STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
CIVIL RIGHTS BUREAU

August 28, 2024

VIA ELECTRONIC MAIL

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Re: Preliminary Identification of Orange County as a Covered Entity Under the New York Voting Rights Act

The Civil Rights Bureau ("CRB") of the Office of the New York Attorney General ("OAG") writes regarding your letters dated February 20, 2024, and May 6, 2024,[1] concerning the preliminary identification of Orange County as a covered entity subject to preclearance under the New York Voting Rights Act (the "NYVRA").[2] We are also in receipt of your letter of July 24, 2024, concerning OAG's proposed regulations implementing preclearance.

We have carefully considered the issues raised by your letters and, subject to further consideration, continue to believe that Orange County was properly identified as a covered entity subject to preclearance, both as a result of the court order in *Molina v. County of Orange*[3] and, separately, as a result of the consent decree in *United States v. Orange County Board of Elections*.[4] As further discussed below, the Court's order in the former case and the consent decree in the latter case were each "based upon a finding of a[] violation of . . . the federal voting rights act . . . or a voting-related violation of the fourteenth amendment to the United States constitution."[5]

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[1] Both letters are available at https://ag.ny.gov/preliminary-guidance-comments-and-responses.
[2] *See* N.Y. Elec. Law § 17-200 *et seq*.; *see also* OAG Guidance, *The New York Voting Rights Act: Preliminary Identification of Covered Entities and Covered Policies Subject to Preclearance (To Take Effect on September 22, 2024)*, https://ag.ny.gov/sites/default/files/regulatory-documents/nyvra-preliminary-identification-of-covered-entities-and-covered-policies-subject-to-preclearance.pdf.
[3] Order, Dkt. 10, *Molina v. Cnty. of Orange*, No. 13-CV-3018 (S.D.N.Y. June 14, 2013).
[4] Consent Decree, Dkt. 2, *United States v. Orange Cnty. Bd. of Elec.*, No. 12-CV-3071 (S.D.N.Y. April 24, 2012).
[5] N.Y. Elec. Law § 17-210(3)(a).

I. The NYVRA's Preclearance Coverage Formula

Under the NYVRA, statutorily defined "covered entities" must submit certain changes to their election-related policies ("covered policies") to CRB or a designated court for preapproval, referred to as "preclearance" under the statute, before such changes may go into effect. The NYVRA provides that "[a] 'covered entity' shall include . . . any political subdivision that, within the previous twenty-five years, has become subject to a court order or government enforcement action based upon a finding of any violation of . . . the federal voting rights act . . . or a voting-related violation of the fourteenth amendment to the United States constitution."[6] The statutory definition of "government enforcement action" includes "consent decree[s]."[7] However, not every consent decree will automatically be deemed to be "based upon a finding of a[] violation" of relevant law within the meaning of the NYVRA. Rather, OAG has construed the statute to provide that a consent decree "shall be deemed to be based upon a finding of a[] violation" of relevant law when the consent decree "contains a finding of noncompliance with [such relevant law], and contains no provision denying liability with respect to such laws or constitutional provisions."[8]

II. *Molina v. County of Orange*

The record in *Molina v. County of Orange* (2013) makes clear that the Special Master modified the County's legislative districts because she found that those districts violated the Fourteenth Amendment's one-person, one-vote requirement, and on that basis, the District Court entered a court order based upon that violation.[9]

In *Molina*, after the plaintiff filed suit following the county legislature's failure to redistrict after the 2010 census, the Court, on consent of the parties, appointed a Special Master. The Court charged the Special Master with "[p]roposing a new set of legislative districts that are in compliance with the principles of one person/one vote . . . ."[10] Accordingly, the Special Master, consistent with well-established federal court precedent, understood her task as limited to identifying and remedying violations of federal law: as the Special Master stated, "a court-drawn plan should be limited to those changes necessary to cure any constitutional or statutory defect."[11] On June 3, 2013, the Special Master issued her Report and Recommendations proposing a new set of legislative district lines, stating that the new lines "cure[] the

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[6] *Id*.
[7] *Id*. § 17-204(9).
[8] 13 N.Y.C.R.R. § 501.3(b)(3).
[9] *See Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (holding that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable"); *Avery v. Midland Cnty.*, 390 U.S. 474 (1968) (holding that the one-person, one-vote principle set forth in *Reynolds v. Sims* applies to local legislative bodies).
[10] Order at ¶ 5, Dkt. 5, *Molina v. Cnty. of Orange*, No. 13-CV-3018 (S.D.N.Y. May 14, 2013).
[11] Special Master's Report and Recommendations at 14, Dkt. 6, *Molina v. Cnty. of Orange*, No. 13-CV-3018 (S.D.N.Y. filed June 3, 2013); *see also id*. (citing *Upham v. Seamon*, 456 U.S. 37 (1982), which holds that even in circumstances when a federal court is forced by legislative inaction to replace an unconstitutionally malapportioned map with a new one, the court must defer to the legislative judgments reflected in the existing map and make changes only insofar as necessary to cure constitutional infirmities).

constitutional infirmities that exist in the 2005 map."[12] On June 14, 2013, the Court issued an order adopting the Special Master's Report and Recommendations and ordering the County to implement the Special Master's proposed map.[13]

Viewing the Court's order in light of the full record, it is clear that the implementation of a new legislative map was "based upon a finding of a[] violation" of the Constitution, namely, a finding that the 2005 legislative districts violated the one-person, one-vote requirement and only then required modification by a federal court. We disagree that "[a]s a result of the noted cooperation of Orange County … no determination on the merits . . . was addressed or reached."[14] While the County cooperated throughout the *Molina* proceedings, as discussed above, the Special Master was nevertheless tasked with identifying and remedying any violation of federal law, and she did so. It is therefore incorrect that no determination on the merits was addressed or reached.

The record shows an extremely high level of malapportionment in the County's prior map that provided ample basis for the Special Master's finding of a one-person, one-vote violation. With the County's districts at the time deviating from a high of 29.78% above the target population to a low of 14.39% below it, the map featured a maximum population deviation of 44.17%.[15] Under Supreme Court precedent, maximum deviations above 10% are "presumptively impermissible" and must be justified by the jurisdiction.[16] The County made no attempt to do so here. Indeed, given well-established precedent, it is far from clear how the County could have possibly defended the presumptively impermissible 44.17% deviation in its existing map had it not abandoned any defense.[17] And when the Special Master concluded that the County's existing map had to be modified because it was unconstitutionally malapportioned, it is no surprise that the County did not contest that conclusion.

Accordingly, the Court's June 14, 2013 order was "based upon a finding of . . . a voting-related violation of the fourteenth amendment to the United States constitution,"[18] qualifying Orange County as a covered entity subject to preclearance under the NYVRA.

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[12] *Id*. at 9-10. The Special Master subsequently agreed to revise certain district lines following requests from the County. *See* Supplemental Special Master's Report and Recommendations, Dkt. 9, *Molina v. Cnty. of Orange*, No. 13-CV-3018 (S.D.N.Y. filed June 13, 2013).

[13] Order, Dkt. 10, *Molina v. Cnty. of Orange*, No. 13-CV-3018 (S.D.N.Y. June 14, 2013).

[14] Letter from Orange County Department of Law to CRB (May 6, 2024).

[15] "Maximum population deviation is the sum of the percentage deviations from perfect population equality of the most- and least-populated districts." *Evenwel v. Abbott*, 578 U.S. 54, 60 n.2 (2016).

[16] *Id*. at 60.

[17] The Supreme Court once approved a 16.4% deviation as justified, based on the circumstances presented in that case, while cautioning that such a high degree of deviation "may well approach tolerable limits." *Mahan v. Howell*, 410 U.S. 315, 329 (1973). Accordingly, courts routinely reject deviations substantially lower than 44.17% as unjustifiably high. *See, e.g.*, *McConchie v. Scholz*, 567 F. Supp. 3d 861, 886-87 (N.D. Ill. 2021) (rejecting Illinois legislative redistricting plan featuring 29.88% maximum deviation in the House and 20.25% maximum deviation in the Senate while observing, "No party has cited—nor can we find—a single case upholding a maximum deviation of 20.25%, to say nothing of a 29.88% deviation"); *Coleman v. Winbigler*, 615 F. Supp. 3d 563, 574 (E.D. Ky. 2022) (rejecting maximum deviations of 22.68% and 28.73% while observing, "If 16.4% 'approached tolerable limits' [quoting *Mahan*, 410 U.S. at 329], surely almost 23% and 29% exceed those limits."); *Brown v. Jacobsen*, 345 F.R.D. 490, 494 (D. Mont. 2022) (rejecting "roughly 24%" maximum deviation).

[18] N.Y. Elec. Law § 17-210(3)(a).

III. *United States v. Orange County Board of Elections*

In addition to *Molina*, the consent decree in *United States v. Orange County Board of Elections* (2012) also qualifies the County as a covered entity subject to preclearance, because it reflects a "government enforcement action based upon a finding of a[] violation of . . . the federal voting rights act."[19]

On April 18, 2012, the United States filed an enforcement action against the Orange County Board of Elections, alleging that it failed to provide Spanish-language election materials or make Spanish-language assistance available at the polls for the benefit of Orange County residents of Puerto Rican descent, in violation of Section 4(e) of the federal Voting Rights Act. Section 4(e) of the federal Voting Rights Act prohibits local jurisdictions from "conditioning the right to vote of [persons educated in American-flag schools (*i.e.*, in Puerto Rico) in which the predominant classroom language was other than English] on ability to read, write, understand, or interpret any matter in the English language."[20]

The parties resolved the case by consent decree.[21] In the consent decree, the Board of Elections stipulated that although Orange County had a sizeable and growing population of residents of Puerto Rican descent, including thousands with limited English proficiency, it failed to translate election-related materials, including ballots, election notices, and other items, into Spanish during state and local elections held in 2009, 2010, and 2011.[22] The Board of Elections further stipulated in the consent decree that, due to such failure, it had "conditioned the right to vote of Orange County citizens educated in Puerto Rico on their ability to read, write, understand or interpret the English language by not providing Spanish-language election materials and not consistently providing effective Spanish-language assistance during elections held in Orange County."[23] The Court so-ordered the consent decree on April 19, 2012.[24]

The Board of Elections' stipulation that it "conditioned the right to vote of Orange County citizens educated in Puerto Rico on their ability to read, write, understand or interpret the English language"[25] was a verbatim admission that it violated the federal Voting Rights Act's prohibition on "conditioning the right to vote of [persons educated in Puerto Rico] on ability to read, write, understand, or interpret . . . the English language."[26] In addition, the consent decree does not contain any denial of liability, nor does it state or in any way reflect that the Board of Elections had any potentially viable defense to liability.[27] Indeed, courts have held that the precise conduct to which the Board of Elections had stipulated—failing to translate election-

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[19] *Id*.
[20] 52 U.S.C. § 10303(e)(1).
[21] Consent Decree, Dkt. 2, *United States v. Orange Cnty. Bd. of Elec.*, No. 12-CV-3071 (S.D.N.Y. April 24, 2012).
[22] *Id*. at 2.
[23] *Id.* at 2-3.
[24] *Id*. at 16.
[25] *Id.* at 2-3.
[26] 52 U.S.C. § 10303(e)(1).
[27] Your letter of May 6, 2024 states, "The County . . . continues to maintain that no such violation of the Voting Rights Act ever occurred." Orange County's present denial of liability cannot retroactively modify the consent decree, which contains no such denial and represents that the consent decree's text reflects the entire agreement between the parties. *See* Consent Decree ¶ 45.

related materials into Spanish for the benefit of voters educated predominantly in the Spanish language in Puerto Rico—violates Section 4(e).[28] Section 4(e) has been described as a "straightforward law" with "clear directives."[29] Your letter of May 6, 2024, provides no basis to disregard the County's stipulation that it violated the statute's clear directives.

Thus, the consent decree is "based upon a finding of a[] violation of . . . the federal voting rights act" within the meaning of the NYVRA, as construed by OAG.[30] As a result, Orange County is a "covered entity" subject to preclearance under the NYVRA.

IV. Conclusion

If you continue to believe that Orange County was incorrectly identified as a covered entity subject to preclearance in view of the foregoing, we respectfully request an explanation of your position so that we can further consider the matter.

Sincerely,

/s/ Derek Borchardt

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[28] *See, e.g.*, *Arroyo v. Tucker*, 372 F. Supp. 764 (E.D. Pa. 1974); *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974); *Puerto Rican Org. for Pol. Action v. Kusper*, 350 F. Supp. 606 (N.D. Ill. 1972), *aff'd*, 490 F.2d 575 (7th Cir. 1973).
[29] *Rivera Madera v. Lee*, No. 1:18-CV-152, 2019 WL 2077037, at *1 (N.D. Fla. May 10, 2019).
[30] N.Y. Elec. Law § 17-210(3)(a); *see also* 13 N.Y.C.R.R. § 501.3(b)(3).