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July 24, 2024

VIA ELECTRONIC AND FIRST CLASS MAIL

Office of the New York Attorney General
28 Liberty Street
New York, NY 10005
Attn: Voting Rights Section, Civil Rights Bureau
(votingrights@ag.ny.gov)

RE: Comment on Notice of Proposed Rulemaking – 13 NYCRR Chapter X, Parts 500 and 501

Dear Section Chief McKenzie:

This letter is written on behalf of the County of Orange in response to the invitation to comment on the above referenced proposed rule with respect to the New York Voting Rights Act preclearance requirements. Specifically, we write in objection to proposed Rule 501.3(b)(3) as it exceeds the jurisdiction of the Attorney General's promulgation authority, improperly modifies and goes beyond the scope of Election Law § 17-210(3)(a) and appears to single out Orange County for selective enforcement.[1]

[1] The Attorney General's Regulatory Impact Statement also misstates the impact of the proposed Rule insofar as its costs. It wrongly states that "[to] the extent that covered entities may incur costs associated with preclearance, such costs are imposed not by this rule, but the requirements set forth in the NYVA." (Regulatory Impact Statement, Section 4(a)). *See also* introductory paragraphs of Regulatory Flexibility Analysis and Rural Area Flexibility analysis. Although this may be true as to those political subdivisions clearly within the reach of Section 17-210(3) as enacted, it is patently untrue with respect to the attempt by proposed Rule 501.3(b)(3) to bring within the ambit of Election Law § 17-210(3) additional covered entities, such as Orange County, solely by the Rule's expansion of the statutory definition brought about by the Rule's euphemistic "clarification."

The purported purpose of the proposed Rule 501.3(b)(3) is to "[c]larify certain elements . . . set forth in section 17-210(3) . . . used to designate the political subdivisions . . . that are subject to the preclearance requirement." (Notice of Proposed Rulemaking). There is no basis in the law for the promulgation of a rule by an Executive Branch office that assumes a legislative function, modifying and expanding clear and well-defined elements set out in a statute. *See, e.g., Moran Towing & Transp. Co. v. N.Y.S. Tax* Comm'n, 72 N.Y.2d 166, 173 (1988) ("[L]egal interpretation is the court's responsibility; it cannot be delegated to the agency charged with the statute's enforcement.").

Election Law § 17-210(7) provides that the "civil rights bureau may promulgate such rules and regulations as are necessary to effectuate the purposes of this section." This provision does not give license to the Civil Rights Bureau to directly legislate and expand the scope of § 17-210(3) as to the definition of a "covered entity," as the Attorney General attempts to do in its proposed rulemaking. It is clear from a proper contextual reading of Election Law § 17-210 that the Civil Rights Bureau of the Attorney General was only granted the powers of regulation as to "covered policies," not as to "covered entites." The many references in the statute to the determinations to be made by the Civil Rights Bureau (and the potential need for rulemaking) are as to determinations concerning covered policies only. (*See* § 17-210(1), (2), (4)(a)-(g), (6)). Nowhere in the applicable section on "covered entities" - § 17-210(3) - is there any reference to determinations by the Civil Rights Bureau. A common sense and a plain reading of the Election Law § 17-210(3) warrants that there is no need for any determinations by the Civil Rights Bureau or any further explanation or "clarification" of the definition of a "covered entity." The Legislature took great care and went to great lengths to define precisely the ambit of a covered entity in § 17-210(3), including the precise elements necessary to qualify as such. *See In re Gruber*, 89 N.Y.2d 225, 232 (1996) ("By defining the specific classes of employment that the law is designed to cover and by directing the manner in which the definitional provisions are to be applied, the Legislature has withdrawn that policy-laden determination from the agency.").

In addition to Rule 501.3(b)(3) being *ultra vires*, the Rule plainly goes beyond the statutory language and limitations of Election Law section 17-210(3)(a) which states, as applicable to Orange County, that under the New York Voting Rights Act's preclearance coverage formula a "covered entity" includes:

> "any political subdivision which, 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 this title, the federal voting rights act, the fifteenth amendment to the United States constitution, or a voting-related violation of the fourteenth amendment to the United States constitution."

In contrast, Rule 501.3(b)(3) sets forth, for purposes of Election Law section 17-210(3)(a), that:

> "A consent decree or other executed written agreement shall be deemed to be based upon a finding of a violation, and thus may subject the political subdivision to preclearance coverage, if the agreement reflects a finding of noncompliance with one of the laws or constitutional provisions enumerated in sections 17-

210(3)(a) and (b) of the Election Law and contains no provision denying liability with respect to such laws or constitutional provisions." (Emphasis added).

The Attorney General, or any other Executive Branch agency or office, does not have authority to promulgate a rule that goes beyond the language and scope of a statute. *Council for Owner Occupied Housing. Inc. v. Abrams,* 72 N.Y.2d 553 (1988) (In "the absence of substantive provisions in [the statute granting licensing powers to the Attorney General] indicates that the Legislature did not intend to confer such powers on the Attorney-General and, as an executive official, he may not extend the delegated power or exercise lawmaking power vested solely in the Legislature by adopting remedial measures that exceed the authority granted by the enabling statute."). Rules may only be promulgated to further the implementation of a law as it exists, and there exists no authority to create a rule out of harmony with a statute. *Jones v. Berman,* 37 N.Y.2d 42, 53 (1975) ("We conclude, therefore, that by adding a requirement not found in the existing State statute, the regulation as presently written is invalid").

Here, Rule 501.3(b)(3) impermissibly goes beyond the language of Election Law § 17-210(3)(a). Election Law section 17-210(3)(a) limits the preclearance coverage formula of a "covered entity" to any political subdivision that has been subject to "a court order or government enforcement action based upon a finding of [a] violation of [specifically enumerated laws]" (emphasis added). Rule 501.3(b)(3) goes well beyond the scope and reach of this statutory language in that it improperly expands a "finding" to include any consent decree or undefined "agreement" that "reflects a finding of noncompliance." In expanding the objective and concrete requirement of a "finding" required by the Election Law to now include the ambiguous and vague term of "reflecting a finding," of any type of agreement, the office of the Attorney General has exceeded its rule promulgating authority.

In addition to the common law rule that an Executive Branch office cannot usurp legislative power and expand the reach of statutory requirements, there are due process impacts brought about by this extra-statutory, extra-judicial expansion of the statutory definition of a covered entity. The statute provides the requirement of a specific "finding" of a violation, resulting from and limited to court orders or enforcement actions, both of which necessarily incorporate basic due process principles of an opportunity to be heard by the covered entity concerning the statutorily listed elements, and a clear holding of an actual finding. Here, in contrast, the proposed Rule vests in the Attorney General the power to include an entity as a covered entity not so found to be in violation, but an entity which the Attorney General "deems" by fiat should be considered as a covered entity because a consent decree or, apparently any "agreement" whatsoever, "reflects" a finding of noncompliance. The lack of an opportunity to be heard, coupled with the vagueness of what constitutes a "reflection" of a finding, and the absence of an identification of what types of "agreements" may trigger such a conclusion, renders this Rule constitutionally infirm.

It also appears that the scope of Election Law 17-210-(3)(a) is being expanded unfairly to a particular political subdivision. The County of Orange was preliminarily identified by the Attorney General as a covered entity under Election Law § 17-210(3)(a) premised only on the case of *Molina v. County of Orange,* Case No. 13-CV-3018, 2013 WL 3009716 (S.D.N.Y. 2013). The factual background of *Molina* involved the Orange County Legislature attempting to proceed with

a legislative election in 2013 based upon legislative district boundaries using 2000 Census data, when the redistricting of boundaries could not be agreed upon based on the 2010 Census data. An action was commenced based upon allegations regarding the federal requirements of "one person, one vote" and the Voting Rights Act of 1965 as to an adopted legislative voting map. The action was resolved by a court decision 38 days after it was commenced, based upon an agreement of the parties and special master on redrawn legislative district boundaries. It cannot be disputed that there was never any "finding," as specifically required by Election Law 17-210-(3)(a), in any "court order or enforcement action" that Orange County had violated the "[John R. Lewis Voting Rights Act of New York], the federal voting rights act, the fifteenth amendment to the United States constitution, or a voting-related violation of the fourteenth amendment to the United States constitution." Indeed, there was no "finding" at all in the decision regarding anything.

An objection to the County of Orange being preliminarily identified as a covered entity based on *Molina* was submitted to the Civil Rights Bureau by letter dated February 20, 2024, and is attached hereto. In response to that letter, the Civil Rights Bureau requested the opinion of the County of Orange on whether *United States v. Orange County* qualified it as a covered entity. The County of Orange responded by letter dated May 6, 2024, which is also attached hereto. Clearly, neither *Molina v. County of Orange* nor *United States v. Orange County* would provide a basis for the County of Orange to be designated a covered entity as in neither case was there a finding that the County of Orange violated any of the enumerated laws in Election Law section 17-210(3)(a). It hardly seems coincidental that a mere three weeks later the Attorney General submitted its notice of its proposed rulemaking to the State register that, among other things, effectively expands the statutory definition of a "covered entity" from requiring a "finding" to only requiring a "reflection" of a finding. As Orange County is unaware of any other entity but Orange County that might be brought into the expanded regulatory jurisdiction of the Attorney General by virtue of proposed Rule 501.3(b)(3), it is hard to reach any other conclusion than this expansion specifically targets Orange County for selective enforcement.

For the reasons set forth above, it is requested that Rule 501(b)(3) be withdrawn and not put into effect.

Thank you.

Respectfully,

RICHARD B. GOLDEN
Orange County Attorney

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