

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

Plaintiffs,

v.

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

Defendants.

Oral Argument Requested

Index No.: 50325/2025

**AFFIRMATION OF BENNET J.
MOSKOWITZ**

I, BENNET J. MOSKOWITZ, an attorney duly admitted to practice before the Courts of the State of New York, affirm the following under penalty of perjury pursuant to the New York Civil Practice Law and Rules (“CPLR”) § 2016:

1. I am a member of the Bar of the State of New York, and I am a Partner at Troutman Pepper Locke LLP, counsel for Defendants Town of Newburgh and Town Board of the Town of Newburgh (together, “Defendants”). I am fully familiar with the facts and circumstances of this action.

2. I submit this affirmation in support of Defendants’ motion seeking entry of an order to show cause why this Court should not exercise its inherent authority to stay these proceedings pending the resolution of Defendants’ two appeals and Defendants’ motion for leave to appeal to the Court of Appeals in a third appeal (the “Order to Show Cause”).

3. This Court should enter the Order to Show Cause and, further, grant the relief sought therein because without an order staying these proceedings, the Court and the parties will

have to devote significant resources to trying this case, when proceedings before the Appellate Division, Second Department could well: (1) obviate the need for any trial in the first place, (2) direct that any further proceedings occur in the Orange County Supreme Court, where Plaintiffs filed this lawsuit and litigated for more than a year (through the beginning of trial), or (3) provide that no Supreme Court has jurisdiction at this time. Further, even in the unlikely event that the Appellate Division rejects all of Defendants' arguments (including Defendants' plainly correct venue/waiver argument), Defendants intend to move for renewed summary judgment on Plaintiffs' claims, based upon a court-permitted recent deposition of Plaintiffs' lead expert and supplemental report submitted by Defendants' lead expert without leave. In all, moving forward with a trial in this case now would lead to potentially wasteful proceedings.

4. No possible benefit would come from pressing forward at this time. As Plaintiffs have admitted repeatedly in this litigation, any relief offered by any Supreme Court in the coming months will not impact the upcoming general election in November 2025. NYSCEF No. 144, attached hereto as Exhibit A. Further, Plaintiffs represented to the Orange County Supreme Court that they had no objection to the trial taking place in late July. *See e.g.* Transcript of April 14, 2025 Hearing before Justice Vazquez-Doles at 18:16-23; 27:22-28:7, attached hereto as Exhibit B (“if you could make the July date firm, we would be great with that.”).

5. This case arises out of the John R. Lewis Voting Rights Act of New York (“NYVRA”), which, among other things, defines illegal vote dilution as the use of “an at-large method of election” where either (a) racially polarized voting patterns exist within the political subdivision, 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.” N.Y. Election L. § 17-206(b).

6. Further, as the Appellate Division, Second Department has held, to prevail under N.Y. Election Law § 17-206(2), a plaintiff must prove that there exists “an alternative practice that would allow the minority group to have equitable access to fully participate in the electoral process.” *See Clarke v. Town of Newburgh*, 226 N.Y.S. 3d 310, 330 (2d Dep’t 2025) (citations omitted). The parties in this case agree that a vote-dilution plaintiff must prove that a “reasonable alternative” system exists that would increase the chances that minority-favored candidates would win more seats than under the current, at-large system. NYSCEF No. 70 at 22–24 (Index No. EF002460-2024; Orange Cnty.), attached hereto as Exhibit C; NYSCEF No. 73 at 11, 24 (Index No. EF002460-2024; Orange Cnty.), attached hereto as Exhibit D. Additionally, there may be other implicit elements to an NYVRA vote-dilution claim, given certain other language in the recent Second Department’s decision. *See* NYSCEF No. 160 at 14-21 (Index No. EF002460-2024; Orange Cnty.), attached hereto as Exhibit E.

7. The Town is a political subdivision of the State of New York, and the Town Board is the Town’s law-making authority. *See* N.Y. Town Law § 60; Div. of Loc. Gov’t Servs., N.Y. Dep’t of State, *Local Government Handbook 72–73* (7th ed. 2018) (“Loc. Gov’t Handbook”).¹ The Town is located in Orange County, New York. *About Newburgh, Town of Newburgh, NY*.²

8. Like in “almost all towns” in New York, N.Y. Dep’t of State, *Loc. Gov’t Handbook 74–75*, town offices in the Town—including the Town Board’s members and its supervisor—are

¹ Available at https://video.dos.ny.gov/lg/publications/Local_Government_Handbook.pdf (all websites last visited May 20, 2025).

² Available at <https://www.townofnewburgh.org/cn/webpage.cfm?tpid=10079>.

elected pursuant to an at-large voting system in which “all of the voters of the entire political subdivision elect each of the members to the governing body.” N.Y. Elec. Law § 17-204(1).

9. Plaintiffs Oral Clarke, Romance Reed, Grace Perez, Peter Ramon, Ernest Tirado, and Dorothy Flournoy (collectively, “Plaintiffs”)—all Town residents—filed this lawsuit on March 26, 2024 in the Orange County Supreme Court, alleging that the Town’s at-large system of elections for members of the Town Board violates the NYVRA’s vote-dilution prohibition.³ NYSCEF No. 1 (Index No. EF002460-2024; Orange Cnty.).

10. Defendants filed a verified Answer on May 28, 2024, asserting as an affirmative defense that the NYVRA’s vote dilution provisions violate the New York and United States Constitution’s Equal Protection clauses. NYSCEF No. 34 at 25 (Index No. EF002460-2024; Orange Cnty.). Defendants also filed a Notice of Constitutional Question on May 29, 2024. NYSCEF No. 35 (Index No. EF002460-2024; Orange Cnty.). Neither party moved to transfer the case at that time, pursuant to Election Law § 16-101, thereby waiving the right to contest venue in Orange County. *See Balbuenas v. New York City Health & Hosps. Corp.*, 209 A.D.3d 642, 643–44 (2d Dep’t 2022). Put another way, both parties were happy to continue to litigate this case in Orange County Supreme Court and waived any rights to any alternative venue.

11. The Orange County Supreme Court set an expedited discovery and briefing schedule that required the parties to exchange opening expert reports by June 28, 2024, rebuttal reports by July 26, 2024, and set August 16, 2024 as the deadline for close of discovery. NYSCEF

³ Defendants moved to dismiss the complaint as procedurally improper, NYSCEF No.8 (Index No. EF002460-2024; Orange Cnty.), but the Orange County Supreme Court denied that motion, NYSCEF No.31 (Index No. EF002460-2024; Orange Cnty.). Defendants appealed the Orange County Supreme Court’s denial of their motion to dismiss to the Appellate Division, Second Department, NYSCEF No. 33 (Index No. EF002460-2024; Orange Cnty.), but the Second Department rejected that appeal. NYSCEF No. 159 (Index No. EF002460-2024; Orange Cnty.).

No. 29 (Index No. EF002460-2024; Orange County). On August 29, 2024, the court scheduled trial in this matter for November 1, 2024. NYSCEF No. 41 (Index No. EF002460-2024; Orange Cnty.).

12. On June 28, 2024, Plaintiffs timely served the expert reports of Dr. Matt A. Barreto and Dr. A.K. Sandoval-Strausz. While Dr. Barreto's report concluded that racially polarized voting exists in the Town, it did not opine on whether any reasonable alternative system would increase the electoral chances of minority-preferred candidates in the Town.

13. On July 26, 2024, Defendants timely served rebuttal expert reports of Dr. Brad Lockerbie and Dr. Donald Critchlow.

14. On September 4, 2024—more than two months after the Scheduling Order's deadline for the exchange of initial expert reports and almost one month after the close of discovery—Plaintiffs produced a purported “Addendum Report” prepared by Dr. Barreto (“Barreto Addendum”), without leave of court. The Barreto Addendum purported to propose four alternative district-based maps the Town could, in Dr. Barreto's view, adopt to increase the electoral chances of minority-preferred candidates in the Town. *The Barreto Addendum was Plaintiffs' only attempt to satisfy the “reasonable-alterative benchmark” element of their NYVRA vote-dilution claim. See Clarke, 226 N.Y.S. 3d at 330; supra ¶ 6.*

15. On September 25, 2024, Defendants timely filed a motion for summary judgment challenging the constitutionality of the NYVRA's vote-dilution provisions. Defendants argued primarily that the NYVRA's vote-dilution provisions, including the at-large provisions at issue in this lawsuit, violate the New York and United States Constitutions' Equal Protection clauses, Ex. C (NYSCEF No. 70) at 12–21. Defendants also argued that summary judgment was appropriate because the record evidence demonstrates that the Town's at-large election system complied with

the NYVRA and that Plaintiffs had no evidence of a reasonable alternative system that would give members of the protected class a greater chance to elect candidates of their choice than under an at-large voting system. *Id.* at 21–26; *supra* ¶ 6. Defendants’ summary judgment motion did not address the Barreto Addendum because it was untimely and, thus, Defendants had no opportunity to present any rebuttal expert opinion or analysis thereof under the Court’s expedited discovery and trial schedule. NYSCEF No. 29 (Index No. EF002460-2024; Orange Cnty.).

16. Given the untimeliness of the Barreto Addendum and the resulting prejudice to Defendants, Defendants also filed a motion *in limine* on October 16, 2024 to preclude its consideration from the upcoming trial. NYSCEF No. 112 (Index No. EF002460-2024; Orange Cnty.).

17. On October 25, 2024, the Orange County Supreme Court denied Defendants’ motion *in limine* to preclude the Barreto Addendum but adjourned the trial indefinitely to allow Defendants the opportunity to supplement their expert reports to respond to the Barreto Addendum and to depose Dr. Barreto about the same by November 25, 2024. NYSCEF No. 141 (Index No. EF002460-2024; Orange Cnty.).

18. On November 7, 2024, before Defendants had the opportunity depose Dr. Baretto and present their expert report in response to his untimely Addendum, the Orange County Supreme Court granted Defendants’ motion for summary judgment. NYSCEF No. 147 (Index No. EF002460-2024; Orange Cnty.), attached hereto as Exhibit F. The Orange County Supreme Court first found that the NYVRA “on its face, classifies people according to their race, color and national origin,” making these classifications “the *sine qua non* for relief” under the statute. *Id.* at 16. Therefore, whether those statutory provisions pass constitutional muster depends on whether the statute satisfies strict scrutiny. *Id.* at 1. The Orange County Supreme Court concluded that the

statute did not satisfy strict scrutiny’s “exacting standard,” *id.*, because “no compelling interest of the State in this instance justifies the use of an extremely broad race and national-origin based legislation, which opens the door to an overhaul of the electoral system [in the Town],” and because the “process for reaching a determination of voter dilution,” which “can rest on the slightest impairments in Plaintiffs’ ability to influence an election,” and may be “based on any criteria that the court itself creates, or no criteria at all,” “cannot be described as ‘narrow’ in any sense of the word.” *Id.* at 2, 20. Therefore, the Orange County Supreme Court held that the NYVRA’s vote dilution provisions violated the New York and United States’ constitutions’ equal protection clauses and invalidated the statute on that basis. *Id.* at 25.

19. The Orange County Supreme Court’s grant of summary judgment to Defendants terminated all trial court proceedings, including the November 25, 2024 deadline for Defendants’ response to the Barreto Addendum. Plaintiffs filed a notice of appeal on November 11, 2024. NYSCEF No. 151 (Index No. EF002460-2024; Orange Cnty.).

20. On January 30, 2025, the Second Department reversed the Orange County Supreme Court’s grant of Defendants’ motion for summary judgment, holding that the NYVRA’s vote dilution prohibitions satisfied strict scrutiny. Ex. E (NYSCEF No. 160 (Index No. EF002460-2024; Orange Cnty.)). Notably, however, the Second Department’s decision did not precisely define what elements are required for an NYVRA claim that make the statute withstand constitutional scrutiny. For instance, the Second Department held that an NYVRA vote dilution claim implicitly requires a showing that “‘vote dilution’ has occurred” and “that there is an alternative practice that would allow the minority group to ‘have equitable access to fully participate in the electoral process,’” *id.* at 20. But that is not precisely the same element that the parties agreed Plaintiffs had the burden of proving in this case—namely, that there exists an

alternative system that would *increase* minority preferred candidates' chances of winning compared to the current system. Ex. C (NYSCEF No. 70) at 21-24. In other words, the Second Department's decision invites further analysis as to what "equitable access to fully participate in the electoral process," and "vote dilution" mean, and how those implicit elements are proven.

21. Although Plaintiffs filed a Notice of Entry of that Decision on the Orange County Supreme Court's docket, NYSCEF No. 155, and a certified copy of that Decision was subsequently filed, Ex. E (NYSCEF No. 160), the Second Department's Order was never denominated a "remittitur," nor did it contain any order remitting the case to the Supreme Court for further proceedings—contrary to standard practice in the Second Department. *Compare* Conditional Remittitur, *Haggerty v. Imperial Towers Condo.*, Index No.151708/2020, NYSCEF Mot. No.3 (Sup. Ct. Richmond Cnty. May 15, 2024); Order Directing Remittitur, *Blasch v. Edwards*, Index No.52196/2017, NYSCEF Mot. No.1 (Sup. Ct. Westchester Cnty. May 5, 2020); Remittitur, *Trump Vill. Sec. 3 Inc. v. City of N.Y.*, Index No.0026572/2010 (Sup. Ct. Kings Cnty. Jan. 22, 2015); Remittitur, *Modafferi v. N.Y.C. Transit*, Index No.0024060/2010 (Sup. Ct. Kings Cnty. Mar. 12, 2012); *see also* Notice of Entry of Ct. of Appeals Op. and Remittitur, *Harkenrider v. Hochul*, Index No.E2022-0116CV, NYSCEF No.288 (Sup. Ct. Steuben Cnty. Apr. 27, 2022).

22. On February 18, 2025, Defendants moved the Second Department for leave to appeal its decision reversing the Orange County Supreme Court's grant of summary judgment to the Court of Appeals. NYSCEF No. 37 (Index No. 2024-11753, 2d Dep't), attached hereto as Exhibit G. Specifically, Defendants requested that the Court of Appeals review both the constitutionality of the NYVRA's vote-dilution provisions, as well as provide clarity concerning what elements are required to prove a claim under those provisions. *Id.* at 17–35. Defendants also specifically asked the Appellate Division to refrain from issuing remittitur so that trial would not

take place while the Appellate Division considered their motion. *Id.* at 37–39. That motion remains pending to this day and the Appellate Division, has in, fact, not issued remittitur.

23. The parties and the Orange County Supreme Court then engaged in multiple scheduling conferences to pick a trial date, although Defendants continued to maintain that the Orange County Supreme Court lacked jurisdiction over further proceedings given the Second Department’s failure to issue remittitur. During an April 14, 2025 conference before Justice Vazquez-Doles, Plaintiffs’ counsel explicitly and unequivocally represented that they had no objection to trial occurring in late July 2025. *See* Ex. B at 18:16-23; 27:22-28:7 (“[I]f you could make the July date firm, we would be great with that.”).

24. On April 17, 2025, and after multiple rounds of email discussions between counsel and the Court, the Orange County Supreme Court scheduled this matter for trial on May 12 – May 16, 2025.

25. While scheduling discussions were ongoing, Defendants exercised their court-ordered right to address the Barreto Addendum. Following Plaintiffs’ provision of some, but not all, of the data upon which Dr. Barreto relied to form his conclusions, Defendants produced an Expert Response Report of Dr. Brad Lockerbie on April 30, 2025, and deposed Dr. Barreto about the Addendum Report that same day. NYSCEF No. 174 (Index No. EF002460-2024), attached hereto as Exhibit H.

26. Dr. Lockerbie’s Expert Response Report makes clear that the districts proposed in the Barreto Addendum do not satisfy Plaintiffs’ burden to demonstrate that a reasonable alternative system would increase the likelihood of minority-preferred candidate’s electoral success, as compared to the current at large system. As an initial matter, Dr. Lockerbie’s Expert Response Report explained that Dr. Barreto did not explain the process he used to draw the proposed districts

and that it was unclear whether Dr. Barreto took certain legal requirements for redistricting, including those required by N.Y. Municipal Home Rule Law § 10, into account during that process. Ex. H (NYSCEF No. 174) at 1–3 (Index No. EF002460-2024). Additionally, the Expert Response Report analyzed the same endogenous and exogenous races as Dr. Barreto and observed that the implementation of those districts would not increase the electoral chances of minority-preferred candidates in the Town and would, in fact, decrease the competitiveness of elections in the Town. *Id.* at 3–10 (Index No. EF002460-2024).

27. Because trial was already scheduled to begin on May 12, 2025, Defendants had no practical means or opportunity to seek renewed summary judgment and obtain a ruling on that motion based upon this newly-developed evidence before trial.

28. Trial began as scheduled on May 12, 2025. On the morning of the first day of trial, Justice Vazquez-Doles entered an order rejecting Defendants’ argument that the Supreme Court lacked jurisdiction due to the Second Department’s failure to issue remittitur when it reversed the Orange County Supreme Court’s summary judgment decision. NYSCEF No. 179 (Index No. EF002460-2024; Orange Cnty.), attached hereto as Exhibit I.

29. The trial abruptly ended shortly after Plaintiffs’ opening statement, after Justice Vazquez-Doles disclosed that she had known Plaintiff Ernest Tirado over a decade ago, but that she had not had any contact with him since that time. Plaintiffs subsequently disclosed, for the first time, other connections between certain named Plaintiffs and the Justice. Defendants represented that they were prepared to proceed with trial despite the disclosures, given the substantial efforts they had undertaken to make themselves and their experts available for those trial dates on short notice. But Plaintiffs refused to do the same, insisting that Defendants waive all rights related to Justice Vazquez-Doles’ relationship with Plaintiffs. Therefore, at Plaintiffs’

behest, Justice Vazquez-Doles recused herself from this case. NYSCEF No. 181 (Index No. EF002460-2024; Orange Cnty.). In a post-recusal discussion with Justice Vazquez-Doles concerning administrative matters, Plaintiffs suggested that this case should be heard in Westchester County, instead of Orange County.⁴ Plaintiffs filed a letter request to the Hon. Anne E. Minihan the following day requesting such transfer. NYSCEF No. 183 (Index No. EF002460-2024; Orange Cnty.).

30. In the two days that ensued, several Justices recused themselves from presiding over this case, for various reasons not all of which are detailed in the recusal orders. NYSCEF Nos. 182, 185, 186, 188, 192 (Index No. EF002460-2024; Orange Cnty.).

31. On May 14, 2025, Defendants filed a notice of appeal challenging Justice Vazquez-Doles' decision concerning the exercise of Supreme Court jurisdiction despite the Second Department's lack of remittitur ("Remittitur Appeal"). NYSCEF No. 191 (Index No. EF002460-2024; Orange Cnty.).

32. On May 15, 2025, Justice Mary Anne Scattaretico-Naber—to whom the case had been assigned following the aforementioned recusals and who notably did not recuse—held a conference with the parties and transferred the case to the Westchester County Supreme Court over Defendants' objections. In Justice Scattaretico-Naber's view, transfer was appropriate by virtue of Election Law § 16-101(1)(b). With all respect, Justice Scattaretico-Naber's decision is plainly contrary to binding caselaw cited by Defendants explaining that statutory venue provisions—

⁴ While Plaintiffs had previously sought transfer to "a Justice within the Ninth Judicial District who can try [this case] on dates to which counsel have already agreed," and suggested that this case "is properly venued in Westchester County," on April 11, 2025, NYSCEF No. 164 (Index No. EF002460-2024; Orange Cnty.), Plaintiffs abandoned that request when Justice Vazquez-Doles rearranged her schedule to accommodate Plaintiffs' requested trial dates.

although often using mandatory language—are non-jurisdictional and therefore waivable by a parties’ failure to timely seek transfer. *See Balbuenas*, 209 A.D.3d at 643–44.

33. On May 16, 2025, this case was transferred to Westchester County and reassigned as Index No. 50325/2025.

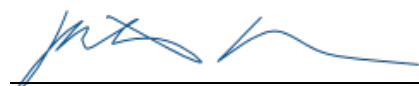
34. That same day, Defendants filed a notice of appeal challenging Justice Scattaretico-Naber’s transfer of this case to Westchester County pursuant to Election Law § 16-101(1)(b) (“Transfer Appeal”).

35. At the time of this filing, neither the Remittitur Appeal nor the Transfer Appeal have been assigned Index Numbers by the Second Department.

36. As stated above, Defendants herein seek an order staying these proceedings while Defendants’ appeals and motion for leave to appeal to the Court of Appeals are pending, as an exercise of this Court’s inherent authority. *See Tax Equity Now NY LLC v. City of New York*, 173 A.D.3d 464, 465 (1st Dep’t 2019).

37. For the foregoing reasons and those set forth in the accompanying memorandum of law, the Court should grant Defendants’ motion for a stay of proceedings pending resolution of the pending appeals and appellate motions.

I affirm this 20th day of May, 2025, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.


Bennet J. Moskowitz

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Affirmation complies with the word count limitations set forth in Uniform Rule 202.8-b for the Supreme Court. This Affirmation uses Times New Roman 12-point typeface and contains 3,436 words, excluding parts of the document exempted by Rule 202.8-b. As permitted, the undersigned has relied on the word count feature of this word-processing program.

By: 
Bennet J. Moskowitz