have trafficked in racist stereotypes about immigrants that inflame anti-Hispanic sentiment. Due to historical and ongoing discrimination against the Hispanic community, there are substantial disparities between Hispanic and white residents across numerous socioeconomic indicators, including education, employment, and wealth, and in their respective levels of participation in electoral politics.

Plaintiffs, like all citizens residing in New York, possess a fundamental right to vote guaranteed by the federal and state constitutions. *See Friedman v. Cuomo*, 39 N.Y.2d 81, 85

(1976). But the protections afforded under each constitution are not coextensive. As the Legislature has recognized, the State constitution’s protections for the right to vote “substantially exceed the [U.S. constitution’s] protections.” Election Law § 17-200. Drawing on these more expansive state constitutional protections, and reflecting the foundational importance of the right to vote in New York, the legislature enacted the NYVRA to:

1. Encourage participation in the elective franchise by all eligible voters to the maximum extent; and
2. Ensure 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.

Id. The NYVRA achieves these dual purposes by prohibiting practices which deprive voters of an equal opportunity to participate in state political processes including, as relevant here, a prohibition on vote dilution, which the NYVRA defines as “any method of election[] having 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 plaintiff establishes vote dilution, and thus a violation of Election Law § 17-206(2), by meeting one of the two tests set forth in Election Law § 17-206(2)(b). As detailed below, the undisputed evidence demonstrates that the Town has unlawfully diluted the vote of Hispanic voters in Mount Pleasant. First, the undisputed evidence—including, remarkably, reports prepared by the Town’s own, retained experts—conclusively establishes that “voting patterns of members of the protected class within the political subdivision are racially polarized,” and that the Town’s at-large system diminishes Hispanic voters’ ability to elect their preferred candidates relative to alternative systems permitted under the NYVRA (such as a district-based system that comports with traditional districting principles, proportional ranked choice voting, cumulative voting, and limited voting). *Id.* at § 17-206(2)(b)(i)(A). Second, the undisputed evidence establishes that “under the

totality of the circumstances, the ability of members of [the Hispanic community] to elect candidates of their choice or influence the outcome of elections is impaired.” *Id.* at § 17-206(2)(b)(i)(B) .

Defendants’ affirmative defenses, which include vague and scattershot challenges to the NYVRA’s constitutionality, are procedurally improper and substantively meritless. Defendants, a subdivision of the State and its governing board, lack capacity to challenge the NYVRA’s constitutionality. Even if they could, their constitutional challenge would be unsuccessful. The NYVRA is not an impermissible racial classification because it does not assign benefits or penalties to individuals based on their race. Laws like the NYVRA which account for race for the purpose of eliminating racial discrimination do not violate equal protection principles. The NYVRA does not require, and Plaintiffs have not proposed, any remedy that would constitute an impermissible racial gerrymander. Defendants’ constitutional defenses thus fail for the same reasons that constitutional challenges to other state voting rights acts have uniformly failed. *See, e.g., Portugal v. Franklin Cnty.*, 530 P.3d 994, 1011 (Wash. 2023), *cert. denied sub nom. Gimenez v. Franklin Cnty., Washington*, 144 S. Ct. 1343 (2024); *Higginson v. Becerra*, 786 F. App’x 705, 707 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2807 (2020).

Plaintiffs have met their burden of “mak[ing] a *prima facie* showing of entitlement to judgment as a matter of law, [and] tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Defendants cannot, on this record, raise a triable issue of fact. Accordingly, Plaintiffs respectfully ask this Court to hold the Town liable for unlawful vote dilution and order further proceedings to identify and implement an appropriate remedy.

FACTUAL SUMMARY

A. The Parties

Plaintiffs are Hispanic residents of, and registered voters in, the Town of Mount Pleasant, Westchester County, a political subdivision encompassing various unincorporated hamlets and incorporated villages, including the Village of Sleepy Hollow. SOF ¶¶ 1-10. Mount Pleasant's legislative and policymaking authority is the Town Board, comprised of five members: Town Supervisor Carl Fulgenzi and Board members Mark Saracino, Danielle Zaino, Laurie Rogers-Smalley, and Tom Sialiano. SOF ¶¶ 11-14. Board members are elected through at-large elections. SOF ¶ 48.

On July 13, 2023, Plaintiffs sent a letter to the Town Clerk advising that the Town's at-large system of elections violated the NYVRA (the "notice letter"). SOF ¶ 107. The following month, the Town Board hired two expert consultants, Dr. Lisa Handley and Jeffrey Wice, to investigate plaintiffs' NYVRA claims "and assist the Town Supervisor and Town Attorney in investigating same and complying, to the extent the Town is not already complying, with [the NYVRA] and/or federal law." SOF ¶¶ 109. Dr. Handley concluded that voting patterns in Mount Pleasant were racially polarized, and Mr. Wice concluded that the Town's at-large election system likely violated the NYVRA by unlawfully diluting Hispanic voters' electoral influence. SOF ¶¶ 127-135. After receiving these reports, the Board conducted two special meetings to receive "input from the public regarding any proposed remedy(ies) believed to be necessary and appropriate by the Town." SOF ¶¶ 111-120. The Town also received comments via email. SOF ¶¶ 121-124. Ultimately, the Board declined to remedy the NYVRA violation Plaintiffs had identified. Plaintiffs commenced this lawsuit on January 9, 2024. Dkt. 1.

B. The Hispanic community in Mount Pleasant

Mount Pleasant's Hispanic community has grown substantially since the mid-twentieth century when the Town's population was almost entirely white. Today, Hispanics are the Town's largest minority population, comprising more than 20% of the population. SOF ¶¶ 15-22. The Town's Hispanic community is heavily concentrated in Sleepy Hollow. SOF ¶ 23. A map of Mount Pleasant appearing on the Town's website erroneously shows the Town's boundaries to exclude Sleepy Hollow. SOF ¶ 28. However, residents of Sleepy Hollow are Town residents eligible to vote in elections and represented by Town Board members. SOF ¶¶ 26, 30-33. Sleepy Hollow has a village government, but Mount Pleasant provides services to Sleepy Hollow and retains a percentage of taxes collected from Sleepy Hollow residents. SOF ¶¶ 34-35. No current Town Board member – and no Town official since at least 2010 – has resided in Sleepy Hollow. SOF ¶¶ 40-41.

There is a long history of discrimination against Hispanics in Mount Pleasant, Westchester County, and the State of New York which continues to the present. SOF ¶¶ 190-229. Hispanics were excluded from the housing market through restrictive covenants, leading to intense residential segregation and depriving Hispanic families of the opportunity to build wealth. SOF ¶¶ 191-194. Hispanics were excluded from the political process through English-literacy requirements, gerrymandering, a lack of Spanish-language information and interpreters, disparate eligibility challenges, and other informal stratagems. SOF ¶¶ 195-210. The consequences of this discrimination are stark: Hispanic residents of Mount Pleasant as a group experience significantly worse outcomes than white residents in educational attainment, employment, income, wealth, homeownership, and other socioeconomic indicators. SOF ¶¶ 230-236. Hispanic citizens are significantly less likely to vote or contribute to campaigns. SOF ¶¶ 237-240.

Prior to this lawsuit, the Town and Town Board members were unaware of these disparities and had taken no steps to address them or the Hispanic community's particularized needs. SOF ¶¶ 245-250. They have done nothing since. That is likely because the Town conducts little to no outreach to Hispanic residents even when implementing policies affecting the Hispanic community. SOF ¶¶ 299, 330. Indeed, although the Town recognizes its responsibility for addressing inequities among residents, and Town Board members acknowledge they could take actions to assist the Hispanic community, reducing disparities between Hispanic and white residents is not one of the Board's goals for the coming years. SOF ¶ 252-253, 334.

Town communications and services are offered exclusively in English. SOF ¶ 42. For example, when the Town sought input on its new Master Plan, it conducted public outreach entirely in English, without making any effort to engage Hispanic and Spanish-speaking residents. SOF ¶¶ 327-331. Unsurprisingly, the Master Plan contains numerous goals addressed to the specific needs of some communities, but none to the needs of Hispanic residents. SOF ¶ 343. By contrast, the Board has responded to the needs of other communities, such as senior citizens, by using its leverage to encourage the construction of age-restricted housing. SOF ¶¶ 273-278. The Town has not done anything to encourage construction of more affordable housing that would benefit Hispanic residents. SOF ¶¶ 335-337.

Rather than responding to the Hispanic community's needs, Supervisor Fulgenzi, with the Board's unanimous support, targeted Hispanic residents with an emergency order banning the transportation or housing of migrants and prohibiting a local facility from operating a shelter for migrant children. SOF ¶¶ 282-308. The emergency order is consistent with Supervisor Fulgenzi's practice of denigrating nonwhite immigrants, whom he has distinguished from and compared unfavorably to the "European Christians" like his grandparents who "came to take part in the

American dream.” SOF ¶¶ 346-358. Candidates and officials in Mount Pleasant and nearby jurisdictions have made anti-Hispanic animus a central component of their political identities, communicating or endorsing statements depicting nonwhite immigrants, especially those who cross the southern border, as threats. SOF ¶¶ 344-346, 359-373.

The Town’s disregard for its Hispanic residents’ needs is unsurprising given the insular nature of its politics. Every current member of the Board was approached, vetted, and approved by the Mount Pleasant Republican Committee (the “Republican Committee”), which provides training and campaign support for candidates it selects for its ballot line. SOF ¶¶ 58-105. The Republican Committee also oversees a closed process for filling vacant Town offices – the Town does not conduct interviews or solicit nominations, and officials appointed to fill vacancies almost always retain their seats in subsequent elections. SOF ¶¶ 51-52, 77-89. Candidates for Town office conduct little to no outreach in Spanish or in the Hispanic community. SOF ¶¶ 71-75; 102-105. The Town has done nothing to encourage Hispanic residents to participate in political processes. SOF ¶ 251. As a result, while there have been Hispanic elected officials in Sleepy Hollow’s village government, no Hispanic person has ever held Town office. SOF ¶¶ 43-47. No Hispanic resident has even run for Town office in the last decade, in part because Hispanic residents do not think they can win. *Id.* Lacking Spanish-language information about local elections, Hispanic residents forego voting, even while participating in state and national elections. SOF ¶ 254-255.

Town officials’ disregard for their community has made Hispanic residents feel “silenced” and “marginalized”—in turn, Hispanic residents avoid bringing issues to the Board because they “d[on’t] have much hope of being heard” and “don’t think anything [they] say . . . is going to affect” Board members. SOF ¶¶ 256-257. This concern has repeatedly been borne out. When residents from Sleepy Hollow complained about a lakeside development that threatened increased

flooding and pollution, the Town dismissed their concerns as “a false complaint” and did nothing. SOF ¶¶ 258-259. At a hearing to discuss the Notice Letter, Board member Saracino declared that while “minority folks . . . might have issues,” vote dilution in Mount Pleasant “is not one of them.” He then encouraged Hispanic residents of Sleepy Hollow to secede and form their own town. SOF ¶¶ 118-120. Fulgenzi expressed agreement with public comments describing plaintiffs’ NYVRA allegations as “just hurt feelings” and suggested that the real issue was non-citizens voting in Town elections. SOF ¶¶ 123-124.

C. The dilutive effects of at-large elections on Hispanic electoral power in Mount Pleasant

In her report to the Town Board, Dr. Handley assessed whether Hispanic and white voters in Mount Pleasant exhibited patterns of racially polarized voting. SOF ¶ 127. “Racially polarized voting” means voting in which there is a divergence in the candidate, political preferences, or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate.” Election Law § 17-204(6) .

To estimate candidate support by racial group, Dr. Handley analyzed all contested elections in Mount Pleasant since 2015 utilizing standard statistical techniques. SOF ¶¶ 128-129. Based on this analysis, Dr. Handley concluded that “voting is racially/ethnically polarized [in Mount Pleasant]: Hispanic voters and non-Hispanic white voters consistently support different candidates and the candidates supported by non-Hispanic White voters usually prevail in Mount Pleasant elections.” SOF ¶ 130. The Hispanic-preferred candidate prevailed in only one single Town election, and that election was characterized by unusual electoral conditions. SOF ¶¶ 131-132. The Town’s other expert, Jeffrey Wice, agreed that voting patterns were racially polarized and concluded that “[t]his pattern [of racially polarized voting] alone . . . is very likely to warrant remedial action” under the NYVRA. SOF ¶¶ 133-135.

After filing this lawsuit, plaintiffs retained Professor Yamil Ricardo Velez to assess whether racially polarized voting exists in Mount Pleasant. SOF ¶ 136. Professor Velez used common statistical tools to estimate precinct-level demographics and turnout in Mount Pleasant. SOF ¶¶ 137-140. He then estimated the vote share candidates received from Hispanic and white residents in eight contested Town elections using the same widely accepted methods as Dr. Handley. SOF ¶¶ 141-142. Based on this analysis, and his analysis of a set of 37 exogenous elections (i.e., elections for offices other than Town offices), Professor Velez concluded that “racially polarized voting emerges in the overwhelming majority of races.” SOF ¶¶ 143-145.

Defendants’ rebuttal expert, Professor Jeffrey B. Lewis, offered no opinion regarding the existence of racially polarized voting in Mount Pleasant, but instead only asserted that Professor Velez used unreliable methods to aggregate data from census blocks to precincts thereby skewing his demographic estimates. SOF ¶¶ 146-147. However, Professor Lewis’s preferred methods have similar limitations, and Professor Velez performed robustness checks on his original estimates by using alternative methods for estimating precinct-level demographics. These alternative methods confirmed the reliability of his initial estimates. SOF ¶ 148-152. Indeed, when Professor Velez re-ran his analysis using various alternative methods – including Professor Lewis’s preferred approach, Bayesian Improved Surname Geocoding (“BISG”) – he consistently found racially polarized voting patterns in Town elections, as had Dr. Handley. SOF ¶¶ 153-157.

Professor Velez also analyzed what would happen if the Town shifted to a district-based system, using a computer algorithm to randomly generate four districting plans, each containing four districts that respected traditional criteria such as compactness and population parity. SOF ¶ 158. Professor Velez concluded that there would be a district in which the Hispanic-preferred candidate would likely prevail in all four plans, no matter what method for estimating precinct-

level demographics he utilized. SOF ¶¶ 159-162. Professor Lewis’s report did not dispute this finding – indeed, Professor Lewis’s analysis also produced a simulated district where Hispanic-preferred candidates would likely prevail. SOF ¶¶ 162-164

Plaintiffs retained Professor Daryl DeFord to assess whether the existing at-large system diminishes the electoral influence of Hispanic voters relative to reasonable alternative election systems (i.e., systems using neither single-member districts nor at-large voting). SOF ¶ 165. Using estimates of voting preference from Dr. Handley’s report, Professor DeFord estimated the impact of switching to three alternative systems: cumulative voting, limited voting, and proportional ranked choice voting (“PRCV”). SOF ¶¶ 168-170. Professor DeFord generated these estimates by simulating how voters would be expected to vote under different electoral conditions using varying assumptions based on real-world examples where these voting systems were used. SOF ¶¶ 170-176. He concluded that adopting any of these alternatives would increase Hispanic electoral influence as compared to the existing at-large elections, especially when implemented in conjunction with other permissible NYVRA remedies. SOF ¶¶ 177-186.

Defendants’ rebuttal expert, Professor Nolan McCarty, asserted that some of Professor DeFord’s assumptions about expected voter behavior under alternative election systems were unrealistic. SOF ¶ 187. But Professor McCarty did not account for the real-world example of the shift to cumulative voting in Port Chester, New York, which demonstrated that his theoretical concerns about voter and candidate behavior were overblown. SOF ¶¶ 187-188. Moreover, the simulations Professor McCarty performed using his own assumptions about voter and candidate behavior under alternative systems show that Hispanic electoral influence would improve in most scenarios as compared to the existing at-large system. SOF ¶ 189.

These findings are consistent with extensive scholarship documenting that at-large

elections dilute minority voting power, as summarized by plaintiffs' other expert, Professor A.K. Sandoval-Strausz. Professor Sandoval-Strausz explained that this dilutive effect is a feature of at-large systems, which were designed by prosperous white Americans who believed that districts gave too much power to urban political machines. SOF ¶¶ 53. He further explained that at-large election systems also decrease minority turnout because minority voters who do not think they can elect candidates who represent their interests tend not to vote, especially in places like Mount Pleasant where there is racially polarized voting. SOF ¶¶ 54-56. Shifting away from at-large elections has resulted in the election of more minority-preferred officials and greater responsiveness to minority constituencies in many municipalities. SOF ¶ 57.

PROCEDURAL HISTORY

Plaintiffs "sen[t] by certified mail a written notice to the clerk of the political subdivision . . . against which the action would be brought, asserting that the political subdivision may be in violation of [the NYVRA]." Election Law § 17-206(7); SOF ¶ 107. The Town subsequently passed a resolution availing itself of the NYVRA's "safe harbor" provision, SOF ¶ 110, which provided it with "ninety days . . . to enact and implement [a] remedy [for the alleged NYVRA violation], during which [the] prospective plaintiff[s] shall not commence an action to enforce this section against the political subdivision," Election Law § 17-206(7)(b). However, the Town failed to implement a remedy, and plaintiffs commenced this action. Dkt. 1.

LEGAL STANDARD

Under CPLR 3212(b), "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez*, 68 N.Y.2d at 324. Once the movant meets this burden, "the burden shifts to the [opposing] party . . . to produce evidentiary

proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Id.*

ARGUMENT

“[T]he unfettered right to vote is preservative of all other rights.” *City of Mobile v. Bolden*, 446 U.S. 55, 141 (1980) (Marshall, J., dissenting). At the federal level, the right to vote is guaranteed by the U.S. Constitution and the Voting Rights Act of 1965, 52 U.S.C. § 10101 (the “Federal VRA”). In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the U.S. Supreme Court established the standard for vote dilution claims under the Federal VRA. Under *Gingles*, plaintiffs must first demonstrate that their minority group is “sufficiently large and geographically compact to constitute a majority in a single-member district,” “politically cohesive,” and “that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.” *Id.* at 50-51. Then, plaintiffs must show that the political process is not “equally open to minority voters” under the “totality of the circumstances.” *Id.* at 79.

The NYVRA builds on *Gingles* but expands protections for the right to vote, consistent with the more expansive protections afforded under the New York constitution. Under the NYVRA, a member of a protected class can establish that a political subdivision has engaged in unlawful vote dilution by proving *either* the existence of racially polarized voting *or* that “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.” Election Law § 17-206(2)(b)(i)(A)-(B). Under either prong, plaintiffs must also show that the existing system “ha[s] the effect of” impairing their political influence, which they can do by comparing their ability to elect a candidate of choice under the current at-large system to a reasonable alternative system. Election Law § 17-206(2)(a).

Mount Pleasant is a political subdivision of the State of New York. *See* Election Law § 17-204(4); SOF ¶ 9. Plaintiffs are members of a “protected class” under the NYVRA with standing to sue. *See* Election Law § 17-206(4)-(5). Plaintiffs have established their entitlement to judgment under both prongs by proving that voting in the Town is racially polarized, that the existing system impairs Hispanic voters’ electoral influence under the totality of the circumstances, and that there are reasonable alternative election systems that would make it possible for Hispanic voters to elect candidates of their choice. Defendants’ principal defense, that the NYVRA is unconstitutional, is unavailable to them as a political subdivision of the State and, regardless, is unavailing. Therefore, Plaintiffs’ motion for summary judgment should be granted because Plaintiffs have established their entitlement to judgment as a matter of law and Defendants have failed to establish the existence of material issues of fact.

I

Plaintiffs have established that Mount Pleasant’s at-large election system violates the NYVRA by diluting their electoral influence relative to reasonable alternative systems.

A. The elements of a vote dilution claim based on racially polarized voting under Election Law § 17-206(2)(b)(i)(A).

A plaintiff challenging an at-large method of election under the NYVRA may establish unlawful vote dilution by demonstrating that “voting patterns of members of the protected class within the political subdivision are racially polarized.” Election Law § 17-206(2)(b)(i)(A). The NYVRA defines racially polarized voting as “voting in which there is a divergence in the candidate, political preferences, or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate.” Election Law § 17-204(6). This definition is similar to *Gingles* but diverges from the federal model in two important ways.

First, NYVRA plaintiffs need not “demonstrate that [their protected class] is sufficiently

large and geographically compact to constitute a majority in a single-member district.” *Gingles*, 478 U.S. at 51. Indeed, the NYVRA expressly disclaims this *Gingles* “precondition.” See Election Law § 17-206(2)(c)(viii) (“For the purposes of demonstrating that [unlawful vote dilution] has occurred . . . evidence concerning whether members of a protected class are geographically compact or concentrated shall not be considered.”). This is because the NYVRA, unlike the Federal VRA, expressly contemplates remedies *other* than single-member districts, including “alternative method[s] of election.” Election Law § 17-206(5)(a)(ii). The compactness and numerosity requirement, which in the Federal VRA context is “needed to establish that the minority [group] has the potential to elect a representative of its own choice in some single-member district,” *Grove v. Emison*, 507 U.S. 25, 40 (1993), serves no purpose where single-member districts need not be imposed.¹

Second, unlike in Federal VRA cases, NYVRA plaintiffs who establish racially polarized voting need not “also show, under the ‘totality of circumstances,’ that the political process is not ‘equally open’ to minority voters.” *Allen v. Milligan*, 599 U.S. 1, 18 (2023) (quoting *Gingles*, 478 U.S. at 45-46). Rather, under the NYVRA, plaintiffs may establish unlawful vote dilution by proving *either* the existence of racially polarized voting *or* that “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.” Election Law § 17-206(2)(b)(i)(A)-(B).

¹ Of course, if a court does order a district-based system as a NYVRA remedy, the resulting districts must comply with federal constitutional requirements, including the prohibition on racially gerrymandered districts that subordinate traditional criteria to race. To that end, the NYVRA specifies that “evidence concerning whether members of a protected class are geographically compact or concentrated . . . may be a factor in determining an appropriate remedy.” Election Law § 17-206(2)(c)(viii).

Plaintiffs bringing vote dilution claims (of either kind) under the NYVRA must also identify a reasonable alternative voting system as a benchmark against which the dilutive effects of the existing system can be shown. The need for a benchmark is inherent in the concept of vote dilution. *See, e.g., Holder v. Hall*, 512 U.S. 874, 880 (1994) (plurality opinion) (“The phrase vote dilution itself suggests a norm with respect to which the fact of dilution may be ascertained.”). Absent a benchmark requirement, “a party [could] prevail based solely on proof of racially polarized voting that could not be remedied or ameliorated by any other electoral system.” *Pico Neighborhood Assn. v. City of Santa Monica*, 15 Cal. 5th 292, 315 (2023). Notably, the Legislature was not concerned with racially polarized voting in the abstract; it was concerned with rooting out “method[s] of election[] *having 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) (emphasis added). If members of a protected class cannot identify a reasonable alternative which could improve their ability to elect a candidate of choice relative to the existing system, then logically they cannot show that *the existing system* “ha[s] the effect of” impairing their political influence, as opposed to demographics or some existing feature of natural or political geography.

Because the NYVRA’s definition of racially polarized voting is similar to the definition utilized in Federal VRA cases, NYVRA plaintiffs can and should rely on the same common statistical methodologies widely accepted by federal courts to demonstrate the existence of racially polarized voting. *Cf. People v. Huggins*, 144 Misc.2d. 49, 53 (Sup. Ct. 1989) (finding “federal cases to be very persuasive [where] the federal test . . . is extremely similar to the New York test”).

B. Plaintiffs have established unlawful vote dilution based on racially polarized voting.

Plaintiffs have met their burden of establishing unlawful vote dilution based on racially

polarized voting in Mount Pleasant under Election Law § 17-206(2)(b)(i)(A). The undisputed evidence demonstrates that (1) Hispanic and non-Hispanic white voters in Mount Pleasant are politically cohesive; (2) they prefer different candidates and the candidates preferred by white voters almost always prevail in at-large elections; and (3) there are multiple alternative election systems that would likely allow Hispanic voters to elect a candidate of their choice to the Town Board. SOF ¶¶ 125-189. On elements (1) and (2), the experts *retained by the Town* to evaluate Plaintiffs' NYVRA claims and Plaintiffs' experts all agree that voting is racially polarized in contested Town elections. SOF ¶¶ 127-145. Notably, Defendants' litigation experts offered no opinions and reached no conclusions questioning the existence of racially polarized voting in Town elections. SOF ¶ 146-157.

On element (3), the undisputed evidence demonstrates that the existing at-large system impairs Hispanic voters' ability to elect candidates of their choice relative to multiple reasonable alternatives. The NYVRA enumerates a non-exhaustive list of remedies courts may adopt "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)(i)-(xvi). Professor Velez and Professor DeFord demonstrated that multiple permissible remedies would improve Hispanic voters' electoral influence relative to the existing at-large system, including a district-based system comporting with traditional districting principles and alternative systems like PRCV, cumulative voting, and limited voting. SOF ¶¶ 158-189. Notwithstanding minor methodological quibbles, Professor Lewis also produced a map including a district where Hispanic-preferred candidates would likely prevail, and Professor McCarty found an improvement in Hispanic electoral influence under alternative systems in most scenarios compared to at-large elections. SOF ¶¶ 163-164, 187-189.

Federal courts considering Federal VRA claims routinely credit expert opinions based on analyses conducted using various common statistical methods of estimating voter demographics, turnout, and candidate preferences. *See, e.g., Nat'l Ass'n for Advancement of Colored People, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 384 (S.D.N.Y. 2020), *aff'd sub nom. Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021) (crediting expert's conclusions based on "King's EI and RxC analyses using BISG data"); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1003 (D.S.D. 2004) ("With regard to EI . . . the court finds that EI is a reliable method of analysis."). Here, the experts who found patterns of racially polarized voting in Mount Pleasant used these same common statistical methods. *Supra* at 8-11. Numerous federal courts have specifically adopted Dr. Handley's conclusions and expressly affirmed the reliability of her methods.² Professor Lewis critiqued some methodological choices Professor Velez made in estimating precinct-level demographics in Mount Pleasant,³ but Professor Velez reached the exact same conclusions when he re-ran his analysis using Professor Lewis's preferred methods (and other alternative methods). SOF ¶¶ 148-156. Defendants have proffered no evidence revealing a

² *See, e.g., Mississippi State Conf. of Nat'l Ass'n for Advancement of Colored People v. State Bd. of Election Commissioners*, 2024 WL 3275965, at *26 (S.D. Miss. July 2, 2024) (adopting Dr. Handley's conclusions and agreeing with her assessment that "the ecological inference ('EI RxC') method is the most accurate and reliable for determining credible intervals of racial bloc voting"); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1309 (N.D. Ga. 2022) (adopting Dr. Handley's conclusions and explaining that her analysis "employed . . . commonly used statistical methods that have been widely accepted by courts in voting rights cases" including "ecological regression[] and King's EI"); *United States v. City of Euclid*, 580 F. Supp. 2d 584, 598 (N.D. Ohio 2008) (adopting Dr. Handley's conclusions based on analysis using King's EI).

³ Professor Lewis did not address Dr. Handley's racially polarized voting findings. The Town may now wish to disclaim Dr. Handley's report, but it has no evidence to support that assertion. SOF ¶¶ 125-126.

material factual dispute on this issue.

Similarly, in Federal VRA cases courts have relied on the kinds of analyses the experts in this case conducted to assess the consequences of transitioning to alternative election systems. *Compare United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 450 (S.D.N.Y. 2010) (“Courts evaluate whether cumulative voting will actually give minorities the opportunity to elect candidates of their choosing using a commonly-accepted and reliable political science concept called the ‘threshold of exclusion.’”), *with* SOF ¶ 170 (describing Professor Deford’s use of the “threshold of exclusion” concept). Courts have also endorsed analyses which adjust theoretical parameters to account for data from the challenged jurisdiction to better approximate “existing political realities.” *Compare United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 763 (N.D. Ohio 2009) (“[A] court considering a limited or cumulative voting proposal must determine whether that proposal provides minorities a meaningful opportunity to participate in the political process by considering a combination of VAP [Voting Age Population] and the existing political realities of the district.”), *with* SOF ¶ 171-177 (describing how Professor DeFord adjusted his model’s input parameters to account for voter behavior in Mount Pleasant). While the NVYRA may be new, the tools and analyses courts will rely on to adjudicate NYVRA claims are not. Plaintiffs are entitled to summary judgment under Election Law § 17-206(2)(b)(i)(A) based on evidence derived using common, widely accepted methods.

C. Plaintiffs have established that the ability of Hispanic voters to elect candidates of their choice in Mount Pleasant is impaired under the totality of the circumstances.

Plaintiffs are separately entitled to summary judgment because the undisputed evidence demonstrates that “under the totality of the circumstances, the ability of [Hispanic voters] to elect candidates of their choice or influence the outcome of elections is impaired.” Election Law § 17-206(2)(b)(i)(B). As under Election Law § 17-206(2)(b)(i)(A), a plaintiff must show the existence

of a reasonable alternative election system as a benchmark to prove that the existing system dilutes their vote under § 17-206(2)(b)(i)(B), a burden Plaintiffs have met here. *Supra* at 17.

The NYVRA enumerates a non-exhaustive list of factors that “may be considered” in the totality of the circumstances analysis. Election Law § 17-206(3). These “NYVRA factors” draw from those enumerated in the Senate Judiciary Committee Report accompanying the bill amending the Federal VRA in 1982 (the “Senate factors”), “which identif[y] the factors typically relevant to a section 2 [vote dilution] claim.” *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1289 (11th Cir. 2020). Where the NYVRA factors mirror the Senate factors, Federal VRA case law is instructive. *See Fink v. Lefkowitz*, 47 N.Y.2d 567, 572 n.1 (1979) (where statute’s “legislative history . . . indicates that many of its provisions . . . were patterned after the Federal analogue Federal case law and legislative history on [these provisions] are instructive”). For example, as under the Federal VRA, “evidence concerning the intent on the part of voters, elected officials, or the political subdivision to discriminate against a protected class is not required.” Election Law § 17-206(2)(c); *see Allen*, 599 U.S. at 25 (noting that liability under the Federal VRA “turns on the presence of discriminatory effects, not discriminatory intent”).

The NYVRA factors must be interpreted in light of the statute’s overarching purpose, which is to “offer[] the most comprehensive state law protections for the right to vote in the United States.” SOF ¶ 106. The NYVRA provides that “[n]othing . . . shall preclude any additional factors from being considered, nor shall any specified number of factors be required in establishing that such a violation has occurred.” Election Law § 17-206(3). Thus, Plaintiffs need not present evidence addressing every enumerated factor to prevail on a vote dilution claim under § 17-206(2)(b)(i)(B), and they may rely on evidence addressing factors beyond those enumerated in § 17-206(3). Here, however, the undisputed evidence on nearly every enumerated factor is

overwhelming. There is no genuine dispute that, under the totality of the circumstances, the ability of Hispanic voters in Mount Pleasant to elect candidates of their choosing is impaired.

1. There is a history of discrimination against Hispanic voters in Mount Pleasant, Westchester County, and New York.

The first NYVRA factor is “[t]he history of discrimination in or affecting the political subdivision.” Election Law § 17-206(3)(a). This is similar to the first Senate factor assessed under the Federal VRA. *See Gingles*, 478 U.S. at 36-37. The Hispanic community of Mount Pleasant has experienced pervasive discrimination at the local, state, and national level that continues to the present day. *Supra* at 5-8. Defendants do not dispute these facts. Instead, Defendants rely on a report prepared by a scholar with no experience studying the Hispanic community, Professor Donald Critchlow, who advances three erroneous, irrelevant arguments. SOF ¶ 211.

First, Professor Critchlow asserts that evidence of discrimination against Hispanics is irrelevant because the Hispanic community is not monolithic. SOF ¶ 213. Hispanics, like other ethnic groups, obviously come from different backgrounds and have different life experiences which inform their varied perspectives. But Professor Critchlow’s report ignores the comprehensively studied process of pan-ethnic identity formation that has made Hispanic a defining identity for millions of Americans (and organizations, businesses, and governmental entities which serve them). SOF ¶ 215. Professor Critchlow also ignores evidence demonstrating the political cohesiveness of Hispanics in Mount Pleasant. *See supra* at 8-11. Regardless, uniformity is not a requirement for minority groups to be legally cognizable – otherwise, antidiscrimination laws addressed to internally diverse minority communities (as all communities are) would not exist. SOF ¶¶ 216-217.

Second, Professor Critchlow asserts that evidence of discrimination against Hispanics outside Mount Pleasant is irrelevant. SOF ¶ 218-220. But the NYVRA explicitly requires

consideration of discrimination “in *or affecting* the political subdivision.” Election Law § 17-206(3)(a) (emphasis added).⁴ This reflects the reality of how discrimination affects minority communities which, as scholars recognize, “have not been hermetically sealed off from the outside world” but are instead “affected by laws, people, information, and attitudes that originate elsewhere.” SOF ¶¶ 221-224. Regardless, there is ample evidence of discrimination directed specifically at Hispanics in Mount Pleasant. *Supra* at 5-8.

Third, Professor Critchlow contends that the significant progress Hispanics have made in recent years negates the record of historical and ongoing discrimination against Hispanics in Mount Pleasant. SOF ¶ 225. No one disputes that New York has made progress towards racial equity. SOF ¶ 226. But progress does not erase the undisputed record of discrimination against and affecting Mount Pleasant’s Hispanic community. *Supra* at 5-8. Moreover, Professor Critchlow cites no examples of the Town remedying discrimination against Hispanic residents. SOF ¶ 227. Professor Critchlow cites only to actions undertaken by Westchester County and New York, some of which the Town has opposed. SOF ¶¶ 228-229. The Town admits it has done nothing to address socioeconomic disparities between Hispanic and white residents. SOF ¶¶ 245-250. Professor Critchlow’s consideration of evidence from other jurisdictions is proper in assessing this NYVRA factor – where he errs is in his refusal to acknowledge the full picture, good and bad alike.

⁴ Courts consider discrimination occurring in other jurisdictions in Federal VRA cases. *See Goosby v. Town Bd. of the Town of Hempstead*, 180 F.3d 476, 488 (2d Cir. 1999) (finding “no history of official discrimination against blacks in the Town” but noting discriminatory county and state voting practices); *Gomez v. City of Watsonville*, 863 F.2d 1407, 1418 (9th Cir. 1988) (“The district court apparently believed that it was required to consider only the existence and effects of discrimination committed by the *City of Watsonville itself*. This conclusion is incorrect”).

2. No Hispanic candidates have been elected to the Town Board or other Town office.

The second NYVRA factor is “[t]he extent to which members of the protected class have been elected to office in the political subdivision,” Election Law § 17-206(3)(b), mirroring the seventh Senate factor, *see Gingles*, 478 U.S. at 37. As under the Federal VRA, “the election of a few minority candidates does not necessarily foreclose the possibility of dilution of the [minority] vote.” *Id.* at 75. Regardless, there is no evidence to suggest that a Hispanic person has ever been elected or appointed to the Town Board or held Town-wide office. SOF ¶¶ 43-44.

3. Other features compound the dilutive effects of Mount Pleasant’s at-large election system.

The third NYVRA factor considers “the use of any voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy that may enhance the dilutive effects of the election scheme.” Election Law § 17-206(3)(c). This largely mirrors the third Senate factor. *See Gingles*, 478 U.S. at 37. Here, the fact that the Town conducts staggered, off-cycle elections compounds its at-large system’s dilutive effects. SOF ¶¶ 175-186; *see also Vill. of Port Chester*, 704 F. Supp. 2d at 444 (“Port Chester’s practice of holding local elections ‘off-cycle’ in March and staggering its Trustee elections combines to enhance the opportunity for discrimination against the Hispanic voting population.”).

4. Hispanic voters and candidates lack access to the processes of determining who appears on the ballot in Town elections.

The fourth NYVRA factor considers whether voters and candidates from a protected class are “deni[ed] . . . [access] to processes determining which groups of candidates receive access to the ballot, financial support, or other support in a given election.” Election Law § 17-206(3)(d). This builds upon the fourth Senate factor, which considers whether “there is a candidate slating process” and, if so, “whether the members of the minority group have been denied access to that

process.” *Gingles*, 478 U.S. at 37 (internal quotation marks omitted). “[A] system that provides only a theoretical avenue for minority or other upstart candidates to get their names on the ballot while for all practical purposes making it extremely difficult for such candidates to have a meaningful opportunity to participate does in fact contribute to a violation.” *Vill. of Port Chester*, 704 F. Supp. 2d at 444-45.

In Mount Pleasant, given the Republican Party’s dominance of Town elections, SOF ¶ 61, what matters is access to the Republican candidate slate, which provides the only functional path to attaining Town office. *See Pope v. Cnty. of Albany*, 94 F. Supp. 3d 302, 344 (N.D.N.Y. 2015) (considering only access to the Democratic slate in assessing the fourth Senate factor because “the only effective slating process is controlled by the County Democratic Party”). Access to the Republican slate is especially important because “[t]he Party’s endorsement conveys numerous benefits on candidates, including money, support, and most often victory.” *Id.* at 344; SOF ¶¶ 70-101. Here, the undisputed evidence demonstrates that access to Town office – either by election or vacancy appointment – is limited to those who can navigate an insular process overseen by the Republican Committee, which Supervisor Fulgenzi described as a “club” where “if you didn’t fit the mold they didn’t want you and they made your life harder.” SOF ¶¶ 64-67. This process has excluded Hispanic and Hispanic-preferred candidates from Town office, even as such candidates have run successfully in village elections. *Supra* at 7.

5. Hispanic voters contribute to political campaigns at lower rates than white voters.

The fifth NYVRA factor is “[t]he extent to which members of the protected class contribute to political campaigns at lower rates.” Election Law § 17-206(3)(e). These disparities are relevant because political donations are an important means for voters to influence elections and officials. SOF ¶ 238; *see also McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 227 (2014) (plurality

opinion) (explaining that unduly stringent limits on campaign contributions would “compromis[e] the political responsiveness at the heart of the democratic process”). Here, the undisputed evidence reveals dramatic disparities in campaign contributions nationally between white and Hispanic voters. SOF ¶ 237. This trend undoubtedly holds true in Mount Pleasant, where Hispanic voters participate in Town elections at substantially lower rates than white voters, Hispanic households have less income and wealth than white households, and there have been no Hispanic candidates for Town office to galvanize community support. *Supra* at 5-8.

6. Hispanic voters vote at lower rates than other members of the electorate.

The sixth NYVRA factor assesses “the extent to which members of a protected class in the state or political subdivision vote at lower rates than other members of the electorate.” Election Law § 17-206(3)(f). The undisputed evidence establishes that eligible Hispanic voters register and turn out to vote at significantly lower rates than white voters in national, state, and local elections. SOF ¶¶ 239-240. In Mount Pleasant, Hispanics typically comprise between 6.9 and 8.5% of voters (as compared to comprising around 19% of the Town’s total, and 13.8% of the Town’s citizen voting age, population), while white voters typically comprise more than 80% of voters (as compared to comprising 69% of the Town’s total, and 74.7% of the Town’s citizen voting age, population). *Id.*

7. Hispanic residents are significantly disadvantaged across numerous socioeconomic indicators as compared to white residents.

The seventh NYVRA factor assesses “[t]he extent to which members of the protected class are disadvantaged in areas including but not limited to education, employment, health, criminal justice, housing, land use, or environmental protection.” Election Law § 17-206(3)(g). This factor is similar to the fifth Senate factor. *Gingles*, 478 U.S. at 37. In Federal VRA cases, courts have found indicators like the unemployment rate, the distribution of employment across sectors,

educational attainment, the poverty rate, and household income to be probative. *See, e.g., NAACP v. East Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d at 407. Considering these socioeconomic markers is essential because “political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes.” *Gingles*, 478 U.S. at 69.

As described above, Hispanic residents of Mount Pleasant are worse off compared to white residents across almost all relevant indicators. *Supra* at 5-6. Compared to white residents, Hispanics in Mount Pleasant earn less; are significantly more likely to be unemployed, rely on food stamps, live in poverty, be arrested and incarcerated, and reside in overcrowded housing; and significantly less likely to own a home, attend a well-resourced high school, and attain a high school or college degree. SOF ¶¶ 230-240.

8. Hispanic voters are disadvantaged in other areas which hinder their ability to participate in the political process.

The eighth NYVRA factor assesses “[t]he extent to which members of the protected class are disadvantaged in other areas which may hinder their ability to participate effectively in the political process.” Election Law § 17-206(3)(h). This asks whether there are additional circumstances which inhibit a minority community’s participation in political processes. Here, as Defendants admit, the Town does not provide official information in Spanish, and Board members conduct little to no outreach to the Hispanic community. *See* SOF ¶¶ 42, 85, 102, 328. The map on the Town’s website communicates to residents of the area with the heaviest concentration of Hispanic residents that they are not part of the Town. SOF ¶ 28. This lack of accessible, accurate information about Town elections hinders Hispanic voters’ participation in Town elections. SOF ¶¶ 254-255.

9. Candidates and elected officials have deployed racial appeals reliant on anti-Hispanic stereotypes.

The ninth NYVRA factor considers “the use of overt or subtle racial appeals in political campaigns,” Election Law § 17-206(3)(i), mirroring Senate factor six, *see Gingles*, 478 U.S. at 37. “The use of racially-charged campaign issues, such as campaign literature that preys on racial anxiety, is a well-recognized form of racial appeal.” *City of Euclid*, 580 F. Supp. 2d at 610. Racial appeals aimed at Hispanics often invoke the “Latino threat narrative,” which portrays Hispanic people as invaders coming across the southern border who refuse to integrate and are intent on destroying the American way of life. SOF ¶ 344.

Elected officials in and around Mount Pleasant have made anti-Hispanic appeals central to their campaigns and political identities. SOF ¶ 345. Supervisor Fulgenzi has posted messages denigrating non-white immigrants and deriding efforts to accommodate Americans whose primary language is not English. SOF ¶¶ 346-357. During his most recent campaign, Fulgenzi shared a post calling on the government to “CLOSE OUR BORDERS,” with the goal of contrasting modern-day immigrants to immigrants like his grandparents who came to America “in the past.” *Id.* During that same campaign, the Republican Committee sent out mailers warning that “[u]nvetted migrants” would be sent to a local shelter and posted a Facebook message accusing their “opponents” of “want[ing] migrant housing in town.” SOF ¶¶ 359-362. A flyer for a rally in Town stated “WE NEED YOU To fight the Illegal Alien Invasion” before describing a number of Democratic officials as “PRO ILLEGAL ALIENS.” SOF ¶¶ 362-363. Town officials subsequently enacted an order targeting migrants and the Hispanic community, which Supervisor Fulgenzi will maintain until the nation’s southern border is “secure” or the early-twentieth-century immigration policies are restored. SOF ¶¶ 301-303.

Mount Pleasant resident and former Westchester County Executive Rob Astorino made

opposition to immigration central to his 2022 gubernatorial campaign, appearing on Fox News segments asserting that officials were “BETRAYING AMERICANS” by allowing migrants across the southern border. Lest anyone miss his point, Astorino claimed that his opponents were “giving everything to non-citizens as goodies,” including “dinero.” SOF ¶¶ 364-366. State legislators representing Mount Pleasant and nearby areas have characterized laws benefitting immigrants as supporting “terrorists,” erroneously asserted that immigration leads to “heightened local crime,” and falsely referred to lawfully present refugees as illegal immigrants. SOF ¶¶ 367-373. Representative Mike Lawler, whose district includes Mount Pleasant, circulated a petition claiming that New York City Mayor Eric Adams had “just sent HUNDREDS of illegal adult male migrants into your backyard!” *Id.*

While “illegal immigration is a fair topic for political debate . . . [i]f candidates are making race an issue on the campaign trail – especially in a way that demonizes the minority community and stokes fear and/or anger in the majority – the possibility of inequality in electoral opportunities increases.” *Soto Palmer v. Hobbs*, 686 F. Supp. 3d 1213, 1230 (W.D. Wash. 2023), *cert. denied before judgment sub nom. Trevino v. Palmer*, 144 S. Ct. 873 (2024). There is a difference between good-faith policy arguments and racial dog whistles which “equate ‘immigrant’ or ‘non-citizen’ with the derogatory term ‘illegal’ and then use those terms to describe the entire Latino community without regard to actual facts regarding citizenship and/or immigration status.” *Id.* Politicians in Mount Pleasant have frequently resorted to the latter.

10. Elected officials in Mount Pleasant, including members of the Town Board, are unresponsive to the needs of Hispanic voters.

The tenth NYVRA factor asks whether there is “a significant lack of responsiveness on the part of elected officials to the particularized needs of members of the protected class.” N.Y. Elec. § 17-206(3)(j). This aligns closely with an “[a]dditional factor[]” considered in Federal VRA cases.

Gingles, 478 U.S. at 37; *see also Goosby*, 956 F. Supp. at 344 (“[E]vidence of tangible efforts of elected officials to respond to the needs of the minority group is relevant.”). In Federal VRA cases, examples of unresponsiveness can include officials’ “failure to identify concerns of the minority community . . . scarcity of outreach sessions in the minority community . . . and failure to provide bilingual translations of official forms.” *NAACP v. East Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d at 413; *see also McDaniels v. Mehfoud*, 702 F. Supp. 588, 595 (E.D. Va. 1988) (“The Court was most struck, however, by the simple fact that when asked, none of the five sitting members of the Henrico Board of Supervisors could identify a single issue of unique concern to the black community”).

The Hispanic community in Mount Pleasant has particularized needs in areas like housing, SOF ¶ 245, which the Town Board admittedly has the capacity to address, SOF ¶¶ 275, 335-336. Yet the Board has done nothing to help develop affordable housing for Hispanic residents of Mount Pleasant, even as it has taken concrete steps to address seniors’ housing needs. SOF ¶ 337. The Town was unaware of socioeconomic disparities between Hispanic and white residents and has taken no steps to address them. SOF ¶¶ 246-251. The Town has done nothing to include Hispanic residents in policy discussions. SOF ¶¶ 298-300, 327-331. Officials have evinced hostility Hispanic residents’ needs, dismissing concerns about their lack of political representation and encouraging secession from the Town. SOF ¶¶ 118-120. The Board has disclaimed responsibility for Hispanic residents in Sleepy Hollow, even though it possesses legal and functional power over their lives, and just raised their taxes by more than 20 percent SOF ¶¶ 30-39, 374.

The only action the Town has identified as responding to Hispanic residents’ needs was the Mount Pleasant Industrial Development Agency’s (“MPIDA”) decision to approve a development in Sleepy Hollow, which allegedly created jobs for Hispanic residents. SOF ¶ 313.

But the MPIDA is an independent agency. SOF ¶ 310. Thus, even if MPIDA-approved projects have benefited Hispanics – which neither the MPIDA nor the Town has any way of knowing, SOF ¶¶ 314-324 – this does not demonstrate that *the Town* has responded to Hispanic residents’ needs. Regardless, the Town’s belief that development projects benefit Hispanics because “Hispanics . . . have, uhm, been very good in the construction business” and “there’s other jobs for maintenance of the buildings” does not negate the Town’s consistent neglect for the Hispanic community’s needs. *Id.*

11. The Town has no compelling justification for maintaining at-large elections.

The final NYVRA factor asks “whether the political subdivision has a compelling policy justification that is substantiated and supported by evidence for adopting or maintaining the method of election.” Election Law § 17-206(k). Defendants have had numerous opportunities throughout discovery to provide a justification for maintaining at-large elections. SOF ¶¶ 49-50. Yet defendants have failed to identify *any* policy justification, let alone one that is “compelling” and “substantiated and supported by evidence.” *Id.*

II

The NYVRA is a lawful exercise of the legislature’s authority to protect the voting rights of all New York citizens.

Most of Defendants’ 16 affirmative defenses are either meaningless or defeated by the evidence. The remainder assert that the NYVRA is unconstitutional (5, 7, 8, 9, 11, 12) or preempted by federal law (6, 13). These defenses all fail.

A. Defendants lack capacity and standing to argue that the NYVRA is unconstitutional.

The Town and Town Board are creatures of the State. SOF ¶ 9. They therefore lack capacity and standing to assert that the NYVRA is unconstitutional. See *City of New York v.*

State of New York, 86 N.Y.2d 286, 291 (1995); *Matter of Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287 (1977); *Cnty. of Chautauqua v. Shah*, 126 A.D.3d 1317, 1321 (4th Dep't 2015), *aff'd sub nom. Cnty. of Chemung v. Shah*, 28 N.Y.3d 244 (2016); see also *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933); *City of Newark v. State of New Jersey*, 262 U.S. 192, 196 (1923); *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973); *City of New Rochelle v. Town of Mamaroneck*, 111 F. Supp. 2d 353, 364 (S.D.N.Y. 2000).

B. The NYVRA is consistent with the federal constitution.

Regardless, the NYVRA is constitutional. Defendants appear to assert the NYVRA is unconstitutional because (1) it impermissibly classifies voters based on race; (2) its underlying objectives are racially discriminatory; and (3) it mandates racial discrimination at the remedial phase. These assertions mischaracterize the scope and operation of the NYVRA and are inconsistent with settled law.

First, the NYVRA is not a racial classification under the Equal Protection Clause. “[W]hen the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.” *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 720 (2007). The NYVRA, by contrast, does not grant cognizable benefits (or inflict cognizable harms) on *any individual* for any reason, let alone because of their race – it merely requires a *jurisdiction* to replace a racially dilutive electoral system with one that furthers the state’s interest in ensuring that its political processes are equally open to all citizens. *See, e.g., Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 837 (Cal. Ct. App. 2006) (holding that the California VRA is not subject to strict scrutiny because it “does not allocate benefits or burdens on the basis of race”).

Second, the NYVRA does not reflect an invidious racial intent. To the extent the NYVRA

explicitly refers to race, it does so to further the legislature’s permissible goal of remedying discrimination in voting by eliminating racial vote denial and dilution. *See* Election Law § 17-200. Antidiscrimination laws which seek to ameliorate historical and ongoing racial discrimination do not offend equal protection principles merely because they account for race – including, recently, when the Court affirmed the constitutionality of the Federal VRA. *Allen*, 599 U.S. at 41; *see also Texas Dep’t of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 545 (2015) (“[M]ere awareness of race in attempting to solve [race-related] problems . . . does not doom that endeavor at the outset.”). Likewise, the fact that the NYVRA invites courts to consider race when conducting racially polarized voting analyses does not render the statute subject to strict scrutiny. The same analyses are required under the Federal VRA because of the *Gingles* framework the Court itself set forth. *See Allen*, 599 U.S. at 33 (rejecting the argument that the *Gingles* framework is unconstitutional because it requires “maps [to be] created with an express target in mind” e.g., “to show, as our cases require, that an additional majority-minority district could be drawn”).

Third, the NYVRA does not contemplate, let alone require, the drawing of racially gerrymandered districts. In some cases, the NYVRA does not require the drawing of *any* districts; where districts are imposed as remedies, they must comport with the federal constitution and can be challenged under the established framework for adjudicating racial gerrymandering claims. *See, e.g., Portugal*, 530 P.3d at 1006 (“Strict scrutiny could certainly be triggered in an as-applied challenge to districting maps that sort voters on the basis of race.” (cleaned up)). The possibility that a NYVRA remedy *could* be a racial gerrymander does not render the NYVRA facially unconstitutional, just as the possibility that Federal VRA remedial districts *could* be racial gerrymanders does not render the Federal VRA facially unconstitutional. *See, e.g., Shaw v. Reno*,

509 U.S. 630, 658 (1993) (recognizing claim that a Federal VRA remedial district violated the Equal Protection Clause without questioning the Act’s facial constitutionality).

C. The Federal VRA does not preempt the NYVRA.

Where a federal statute contains no language expressly preempting state law, a state law is preempted only if “compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (cleaned up). There is no conflict between the NYVRA and the Federal VRA. Nothing in the NYVRA requires municipalities to do what federal law forbids. And the NYVRA plainly furthers the Federal VRA’s “broad remedial purpose of eliminating racial discrimination in voting.” *Luna v. Cnty. of Kern*, 291 F. Supp. 3d 1088, 1098-99 (E.D. Cal. 2018).

CONCLUSION

The undisputed evidence satisfies Plaintiffs’ burden of demonstrating that voting is racially polarized in Mount Pleasant, that their ability to participate in the Town’s political processes has been impaired under the totality of the circumstances, and that Hispanic voters’ electoral influence has been diluted by the Town’s at-large system as compared to reasonable alternatives. Plaintiffs respectfully request, therefore, that this Court grant their motion for summary judgment under sections 17-206(2)(b)(i)(A) and 17-206(2)(b)(i)(B)⁵ of the NYVRA and, under Election Law § 216, proceed immediately to identify and implement an appropriate remedy.

⁵ The Court should address both issues even if one is dispositive. *See Matter of Farrell v. Sunderland*, 173 Misc. 2d 787, 792–93 (Sup. Ct., Westchester Cnty. [Anthony A. Scarpino, Jr., J.] 1997).

Dated: White Plains
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CERTIFICATION OF COMPLIANCE WITH UNIFORM RULE 202.8-B

I, Robert A. Spolzino, an attorney at law licensed to practice in the State of New York, certify that this document contains 9,868 words, as calculated by the Microsoft Word processing system, inclusive of point headings and footnotes, and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules and regulations, etc.

/s/ Robert A. Spolzino

**Memorandum of Law by Defendants in Support of Motion
for Summary Judgment, dated September 25, 2024
[pp. A354 - A385]**

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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,

Index No.: EF002460-2024

v.

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

Defendants.

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

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TABLE OF CONTENTS

I.	PRELIMINARY STATEMENT	1
II.	STATEMENT OF FACTS	1
	A. Background	1
	B. Litigation Background	5
III.	LEGAL STANDARD.....	6
IV.	ARGUMENT	7
	A. The NYVRA’s Vote-Dilution Provisions—including The At-Large Provisions Directly At Issue—Violate The Equal Protection Clauses Of The Fourteenth Amendment To The U.S. Constitution And Of The New York Constitution.....	7
	B. The Undisputed Record Evidence Shows That The Town’s At-Large System Complies With The NYVRA	21
V.	CONCLUSION.....	26

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Abbott v. Perez</i> , 585 U.S. 579 (2018).....	8, 15, 18
<i>Adarand Constructors Inc. v. Peña</i> , 515 U.S. 200 (1995).....	15
<i>Allen v. Milligan</i> , 599 U.S. 1 (2023).....	<i>passim</i>
<i>Alvarez v. Prospect Hosp.</i> , 501 N.E.2d 572 (1986)	6
<i>Ashlaw v. State of New York</i> , No.EF2024-00001746 (N.Y. Sup. Ct. Onondaga Cnty.).....	5
<i>Brown v. Bd. of Ed. of Topeka</i> , 347 U.S. 483 (1954).....	7
<i>City of Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989).....	17
<i>Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs</i> , 906 F.2d 524 (11th Cir. 1990)	9
<i>Cooper v. Harris</i> , 581 U.S. 285 (2017).....	8, 9, 16
<i>Esler v. Walters</i> , 56 N.Y.2d 306 (1982).....	7
<i>Holder v. Hall</i> , a 512 U.S. 874 (1994).....	23, 25
<i>Johnson v. California</i> , 543 U.S. 499 (2005).....	16
<i>Khutoryanskaya v. Laser & Microsurgery</i> , P.C., 222 A.D.3d 633 (2d Dep't 2023).....	24
<i>League of United Latin Am. Citizens v. Perry (LULAC)</i> , 548 U.S. 399 (2006).....	9, 18, 19
<i>Little v. Blue Cross of W. New York</i> , 72 A.D.2d 200 (4th Dep't 1980).....	6

<i>Miller v. Johnson</i> , 515 U.S. 900 (1995).....	8, 16
<i>Parents Involved In Community Schs. v. Seattle Sch. Dist. No. 1</i> , 551 U.S. 701 (2007).....	15, 19
<i>Petteway v. Galveston Cnty.</i> , 111 F.4th 596 (5th Cir. 2024)	9, 19
<i>Pico Neighborhood Ass’n v. City of Santa Monica</i> , 534 P.3d 54 (Cal. 2023)	22, 23, 24
<i>Reno v. Bossier Parish Sch. Bd.</i> , 520 U.S. 471 (1997).....	22, 25, 26
<i>Reno v. Bossier Parish Sch. Bd.</i> , 528 U.S. 320 (2000).....	22
<i>Seaman v. Fedourich</i> , 16 N.Y.2d 94 (1965)	7
<i>Serrato v. Town of Mount Pleasant</i> , No.55442/2024 (N.Y. Sup. Ct. Westchester Cnty.).....	23
<i>Shaw v. Hunt</i> , 517 U.S. 899 (1996).....	8, 9, 10
<i>Shaw v. Reno</i> , 509 U.S. 630 (1993).....	8, 16, 17
<i>Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.</i> , 600 U.S. 181 (2023).....	<i>passim</i>
<i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986).....	<i>passim</i>
<i>Trump v. Anderson</i> , 601 US 100 (2024).....	17
<i>Under 21 v. City of New York</i> , 65 N.Y.2d 344 (1985)	7
<i>White v. Cuomo</i> , 38 N.Y.3d 209 (2022)	5
<i>Wis. Legislature v. Wis. Elections Comm’n</i> , 595 U.S. 398 (2022).....	8, 9, 19

<i>Zuckerman v. City of New York</i> , 49 N.Y.2d 557 (1980)	6

Statutes

42 U.S.C. § 1973	8
52 U.S.C. § 10301	8
CPLR § 3212	6
CPLR § 5519	5
Even Year Election Law § 1	4, 5, 24
Even Year Election Law § 5	5
N.Y. Elec. Law § 17-204	10, 11, 19
N.Y. Elec. Law § 17-206	<i>passim</i>
N.Y. Town Law § 80	4, 24
N.Y. Town Law § 81	2
N.Y. Town Law § 85	2

Constitutional Provisions

N.Y. Const. Art. I, § 11	7
U.S. Const. amend. XIV, § 1	7

I. PRELIMINARY STATEMENT

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

II. STATEMENT OF FACTS**A. Background**

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

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

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

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

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

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

3. “[D]emocratic participation is alive and well in the town of Newburgh,” with Newburgh’s voter turnout exceeding the national average in 2020 by 1%. Critchlow Report at 19. The Town is closely politically divided, with candidates from both major political parties often winning more votes in the Town. Expert Report of Dr. Brad Lockerbie (“Lockerbie Report”) at 3 (Moskowitz Aff., Exhibit C). Since 2008, the winning candidate amongst the Town’s voters in races between one Democratic candidate and one Republican candidate received less than 60% of the vote in over 70% of races and, using an even more demanding threshold, received less than 55% of the vote in over 40% of these races. *Id.* at 3–6. Out of the 77 election races during this period where one Democratic candidate and one Republican candidate contested an office, the Democratic candidates—who are the minority-preferred candidates amongst the Town’s electors¹—garnered more votes in 26 of them, whereas the Republican candidates garnered more

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

votes in 51. *Id.* Further, while Republican candidates have historically done better in Newburgh than Democratic candidates, these races also demonstrate that the Town, like many jurisdictions, experiences fluctuations in voter turnout and results depending upon whether an election takes place in an odd-numbered year or an even-numbered year. *See id.* at 3. In particular, Republicans tend to do better in odd-numbered years, whereas Democrats tend to do better in even-numbered years due to the turnout generated by statewide and national races. *See id.* at 3–6; *see* Barreto Dep. at 145:4–6.² And so, while minority-favored candidates have won the most votes from the Town’s electors in over 30% of races since 2008 between one Democratic candidate and one Republican candidate, these candidates have won the majority of Town votes just under half the time (48%, to be precise) in even-numbered year elections. Lockerbie Report at 3–6.

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

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

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

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

B. Litigation Background

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

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

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

III. LEGAL STANDARD

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

IV. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

Subsection 17-206(2)(c) then mandates several evidentiary rules for “purposes of demonstrating that a violation of [Subsection 17-206(2)(a)’s vote-dilution prohibition] has occurred.” *Id.* § 17-206(2)(c). For example, “evidence concerning whether members of a protected class are geographically compact or concentrated shall *not* be considered, but may be a factor in determining an appropriate remedy.” *Id.* § 17-206(2)(c)(viii) (emphasis added). Further,

“where there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision, members of each of those protected classes may be combined” for vote-dilution-claim purposes. *Id.* § 17-206(2)(c)(iv). And “evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class is not required,” *id.* § 17-206(2)(c)(v); “evidence that voting patterns and election outcomes could be explained by factors other than racially polarized voting, including but not limited to partisanship, shall not be considered,” *id.* § 17-206(2)(c)(vi); and “evidence that subgroups within a protected class have different voting patterns shall *not* be considered,” *id.* § 17-206(2)(c)(vii) (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the fact of dilution may be measured,” Plaintiffs cannot demonstrate vote dilution at all, and so cannot succeed on their Section 17-206(2) claims. *Reno*, 520 U.S. at 480.⁶

V. CONCLUSION

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

Dated: New York, New York
September 25, 2024

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

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing memorandum of law complies with the word count limitations set forth in Uniform Rule 202.8-b for the Supreme Court and this Court's orders.

This memorandum of law uses Times New Roman 12-point typeface and contains 8,248 words, excluding parts of the document exempted by Rule 202.8-b. As permitted, the undersigned has relied on the word count feature of this word-processing program.

/s/ Bennet J. Moskowitz

**Memorandum of Law by Plaintiffs in Opposition to Motion
for Summary Judgment, dated October 10, 2024
[pp. A386 - A416]**

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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,

Index No. EF002460-2024

– against –

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

Defendants.

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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Table of Contents

Table of Contents	i
Table of Authorities	ii
Introduction	1
Factual Background	4
A. The Parties	4
B. The Black and Hispanic communities in Newburgh.	5
C. The dilutive effects of the at-large election system on Hispanic and Black voters’ electoral power in Newburgh.	7
Argument	8
I Defendants lack capacity to challenge the facial constitutionality of the NYVRA.	8
II The NYVRA is constitutional.	10
i. Voting rights acts with similar elements to the NYVRA have universally withstood constitutional challenges.	11
ii. The NYVRA is not subject to strict scrutiny because it does not classify individuals on the basis of their race.	13
iii. Even if it is subject to strict scrutiny, the NYVRA is narrowly tailored to achieve New York’s compelling interest in combatting racial discrimination in voting.	17
III. The amendments to Town Law § 80, which Defendants are currently challenging as unconstitutional in a separate case, do not moot this case.	22
IV. There is extensive un rebutted evidence that a reasonable alternative election system would improve Black and Hispanic voters’ electoral influence relative to the existing system.	24
Conclusion	25

TABLE OF AUTHORITIES

Cases

<i>Abbot v. Perez</i> , 585 U.S. 579 (2018)	17, 18
<i>Adarand Constrs., Inc. v. Pena</i> , 515 U.S. 200 (1995)	4, 21
<i>Allen v. Milligan</i> , 599 U.S. 1 (2023).....	passim
<i>Ashlaw v. State of New York</i> , No. EF2024-00001746 (N.Y. Sup. Ct. Onondaga Cnty.).....	4
<i>Baldwin Union Free Sch. Dist. v. Cnty. of Nassau</i> , 62 Misc. 3d 236 (N.Y. Sup. Ct. 2018).....	1, 9
<i>Bartlett v. Strickland</i> , 556 U.S. 1 (2009)	25
<i>Bd. of Educ. of Roosevelt Union Free Sch. Dist. v. Bd. of Trustees</i> <i>of State Univ. of New York</i> , 282 A.D.2d 166 (3d Dep't 2001)	9
<i>Black River Regulating Dist. v. Adirondack League Club</i> , 307 N.Y. 475 (1954)	9
<i>Borges v. Placeres</i> , 64 Misc. 3d 92 (N.Y. App. Term. 2019)	26
<i>City of New York v. State of New York</i> , 86 N.Y.2d 286 (1995)	1, 10, 11
<i>City of Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989)	21
<i>Cohen v. State</i> , 94 N.Y.2d 1 (1999).....	2
<i>Colon v. Bell</i> , 137 A.D.3d 1067 (2016)	5, 29
<i>Cooper v. Harris</i> , 581 U.S. 285 (2017)	25
<i>Crawford v. Board of Educ. of City of Los Angeles</i> , 458 U.S. 527 (1982).....	15
<i>George v. New York City Hous. Auth.</i> , 151 A.D.3d 532 (2017).....	28
<i>Hearst Corp. v. Clyne</i> , 50 N.Y.2d 707 (1980).....	27
<i>Higginson v. Becerra</i> , 786 F. App'x. 705 (9th Cir. 2019).....	14
<i>Hunter v. City of Pittsburgh</i> , 207 U.S. 161 (1907).....	10
<i>In re World Trade Ctr. Lower Manhattan Disaster Site Litig.</i> , 892 F.3d 108 (2d Cir. 2018).....	1, 10
<i>Jeter v. Ellenville Cent. Sch. Dist.</i> , 41 N.Y.2d 283 (1977)	11
<i>Krimkevitch v. Imperiale</i> , 104 A.D.3d 649 (2d Dep't 2013)	29
<i>LaValle v. Hayden</i> , 98 N.Y.2d 155 (2002)	12
<i>Marshall v. Arias</i> , 12 A.D.3d 423 (2004).....	27
<i>Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.</i> , 30 N.Y.3d 377 (2017)	1, 10
<i>Miller v. Johnson</i> 515 U.S. 900 (1995).....	18
<i>Myers v. Home Energy Performance by Halco</i> , 188 A.D.3d 1327 (2020).....	28
<i>N.A.A.C.P. v. Hampton Cnty. Election Comm'n</i> , 470 U.S. 166 (1985).....	4, 27
<i>Overstock.com, Inc. v. New York State Dep't of Tax'n & Fin.</i> , 20 N.Y.3d 586 (2013)	12
<i>Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1</i> , 551 U.S. 701 (2007).....	15
<i>People v. Tichenor</i> , 89 N.Y.2d 769 (1997).....	12
<i>Pico Neighborhood Assn. v. City of Santa Monica</i> , 15 Cal. 5th 292 (2023)	2, 24
<i>Portugal v. Franklin Cnty.</i> , 530 P.3d 994 (Wash. 2023)	passim
<i>Robinson v. Ardoin</i> , 86 F.4th 574 (5th Cir. 2023)	20

<i>Sanchez v. City of Modesto</i> , 145 Cal. App. 4th 660 (2006).....	14, 17, 19
<i>Shaw v. Hunt</i> , 517 U.S. 899 (1996)	3, 11
<i>Shelby County v. Holder</i> , 570 U.S. 529 (2013)	21
<i>Singleton v. Allen</i> , 690 F. Supp. 3d 1226 (N.D. Ala. 2023).....	19
<i>Society of Plastics Indus., Inc. v. Cnty. of Suffolk</i> , 77 N.Y.2d 761 (1991)	11
<i>South Carolina v. Katzenbach</i> , 383 U.S. 301 (1966).....	20
<i>Students for Fair Admissions Inc. v. President & Fellows of Harvard Coll.</i> , 600 U.S. 181 (2023).....	2, 19
<i>Tex. Dep't of Hous. & Cmty. Aff. v. Inclusive Cmities. Project, Inc.</i> , 576 U.S. 519 (2015)....	16, 17
<i>Theroux v. Resnicow</i> , 148 N.Y.S.3d 885 (Sup. Ct., N.Y. Cty. [Gerald Leibovits, J.] 2021).....	29
<i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986)	passim
<i>Village of Chestnut Ridge v. Town of Ramapo</i> , 45 A.D.3d 74 (2d Dep't 2007).....	12
<i>Whole Woman's Health v. Jackson</i> , 595 U.S. 30 (2021).....	11

Statutes

52 U.S.C. § 10310.....	15
Election Law § 17-200.....	3, 18
Election Law § 17-204.....	14
Election Law § 17-206.....	3, 20, 21
Town Law § 80	i, 3, 22, 23
Wash. Rev. Code § 29A.92.010.....	15

Other Authorities

Jurisdictions Previously Covered by Section 5, U.S. Dep't of Justice (May 17, 2023), https://www.justice.gov/crt/jurisdictions-previously-covered-section-5	16
N.Y. Comm. Rpt. on S. 1046D (N.Y. May 20, 2022)	15
NYCLU & LDF, John R. Lewis Voting Rights Act of New York at 2 (Feb. 24, 2022), https://www.naacpldf.org/wp-content/uploads/NYVRA-White-Paper-NYCLU-LDF-March-2022.pdf	15
Ruth M. Greenwood & Nicholas O. Stephanopoulos, <i>Voting Rights Federalism</i> , 73 Emory L.J. 299 (2023)	8, 9
<i>The Evolution of Section 2: Numbers and Trends</i> , Michigan Law Voting Rights Initiative (2024), https://voting.law.umich.edu/findings/	9

INTRODUCTION

In their headlong rush to eviscerate the protections afforded to New York voters under the John R. Lewis Voting Rights Act (“NYVRA”), Defendants ignore New York’s settled rule that “municipalities . . . and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation.” *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 383 (2017) (quoting *City of New York v. State of New York*, 86 N.Y.2d 286, 289 (1995)). As “the preeminent sovereign,” *Baldwin Union Free Sch. Dist. v. Cnty. of Nassau*, 62 Misc. 3d 236, 255 (N.Y. Sup. Ct. 2018), New York rationally chose to prohibit its subdivisions from seeking to invalidate state laws. *See In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 892 F.3d 108, 110-11 (2d Cir. 2018). That choice must be respected here: Defendants may not advance a facial constitutional challenge to the NYVRA.

Regardless, the facial constitutional arguments Defendants are so eager to advance are meritless. The NYVRA is a relatively *new* law, but it is not a highly *novel* law. To the contrary, it strongly resembles both other state voting rights acts (“state VRAs”) and, in many respects, the federal Voting Rights Act (“federal VRA”). Once these similarities are recognized, Defendants’ arguments that the NYVRA is racially discriminatory collapse. Defendants offer no explanation as to how the NYVRA could possibly be unconstitutional “in every conceivable application,” *Cohen v. State*, 94 N.Y.2d 1, 8 (1999), when courts routinely apply very similar laws consistent with equal protection principles. *See, e.g., Portugal v. Franklin Cnty.*, 530 P.3d 994, 1006 (Wash. 2023); *Pico Neighborhood Assn. v. City of Santa Monica*, 15 Cal. 5th 292, 314 (2023). These courts include the U.S. Supreme Court, which affirmed the use of race-conscious districting to remedy racial vote dilution in *Allen v. Milligan*, 599 U.S. 1 (2023).

Defendants offer various other arguments premised on misleading excerpts from their preferred U.S. Supreme Court opinions, stitched together into a constitutional crazy quilt. None are persuasive. Defendants argue that the NYVRA violates the federal Equal Protection Clause because it “require[s] political subdivisions to make redistricting decisions based upon their residents’ racial classifications.” NYSCEF 70 at 15. That is wrong. The NYVRA does not include *any* racial classifications – none of its provisions distribute burdens or benefits to individuals on the basis of their race. While some provisions *refer* to race-related concepts (like racially polarized voting), that is entirely different from *classifying* people by race. Likewise, the fact that experts in this case assessed the voting patterns of voters from various racial groups does not invite heightened scrutiny. The U.S. Supreme Court has specifically rejected “[t]he contention that mapmakers must be entirely ‘blind’ to race” when identifying and remedying racial vote dilution. *Milligan*, 599 U.S. at 33. For these reasons, Defendants’ reliance on *Students for Fair Admissions Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) – a case involving racial classifications in the very different context of elite university admissions – is misplaced.

Defendants also argue that the NYVRA’s vote dilution provisions are unconstitutional because they cannot satisfy strict scrutiny. But the NYVRA is *not* subject to strict scrutiny because it does *not* classify individuals on the basis of their race. And Defendants are wrong that Section 2 of the federal VRA is itself subject to strict scrutiny. NYSCEF 70 at 23 n.4. Rather, strict scrutiny applies to *individual districts* only when race *predominates* in the redistricting process. *See, e.g., Shaw v. Hunt*, 517 U.S. 899, 907 (1996); *see also Milligan*, 599 U.S. at 33 (“The line that we have long drawn is between [race] consciousness and predominance.”). The hypothetical possibility that a district drawn to comply with the NYVRA could be a racial gerrymander does not subject the NYVRA to strict scrutiny, either. The NYVRA deters racial gerrymandering by expressly

providing for numerous potential non-district remedies, *see* Election Law § 17-206(5)(a), and instructs courts to consider “whether members of a protected class are geographically compact or concentrated . . . in determining an appropriate remedy,” *id.* § 17-206(2)(c)(viii). If a court ignores these safeguards, the remedy is for parties to bring an as-applied constitutional challenge to *individual districts* on the grounds that they are racial gerrymanders, not to invalidate the NYVRA in its entirety.

Even if strict scrutiny applies, however, the NYVRA is narrowly tailored to serve the State’s compelling government interest in eradicating racial discrimination in voting. The NYVRA, like Section 2 of the federal VRA, “turns on the presence of discriminatory effects, not discriminatory intent,” and targets voting systems or policies which “render[] a minority vote unequal to a vote by a nonminority voter.” *Milligan*, 599 U.S. at 25. The fact that the NYVRA is, in some respects, more expansive than Section 2 is entirely unremarkable – the New York Constitution’s protections for voters “substantially exceed” those contained in the federal constitution. Election Law § 17-200. And Defendants’ assertion that New York is more limited than the federal government in the steps it may take to stop racial discrimination ignores U.S. Supreme Court decisions stating otherwise. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995). Finally, Defendants’ attempt to manufacture a constitutional problem by noting differences between the NYVRA and Section 2 does not convert the NYVRA into a racial classification, as the NYVRA’s vote dilution elements correspond closely to the “essence” of a federal vote dilution claim. *See Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

Defendants’ motion also fails on the merits. Their argument that Plaintiffs claims are effectively moot because amendments to Town Law § 80 will eventually require even-year elections is deeply cynical, given that the Town is currently fighting to prevent Town Law § 80

from ever being implemented. *See Ashlaw v. State of New York*, No. EF2024-00001746 (N.Y. Sup. Ct. Onondaga Cnty.). Regardless, because of how Town Law § 80 will be phased in, there will undeniably be odd-year elections for Town Board seats in the coming years. The NYVRA, like the federal VRA, assuredly “reaches changes that affect even a single election.” *N.A.A.C.P. v. Hampton Cnty. Election Comm’n*, 470 U.S. 166, 178 (1985). And dispositively at the summary judgment stage, whether minority-preferred candidates are likely to prevail in even-year Town elections is factually disputed.

Finally, Defendants choice to blind themselves to Plaintiffs’ evidence on the reasonable-alternative-benchmark requirement does not, under New York rules, entitle them to summary judgment. Plaintiffs introduced Dr. Barreto’s addendum in advance of the experts’ depositions and the summary judgment motion deadline. Defendants have not and cannot show that the timing of this disclosure was prejudicial, as they must. *See Colon v. Bell*, 137 A.D.3d 1067, 1068 (2016). Regardless, Defendants’ argument fails on its own terms: Plaintiffs can introduce Dr. Barreto’s addendum in opposing Defendants’ summary judgment motion, *see* CPLR 3212(b), and his initial report is sufficient on its own to create a factual dispute on this issue.

FACTUAL BACKGROUND

A. The Parties

Plaintiffs Oral Clarke, Romance Reed, Grace Perez, Peter Ramon, Ernest Tirado, and Dorothy Flournoy (collectively, “Plaintiffs”) are residents of and registered voters in the Town of Newburgh (“the Town”). Plaintiffs’ Statement of Facts (“SOF”), ¶¶ 1-18. Plaintiffs Clarke, Reed, and Flournoy are Black; Perez, Ramon, and Tirado are Latino. *Id.* The Town’s governance authority is the Town Board of the Town of Newburgh (“the Town Board”), a political subdivision of the State of New York. *Id.* at ¶ 19. Its current members are Town Supervisor Gil Piaquadio and

Board members Paul Ruggiero, Scott Manley, and Anthony LoBiondo. *Id.* at ¶¶ 20-22. A vacant seat will be filled in a special election. *Id.* at ¶ 23. Board members are elected through at-large elections. *Id.* at ¶ 24.

On January 26, 2024, Plaintiffs sent a letter to the Town Clerk advising that the Town's at-large system of elections violated the NYVRA. *Id.* at ¶ 27. On March 15, 2025, the Town Board adopted a resolution to investigate Plaintiffs' allegations. *Id.* at ¶ 29. Because the Board's response did not satisfy Election Law § 17-206(7), it did not trigger the NYVRA's "safe harbor" provisions. NYSCEF 31. Plaintiffs filed suit. NYSCEF 1.

B. The Black and Hispanic communities in Newburgh.

The Black and Hispanic populations in Town have grown significantly in recent decades, from 6.6% of the population combined in 1980 to today, where 15.4% identify as Black and 25.2% as Hispanic. SOF at ¶¶ 33-39. The Town's government has not adapted to reflect Newburgh's changing demographics. Indeed, the Town is unaware of these communities' growth.¹ There has never been a Black or Hispanic member of the Town Board. *Id.* at ¶ 42. The Town does not provide information to residents in Spanish, except for a notice regarding mosquito-borne viruses issued after this litigation commenced. *Id.* at ¶ 41. Although at-large election systems were designed to minimize the political strength of minority voters, the Town has no justification for maintaining

¹ In his affidavit, Supervisor Piaquadio testified that the "Town's current population is 31,987," of which "15.4% are black . . . and 25.2% are Hispanic." NYSCEF 58 at 1. Previously, Piaquadio testified he did not know what percentage of the Town was Black or Hispanic, Piaquadio Deposition at 15:18-16:7, 17:20-18:8, and that he had no public, non-privileged information regarding the same. NYSCEF 61 (Town Deposition) at 44:11-23, 46:17-47:6. While Plaintiffs do not dispute the accuracy of Supervisor Piaquadio's figures, the discrepancies in his testimony cast serious doubt on Defendants' discovery efforts and the legitimacy of their privilege claims.

its at-large election system besides its assertion that it “has relied on [the system] since at least 1865.” *Id.* at ¶¶ 43-47.

There is an extensive history of discrimination in New York, Orange County, and the Town of Newburgh affecting Black and Hispanic residents. *Id.* at ¶¶ 80-82. Black and Hispanic people were excluded from the housing market through restrictive covenants. *Id.* at ¶ 33. They were excluded from the political process through English-literacy requirements, racial gerrymandering, a lack of Spanish-language information and interpreters, and other barriers. *Id.* at ¶¶ 80-81. The consequences of this historical and ongoing discrimination are stark: Black and Hispanic residents of Newburgh, on the whole, experience significantly worse outcomes than white residents across most socioeconomic indicators. *Id.* at ¶¶ 91-96.

There have been numerous high-profile racial incidents within the Town. In 1992, members of the Ku Klux Klan and neo-Nazi groups hosted a rally at a local businessman’s property. *Id.* at ¶ 83. There was a counterprotest in the neighboring City of Newburgh, but no reported response in or by the Town. *Id.*² In 2012, a Black Town employee filed a lawsuit alleging that his supervisors created a racially hostile work environment. *Id.* at ¶¶ 87-90. The employee’s claims included being singled out for negative treatment and repeatedly subjected to racial slurs. The lawsuit quickly settled. Four years later, one of the same employees named in the 2012 complaint was again accused of racial discrimination. *Id.*

² Defendants’ rebuttal expert, Professor Donald Critchlow, disputed the significance of this incident on the grounds that “relatively few people attended the neo-Nazi rally.” NYSCEF 60 at 9-10. However, Professor Critchlow eventually conceded that the rally was a “historical fact” and “an expression of . . . [w]hite supremacy” in the Town. *See* Critchlow Deposition at 107:20-110:25.

There have also been numerous incidents evincing the use of racial appeals and the Town's nonresponsiveness to Black and Hispanic residents. After Orange County declared a state of emergency due to the arrival of around 60 asylum seekers, elected officials promoted a story that asylum seekers were displacing homeless veterans at a local hotel, even though the story was fabricated (as the hotel's manager quickly confirmed). *Id.* at ¶¶ 111-18. The Town subsequently sued the hotel based on alleged zoning violations, arguing that housing "single male asylum seekers from the City of New York will result in potential disaster." *Id.* Town officials have done little to accommodate or meet the needs of Black and Hispanic residents – the few actions they point to as benefiting these communities were either legally required or are completely unsubstantiated. *Id.* at ¶¶ 97-102. For example, the Town does not provide Spanish-language information to residents, and officials supported expanding a powerplant over the opposition of racial justice advocates who raised concerns about the environmental and health impacts on communities of color. *Id.* at ¶¶ 104-110. The Town has done little for its Black and Hispanic residents and has no plans to change course in the future. *Id.* at ¶ 103.

C. The dilutive effects of the at-large election system on Hispanic and Black voters' electoral power in Newburgh.

There is extensive evidence that the Town's at-large election system dilutes the voting power of Hispanic and Black voters. Plaintiffs' expert, Dr. Matt Barreto, analyzed dozens of elections using court-approved techniques and reported a "clear, consistent, and statistically significant finding of racially polarized voting in the Town of Newburgh." SOF at ¶¶ 48-64. Specifically, he found that "Latino and Black voters are cohesive in local elections for Town Council," but that these candidates "typically receive very low rates of support from white voters, who effectively block [them] from winning office." *Id.* Dr. Barreto also opined that various alternative election systems would allow Latino and Black voters a reasonable opportunity to elect

candidates of choice. *Id.* at ¶¶ 74-79. In an addendum, he reported multiple viable single-member district plans. *Id.* Defendants’ rebuttal expert, Professor Brad Lockerbie, did not dispute Dr. Barreto’s analysis and reached no conclusions regarding racially polarized voting. *Id.* at ¶¶ 67-73.

Notwithstanding this evidence, Defendants blithely maintain that, in the words of Professor Critchlow, “democratic participation is alive and well in the town of Newburgh.” NYSCEF 70 at 8 (quoting NYSCEF 60 at 19). But Professor Critchlow reached this conclusion knowing *nothing* about Black and Hispanic participation in Town elections – indeed, he later testified that he did not *need* to know anything about Black and Hispanic participation to assess the health of Newburgh’s democracy. *See* Critchlow Deposition at 140:9-144:20. Professor Critchlow also concluded that Hispanic turnout was increasing statewide based exclusively on his misreading of a report that found the opposite. *Id.* at 77:6-79:19, 82:9-93:4. The Town can only characterize democratic participation in Newburgh as “alive and well” if it ignores the voices of Black and Hispanic residents, as it has for years.

ARGUMENT

I Defendants lack capacity to challenge the facial constitutionality of the NYVRA.

As a municipality and its officers, Defendants “lack[] the capacity to mount a constitutional challenge to invalidate State legislation.” *Bd. of Educ. of Roosevelt Union Free Sch. Dist. v. Bd. of Trustees of State Univ. of New York*, 282 A.D.2d 166, 172 (3d Dep’t 2001).³ All municipal authority in New York “is subject to the power provided by the State.” *Baldwin*, 62 Misc. 3d at

³ The Attorney General has taken the same position in another case where a defendant municipality is seeking to facially invalidate the NYVRA, *Young v. Town of Cheektowaga*, No. 803989/2024 (N.Y. Sup. Ct. Erie Cnty.). *See* NYAG Memorandum of Law at 18.

255. The State has chosen not to grant political subdivisions the authority to seek to have state statutes invalidated. *See, e.g., Black River Regulating Dist. v. Adirondack League Club*, 307 N.Y. 475, 488 (1954) (explaining that the “political power conferred by the Legislature [on its subdivisions] confers no vested right as against the government itself”). Making this choice is plainly the State’s prerogative. *See Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (explaining that in structuring political subdivisions, “the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the [federal] Constitution”). Given this choice, it makes no sense to suppose that the same Legislature which enacted the NYVRA to “breathe constitutional rights into . . . public entit[ies] [would] then equip [them] with authority to police state legislation on the basis of those rights.” *Matter of World Trade Ctr.*, 30 N.Y.3d at 385.

The capacity rule “flows from judicial recognition of the juridical as well as political relationship between [municipal] entities and the State.” *City of New York*, 86 N.Y.2d at 289.

Constitutionally as well as a matter of historical fact, municipal corporate bodies . . . are merely subdivisions of the State, created by the State for the convenient carrying out of the State’s governmental powers and responsibilities as its agents. . . . [A]s purely creatures or agents of the State, it followed that municipal corporate bodies cannot have the right to contest the actions of their principal or creator affecting them in their governmental capacity or as representatives of their inhabitants.

Id. at 290. The rule applies whether the constitutional argument is raised affirmatively or defensively. *See In re World Trade Ctr.*, 892 F.3d at 110-11 (holding that defendant public entity

lacked capacity to assert that statute sought to be enforced by plaintiffs was unconstitutional).⁴

Defendants are therefore barred from seeking to invalidate the NYVRA.

To be clear, the capacity rule does not insulate the NYVRA from federal constitutional challenges. If this Court finds the Town liable and imposes a remedy, Defendants may seek to challenge the constitutionality of actions they would thereby be required to undertake. *See Jeter*, 41 N.Y.2d at 287 (recognizing possibility that municipal officials could assert constitutional challenge on grounds that “if they are obliged to comply . . . they will by that very compliance be forced to violate a constitutional proscription”). Or a private party may assert their own constitutional rights. *See e.g., Shaw*, 517 U.S. at 908 (adjudicating racial gerrymandering claim challenging federal VRA remedial district). The capacity rule leaves “many paths . . . to vindicate the supremacy of federal law in this area,” so applying it here does not raise federal constitutional concerns. *Whole Woman’s Health v. Jackson*, 595 U.S. 30, 48 (2021). But one party cannot raise the legal rights of another, *see Society of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 773 (1991), and a municipality and its officials cannot assert the constitutional rights of the municipality’s residents, *see Village of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74, 89 (2d Dep’t 2007). Defendants are precluded from challenging the facial validity of the NYVRA.

II The NYVRA is constitutional.

Even if Defendants could mount a facial constitutional challenge to the NYVRA, the NYVRA is facially constitutional. Under New York law, “[i]t is well settled that facial

⁴ *See also Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287 (1977) (defendant school districts “do not have the substantive right to raise . . . constitutional challenges” to state statute); *City of New York*, 86 N.Y.2d at 289 (defendant political subdivisions lacked capacity to challenge public education funding system under federal and state constitutions).

constitutional challenges are disfavored.” *Overstock.com, Inc. v. New York State Dep’t of Tax’n & Fin.*, 20 N.Y.3d 586, 593 (2013). “Legislative enactments enjoy a strong presumption of constitutionality,” and “parties challenging a duly enacted statute face the initial burden of demonstrating the statute’s invalidity ‘beyond a reasonable doubt.’” *LaValle v. Hayden*, 98 N.Y.2d 155, 161 (2002) (quoting *People v. Tichenor*, 89 N.Y.2d 769, 773 (1997)). The NYVRA is a straightforward voting rights act that sets forth familiar elements for proving liability for vote dilution. It contains no racial classifications, so it is not subject to strict scrutiny. Even if strict scrutiny applied, the NYVRA is narrowly tailored to further the State’s compelling interest in eradicating racial discrimination in voting. Defendants have not carried their heavy burden to prevail on their facial constitutional challenge.

i. Voting rights acts with similar elements to the NYVRA have universally withstood constitutional challenges.

The NYVRA’s framework for determining liability for vote dilution is straightforward. With respect to at-large election systems like Newburgh’s, this framework includes two potential claims. *First*, plaintiffs may establish illegal vote dilution by showing that the “voting patterns of members of the protected class within the political subdivision are racially polarized” from the voting patterns of other members of the electorate. Election Law § 17-206(2)(b)(i)(A). *Second*, plaintiffs may, instead or in addition, prove vote dilution by showing that “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)(B). The first claim is based on racially polarized voting; the second hinges on the totality of the circumstances. Under either theory, Plaintiffs must *also* prove that one or more reasonable alternative policies exist that would improve the protected class’s representation relative to the status quo. This element follows from the NYVRA’s statement of the “[p]rohibition against vote dilution.” *Id.* § 17-206(2). A challenged

practice only “*ha[s] the effect*” of “*impairing*” a protected class’s electoral influence “*as a result of vote dilution*” if, under some other reasonable policy or system, the protected class would be better represented than it currently is. *Id.* § 17-206(2)(a) (emphasis added).

This framework for determining liability closely resembles the structure of Section 2 of the federal VRA and the California and Washington VRAs. That is no accident: the Legislature intended the NYVRA to “build[] upon the demonstrated track record of success [of state voting rights acts] in California and Washington, as well as the historic success of the federal voting rights act.” SOF at ¶ 26. Statutes containing similar elements for proving racial vote dilution have universally withstood constitutional challenges. *See, e.g., Milligan*, 599 U.S. at 19 (“[W]e have applied *Gingles* in one § 2 case after another, to different kinds of electoral systems and to different jurisdictions in States all over the country.”); *Portugal*, 530 P.3d at 1012 (“[T]he [Washington] VRA, on its face, does not require unconstitutional actions.”); *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 688 (2006) (rejecting argument “that the [California] VRA is facially invalid”).

The track record of VRAs at the remedial stage is equally impressive. Hundreds of subdivisions have been required to switch from at-large elections to single-member districts under state VRAs. *See* Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 Emory L.J. 299, 329 (2023). Yet “*not a single district* created to remedy or avoid a [state VRA] violation has been found to be an illegal racial gerrymander.” *Id.* Only one suit has even alleged that state VRA remedial districts were unlawful, and it was dismissed due to its “fail[ure] to plausibly state that [the plaintiff] is a victim of racial gerrymandering.” *Higginson v. Becerra*, 786 F. App’x. 705, 706 (9th Cir. 2019). Hundreds more jurisdictions have been required to draw single-member districts under the federal VRA. *See, e.g., The Evolution of Section 2: Numbers and Trends*, Michigan Law Voting Rights Initiative (2024), <https://voting.law.umich.edu/findings/>

(last accessed Aug. 26, 2024). In none of these cases has any court ever held that a VRA with similar elements to the NYVRA is facially unconstitutional.

ii. The NYVRA is not subject to strict scrutiny because it does not classify individuals on the basis of their race.

Defendants argue that the NYVRA is subject to strict scrutiny under the federal Equal Protection Clause “because [its vote dilution] provisions require political subdivisions to make redistricting decisions based upon their residents’ racial classifications.” NYSCEF 70 at 15. This audacious claim fails on its own terms. The NYVRA does not employ racial classifications, rely on racial stereotypes, or require racial gerrymandering. The implications of Defendants’ logic – condemning most other state VRAs, the federal VRA, and much civil rights law beyond the voting rights context – are untenable.

To begin, the NYVRA uses no racial classifications and therefore is not subject to strict scrutiny on this ground. The U.S. Supreme Court has defined a racial classification as a legal provision that (1) distributes burdens or benefits (2) to individuals (3) on the basis of individuals’ race. *See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (“[W]hen the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”); *Crawford v. Board of Educ. of City of Los Angeles*, 458 U.S. 527, 537 (1982) (explaining that a law “does not embody a racial classification” if “[i]t neither says nor implies that persons are to be treated differently on account of their race”). The Court has made clear that a mere statutory *reference* to race *is not* a racial classification. *See, e.g., Tex. Dep’t of Hous. & Cmty. Aff. v. Inclusive Cmities. Project, Inc.*, 576 U.S. 519, 545 (2015) (“[M]ere awareness of race in attempting to solve [race-related] problems . . . does not doom that endeavor at the outset.”).

Under this definition, no part of the NYVRA is a racial classification for two reasons. First, no part of the law distributes burdens or benefits to *individuals*. Rather, the law prohibits *political subdivisions* from committing voter suppression or vote dilution. The NYVRA's vote dilution section, for instance, provides that "[n]o board of elections or political subdivision shall use any [dilutive] method of election." Election Law § 17-206(2)(a). This imposes no requirements on any individuals. No individuals are compelled to do anything, nor may any individuals be sued. The sole regulated entities are political subdivisions.

Second, no part of the NYVRA distributes burdens or benefits *on the basis of individuals' race*. Political subdivisions never become liable for vote dilution because of the racial identities of their residents. An individual's racial identity is not even a statutory element, let alone the fulcrum on which liability hinges. Liability is instead predicated on voters' *voting patterns* and evidence that the existing election system dilutes their voting power. *See* Election Law § 17-206(2)(b)(i)(A)-(B). And members of *any* "race, color, or language-minority group" who can make the requisite showings may bring a vote dilution claim. Election Law § 17-204(5). Plaintiffs have asked this Court to remedy the dilutive effect of Newburgh's at-large system on Black and Hispanic voters, not to pick winners based on race *qua* race.

In an effort to find a racial classification where none exists, Defendants note that the NYVRA refers to a "[p]rotected class," which "means a class of individuals who are members of a race, color, or language-minority group." Election Law § 17-204(5). Defendants extrapolate from this definition that the NYVRA "draw[s] racial distinctions, giving . . . special preferences only to minority groups' ability to elect candidates of their choice." NYSCEF 70 at 15. But this is a quintessential *reference* to race, not a racial classification. *See, e.g., Inclusive Cmities. Project*, 576 U.S. at 545. Other state VRAs, the federal VRA, and most civil rights statutes also refer to race in

similar ways. *See, e.g.*, 52 U.S.C. § 10301(a) (barring voting discrimination “on account of race”); *id.* § 10310(c)(3) (defining “language minority group[s]”); Wash. Rev. Code § 29A.92.010(6) (defining “protected class” to mean “a class of voters who are members of a race, color, or language minority group”). Courts have universally held that these laws do not classify by race and are not subject to strict scrutiny. *See Portugal*, 530 P.3d at 1011 (“[T]he [Washington] VRA . . . mandates equal voting opportunities for members of every race, color, and language minority group” and is subject to “rational basis review, not strict scrutiny”); *Sanchez*, 51 Cal. Rptr. 3d at 838 (explaining that California VRA is not subject to strict scrutiny because “[l]ike the [federal] VRA, [the California VRA] involves race and voting, but, also like the [federal] VRA, it does not allocate benefits or burdens on the basis of race or any other suspect classification”).

Defendants’ assertion that that the U.S. Supreme Court “has *not* doubted that Section 2 [of the federal VRA] is subject to the constitutional strict scrutiny analysis” is misleading. NYSCEF 70 at 23 n.4 (citing *Abbot v. Perez*, 585 U.S. 579 (2018)) The U.S. Supreme Court has *never* applied strict scrutiny to Section 2. Strict scrutiny applies to *individual districts* drawn to comply with the federal VRA if “race was *the predominant factor* motivating the” drawing of the district and the mapmaker “subordinated traditional race-neutral districting principles.” *Miller v. Johnson* 515 U.S. 900, 916 (1995) (emphasis added). Whether such a *district* withstands strict scrutiny was the question before the Court in *Abbot*, not whether Section 2 *itself* was subject to heightened scrutiny. 585 U.S. at 620 (“Texas does not dispute that race was the predominant factor in the design of [the challenged district], but it argues that this was permissible because it had good reasons to believe that this was necessary to satisfy § 2 of the Voting Rights Act.”) (internal quotation marks omitted).

The Court has affirmed that “racial predominance” is what makes *districts* subject to strict scrutiny, not the need for “racial consciousness” when identifying and remedying racial vote dilution. *Milligan*, 599 U.S. at 31. The Court has also conclusively rejected another of Defendants’ arguments: courts routinely assess the consequences of potential vote dilution remedies on minority voters’ electoral influence, but that does not mean “racial predominance plagues *every single*” remedy. *Id.* at 33. Rather, accounting for race when identifying racial vote dilution and demonstrating it can be remedied “is the whole point of the enterprise.” *Id.*

Continuing their hunt for a racial classification, Defendants emphasize that the NYVRA’s vote dilution prong requires evidence “assess[ing] how racial groups have voted in a political subdivision.” *See* NYSCEF 70 at 19. But racially polarized voting involves the *behavior* of members of different racial groups – how they vote – not their racial identity. Similarly, the NYVRA’s totality of the circumstances factors are neither “amorphous” nor impermissibly race-based. *Id.* at 20. The NYVRA instructs courts to assess factors like a subdivision’s history of racial discrimination, racial disparities in education, employment, and other areas, and the use of racial appeals in campaigns, Election Law § 17-206(3), just like in Section 2 cases, *see Gingles*, 478 U.S. at 37. These factors are race-related, of course, but they do not depend on race *per se*. Racially polarized voting and the totality of the circumstances are components of other state VRAs and the federal VRA, but no court has *ever* applied strict scrutiny to these laws because of these elements. *See, e.g., Milligan*, 599 U.S. at 41; *Portugal*, 530 P.3d at 656 (“Recognizing the possibility of racially polarized voting is neither novel nor unique to the [Washington] VRA.”); *Sanchez*, 51 Cal. Rptr. 3d at 826 (rejecting argument that California VRA “is unconstitutional because it uses ‘race’ to identify the polarized voting that causes vote dilution”).

Because the NYVRA contains no racial classifications, Defendants’ invocations of *Students for Fair Admissions* are misplaced. In *SFFA*, the question was whether affirmative action programs – which the Court characterized as “[c]lassifying and assigning students based on their race” – satisfied strict scrutiny. *SFFA*, 600 U.S. at 214 (internal quotation marks omitted). Moreover, while the Court in *SFFA* described affirmative action as “[o]utright racial balancing,” *Id.* at 223-24, the Court in *Milligan* made clear that remedying racial vote dilution does not “inevitably demand[] racial proportionality in districting,” *Milligan*, 599 U.S. at 26. And the “interests” considered “not sufficiently coherent” or “compelling” to satisfy strict scrutiny in *SFFA* were a university’s interests in things like training future leaders, promoting a robust marketplace of ideas, and preparing engaged and productive citizens, *SFFA*, 600 U.S. at 214, not (as Defendants’ misleadingly suggest) a state’s interest in ensuring every citizen “an equal opportunity to vote,” NYSCEF 70 at 22. Unsurprisingly, the few courts asked to apply *SFFA* in the racial vote dilution context have declined the invitation. *See Singleton v. Allen*, 690 F. Supp. 3d 1226, 1317 (N.D. Ala. 2023) (explaining that “affirmative action cases, like [*SFFA*] . . . are fundamentally unlike this case”); *Robinson v. Ardoin*, 86 F.4th 574, 593 (5th Cir. 2023) (“Drawing a comparison between voting redistricting and affirmative action occurring at Harvard is a tough analogy.”). This Court should do the same.

iii. Even if it is subject to strict scrutiny, the NYVRA is narrowly tailored to achieve New York’s compelling interest in combatting racial discrimination in voting.

As detailed above, strict scrutiny does not apply to the NYVRA. But even if strict scrutiny does apply, the NYVRA passes muster. To start, the NYVRA furthers a state interest of paramount importance: preventing and remedying racial discrimination in voting. This is the same urgent goal motivating the Fifteenth Amendment itself. The U.S. Supreme Court has described “racial discrimination in voting” as an “insidious and pervasive evil” that may be addressed through

“sterner and more elaborate measures.” *South Carolina v. Katzenbach*, 383 U.S. 301, 308-09 (1966). The NYVRA indisputably aims to fight racial discrimination in voting. It says so in the very first section: to avoid “the denial or abridgement of the voting rights of members of a race, color, or language-minority group,” the NYVRA seeks to “[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.

Defendants maintain that states are more limited than the federal government in combatting racial discrimination. NYSCEF 70 at 22. This may have been true in an earlier era. Since the 1990s, however, “congruence between the standards applicable to federal and state racial classifications” has been one of the “general propositions” on which equal protection law is based. *Adarand*, 515 U.S. at 223, 226. Moreover, even under the earlier doctrine Defendants harken back to, New York would possess the authority to enact the NYVRA: unlike the municipality in *City of Richmond v. J.A. Croson Co.*, the Legislature here “ma[d]e specific findings of discrimination” prior to enacting the challenged law. 488 U.S. 469, 489 (1989); *see also* N.Y. Comm. Rpt. on S. 1046D (N.Y. May 20, 2022) (acknowledging the state’s “extensive history of discrimination against racial, ethnic, and language minority groups in voting”).

Indeed, the evidence of discrimination in voting in New York is overwhelming. In addition to the legislative findings, a detailed white paper confirmed that “many discriminatory practices remain in place” in New York, including “at-large election systems, redistricting plans that dilute minority voting strength, polling location plans with too few and/or too inconvenient sites, and failures to provide adequate language assistance.” *See* NYCLU & LDF, John R. Lewis Voting Rights Act of New York at 2 (Feb. 24, 2022), <https://www.naacpldf.org/wp-content/uploads/NYVRA-White-Paper-NYCLU-LDF-March-2022.pdf>. Several New York

counties – including much of New York City – were previously covered by Section 5 of the federal VRA. *See* Jurisdictions Previously Covered by Section 5, U.S. Dep’t of Justice (May 17, 2023), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>. And since Section 2 of the federal VRA took its current form, dozens of New York political subdivisions – including Orange County – have been sued for voter suppression and vote dilution. *See Section 2 Cases Database*, Michigan Law Voting Rights Initiative (2024), <https://voting.law.umich.edu/database/> (last accessed Aug. 26, 2024).

These findings and the extensive history of racial discrimination in voting across New York conclusively answer the question of the Legislature’s authority to enact the NYVRA, a statewide bill designed to prevent and remedy racial discrimination in voting. Further, like the federal VRA, application of the NYVRA in a political subdivision is fact dependent and “requires courts to conduct ‘an intensely local appraisal’ of the electoral mechanism at issue.” *Milligan*, 599 U.S. at 19 (quoting *Gingles*, 478 U.S. at 79). A plaintiff alleging vote dilution under the NYVRA must offer evidence addressing the voting patterns of the protected class they belong to and/or evidence of discrimination against that protected class within the relevant political subdivision. *See* Election Law § 17-206(2)(b)(i)(A)-(B). Plaintiffs can never prove vote dilution without demonstrating that what *causes* their vote to be diluted is the particular election system or policy they are challenging, as opposed to demographics or some existing feature of natural or political geography. *See* Election Law § 17-206(2)(a).

The NYVRA is also narrowly tailored. The “essence” of vote dilution is that an electoral practice “interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [different racial groups] to elect their preferred representatives.” *Gingles*, 478 U.S. at 47. The NYVRA’s vote dilution elements correspond closely to this “essence.” The “social and

historical conditions” that enable vote dilution are racially polarized voting, *see id.* at 52-74, and past and present racial discrimination, *see id.* at 36-37, 44-45. One of the NYVRA’s vote dilution claims is based on racially polarized voting, *see* Election Law § 17-206(2)(b)(i)(A); the other focuses on historical and ongoing racial discrimination, the crux of the totality of the circumstances analysis, *see id.* §§ 17-206(2)(b)(i)(B), 17-206(3). The NYVRA’s reasonable-alternative-policy requirement, *id.* § 17-206(2)(a), focuses the inquiry on whether different racial groups have an equal opportunity to elect candidates of their choice, *see Gingles*, 478 U.S. at 47.

Defendants contend that the NYVRA is not narrowly tailored because it departs from the *Gingles* prongs in certain ways. They first note that the NYVRA omits the first of *Gingles*’s three prongs (that an additional, reasonably compact, majority-minority district could be drawn). NYSCEF 70 at 23. But the U.S. Supreme Court adopted this prong for prudential, not constitutional, reasons – the Court thought that majority-minority districts would be the remedies in vote dilution cases and wanted to ensure that such districts could feasibly be created. *See Gingles*, 478 U.S. at 50 n.17. The Court said nothing about the Constitution in articulating this requirement. *Id.* at 50-51. Additionally, the NYVRA’s reasonable-alternative-policy requirement serves exactly the same function as the first *Gingles* prong: ascertaining that a valid remedy could be implemented. And, like the first *Gingles* prong, the NYVRA mitigates the risk of racial gerrymandering by instructing courts to consider “whether members of a protected class are geographically compact or concentrated . . . in determining an appropriate remedy.” Election Law § 17-206(2)(c)(viii). So even if something like the first *Gingles* prong is constitutionally required, it is present here.

Defendants next argue that the NYVRA “disregard[s] the second *Gingles* precondition” because it “does not require plaintiffs to show that a minority group is ‘politically cohesive.’”

NYSCEF 70 at 24. Defendants are wrong: the NVYRA expressly asks whether protected class members are “politically cohesive,” Election Law § 17-206(2)(c)(iv), and the need for proof of a minority community’s political cohesion is inherent in the concept of racially polarized voting, *see Pico*, 15 Cal. 5th at 306 (“Both [the federal and California VRAs] require a plaintiff to show racially polarized voting — i.e., that the protected class members vote as a politically cohesive unit, while the majority votes ‘sufficiently as a bloc usually to defeat’ the protected class’s preferred candidate.”) (quoting *Gingles*, 478 U.S. at 56). Defendants’ argument is also nonsensical: only if protected class members are politically cohesive do they have “candidates of *their choice*” whose election may be “impair[ed]” by an electoral system. Election Law § 17-206(2)(a) (emphasis added). A protected class that is not politically cohesive has no candidates it truly favors over others and will be unable to demonstrate “that an alternative voting system exists that would give those members of a protected class a greater chance to elect candidates of their choice.” NYSECF 70 at 26.

Finally, Defendants raise various policy disputes properly directed at the Legislature, not this Court. Defendants dislike that the NYVRA allows for crossover and coalition claims, NYSCEF 70 at 23-24, but the fact that Section 2 does not *require* courts to implement a particular remedy does not mean states are constitutionally *forbidden* from doing so. *See Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (“States that wish to draw crossover districts are free to do so where no other prohibition exists.”); *Cooper v. Harris*, 581 U.S. 285, 306 (2017) (describing idea that states are prohibited from drawing crossover districts as “at war with our § 2 jurisprudence”). Other state VRAs also “permit[] remedies that Section 2 does not,” yet that “does not create a conflict between state and federal law because the states are free to implement remedies that are

not required pursuant to Section 2, so long as those remedies are not otherwise prohibited.”

Portugal, 530 P.3d at 1002.

Defendants also dislike that, under the NYVRA, a vote dilution claim can be based on either racially polarized voting *or* the totality of the circumstances. Defendants would prefer that, as under the federal VRA, Plaintiffs had to prove *both* racially polarized voting *and* that the totality of the circumstances supports liability. *See* NYSCEF 70 at 25-26. Defendants call the latter test “amorphous,” but, again, the “factors” that comprise the totality of the circumstances under the NYVRA, *see* Election Law § 17-206(3), largely parallel the factors first listed by a crucial U.S. Senate committee report and then deemed “probative of a [federal VRA] violation” in *Gingles*, 478 U.S. at 36. And the NYVRA *does* require more from plaintiffs than just evidence about the totality of the circumstances, as Defendants acknowledge. For a claim of this kind, as for a claim based on racially polarized voting, plaintiffs must also satisfy the statute’s reasonable-alternative-policy requirement, which is necessary to establish that the challenged election system is what *causes* the dilution of members of a protected class’s votes. NYSCEF 70 at 27-28. The fact that the NYVRA is, in some respects, more expansive than the federal VRA does not convert it into an unconstitutional racial classification.

III. The amendments to Town Law § 80, which Defendants are currently challenging as unconstitutional in a separate case, do not moot this case.

Defendants argue they are entitled to summary judgment because the Town may eventually conduct even-year elections. Defendants are speaking out of both sides of its mouth. They cannot evade liability in *this* case by pointing to the possible future implementation a law which they are seeking to have invalidated as facially unconstitutional in *another* case. *See* First Amended Complaint, *Ashlaw v. State of New York*, No. EF2024-00001746 (N.Y. Sup. Ct. Onondaga Cnty., May 13, 2024)); *see also* *Borges v. Placeres*, 64 Misc. 3d 92, 95 (N.Y. App. Term. 2019) (“[A]

litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise.”⁵

Their argument is also legally erroneous. Defendants are essentially advancing a mootness claim, contending that even if Black and Latino voters are currently suffering racial vote dilution, their votes will not be diluted in the *even*-year at-large elections which Town Law § 80 will eventually require. *See* NYSCEF 70 at 29-30.⁶ A claim is not moot if “the rights of the parties will be directly affected by the determination of the [case] and the interest of the parties is an immediate consequence of the judgment.” *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714 (1980). Town Law § 80 will not fully be implemented until 2028. *See* McKinney’s Sess. Law News, ch 741, § 5 (A. 4282-B) (Dec. 22, 2023). The Town acknowledges there will be odd-year Town Board elections before then. *See* NYSCEF 58 at 3. The NYVRA, like the federal VRA, “reaches changes that affect even a single election.” *Hampton Cnty. Election Comm’n*, 470 U.S. at 178. Absent judicial intervention, Plaintiffs will be deprived of their right to an undiluted vote in Town elections. SOF at ¶¶ 71-72.

Even if Defendants had a legally plausible mootness argument, Defendants have not met their “burden of establishing their entitlement to judgment as a matter of law.” *Marshall v. Arias*, 12 A.D.3d 423, 424 (2004). At most, there is a triable issue of fact regarding the consequences of shifting to even-year elections. The sole evidence supporting Defendants’ argument is Professor

⁵ Indeed, earlier this week, a judge issued an order in parallel litigation enjoining the State “from enforcing and/or implementing the Even Year Election Law.” *County of Onondaga et al. v. New York et al.*, No. 003095/2024 (N.Y. Sup. Ct. Onondaga Cnty., Oct. 8, 2024) at 26.

⁶ Notably, moving the timing of elections is a remedy under the NYVRA. *See* Election Law § 17-206(5)(vi). If Defendants are correct that shifting to even-year elections would enable Black and Hispanic voters a reasonable opportunity to elect candidates of choice, they are effectively conceding the availability of a reasonable alternative system that would remedy Plaintiffs’ injuries.

Lockerbie's report, but he failed to analyze Town elections, which are obviously most probative to the question of likelihood of success in Town elections. SOF at ¶ 68. Dr. Barreto testified that his analysis of voting patterns in Town elections was largely consistent in even- and odd-year elections. Barreto Deposition at 57:24-59:10. Plaintiffs claims are not moot.

IV. There is extensive un rebutted evidence that a reasonable alternative election system would improve Black and Hispanic voters' electoral influence relative to the existing system.

Finally, Defendants assert that Plaintiffs failed to “demonstrate[e] a ‘reasonable alternative voting practice’ that would give minority voters a greater opportunity to elect their preferred candidate than the Town’s at-large system.” NYSCEF 70 at 30. That is wrong even on the evidence Defendants acknowledge. This Court “must view the evidence in the light most favorable to the nonmoving party and accord such party the benefit of every reasonable inference that can be drawn therefrom.” *Myers v. Home Energy Performance by Halco*, 188 A.D.3d 1327, 1329 (2020) (quotations omitted). Dr. Barreto opined that numerous alternative voting systems would allow Black and Hispanic voters to elect their candidates of choice. SOF at ¶ 74. His opinion as an expert “raise[s] a triable issue of fact.” *George v. New York City Hous. Auth.*, 151 A.D.3d 532, 533 (2017).

There is additional evidence. Plaintiffs disclosed an addendum to Dr. Barreto’s report in which he analyzed different districting schemes that included either four districts or five districts and concluded “that a district-based scheme would be effective to remedy vote dilution and allow Black and Latino voters . . . to elect candidates of their choice in at least some districts.” SOF at ¶¶ 75-79. This disclosure occurred after the stipulated deadline for expert disclosures but before the experts’ depositions. Plaintiffs offered Defendants the opportunity to rebut the addendum, but Defendants instead chose not to share it with their expert. Lockerbie Deposition at 127:19-128:25.

Defendants now claim they need not address the addendum because its “late submission is obviously improper.” NYSCEF 70 at 31 n.6. New York law says otherwise. The governing rules do not impose time limits on expert disclosures. *See* CPLR 3101(d). Indeed, recent amendments to the CPLR were intended to override “appellate decisions that limited a party’s ability to rely on an expert at summary judgment merely because the expert had not been disclosed during pretrial discovery.” *Theroux v. Resnicow*, 148 N.Y.S.3d 885, 889 (Sup. Ct., N.Y. Cty. [Gerald Leibovits, J.] 2021) (summarizing Report of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York (January 2015)). Defendants knew Plaintiffs had retained Dr. Barreto, knew his qualifications, and knew he intended to opine on this topic. Defendants may not ignore his addendum because they cannot show that the timing of its disclosure was “intentional, willful, or prejudicial.” *Colon*, 137 A.D.3d at 1068; *see also Krimkevitch v. Imperiale*, 104 A.D.3d 649, 650 (2d Dep’t 2013) (excluding expert testimony where supplemental report “was exchanged immediately before trial” and advanced novel theory).

Regardless, Plaintiffs can introduce the addendum at this stage. *See* CPLR 3212(b) (“Where an expert affidavit is submitted in . . . opposition to[] a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange . . . was not furnished prior to the submission of the affidavit.”); *see also* Advisory Report at 28 (explaining that purpose of CPLR 3212(b) is to “mak[e] certain that where expert testimony is required or desired [at summary judgment] . . . that parties have the same latitude to utilize expert testimony as they do at trial”).

CONCLUSION

For these reasons, Defendants’ motion for summary judgment should be denied.

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October 10, 2024

CERTIFICATION OF COMPLIANCE WITH UNIFORM RULE 202.8-B

I, Ruth Greenwood, an attorney at law licensed to practice in the State of New York, certify that this document contains 7,981 words, as calculated by the Microsoft Word processing system, inclusive of point headings and footnotes, and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, and regulations, etc.

/s/ Ruth Greenwood

**Reply Memorandum of Law by Defendants in Further
Support of Motion for Summary Judgment,
dated October 17, 2024
[pp. A417 - A436]**

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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,

Index No.: EF002460-2024

v.

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

Defendants.

**REPLY IN SUPPORT OF DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

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TABLE OF CONTENTS

I.	PRELIMINARY STATEMENT	1
II.	ARGUMENT	1
A.	Plaintiffs’ Failure To Provide Any Admissible Evidence Of An Alternative Election System That Would Give Minority Voters A Greater Chance To Elect Their Preferred Candidates Should Be The End Of This Case.....	1
B.	Plaintiffs Cannot Successfully Defend The Constitutionality Of The NYVRA’s At-Large Provisions.....	3
C.	Plaintiffs Point To No Evidence That Minority-Favored Candidates Do Not Have A Reasonable Opportunity To Elect Preferred Candidates In Even-Numbered Years.....	12
III.	CONCLUSION.....	14

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Abbott v. Perez</i> , 585 U.S. 579 (2018).....	8
<i>Bank of Am., N.A. v. Kessler</i> , 39 N.Y.3d 317 (2023).....	6
<i>Bartlett v. Strickland</i> , 556 U.S. 1 (2009).....	11
<i>Bethune-Hill v. Va. State Bd. of Elections</i> , 580 U.S. 178 (2017).....	8
<i>City of Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989).....	4, 10
<i>Colucci v. Stuyvesant Plaza, Inc.</i> , 157 A.D.3d 1095 (3d Dep't 2018).....	2, 3
<i>Cooper v. Harris</i> , 581 U.S. 285 (2017).....	8
<i>Jeter v. Ellenville Cent. Sch. Dist.</i> , 41 N.Y.2d 283 (1977).....	4
<i>Johnson v. California</i> , 543 U.S. 499 (2005).....	7
<i>Portugal v. Franklin County</i> , 530 P.3d 994 (Wash. 2023)	7
<i>Sanchez v. City of Modesto</i> , 51 Cal. Rptr. 3d 821 (Ct. App. 2006)	7
<i>Shaw v. Hunt</i> , 517 U.S. 899 (1996).....	10
<i>Shaw v. Reno</i> , 509 U.S. 630 (1993).....	4, 9
<i>Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.</i> , 600 U.S. 181 (2023).....	<i>passim</i>
<i>Theroux v. Resnicow</i> , 148 N.Y.S.3d 885 (Sup. Ct., N.Y. Cnty. 2021)	3

Thornburg v. Gingles,
478 U.S. 30 (1986)..... 7, 8, 11, 12

Trump v. Anderson,
601 U.S. 100 (2024)..... 11

White v. Cuomo,
38 N.Y.3d 209 (2022)..... 13

Statutes And Rules

Cal. Elec. Code § 14026 7

CPLR 3212..... 3

Even Year Election Law, L. 2023 ch. 741 13

N.Y. Elec. Law § 17-204 6

N.Y. Elec. Law § 17-206 *passim*

Wash. Rev. Code § 29A.92.010..... 7, 8

I. PRELIMINARY STATEMENT

In their Motion for Summary Judgment, Defendants explained that the NYVRA's vote-dilution provisions are unconstitutional and that, in any event, Plaintiffs failed to produce any evidence from which a factfinder could conclude that the Town violated the NYVRA. While Defendants strongly believe that the NYVRA is unconstitutional and respond to Plaintiffs' various arguments below, they respectfully submit that the most straightforward way to dispose of this case is for this Court to order summary judgment in Defendants' favor because Plaintiffs failed to submit *any* admissible evidence as to a critical element of their NYVRA claim. Specifically, Plaintiffs ignored their burden to show an alternative voting system that would give the Town's minority voters a greater chance to elect their preferred candidates than the current at-large system before this Court's deadline for doing so, and presented no other timely evidence on this point. Plaintiffs' attempt to rely upon a two-months-too-late expert "addendum" to make up for this evidentiary failure comes too late.

II. ARGUMENT

A. Plaintiffs' Failure To Provide Any Admissible Evidence Of An Alternative Election System That Would Give Minority Voters A Greater Chance To Elect Their Preferred Candidates Should Be The End Of This Case

1. To prevail on their vote-dilution claim, Plaintiffs must show that there is an alternative voting system that would give the Town's minority voters a greater chance to elect their preferred candidates than the current at-large system. Op.Br.21–26. The only timely expert reports that Plaintiffs submitted in this case do not even try to carry their burden on this critical issue. Dr. Sandoval-Strausz's expert report does not address alternative voting systems at all. *See* Resp.Br.24–25. Dr. Barreto's expert report merely discusses different electoral systems generally, *without attempting to demonstrate that one of these systems would actually give minority voters a greater chance to elect their candidates of choice than the Town's current at-large system. See*

Expert Report of Dr. Barreto (“Barreto Report”) at 16–18 (attached to NYSCEF 59, Affirmation of Bennet J. Moskowitz (“Moskowitz Aff.”), as Exhibit I). Accordingly, the Town is entitled to summary judgment because Plaintiffs presented absolutely no evidence on a necessary element of their claim.

2. In their Opposition, Plaintiffs admit they have the burden to “prove that one or more reasonable alternative policies exist that would *improve* the protected class’s representation relative to the status quo,” Resp.Br.11 (emphasis added), but meekly claim that they did so because “Dr. Barreto opined” generally in his June 28, 2024 report “that numerous alternative voting systems would allow Black and Hispanic voters to elect their candidates of choice,” Resp.Br.24. But this does not even purport to satisfy Plaintiffs’ burden, which is to demonstrate a reasonable alternative voting system that would give the Town’s minority voters a *greater* opportunity to elect their preferred candidates as compared to the current at-large system. Op.Br.21–24. Dr. Barreto’s expert report performed absolutely no comparison between the Town’s current at-large system and an alternative voting system. *See* Barreto Report at 16–18.

Plaintiffs’ only other response is to point to an untimely “addendum” from Dr. Barreto. Resp.Br.24–25. But as Defendants explain in more detail in their pending Motion In Limine, this addendum is not part of this case because ***Plaintiffs submitted it more than two months too late—on the eve of expert depositions—without even attempting to offer any justification for their untimely submittal.*** NYSCEF 126. Although Plaintiffs appeal to CPLR 3101’s lack of specific “time limits” for expert disclosures, Resp.Br.25, they were required to comply with this Court’s May 9, 2024 scheduling order and cannot “ignore” those deadlines “with impunity,” *Colucci v. Stuyvesant Plaza, Inc.*, 157 A.D.3d 1095, 1099 (3d Dep’t 2018).

Plaintiffs contend that their dilatory conduct does not suggest fault or prejudice, Resp.Br.25, but that is wrong. Plaintiffs' counsel was aware of Plaintiffs' obligation to establish a reasonable alternative system, *see* Op.Br.21–24, and yet Plaintiffs still chose to surprise Defendants with an untimely expert report on the eve of the parties' expert depositions, without providing any justification or explanation for their delay, *see* NYSCEF 126 at 1–4. And while no prejudice showing is necessary given Plaintiffs' unexplained and unjustified violation of this Court's scheduling order, *see Colucci*, 157 A.D.3d at 1099, the Town was prejudiced by Plaintiffs' delay, as they explain in detail in their pending Motion In Limine, NYSCEF 126 at 7–9.

No matter, say Plaintiffs, because, in their view, CPLR 3212(b) gives them free reign to ignore this Court's scheduling order, so long as they are submitting an untimely expert report in opposition to summary judgment. Resp.Br.25. But CPLR 3212(b) does no such thing. As the court explained in *Theroux v. Resnicow*—a case that Plaintiffs rely upon, *see* Resp.Br.25—although CPLR 3212(b) permits courts to consider expert affidavits at summary judgment regardless of whether the parties exchanged expert discovery beforehand, that rule does not eliminate a court's discretion to “preclude a party from introducing expert evidence at summary judgment because the party had flouted a specific *court-ordered* disclosure deadline.” 148 N.Y.S.3d 885, 889 (Sup. Ct., N.Y. Cnty. 2021). That is exactly what happened here, and Plaintiffs offer no justification as to why they missed this Court's expert-disclosure deadline by over two months or why this Court should excuse them from this unexplained failure.

B. Plaintiffs Cannot Successfully Defend The Constitutionality Of The NYVRA's At-Large Provisions

1. The NYVRA's at-large provisions require political subdivisions to abandon at-large systems that they adopted for race-neutral reasons in order to give voters lumped together by race a greater chance to elect candidates of their choice (and, given the zero-sum nature of elections,

give voters grouped together by other racial groups a smaller chance to elect candidates of their choice). Op.Br.10–21. Forcing political subdivisions to change their election systems to favor the voting preferences of voters grouped together by race vis-à-vis other voters obviously triggers strict scrutiny. Op.Br.13–16. And these provisions just as clearly cannot satisfy strict scrutiny because they are not necessary to achieve any compelling state interest. Op.Br.16–21.

2. Plaintiffs claim that the Town cannot constitutionally challenge the NYVRA, Resp.Br.8–10, that the NYVRA is not subject to strict scrutiny, Resp.Br.10–17, and, alternatively, that the NYVRA satisfies strict scrutiny, Resp.Br.17–22. All three arguments are wrong.

First, Plaintiffs’ assertion that Defendants “lack capacity” to challenge the NYVRA’s constitutionality, Resp.Br.8–9, is without merit. As Plaintiffs admit, “the capacity rule” is subject to an exception in that political subdivisions can challenge a statute “on grounds that ‘if they are obliged to comply [with the State statute] they will by that very compliance be forced to violate a constitutional proscription.’” Resp.Br.10 (quoting *Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y.2d 283, 287 (1977)). That is *exactly* Defendants’ argument here. Complying with the NYVRA’s at-large voting provisions requires political subdivisions to abandon race-neutral at-large voting systems for the express statutory purpose of giving voters lumped together by race a greater chance to elect their preferred candidates, and thus give citizens grouped together by other racial groups a smaller chance to elect their preferred candidates. The “very compliance” with that mandate violates the Equal Protection Clauses of the United States and New York Constitutions, *Jeter*, 41 N.Y.2d at 287, by “classif[ying] [] citizens solely on the basis of race,” *Shaw v. Reno*, 509 U.S. 630, 643 (1993), and using “race as a criterion for legislative action,” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490–91 (1989); see *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023) (“*SFFA*”), without satisfying strict scrutiny.

A simple hypothetical makes this point even more clearly, while also refuting some of Plaintiffs' other arguments below. If the Legislature adopted a law that required political subdivisions to change their method of election whenever doing so would lead to the election of more white-voter-favored candidates, a town could *obviously* challenge that law successfully as *requiring* it to violate the Equal Protection Clauses of the United States and New York Constitutions. And while the NYVRA requires changing election systems to favor minority voters rather than white voters, the application of the capacity rule to this hypothetical statute and the NYVRA is no different.

Second, Plaintiffs' remarkable argument that the NYVRA's vote-dilution provisions are not subject to strict scrutiny, Resp.Br.13–17, fails.

Plaintiffs' assertions that "the NYVRA uses no racial classification," Resp.Br.13, merely contains "reference[s] to race," and does not "distribute[] burdens or benefits on the basis of individuals' race," Resp.Br.14 (emphasis omitted), are demonstrably false. The NYVRA requires political subdivisions to make "racial classification[s]" from top to bottom. *SFFA*, 600 U.S. at 206–07 (citations omitted). The NYVRA requires Defendants to group citizens by racial group and then abandon their race-neutral at-large election method with the singular goal of increasing some racial groups' chances of electoral success, thereby decreasing other racial groups' chances of electoral success. *Supra* pp.3–4. While the NYVRA claims doing so is necessary to prevent "vote dilution," N.Y. Elec. Law § 17-206(2), this cannot save the statute from the strictures of strict scrutiny, *see SFFA*, 600 U.S. at 206. To reference the hypothetical discussed immediately above, if a law required political subdivisions to change their election systems to ensure that white-favored candidates won more elections, that would clearly "burden" individual members of racial

minority groups, and “distribute[] benefits” on the basis of race, Resp.Br.14, triggering strict scrutiny.

Plaintiffs and their *amici* claim that strict scrutiny does not apply because the NYVRA applies to “members of *any*” racial group, Resp.Br.14; *see* NYSCEF 108 at 4–6 (“ACLU Br.”), but that is both incorrect and legally irrelevant.

Initially, the NYVRA’s vote-dilution provisions do not apply to members of “any” racial group as Plaintiffs contend. Resp.Br.14. Rather, those provisions apply only to “members of [a] protected class,” N.Y. Elec. Law § 17-206(2)(b)(i)–(ii), which the NYVRA statutorily defines as “a class of individuals who are members of a race, color, or language-*minority* group,” *id.* § 17-204(5) (emphasis added). Any contrary reading of the NYVRA as also protecting white-majority voters from vote dilution would render the provision “absurd.” *See Bank of Am., N.A. v. Kessler*, 39 N.Y.3d 317, 324 (2023). To take just the most obvious example, the NYVRA renders district-based or alternative election systems unlawful if a racial minority group’s preferred candidate “would usually be defeated” and there is “racially polarized voting.” N.Y. Elec. Law § 17-206(2)(b)(ii). Due to the zero-sum nature of elections, if the NYVRA’s race-based rules also protected white-majority voters like they do minority voters, as Plaintiffs suggest, Resp.Br.14, the NYVRA would render nearly *every* election system unlawful when there is racially polarized voting in a political subdivision. After all, given the zero-sum nature of elections, at least some racial groups’ candidates of choice would “usually be defeated.” N.Y. Elec. Law § 17-206(2)(b)(ii).

But even assuming the NYVRA’s vote-dilution provisions did apply equally to white majorities as well, the statute would still be subject to strict scrutiny because that heightened review applies to “*all* racial classifications imposed by the government” by law, *Johnson v. California*,

543 U.S. 499, 505 (2005), “even when they may be said to burden or benefit the races equally,” *id.* at 506 (citations omitted). The NYVRA is still a racial-classification statute regardless whether it allows *any* group of citizens lumped together by *any* race to force a political subdivision to abandon its race-neutral at-large method of election to ensure that more of that group’s preferred candidates win (again, necessarily at the expense of all other racial groups’ preferred candidates). *See id.* A statute giving white voters state assistance in electing their preferred candidates at the expense of minority-preferred candidates would obviously be subject to strict scrutiny because it clearly creates racial classifications. *Supra* pp.5–6.

Plaintiffs’ and their *amici*’s argument that the NYVRA is similar to “[o]ther state VRAs” in California and Washington that courts have found “are not subject to strict scrutiny,” Resp.Br.14–15; *see* ACLU Br.5–9, is unpersuasive. While those statutes are still constitutionally problematic in some ways, each is far more narrowly tailored than the NYVRA. The California Voting Rights Act (“CVRA”) incorporates “case law regarding enforcement of the federal Voting Rights Act,” Cal. Elec. Code § 14026(e), and retains many of the federal VRA’s procedural safeguards that allow it to survive strict scrutiny, *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 828 (Ct. App. 2006). For example, unlike with the NYVRA, CVRA plaintiffs must satisfy two of the three necessary preconditions to make out a vote-dilution claim under *Thornburg v. Gingles*, 478 U.S. 30 (1986). *Sanchez*, 51 Cal. Rptr. 3d at 828. Similarly, the Washington Voting Rights Act (“WVRA”) allows courts to “rely on relevant federal case law” in interpreting its provisions, Wash. Rev. Code § 29A.92.010, and only eliminates consideration of the “sufficiently large and geographically compact” *Gingles* factor from its “threshold requirement[s] for vote dilution claims,” *Portugal v. Franklin County*, 530 P.3d 994, 1011 (Wash. 2023) (en banc) (citations omitted). Further, unlike the NYVRA, the WVRA expressly incorporates the federal VRA’s

definition of “protected class.” Wash. Rev. Code § 29A.92.010. The NYVRA goes much further than either the CVRA or WVRA in eliminating Section 2’s exacting standards and the *Gingles* safeguards, such that reference to these statutes cannot save the NYVRA from strict scrutiny.

Contrary to Plaintiffs’ suggestion, there is nothing “misleading,” Resp.Br.15, about Defendants stating that Section 2 of the federal VRA is subject to the constitutional strict scrutiny analysis, *see* Op.Br.18 & n.4. As the Supreme Court has explained, Section 2 is subject to “strict scrutiny” because it “demands consideration of race” in a state’s redistricting process. *Abbott v. Perez*, 585 U.S. 579, 587 (2018) (citations omitted). Plaintiffs claim that whether a district drawn to comply with Section 2 “withstands strict scrutiny was the question before the Court in *Abbott*, not whether Section 2 *itself* was subject to heightened scrutiny.” Resp.Br.15. But this ignores the necessary implication of the Supreme Court’s “assum[ption]” that “complying with the VRA” means that a state’s “consideration of race” in enacting a redistricting plan “satisfies strict scrutiny.” *Abbott*, 585 U.S. at 587; *see also Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 194 (2017); *Cooper v. Harris*, 581 U.S. 285, 292–93 (2017). Section 2 is only constitutional because it is narrowly tailored to satisfying a compelling government interest, unlike the NYVRA. *See infra* pp.9–12.

Plaintiffs claim that the NYVRA’s “framework for determining liability closely resembles the structure of Section 2 of the federal VRA,” Resp.Br.12, and that the NYVRA instructs courts to evaluate totality-of-the-circumstances factors “just like in Section 2 cases” under *Gingles*, Resp.Br.16 (citing *Gingles*, 478 U.S. at 27). This is entirely false. In the Section 2 context, the all-things-considered inquiry acts as an additional requirement that plaintiffs need to satisfy, after making the difficult showing under the *Gingles* preconditions. Op.Br.9–10. The NYVRA’s at-large provisions, however, require even a political subdivision without racially polarized voting to

change its election systems so that voters grouped together by some races will elect more candidates of choice, at the expense of other citizens grouped together by different races. *See* Op.Br.10–11, 19–21; N.Y. Elec. Law § 17-206(2)(b)(i).

Plaintiffs mischaracterize Defendants’ arguments as only targeting “the consequences of potential vote dilution remedies.” Resp.Br.16. While judicially imposing a remedy requiring a town to draw a race-based district would trigger strict scrutiny, *see Shaw*, 509 U.S. at 643, 646, so does imposing NYVRA *liability* on a town for refusing to abandon a race-neutral at-large election system so that the preferred candidates of the town’s minority citizens grouped together by race will have more electoral success, *see* Op.Br.13–16; *supra* pp.4–5. Just as a statute imposing liability on a town if it did not adopt an election method favoring white-majority voters would be subject to strict scrutiny, *supra* pp.5–6, so is the NYVRA for the same reasons, *see SFFA*, 600 U.S. at 206.

Third, Plaintiffs’ arguments that the NYVRA can pass strict scrutiny review, Resp.Br.17–22, are unpersuasive.

Plaintiffs identify “preventing and remedying racial discrimination in voting” as the compelling state interest that the NYVRA purportedly furthers. Resp.Br.17. But the NYVRA is not tailored to achieve that interest because the statute does not require plaintiffs to show that a political subdivision has engaged in racial discrimination in order to prove a vote-dilution claim. Op.Br.18–21. Plaintiffs’ own argument demonstrates this: “A plaintiff alleging vote dilution under the NYVRA must offer evidence addressing the voting patterns of the protected class they belong to and/or evidence of discrimination against that protected class within the relevant political subdivision.” Resp.Br.19. By using “and/or,” Plaintiffs concede that the NYVRA does not *require*

plaintiffs to present any evidence that the relevant political subdivision has engaged in discrimination.

Plaintiffs' claim that New York has a compelling interest in "combatting racial discrimination" because there is "evidence of discrimination in voting in New York," Resp.Br.18, cannot justify the NYVRA. Plaintiffs' "generalized assertion[s] of past discrimination in a particular [] region," are "not adequate" to establish a compelling interest for race-based legislation. *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996). At most, the limited examples that Plaintiffs point to could identify an interest in implementing a remedy to address discrimination in those particular jurisdictions, under a narrowly drawn statute. *See id.* Plaintiffs insinuate that Newburgh has engaged in racial discrimination because other, unnamed political subdivisions in Orange County "have been sued for voter suppression and vote dilution." Resp.Br.19. But, tellingly, Plaintiffs present no evidence that Newburgh has a history of engaging in such activity, nor would the mere filing of a lawsuit making such allegations establish "a strong basis in evidence to conclude that" Newburgh adopted its at-large method of election out of racial animus, such that "action [is] necessary" to remediate an "identified discrimination" in the town. *Shaw*, 517 U.S. at 909–10.

In any event, this is not a compelling *state* interest because states do not share Congress's interest in remedying the effects of societal discrimination. Op.Br.17. Plaintiffs assert that states are no longer "more limited than the federal government in combatting racial discrimination," Resp.Br.18, but the Supreme Court has made clear that the Fourteenth Amendment serves as a "limit[] on the States' use of race as a criterion for legislative action," *City of Richmond*, 488 U.S. at 490–91, and reaffirmed just last year that this "explicit constraint on state power" applies even

to allegedly “benign” racial classifications, *id.*, “without regard to any differences of race, of color, or of nationality,” *SFFA*, 600 U.S. at 206; *accord Trump v. Anderson*, 601 U.S. 100, 112 (2024).

Even assuming the NYVRA’s vote-dilution provisions pursue a compelling state interest in remediating “specific, identified instances of past discrimination,” Plaintiffs still fail to explain how they are “narrowly tailored—meaning necessary—to achieve that interest.” *SFFA*, 600 U.S. at 206–07 (citation omitted). Plaintiffs acknowledge that the “essence” of vote dilution is “racially polarized voting” and “past and present racial discrimination,” but the NYVRA does not “correspond closely to this ‘essence’” as Plaintiffs claim. Resp.Br.19–20. This is because, *inter alia*, unlike with Section 2 of the VRA, a plaintiff can prove an NYVRA vote-dilution claim relying solely on the “racially polarized voting” prong of the analysis without presenting any evidence of “past and present racial discrimination.” *Supra* pp.9–10.

Plaintiffs’ attempt to cast the NYVRA as narrowly tailored despite the NYVRA’s explicit rejection of both the *Gingles* preconditions and required totality-of-the-circumstances analysis, Resp.Br.20–22, similarly fails. Plaintiffs argue that the first *Gingles* precondition is “prudential” and irrelevant to the constitutionality analysis, Resp.Br.20, but the Supreme Court has warned that relaxing the *Gingles* standards would present “serious constitutional concerns under the Equal Protection Clause,” *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion).

Alternatively, Plaintiffs claim that the NYVRA accounts for this precondition by instructing “courts to consider ‘whether members of a protected class are geographically compact or concentrated . . . in determining an appropriate remedy.’” Resp.Br.20. But the NYVRA does no such thing: the NYVRA instructs that such evidence “*shall not* be considered” for liability purposes and then only provides that such evidence “*may* be a factor” at the remedy stage. N.Y. Elec. Law § 17-206(2)(c) (emphases added). Similarly, regarding the second precondition, the

NYVRA does not “expressly ask[] whether protected class members are ‘politically cohesive.’” Resp.Br.21. Rather, the NYVRA only provides that such evidence is relevant when determining whether members of *different* protected classes may be combined. N.Y. Elec. Law § 17-206(2)(c). There is no requirement that plaintiffs show that members of a protected class are politically cohesive to establish liability under the NYVRA, as is required under Section 2 of the VRA. Op.Br.9, 19. Regarding *Gingles*’ required second step, satisfying the totality-of-the-circumstances inquiry, Plaintiffs admit that doing so is not required under the NYVRA and concede that the NYVRA’s analysis is “more expansive than the federal VRA.” Resp.Br.22. Plaintiffs argue that the NYVRA nevertheless provides sufficient safeguards because “plaintiffs must also satisfy the statute’s reasonable-alternative-policy requirement,” Resp.Br.22, but this requirement only necessitates determining whether minority-preferred candidates would fare better under an alternative method of election—it in no way requires courts to evaluate *Gingles*’ totality-of-the-circumstances factors before imposing liability, Op.Br.18–21.

Finally, the NYVRA cannot be “narrowly tailored” if a federal statute already achieves the compelling interest that the NYVRA purportedly furthers because it would not be “necessary [] to achiev[ing] that interest,” and does so by more tailored means. *SFFA*, 600 U.S. at 206–07 (citation omitted). Here, Section 2 of the VRA does exactly that, and Plaintiffs point to nothing in that provision that would justify the additional race-based districting in the at-large election system context that the NYVRA requires.

C. Plaintiffs Point To No Evidence That Minority-Favored Candidates Do Not Have A Reasonable Opportunity To Elect Preferred Candidates In Even-Numbered Years

1. As an element of their NYVRA claim, Plaintiffs needed to show that the Town’s minority voters will not have a reasonable opportunity to elect their preferred candidates under the Town’s at-large system, which they have not done. Op.Br.21–26. Plaintiffs made no effort to

make such a showing for even-numbered years, which is when the Town will need to hold Town Board elections starting in 2026 under the Even Year Election Law, L. 2023 ch. 741. *See* Op.Br.24–25.

2. Plaintiffs say the Town should be estopped from even citing the effect of the Even Year Election Law, where the Town has argued that this law is unconstitutional in separate litigation. Resp.Br.22–23 & n.5. But this separate litigation remains ongoing, *see Ashlaw v. State of New York*, No.EF2024-00001746 (N.Y. Sup. Ct. Onondaga Cnty.), and while the law has now been struck down at the trial-court level, *see County of Onondaga v. New York*, No.003095/2024 (N.Y. Sup. Ct. Onondaga Cnty., Oct. 8, 2024), NYSCEF 224, there is no guarantee that the Town will succeed after appeal. There is no inconsistency in the Town’s positions: presuming, as courts and litigants must, that the Even Year Election Law is constitutional, *see* Op.Br.5 (quoting *White v. Cuomo*, 38 N.Y.3d 209, 217 (2022)), the Town’s elections for Town Board will move to even years, in which case the undisputed record evidence is that the minorities will have a strong chance to elect their preferred candidates to the Town Board, Expert Report of Dr. Lockerbie (“Lockerbie Report”) at 3–6 (Moskowitz Aff., Exhibit C).

Plaintiffs claim that the Town is advancing a mootness argument, Resp.Br.23, but this is wrong. The Town has never suggested that Plaintiffs’ lawsuit is moot; rather, the Town has argued that the undisputed evidence is that the Town’s minority voters have a reasonable opportunity to elect their preferred candidates under an at-large election method under the timing mandated by state law, Op.Br.24–25, which will control elections under the Town’s at-large system after the single transition cycle that the Legislature itself built into the law, *see* Even Year Election Law § 1. Although Plaintiffs say there is a “triable issue of fact regarding the consequences of shifting to even-year elections,” Resp.Br.23–24, they cite to no evidence that would raise a triable issue.

Dr. Lockerbie’s expert testimony regarding the success of minority-favored candidates amongst the Town’s electors in even years is *unrebutted*, and demonstrates that such candidates have a reasonable chance of success in even-numbered years in Town elections. Op.Br.24–25. Plaintiffs’ *only* response is to point to Dr. Barreto’s testimony, where he acknowledged that “the percentages are different” in even-numbered years versus odd-numbered years, even if, in Dr. Barreto’s view, the pattern of racially polarized voting remains “consistent.” Transcript of Deposition of Dr. Barreto (“Barreto Dep.”) at 58:15–16 (Moskowitz Aff, Exhibit D); Resp.Br.24 (citing Barreto Dep. at 57:24–59:10). That testimony does not create any triable issue, where Dr. Barreto has conceded that he did not analyze whether minority-preferred candidates have a reasonable chance of winning a majority of the Town’s votes in even-numbered years, Barreto Dep. at 64:25–65:8, and has acknowledged that the Town has had “close elections in even-numbered years,” *id.* at 59:12–14.

III. CONCLUSION

This Court should enter summary judgment in Defendants’ favor.

Dated: New York, New York
October 17, 2024

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Affirmation complies with the word count limitations set forth in Uniform Rule 202.8-b for the Supreme Court. This Affirmation uses Times New Roman 12-point typeface and contains 4,199 words, excluding parts of the document exempted by Rule 202.8-b. As permitted, the undersigned has relied on the word count feature of this word-processing program.

/s/ Bennet J. Moskowitz

Certification Pursuant to CPLR § 2105

CERTIFICATION PURSUANT TO CPLR § 2105

I, Misha Tseytlin, an attorney at law admitted to practice before the courts of the State of New York, hereby certify pursuant to Section 2105 of the CPLR that the foregoing papers constituting the Appendix have been personally compared by me with the originals on file in the office of the Clerk of the Supreme Court, County of Westchester, and have been found to be true and complete copies of said originals.

Dated: July 7, 2025

By: 
TROUTMAN PEPPER LOCKE LLP
Misha Tseytlin, Esq.
Attorneys for Defendants-Appellants

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS

Willie Addison, Being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on 7/7/2025 deponent caused to be served 3 copy(s) of the within

Appendix

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Case Name: Oral Clarke v. Town of Newburgh (5)

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