UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	**06 CV 15173 (SCR)**
VILLAGE OF PORT CHESTER,	:	
	:	
Defendant.	:	

DEFENDANT'S PRE-HEARING REMEDY BRIEF

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PRELIMINARY STATEMENT

The Village of Port Chester (the "Defendant" or the "Village"), respectfully submits this Pre-Hearing Remedy Brief, along with the report of Dr. Richard Engstrom, dated February 7, 2008 (hereinafter, Engstrom Report) and a certified copy of a resolution of the Village of Port Chester Board of Trustees, dated January 28, 2008, stating its preference for cumulative voting as a remedy.

For the reasons stated herein, it is respectfully submitted that this Court should order a cumulative voting system with the elimination of staggered terms combined with a substantial educational component as the remedy in this case.

As set out in more detail below, such a plan would not only adequately remedy the Section 2 violation found in this case, but would enhance minority voting opportunity even more than the plaintiffs' competing plans, by providing a realistic opportunity for Hispanic voters to elect more than one Board of Trustees member. Further, there are no federal or state law provisions barring the use of cumulative voting as a remedy in this case, and the Justice Department itself has repeatedly endorsed the use of cumulative voting as a remedy for minority vote dilution. Given all this, the local legislative body's preference must be accepted, and plaintiffs' argument for a different plan must be rejected.

Additionally, cumulative voting is simply a better plan for Port Chester. It would afford all Hispanic voters in Port Chester an opportunity to elect candidates of choice, and not just those within one Hispanic-majority single-member district. It would avoid potential legal challenges based on one-person, one-vote concerns. It would save a village tiny in area from the expense

and administrative difficulty involved in districting, administering elections by district, and redistricting every ten years.

I. THE VILLAGE'S CUMULATIVE VOTING PLAN IS AN APPROPRIATE REMEDY OF THE VOTING RIGHTS ACT VIOLATION FOUND BY THE COURT

A. The Village's Remedial Preference Governs

At the remedy phase of a voting rights case, the district court must give the defendant jurisdiction the first opportunity to suggest a remedial plan. White v. Weiser, 412 U.S. 783, 794-795 (1973), *quoting* Reynolds v. Sims, 377 U.S. 533, 586 (1964); Upham v. Seamon, 456 U.S. 37, 41 (1982) (adhering to the same requirement in another redistricting case and quoting this same language from White v. Weiser); Cottier v. City of Martin, 445 F.3d 1113, 1123 (8th Cir.2006); East Jefferson Coalition for Leadership & Dev. V. Parish of Jefferson, 926 F.2d 487, 490 (5th Cir. 1991). The court must defer to the choice of the governing legislative body, as long as that choice is consistent with federal statutes and the Constitution. Upham, 456 U.S. at 40-41; Whitcomb v. Chavis, 403 U.S. 124, 160-161 (1971). The Supreme Court has in recent years reaffirmed the principle that federal courts must defer to legislative bodies in drawing up voting plans. *See* Lawyer v. Department of Justice, 521 U.S. 567, 576-577 (1997) (legislature must have first opportunity to prepare districting plan); Growe v. Emison, 507 U.S. 25, 34 (1993) (same); Branch v. Smith, 538 U.S. 254, 309-310 (2003) (O'Connor, J., concurring) (a federal court's modifications of a state's plan "are limited to those necessary to cure any constitutional or statutory defect") (*citing* Upham).

Although the Supreme Court first enunciated these principles in one-person, one-vote cases, the district court's obligation to defer to the legislative body as to any remedy plan which

complies with federal law applies equally to claims under Section 2 of the Voting Rights Act. *See, e.g.,* Growe v. Emison, 507 U.S. 25, 34 (1993) (federal court erred in imposing Voting Rights Act remedy rather than deferring to defendant); Cottier v. City of Martin, 445 F.3d 1113, 1123 (8th Cir.2006) (district court must adopt defendant's proposed Section 2 remedy unless it is "legally unacceptable") ; Cane v. Worcester County, 35 F.3d 921, 927-928 (4th Cir. 1994) (reversing a district court's remedial order in a Section 2 Voting Rights Act case on this ground, citing White and Whitcomb); McGhee v. Granville County, 860 F.2d 110, 115 (4th Cir. 1988) (same); Seastrunk v. Burns, 772 F.2d 143, 151 (5th Cir. 1983) (reversing district court remedial order in Section 2 Voting Rights Act case on this ground); Cook v. Luckett, 735 F.2d 912, 920-921 (5th Cir. 1984) (same); Harper v. City of Chicago Heights, 223 F.3d 593, 601-602 (7th Cir. 2000) (same). Similarly, while some of the cases involved statewide plans and referred to federal courts' need to defer to "states," courts have made clear that the need for deference applies equally to cases involving local legislative bodies. *See* Harper, 223 F.3d at 601-602 (citing White v. Weiser).

B. A Cumulative Voting Remedy Is Consistent With Federal And State Law Requirements

Since the Village proposes a cumulative voting remedy, this Court must accept that plan unless it fails to cure the Section 2 violation and/or otherwise violates federal law. As a general matter, there is no federal constitutional or statutory provision banning the use of cumulative voting or its adoption by federal courts. Indeed, federal courts at all levels have repeatedly noted that cumulative voting is a remedial option in Voting Rights Act cases. *See* Holder v. Hall, 512 U.S. 874, 897-899, 908-913 (1994) (Thomas, J., concurring in the judgment) ("Nothing in our present understanding of the Voting Rights Act places a principled limit on the authority of federal courts that would prevent them from instituting a system of cumulative voting as a remedy under Section 2"); Branch v. Smith, 538 U.S. 254, 309-310 (2003) (O'Connor, J.,

concurring) ("a court could design an at-large election plan that awards seats on a cumulative basis, or by some other method that would result in a plan that satisfies the Voting Rights Act"); LULAC v. Clements, 986 F.2d 728, 814-815 (5th Cir.) ("state policy choices may require the district court to carefully consider remedies such as cumulative voting" and other remedies); *rev'd on other grounds*, 999 F.2d 831 (5th Cir. 1993) (en banc); United States v. Marengo County Comm'n, 731 F.2d 1546, 1560 (11th Cir. 1984) (listing cumulative voting as a potential Section 2 remedy); Dillard v. Town of Louisville, 730 F. Supp. 1546, 1548 n.8 (M.D. Ala. 1990) (noting availability of cumulative voting as a remedy in a Section 2 case); Dillard v. Chilton County Bd. Of Educ., 699 F. Supp. 870, 875 (M.D. Ala. 1988) (accepting cumulative voting settlement in Section 2 case), *aff'd*, 868 F.2d 1274 (11th Cir. 1989). While many of these cases have arisen in the South, similar sentiments have recently been voiced right here in New York. *See* Lopez Torres v. New York State Bd. of Elec, 411 F. Supp.2d 212 (E.D. N.Y. 2006) (cumulative voting could be used to remedy constitutional challenge to the method of electing state Supreme Court judges).

Courts have accepted cumulative voting plans as settlements of Voting Rights Act cases. *See, e.g.*, Buckanaga v. Sisseton ISD, No. 84-1025 (D.S.D. 1988); Dillard v. Chilton County Bd. of Educ, 699 F. Supp. 870 (M.D. Ala. 1988); Banks v. Peoria, No. 87-2371 (C.D. Ill. 1987). Courts have even imposed cumulative voting as a Section 2 remedy outside the settlement context. *See* Collier v. City of St. Martin, 475 F. Supp.2d 932 (D.S.D. 2007) (ordering cumulative voting where defendant city remained silent as to remedy). In accepting cumulative voting, these courts use the same "threshold of exclusion" analysis employed by Dr. Engstrom in this case. *See, e.g.*, Collier, 475 F. Supp.2d at 937; Chilton County, 699 F. Supp. at 874.

This "threshold of exclusion" analysis is standard, widely accepted, and long standing.

See Mulroy, 77 NORTH CAROLINA L. REV. at 1880 & sources cited therein; Richard Engstrom, *Modified Multi-Seat Systems as Remedies for Minority Vote Dilution*, 21 Stetson L. Rev. 743, 750 (1992); Edward Still, *Alternatives to Single-Member Districts*, in Minority Vote Dilution 249 (Chandler Davidson, ed., 1984). Applying the threshold of exclusion formula makes clear that the defendant's cumulative voting plan adequately cures the Section 2 violation. It provides Hispanic voters in Port Chester with an opportunity to elect at least one candidate of choice, and probably two. Engstrom Report page 13. This equals or exceeds the opportunity provided by the plaintiffs' district plans. Thus, neither the Voting Rights Act nor any other provision of federal law prevents this Court from accepting the defendant's proffered remedial plan.

Nor does New York state law bar imposition of the defendant's plan. New York's Constitution gives local legislatures full authority to adopt all laws "not inconsistent with" the state constitution or statutes concerning its own "affairs or government." Constitution of the State of New York, Art. IX, §2(3)(c). This includes the "membership and composition" of a village's legislative body. Id. This same authority is codified in state statutes. *See* Municipal Home Rule Law, Art. 2, § 10(1)(i), §10(1)(ii). At-large elections have long been in use in villages, and we are aware of no specific provision of New York state law which expressly prohibits the adoption of a cumulative voting system by a village. Thus, the Village's plan is "not inconsistent with" state law and is thus permitted.

Indeed, New York law arguably *presumes* that villages elect trustee board members at-large, and simply gives the trustees the *option* of selecting a district plan. *See* New York Election Law, Art. 9, §15-130. To select this option, the Village is required by state law to hold a referendum, whereas no such referendum is required to allow cumulative voting in its already at-large elections. Further, it is the Village's understanding that no Village in New York State has adopted a ward or district plan. Thus, the defendant's plan actually does less violence to

state law considerations than the plaintiffs' plans.

The need for maximum consistency with state law is always part of a district court's remedial calculus in voting cases. *See* Cleveland County Ass'n for Gov't by the People v. Cleveland County Bd. of Comm'rs, 142 F.3d 468, 476 (D.C. Cir. 1998) (setting aside a voting rights remedy on the grounds that its terms conflicted with state law); Perkins v. City of Chicago Heights, 47 F.3d 212, 218 (7th Cir. 1995) (same); LULAC v. Clements, 999 F.2d 8313, 846-848 (5th Cir. 1993) (en banc) (same). A district court can only impose a plan in contravention of state law requirements if it finds that such a plan is *necessary* to cure the Section 2 violation---i.e., that there is no other alternative plan more consistent with state law which also adequately cures the violation. Id. Therefore, since the cumulative voting plan is an adequate Section 2 remedy, state law considerations independently bar this Court from imposing any of the plaintiffs' plans---at least without conducting a referendum.

C. Cases Rejecting Cumulative Voting Remedies Are Distinct

The courts which have rejected cumulative voting have done so for reasons distinct to the present case. In Cane v. Worcester County, the Fourth Circuit reversed a district court's imposition of cumulative voting because it failed to defer to the county's policy preference for districts. 35 F.3d 921, 928-929 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 1097 (1995). The Fourth Circuit expressly disclaimed any intent to state generally that cumulative voting was unavailable as a remedy. Id. Similarly, in Harper v. City of Chicago Heights, 223 F.3d 593 (7th Cir. 2000), the Seventh Circuit reversed the district court's imposition of a cumulative voting plan, criticizing the trial court for failing to respect the defendant city's preference for single-member-districts. Id. at 602. More important to its decision was that the trial court unnecessarily deviated from state law requirements governing the use of cumulative voting. Id. at 601. The Seventh Circuit took pains to point out that it did not "disapprove of cumulative voting in the abstract," id. at 601,

and that it was not criticizing cumulative voting, id. at 603. These cases merely prove the Village's point: i.e. that its choice of remedy should be respected, as should state law.

Another federal court criticism of cumulative voting is tied narrowly to the distinct question of the best way to select judges. In Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) (en banc), the Eleventh Circuit dealt with a Section 2 challenge to judicial elections. In an opinion by Judge Tjoflat rejecting a variety of proposed remedies, the court explained that the proposed cumulative voting remedy would require the elimination of numbered posts. This would force all judges in a jurisdiction to run against each other, harming the special "collegiality" that judges need in working together on administrative matters. Id. at 1546. The increased competition would also dampen the interest of qualified attorneys in running for office, harm the independence of the judiciary, and work at cross-purposes to the "merit selection" system for judges, which requires a certain amount of insulation from popular pressure. Id. Judge Tjoflat made very similar observations in another judicial election case. *See* SCLC v. Sessions, 56 F.3d 1281, 1296 n.24 (11th Cir. 1995); *cf.* LULAC v. Clements, 999 F.2d 831, 876 (5th Cir. 1993) (en banc) (since plaintiffs in judicial election case had sought district remedy, court would not consider limited and cumulative voting because they retained the challenged at-large electoral feature). The Sixth Circuit, citing Nipper, followed suit. Cousin v. Sundquist, 145 F.3d 818, 830 (6th Cir. 1998). Whatever the merits of these observations, they are by their terms limited to the special case of judicial elections and have no application here.[1]

[1] Additionally, there is good reason to suspect that the courts' statements in all these judicial election cases is grounded in a consistent hostility to Voting Rights Act liability in the judicial elections context, motivating the courts to reject any proposed voting scheme that, if found to be an appropriate remedy, would necessitate a finding of liability. *See* Mulroy, 33 HARV. CIV. RTS—CIV. LIBERTIES L. REV. 333, 362 (1998), and sources cited therein.

D. The Justice Department Endorses Cumulative Voting As A Remedy For Minority Vote Dilution

Indeed, on a number of occasions, the Department of Justice has itself endorsed cumulative voting as a remedy for minority vote dilution. Between 1980 and 2000, the Civil Rights Division received and evaluated more than 50 submissions of cumulative voting systems as part of its duty to "preclear" voting changes in covered jurisdictions under Section 5 of the Voting Rights Act.[2] *See* States' Choice Of Voting Systems Act of 2000: Hearing On H.R. 1173 Before the Subcommittee on the Constitution, H. Comm. On the Judiciary, 106th Cong. 57 (Sept. 23, 1999) (statement of Anita Hodgkiss, Deputy Assistant Attorney General, Civil Rights Division, U.S. Department of Justice). Almost all were precleared. Id. The Department objected to only two cumulative voting submissions during this period: one because of the use of numbered posts, and another because the city involved had not made any effort to explain the new voting system to minority voters. Id; *see also* Steven J. Mulroy, *Limited, Cumulative Evidence: Divining Justice Department Positions on Alternative Electoral Schemes*, 84 NAT'L CIVIC REV. 66, 67-68 (1995) (conducting a similar review of Section 5 preclearance of cumulative voting plans for a different time period, as well as an overall assessment of Justice Department policy toward cumulative voting), *available at* http://www.fairvote.org/?page=542. In the first instance, the Department ultimately precleared the submission on other grounds; in the second, it precleared the submission after the city proposed an appropriate voter education program. Id[4] Thus, out of over 50 instances during this period, the Department of Justice *never once* prevented the imposition of a cumulative voting plan.[3]

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[2] Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, requires that certain jurisdictions to preclear any new voting "standard, practice or procedure" with either the United States Attorney General or the District Court for the District of Columbia, to ensure that such voting changes do not "have the purpose or effect of denying or abridging the right to vote on account of race or color."42 U.S.C. §1973c.

[3] In any event, neither of the two initial objections are relevant to the instant case. Port Chester's plan does not have numbered posts, and it proposes to do an aggressive voter education plan.

Moreover, the Justice Department officially supported legislation in Congress which would have allowed states the option of choosing cumulative voting for congressional elections. Id. at 55. Citing among others Dr. Engstrom, the Village's expert in this case, a high-ranking official of the Civil Rights Division testified before Congress that "Studies of the outcomes of cumulative voting elections adopted by jurisdictions around the country to resolve Voting Rights Act claims reveal that they have been effective in removing barriers to electoral participation." Id. at 56.

The Justice Department's enthusiasm for cumulative voting can also be seen in the positions it has taken in prior litigation. In Harper v. City of Chicago Heights, 223 F.3d 593 (7th Cir. 2000), the Justice Department filed an *amicus* brief supporting the district court's imposition of a cumulative voting plan. No. 98-3075, Amicus Brief By United States, Jan. 29, 1999. Further, in State of GA. v. Reno, 881 F. Supp. 7, (D.C. 1995, the Justice Department argued that cumulative voting was a valid option among several from which the State could choose to remedy its voting rights violation. State of GA. v. Reno, Reply Brief of the United States, at 14-16. In support of this position, the United States submitted into evidence an expert report discussing cumulative voting by Dr. Richard Engstrom, the Village's expert in this litigation. Mulroy, 84 NAT'L CIVIC REV. at 69-71. Finally, in a footnote in its *amicus* brief in Cane v. Worcester County, the Civil Rights Division noted that a cumulative voting proposal was "within the range of remedial options for a proven violation of Section 2." Id.

II. CUMULATIVE VOTING IS A BETTER REMEDY THAN A DISTRICTING PLAN

A. Legal and Policy Advantages

Cumulative voting would have a number of legal advantages to a districting plan. For one thing, cumulative voting would render the plan immune from challenge as a "racial gerrymander" under Shaw v. Reno, 509 U.S. 630 (1993), and its progeny. See Mulroy, Alternative Ways Out, 77 North Carolina L. Rev. 1867 (1999) at 1882 (explaining how such plans would not be vulnerable to a Shaw challenge, and citing authorities). For another, it would be immune from challenge on one-person, one-vote grounds. This is a real concern given the high deviations in CVAP population the districts have in the plaintiffs' remedial plans.

The Equal Protection Clause of the Fourteenth Amendment requires states and local governments to apportion their congressional districts and state legislative seats on a "one-person, one-vote" basis. Baker v. Carr 369 U.S. 186 (1962), Reynolds v. Sims 377 U.S. 533, 84 S.Ct, 1362 (1964). The Supreme Court has sanctioned minor deviations from absolute population equality. Voinovich v. Quilter, 507 U.S. 146, 160-62 (1993). In this Circuit, the appropriate standard was set forth in Rodriguez v. Pataki 02 Civ. 618, 02 Civ. 3239 when the Court recited:

> In Brown v. Thomson, 462 U.S. 835, 842 (1983), the Court held that redistricting plans with a maximum population deviation below ten percent fall within the category of minor deviations that are insufficient to establish a prima facie violation of the Equal Protection Clause. "Thus, a redistricting plan with a maximum deviation below ten percent is prima facie constitutional and there is no burden on the State to justify that deviation." Marylanders for Fair Representation, Inc., v. Schaefer, 849 F. Supp 1022, 103 (D. Md. 1994) (three-judge court); et al. at Page 26.

In Burns v. Richardson 86 S.Ct. 1286 (1966), the Supreme Court upheld an apportionment scheme of the bicameral legislature in Hawaii on the basis of citizenship rather than on the basis of total population. Justice Brennan noted that:

> Neither in Reynolds v. Sims nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. (fn21) The decision to include or exclude any such group involves choices about the nature of the representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids, cf., e.g., Carrington v. Rash, 380 U.S. 89, the resulting apportionment base offends no constitutional bar, and compliance with the rule established in Reynolds v. Sims is to be measured thereby. Page 92

The illustrative district plan presented to the Court may satisfy the traditional standard on the basis of total population, since no individual Trustee district has a deviation from the mean in excess of ten (10%) percent of the total population. However, Professor Morrison testified to serious vote devaluation resulting from the illustrative district. (Trial Transcript pages 1435 – 1445). He testified that District 4, the proposed minority district had a "one person/1.7 vote" (Tr. 1437) utilizing Citizen Voting Age Population (CVAP). Dr. Morrison testified that using Dr. Beveridge's estimate of population for 2006, the deviation from the mean in CVAP for the Government's plan A would be 87.4 percent. (Trial Transcript pg. 467. Lines 23-25)

In 2001 in a dissent from a denial of certiorari of the City of Houston redistricting plan in Chen v. City of Houston, 532 U.S. 1046 (2001), Justice Clarence Thomas wrote:

> I would grant certiorari on petitioners' one-person, one-vote claim, which asks what measure of population should be used for determining whether the population is equally distributed among the districts. In Reynolds v. Sims, 377 U.S. 533 (1964), this Court held 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." Id., at 577; see Avery v. Midland County, 390 U.S. 474 (1968) (applying Reynolds' one-person, one vote holding to districting for the selection of local governmental representatives)...Having read the Equal Protection Clause to include a "one-person, one-vote" requirement, and having prescribed population variance that, without additional evidence, often will satisfy the requirement, we have left a critical variable in the requirement undefined. We have never determined the relevant "population" that States and localities must equally distribute among districts.
>
> Such a determination might be dispositive of whether the city has violated the Equal Protection Clause. If "population" means "total population," the district in the city's 1997 plan had a less than 10% population variance. If, however, it means "citizen voting age population,", the maximum deviation is allegedly anywhere from 20% to 32.5% . . . The Fifth Circuit in the case held the decision as to which population figures to use was "a choice left to the political process." 206 F.3d 502, 523 (2000). Likewise the Fourth Circuit has held that the decision whether to use total population or voting age population is a political choice generally not reviewable by courts. Daly v. Hunt 93 F.3d 1212, 1227 (1996).
>
> ...The one-person, one-vote principle may, in the end, be of little consequence if we decide that each jurisdiction can choose its own measure of population. But as long as we sustain the one-person, one-vote principle, we have an obligation to explain to States and localities what it actually means. Chen v. City of Houston

New York's Constitutional provision specifies "inhabitants, excluding aliens" Article 3, Section 4 and 5, regarding use of citizenship for its redistricting of its Senate and Assembly. This provision survived a Constitutional challenge. WMCA v. Lomenzo 377 U.S.633, at 642, 646 (1964). Indeed, in this Circuit, a district plan which excluded prisoners was upheld on standing grounds, although Justice Feinberg, citing Burns v. Richarson noted that the underlying District Plan would survive an Equal Protection Clause challenge. Kaplan v. County of Sullivan 74 F.3rd 398 (2nd Cir. 1996).

Were CVAP used as the basis for equal apportionments of districts, it follows that a ten

(10%) safe harbor test for Constitutional compliance may apply. Indeed, a Court in this District undertook scrutiny sua sponte to ensure that a District Plan done on the basis of citizenship was not violative of the Fourteenth Amendment. WMCA v. Lomenzo 238 F. Supp. 916, 926-927. (1965).

Thus, by adopting a cumulative voting plan, Port Chester can avoid any potential challenges based on one-person, one-vote concerns, and this Court can avoid the legal question of whether dramatic CVAP deviations run afoul of the Equal Protection Clause.

Further, the evidence suggests that cumulative voting would actually *better* remedy the minority vote dilution complained of by plaintiffs. As detailed in the expert report of Dr. Richard Engstrom, the kind of districting plans suggested by plaintiffs would feature only one district in which Hispanic voters would have a reasonable opportunity to elect candidates of choice. Given the Village-wide HCVAP population, cumulative voting would likely provide an opportunity for Hispanic voters to elect *two* candidates of choice to the Village Trustee Board. *See* Mulroy, 77 NORTH CAROLINA L. REV. at 1882 (discussing a hypothetical remarkably similar to the instant case).

More fundamentally, cumulative voting would afford an opportunity to elect candidates of choice to *all* Hispanic voters in Port Chester, and not just those lucky enough to reside in the sole "opportunity to elect" district. Under the various remedial plans proposed by plaintiffs, 82% of the Village's Hispanic population lives outside the Hispanic-majority district, in districts small enough in HCVAP that they will likely not be able to elect candidates of choice. These Hispanics will have to be satisfied with what commentators and courts refer to as "virtual representation." That is, they will theoretically be represented by the candidate elected by Hispanic voters in the so-called HCVAP majority district. *See id.* at 1895-1896. Courts have

recognized such "virtual representation" as a necessary evil in district remedies to Section 2 cases. *See* Gomez v. City of Watsonville, 863 F.2d 1407, 1414 (9th Cir. 1988); Campos v. City of Baytown, 840 F.2d 1240, 1244 (5th Cir. 1988). Cumulative voting avoids this evil. In a cumulative voting system, *all* Hispanic voters in Port Chester will have a say in who represents them. Almost every one of them will be able to point to at least one sitting Board of Trustees member and say, "I voted for that person." More importantly, members of the Village Board of Trustees must be responsive to the will of all such voters, because all such voters are their constituents.

Cumulative voting has several other "good government" advantages over single-member-district schemes. It promotes ideological, partisan, and gender diversity as well as racial and ethnic diversity; a more accurate reflection of the popular will; and enhanced competitiveness, which in turn will lead to enhanced voter turnout. *See* Mulroy, *Alternative Ways Out*, 77 North Carolina L. Rev. at 1891-1894 (providing sources).

B. Administrative Practicalities Warrant An At-Large System

Separate and apart from all these compelling legal and policy rationales, the Village's preference for cumulative voting is justified simply by the practical concerns involved in implementing a districting system in a village as small as Port Chester. As a practical matter, jurisdictions small in area which use cumulative voting save the trouble and expense of drawing district boundaries, setting up and staffing multiple polling places, and redrawing district boundaries every ten years after the Census. *See id.*, 77 NORTH CAROLINA L. REV. at 1883 & n.83.

Indeed, the district court in Collier v. City of St. Martin opted for a cumulative voting

remedy for this very reason. 475 F. Supp.2d 932 (D.S.D. 2007). In that case, the court found that a small South Dakota town's at-large voting system diluted the voting strength of the town's Indian residents, violating Section 2. Id. at 936. The defendant stayed silent on remedy, and the plaintiffs submitted both a single-member-district option and a cumulative voting option. Id. The court reasoned that because of the small geographic area of the town, it was not practical to draw 6 districts. Id. at 940-941. In addition, the small population of each such district raised the question of whether sufficient candidates could reliably be found in each district for each election. Id. Therefore, the court chose a cumulative voting remedy. Id.

C. Even If Cumulative Voting Were Somehow Legally Infirm, This Court Should Consider Alternatives Which Retain An At-Large System

Clearly, unless the local legislative body's proposed remedial plan violates the Voting Rights Act, the Constitution, or some other federal law, the district court must adopt it, and its refusal to do so is reversible error. *See, e.g.,* McGhee 860 F.2d at 115; Seastrunk 772 F.2d at 151; Harper 223 F.3d at 601. Even if the plan proposed by the defendant jurisdiction does *not* adequately remedy the Voting Rights Act violation, the district court must still defer to the legislature. The Court must fashion a remedy that changes the defendant's proposed plan as little as possible, and which is in accords with the stated policy preferences of the legislative body as much as possible. White v. Weiser, 412 U.S. 783, 793-796 (1973); Whitcomb v. Chavis, 403 U.S. 124, 160-161 (1971); Harper, 223 F.3d at 601; Cottier, 445 F.3d at 1123.

In Cook v. Luckett the Fifth Circuit agreed with the district court that the defendant's redistricting plan, proposed as a remedy to a Section 2 violation, had impermissible deviations from the one-person, one-vote standard. 735 F.2d at 920-921. Nonetheless, it reversed the district court for rejecting the defendant's plan wholesale, when the vote devaluation could have

been corrected with only "slight deviations" in defendant's proposed district lines. Id. The Fifth Circuit so held even though it acknowledged that the defendant's proposed district lines were oddly shaped and poorly designed, explaining that federal courts could only ensure compliance with the Voting Rights Act, and could not delve into matters of policy. Similarly, in Cane the Fourth Circuit rejected a district court's adoption of a cumulative voting plan over a single-member district remedy. It did so not out of any criticism of cumulative voting, but rather simply because the defendant jurisdiction preferred a district remedy. 35 F.3d at 927-929, *citing* McGhee v. Granville County 35 F.3d at 927-929 (rejecting a court-imposed "limited voting" remedy because the defendant jurisdiction's proffered district remedy did not violate federal law).

In like manner, if this Court were to find fault with some feature of the Village's proposed remedial plan, it should fashion a remedy which respected the Village's preference for at-large elections.

CONCLUSION

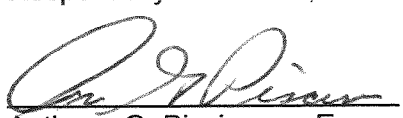
Cumulative voting with the elimination of staggered terms is the preferred remedy of the Village. The Village is also proposing a strong educational component to the plan. Dr. Engstrom concluded that this plan will remedy the Section 2 violation found by the Court.

A cumulative voting plan will not devalue or over value the votes of any voter in the Village. Hispanics in the Village will have the opportunity to vote for their preferred candidate of choice Village-wide.

Cumulative voting will not subject the Village to lawsuits regarding vote devaluation or the drawing of district lines.

Finally, the proposed cumulative voting system will retain the at-large component of the Trustee elections present since the inception of the Village in 1868.

Respectfully Submitted,



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