

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

ORAL CLARKE, et al.,

No. 2024-04378

Plaintiffs-Respondents,

Supreme Court

Orange County

v.

Index No. EF002460-2024

TOWN OF NEWBURGH AND TOWN BOARD OF THE
TOWN OF NEWBURGH,

**NOTICE OF MOTION FOR
LEAVE TO FILE AMICUS
CURIAE BRIEF**

Defendants-Appellants.

PLEASE TAKE NOTICE that upon the annexed Affirmation of Assistant Attorney General Derek Borchardt, and upon all of the prior pleadings and proceedings had in this matter, Attorney General of the State of New York shall move this Court at the Appellate Division, Second Department Courthouse, 45 Monroe Place, Brooklyn, New York, 11201, on Monday, August 12, 2024, at 10:00 a.m., or as soon thereafter as counsel can be heard, for an order granting permission to file the annexed proposed amicus curiae brief in support of plaintiffs-respondents, and for such other relief as the Court may consider just and proper.

Dated: New York, New York
July 31, 2024

Respectfully submitted,

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Attorney General
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TO: The Honorable Darrell M. Joseph
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SUPREME COURT OF THE STATE OF NEW YORK
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No. 2024-04378

Plaintiffs-Respondents,

Supreme Court
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v.

Index No. EF002460-2024

TOWN OF NEWBURGH AND TOWN BOARD OF THE
TOWN OF NEWBURGH,

**AFFIRMATION IN
SUPPORT OF MOTION
FOR LEAVE TO FILE
AMICUS CURIAE BRIEF**

Defendants-Appellants.

DEREK BORCHARDT, an attorney admitted to the practice of law in the State of New York, who is not a party to this appeal, under penalty of perjury, which may include a fine or imprisonment, affirms as follows:

1. I am an Assistant Attorney General in the Office of Letitia James, Attorney General of the State of New York, which represents movant Attorney General of the State of New York in this matter. I make this affirmation in support of the Attorney General's motion for leave to submit an amicus curiae brief in support of plaintiffs-respondents. A copy of the Attorney General's proposed amicus brief is attached as an exhibit to this affirmation. I make this affirmation based on personal knowledge and on information and belief, based on my review of this office's files and prior proceedings in this matter.

2. At issue in this appeal is the proper interpretation of the safe harbor provisions of the John R. Lewis Voting Rights Act of New York (NYVRA): whether a political subdivision may receive the benefit of a 90-day shield from litigation

pursuant to Election Law § 17-206(7)(b) when it does not meaningfully commit to enacting a specific remedy during the 90-day period, but instead indicates that it will further investigate an alleged voting rights violation. Supreme Court, Orange County (Vazquez-Doles, J.) correctly concluded that a political subdivision may not rely on the NYVRA's 90-day safe harbor unless it passes a timely resolution evincing the intention to enact and implement a remedy for the violation. For the reasons further explained in the Attorney General's proposed amicus brief, appellants' interpretation of the NYVRA's 90-day safe harbor, if accepted by this Court, could lead to routine delays in voting rights litigation under the NYVRA, which undermines the ability to expeditiously address discriminatory conditions before elections.

3. The Attorney General should be permitted to participate as amicus curiae for several reasons. First, the Attorney General is tasked with enforcing the NYVRA, *see, e.g.*, Election Law § 17-206(4), and therefore has a clear interest in the proper interpretation of the statute. While the parties are ably represented by counsel, the Court would benefit from the perspective of the Attorney General as to the public interest implications of this case, as the Attorney General is not a private party but an officer of the State.

4. Second, the Attorney General often participates as amicus curiae in cases involving matters of important public interest. Here, the judicial construction of the NYVRA's safe harbor provisions, an issue of first impression in the New York appellate courts, is a question of important public interest with ramifications far beyond this individual case.

5. Third, an order granting the Attorney General's motion for leave to file an amicus curiae brief will not delay this proceeding or prejudice the parties. The proposed amicus brief is substantially similar to the amicus brief that the Attorney General filed in the trial court. The parties are therefore familiar with and able to respond to the arguments made in the brief. The Attorney General is filing this motion on July 31, 2024, which is the due date for plaintiffs-respondents' brief, and prior to the due date for appellants' reply brief. Moreover, the return date on this motion is August 12, 2024, only 5 days after the appellants' reply brief is due, and before argument in this case has been scheduled. Finally, counsel for plaintiffs-respondents consented to the relief requested in this motion, and counsel for defendants-appellants stated that they take no position.

6. For these reasons, I respectfully request that this Court enter an order granting the Attorney General's motion for leave to submit the annexed proposed amicus curiae brief, and granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
July 31, 2024



DEREK BORCHARDT
Assistant Attorney General

EXHIBIT A

**Supreme Court of the State of New York
Appellate Division – Second Department**

No. 2024-04378

ORAL CLARKE, et al.,

Plaintiffs-Respondents,

v.

TOWN OF NEWBURGH AND TOWN BOARD OF THE TOWN OF NEWBURGH,

Defendants-Appellants.

**BRIEF FOR OFFICE OF THE ATTORNEY GENERAL
AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE**

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INTRODUCTION AND INTERESTS OF AMICUS CURIAE

The New York State Attorney General submits this memorandum of law as amicus curiae in support of plaintiffs-appellees, who are residents of the Town of Newburgh and allege that the Town's at-large voting system for municipal elections prevents Black and Hispanic voters from electing candidates of their choice to the Town Board in violation of the John R. Lewis Voting Rights Act of New York (NYVRA). Defendants-appellants Town of Newburgh and the Town Board moved to dismiss the complaint as premature, contending that the Town was entitled to the benefit of a 90-day safe harbor from litigation pursuant to Election Law § 17-206(7)(b). Supreme Court, Orange County (Vazquez-Doles, J.) denied the Town's motion. This Court should affirm.

The NYVRA is aimed at ensuring that "eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York, and especially to exercise the elective franchise." Election Law § 17-200(2). To that end, the statute authorizes the Attorney General and certain private parties, including voters, to bring judicial actions against political subdivisions, including counties, cities, towns, and villages, that

have electoral schemes with discriminatory effects, so that courts may impose judicial remedies. *Id.* § 17-206. The Attorney General therefore has a strong interest in the proper interpretation and application of the statute. Further, consistent with the Attorney General’s important role in defending access to the elective franchise for New York voters, the Attorney General is interested in ensuring that the NYVRA’s safe harbor provisions are not erroneously construed in a manner that would frustrate the statutory aim of ensuring that unlawful conditions in voting and elections are remedied expeditiously.

STATEMENT OF THE CASE

A. Statutory Background

For decades, the federal Voting Rights Act of 1965 provided critical protections for the franchise nationwide. However, after a series of U.S. Supreme Court decisions that weakened the federal statute’s protections, *see, e.g., Shelby County v. Holder*, 570 U.S. 529 (2013), multiple States adopted “state-level enactments that provide more protection against racial discrimination in voting than does federal law.” Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 *Emory L.J.* 299, 299 (2023). The NYVRA, enacted in 2022, was “the most ambitious”

state voting rights act in the nation at the time of its enactment, and has since been used as a model for subsequent state laws. *Id.* at 301.

Among other protections, the NYVRA allows voters, advocacy organizations, and other parties, *see* Election Law § 17-206(4), to file suit against political subdivisions in New York that have electoral systems or voting procedures that operate to deny or abridge the right of members of a protected class to vote, *id.* § 17-206(1), or that impair 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, *id.* § 17-206(2). In such cases of vote suppression or dilution, the NYVRA mandates an appropriate remedy to ensure the affected protected class has equitable access to the electoral process, such as a change in the method of election, redistricting, or otherwise. *Id.* § 17-206(5). In accordance with the Legislature's broad remedial goals, the Election Law provides that the NYVRA and all other electoral statutes "shall be construed liberally in favor of," among other aims, "ensuring voters [in protected classes] have equitable access to fully participate in the electoral process in registering to vote and voting." *Id.* § 17-202.

At issue in this appeal are provisions of the NYVRA aimed at affording political subdivisions the opportunity to “make necessary amendments to proposed election changes without needing to litigate in court.” (Record on Appeal (R.) 127 (reproducing Senate Introducer’s Memorandum).) Prior to filing suit, a prospective plaintiff must provide written notice of a potential NYVRA violation to the political subdivision. Election Law § 17-206(7). The political subdivision then has 50 days from the mailing of the notification letter to consider the matter and determine whether to pursue a remedy for a potential violation, during which time the statute prohibits the prospective plaintiff from filing suit. *Id.* § 17-206(7)(a).

If the political subdivision decides within these 50 days to voluntarily enact and implement a remedy for the potential violation alleged in the notice, the statute provides an additional 90-day safe harbor from litigation. *Id.* § 17-206(7)(b). To receive the protection of this separate safe harbor, a political subdivision must pass a resolution within the initial 50-day period that “affirm[s]”: (i) “the political subdivision’s intention to enact and implement a remedy for a potential violation of this title”; (ii) “specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy”; and (iii) “a schedule for enacting and

implementing such a remedy.” *Id.* The resolution must satisfy all three requirements to benefit from the 90-day extension to the initial 50-day safe harbor. *Id.*

If a political subdivision complies with the statutory requirements to obtain an extension of the safe harbor, it must use that period to “enact and implement such remedy” proposed in the resolution. *Id.* In certain circumstances—for example, the political subdivision lacks authority to unilaterally enact and implement the “remedy identified in [the] resolution”—it may submit a proposed remedy to the Office of the Attorney General for review, which can then, upon approval, order the remedy into effect. *Id.* § 17-206(7)(c).

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

The safe harbor provisions do not apply if (i) the time for designating petitions for the political subdivision’s next regular election to select

members of its governing board has begun or is scheduled to begin within 30 days of commencing an action, or (ii) a political subdivision is scheduled to conduct any election within 120 days of commencing an action. *Id.* § 17-206(7)(f). In such circumstances, plaintiffs may file an action, so long as they also seek preliminary relief for the upcoming election and submit a notification letter concurrently. *Id.*

B. This Lawsuit

According to the complaint and attached exhibits, plaintiffs sent a letter to the Newburgh Town Clerk on January 26, 2024, alleging that the Town's at-large method of electing Town Board members, combined with the presence of racially polarized voting in the Town, operated to dilute the votes of Black and Hispanic voters, who have been systematically prevented from electing preferred candidates for the Town Board. (R. 79-81.)

On March 15, 2024, 49 days after the date of the notification letter, Newburgh's Town Board passed a resolution directing town officials to work with legal counsel and retained experts "to determine whether any violation of the NYVRA may exist and to evaluate potential alternatives to bring the election system into compliance with the NYVRA should a

potential violation be determined to exist.” (R. 85 (§ 1).) The resolution directed that the findings of such review be reported to the Town Board within 30 days and further provided that, “[i]f, after considering the findings and evaluation and any other information that may become available to the Town . . . , the Town Board concludes that there may be a violation of the NYVRA, the Town Board affirms that the Town intends to enact and implement the appropriate remedy(ies).” (R. 85-86 (§ 2).) The resolution did not propose any specific remedy, but instead stated that, if the Town Board determined a potential violation of the NYVRA may exist, it would direct a proposal of remedies to be prepared within ten days, with public hearings to follow. (R. 86 (§§ 3-4).)

On March 26, 2024, plaintiffs filed this action in Supreme Court, Orange County. (R. 45-78.) On April 8, the Town Board responded by adopting a new resolution which (i) suspended the schedule set forth in the March 15 resolution, and (ii) provided that the Town’s evaluation of the potential NYVRA violation would recommence only if plaintiffs’ suit were dismissed. *See* Resolution of the Town Board of the Town of Newburgh Pertaining to New York State Election Law 17-206 and Commencement of Litigation (Apr. 8, 2024).

On April 16, defendants moved to dismiss the action in Supreme Court, contending that the March 15 resolution triggered the 90-day safe harbor following the initial 50-day safe harbor under § 17-206(7)(b) of the NYVRA, and, therefore, plaintiffs' suit was premature, as it was filed prior to 90 days after the March 15 resolution. (R. 20-41.) At the same time, defendants acknowledged that the Town had "suspend[ed]" any pursuit of a voluntary remedy for plaintiffs' claims. (R. 33.)

On May 17, 2024, Supreme Court (Vazquez-Doles, J.) denied the motion. (R. 5-19.) Supreme Court held that the March 15 resolution failed to "satisfy the three elements in the Act because it lacks the intention to enact and implement specific remedies, the steps to accomplish that process, and a timetable for the implementation." (R. 5.) As Supreme Court explained, the resolution was "bereft of any remedy" whatsoever. (R. 5-6.) "Instead, Defendants enacted only a plan to investigate whether a violation of the Act is ongoing, a process that the Act does not authorize and that does not satisfy the requirements to trigger the 90-day safe harbor." (R. 6.)

Defendants appealed Supreme Court's order (R. 2-3) and moved this Court, by order to show cause, to stay all trial court proceedings pending the appeal and to expedite the appeal. (Order to Show Cause

(June 10, 2024), 2d Dep't NYSCEF No. 3.) This Court denied the request for a stay but expedited the appeal. (Decision & Order (July 5, 2024), 2d Dep't NYSCEF No. 7.) In the meantime, defendants answered the complaint, asserting six affirmative defenses, including a constitutional challenge to the validity of the NYVRA. (Answer (May 28, 2024), Sup. Ct. NYSCEF No. 34.)

ARGUMENT

SUPREME COURT CORRECTLY DENIED NEWBURGH'S MOTION TO DISMISS THE COMPLAINT

Supreme Court correctly held that the March 15 resolution did not satisfy the statutory requirements for an additional 90-day safe harbor under the NYVRA. Specifically, defendants did not affirm any actual intent to enact and implement a remedy for the potential violation plaintiffs asserted in their notification letter, much less outline specific steps or a timetable for doing so. Instead, defendants merely affirmed an intent to investigate the alleged violation, with no indication that they used any of the initial 50-day safe harbor to do so. Allowing a political subdivision to delay resolution of a potential voting rights violation in such circumstances contravenes the NYVRA's text and increases the risk of unremedied

discriminatory conditions in elections contrary to the Legislature’s express intent.

A. Supreme Court Correctly Held That the March 15 Resolution Does Not Satisfy the Statutory Requirements for a 90-Day Safe Harbor.

As explained above, the NYVRA affords every political subdivision a mandatory 50-day safe harbor from litigation upon being sent a presuit notification letter. Election Law § 17-206(7)(a). The purpose of this 50-day period is to allow a political subdivision to investigate the allegations, assess whether there is a potential violation, and if so, determine whether to voluntarily remedy the potential violation or face litigation.

The purpose of the NYVRA’s separate 90-day safe harbor is different: it gives a political subdivision that has confirmed a potential violation time to implement a remedy without fear of litigation. *Id.* § 17-206(7)(b). Accordingly, a political subdivision receives the benefit of the 90-day safe harbor only if it enacts a resolution that “affirm[s]” its “intention to enact and implement a remedy for a potential violation of this title” and details “specific steps the political subdivision will undertake to facilitate approval and implementation of” and a “schedule for enacting and implementing such a remedy.” *Id.* § 17-206(7)(b).

Defendants' March 15 resolution mistakenly treats the 90-day safe harbor as a routine extension of the 50-day safe harbor. In so doing, the resolution fails to meet the requirements of § 17-206(7)(b) in at least two respects: (i) the resolution does not meaningfully affirm that Newburgh actually intends to enact and implement a remedy; and (ii) the resolution does not propose any specific remedy, let alone specific steps or a schedule for enacting and implementing any such specific remedy.

As Supreme Court correctly held, the March 15 resolution calls for an “investigative act,” not a “remedial act.” (R. 15.) By its plain terms, the resolution commits defendants only to a “review and investigation of the current at-large election system . . . to determine whether any potential violation of the NYVRA may exist and to evaluate potential alternatives . . . should a potential violation be determined to exist.” (R. 85 (§ 1).) The resolution makes no effort to explain why defendants failed to conduct this review and investigation in the initial 50-day safe harbor period.

A commitment to “review and investigat[e]” (R. 85) is not a resolution “to enact and implement a remedy,” as required to trigger the 90-day safe harbor. *See* Election Law § 17-206(7)(b). The NYVRA makes no reference to “investigating” a remedy in detailing the required elements of a resolution.

See id. “The absence of this word” or similar ones must be considered “meaningful and intentional” because “the failure of the legislature to include a term in a statute is a significant indication that its exclusion was intended.” *Commonwealth of N. Mariana Is. v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 60 (2013); *see also* Statutes § 74, 1 McKinney’s Cons. Laws of N.Y. (Westlaw).

Other provisions of the safe harbor scheme underscore that a qualifying resolution must specify a particular remedy that the political subdivision intends to enact and implement. For example, § 17-206(7)(c) provides that, “within ninety days after the passage of the NYVRA resolution,” a political subdivision that “lacks the authority . . . to enact or implement a remedy identified in a NYVRA resolution” may submit a proposed remedy to the Attorney General. Section 17-206(7)(c) therefore plainly contemplates that the resolution actually enumerate a particular remedy for enactment and implementation, given that a jurisdiction cannot possibly determine whether it “lacks authority” to implement an unidentified remedy to potentially be considered only later.

It is immaterial that Newburgh’s March 15 resolution separately states that defendants intend “to enact and implement the appropriate

remedy(ies)” if they later conclude that there “may be” a violation of the NYVRA. (R. 85-86 (§ 2).) As Supreme Court correctly explained, the conditional nature of this promise “means that Defendants do *not* intend to enact and implement the ‘appropriate remedy(ies)’ unless they [later] conclude . . . that there ‘may be’ a violation of the NYVRA.” (R. 15.) While the Legislature could have written the statute to permit a party to act solely upon a conditional intention, *see, e.g., Holloway v. United States*, 526 U.S. 1, 7-12 (1999), affirming *United States v. Arnold*, 126 F.3d 82 (2d Cir. 1997), neither the text of the NYVRA nor its context or legislative history support such a reading. To the contrary, the text, context, and history of the NYVRA show that the Legislature sought to require an actual commitment to take action and not merely a commitment to take action if further investigation warranted it.

For example, *People v. Alexander* concerned the proper interpretation of Criminal Procedure Law § 710.30, which requires a prosecutor to give pretrial notice of intent to use a defendant’s statement to admit the statement into evidence. Ind. No. 03-28035, 2003 WL 21169075 (Poughkeepsie City Ct. May 12, 2003). The court held that the statute does not apply when a prosecutor merely expresses an intent to potentially use the

statement for impeachment purposes depending on the defendant’s testimony in defense, because that intent “is really no more than an expression of contingency, at best an illusory promise, vastly different than a prosecutor’s stated intent to use a particular statement as evidence-in-chief,” as CPL § 710.30 requires. *Id.* at *5 (footnote omitted). The NYVRA’s plain language likewise unambiguously requires that the political subdivision’s intention to enact and implement a remedy, as reflected in a resolution passed within the first 50 days following a notification of a potential violation, be meaningful, and not so conditional as to be entirely illusory, for the political subdivision to receive the benefit of the additional 90-day safe harbor. *See* Election Law § 17-206(7)(b)-(c).

Moreover, the March 15 resolution fails to identify the “specific steps” or the “schedule” for a remedy that defendants intend to enact and implement. Instead, the resolution commits only to “evaluat[ing] potential alternatives to bring the election system into compliance with the NYVRA should a potential violation be determined to exist.” (R. 85 (§ 1).) While the resolution provides that the Town will “enact and implement the appropriate remedy(ies)” upon the finding of a potential violation (R. 85-86 (§ 2)) and makes a passing reference to “the composition of proposed

new election districts” as a potential remedy (R. 86 (§ 4)), the resolution does not explain the “specific steps” or “schedule” that would be used to implement that remedy or any other alternative, as required by Election Law § 17-206(7)(b)(ii) and (iii). And, as noted above, the selection of any remedy is itself contingent on a speculative future finding of a potential violation by the Town Board. Supreme Court correctly concluded that these open-ended promises are not sufficient under the plain text of the NYVRA. (R. 17-18.)

None of defendants’ arguments to the contrary has merit.

First, defendants mistakenly contend that the NYVRA authorizes a political subdivision to unilaterally obtain a 90-day safe harbor without committing to a particular remedy because the statute requires the resolution to affirm an “intention to enact and implement a remedy for a *potential* violation.” Br. for Appellants at 20 (quoting § 17-206(7)(b)(i)). The Legislature’s use of the term “potential violation” merely indicates that, in the presuit posture of the safe harbor, no court has yet made a finding of an NYVRA violation. Indeed, the purpose of the presuit safe harbor is to allow political subdivisions to voluntarily remedy “potential violations” without the predicate judicial finding of an actual violation.

The statute does not, as defendants suggest, allow a political subdivision to affirm a “potential intention” to enact and implement a remedy following investigation. *See id.* at 20-21.

Second, defendants miss the mark in attempting to draw a contrast between § 17-206(7)(b), which authorizes the 90-day safe harbor upon the passage of a qualifying resolution, and § 17-206(7)(d), which allows a political subdivision and prospective plaintiff to enter an agreement to extend that safe harbor for an additional 90 days. *See Br. for Appellants* at 21-22. Defendants contend that, because § 17-206(7)(d) mandates any agreement authorizing a second 90-day extension to “include a requirement that either the political subdivision shall enact and implement a remedy that complies with this title or . . . pass a NYVRA proposal and submit it to” the Attorney General, it would be irrational to interpret § 17-206(7)(b) to contain a comparable guarantee. *See Br. for Appellants* at 21-22. Defendants fail to explain how Supreme Court’s interpretation of (b) renders (d) “superfluous.” *See id.* at 22. To the contrary, the provisions are entirely harmonious.

Section 17-206(7)(b) allows a political subdivision to unilaterally obtain a 90-day safe harbor (even over the objection of a potential plaintiff) by

affirming in a resolution an intent to enact and implement a remedy for a potential violation. Section 17-206(7)(c) contemplates that “within ninety days after the passage” of this resolution, the political subdivision will either enact and implement a remedy or submit a proposed remedy to the Attorney General. Section 17-206(7)(d), by contrast, does not allow a political subdivision to act unilaterally and requires the consent of the potential plaintiff. Subsection (d)’s additional requirement that the political subdivision agree with the potential plaintiff to enact or implement a remedy or submit a proposal to the Attorney General in this time period is merely a way of extending the enactment and implementation process that would already be underway during § 17-206(7)(b)’s initial 90-day window.

Third, defendants mistakenly argue that the NYVRA requires a political subdivision to only set forth “specific steps” and a “schedule” for investigating a potential violation and remedy. Br. for Appellants at 25-27. To the contrary, the NYVRA requires a political subdivision to affirm its “intention to enact and implement a remedy for a potential violation of this title,” Election Law § 17-206(7)(b)(i), and to enumerate the “specific steps” and “schedule” for implementing “such a remedy,” *id.* § 17-206(7)(b)(ii)-(iii). Requiring the political subdivision to enumerate remedy-specific

steps and schedules makes sense because the framework and timetable for implementation differs based on the chosen remedy. For example, the process of designating new poll sites is dramatically different from the process for increasing the number of representatives within a governing body. *See id.* § 17-206(5)(a) (listing remedial options). It would be illogical for the Legislature to require political subdivisions to detail “specific steps” and a “schedule” without also identifying the specific remedy that will be achieved at the end of the process. As Supreme Court explained, “[t]here would be no means by which the political subdivision could state ‘specific’ steps for implementation of a remedy if it had not resolved what comprises the remedy.” (R. 17.)

B. Defendants’ Interpretation of the Safe Harbor Subverts the Purposes of the New York Voting Rights Act.

The NYVRA’s safe harbor provisions strike a careful balance between the political subdivision’s interest in investigating and remedying a potential violation outside of litigation and the prospective plaintiff’s interest, as well as the broader public interest, in a speedy resolution of a potential denial or abridgment of a fundamental right. To that end, every political subdivision has 50 days after a notification letter to decide whether and

how to remedy a potential NYVRA violation. However, any subsequent delay in judicial proceedings can happen only if the political subdivision meaningfully commits itself to pursuing the enactment and implementation of a specific remedy. Without reasonable assurance that a remedy for the NYVRA violation will in fact be enacted and implemented, the additional 90-day safe harbor risks causing unjustifiable delays in judicial remedies, even when time is of the essence. Such an interpretation would be inconsistent with the NYVRA's remedial purposes and would undermine the statute's operation.

First, adopting defendants' interpretation of the NYVRA would incentivize routine delay in voting rights cases, both by political subdivisions seeking to delay relief in bad faith and political subdivisions that intend, in good faith, to investigate potential violations after the initial 50-day safe harbor. Political subdivisions acting entirely in good faith could pass resolutions, like the one at issue here, that commit to no more than further investigation and consideration, even if their review and deliberations during the first 50 days have not yet progressed to the point that the political subdivision has decided it is, in fact, likely to enact and implement a remedy. If such resolutions were deemed sufficient, it would

transform the 90-day safe harbor extension from a benefit provided to political subdivisions only when there is reasonable assurance of a voluntary remedy to an almost automatic entitlement irrespective of the existence of such reasonable assurance. The routine delays created by this outcome would be utterly at odds with the NYVRA’s mandate for expedited judicial proceedings, Election Law § 17-216. *See Bank of Am., N.A. v. Kessler*, 39 N.Y.3d 317, 325 (2023) (statutory construction must “harmonize[]” a statute’s “interlocking provisions”).

Second, the possibility that a political subdivision might use such a resolution to obtain delay without ultimately enacting a remedy is not speculative. Last year, for example, the Town of Mount Pleasant passed a resolution substantially similar to Newburgh’s, stating in almost identical terms that Mount Pleasant’s Town Board intended to use the 90-day extension to the initial 50-day safe harbor to “review and investigate” Mount Pleasant’s electoral system, and “[i]f, after [the review], the Town concludes that there may be a violation of the NYVRA, the Town intends to enact and implement” some unspecified “appropriate remedy(ies).” (Compl. (Jan. 9, 2024), Ex. B, NYVRA Resolution (Aug. 25, 2023), *Serratto v. Town of Mount Pleasant*, Index No. 55442/2024 (Sup. Ct. Westchester

County), NYSCEF No. 3 (emphasis added).) After Mount Pleasant passed the resolution, no lawsuit was filed for more than 90 days. Yet, Mount Pleasant never enacted and implemented a voluntary remedy during that time, leading the prospective plaintiffs to sue after having been delayed in their pursuit of a judicial remedy for months. (See Compl., *Serratto*, NYSCEF No. 1.) And like defendants here (see *supra* at 9), Mount Pleasant has taken the position that it need not comply with the NYVRA at all because the statute is purportedly unconstitutional (see Answer (Jan. 29, 2024), *Serratto*, NYSCEF No. 8; Notice of Constitutional Question (Jan. 30, 2024), *Serratto*, NYSCEF No. 9), which further delayed relief and called into question whether a voluntary remedy was ever likely.

Third, routine 90-day delays in NYVRA lawsuits would undermine the imposition of timely judicial remedies in cases where discriminatory barriers must be quickly addressed before upcoming elections. *Cf., e.g., Flores v. Town of Islip*, 382 F. Supp. 3d 197, 247 (E.D.N.Y. 2019) (in challenge to town’s method of elections, denying motion for preliminary injunction because there was “simply not enough time” to implement a remedy “in time for the upcoming elections” that were “less than six months away”). And, given this delay, voters may be forced to vote in electoral

systems later deemed illegal. *Cf., e.g., Flores v. Town of Islip*, No. 18-cv-3549, 2020 WL 6060982, at *4 (E.D.N.Y. Oct. 14, 2020) (following denial of preliminary relief close to election, court approved postelection consent decree reflecting voting rights violation admission).

Although Election Law § 17-206(7)(f) allows plaintiffs to file suits without regard for the safe harbor in certain circumstances (see *supra* at 6), this exception does not adequately address the risk posed by misuse of resolutions. Even if certain remedies can be judicially implemented in close proximity to an election, as § 17-206(7)(f) contemplates, that is not likely to always be so, and routine 90-day delays in NYVRA litigation may have the effect of pushing some remedies past the point of feasibility. The NYVRA, like all statutes related to the elective franchise, must “be construed liberally in favor of . . . ensuring that voters [in protected classes] have equitable access to fully participate in the electoral process in registering to vote and voting.” Election Law § 17-202. Any interpretation of the statute’s safe harbor provisions that would increase the risk of unremedied discriminatory conditions in elections would be violative of this interpretive mandate.

In response to these policy concerns, defendants respond only that it may take time for a political subdivision to investigate alleged violations and determine whether to implement a voluntary remedy or litigate. *See Br. for Appellants at 22-23.* That may be true, but defendants are wrong to claim that it is unfair to leave political subdivisions “out of luck” if they cannot complete this investigation within the 50-day safe harbor. *See id.* at 23. Any litigant facing a lawsuit faces the same burden of investigating a claim and determining how to proceed. The Legislature in fact gave favorable treatment to political subdivisions by granting them a 50-day window not afforded to other litigants to resolve disputes on a voluntary basis. If the Legislature had intended to give political subdivisions more than 50 days to complete this process, then it could have readily done so. And if the Legislature intended for both the 50-day and the 90-day safe harbors to serve the same purpose, it could have created a single 140-day safe harbor. Political subdivisions and courts should, as Supreme Court did here, honor the Legislature’s determination to treat the 50-day and 90-day safe harbors as distinct periods serving different purposes.

In any event, nothing in the NYVRA precludes a political subdivision from negotiating with putative plaintiffs to refrain from filing suit for any

period of time beyond the 50-day safe harbor that every political subdivision automatically receives. If a political subdivision is pursuing a voluntary remedy in good faith, putative plaintiffs would have little reason to commence an action that may soon be mooted. And nothing in the NYVRA precludes the political subdivision from enacting and implementing a voluntary remedy during the pendency of a lawsuit either unilaterally or in connection with a settlement with the plaintiffs. Indeed, defendants here have had seven months to investigate plaintiffs' allegations and determine what, if any, remedy was appropriate. Instead, defendants unilaterally suspended such efforts and chose to pursue this motion instead. It is defendants' own action and not the NYVRA that leaves them "out of luck."

CONCLUSION

This Court should affirm Supreme Court's decision.

Dated: New York, New York
July 31, 2024

Respectfully submitted,

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EXHIBIT B

Decision and Order of the Honorable Maria S. Vazquez-Doles,
dated May 17, 2024, Appealed From, with Notice of Entry
[pp. 4 - 19]

FILED: ORANGE COUNTY CLERK 05/27/2024 05:59 PM

NYSCEF DOC. NO. 32

INDEX NO. EF002460-2024

RECEIVED NYSCEF: 05/27/2024

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.

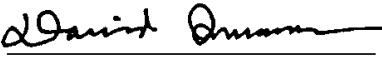
Index No. EF002460-2024

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true copy of an order of the Supreme Court,
Orange County (Vazquez-Doles, J.) dated May 17, 2024 and entered in the office of the Orange
County Clerk on May 17, 2024.

Dated: White Plains, New York
May 17, 2024

ABRAMS FENSTERMAN, LLP
Attorneys for Plaintiffs

By: 

David T. Imamura, Esq.
81 Main Street, Suite 400
White Plains, NY 10601
(914) 607-7010

To: Bennet Moskowitz, Esq.
Troutman Pepper Hamilton Sanders LLP
875 Third Avenue
New York, NY 10022

At a term of the IAS 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 17th day of May 2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

ORAL CLARKE et al.,

Plaintiffs,

-against-

TOWN OF NEWBURGH et al.,

Defendants.

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: 5/2/2024

Motion Seq. No.: 1

VAZQUEZ-DOLES, J.S.C.

The following papers were read on this motion by Defendants to dismiss the Complaint pursuant to CPLR §3211(a)(1) and (7):

- Notice of Motion/Memo of Law/Affirmation/Ex. 1.....1-4
- Opposition Affirmation/Memo of Law/Ex. A-B.....5-8
- Amicus Brief of the NY Attorney General.....9
- Reply Memo of Law.....10

Summary of the Decision

Defendants failed to establish that Plaintiffs’ Complaint does not set forth a claim for a violation of the John Lewis Voting Rights Act of NY (“NYVRA” or “the Act”). Defendants’ challenge to the Complaint is based only upon whether the instant lawsuit was filed prematurely. Had Defendants passed a timely resolution that satisfied the requirements of the Act, it would have triggered the Act’s 90 day “safe harbor” during which Plaintiffs could not file suit.

However, the resolution that Defendants passed does not satisfy the three elements in the Act because it lacks the intention to enact and implement specific remedies, the steps to accomplish that process, and a timetable for implementation. Defendants’ resolution is bereft of

any remedy, specific or otherwise, for Plaintiffs' claims. Instead, Defendants enacted only a plan to investigate whether a violation of the Act is ongoing, a process that the Act does not authorize and that does not satisfy the requirements to trigger the 90-day safe harbor.

Therefore, the lawsuit is not premature. The Complaint states a claim for a violation of the Act. Defendants' motion to dismiss is DENIED.

Facts Underlying the Complaint

Plaintiffs are residents of the Defendant Town of Newburgh ("the Town"). They are members of the Black and Hispanic communities, which comprise a minority of the population of the Town. Plaintiffs assert that the two communities combined comprise 40 percent of the population.

The Town holds elections on a periodic basis for voters to choose members of Defendant Town Board of Town of Newburgh ("the Board"). The election process provides for voters living anywhere in the Town to vote for each of the open Board seats in each election. Plaintiffs assert that no member of their two communities has ever been elected to the Board, dating to the Town being founded in 1788. They also assert that no members of their communities have been candidates for election in the Town since 2011 because of the alleged impracticability of becoming elected. Plaintiffs allege that most of the population will not vote for Black or Hispanic candidates.

As discussed in greater detail, *infra*, New York passed the Act as a means by which an aggrieved person can petition their municipality to make changes to the voting system to enhance the potential for the election of members of a qualifying minority population. The first step in that process is sending a letter to assert violations of the Act. The receiving municipality then has 50 days in which to take action on the letter, during which time no lawsuit can be filed. If

the municipality passes a resolution within those 50 days that includes certain elements, the claimants cannot file a lawsuit for an additional 90 days.

Plaintiffs sent a letter to the Town and the Board on January 26, 2024. The letter notified the Town and the Town Board of Plaintiffs' intention to file a lawsuit for violations of the Act in order to seek remedies that would change the current voting system. An excerpt reflects the following text:

VIA CERTIFIED MAIL

**Lisa M. Vance-Ayers, Newburgh Town Clerk
1496 Route 300
Newburgh, NY 12550**

Re: Violation of the New York State Voting Rights Act

Dear Town Clerk Vance-Ayers:

We are writing on behalf of our clients Oral Clarke, Romance Reed, Grace Perez, Peter Ramos, Ernest Tirado, and Dorothy Flourmoy, who are Hispanic and African American voters in the Town of Newburgh, to advise you that the Town's current method of electing Town Council Members, by at-large elections, violates the John R. Lewis Voting Rights Act of New York, also known as the New York State Voting Rights Act ("NYVRA"). If the Town does not cure that violation, we intend to commence an action under NYVRA to compel the Town to elect Council Members by district, cumulative voting, ranked choice voting, or other alternative voting systems.

The New York State Voting Rights Act

NYVRA specifically forbids the use of at-large methods of election where the voting patterns of members of a protected class or classes within the political subdivision are racially polarized or

The Board passed a resolution concerning the letter from Plaintiffs on the 49th day thereafter, March 15, 2024 ("the Board Resolution"). The Board Resolution contained a number of initial "whereas" clauses, followed by these action items:

NOW, THEREFORE, BE IT RESOLVED by the Town Board of the Town of Newburgh as follows:

Section 1: The Town Supervisor and the Attorney for the Town are hereby directed to work with Sokoloff Stern, LLP and the authorized experts it retains in the review and investigation of the current at-large election system employed by the Town for members of the Town Board, to determine whether any potential violation of the NYVRA may exist and to evaluate potential alternatives to bring the election system into compliance with the NYVRA should a potential violation be determined to exist. The Town is availing itself of the "Safe Harbor Provision" under the NYVRA. See NYS Election Law 17206(7).

Section 2: The findings and evaluation directed in Section 1 shall be reported to the Town Board within thirty (30) days of the date of this Resolution. If, after considering the findings and evaluation and any other information that may become available to the Town -- including, without limitation, any analysis that Abrams Fensterman may provide following the adoption of this Resolution, the Town Board concludes that there may be a violation of the NYVRA, the Town Board affirms that the Town intends to enact and implement the appropriate remedy(ies).

Section 3. Following a Town Board finding that there may be a violation of the NYVRA, and in consultation with Sokoloff Stern, LLP and the experts it retains, the Town Board shall cause a written proposal of the selected remedy(ies) that comply with the NYVRA (the "NYVRA Proposal") to be prepared and presented to the Town Board within ten (10) days of the Town Board's finding of the potential violation.

Section 4. Within thirty (30) days of the presentation of the NYVRA Proposal, the Town Board shall conduct at least two (2) public hearings within a thirty (30) day timeframe at which the public shall be invited to provide input regarding the NYVRA Proposal and the proposed remedy(ies) set forth therein believed to be necessary and appropriate by the Town including, without limitation, the composition of proposed new election districts and shall undertake such amendments to NYVRA Proposal based upon the public input received as the Town Board determines appropriate

Section 5. Following the close of the last Town Board public hearing and within ninety (90) days of date of this Resolution, the Town Board shall approve the completed NYVRA Proposal and submit the NYVRA Proposal to the Civil Rights Bureau of the Office of the New York State Attorney General. The Town Board's schedule for enacting and implementing the proposed remedy(ies) shall in any event comply with NYS Election Law 17-206.

Section 6. This Resolution shall take effect immediately.

After the Board Resolution was enacted, less than 90 days passed before Plaintiffs filed the instant lawsuit on March 26, 2024.

Procedural History

Plaintiffs commenced the instant lawsuit by filing a Summons and Complaint on March 26, 2024. The Complaint consists of 160 paragraphs and asserts detailed allegations as to the composition of the Town population, voting history and trends, community issues that have established a pattern of racially motivated behavior by the Defendants, and other data related to alleged disenfranchisement. For purposes of this motion, most of the alleged facts are not relevant to deciding if the instant lawsuit was filed prematurely, in contravention of the 90-day safe harbor that can be available pursuant to the Act.

In sum, the Complaint pleads two causes of action. Both causes of action allege illegal “vote dilution” in a Town that employs “at-large” voting for the Board. The first cause of action asserts that “racial polarization” creates dilution. The second cause of action asserts that under the totality of the circumstances, the ability of Plaintiffs to elect candidates of their choice is impaired. Plaintiffs also pled that the Board Resolution did not satisfy the Act and therefore the lawsuit was timely filed.

Defendants filed the instant motion in lieu of an Answer. The instant motion asserts that the claims in the Complaint are conclusively refuted by documentary evidence, to wit, the Board Resolution. Alternatively, Defendants assert that the Complaint fails to state a claim. The sole predicate for the motion to dismiss is that Plaintiffs allegedly were prohibited by the Act from filing this lawsuit until the expiration of the aforementioned 90-day safe harbor.

Purpose of the NYVRA

The New York State Senate proposed a bill in the 2021-2022 session that provided for changes in the voting systems of political subdivisions, in certain enumerated circumstances, to address lack of representation among elected officials from certain specified populations. Senate Bill 2021-S1046E. The bill was amended five times, passed by both the Senate and Assembly, and signed into law by the Governor in 2022. That series of statutes that were passed as part of the NY Election Law 17-200 et seq. comprise the Act. The Act became effective in July 2023.

The Act 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 Act provides a broad mandate as to the interpretation of any other New York law that concerns the right to vote:

[A]ll 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.

NY Election Law 17-202.

The legislative history of the Act corroborates these goals and the means to achieve them:

PURPOSE:

The purpose of the act 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.

Senate Bill 2021-S1046E, Sponsor (Myrie) Memorandum (Version E – final).

Prohibitions Created by the NYVRA

The Act prohibits certain actions, or the effects of such actions, on the voting process in 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). Plaintiffs assert that Defendant Town is a “political subdivision” encompassed by the Act.

One such prohibition of the Act is a bar to any law, regulation, etc. that “results in a denial or abridgement of the right of members of a protected class to vote” (“Unlawful Abridgment”). NY Election Law 17-206(1)(a). A “protected class” is defined as “members of a race, color or language-minority group”. NY Election Law 17-204 (5). The Complaint asserts that Plaintiffs are Black and Hispanic residents who comprise less than a majority of the population of the Town, even when combined, and are therefore a “protected class”.

A plaintiff can establish an Unlawful Abridgment by showing that members of a protected class have “less opportunity than the rest of the electorate to elect candidates of their choice or influence the outcome of elections”. NY Election Law 17-206(1)(b). Plaintiffs herein allege in the First Cause of Action that Defendants’ historic and continuing process for voting constitutes an Unlawful Abridgment.

The Act also makes it unlawful for a town, etc. 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” (“Unlawful Vote Dilution”). NY Election Law 17-206(2)(a). One means to prove Unlawful Vote Dilution is where a town:

(i) used an at-large method of election 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;

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). Plaintiffs assert, and the Town admits in its motion, that the Town employs “at-large” voting.

“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.” NY Election Law 17-204(6). The Act 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). Plaintiffs assert in their Complaint that racially polarized voting has occurred in the Town elections.

Regarding an allegation of either Unlawful Abridgment or Unlawful Vote Dilution, the Act lists 11 factors that a court may consider when deciding whether a violation of the Act has occurred. NY Election Law 17-206(3)(a)-(k). This list is not exclusive. *Id.* Plaintiffs allege in their Complaint that some of the circumstances described in these factors have occurred in the Town.

Timing of a Lawsuit for Violation of the NYVRA

The Act requires that a person or group claiming a violation of the Act must, before filing a lawsuit, satisfy certain requirements. First, the prospective plaintiff(s) must “send by certified mail a written notice to the clerk of the political subdivision, or, if the political subdivision does

not have a clerk, the governing body of the political subdivision, against which the action would be brought, asserting that the political subdivision may be in violation of [the Act]”. NY Election Law 17-206(7). That written notice is referred to as a “NYVRA notification letter”. Id. Plaintiffs herein completed this requirement by sending the certified mail letter to the Town and the Board on January 26, 2024.

The Act also prohibits a prospective plaintiff from filing a lawsuit against a political subdivision within fifty days of sending a NYVRA notification letter. Id. The Act allows the receiving entity to pass an “NYVRA resolution” either before receiving the NYVRA notification letter or within fifty days of it having been mailed. NY Election Law 17-206(7)(b). Here, the Board Resolution was passed on March 15, 2024. The parties do not dispute that the Board Resolution was timely passed within 50 days after Plaintiffs mailed a NYVRA notification letter.

If the Board Resolution qualifies as a “NYVRA resolution”, the Town and the Board would be afforded 90 days thereafter “to enact and implement such remedy”. Id. During those additional 90 days, the prospective plaintiffs cannot file a lawsuit. Id.

For the Board Resolution to qualify as a “NYVRA resolution”, it must satisfy the following criteria:

- (i) the political subdivision's intention to enact and implement a remedy for a potential violation of this title;
- (ii) specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy; and
- (iii) a schedule for enacting and implementing such a remedy.

Id. Here, the Defendants asserts that the Board Resolution meets the three criteria. Plaintiffs disagree.

Instant Motion to Dismiss

Plaintiffs filed the instant lawsuit less than 90 days after Defendants passed the Board Resolution. On the instant motion, Defendants assert that the Board Resolution qualifies pursuant to the Act and therefore this lawsuit would not be timely to file until 90 days after the Board Resolution was passed on March 15, 2024. Plaintiffs oppose on the basis that the lawsuit is timely because Defendants never passed a qualifying NYVRA resolution.

To prevail on a motion to dismiss based on documentary evidence, CPLR 3211(a)(1), the data must “conclusively dispose of the [party’s] claim”. *Fontanetta v Doe*, 73 AD3d 78 (2d Dept 2010). Thus, the evidence that Defendants submit in the form of the Board Resolution must conclusively establish that they met all three elements for an NYVRA Resolution and are thereby entitled to the 90-day safe harbor.

On a motion to dismiss for failure to state a cause of action, CPLR 3211(a)(7), the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002); *Leon v. Martinez*, 84 NY2d 83 (1994). A complaint is legally sufficient if the court determines that a plaintiff would be entitled to relief on any reasonable view of the facts stated. *Campaign for Fiscal Equity v. State of New York*, 86 NY2d 307 (1995). Thus, if the Board Resolution does not satisfy the Act as Plaintiffs have pled, upon “any reasonable view” of their Complaint, then the motion must be denied.

“It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent.” *Affiliated Brookhaven 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.* Therefore, the starting point in any case of interpretation must always be the

language itself, giving effect to the plain meaning thereof. *Id.* The plain meaning of the language of a statute must be interpreted ‘in the light of conditions existing at the time of its passage and construed as the courts would have construed it soon after its passage’. *Id.*

The wording of Subsection 7 of Section 17-206 describes three elements for a resolution to qualify for the 90-day safe harbor moratorium on a potential plaintiff filing a lawsuit. All three elements are required because the word “and” is used to join them.

Intention to Enact and Implement a Remedy.

The first element for an NYVRA resolution is “the political subdivision's intention to enact and implement a remedy for a potential violation of this title”. NY Election Law 17-206(7)(b). Defendants assert that the Board Resolution satisfies the Act:

If, after considering the findings and evaluation and any other information that may become available to the Town — including, without limitation, any analysis that Abrams Fensterman may provide following the adoption of this Resolution, the Town Board concludes that there may be a violation of the NYVRA, the Town Board affirms that the Town intends to enact and implement the appropriate remedy(ies).

However, the “If” at the beginning of that sentence means that Defendants do *not* intend to enact and implement the “appropriate remedy(ies)” unless they conclude “after considering the findings and evaluation ... including, ... any analysis that Abrams Fensterman may provide ...that there “may be” a violation of the NYVRA. The Board resolution calls for an investigative act not an intentional or remedial act. The Board Resolution’s delay of an intention to enact and implement -- past the 50 days -- finds no support in the plain wording of the Act. The plain wording of the Act requires an expression of intent to enact and implement the appropriate remedies by Defendants within the 50 days, not on some date after that 50-day window expires.

Defendants do not cite to any wording in the Act that allows them to investigate and determine whether a violation of the Act “may be occurring”. First, they lack any authority to make such a finding. Defendants are not authorized by law to determine if a person or entity has violated a New York statute. Only the judiciary branch of government has that authority.

Moreover, Defendants’ use of the present tense (“there may be”) in the Board Resolution is misplaced and finds no support in the Act. A current and ongoing violation of the Act is not a prerequisite for a violation. For example, Unlawful Vote Dilution is based in part on a defendant having “used” at-large voting, i.e. employing that system *in the past*. Additionally, one means to prove Unlawful Vote Dilution is by voting “patterns” of members of the protected class. NY Election Law 17-206(2)(a). A “pattern” in this context can only refer to *past* votes of members of that class. Thus, whether the Defendants “may be” currently violating the Act is not a *sine qua non* for a violation.

Had the Legislature decided that a political subdivision such as Defendants need not express their intention to act within 50 days unless it makes its own finding as to a violation of the Act, the Legislature would have so stated in the Act. The Legislature would have provided the process for Defendants to make such findings. It did neither.

The Court finds the wording of the first element in the Act to be clear and unambiguous. Neither party has cited to any decision of any court applying the Act to any dispute. The Court is not aware of any such decision. Thus, no contrary precedent appears to exist that would conflict with this Court’s analysis, rationale, and conclusion herein.

If any ambiguity did exist in the wording of the Act, the Court could examine the legislative history. NY Statutes, Section 125; *Affiliated Brookhaven Civic Org. v Planning Board of Town of Brookhaven*, 209 AD3d 854 (2d Dept. 2022). That history can include the

memorandum prepared by the sponsor of the bill. *E.g., Cohen v Bd. of Appeals*, 297 AD2d 38 (2d Dept 2002); *Matter of Emmanuel S. v Joseph E.*, 161 AD2d 83 (2d Dept 1990). Here, the sponsor's memorandum on Subsection 7 is brief and provides little guidance:

The bill also contains notification requirements and provides a safe harbor for judicial actions. So that political jurisdictions can make necessary amendments to proposed election changes without needing to litigate in court.

Senate Bill 2021-S1046E, Sponsor (Myrie) Memorandum (Version E – final). If any insight into intent exists in that very summary, the sponsor's reference to "amendments" to proposed election changes indicates that the Legislature intended parties to use the 90 days to modify proposed remedies *already passed* in a NYVRA resolution within the first 50 days.

For these reasons, Defendants have not satisfied the first element of the Act's requirements for a NYVRA resolution. On that basis alone, their assertion that the instant lawsuit is premature fails. However, even assuming arguendo that Defendants did indeed satisfy the first element, the Court examines whether Defendants satisfied the other two elements.

Specific Steps to Facilitate Approval and Implementation of a Remedy.

The second element requires a NYVRA resolution to state "specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy". NY Election Law 17-206(7)(b). Examples of 16 different types of a "remedy" are set forth in the Act. NY Election Law 17-206(5). The list is not exhaustive. *Id.*

The only "remedy" as required by the second element that would comport with the purpose of the Act generally, and with the other two requirements, is an actual, defined remedy. There would be no means by which the political subdivision could state "specific" steps for implementation of a remedy if it had not resolved what comprises the remedy. The Act alone lists 16 types of remedies, and more options exist. Defendants cannot state their "specific steps"

unless they already decided which of those 16 options (or some other remedy) they have resolved to implement.

Defendants assert they have provided the “specific steps” required by the Act because the Board Resolution provides certain actions that Defendants will undertake to investigate if a violation of the Act occurred. Those steps in the Board Resolution do *not* relate to implementing a remedy, which is what the Act requires. Therefore, the Board Resolution does not satisfy the second element of the Act.

Schedule for Enacting and Implementing a Remedy

The third element of a NYVRA resolution requires “a schedule for enacting and implementing such a remedy”. The Board Resolution provides a schedule -- but not regarding enacting and implementing a remedy. The schedule concerns the Defendants’ timetable for investigating whether a violation of the Act may be occurring.

For the reasons already set forth as to why the Board Resolution does not satisfy the second element, the same reasoning applies to the third required element. Defendants cannot create a schedule for a remedy if they have not yet decided upon the remedy. The Act requires that Defendants create the schedule within the 50 days after Plaintiffs mailed their NYVRA letter. Defendants failed to satisfy this third requirement.

Thus, regarding each of the three elements, the Board Resolution does not “conclusively” show that they complied with the Act. Therefore, the motion to dismiss as based upon Subsection (a)(1) of CPLR 3211 fails. If the Court accords the Plaintiffs the benefit of every possible favorable inference as required on a motion to dismiss, Plaintiffs would be entitled to their relief upon any reasonable view of the facts pled. *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98

NY2d 314 (2002); *Leon v. Martinez*, 84 NY2d 83 (1994). Therefore, the motion to dismiss as based upon Subsection (a)(7) of CPLR 3211 also fails.

Further Proceedings in Accordance With the Act

The Act 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. This is required “[b]ecause 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.” *Id.* In light of these requirements, the parties will appear as already ordered on May 29, 2024, to address how they intend to comply with the mandated expedited timing for resolution of the lawsuit.

Upon the foregoing, it is hereby

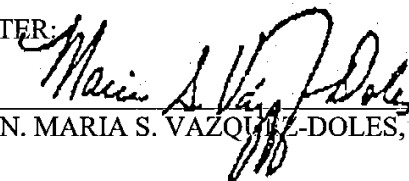
ORDERED that Defendants’ motion to dismiss is **DENIED**, and it is further

ORDERED that the parties will appear for a status conference on May 29, 2024, at 9:15 a.m. to discuss the expedited schedule for the completion of discovery and setting of a trial date that complies with NY Election Law 17-216.

The foregoing constitutes the Decision and Order of this Court.

Dated: May 17, 2024
Goshen, New York

ENTER:


HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

Notice of Appeal, dated May 24, 2024
[pp. 2 - 3]

FILED: ORANGE COUNTY CLERK 05/24/2024 03:33 PM

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INDEX NO. EF002460-2024

RECEIVED NYSCEF: 05/24/2024

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.

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

Defendants.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that, Defendants-Appellants Town of Newburgh and Town Board of the Town of Newburgh (collectively, "Defendants-Appellants"), by their attorneys, Troutman Pepper Hamilton Sanders LLP, hereby appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from the Decision and Order of Hon. Maria S. Vazquez-Doles, J.S.C. of the Supreme Court of the State of New York, Orange County, dated May 17, 2024, and entered in the office of the Orange County Clerk on May 17, 2024. This appeal is taken from each and every portion of said Decision and Order. Plaintiffs Oral Clarke, Romance Reed, Grace Perez, Peter Ramon, Ernest Tirado, and Dorothy Flournoy served a Notice of Entry on Defendants-Appellants on May 17, 2024, a copy of which is attached.

An Information Statement pursuant to 22 NYCRR 1250.3 is also attached.

Dated: New York, New York
May 24, 2024

**TROUTMAN PEPPER HAMILTON
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PRINTING SPECIFICATIONS STATEMENT

Pursuant to Uniform Practice Rules of the Appellate Division (22 N.Y.C.R.R.) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, serif typeface was used, as follows:

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