

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

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

Plaintiffs-Respondents,

- against -

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

Defendants-Appellants.

**AFFIRMATION IN PARTIAL  
OPPOSITION**

Appellate Division Docket No.:  
2024-04378

Orange County Index No.:  
EF002460-2024

ROBERT A. SPOLZINO, an attorney duly admitted to practice in the courts of the State of New York, affirms the following to be true under the penalty of perjury:

1. I am a member of the law firm of Abrams Fensterman, LLP, counsel to Plaintiffs-Respondents Oral Clarke, Romance Reed, Grace Perez, Peter Ramón, Ernest Tirado, and Dorothy Flournoy (collectively, “Respondents”). I make this affirmation, based upon my review of the file maintained by my office, in opposition to that portion of the motion by Defendants-Appellants the Town of Newburgh (the “Town”) and the Town Board of the Town of Newburgh (the “Town Board” and, collectively with the Town, “Appellants”) to stay all proceedings pending before the Supreme Court, Orange County, under Index No. EF002460-2024, pending resolution of this appeal. Respondents do not oppose Appellants’ requests for expedited briefing or for a calendar preference in the hearing of the above-captioned appeal.

2. This Court should deny that portion of Appellants’ motion to stay the ongoing proceedings in the Supreme Court for three reasons. First, a stay would contravene the Election Law, which expressly provides that actions commenced pursuant to the New York Voting Rights Act, like this action, are subject to expedited trial court proceedings. Second, Appellants have failed to establish that they will suffer irreparable harm absent a stay. And third, a stay is not

warranted because this appeal is wholly lacking in merit, removing any likelihood of success on appeal.

### **BACKGROUND**

3. This is an appeal from an order of the Supreme Court, Orange County (Maria S. Vazquez-Doles, J.) dated May 17, 2024, which denied Appellants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). A copy of the order is attached as Exhibit A.

4. In this action, which is among the first filed under the newly enacted John R. Lewis Voting Rights Act, or New York Voting Rights Act ("NYVRA"), Respondents assert that the Town's method of electing members to the Town Board impairs the ability of Black and Hispanic voters to elect candidates of choice or to influence the outcome of elections both due to racially polarized voting and under the totality of the circumstances. *See* Election Law § 17-206(2)(b).

5. Although a dramatic increase in both the Black and Hispanic populations has occurred within the Town in recent decades, to Respondents' knowledge, every person ever elected to the Town Board has been white. This is no coincidence. Rather, it is the result of the Town's at-large voting system, where all eligible voters within the Town can vote for every seat on the Town Board that is up for election. Because white voters typically prefer different candidates than Black and Hispanic voters, and because white voters continue to make up a majority of the electorate, under the current system, Black and Hispanic voters will continue to be denied fair opportunities to elect candidates of their choice to the Town Board. This, Respondents allege, dilutes their votes in violation of NYVRA. *See* Election Law § 17-206(2)(a).

6. Because the Legislature recognized that voters are irreparably harmed every time elections are held under unlawful conditions, actions brought pursuant to NYVRA are subject to expedited pretrial and trial proceedings as well as an automatic calendar preference. *See* Election

Law § 17-216. Expedited proceedings also address the inherent problem that incumbent officials who benefit from potentially unlawful conditions are incentivized to spend public funds delaying remedial action. *See id.*

7. In fact, NYVRA creates a mechanism for local governments that are serious about remedying voter disenfranchisement to resolve a NYVRA violation without incurring substantial costs in litigation. Pursuant to that mechanism, before commencing a lawsuit under NYVRA against a political subdivision such as a town, a prospective plaintiff must send a notification letter to the clerk of that political subdivision asserting that the political subdivision may be in violation of NYVRA. *See* Election Law § 17-206(7). That prospective plaintiff must wait 50 days before commencing an action.

8. During those 50 days, the political subdivision may avail itself of a “safe harbor” provision built into the statute. *See* Election Law § 17-206(7). If the political subdivision does so successfully, it has another 90 days to enact and implement a remedy before the prospective plaintiff who sent the notification letter may commence a lawsuit.

9. In order to avail itself of the safe harbor, a political subdivision must adopt a “NYVRA resolution,” which affirms: “(i) the political subdivision’s intention to enact and implement a remedy for a potential violation of [NYVRA]; (ii) specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy; and (iii) a schedule for enacting and implementing such a remedy.” *See* Election Law § 17-206(7)(b).

10. Respondents, as Hispanic and Black voters residing in the Town, sent a notification letter to the Town Clerk by letter dated January 26, 2024. Therefore, Respondents were required to wait until after March 16, 2024—50 days from the date of their letter—to bring a lawsuit.

11. The Town made no formal response to the notification letter for weeks. Although

the Town Board held regular meetings on both February 13 and March 11, there is no mention of Respondents' letter or allegations in the minutes of those meetings.

12. Suddenly, on March 15—one day before the 50-day waiting period was set to expire—the Town Board apparently held a special meeting to pass what it claimed to be a NYVRA resolution. A copy of the Town's March 15, 2024 resolution (the "March resolution") is attached as Exhibit B.

13. The March resolution asserted that the Town was availing itself of NYVRA's safe harbor provision, and directed the Town Supervisor and Town Attorney to work with outside counsel and "authorized experts it retains" to review and investigate the Town's at-large election system "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." *See* Exhibit B § 1. According to the March resolution, the investigation's findings would be reported to the Town Board within 30 days and, "[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)." *Id.* § 2.

14. No schedule was set forth as to when the Town Board would make its determination, providing only that that if the Town Board found that "there may be violation of the NYVRA . . . the Town Board shall cause a written proposal of the selected remedy(ies) . . . to be prepared and presented to the Town Board within ten (10) days of the Town's finding of the potential violation." Exhibit B § 3. Then, within thirty (30) days thereafter, the Town Board would conduct at least two (2) public hearings within that thirty-day timeframe "at which the public shall be invited to provide input regarding the NYVRA Proposal and the proposed remedy(ies) set forth

therein.” *Id.* § 4. And, following the last hearing, “the Town Board shall approve the completed NYVRA Proposal” within 90 days of the March resolution. *Id.* § 5.

15. Respondents filed their complaint in this action on March 26, 2024. They acknowledged that the Town Board purported to avail itself of the NYVRA’s safe harbor in the March resolution but asserted that the resolution was insufficient to trigger the protection of the safe-harbor provision. Specifically, Respondents asserted that the March resolution did not commit the Town to take any action other than considering the findings of an investigation and did not contain an adequate “schedule” for acting on the evaluation. Respondents also alleged that the March resolution was void and of no effect because the March resolution was not duly adopted at a duly called meeting of the Town Board. Therefore, the resolution was insufficient to trigger the 90-day safe harbor.

16. On April 8, 2024, the Town suspended its investigation into Respondents’ allegations.

17. Instead, on April 16, 2024, the Town moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). The motion did not address the substantive allegations in the complaint. Rather, the Town claimed that the complaint should be dismissed as premature because the March resolution was sufficient to invoke NYVRA’s safe harbor protection. Respondents opposed, arguing that the March resolution did not satisfy the requirements of Election Law § 17-206(7).

18. While the motion was pending, the Attorney General of the State of New York (the “Attorney General”) sought leave to participate as *amicus curiae*. The Attorney General submitted a brief in opposition to the Town’s motion, echoing Respondents’ position that the March resolution was insufficient to avail the Town of the 90-day safe harbor and that the Town’s interpretation of the statute would subvert the purposes of NYVRA. A copy of the Memorandum

of Law of *Amicus Curiae* Attorney General of the State of New York in Opposition to Defendants’ Motion to Dismiss is attached as Exhibit C.

19. In its order, the Supreme Court denied Appellants’ motion to dismiss the complaint.

Specifically, the Supreme Court concluded that:

[T]he 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.

Exhibit A at pp. 1-2. The Supreme Court did not reach the issue of whether the March resolution was duly adopted at a duly called meeting of the Town Board.

20. Appellants filed a notice of appeal from the order on May 24, 2024.

21. Appellants then moved by order to show cause in this Court for a stay of all proceedings in the Supreme Court pending a resolution of their appeal, as well as expedited briefing and a calendar preference for their appeal.

22. On June 17, 2024, Associate Justice Laurence L. Love signed the order to show cause but declined to grant Appellants’ request for interim relief. *See* Appellate Division Docket No. 2024-04378, NYSCEF # 4.

## ARGUMENT

### I

#### **The stay Appellants request would circumvent NYVRA’s mandate to expedite pretrial and trial proceedings**

23. Appellants’ motion for a stay is an unmistakable attempt to delay these proceedings. NYVRA does not countenance such delays. In fact, to the contrary, Election Law § 17-216 specifically provides that “actions brought pursuant to this title shall be subject to expedited

pretrial and trial proceedings and receive an automatic calendar preference.”

24. As the Legislature recognized in enacting NYVRA, expedited proceedings are a necessity in voting rights litigation “[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.” Election Law § 17-216.

25. Those serious concerns are present here. Regular elections to the Town Board are held every two years, in odd-numbered years. This means that the next general election for Town Board positions will take place in November 2025.<sup>1</sup> Under the existing system, the nomination process for candidates for Town office in the November 2025 elections will begin in or around February 2025. Therefore, any remedy Respondents may be granted in this action, such as a districting plan, will need to be implemented before February 2025 or else the next general election will continue to be tainted by the same unlawful conditions which are the subject of Respondents’ allegations, without recourse. The proceedings in the Supreme Court must also conclude with enough time to enable appellate review, if necessary. As NYVRA recognizes, Respondents— together with all other Black and Hispanic voters in the Town—are irreparably harmed every time an election is held under unlawful conditions.

26. Unfortunately, as the statute makes clear, incumbent officials tend to benefit from the same unlawful conditions that voting rights litigation seeks to rectify. Likewise, incumbents necessarily profit by delaying the resolution of such litigation for as long as possible, expending substantial public dollars in the process. Consciously or not, the unanimously white members of

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<sup>1</sup> There will also be a special election this coming November to fill a seat on the Town Board which became vacant when an incumbent passed away after this lawsuit was filed.

the incumbent Town Board have undoubtedly benefited—and would almost certainly continue to benefit from—the current method of election, which dilutes the votes of Black and Hispanic voters.

27. By seeking a stay here, Appellants have made their intent to delay these proceedings obvious. Indeed, the very March resolution at issue on this appeal was similarly a transparent attempt to stall Respondents’ efforts to vindicate their rights.

28. Consistent with NYVRA’s text and purpose, proceedings before the Supreme Court have continued expeditiously. Discovery is underway and is scheduled to conclude in August. Summary judgment motions are due to be filed by September 13, 2024. A stay would completely derail that schedule and render it nearly impossible to resolve this case with enough time to impact the 2025 elections.

## II

### **Appellants have not demonstrated that they will suffer irreparable harm absent a stay**

29. In their motion, Appellants claim that they will suffer irreparable harm without a stay. The only economic harm they allege, however, is cost of continuing to defend this lawsuit.

30. Economic loss does not constitute irreparable injury. *Matter of Rice*, 105 A.D.3d 962, 963 (2d Dep’t 2013); *Family-Friendly Media, Inc. v. Recorder Television Network*, 74 A.D.3d 738, 739 (2d Dep’t 2010); *Di Fabio v. Omnipoint Communications, Inc.*, 66 A.D.3d 635, 637 (2d Dep’t 2009); *Mar v. Liquid Management Partners, LLC*, 62 A.D.3d 762, 763 (2d Dep’t 2009); *EdCia Corp. v. McCormack*, 44 A.D.3d 991, 994 (2d Dep’t 2007).

31. More specifically, “[m]ere litigation expense, even substantial and unrecoverable cost, does not constitute irreparable injury.” *Founders Ins. Co. Ltd. v. Everest Nat. Ins. Co.*, 41 A.D.3d 350, 351 (1st Dep’t 2007), quoting *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980); see also *Baker v. 40 East 80 Apartment Corp.*, 2014 WL 1325314, at \*6 (Sup. Ct.

N.Y. Cnty. [Paul Wooten, J.] 2014); *East Harlem Alliance of Responsible Merchants v. City of New York*, 23 Misc.3d 1136(A), at \*5 (Sup. Ct. N.Y. Cnty. [Joan B. Lobis, J.] 2009).

32. Indeed, in *F.T.C. v. Standard Oil Co. of California*, the United States Supreme Court rejected the very argument that Appellants advance here:

[Defendant] argues that the expense and disruption of defending itself in protracted adjudicatory proceedings constitutes irreparable harm. As indicated above, we do not doubt that the burden of defending this proceeding will be substantial. But “the expense and annoyance of litigation is part of the social burden of living under government.”

449 U.S. at 244, quoting *Petroleum Exploration, Inc. v. Pub. Serv. Commission of Kentucky*, 304 U.S. 209, 222 (1938) (additional quotation marks omitted).

33. To be clear, Appellants can blame only themselves for their current predicament. Respondents sent a notification letter informing the Town that it is in violation of NYVRA. Rather than be proactive, they waited until the forty-ninth day to pass a resolution, which only committed the Town to “investigating” those allegations. Had Appellants timely investigated those allegations and passed a proper NYVRA resolution, they could have availed themselves of NYVRA’s safe harbor provision and obtained another 90 days to implement a remedy. They failed to do so and now must live with the consequences of their inaction.

34. Nor should this Court simply accept Appellants’ contentions that they are unable to afford the expense of defending against this litigation. There is no support in the record for that assertion. The assertion that it cannot both defend this lawsuit and implement a remedy is ludicrous.

35. Appellants’ additional arguments that litigation expenses will prevent them from implementing remedies for their NYVRA violations are more puzzling still. If anything, litigation would accelerate the implementation of remedies, assuming Appellants are truly concerned about the costs of defending this suit. As the Attorney General emphasized in her amicus brief, a political

subdivision “may enact and implement a remedy during the pendency of a subsequent lawsuit, either unilaterally, which may moot the lawsuit, or as a settlement with the plaintiffs. Thus, faithfully applying the Legislature’s safe harbor scheme would not operate to impose any unfair hardship upon political subdivisions acting in good faith.” *See* Exhibit C, p. 9 n.2. Nothing other than their desire to delay is preventing Appellants from acting right now to remedy the Town’s at-large system.

36. Litigation will also require the Town to do what it should have done when it received Respondents’ initial letter—to investigate whether its at-large election system violates Respondents voting rights. The Town’s decision to suspend that investigation upon the commencement of this litigation is particularly suspect, considering that investigation would have necessarily required the exact same expert analyses that are now required in litigation. In fact, the parties will exchange initial expert reports this week. This litigation, therefore, has simply forced Appellants to do exactly what they presumably would have been doing had Respondents not commenced this action.

37. NYVRA already treats political subdivisions more favorably than most litigants by requiring plaintiffs to wait 50 days after sending a notification letter before suing. *See* Election Law § 17-206(7)(a). Respondents did what was required of them and waited. Appellants cannot claim that they are irreparably harmed by not receiving an additional 90 days.

38. Despite Appellants’ arguments, the Supreme Court’s reading of NYVRA does not allow “prospective plaintiffs to disrupt a political subdivision’s affairs merely by sending a NYVRA notification and forcing political subdivisions to shirk immediately their other myriad responsibilities to avoid costly litigation.” Affirmation of Bennet J. Moskowitz ¶ 26, Appellate Division Docket No. 2024-04378, NYSCEF # 3. Public officials are not “forced” to do anything

in response to a notification letter. To the contrary, NYVRA's notification and safe harbor procedure gives those officials an opportunity to avoid litigation expenses they would otherwise incur, if they are proactive. Of course, public officials may decline to take any action in response to a notification letter. And the insinuation that investigating allegations in an NYVRA notification letter would cause public officials to "shirk" their other responsibilities is absurd considering the multitude of responsibilities that those officials must handle regularly.

### III

#### **A stay is not warranted because this appeal lacks merit**

39. Ultimately, however, there is no basis to stay these proceedings because this appeal lacks merit. The Supreme Court's denial of Appellants' motion to dismiss the complaint was undoubtedly correct.

40. Appellants' motion to dismiss did not challenge Respondents' substantive allegations of voter disenfranchisement. Instead, they simply argued that the action was premature because the March resolution was sufficient to invoke NYVRA's safe harbor provision. *See* Election Law § 17-206(7)(b). But the Supreme Court properly recognized that the resolution does not comply with the statute.

41. To avail itself of NYVRA's safe harbor, a political subdivision must pass a resolution affirming three things: "(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." Election Law § 17-206(7)(b). A NYVRA safe harbor resolution must, therefore, be a commitment "to enact and implement a remedy." It is not sufficient, contrary to what Appellants argue, for a municipality to commit only to investigate

whether a violation has occurred.

42. “The primary consideration of courts in interpreting a statute is to ascertain and give effect to the intention of the Legislature.” *Riley v. Cnty. of Broome*, 95 N.Y.2d 455, 463 (2000) (internal quotation marks omitted). “[W]hen the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used.” *People v. Williams*, 19 N.Y.3d 100, 103 (2012), quoting *People v. Finnegan*, 85 N.Y.2d 53, 58 (1995) (additional citations omitted), *reargument denied* 85 N.Y.2d 968 (1995), *cert. denied* 516 U.S. 919 (1995). A court may consider extrinsic evidence of the legislature’s intent, such as legislative history, only where the legislative intent cannot be discerned from the plain language of a statute. *See People v. Cypress Hills Cemetery*, 208 A.D.2d 247, 251 (2d Dep’t 1995). The same rules apply to resolutions adopted by local governments. *See Town of Massena v. Niagara Mohawk Power Corp.*, 45 N.Y.2d 482, 490 (1978) (“Words employed in the resolution will be construed according to their ordinary and plain meaning in the absence of a clear intent to the contrary expressed in the enactment”).

43. The Legislature’s intent in enacting NYVRA is clear. Recognizing that among all the rights secured to citizens of the United States, the right to vote is unique because it is “preservative of all rights,” *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966), quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), the statute unequivocally states that the public policy of the state is both to “[e]ncourage participation in the elective franchise by all eligible voters to the maximum extent” and “[e]nsure that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York, and especially to exercise the elective franchise.” Election Law § 17-200.

44. To achieve its purpose, NYVRA expressly requires expedited proceedings. *See* Election Law § 17-216. This is because, as the Legislature recognized, disenfranchised voters are irreparably harmed every time an election is held under unlawful conditions. *Id.* Another reason for expedited proceedings is that because public officials often benefit from unlawful conditions, they may expend significant public resources defending unlawful conditions and delay the litigation for as long as possible. *See id.* (“Because of the frequency of elections, the severe consequences and irreparable harm of holding elections under unlawful conditions, and the expenditure to defend potentially unlawful conditions that benefit incumbent officials, actions brought pursuant to this title shall be subject to expedited pretrial and trial proceedings and receive an automatic calendar preference”). The Legislature thus included the notification letter and safe harbor procedure in NYVRA not to delay the determination of NYVRA claims, but to facilitate the avoidance of protracted and costly litigation where a local government has committed, in response to the notice letter, to remedy the disenfranchisement that has been brought to its attention. *See* Election Law § 17-206(7). The safe harbor procedure must be construed in that light, as the canons of construction require.

45. The Town’s March resolution does not comply with any of NYVRA’s three requirements. *See* Election Law § 17-206(7)(b). First, the resolution does not actually commit the Town “to enact and implement a remedy.” Rather, it commits the Town only “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.” Exhibit B § 1. Second, because the Town has not actually committed to implementing a particular remedy, or any remedy at all, it does not identify specific steps the Town will take to implement a remedy. Third, for the same reason, the resolution does not establish a

schedule for implementing a remedy.

**A. The March resolution does not declare the Town’s intention to enact and implement a remedy.**

46. The plain text of the March resolution demonstrates that the Town has not declared its “intention *to enact and implement a remedy* for a potential violation of [NYVRA].” Election Law § 17-206(7)(b)(i) (emphasis added). All the resolution says is that the Town will investigate the allegations and might implement a remedy after conducting an “investigation” of its at-large method of election. *See* Exhibit B § 1. What that investigation would entail, or who the “authorized experts” are who would carry out that investigation, are not specified. *See id.* Then, the resolution states:

*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).

*Id.* § 2 (emphasis added).

47. This is not a commitment to remedy an NYVRA violation. It is, at most, a conditional statement of the Town’s Board’s intention to implement any remedy if the Town Board first finds that there may be a violation of NYVRA. By retaining unfettered discretion to determine whether a violation of NYVRA may exist and, consequently, whether the Town will do anything about it, the Town Board has carefully avoided making the actual commitment to remedy the faulty election system that NYVRA requires for the safe harbor. If the resolution were a contract, it would be unenforceable because the promise it purports to contain is illusory. *See Chiapparelli v. Baker, Kellogg & Co., Inc.*, 252 N.Y. 192, 200 (1929) (“Where a promisor retains an unlimited right to decide later the nature or extent of his performance, the promise is too indefinite for legal enforcement. The unlimited choice in effect destroys the promise and makes it merely illusory”),

citing *Williston on Contracts*, § 43; *cf. Matter of Brown & Guenther (North Queensview Homes, Inc.)*, 18 A.D.2d 327, 330 (1st Dep’t 1963) (“A promise that is too uncertain in terms for possible enforcement is an illusory promise”) (internal quotation marks omitted).

48. Courts should not allow local governments to avoid prompt compliance with NYVRA by making illusory promises. Because the Town’s commitment to enact and implement a remedy is made wholly contingent on the Town Board first finding that a violation of NYVRA may exist, the Town has not actually made any commitment at all and is not entitled to the safe harbor NYVRA provides to those who seek to comply.

49. In her amicus brief, the Attorney General elaborated on the text and purpose of NYVRA and why the Town’s March resolution was insufficient to trigger the safe harbor scheme. *See* Exhibit C pp. 4-11. As the Attorney General explained, NYVRA distinguishes between two separate waiting periods: the initial 50-day period after a plaintiff sends a notification letter and the 90-day safe harbor. *See* Election Law §§ 17-206(7)(a), (b). The two distinct waiting periods serve distinct purposes. “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.” Exhibit C p. 4. By contrast, “[t]he 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. ... Accordingly, a political subdivision receives the benefit of the 90-day safe harbor only if it enacts a resolution that ‘affirm[s]’ its ‘intention to enact and implement a remedy for a potential violation of this title’ and details ‘specific steps the political subdivision will undertake to facilitate approval and implementation’ and a ‘schedule for enacting and implementing’ such a remedy.” *Id.* pp. 4-5, quoting Election Law § 17-206(7)(b).

50. As previously discussed, the Town’s March resolution does not affirm that the Town actually intended to implement any remedy. Instead, the Town treats the 90-day safe harbor as merely an extension of the initial 50-day waiting period by committing the Town only to investigate Respondents’ claims. But the safe harbor was not designed for the purpose of conducting a preliminary investigation. NYVRA does not authorize a political subdivision to extend its immunity from a lawsuit merely by committing to “investigate.” By excluding the word “investigate” from NYVRA’s safe harbor provision, *see* Election Law § 17-206(7)(b), this Court must assume that the legislature intended to exclude it. *See Commonwealth of the N. Mariana Is. v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 60 (2013) (“failure of the legislature to include a term in a statute is a significant indication that its exclusion was intended”). Therefore, preliminary investigation into the merits of allegations raised in a notification letter must be carried out during the initial 50 days a municipality has to avail itself of the safe harbor. Otherwise, NYVRA’s distinction between the initial 50-day waiting period and the safe harbor would be meaningless, as every municipality could simply pass a noncommittal resolution in response to every NYVRA notification letter. The only reading of NYVRA’s safe harbor provision that is consistent with the statute’s clear legislative purpose is one that requires a firm commitment from the municipality to enact a remedy within 50 days after the receipt of a notification letter.

51. This Court should not allow local governments to avoid prompt compliance with NYVRA by making illusory promises. Because the Town’s commitment to enact and implement a remedy is made wholly contingent on the Town Board first finding that a violation of NYVRA may exist, the Town did not actually make any commitment at all and is not entitled to the safe harbor NYVRA provides to those who seek to comply.

**B. The March resolution did not identify specific steps that the Town intended to take to implement a remedy.**

52. Nor can Appellants claim that their March resolution identified “specific” steps for implementing remedies, as required by NYVRA. Election Law § 17-206(7)(b)(ii). As just stated, because the March resolution does not commit the Town to take any remedial action, let alone identify a particular remedy, that resolution also cannot identify particular steps that the Town will take in implementing a remedy. And because the Town did not engage in any analysis of its at-large system, the March resolution does not ever suggest what remedies might be considered or identify the experts who would have assisted in developing remedial plans.

53. The only terms of the March resolution that could have been considered a specific step for implementing a remedy would have been the anticipated public hearings, which would only occur after the Town Board determined that the Town may be in violation of the law. *See* Exhibit B § 4. But NYVRA already requires a political subdivision to hold public hearings before implementing remedies. Election Law §§ 17-206(6), (7)(c)(ii). Essentially then, the March resolution provided only that the Town intended to follow that hearing mandate as set forth by the statute. Such empty platitudes are not the “specific steps” that must be identified to comply with NYVRA’s safe harbor provision.

**C. The Town’s purported schedule does not comply with NYVRA.**

54. Finally, the “schedule” contained in the March resolution does not satisfy Election Law § 17-206(7)(b). Again, because the Town made no genuine commitment to implement a remedy, the Town had no obligation to act in accordance with any timeline specified in the resolution.

55. But even if the Town had made the commitment, the March resolution still would not comply with NYVRA. When a political subdivision properly utilizes NYVRA’s safe harbor, it has 90 days from the date of the resolution to implement the remedy. *See* Election Law § 17-206(7)(b)(iii). The March resolution would not come close to allowing the Town to implement a

remedy within that time. It provides, first, that the findings and evaluations of the Town's investigation into NYVRA claim must be reported to the Town Board within 30 days. *See* Exhibit B § 2. No time frame is then specified, however, for the Town Board to evaluate those findings, along with any other information, and reach a conclusion about whether there may be a violation of NYVRA. Then, if the Town Board determines that there may be such a violation, a NYVRA proposal would have to be submitted to the Town Board within 10 days, *see id.* § 3, and, within 30 days of receiving that proposal, the Town Board would hold at least two public hearings on the proposal. *See id.* § 4.

56. This means that 70 days would be taken up to investigate the claims, prepare and submit a NYVRA proposal, and conduct public hearings. The "schedule" fails to account for any time necessary for the Town Board to consider the results of the investigation and determine whether there is a possible violation of NYVRA. It also does not leave any time or create any mechanism for the Town Board to modify an NYVRA proposal based on issues raised by voters during the public hearings. Deliberations on both the initial determination of whether there is a potential NYVRA violation and modifications to the NYVRA proposal after the public hearings would almost certainly require more than 20 days. If not, there would surely be no time for additional public hearings on a modified proposal.

57. Drawing districts, a potential remedy for NYVRA's violations arising from at-large election systems, would not just be unlikely under the Town's schedule, it would be impossible. When a political subdivision implements a new or revised districting plan as a remedy under NYVRA, four public hearings are required, not two. *See* Election Law § 17-206(6). Before drawing a districting plan, "the political subdivision shall hold at least two public hearings over a period of no more than thirty days." *Id.* § 17-206(6)(a). A political subdivision must then publish

at least one plan and “hold at least two additional hearings over a period of no more than forty-five days, at which the public shall be invited to provide input.” *Id.* § 17-206(6)(b). A draft districting or redistricting plan “shall be published at least seven days before consideration at a hearing.” *Id.* And, if the draft plan is revised following a hearing, the revised version must be published and made available for the public “at least seven days before being adopted.” *Id.* The March resolution does not account for or allow any time to hold two meetings both before and after drawing a districting plan. Therefore, the Town never would have been able to implement a districting plan within 90 days of the March resolution.

58. Ultimately, the inherently unreasonable timeline set forth in the Town’s NYVRA safe harbor resolution only establishes its intention not to remedy NYVRA violations that are the subject of this lawsuit. The conditional nature of the resolution, the absence of any specific remedial measures and the schedule that makes it impossible to adopt any remedy within the statutory time frame all evidence the Town’s intent not to comply with NYVRA. This is not at all the scenario the Legislature contemplated when it enacted the safe harbor provision of NYVRA. The purpose of the safe harbor provision is to give a political subdivision time within which to remedy the violation. It was not intended merely as an additional delay. A 90-day safe harbor here would have served NYVRA’s purpose if the Town had already conducted its investigation and committed to implementing a remedy. But it is simply not feasible both to investigate and implement a remedy in 90 days. The Town’s “schedule” is, therefore, insufficient to invoke the safe harbor provisions of NYVRA.

59. All of this is likely moot, however. Even if the Town had availed itself of NYVRA’s safe harbor, those 90 days would have expired on June 13, 2024. As of today, the Town is no closer to implementing a remedy that it was when it passed its resolution in March. The Town even

affirmatively suspended any efforts to address the problem shortly after the complaint was filed.

60. For all of these reasons, this appeal lacks merit and does not warrant a stay of the lower court proceedings.

#### CONCLUSION

61. WHEREFORE, Respondents respectfully request that this Court deny Appellants' order to show cause to the extent that it seeks a stay of proceedings ongoing before the trial court pending a resolution of this appeal.

I hereby affirm this 25th day of June, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing statement is true, and I understand that this document may be filed in an action or proceeding in a court of law.



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Robert A. Spolzino

**CERTIFICATION OF COMPLIANCE WITH UNIFORM RULE 202.8-B**

I, Robert Spolzino, an attorney at law licensed to practice in the State of New York, certify that this document contains 6,104 words, as calculated by the Microsoft Word processing system, inclusive of point headings and footnotes, and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules and regulations, etc.

/s/ Robert Spolzino  
Robert Spolzino

# Exhibit A

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.

VAZQUEZ-DOLES, J.S.C.

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

**DECISION & ORDER**

Index No.: EF002460-2024

Motion date: 5/2/2024

Motion Seq. No.: 1

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 Flournoy, 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 socially 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

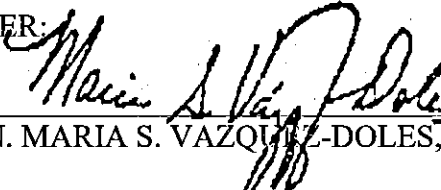
**ORDERED** that Defendants’ motion to dismiss is **DENIED**, and it is further

**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.

# Exhibit B

At a special meeting of the Town Board of the Town of Newburgh, held at the Town Hall, 1496 Route 300, in the Town of Newburgh, Orange County, New York on the 15th day of March, 2024 at 12:00 o'clock p.m.

PRESENT:

Gilbert J. Piaquadio, Supervisor

Paul I. Ruggiero, Councilman

Anthony R. LoBiondo, Councilman

RESOLUTION OF THE TOWN BOARD OF THE  
TOWN OF NEWBURGH PERTAINING TO  
NEW YORK STATE ELECTION LAW 17-206

Councilman LoBiondo presented the following resolution which was seconded by Councilman Ruggiero.

**WHEREAS**, the Town of Newburgh is a diverse community of people from rural, suburban, and urban cultures and the Town Board recognizes that the Town's diversity makes our community more resilient and adaptable, and promotes tolerance, empathy and cohesion among our citizens; and

**WHEREAS**, on January 30, 2024, the Town Clerk of the Town of Newburgh received a letter dated and postmarked January 26, 2024 from the law firm Abrams Fensterman LLP on behalf of certain voters in the Town, alleging a violation of the recently enacted John R. Lewis Voting Rights Act of New York, Chapter 226 of the Laws of 2022 of the State of New York (hereinafter referred to as the "NYVRA") and of their intent to commence an action if the Town does not cure the alleged violation (hereinafter referred to the "NYVRA Notification Letter") (Exhibit A); and

**WHEREAS**, as with most towns in the State of New York, the Town Board of the Town of Newburgh is comprised of four members, elected at-large to serve a four-year term, and a duly elected Supervisor, who serves a two-year term; and

**WHEREAS**, the NYVRA Notification Letter broadly alleges that the voting patterns of members of protected classes within the Town are racially polarized and that under the totality of the circumstances, the ability of members of protected classes to elect candidates of their choice or influence the outcome of Town elections is impaired; and

**WHEREAS**, while the NYVRA Notification Letter claims a statistical analysis has been performed of election data and demographic patterns in the Town of Newburgh, Abrams Fensterman LLP has failed and refused to provide the Town with any data or information tending to support the broad allegations made in the NYVRA Notification Letter; and

**WHEREAS**, notwithstanding the foregoing, the Town Board of the Town of Newburgh recognizes that it is the public policy of the State of New York and the Town of Newburgh to encourage participation in the elective franchise by all eligible voters to the maximum extent; and to ensure that eligible voters who are members of racial and language-minority groups have an equal opportunity to participate in the political processes of the State of New York, and especially to exercise the elective franchise; and

**WHEREAS**, evidence concerning the intent on the part of the voters, elected officials, or the Town to discriminate against a protected class is not required for there to be a potential violation of the NYVRA; and

**WHEREAS**, the Town Board of the Town of Newburgh intends to proactively review the Town's current at-large election system for members of the Town Board in order to ensure that the aforementioned public policy is achieved and to enact or apply for approval, as the case may be, and implement remedies for any potential violation of the NYVRA that may exist; and

**WHEREAS**, the Town Board of the Town of Newburgh has heretofore authorized the retention of the law firm of Sokoloff Stern, LLP to provide legal services to the Town in connection with the review of Town's compliance with the NYVRA and the allegations contained in the NYVRA Notification Letter and the implementation of any necessary remedies, and to retain experts approved by the Town Board who are necessary and appropriate for the performance of those services.

**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.

The question of the adoption of the foregoing resolution was duly put to a vote on roll call which resulted as follows:

|  |        |               |
|--|--------|---------------|
| <u>Elizabeth J. Greene, Councilwoman</u> | voting | <u>ABSENT</u> |
| <u>Paul I. Ruggiero, Councilman</u>      | voting | <u>AYE</u>    |
| <u>Scott M. Manley, Councilman</u>       | voting | <u>ABSENT</u> |
| <u>Anthony R. LoBiondo, Councilman</u>   | voting | <u>AYE</u>    |
| <u>Gilbert J. Piaquadio, Supervisor</u>  | voting | <u>AYE</u>    |

The resolution was thereupon declared duly adopted.

Exhibit "A"

NYVRA Voting Rights Notification Letter

January 26, 2024

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 Flournoy, 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 where, under the totality of the circumstances, the ability of members of the protected class or classes to elect candidates of their choice or to influence the outcome of elections is impaired. N.Y. Elec. Law § 17-206(2)(b)(i). Members of different protected classes may file an action jointly where the combined voting preferences of multiple protected classes are polarized against the rest of the electorate. N.Y. Elec. Law § 17-206(8).

The Town of Newburgh's at-large voting system clearly violates NYVRA under these statutory standards. An analysis of election data and demographic patterns in the Town of Newburgh utilizing Bayesian Improved Surname Geocoding (among other statistical methods) reveals significant and persistent patterns of racially polarized voting with respect to African American and Hispanic voters and demonstrates that the voting preferences and choices of African American and Hispanic voters differ markedly from those of white voters within the jurisdiction. These disparities have persisted across multiple elections and are not attributable to chance or isolated incidents.

In addition, under the totality of the circumstances, the African American and Hispanic communities are less able to elect candidates of their choice and their ability to influence the outcome of elections is impaired. Among other things, not once has Newburgh ever elected an African American or Hispanic candidate to Town office, despite the fact that African Americans

and Hispanics represent 14.6% and 23.6% of the Town's population respectively. The absence of African American and Hispanic candidates for Town office is further evidence of vote dilution.

#### The Town of Newburgh May Cure Its Violation

NYVRA provides a safe harbor against judicial action if the Town takes certain actions to remedy its violation. Specifically, if, within 50 days of the mailing of this letter, the Town Board adopts a resolution affirming: (i) its intention to enact and implement a remedy for its NYVRA violation; (ii) the specific steps it will undertake to facilitate the approval and implementation of such a remedy; and (iii) a schedule for enacting and implementing such a remedy, the Town will fall within the safe harbor provided by NYVRA. N.Y. Elec. Law § 17-206(7). If the Town Board does so, it will have 90 days from the date of the resolution to enact and implement a remedy. If the Town Board concludes that it does not have authority to adopt a remedy, it may submit the proposed remedy to the New York Attorney General's office for approval.

You should be aware that if the Town Board fails to satisfy these statutory requirements in its resolution, especially the requirement that the resolution include the Town's "intention to enact and implement a remedy for a potential violation," it will have failed to avail itself of the NYVRA's safe harbor provision and immediate litigation to enforce the requirements of NYVRA could result.

#### Consequences of Failure to Cure

If the Town does not voluntarily cure its violation of the NYVRA, our clients are prepared to commence litigation against the Town to enforce the NYVRA. If our clients are successful in that litigation, the Town will be required to pay our clients' legal fees as well as its own. N.Y. Election Law § 17-218. The Town can limit its exposure for legal fees significantly by acting promptly to cure the NYVRA violation. N.Y. Elec. Law. § 17-206(7)(e).

Voting rights litigation can be extremely expensive. In *NAACP v. East Ramapo Central School District*, No. 2017-CV-8943 (S.D.N.Y.), the NAACP sued the East Ramapo Central School District under the federal equivalent of NYVRA and forced the School District to draw individual districts for school board elections. East Ramapo ultimately paid at least \$7.2 million in its own fees<sup>1</sup> and \$5.4 million to the plaintiffs for their legal fees.<sup>2</sup>

The City of Santa Clara, California, paid over \$5.8 million to its own attorneys and to plaintiffs' counsel in a California Voting Rights Act ("CVRA") case.<sup>3</sup> Similarly, the City of Palmdale paid out \$4.6 million in attorneys' fees.<sup>4</sup> In the 20 years the CVRA has been in effect, no California municipality has ever successfully defended itself against a CVRA claim.

<sup>1</sup> Thomas C. Zambito, JOURNAL NEWS, *East Ramapo wants to tilt NAACP legal fees to \$1, if not teachers could be fired* (Jan. 13, 2021), <https://www.lohud.com/story/news/local/rockland/2021/01/13/east-ramapo-wants-tilt-naacp-legal-fees-wants-firings/4148743001/>.

<sup>2</sup> Nancy Cutler, JOURNAL NEWS, *Voting rights lawyers blast how East Ramapo wants to pay court-demanded \$5.4M payment* (July 8, 2021), <https://www.lohud.com/story/news/local/rockland/2021/07/08/naacp-school-board-diversity-lawsuit/7887398002/>.


<sup>3</sup> Carolyn Schuk, THE SILICON VALLEY VOICE, *Final Verdict: Twice-Lost Voting Rights Lawsuit Cost City Nearly \$5.8 Million* (Apr. 21, 2021), <https://www.svvoice.com/final-verdict-twice-lost-voting-rights-lawsuit-cost-city-nearly-5-8-million/>.

<sup>4</sup> Perry Smith, SCV NEWS, *Palmdale Out \$4.6 Mil. To Settle Voting Rights Lawsuit* (May 7, 2015), <https://scvnews.com/palmdale-out-4-6-mil-to-settle-voting-rights-lawsuit/>.

**Conclusion**

Given the historical lack of African American and Hispanic representation on the Newburgh Town Council, the presence of racially polarized voting, and other indicia of the disenfranchisement of the African American and Hispanic communities, we urge the Town to change its at-large system voluntarily. Our goal is to bring about the fair electoral process in the Town of Newburgh that the NYVRA act requires. To that end, we will be happy to work with the Town to bring it into compliance. If the Town does not take voluntary steps to achieve compliance, however, we will have no choice but to seek judicial relief. Please advise us no later than February 29, 2024, as to the Town's decision.

**ABRAMS FENSTERMAN, LLP**

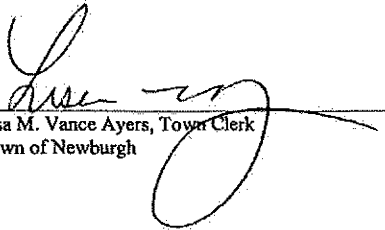


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Robert A. Spolzino Esq.  
81 Main Street, Suite 400  
White Plains, New York 10601  
(914) 607-7010

I, Lisa M. Vance Ayers, the duly elected and qualified Town Clerk of the Town of Newburgh, New York, do hereby certify that the following resolution was adopted at a special meeting of the Town Board duly held March 15, 2024 and is on file and of record and that said resolution has not been altered, amended or revoked and is in full force and effect.



  
Lisa M. Vance Ayers, Town Clerk  
Town of Newburgh

# Exhibit C

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

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

Plaintiffs,

- against -

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

Defendants.

Index No. EF002460-2024

Hon. Maria S. Vazquez-Doles

Mot. Seq. 1

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

Barbara D. Underwood  
*Solicitor General*  
Ester Murdukhayeva  
*Deputy Solicitor General*  
Sandra Park  
*Bureau Chief, Civil Rights*  
Lindsay McKenzie  
*Section Chief, Voting Rights*  
Derek Borchardt  
Edward Fenster  
Vivian Costandy Michael  
Bethany Perskie  
*Assistants Attorney General  
Of Counsel*

LETITIA JAMES  
*Attorney General*  
*State of New York*  
Attorney for Amicus Curiae  
28 Liberty Street  
New York, NY 10005  
(212) 416-8819

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**PRELIMINARY STATEMENT AND INTERESTS OF AMICUS CURIAE**

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

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

## BACKGROUND

### A. Statutory Background

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

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

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

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

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

#### **B. This Lawsuit**

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

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

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

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

## ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### CONCLUSION

The Court should deny the motion to dismiss.

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New York, New York

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**CERTIFICATION**

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

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