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March 7, 2025

Darrell M. Joseph
Clerk of the Court
New York Appellate Division
Second Judicial Department
45 Monroe Place
Brooklyn, New York 11201

Re: *Oral Clarke et al. v. Town of Newburgh et al.*, Docket No.2024-11753

Dear Mr. Joseph:

Defendants-Respondents the Town of Newburgh and Town Board of the Town of Newburgh (collectively, the "Town"), respectfully request that the Court accept for filing the attached Reply Memorandum Of Law In Support Of Motion Of Defendants-Respondents For Leave To Appeal To The New York State Court Of Appeals And To Refrain From Issuing Remittitur ("Reply"), which Reply responds to Plaintiffs-Appellants' and Intervenor-Appellant's February 28, 2025 responses to the Town's Motion For Leave To Appeal To The New York State Court Of Appeals And To Refrain From Issuing Remittitur ("Motion"). See Docket No.2024-11753, NYSCEF No.39 (Feb. 28, 2025); Docket No.2024-11753, NYSCEF No.38 (Feb. 28, 2025). Under CPLR 2214(b), the Town may not file this Reply as of right, given that the Motion was served on less than 16 days' notice, as required by CPLR 5516. Nevertheless, the Town respectfully submits that this Reply would aid the Court's disposition of the Town's Motion, particularly considering the important legal issues of statewide significance that this Motion involves. Further, the Town notes that in *Hazel Coads et al. v. Nassau County et al.*, Docket No.2024-07814, this Court recently accepted a similar reply in support of the government-defendants' motion for leave to appeal, filed on a similar timeline after the plaintiffs there filed their response to that motion, see *id.* NYSCEF No.33. For these reasons, the Town respectfully requests that the Court accept the attached Reply for filing.

Sincerely,



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New York Supreme Court

APPELLATE DIVISION – SECOND DEPARTMENT

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

v.

TOWN OF NEWBURGH and
TOWN BOARD OF THE TOWN OF NEWBURGH,
DEFENDANTS-RESPONDENTS,

NEW YORK STATE OFFICE OF
THE ATTORNEY GENERAL,
INTERVENOR-APPELLANT.

**Docket No.
2024-11753**

**REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION OF
DEFENDANTS-RESPONDENTS FOR LEAVE TO APPEAL
TO THE NEW YORK STATE COURT OF APPEALS
AND TO REFRAIN FROM ISSUING REMITTITUR**

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Defendants-Respondents Town of Newburgh and Town Board of the Town of Newburgh (collectively, the “Town”), by their attorneys, Troutman Pepper Locke LLP, respectfully submit this Reply Memorandum Of Law In Support Of Motion For Leave To Appeal To The New York State Court Of Appeals And To Refrain From Issuing Remittitur, pursuant to CPLR 5602(b) and 22 NYCRR § 1250.16, for leave to appeal to the Court of Appeals from this Court’s January 30, 2025, Decision.

PRELIMINARY STATEMENT

As the Town explained, this Court should grant its Motion For Leave To Appeal so that the Court of Appeals can resolve the constitutionality of the vote-dilution provisions of the John R. Lewis Voting Rights Act of New York (“NYVRA”)—including whether those provisions incorporate certain implied elements. The Town has raised substantial arguments on these issues in its Motion, such that the Court of Appeals may well hold either hold that the NYVRA is unconstitutional or interpret the NYVRA as incorporating different implied elements than this Court did. Further, given that there are three now-pending NYVRA vote-dilution trials, clarity over these questions is needed *now*, rather

than after final judgment in one of those cases. Otherwise, the courts and parties in these cases will spend unrecoverable resources litigating claims either based on an unconstitutional statute or under the wrong standard. And the sensitive, election-related context here makes review now more pressing. Notably, the Court of Appeals' review would be inevitable under the CPLR after final judgment, and there is no reason to force the People to wait before the State's highest court can resolve these foundational issues.

In their Opposition, Plaintiffs do not meaningfully dispute that the Court of Appeals will need to resolve these issues, urging that the better course is to delay that review until one of the three pending NYVRA cases reaches final judgment. Plaintiffs' primary reason for this request for delay is an assertion of prejudice from their trial not moving forward in Spring 2025, but they cannot explain what actual prejudice they are concerned about. The 2025 Town Board election is already underway, and Plaintiffs do not suggest that their lawsuit—even if successful—would impact that ongoing election. Plaintiffs' (and Attorney General's) remaining arguments for delay in resolving these issues until after final judgment misunderstand the nature of the Town's arguments. The Town

seeks clarity from the Court of Appeals as to whether the NYVRA is *facially* constitutional and what implicit *elements* in the NYVRA support that conclusion—legal issues that trials under the approach that this Court adopted will not clarify. It is far better for the Court of Appeals to provide its definitive ruling now, before the three upcoming NYVRA trials take place, rather than forcing litigants and courts to move forward under legal uncertainty, potentially leading to either unnecessary trials or wasteful retrials.

This Court should grant the Town leave to appeal to the Court of Appeals and refrain from issuing the remittitur.

REPLY IN SUPPORT OF GRANTING LEAVE TO APPEAL

I. The Court Of Appeals Reviewing The Constitutionality Of The NYVRA Now—including Determining What Implicit Elements May Support That Conclusion—Would Provide Essential Clarity To The Pending NYVRA Cases Across The State, While Furthering Judicial And Litigant Economy

A. As the Town explained, this Court should grant its Motion so that the Court of Appeals can resolve for this State the constitutionality of the NYVRA—including what implicit elements the NYVRA may require to supports its constitutionality, Mem.22–23—which are important and emerging issues of statewide importance, Mem.24–25, 33–

35. The Court of Appeals reviewing these significant issues now would provide needed guidance for three pending NYVRA trials, before those trials commence, no matter how the Court rules. Mem.25, 33–35. If the Court of Appeals were to *reverse* this Court and hold the NYVRA’s vote-dilution provisions are unconstitutional, that would immediately end those three cases. *See* Mem.22–23; *see also* Mem.2–4. And if the Court of Appeals were to *affirm* this Court’s constitutional decision, it would still further define what, if any, implicit elements the NYVRA incorporates to support its constitutionality. Mem.33–35. That would ensure that the litigants in these three trials know what elements they need to prove before their trials commence, avoiding costly new trials if the Court of Appeals only conducted its review after final judgment. Mem.33–34. Notably, the Court of Appeals will have to review the same issues here once one of these three NYVRA cases reaches final judgment under CPLR 5601, highlighting the waste of judicial and litigant resources that will occur from postponing the court’s review now. Mem.34–35.

B. The Attorney General does not respond to the Town’s arguments about the importance of the Court of Appeals addressing the

constitutionality of the NYVRA’s vote-dilution provisions now, rather than after final judgment. And while Plaintiffs do attempt to respond, they fail to confront the Town’s fundamental point: postponing the inevitable review by the Court of Appeals is likely to undermine judicial and litigant economy in the three pending NYVRA cases, no matter how the Court ultimately rules. The arguments that Plaintiffs make do not justify postponing the Court of Appeals’ review of these unsettled questions of statewide importance—especially considering Plaintiffs’ failure to join issue on the Town’s principal argument, as just discussed.

Plaintiffs claim that the Court of Appeals reviewing the constitutionality of the NYVRA’s vote-dilution provisions now would cause them prejudice, but that makes no sense given the calendar. Resp.2, 9–10. Plaintiffs do not argue that any remedy they may obtain from the Supreme Court would apply to the already ongoing 2025 Town Board election. *See Clarke et al. v. Town of Newburgh et al.*, Index No.EF002460/2024, NYSCEF No.1 at 25–26 (Plaintiffs explaining that “any court-ordered remedies” would need “to be implemented *before February 2025*” when “the nomination process for candidates for Town office” began in order to impact the Town’s November 2025 election)

(emphasis added). There is, of course, ample time *now* for the Court of Appeals to decide the significant issues here without impacting any future election, and Plaintiffs do not argue otherwise.

Plaintiffs worry that granting leave to appeal now “risks the unnecessary adjudication of a constitutional question,” Resp.7–8 (citing *In re Bailey*, 46 A.D.2d 945, 946 (3d Dep’t 1974)); Resp.2, but that is also wrong. The Town has argued—and the Supreme Court below held—that imposing any *liability* under the NYVRA’s vote-dilution provisions would be unconstitutional under state and federal equal-protection principles. Mem.27–28. So, the question of whether the NYVRA’s vote-dilution liability provisions are unconstitutional—and, if not, what implied elements the NYVRA requires a plaintiff to show to prove vote-dilution liability—is an unavoidable part of this case, regardless of what remedies the Supreme Court may award Plaintiffs if they prevail below. *Contra* Resp.2. And these questions will remain directly relevant even if the Town (or the other two town defendants in the other NYVRA vote-dilution trials) “prevail on the merits below.” Resp.7–8. In that scenario, the losing plaintiffs would surely appeal, and the defendants would then

cross-appeal, raising all of the same arguments at issue in this Motion. See CPLR 5513.

Plaintiffs’ assertion that the defendants in the other two pending NYVRA cases* can make their own arguments, allowing the issues to percolate before reaching the Court of Appeals, misses the mark. The defendants in the other two NYVRA cases have presented much the same constitutional arguments that the Town has here, *e.g.*, *Serratto v. Town of Mount Pleasant*, Index No.55442/2024, NYSCEF No.118 at 10–19 (Sup. Ct. Westchester Cnty.); *Young v. Town of Cheektowaga*, Index No.803989/2024, NYSCEF No.68 at 14–28 (Sup. Ct. Erie Cnty.), underscoring the importance of resolving these questions to provide

* Plaintiffs criticize the Town for not listing *Coads v. Nassau County*, Index No.602316/2024 (Sup. Ct. Nassau Cnty.), in the Town’s list of pending NYVRA cases across the State. Resp.12 n.1. The Town did not list *Coads* because the parties in *Coads* settled that case. See Consent Judgment and Decree, *Coads*, Index No.602316/2024, NYSCEF No.370 (Sup. Ct. Nassau Cnty., Jan 23, 2025). That settlement does not support Plaintiffs’ claim that “compliance with the NYVRA does not necessarily offend the Equal Protection Clause,” Resp.12 n.1, as the defendants there “d[id] not concede liability or admit any wrongdoing whatsoever,” but rather voluntarily settled the case “to avoid unnecessary, costly, and divisive litigation,” *see id.* at 4. *Coads* is also different from the three pending cases because there, both sets of plaintiffs included partisan-gerrymandering claims (with one set asserting *only* a partisan-gerrymandering theory), *see id.* at 2, while the only claims here and in the other two pending NYVRA vote-dilution trials are under the NYVRA’s vote-dilution provisions, *see Clarke et al. v. Town of Newburgh et al.*, Index No.EF002460/2024, NYSCEF No.1 at 26–28; *Young v. Town of Cheektowaga*, Index No.803989/2024, NYSCEF No.1 at ¶¶ 43–87 (Sup. Ct. Erie Cnty.); *Serratto v. Town of Mount Pleasant*, Index No.55442/2024, NYSCEF No.1 at ¶¶ 174–87 (Sup. Ct. Westchester Cnty.).

consistent guidance across all pending NYVRA cases. Indeed, the Town here and the Town of Mount Pleasant submitted a joint *amicus* brief in the Town of Cheektowaga litigation on the NYVRA’s constitutionality, making the arguments that this Court adjudicated. *See Young*, Index No.803989/2024, NYSCEF No.76. And given that this Court’s decision is binding upon all Supreme Courts, *see People v. Turner*, 5 N.Y.3d 476, 482 (2005), the issues are unlikely to “percolate across these cases,” Resp.12–13. While other Judicial Departments may well disagree with this Court’s holding, there is good reason to doubt that these issues will ever come to those Departments in these cases, as parties will have the right under the CPLR 5601(b) to skip directly to the Court of Appeals after a final judgment.

Finally, Plaintiffs’ claim that the Court of Appeals reviewing these issues now would result in “duplicative” appellate proceedings, Resp.2, 8–10, does not withstanding scrutiny. If this Court granted the Town’s Motion, the Court of Appeals would review the constitutionality of the NYVRA’s vote-dilution liability provisions and—unless the Court declared those provisions unconstitutional—determine what implicit elements the NYVRA incorporates to make those provisions

constitutional. *Supra* pp.3–4. That review would settle fundamental issues of New York constitutional and statutory interpretation, and could well end the case without the need for a trial if the Court of Appeals strikes down the NYVRA’s vote-dilution provisions. And even if the Court of Appeals holds that the NYVRA’s vote dilution provisions are constitutional, then the only issues after a verdict would involve the *application* of those settled principles, as well as any potential review at the U.S. Supreme Court (with U.S. Supreme Court review not involving “duplicative briefing” or duplicative “costs,” *contra* Resp.10). It is postponing the Court of Appeals’ review that would result in unnecessary costs and burdens to courts and litigants by forcing them either through entirely unnecessary trials (if the Court of Appeals ultimately declares the NYVRA unconstitutional) or retrials (if the Court of Appeals interprets the NYVRA as adopting different implicit elements than this Court did). *Supra* pp.3–4.

II. This Case Is A Proper Vehicle For The Court Of Appeals Deciding The Unsettled And Important Constitutional Question Of Whether The NYVRA Violates The Federal Or State Equal Protection Clause, And What Implicit Elements May Support That Conclusion

A. As the Town explained, Mem.17–30, 35–37, whether the NYVRA’s vote-dilution provisions facially violate the federal or New York Equal Protection Clauses—and whether the Town has capacity to raise that defense in litigation—are “question[s] of law” that the Court of Appeals has not yet “passed on,” *Corbett v. Scott*, 243 N.Y. 66, 67 (1926), and that are “of statewide significance,” *People v. Hawkins*, 11 N.Y.3d 484, 493 (2008), thus “merit[ing] the attention of” the Court of Appeals, *Babigian v. Wachtler*, 69 N.Y.2d 1012, 1014 (1987). The Town respectfully submits that it has substantial arguments that the NYVRA’s vote-dilution provisions trigger strict-scrutiny review because they force political subdivisions to group their citizens by racial classifications and then to take official action based solely on those racial classifications. Mem.19–21, 25–28. Further, the Town has made a substantial argument that the NYVRA’s vote-dilution provisions fail strict scrutiny because they do not target a compelling state interest in remedying specific acts of discrimination and, in any event, are not narrowly tailored because the

NYVRA fails to incorporate the *Gingles* framework’s careful safeguards (or comparable safeguards), thereby demanding race-based action in a far broader set of circumstances than permissible under Section 2 of the federal Voting Rights Act of 1965 (“VRA”) and U.S. Supreme Court precedent. Mem.21–22, 28–30. And the Town has reasonably argued that the NYVRA is also significantly less narrowly tailored than other state voting rights acts that other courts have upheld. Mem.28–29.

The Court of Appeals has not yet considered the constitutionality of the recently-enacted NYVRA, and it is the only court that can definitively resolve this legal issue as a matter of New York law. Mem.22–25. The Court of Appeals’ review is especially needed now as the first attempts to litigate the NYVRA’s vote-dilution provisions are ongoing throughout the State, including outside of this Court’s jurisdiction. Mem.22–23. The Town’s constitutional challenge is also particularly worthy of Court of Appeals review because the NYVRA regulates the critically important area of elections and involves the inherently suspect issue of racial classifications. Mem.23–24. That this Court disagreed with the Town’s constitutional arguments on the merits does not change the fact that the

NYVRA's constitutionality raises a significant legal question of statewide importance. Mem.25–30.

Finally, the Court of Appeals' review would still be necessary now even if it were to conclude that the NYVRA is constitutional, as courts and litigants would still need the Court of Appeals to authoritatively decide what implicit elements the NYVRA's vote-dilution provisions require. Mem.30–35. This Court held that the NYVRA's vote-dilution provisions incorporate at least one implicit element. Mem.30–31. Further, the parties in each of the three pending NYVRA vote-dilution cases—including the parties here—have all argued that the NYVRA contains implicit elements that differ from the implicit element(s) recognized by this Court. *See* Mem.30–32. Only the Court of Appeals' review now would finally settle what implicit elements the NYVRA vote-dilution provisions incorporate, so that the courts and litigants may know in advance of their NYVRA vote-dilution trials what elements must be proven. Mem.37–39.

B. In their Responses, Plaintiffs and the Attorney General do not dispute that the question of the NYVRA's constitutionality (including the interrelated question of the Town's capacity to raise this argument) or

the question of what implicit elements an NYVRA vote-dilution claim must contain are important questions of statewide significance. *See generally* Resp.7–24; AG.Resp.7–13. Rather, they largely argue that this Court “correctly” resolved these questions in its Decision. *E.g.*, Resp.13. But a disagreement over the merits of an indisputably important question of statewide significance is no grounds to deny leave to appeal to the Court of Appeals, *see* Mem.25–30—particularly where the Court of Appeals’ review now would eliminate significant waste of judicial and litigant resources in NYVRA cases pending across the State, as already explained above, *supra* Part I.

In any event, the Town respectfully submits that there are several grounds upon which the Court of Appeals could disagree with this Court’s Decision on the merits. *See* Mem.25–35. This Court is, of course, intimately familiar with the various merits arguments of the parties and so does not need a full recitation of these points here. Rather, it is the Town’s modest, respectful submission that it has presented serious arguments on the merits, such that the Court of Appeals may well agree with the Town and the Supreme Court below.

First, while Plaintiffs argue that this Court correctly concluded that the Town lacks capacity to “defensively rais[e] a facial challenge to the NYVRA,” Resp.19; *see also* AG.Resp.7, 11, they do not dispute that this question is inextricably intertwined with the question of the facial validity of the NYVRA’s vote-dilution provisions, *see generally* Resp.19; AG.Resp.7, 11. Thus, Plaintiffs implicitly concede that if this Court grants leave to appeal with respect to the constitutional question, it should also grant leave to appeal on the capacity question as well. *See* Mem.36–37. Further, the Town respectfully submits that the Court of Appeals may well disagree with this Court’s lack-of-capacity holding, notwithstanding Plaintiffs’ counterarguments. Plaintiffs argue that the Town lacks capacity because it “cannot prove . . . that complying with the NYVRA would force it to engage in unconstitutional actions,” given that the Supreme Court may not “impose unconstitutional remedies.” Resp.21. But this misunderstands the Town’s core argument that compliance with the NYVRA’s vote-dilution provisions is unconstitutional regardless of any remedy the Supreme Court may ultimately order, thus bringing this case within a well-established exception to the municipal-capacity rule. Mem.35–36.

Second, the Court of Appeals could also disagree that the NYVRA is “facially neutral” and “not a racial classification subject to strict scrutiny.” Resp.14 (making argument as to liability provisions); Resp.15 (making similar argument as to remedies provisions); *see* Decision at 16–19. The NYVRA requires municipalities to group their citizens according to racial classifications and then to analyze their voting patterns along racial lines to determine if there is “racially polarized” voting among minority group members. *See* Election Law §§ 17-206(2)(b)(i), 17-206(2)(c)(iv), 17-204(5); Mem.19–20. If voting is “racially polarized”—as it is “in most States,” *Cooper v. Harris*, 581 U.S. 285, 304 n.5 (2017)—the municipality must abandon or alter its race-neutral method of election in favor of one that increases minority-preferred candidates’ chances of electoral success, necessarily decreasing other lumped-together racial groups’ preferred candidates’ chances of electoral success. Mem.19–20; *see* Election Law § 17-206(5). The Court of Appeals could reasonably conclude that the NYVRA’s distribution of “benefits” and “burdens” on the basis of “racial classifications” both triggers and fails strict scrutiny, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); Mem.20, including because the NYVRA lacks the narrow

tailoring of Section 2 of the VRA, *see* Mem.21–22, 28–30. Plaintiffs and the Attorney General rely heavily on out-of-state decisions holding that other State’s voting rights acts are not subject to strict scrutiny. *See* Resp.14–16; AG.Resp.8–9. But the Court of Appeals could find these nonbinding cases unpersuasive because the NYVRA is significantly less tailored than those other state laws and because the decisions interpreting them both predate *Students for Fair Admission, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (“*SFFA*”), and are not well-reasoned. Mem.25–26.

Third, Plaintiffs mischaracterize the Town as arguing that the U.S. Supreme Court’s recent decision in *SFFA* “upend[ed] decades of racial vote dilution precedents” and “abrogate[d]” *Allen v. Milligan*, 599 U.S. 1 (2023). Resp.18–19; *see also* AG.Resp.9–10. As the Town explained, *SFFA* makes clear that the Equal Protection Clause subjects all laws making “racial classification[s]” or requiring “official conduct discriminating on the basis of race” to “strict scrutiny.” *SFFA*, 600 U.S. at 206–07 (citations omitted). *SFFA* also reiterates that the compelling state interests justifying such race-based laws include “remediating specific, identified instances of past discrimination.” *Id.* at 207. There is

no reason why the NYVRA would be exempt from these generally applicable equal-protection principles. See Mem.19–22. Nor is the U.S. Supreme Court’s recent decision in *Allen* to the contrary, as it did not hold that race-focused, voting-related statutes lacking the protections of the federal VRA evade strict-scrutiny review (a proposition that would have overruled prior U.S. Supreme Court precedent *sub silentio*, Mem.18–19), notwithstanding Plaintiffs’ claims. Resp.15. Rather, *Allen* simply applied the current federal VRA precedent, which holds that the VRA *satisfies* strict scrutiny due to its narrow tailoring. Mem.18–19; *Allen*, 599 U.S. at 30, 41–42. This is also why the Court of Appeals may well disagree with this Court’s related conclusion that “Section 2 of the federal VRA is not *itself* subject to strict scrutiny.” Resp.16; *see also* AG.Resp.10. The U.S. Supreme Court has concluded that Section 2 triggers “strict scrutiny” because it “demands consideration of race” by States in redistricting, *Abbott v. Perez*, 585 U.S. 579, 587 (2018) (citations omitted), as the Town explained, Mem.26–27; *contra* Resp.16–17.

Fourth, and relatedly, it would be reasonable for the Court of Appeals to disagree with this Court’s conclusion that the NYVRA’s decision to reject several aspects of the “*Gingles* framework” lacks

constitutional significance. Resp.17; *see also* AG.Resp.10–11. While Plaintiffs claim that “the *Gingles* prongs” are a matter of “statutory interpretation” and are not constitutionally required, Resp.17–18, the Court of Appeals may well agree with the Town that this disregards the U.S. Supreme Court’s explicit warning that relaxing any of the *Gingles* standards would raise “serious constitutional concerns,” *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion). And the Court of Appeals may reject Plaintiffs’ claim that the NYVRA contains only “modest departures from *Gingles*.” Resp.17–18. Plaintiffs have conceded that the NYVRA does not contain the first *Gingles* precondition, Resp.17; Plaintiffs do not contest that the NYVRA fails to incorporate the second precondition, *see* Mem.22 (citing Election Law § 17-206(2)(b)(i)(A), (ii)(A)); and Plaintiffs admit that the NYVRA eschews *Gingles*’ second step as mandatory, Resp.18. The Court of Appeals could well conclude that these are significant departures from *Gingles*, such that the NYVRA’s vote-dilution provisions fail the narrow tailoring requirement of strict-scrutiny review. *See* Mem.21–22, 28–30.

Fifth, the Court of Appeals could well disagree that this Court “correctly identified” and properly articulated “all the elements of a vote dilution claim under the NYVRA.” Resp.21; *see also* AG.Resp.12–13.

Plaintiffs are incorrect that “this Court confirmed that the NYVRA contains exactly th[e] implied element” that the parties agreed upon. Resp.22. The parties agreed that a plaintiff must show that there is a reasonable available remedy that would *increase* the minority group’s preferred candidates’ chances of winning more seats than under the Town’s current at-large method of election. Mem.31–32; *see* Resp.22. This Court adopted a different implicit vote-dilution element, requiring a plaintiff to show “that there is an alternative practice that would allow the minority group to have *equitable access to fully participate in the electoral process*” to obtain relief. Decision at 20 (citations omitted) (emphasis added).

Contrary to Plaintiffs’ claim, Resp.22 n.3, this Court’s adoption of an “equitable access” element is extremely significant, as it shows that this Court’s implicit element is not at all the same as the parties’ agreed-upon implicit element, Mem.31–32. To repeat, the parties’ agreed-upon implicit element requires a plaintiff to show that an alternative election

system exists under which minority-preferred candidates would perform *better* than under the extant at-large system, Mem.31–32, while this Court’s implicit element requires plaintiffs to somehow further define what “equitable access to fully participate in the electoral process” means and then show that an alternative map satisfies this new element, *see* Decision at 20. For example, the Town currently has five Town Board seats (four councilpersons and one supervisor): what number of Board seats must minority-preferred candidates be projected to win under a different system—and how frequently must those candidates win—so that minority voters could be said to have “equitable access to fully participate in the electoral process”? That is a very different, entirely amorphous inquiry than the implicit element that the parties agreed to. Forcing three trials to take place under that standard is a recipe for multiple retrials after appeal, resulting in just the type of delay that Plaintiffs decry elsewhere in their Opposition.

The Attorney General, for her part, argues that it would be premature for the Court of Appeals to decide the required elements of an NYVRA vote-dilution claim before trial. *See* AG.Resp.12–13. But it

makes little sense for a trial (or three) to go forward without knowing the elements that the plaintiffs need to prove to obtain relief.

Relatedly, the Court of Appeals could also disagree with Plaintiffs' claim that "nowhere in the Court's decision is any suggestion" that additional implicit elements for proving an NYVRA vote-dilution claim may exist. Resp.24. This Court concluded that a plaintiff must also show "that 'vote dilution' has occurred," Decision at 20, without elaborating on what the Court meant by "vote dilution," Mem.13–14, 32. For jurisdictions using at-large methods of election, the NYVRA allows Plaintiffs to establish "vote dilution" either by showing "racially polarized" voting or by establishing that the ability of minority groups' members to elect candidates of their choice is "impaired" under the NYVRA's totality test. Election Law § 17-206(2)(b)(i). And for jurisdictions using district-based or alternative election systems, a plaintiff must also show that the minority groups' preferred candidates "would usually be defeated." *Id.* § 17-206(2)(b)(ii). It is unclear whether the Court was merely reiterating a plaintiff's duty to prove vote-dilution as defined by the NYVRA (which would provide no meaningful safeguards), or whether the Court was indicating that there is some other

aspect of “vote dilution” as that term is understood under Section 2 of the federal VRA caselaw that a plaintiff would need to satisfy to prove a violation of the NYVRA. *See* Mem.32, 13–14.

Finally, Plaintiffs raise unpersuasive vehicle arguments about the Town’s Motion. Resp.5, 10–11, 19. Plaintiffs claim that review of the NYVRA’s constitutionality would be premature because the Supreme Court has not yet imposed an NYVRA vote-dilution remedy upon the Town, Resp.5, 10–11, and further that granting review here “would dragoon the Court of Appeals into resolving abstract constitutional questions on underdeveloped records,” Resp.19. These arguments depend solely on Plaintiffs’ merits position—namely, that *liability* under the NYVRA’s vote-dilution provisions cannot possibly facially violate the Equal Protection Clause, while certain *remedies* under the NYVRA’s vote-dilution provisions may violate the Equal Protection Clause as applied. *Supra* pp.14–15. The Court of Appeals would need no further factual development to disagree and conclude that NYVRA *liability* does facially violate the Equal Protection Clause, as the Supreme Court did below. Nor is any factual development necessary for the Court of Appeals

to articulate the implicit element(s) that a plaintiff must satisfy under the NYVRA's vote-dilution provisions.

III. No Remittitur Appears On The Docket, And Withholding Remittitur Would Promote Judicial And Litigant Economy

A. This Court should stay any further proceedings below by refraining from issuing its remittitur to the Supreme Court, pending consideration of the Town's Motion and any subsequent review by the Court of Appeals. Mem.37–39. The Court of Appeals' review of this appeal could wholly dispose of this case or at least provide clarity on the required elements of an NYVRA vote-dilution claim, which guidance would be essential for trial in this case. Mem.38–39.

B. Plaintiffs are incorrect that remittitur has already issued in this case, and they have no persuasive argument against the Court withholding remittitur here. *See* Resp.24–25.

Plaintiffs' assertion that the Town's request for the Court to refrain from issuing remittitur is moot because "[t]his case has already been remitted to the Supreme Court," Resp.24, is without merit. Plaintiffs claim remittitur has already issued because the Clerk of this Court filed a copy of this Court's Decision in this appeal with the Clerk of the Supreme Court. Resp.24. But "CPLR 5524(b) specifically provides in

part that the entry of a copy of *the remittitur* ‘shall be authority for any further proceedings,’” and for the Supreme Court “to proceed, a copy of *the remittitur* must be entered in the County Clerk’s Office.” *Fry v. Vill. of Tarrytown*, 671 N.Y.S.2d 633, 634 (Sup. Ct. Westchester Cnty. 1998) (citations omitted; emphases added); see Richard C. Reilly, *Practice Commentaries*, McKinney’s Cons. Laws of N.Y., CPLR C5524:2 (“If further proceedings are needed in the lower court, the entry there of the appellate remittitur is the authority for the further proceedings.”). There is no remittitur on the docket. See *Clarke et al. v. Town of Newburgh et al.*, Index No.EF002460/2024 (Sup. Ct. Orange Cnty.).

While there is a notice of entry from Plaintiffs and a copy of this Court’s Decision on the docket, see *id.* NYSCEF Nos.155, 160, neither of those documents are denominated as a remittitur or contain any order remitting the case to the Supreme Court for further proceedings. This is different from other cases, including in this Department. See, e.g., Conditional Remittitur, *Haggerty v. Imperial Towers Condo.*, Index No.151708/2020, NYSCEF Mot. No.3 (Sup. Ct. Richmond Cnty. May 15, 2024); Order Directing Remittitur, *Blasch v. Edwards*, Index No.52196/2017, NYSCEF Mot. No.1 (Sup. Ct. Westchester Cnty. May 7,

2020); Remittitur, *Trump Vill. Sec. 3 Inc. v. City of N.Y.*, Index No.0026572/2010 (Sup. Ct. Kings Cnty. Jan. 22, 2015); Remittitur, *Modafferi v. N.Y.C. Transit*, Index No.0024060/2010 (Sup. Ct. Kings Cnty. Mar. 12, 2012); *see also* Notice of Entry of Ct. of Appeals Op. and Remittitur, *Harkenrider v. Hochul*, Index No.E2022-0116CV, NYSCEF No.288 (Sup. Ct. Steuben Cnty. Apr. 27, 2022). Issuance of the remittitur is essential to the orderly administration of justice. *See, e.g., Fry*, 671 N.Y.S.2d at 634; *Malnati v. Metro. Life Ins. Co.*, 300 N.Y.S. 1313, 1317 (Sup. Ct. Queens Cnty. 1937), *aff'd*, 254 A.D. 681 (2d Dep’t 1938). No such remittitur has been issued here, and thus the Supreme Court has no “authority for any further proceedings.” *Fry*, 671 N.Y.S.2d at 634.

Plaintiffs offer no persuasive argument against withholding the remittitur here. *See* Resp.24–25.

Plaintiffs assert that remittitur should issue to avoid the “irreparable harm of holding elections under unlawful conditions.” Resp.25. But Plaintiffs do not even argue that they could obtain the relief they seek for the already ongoing 2025 election, so Plaintiffs would suffer no harm from this Court withholding issuance of remittitur. *See supra* pp.5–6; Index No.EF002460/2024, NYSCEF No.1 at 25–26. Further,

Plaintiffs' argument merely assumes that they will prevail at any future trial on their NYVRA claims, which is far from certain. *Supra* p.6. As Plaintiffs themselves recognize, no court has yet held that the Town's current election system is unlawful, and "the Town may well prevail on the merits below." Resp.7.

Finally, Plaintiffs argue that refraining from issuing remittitur is inequitable because the NYVRA requires expedited "trial proceedings" with a "calendar preference." Resp.25 (citing Election Law § 17-216). But that provision does not purport to override the ordinary appellate review of a Supreme Court decision striking down the NYVRA pursuant to the normal rules of appellate procedure. *See* CPLR 5602(b), 5713; 22 NYCRR § 1250.16(d). And withholding remittitur and granting the Town's Motion would further the interests in *finally* adjudicating this case because either the Court of Appeals will affirm the Supreme Court's Order striking down the NYVRA, thereby ending this case, or will provide essential clarity on the required elements of an NYVRA vote-dilution claim, obviating the need for a retrial of Plaintiffs' claims. *See* Mem.37–39.

CONCLUSION

The Court should grant the Town leave to appeal to the Court of Appeals and refrain from issuing the remittitur.

Dated: March 7, 2025

Respectfully submitted,

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