UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA and CESAR RUIZ, Plaintiffs,	:	
v.	:	06 Civ. 15173 (SCR)
VILLAGE OF PORT CHESTER, Defendant.	:	

MEMORANDUM OF LAW
OF THE UNITED STATES OF AMERICA
IN SUPPORT OF PLAINTIFFS' JOINT PROPOSED REMEDIAL PLAN

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Plaintiff United States of America respectfully submits this memorandum of law in support of the remedial districting Plan proposed by the United States and as agreed to by plaintiff Cesar Ruiz (the "Joint Proposed Remedial Plan") to remedy defendant Village of Port Chester's violation of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973.

Preliminary Statement

The Court's Decision and Order of January 17, 2008, finding that Port Chester's at-large system of election violates Section 2 of the Voting Rights Act, promises finally to set Port Chester on the road to achieving full electoral and political participation for all of its citizens. The Court should order that a district plan be implemented to remedy Port Chester's violation of the Voting Rights Act. The overwhelming weight of precedent under Section 2 of the Voting Rights Act establishes that a district system of election – the same system used to elect all members of the United States House of Representatives, the New York State Assembly, the New York State Senate, the Westchester County Board of Legislators, and countless towns and cities throughout New York State, including New York City, Yonkers, and New Rochelle – is the preferred alternative under the law to Port Chester's at-large system of elections. As demonstrated at the preliminary injunction hearing and the trial of this matter, a district can be readily drawn in which Hispanics constitute a majority of the citizen voting age population, thereby curing Port Chester's violation of the Voting Rights Act.

Port Chester apparently intends to argue that a district plan should not be adopted or imposed. The six districts contained in the Joint Proposed Remedial Plan, the same plan offered for illustrative purposes by the United States at the preliminary injunction hearing and at trial, have roughly equal total populations. Port Chester, however, will suggest that it is not enough

for districts to have equal total populations because they must also have equal numbers of citizens. Consistent with its advocacy of this "vote devaluation" argument, Port Chester appears intent upon retaining its at-large system of election, and proposing cumulative voting for that flawed system rather than proposing a district plan.

Every part of Port Chester's argument and remedy has been soundly rejected by every appellate court to have addressed them. Every appellate court to consider the issue has rejected the argument that total population is an improper basis – or that citizen population is the only proper basis – on which to construct electoral districts. Even Port Chester's own experts conceded at trial that total population was the appropriate basis upon which election districts are drawn around the country. In addition, appellate courts have rejected the use of cumulative voting as a remedy for a violation of Section 2 the Voting Rights Act. Indeed, whatever the merits of cumulative voting may be, even its proponents identify it as an appropriate remedy for nonpartisan election systems held in municipalities wherein the minority population is widely dispersed, the very opposite of the case in Port Chester. The Court should reject a cumulative voting system for Port Chester and order the creation of election districts, the traditional remedy for violations of Section 2 of the Voting Rights Act, and order that the special election be conducted pursuant to the Joint Proposed Remedial Plan.

ARGUMENT

POINT I

THE COURT SHOULD ADOPT THE JOINT PROPOSED REMEDIAL PLAN TO REMEDY PORT CHESTER'S VIOLATION OF THE VOTING RIGHTS ACT

After a Section 2 violation has been found, the defendant should be given the first opportunity to propose a legally acceptable remedy in the form of a districting plan. See Reynolds v. Sims, 377 U.S. 533, 586 (1964). Where the defendant fails to propose a districting plan or responds with a legally unacceptable remedy, the responsibility falls on the district court to fashion an appropriate remedial plan. See Wise v. Lipscomb, 437 U.S. 535, 539-40 (1978); Chapman v. Meier, 420 U.S. 1, 27 (1975). The primary obligation of the Court is to structure a lawful districting system that will, to the maximum extent possible, cure the proven vote dilution. See Dillard v. Crenshaw County, 831 F.2d 246, 252-53 (11th Cir. 1987) ("This Court cannot authorize an element of an election proposal that will not with certitude completely remedy the Section 2 violation."). In ordering a plan, courts must "exercise [their] traditional equitable powers to fashion . . . relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 417, 97th Cong., 2d Sess. 26, reprinted in 1982 U.S.C.C.A.N. 177, 208. Of course, any proposal to remedy a Section 2 violation must not itself violate Section 2. See Dillard v. City of Greensboro, 74 F.3d 230, 233 (11th Cir. 1996) ("[w]hen evaluating whether [a proposed plan] provides an adequate remedy for [a] section 2 violation, the district court must determine that the remedy itself satisfies section 2."); Crenshaw County, 831 F.2d at 249-50, 252; see also Bone Shirt v. Hazeltine, 461 F.3d 1011, 1022-23 (8th Cir. 2006); Westwego Citizens for Better Gov't v. City of Westwego, 946 F.2d 1109, 1124 (5th Cir. 1991).

The Joint Proposed Remedial Plan is identical to Modified Plan A, which the Court has already scrutinized, and complies with Section 2. Port Chester's cumulative voting proposal does not resolve its violation of Section 2.

A. Single-Member Districts Are the Presumptive Remedy Under the Voting Rights Act

The presumptive remedy for a violation of Section 2 of the Voting Rights Act is a district plan. See, e.g., Thornburg v. Gingles, 478 U.S. 30, 50 (1986); see, e.g., Goosby v. Town Bd. of Hempstead, 180 F.3d 476, 498 (2d Cir. 1999) ("We think that the six-district plan is an entirely appropriate remedy under the circumstances."); White v. Alabama, 74 F.3d 1058, 1071 n.43 (11th Cir. 1996) ("[T]he typical remedy for racial vote dilution yielded by at-large voting in a multi-member district is to divide the district into single-member districts if the plaintiff minority is sufficiently cohesive and compact to comprise a majority in one or more single-member districts."); Garza v. County of Los Angeles, 918 F.2d 763, 776 (9th Cir. 1990) ("The deliberate construction of minority controlled voting districts is exactly what the Voting Rights Act authorizes."). Consistent with the law, the United States proposes that the Court order Port Chester to adopt a plan with six single-member districts.

Where courts have found that an at-large system of election violates Section 2 of the Voting Rights Act, the law strongly disfavors a remedy that continues to use multi-member districts. District courts should not order remedial schemes which "perpetuate[] rather than ameliorate[] the inequities" of diluting minority votes through at-large voting. Dallas County Comm'n, 850 F.2d at 1440. The Supreme Court has expressly instructed that:

> Among other requirements, a court-drawn plan should prefer single-member districts over multimember districts, absent persuasive justification to the contrary. Connor v. Johnson, 402 U.S. 690, 692 (1971). We have repeatedly reaffirmed this remedial principle.

Wise, 437 U.S. at 540 (citing Connor v. Williams, 404 U.S. 549, 551 (1972); Mahan v. Howell, 410 U.S. 315, 333 (1973); Chapman, 420 U.S. at 18; East Carroll Parish School Bd. v. Marshall, 424 U.S. 636, 639 (1976); see also Bone Shirt, 461 F.3d at 1022-23 ("[T]he plan should be narrowly tailored, and achieve population equality while avoiding, when possible, the use of multi-member districts.") (additional citations omitted). Consequently, any effort by Port Chester to maintain its at-large system should be rejected.

B. The Joint Proposed Remedial Plan Is Properly Apportioned Under the Law

The United States respectfully proposes that the Court order Port Chester to implement the Joint Proposed Remedial Plan, which is identical to Modified Plan A, accepted into evidence at the trial of this matter. (PI Hng. 619:25–620:18; GX 28, received at 620:22-24; see also GX 33, received at PI Hng. 628:23-25) (The Joint Proposed Remedial Plan is attached as Exhibit 1 to the Declaration of Andrew A. Beveridge, Feb. 7, 2008 ("Beveridge Remedy Decl.").)

The single most important criterion in the drawing of election districts is equality in total population. Federal congressional districts must achieve population equality "as nearly as is practicable." Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964). The general rule is that state or other non-federal districts may have no more than a 10% total deviation in total population. See Brown v. Thomson, 462 U.S. 835, 842 (1983). In determining that the districts in Goosby were properly drawn, the district court in Goosby considered solely the total population, not the citizen population. See Goosby v. Town Bd. of Hempstead, 981 F. Supp. 751, 756 (E.D.N.Y. 1997), aff'd, 180 F.3d 476 (2d Cir. 1999). Similarly, under state law, "New York's legislative districts as well as its congressional seats are both apportioned based on the number 'of inhabitants of the state.'" Longway v. Jefferson Cty. Bd. of Sup'rs, 83 N.Y.2d 17, 628 N.E.2d 1316 (1993),

answering certified question, 995 F.2d 12 (2d Cir. 1993). Applying these principles, the most important criterion which the Joint Proposed Remedial Plan must meet is equality of total population among proposed election districts.

The Joint Proposed Remedial Plan creates six districts of roughly equal population "as nearly as is practicable." Wesberry, 376 U.S. at 7-8. As the Court has already found, "the proposed plans show very limited deviation in the total population among the six proposed districts based on data from the 2000 Census." (Decision and Order, Jan. 17, 2008 ("Decision") at 9.) The proposed districts range in total population from 4,575 (District 5) to 4,730 (District 3). (Beveridge Remedy Decl. Exh. 2.) The Court has previously found that "Modified Plan A therefore has a total deviation of 3.34 percent, again well within acceptable population deviation parameters." (Decision at 10.) Port Chester's own expert Dr. Peter Morrison conceded at the preliminary injunction hearing, "I have no problem with anything that Dr. Beveridge has done in any of these. They are all within the range of what they should be on total population." (PI Hng. 1439:2-4.) The Joint Proposed Remedial Plan, therefore, satisfies the most important criterion of population equality.

The Joint Proposed Remedial Plan would remedy Port Chester's violation of Section 2. As the Court has found, the Joint Proposed Remedial Plan includes a compact district with a 56.27% Hispanic CVAP for 2000, and an estimated 70.35% Hispanic CVAP for 2006. (Decision at 16; see also Beveridge Remedy Decl. Exh. 2.) At trial, Port Chester's own expert, Dr. Morrison, repeatedly conceded that as to Plan A as Modified, "I would not dispute the fact that Hispanics are a majority of the citizen voting age population in 2000." (PI Hng. 1390:15-16 (Morrison); id. at 1429:23–25 (same); id. at 1430:10-12 (same).) In fact, Dr. Morrison conceded

that "there is no question, that using [C]ensus 2000 data, the Hispanic citizen voting age majority in District 4, under Plan A as [M]odified, is greater than 50 percent." (PI Hng. 1456:6-10 (Morrison).) Because the Court has found that "Hispanics constitute a slight CVAP majority in District 4 under Plan A, and an even more substantial majority under Modified Plan A," (Decision at 20), the Joint Proposed Remedial Plan remedies the Section 2 violation.

Finally, the Joint Proposed Remedial Plan neither confines the Hispanic voting population into one district nor disperses it across multiple districts. In that regard, the Court has found that "[t]he proposed districts did not result in any impermissible packing or cracking of the Hispanic population of the Village." (Decision at 11.) Under the Joint Proposed Remedial Plan, there are three districts (Districts 3, 4, and 6) in which the Hispanic share of the total population, total VAP, and total CVAP is greater than in the Village as a whole, and an additional district (District 5) in which the CVAP is greater. (Decision at 11-12.) The Court also found that "the inter-district distribution of the Village's Hispanic population in both Plan A and Modified Plan A is well-balanced." (Decision at 12.) To the extent that Port Chester objects to the Joint Proposed Remedial Plan on the ground that it segregates the white and Hispanic populations into different districts, such a claim is inconsistent with the Court's findings.

In sum, the Joint Proposed Remedial Plan has already been scrutinized by the Court, and by Port Chester and its experts, and is an appropriate remedy for the Section 2 violation.

C. The Court Should Reject Port Chester's Argument That Differences in the Number of Eligible Voters Creates "Vote Devaluation"

At trial and in its post-trial brief, Port Chester objected to the creation of single-member districts on the grounds that doing so would lead to disparities in the citizen voting age population between districts, which Port Chester calls "vote devaluation." This argument should be rejected. Every appellate court to have considered this argument has rejected it, federal and state districts in New York State have comparable disparities in citizen voting age population, and even Port Chester's own experts admitted that single-member districts are drawn on the basis of total population, even if doing so creates disparities in citizen voting age populations.

At the outset, it is plain that drawing an election district using the criterion of total population can lead to imbalances when viewed through the prism of other criteria. Indeed, the Supreme Court recognized in Reynolds v. Sims, 377 U.S. 533 (1964), that "it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters." Id. at 577. As this Court observed in the course of listening to Prof. Morrison's testimony: "When you are trying to do what Dr. Beveridge has done here, it is difficult for me, as a lay person in this area, to imagine . . . that you could create districts that are equal in every single measurement that you want." (PI Hng. 1441:23 – 1442:2.)[1] Thus, despite the potential for imbalances in citizenship population, "the Supreme Court has consistently used total population figures, based on census data, to analyze one person, one vote cases." Daly v. Hunt, 93 F.3d 1212, 1222 (4th Cir. 1996). In Gaffney v. Cummings, 412 U.S. 735 (1973), for

[1] Anticipating Port Chester's dubious strategy, the Court continued, "Because, see, if the CVAP were roughly equal, then you will say, 'well, don't look at only the CVAP, look at the CVAP who are registered.' And if that was roughly equal, then you'll say, 'well, don't look at the CVAP who are registered, look at the CVAP who are registered and actually go and vote,' and those aren't equal. So, we can always break it down . . . ." (Hearing 1442:3–9.)

example, the Supreme Court used total population to analyze a legislative plan even while recognizing that "[t]he proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States." Id. at 746-47; Daly, 93 F.3d at 1224 (discussing Gaffney); Garza, 918 F.2d at 774 (same). Otherwise, defendants in Voting Rights Act cases could merely pick and choose among a host of measurements to obstruct any effort to draw election districts designed to comply with the Voting Rights Act.

1. Every Circuit Court That Has Considered the "Vote Devaluation" Claim Port Chester Makes Here Has Rejected It

Every Circuit court to have considered Port Chester's "vote devaluation" argument has rejected it. See Chen v. City of Houston, 206 F.3d 502, 522-28 (5th Cir. 2000) (noting that history of the Equal Protection Clause of the Fourteenth Amendment contemplated differences in citizenship rates between districts of equal population size);[2] Daly, 93 F.3d at 1227 (district court erred in "basing its one person, one vote analysis on voting-age population, rather than total population"); Garza, 918 F.2d at 773-75 (affirming district court's remedy against challenge that it was based on total population rather than citizen population) (citations omitted); see also Horsey v. Bysiewicz, No. 3:99 CV 2250 SRU, 2004 WL 725363 (D. Conn. Mar. 24, 2004) (three-judge panel) (Winter, C.J., Hall, D.J., Underhill, D.J.) ("While [plaintiff's] new evidence may support his argument that there is a disparity between citizenship and the allocation of congressional representatives among the fifty states, this disparity is sanctioned by the

[2] Port Chester has previously relied on Justice Thomas' dissent from the denial of certiorari in Chen, 532 U.S. at 1046 (denial of cert.) (Thomas, J., dissenting) (see, e.g., Trial 465:18–467:7). However, Justice Thomas suggested only that the Court should take up the issue and provide guidance as to whether total population or some other measure of population should be used. Id.

Constitution."). As a three-judge panel in the First Circuit recently summarized:

> We recognize that as a consequence, differences in the demography of districts may yield different effective weights for votes when, as is customarily the case, representational equality for purposes of the one-person, one-vote obligation is measured by total population and electoral equality for purposes of examining vote dilution is measured by some standard relating to voter qualification.
> . . . .
> [W]hen a citizenship qualification is considered, the effect is that even when total population is evenly-distributed among districts, fewer citizens of voting age would be needed to elect a representative in districts with disproportionately low CVAP numbers than in districts with higher CVAP numbers. Such consequences of using total population to measure representational equality and a different standard in the evaluation of the fairness of voting practices and procedures, however, have not yet prompted judicial disapproval.

Meza v. Galvin, 322 F. Supp. 2d 52, 61 n.11 (D. Mass. 2004) (three-judge panel) (emphasis added). Similarly, the New York Court of Appeals has explicitly rejected the suggestion that differences in the number of eligible voters created by drawing populations on the basis of total population are improper:

> [w]hile it is virtually inconceivable that, for voting purposes, a court would question the principle that any citizen's vote must be equal to that of any other citizen, apportionment itself involves the application of different standards. In Reynolds v. Sims, the Supreme Court stated, "We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters."

Longway, 83 N.Y.2d at 24 (citations omitted).[3] Disparities in citizen population between

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[3] The Supreme Court has permitted a state to draw districts based upon citizenship rather than total population in the unusual instance of Hawaii in the 1960s, in which large portions of the population consisted of military personnel and tourists. See Burns v. Richardson, 384 U.S. 73, 94 (1966). Hawaii no longer draws districts on the basis of citizenship, but relies instead on total population for congressional apportionment, and total permanent resident population for state apportionment. See http://www.hawaii.gov/elections/maps/redistricting/Red_crit.pdf.

Drawing districts on a basis other than total population, such as registered voters, is permissible as a surrogate basis for estimating total population. See Travis v. King, 552 F. Supp. 554, 568 (D. Haw. 1982). Of course, Port Chester is making the opposite claim here – that the citizen population distribution differs dramatically from total population distribution.

districts, therefore, are no basis to reject a district-based remedy.[4]

As many courts have noted, drawing election districts based on total population is appropriate: "Indeed, the Supreme Court has indicated that apportionment systems based on total population, without regard to voter eligibility, are constitutional." Meza, 322 F. Supp. 2d at 60 (citing Burns, 384 U.S. at 92; Garza, 918 F.2d 763). Similarly, a three-judge panel in the Second Circuit has rejected an argument that differences in the number of citizens between election districts violated the law because "the Fourteenth Amendment uses both terms in a manner suggesting that 'persons' comprises a broader category of people that includes both citizens and non-citizens." Horsey, 2004 WL 725363, at *5. There is no meritorious objection, therefore, to districts drawn on the basis of total population.

[4] The lone supporter in the judiciary of Port Chester's argument is Judge Kozinski of the Ninth Circuit, who has suggested that drawing districts by population, rather than citizen population, violates the theory of electoral equality. See Garza, 918 F.2d at 781 (Kozinski, J., concurring and dissenting in part). No other Circuit has adopted Judge Kozinski's logic. See id. at 776 ("Adoption of Judge Kozinski's position would constitute a denial of equal protection to these Hispanic plaintiffs and rejection of a valued heritage."); see also Chen, 206 F.3d at 528 (assessing and rejecting Judge Kozinski's view); Daly, 93 F.3d at 1225 ("In sum, this court disagrees with Judge Kozinski's opinion in Garza . . . ."). Indeed, even Judge Kozinski was equivocal about his own conclusion: "All that having been said, I must acknowledge that my colleagues may ultimately have the better of the argument. We are each attempting to divine from language used by the Supreme Court in the past what the Court would say about an issue it has not explicitly addressed." Garza, 918 F.2d at 785.

2. Federal and State Districts in New York Are Based on Total Population Notwithstanding Disparities in Citizenship

Port Chester's "vote devaluation" argument has not only been routinely rejected by the courts, but it has also been rejected by federal, state, and county legislatures, and similarly situated municipalities such as Yonkers and New Rochelle, in the course of drawing district lines. In Rodriguez v. Pataki, 308 F. Supp. 2d 346 (S.D.N.Y. 2004) (three-judge panel) (Walker, C.J., Koeltl, J., Berman, J.), a three-judge panel of the Second Circuit noted, in evaluating a challenge to the apportionment of state legislative districts, that "total population figures are the generally accepted basis for redistricting calculations" in New York State, and did not find it constitutionally problematic that the use of total population resulted in districts that contained disparate ratios of citizens to non-citizens, see id. at 369-70, including legal non-citizens.

Indeed, if Port Chester's argument is correct, then every district in New York State must be redrawn. While population deviation among districts is always less than 10%, CVAP deviation among districts is generally higher. The United States House of Representatives, for example, is elected by individual districts strictly drawn on the basis of population. U.S. Const. amend. XIV, § 2. Applying Dr. Morrison's criterion of analyzing (and criticizing) deviations in CVAP between districts, Prof. Beveridge has calculated that while the population deviation among House of Representatives districts is actually 0.00%, the CVAP deviation is 41.47%. (Beveridge Remedy Decl. Exh. 3, tbl. 1.) Similarly, the population deviation among New York State Senate districts is 9.78%, but the CVAP deviation is 63.07%. The population deviation among New York State Assembly districts is 9.43%, while the CVAP deviation is 75.79%. (Id. Exh. 3, tbls. 2 & 3.) For the Westchester County Board of Legislators, the population deviation is 5.22% but the CVAP deviation is 38.73%. (Id. Exh. 3, tbl. 6.) As for municipalities in New

York State, the population deviation among New York City's City Council districts is 9.99% while the CVAP deviation is 74.54%, and the population deviation among Yonkers City Council districts is 7.54% while the CVAP deviation is 48.17%. (Id. Exh. 3, tbl. 7 & 5.) In fact, the population deviation among New Rochelle Council Districts is 6.46% while the CVAP deviation is 40.11% (id. Exh. 3, tbl 4), on the basis of a district plan approved in this very courthouse. See New Rochelle Voter Defense Fund v. City of New Rochelle, 308 F. Supp. 2d 152, 163-64 (S.D.N.Y. 2003).

Accordingly, Port Chester's claims that the CVAP deviations of the Joint Proposed Remedial Plan are unprecedented or severe bear no relationship to the facts.[5] If Port Chester's "vote devaluation" argument is meritorious, then the United States House of Representatives, the New York State Assembly and Senate, the Westchester County Board of Legislators, New York City, Yonkers, New Rochelle, and countless other New York localities (not to mention thousands of federal, state, and local districts across the country) are all wrongly apportioned. And not only is every district in the State of New York malapportioned, under Port Chester's logic, because they include legal non-citizens in their population base, these districts are even more malapportioned because their population base includes children, who are ineligible voters present

[5] Port Chester has gone so far as to call a district with a majority Hispanic CVAP a "rotten borough." (Port Chester Post-Trial Brief, July 9, 2007, at 23.) Port Chester's analogy, however, is grossly inapt. Until the early nineteenth century, the British Parliament was full of constituencies, often bestowed as royal favors, representing estates and not people. See, e.g., William Makepeace Thackeray, Vanity Fair ch. VII (1848). There is little comparison between handing out power to landed aristocrats and remedying a discriminatory voting system.

Moreover, the problem with "rotten boroughs" was that parliamentary constituencies were not drawn based on total population, nor updated by a Census. See Reynolds, 377 U.S. at 568 n.44 ("Parliamentary representation is now based on districts of substantially equal population, and periodic reapportionment is accomplished through independent Boundary Commissions."). As the Joint Proposed Remedial Plan is based on Census figures of total population (which is what Port Chester is complaining about), the comparison is specious.

in even larger numbers than non-citizens.[6] As this analysis demonstrates, Port Chester's objections concerning the drawing of districts have simply no basis in law or fact.

Port Chester's argument against election districts, moreover, embodies a striking contradiction. Port Chester lies within the 18th New York federal congressional district, the 37th State Senate district, the 91st State Assembly district, and the 7th Westchester County legislative district. ((Kennedy Remedy Decl. Exh. 1 (Pilla Dep.) at 153:1 – 156:24 (naming representatives for several of these districts).) Every one of these districts has a lower CVAP than the average. (Beveridge Remedy Decl. Exh. 3, tbls. 4, 5, 6, & 9.) Consequently, Port Chester has, since at least 2000 (the year the last decennial Census was conducted), relied on its disproportionately larger share of legal non-citizens to obtain representation and population-based funding at the federal and state levels. Yet Port Chester wants to take the very same people who were included

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[6] As the Court observed in its questioning of Prof. Morrison:

> And so what we have are districts that are created based on population. That's what we have always done.
>
> And yes, could I then say, "I'll take you down a category, I'll take you down a category until you get to one where the numbers are no longer equal?" Of course, because populations have different levels of childbirth, which will affect it.
>
> Population would be equal, but population of voting age would be different, because in one community you have 1.3 kids per family; in the other community you have four kids per family, so they will have a larger population, smaller population of voting age, because there are a lot of kids.

(PI Hng. 1442:15–1443:2); see also Daly, 93 F.3d at 1228 (rejecting voting age population as an appropriate criteria because "using voting-age population as the apportionment base would ignore the voting strength of those persons who are between the ages of 8 and 17 at the time of the apportionment, but who would become eligible to vote before the next apportionment"). Yet excluding legal non-citizens from the population while including children is particularly arbitrary; while there is nothing a five-year-old counted in the 2000 Census can do to be eligible to vote by the time he or she is counted in the 2010 Census, a legal non-citizen could naturalize and register within that time.

for purposes of determining Port Chester's representation in the House of Representatives, the New York State Assembly and Senate, and the Westchester County Board of Legislators, and now exclude them for purposes of allocating power within its boundaries.

3. Port Chester's Own Experts Conceded That Districts Are Based on Total Population Notwithstanding Disparities in Citizenship

Nor does Port Chester's "vote devaluation" argument find support in the opinions of its own experts. Professor Beveridge testified that "I don't know of any districting that's ever been done in the United States that doesn't really use total population." (PI Hng. 600:1-3.) Port Chester's own expert Dr. Keith Gaddie agreed, testifying in his deposition that districts in the United States are usually drawn "on the basis of total population." (Kennedy Remedy Decl. Exh. 2 (GX 91 (Gaddie Dep. 178:15–181:4).) Even Port Chester's expert who calculated the numbers underlying Port Chester's "vote devaluation" argument, Dr. Peter Morrison, conceded on the witness stand that "districts are drawn on the basis of total population," explaining that

> It may devalue votes, it may over or undervalue the votes of citizens in one or another district. But it assures that every living person, adult or child, immigrant or nonimmigrant, citizen or noncitizen, has roughly equal access to one representative. That's what the total population criterion does.
>
> . . . .
>
> That's a good thing according to somebody who designed our system to do that.

(Trial 468:18–469:3 (Morrison)). In sum, Port Chester's argument against the Joint Proposed Remedial Plan is meritless.[7]

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[7] Port Chester's denial that the law applies to it, just as it does throughout the rest of the country, is reminiscent of its counsel's request, made at a public hearing on the United States' proposed remedial plans, that Port Chester's representatives in Congress seek to amend the Voting Rights Act to exclude Port Chester. (GX 102 (42:45–43:55). (See Decision at 32.)

POINT II

PORT CHESTER'S CUMULATIVE VOTING PROPOSAL IS NOT AN APPROPRIATE REMEDY

The United States anticipates that, rather than submit its own districting plan, Port Chester will seek to resolve this lawsuit by requesting that the Court order it to retain its at-large system, but with the use of cumulative voting. Under cumulative voting, each voter has as many votes as there are positions open, and may divide his or her votes as he or she sees fit. See Richard Briffault, Review: Lani Guinier and the Dilemmas of American Democracy, 95 Colum. L. Rev. 418, 432 (1995) (hereinafter "Briffault"). In this case, for example, using turnout figures from the most recent November Presidential election, five Trustee slots would be open at one time, and a Port Chester resident would be free to cast five votes for one candidate, one vote for each of five candidates, or any other combination thereof.[8]

As a preliminary matter, the Court should not impose this remedy where there is a perfectly adequate remedy at hand. Courts may not order multi-member districts, as Port Chester proposes, "'absent insurmountable difficulties' in using single-member districts." Chapman v. Meier, 420 U.S. 1, 18 (1975) (quoting Connor v. Johnson, 402 U.S. 690, 692 (1971)); see McDaniel v. Sanchez, 452 U.S. 130, 139 (1981) (same)). Port Chester's concern about "vote devaluation" is not an "insurmountable difficulty." It is also unclear why the Court should be

[8] If Port Chester were to adopt a cumulative voting system, at least five seats would have to be up for election at any one time. To ensure that the minority population in a cumulative voting scheme has an opportunity to elect a candidate of their choice, the minority population must be greater than 1 over n+1, where n = the number of seats up for election. See Steven J. Mulroy, The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies, 33 Harv. C.R.-C.L. L. Rev. 333, 342 (1998) (hereinafter "Mulroy"). Hispanics in Port Chester are approximately 17% of the citizen voting age population as of Census 2000; thus at least five seats must be up for election at any one time. (1 over (5+1) equals 16%.)

asked to impose such an unusual remedy. FairVote claims that "[c]umulative voting is currently used in several states across the nation. At least sixty-four jurisdictions have adopted cumulative voting," referring to the FairVote website. (FairVote Brief, filed June 14, 2007, at 9.) The website demonstrates, however, that of these "sixty-four jurisdictions," thirty-five are Texas school boards, another seventeen are Texas city councils, and the rest are sparsely distributed across only four other states: six in Alabama, three in South Dakota, and one each in Illinois and West Virginia. See **http://www.fairvote.org/?page=243.** Single-member districts, by contrast, are overwhelmingly the most commonly used method of election, and the preferred remedy in Voting Rights Act cases, across the country, as even FairVote concedes. (FairVote Brief at 3 (single-member districts are "[t]he traditional, and most popular, remedy for Section 2 violations").)

A. Cumulative Voting Schemes Have Not Yet Survived Appellate Review

Circuit courts have consistently rejected cumulative voting as a remedy to a Section 2 violation. See Dillard v. Baldwin Cty. Comm'rs, 376 F.3d 1260, 1268 (11th Cir. 2004) (affirming district court's rejection of cumulative voting for election of Alabama county commissioners); Harper v. City of Chicago Heights, 223 F.3d 593 (7th Cir. 2000) (reversing district court for ordering cumulative voting for election of city council members as abuse of discretion); Cousin v. Sundquist, 145 F.3d 818, 829 (6th Cir. 1998) (reversing district court for ordering cumulative voting for election of Tennessee county judgeships); Cane v. Worcester Cty. Comm'n, 35 F.3d 921, 923 (4th Cir. 1994) (reversing district court for ordering cumulative voting for Maryland county board as abuse of discretion); LULAC v. Clements, 999 F.2d 831, 876 (5th Cir. 1993) (en banc) (rejecting cumulative voting as one among "unconventional

electoral methods that preserve at-large voting").[9]

Indeed, the United States is aware of only one case in which the district court ordered cumulative voting, and that ruling has not yet been tested on appeal. See Cottier v. City of Martin, 475 F. Supp. 2d 932 (D.S.D. 2007), appeal pending 07-1628 (8th Cir.).[10] Cottier notes, however, that deviation from district-based remedies requires "rare or exceptional circumstances." Id. at 940. While it is possible that "rare or exceptional circumstances" exist in the City of Martin, a city of one thousand people concentrated in half a square mile in which the Native American minority is dispersed throughout the city, id. at 941, Port Chester cannot make a comparable showing.

Courts reject cumulative voting because it is not a generally accepted voting scheme under the law of the state in which suit was brought. See, e.g., Dillard, 376 F.3d at 1268 ("The federal courts have no authority to conjure up such an election scheme and impose it on a state

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[9] Cumulative voting supporters point to Justice Thomas' statement in Holder v. Hall, 512 U.S. 874 (1994), that, "[N]othing 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 § 2, or even from establishing a more elaborate mechanism for securing proportional representation based on transferable votes." Id. at 910.

Yet to read this statement as an unqualified endorsement of cumulative voting (as does FairVote, see FairVote Brief at 13) ignores its context. Justice Thomas goes on to say that, "In principle, cumulative voting and other non-district based methods of effecting proportional representation are simply more efficient and straightforward mechanisms for achieving what has already become our tacit objective: roughly proportional allocation of political power according to race." Holder, 512 U.S. at 912; see Cousin, 145 F.3d at 831 (placing Justice Thomas' Holder concurrence in proper context).

FairVote also points to a favorable reference to cumulative voting in a concurring opinion in Branch v. Smith, 538 U.S. 254 (2003) (FairVote Brief at 13). However, that case involved the redistricting of congressional districts pursuant to 2 U.S.C. § 2c.

[10] FairVote asserts that "the Circuit courts are split" on cumulative voting, stating that the Eighth Circuit approved cumulative voting in Cottier, 445 F.3d at 1123. (FairVote Brief at 13-14.) This is incorrect, see Cottier, 445 F.3d at 1123; the subject of the current appeal is whether cumulative voting is an appropriate remedy.

government, regardless of the theoretical prospect of increasing minority voting strength."); Harper, 223 F.3d at 602 (cumulative voting inappropriate given city's preference for districts); Cane, 35 F.3d at 928 (noting that in fashioning a remedy, the court "must to the greatest extent possible give effect to the legislative policy judgments underlying the current electoral scheme"). The United States is unaware of any basis for cumulative voting under New York law. Instead, representatives in New York are elected by districts or at large.[11]

Courts have also rejected cumulative voting as inconsistent with the Voting Rights Act in other contexts. See, e.g., Cousin, 145 F.3d at 829 (cumulative voting "is an inappropriate remedy for a Section 2 claim" challenging the election of Tennessee county judges); see also LULAC, 999 F.2d at 876 ("Limited and cumulative voting are election mechanisms that preserve at-large elections. Thus, they are not 'remedies' for the particular structural problem that the plaintiffs have chosen to attack.") (rejecting challenge to system of electing Texas judges). The possibility that cumulative voting may be adopted by agreement between the parties, rather than imposed by the Court, is irrelevant. See Dillard v. Chilton Cty. Comm'n, 447 F. Supp. 2d 1273, 1277 (M.D. Ala. 2006) ("[S]ettlement or not, consent decree or not, the court has no authority to impose a remedy not authorized by the Voting Rights Act."); see also Dillard v. Chilton Cty. Comm'n, 447 F. Supp. 2d 1280, 1281 (M.D. Ala. 2006) (noting that while cumulative voting did not inherently violate § 2, cumulative voting system "cannot withstand a § 2 challenge by third-party intervenors"). Thus FairVote's claim that "[c]ourts uniformly allow these types of consent decrees" (FairVote Brief at 6) is wrong. Because the remedy of cumulative voting is not appropriate under the law in this case, a third-party intervenor or challenger to a consent decree

[11] The Second Circuit has not directly addressed the issue, but noted that, at least under Hempstead's election scheme, "cumulative voting[] is prohibited." Goosby, 180 F.3d at 485.

involving cumulative voting could potentially have a meritorious challenge to the system that would delay the remedy in this case for years to come.

This is not to say that cumulative voting would never be an appropriate remedy in a § 2 case. In several of the cases cited above, the Justice Department noted that cumulative voting is not outright improper to remedy a Section 2 violation. See, e.g., Harper, 223 F.3d at 602 (noting Justice Department's position on cumulative voting); see also FairVote Brief at 10 (same). Of course, the courts did not agree that cumulative voting was appropriate in those cases. See, e.g., Harper, 223 F.3d at 602. FairVote also improperly conflates election schemes that the Department has not objected to in the preclearance process versus remedies that it has endorsed. (FairVote Brief at 10-11 and Exhibits.) In this case, cumulative voting is plainly not a viable alternative for Port Chester compared to the presumptive remedy of single-member districts.

B. None of the Factors Typically Favoring Cumulative Voting Apply to Port Chester

The FairVote brief also states that "cumulative voting would be an effective remedy for the Village of Port Chester" (FairVote Brief at 7) without offering any analysis, statistical or otherwise, as to why that would be the case. FairVote reiterates the convenient fiction that in Port Chester, "Hispanics are dispersed throughout the village." (FairVote Brief at 2.) That is plainly wrong. Hispanics are not geographically dispersed – to the contrary, the experts in this case agreed that Port Chester was moderately to highly segregated. (PI Hng. 1491:16–1492:24 (Morrison) (Port Chester has a "moderately high" level of segregation); see also PI Hng. 408:7 (Smith) ("this is a very segregated town").) A map of the Hispanic concentration in Port Chester by Census block makes the point even more clear. (See GX 3.)

There are also practical concerns with the use of cumulative voting in Port Chester. As

the Court has noted, Port Chester has maintained that "given time and assuming the continued growth of the Hispanic population of the Village, the Hispanic community could come to dominate the political landscape in Port Chester even under the current at-large system." (Decision at 56.) Yet commentators have noted that cumulative voting tends to produce one, but only one, heavily supported minority candidate. See, e.g., Briffault, supra, at 437. In the context of a steadily increasing Hispanic population in Port Chester, cumulative voting could restrain the ability of Hispanics to elect more than one Hispanic-preferred Trustee. For these reasons, the United States respectfully submits that cumulative voting is not appropriate in this case.

POINT III

THE COURT SHOULD ORDER THE REMEDIAL PLAN IMPLEMENTED AND AN ELECTION CONDUCTED PURSUANT TO THAT PLAN

As an initial matter, to fully cure the violation found here, Port Chester should be required to promptly implement a plan which provides Hispanic voters an equal opportunity to elect candidates of their choice. Until a district plan containing a district in which Hispanic voters have the opportunity to elect a representative of their choice (District 4 under Prof. Beveridge's plans) has been implemented, a complete remedy will not be achieved.

Although this Court's preliminary injunction delayed elections in only the two seats scheduled in 2007, the United States proposes that all Trustee seats should be held open for election in a 2008 special election under the new plan. The general approach in federal voting cases striking down an at-large system in favor of a single-member districting plan is to have all positions under the new district voting plan open in the first election held under the new plan. See Dallas County Comm'n, 850 F.2d at 1442 (remanding case to district court for the sole purpose of directing the Dallas County Commission to conduct elections for all five county

commission seats); McMillan v. Escambia Cty., 688 F.2d 960, 971 (5th Cir. 1982) (affirming district court's remedial plan requiring that all five county commission seats be open for election and approximating staggered terms by providing that three of the new commissioners serve four-year terms and two serve two-year terms), vacated on other grounds, 466 U.S. 48 (1984); United States v. Charleston County, No. 2:01-0155-23, 2003 WL 23525360, at *4 (D.S.C. Aug. 14, 2003) (requiring that all nine county council seats be held open for primary and general elections; alternatively, permitting county to implement staggered election schedule so long as all majority-minority districts are up for election at first opportunity); County Council of Sumter County v. United States, Civ. No. 82-0912 (D.D.C 1984) (three-judge court) (after court denied preclearance for County's at-large method of election, state assembly provided that all seats on the County Council be open in the next election); but see McGhee v. Granville Cty., 860 F.2d 110, 114 n.4 (4th Cir. 1988) (affirming district court's refusal to open all seats in the next election).

To avoid unnecessary disruption to the Village's staggered term structure, the United States proposes that, following the 2008 special elections, Port Chester should return to its regular schedule of staggered terms. Accordingly, following the 2008 special elections in which all commission seats would be up for election, seats for Districts 1 and 2 would be up for election again in 2009; seats for Districts 3 and 4 would be up for election again in 2010; and seats for Districts 5 and 6 would be up in 2011.

Conclusion

For the foregoing reasons, the Court should order that Port Chester implement the Joint Proposed Remedial Plan to conduct elections to its Board of Trustees.

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Respectfully submitted,

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