Sent via email

February 21, 2024

Cheektowaga Town Board
3301 Broadway Street
Cheektowaga, New York 14227

Re: Alleged NYVRA Violation Concerning the Town of Cheektowaga's At-Large Method of Elections

To the Members of the Cheektowaga Town Board:

We write to address an exploratory proceeding concerning an alleged violation of the John R. Lewis Voting Rights Act of New York (the "NYVRA") initiated by the Town of Cheektowaga (the "Town"). The Legal Defense Fund ("LDF") is the nation's oldest racial justice legal organization. LDF has worked to promote and protect Black Americans' voting rights since our founding in 1940. Headquartered in New York, we engaged in significant advocacy in support of the enactment of the NYVRA.

On December 12, 2023, Cheektowaga resident Ken Young sent the Town an NYVRA notification letter alleging that the Town's at-large method of election violated the NYVRA. On January 9, 2024, the Town adopted a resolution committing to investigate the current at-large method of election, hold hearings on potential remedies, and retain voting rights and election law experts Lisa Handley and Jeff Wice to advise the Town.[1]

We write to offer background on the NYVRA, to provide information on district-based elections, and to encourage the Town to take full advantage of its present opportunity to pioneer an exemplary remedial process under the NYVRA.

[1] *See* Town of Cheektowaga Resolution (Jan. 9, 2024). The resolution adopted by the Town does not appear to have triggered the safe harbor provisions of the NYVRA because the resolution did not explicitly affirm the Town's "intention to enact and implement a remedy" as required by the NYVRA. N.Y. Elec. Law § 17-206(7)(b)(i). We appreciate the Town's efforts to address the alleged violation, including its adherence to the procedures outlined in the NYVRA at N.Y. Elec. Law § 17-206(6).

I. Overview of Relevant NYVRA Provisions

In 2022, Governor Hochul signed the NYVRA into law. This statute prohibits political subdivisions in New York from maintaining at-large methods of election that "hav[e] the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections."[2]

Under the private right of action against racial vote dilution established by the NYVRA, an at-large method of election is unlawful if 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."[3] The NYVRA establishes specific rules for evaluating racially polarized voting[4] and enumerates a number of factors that may be considered to determine whether, under the totality of the circumstances, a violation has occurred.[5]

Although the NYVRA and the federal Voting Rights Act each provide a private right of action against racial vote dilution that can be used to contest at-large methods of election, the NYVRA differs from the federal VRA in two important ways. *First*, unlike the federal VRA, the NYVRA does not require the drawing of a demonstrative map in which protected class members comprise a majority of one or more potential remedial districts for plaintiffs to demonstrate a violation.[6]

Second, unlike the federal VRA, under which plaintiffs must prove three preconditions and also address a list of "totality of circumstances" factors,[7] under the NYVRA, plaintiffs can prove a claim *either* by demonstrating the existence of racially polarized voting *or* by satisfying the totality of circumstances factors.[8]

In addition, the NYVRA explicitly prohibits certain arguments that some defendant jurisdictions have asserted as defenses in litigation brought under the federal VRA. For example, the NYVRA prohibits consideration of "evidence that [racially polarized] voting patterns and election outcomes could be explained by factors other than racially polarized voting, including but not limited to partisanship" as well as "evidence concerning projected changes in population or demographics."[9]

---

[2] N.Y. Elec. Law § 17-206(2).
[3] N.Y. Elec. Law § 17-206(2)(b)(i).
[4] N.Y. Elec. Law § 17-206(2)(c).
[5] N.Y. Elec. Law § 17-206(3).
[6] *Compare Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) *to* N.Y. Elec. Law § 17-206(2)(b)(i).
[7] *See generally Gingles*, 478 U.S. 30.
[8] N.Y. Elec. Law § 17-206(2)(b)(i).
[9] N.Y. Elec. Law §§ 17-206(2)(c)(vi), (ix).

The NYVRA also provides political subdivisions with a safe harbor to voluntarily remedy potential violations before prospective plaintiffs may commence litigation and permits political subdivisions to adopt remedies with the approval of the Civil Rights Bureau of the New York State Attorney General that may not be otherwise authorized under state law.[10]

II. District-Based Elections May Remedy an Alleged NYVRA Violation

A decision by a political subdivision to adopt district-based elections may remedy an alleged NYVRA violation concerning at-large elections. However, if a political subdivision chooses to adopt district-based elections, districts must be drawn in a manner that ensures that voters of color have an equal opportunity to participate in the political process and elect candidates of their choice, as required by the federal Voting Rights Act and the NYVRA, and must also comply with other provisions of federal and state law that govern redistricting, including the United States Constitution and the New York Municipal Home Rule Law.

In particular, the NYVRA includes provisions to ensure that voters of color do not suffer from racially dilutive district-based elections (in addition to its provisions concerning at-large methods of election).[11] District-based elections might risk violating these provisions if the district configurations crack voters of color into multiple districts, denying voters of color any opportunity to elect candidates of choice in any of those districts. District-based elections may also risk violating these provisions if they pack voters of color into just one district when it is possible to identify an alternate lawful map or voting system in which a politically cohesive group of voters of color might be able to elect additional candidates of their choice. To the extent a political subdivision adopts district-based elections to remedy an alleged NYVRA violation concerning at-large elections, the political subdivision must take steps to comply with these and all other legal requirements for redistricting.

III. The Town of Cheektowaga Can Avoid Costly Litigation

If the Town concludes that the at-large structure may violate the NYVRA, we encourage the Town to voluntarily adopt a remedy to avoid unnecessary and costly litigation at significant taxpayer expense.[12] Like the federal Voting Rights Act, the NYVRA provides that defendant jurisdictions are responsible for paying legal fees for

---

[10] N.Y. Elec. Law § 17-206(7)(c).

[11] N.Y. Elec. Law § 17-206(2)(b)(ii).

[12] *See, e.g.*, NAACP Legal Defense and Educational Fund, Inc., *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation as of February 21*, NAACP Legal Defense and Educational Fund, https://www.naacpldf.org/wp-content/uploads/Section-2-costs-2.19.21.pdf (last visited Feb. 9, 2024).

prevailing plaintiffs.[13] Recent Section 2 litigation in New York shows how costly this can be: The East Ramapo Central School District, for example, recently paid in excess of $7 million in legal fees for unsuccessfully defending a Section 2 lawsuit challenging its at-large structure, and was ordered to pay an additional $4 million in plaintiffs' attorneys' fees and costs.[14] And the Town of Islip paid its lawyers more than $3 million to defend a Section 2 lawsuit challenging its at-large structure, and also paid plaintiffs' attorneys nearly $1 million to ultimately settle the claims.[15]

The Town's current consideration of potential remedies represents one of the first such proceedings since the NYVRA's adoption. Other jurisdictions across the state will look to the Town of Cheektowaga—including the procedural choices made by the Town—as new NYVRA proceedings are initiated. For this reason, the Town of Cheektowaga's actions in this historic matter may set an important precedent.

Please do not hesitate to contact Michael Pernick at mpernick@naacpldf.org or (917) 790-3597 if you have questions or would like to discuss these issues further.

Sincerely,

/s/ *Michael Pernick*

Michael Pernick
John Cusick
Legal Defense Fund
40 Rector Street, 5th Fl.
New York, NY 10006

Adam Lioz
Legal Defense Fund
700 14th Street N.W. Ste. 600
Washington, DC 20005

[13] N.Y. Elec. Law § 17-218.

[14] Jennifer Korn, ERCSD Threatens to Fire Teachers if Legal Fees Not Cut to $1: NAACP Leaders Respond, Rockland County Times (Jan. 21, 2020); Report and Recommendation, NAACP, Spring Valley Branch v. East Ramapo Central School Dist., No. 7:17-08943-CS-JCM (S.D.N.Y. Dec. 29, 2020).

[15] Sophia Chang, Islip Spends Nearly $3M So Far to Fight Voting Rights Case, Newsday (Dec. 16, 2019); Priscilla Korb, Judge Rules in Town of Islip Voting Rights Case, Patch (Oct. 27, 2020).

Legal Defense Fund ("LDF")

Since its founding in 1940, LDF has used litigation, policy advocacy, public education, and community organizing strategies to achieve racial justice and equity in education, economic justice, political participation, and criminal justice. Throughout its history, LDF has worked to enforce and promote laws and policies that increase access to the electoral process and prohibit voter discrimination, intimidation, and suppression. LDF has been fully separate from the National Association for the Advancement of Colored People ("NAACP") since 1957, though LDF was originally founded by the NAACP and shares its commitment to equal rights.