

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

v.

06 CV 15173 (SCR)

VILLAGE OF PORT CHESTER,

Defendant.

-----X

**DEFENDANT'S MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFF'S MOTION
FOR A PRELIMINARY INJUNCTION**

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TABLE OF CONTENTS

Preliminary Statement1

Statement of Facts3

A. Background.....3

B. Port Chester System of Government and Elections3

C. Port Chester’s Alleged Failure to Comply with the Voting Rights Act4

ARGUMENT

PLAINTIFF’S REQUEST FOR A PRELIMINARY INJUNCTION ENJOINING THE VILLAGE’S MARCH, 2007 TRUSTEE ELECTIONS SHOULD BE DENIED.....4

A. Alleged Violation of the Right to Vote Does Not Constitute Irreparable Harm in This Instance5

B. The Plaintiff Is Not Substantially Likely to Succeed on the Merits of its Claims that Port Chester’s At-Large System Violates Section 2 of the Voting Rights Act8

1. Plaintiff is Unable to Meet its Burden of Proof that the Minority Group is Sufficiently Large and Geographically Compact to Constitute a Majority in a Single-Member District9

2. The Hispanic Population in Port Chester is Not Politically Cohesive11

3. The Majority Does Not Vote Sufficiently as a Bloc to Enable it to Affect the Minority’s Preferred Candidates 12

4. Under the Totality of the Circumstances, Port Chester’s At-Large System Does Not Violate the Voting Rights14

C. Plaintiff Fails to Meet the Threshold for a Violation of Subsection (a) of 42 U.S.C. § 1973 (“Section 2”) 23

Conclusion.....24

TABLE OF CASES

<u>Baird v. Consolidated City of Indianapolis</u> , 976 F.2d 357, 360 (7 th Cir. 1992).....	14
<u>Chisom v. Roemer</u> , 853 F.2d 1186, 1189 (5 th Cir. 1988).....	7
<u>Clay v. Bd. of Educ.</u> , 90 F.3d 1357, 1362 (8 th Cir. 1996).....	10
<u>Diaz v. Silver</u> , 932 F. Supp.462, 465-66 (E.D.N.Y. 1996).....	7
<u>Goosby v. Town of Hempstead</u> , 981 F. Supp. 751 (E.D.N.Y. 1997) aff'd, 180 F.3d 476 (2d Cir. 1999)	passim
<u>Grove v. Emison</u> , 507 U.S. 25, 41, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993).....	11
<u>Jack Guttman, Inc. v. Kopycake Enter. Inc.</u> , 302 F. 3d 1352, 1356 (Fed Cir. 2002)	5
<u>Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.</u> 4 F.3d 1103, 1115 (3d Cir. 1993).....	14
<u>Johnson v. De Grandy</u> , 512 U.S. 997, 1007, 114 S. Ct. 2647, 2655, 129 L. Ed. 2d 775 (1994).....	10
<u>Lopez v. New York State Board of Elections</u> , 462 F3d 161 (2 nd Cir. 2006).....	18
<u>N.A.A.C.P. v. City of Niagara Falls, N.Y.</u> , 65 F.3d 1002, 1008 (2d Cir. 1995).....	14
<u>Nat'l Steel Car, Ltd. v. Canadian Pac. Ry.Ltd.</u> , 357 F.3d 1319, 1324 (Fed.Cir. 2004).....	4
<u>No Spray Coalition, Inc. v. City of N.Y.</u> , 252 F. 3d 148, 150 (2d Cir. 2001) (per curiam).....	5
<u>Reed v. Town of Babylon</u> , (E.D.N.Y. 1996) 914 F. Supp. 843.....	1
<u>Reynolds v. Sims</u> , 377 U.S. 533, 585, 84 S. Ct. at 1394.....	7
<u>Rodriguez v. Pataki</u> 280 F. Supp. 2d 89, at 127 (S.D.N.Y. 2003).....	21
<u>Sanchez v. Colorado</u> , 97 F.3d 1303, 1312 (10th Cir. 1996)	11
<u>Stabler v. County of Thurston</u> , 129 F.3d 1015, 1025 (8th Cir. 1997).....	10
<u>Thornburg v. Gingles</u> , 478 U.S. 30 (1986), 106 S.Ct. 752.....	passim

Uno v. City of Holyoke, 72 F 3d 973 (1st Cir. 1995).....22

Statutes:

42 U.S.C. §1973 (“Section 2”)*passim*

N.Y.S. Election Law §15-108 2-a.18

N.Y.S. Election Law 1-104 2818

PRELIMINARY STATEMENT

The Village of Port Chester (the “Defendant”, “Village” or “Port Chester”), respectfully submits this Memorandum in Opposition to the Motion made by the United States of America (the “Plaintiff”) for a preliminary injunction pursuant to Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973 (“Section 2”) and Rule 65 of the F.R.C.P.

Plaintiff seeks to enjoin the Village from conducting an election on March 20, 2007 for two Trustee positions for its Board of Trustees pursuant to its at-large election system in place in 1868. Plaintiff alleges that the Village’s system violates Section 2, in that the system improperly dilutes the voting rights of Hispanics. Plaintiff also seeks to impose upon the Village a six-district system that would include one alleged Hispanic majority district to replace the at-large system.

The Village respectfully submits that Plaintiff’s injunction request should be denied, in that Plaintiff has failed to show a likelihood of success on the merits, and has failed to show that irreparable harm will result if the Court does not grant the request.

Likelihood of Success on the Merits

The Village submits that Plaintiff has failed to make out a violation of Section 2, by failing to meet all three necessary pre-conditions outlined in the seminal case of *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 (1986). Plaintiff’s failure to meet any one of these three pre-conditions is fatal to its case. *Reed v. Town of Babylon*, (914 F. Supp. 843 E.D.N.Y. 1996).

Specifically, Plaintiff has failed to show that a Hispanic “majority/minority” district can be established. Remarkably, the Hispanic Citizen Voting Age Population (“HCVAP”) included in the district as proposed by Plaintiff is just **eight** people shy of not constituting a majority, and Plaintiff’s numbers rely on estimates which have a margin of error greater than eight people. Plaintiff has also failed to show that the Hispanic population in Port Chester is politically cohesive.

Notably, the HCVAP turnout in Village elections has been incredibly low, and has never been more than ten percent, even in years with hotly contested mayoral elections. In addition, Plaintiff has also failed to show that candidates allegedly preferred by Hispanics – to the extent that such preferences can ever be shown beyond mere anecdotal evidence – have usually been defeated by white bloc voting. In fact, Plaintiff's own expert opines that Hispanics always prefer Democratic candidates (even to the exclusion of a Hispanic running on the Republican line), and there is no dispute that Democratic candidates have had recent success at the polls as part of the ebb and flow of partisan politics in the Village. Plaintiff points to the fact that Hispanic candidates have not had success at the polls, but focuses on just one 2001 Trustee election. Plaintiff also refers to various School Board elections which do not relate to this case but has not offered any analysis of them. In all of those races, there is compelling statistical evidence that these candidates lost not because of their race or ethnicity, but because they had other significant shortcomings as candidates.

Aside from failing to satisfy the *Gingles* pre-conditions, Plaintiff has also failed to make out a violation under the totality of the circumstances test. The evidence shows that Port Chester is highly and comprehensively responsive to Hispanic needs in education, recreation, healthcare, employment and housing. Party leaders have made efforts to attempt to recruit more Hispanic district leaders and candidates, and that the party caucus system in Port Chester is completely open to participation by all citizens and is probably the most accessible system in the State. The evidence shows that Port Chester has a clear history of inclusion of Hispanic immigrants.

Irreparable Harm

Plaintiff fails to demonstrate irreparable harm if the injunction is denied. Conversely, there will be irreparable harm if the election does not go forward. A special election can always be conducted if there is an ultimate determination that Section 2 has been violated. Meanwhile, if the

election is stopped, voters in the March 2007 mayoral election may be disenfranchised and the Village government may come to an effective standstill due to the expiring terms of current members. Finally, by dragging its feet in an investigation which started in 2001, Plaintiff has not only waived its prerogative to rush things along now, but has also provided its own commentary of the strength of its own case and the need for immediate relief.

STATEMENT OF FACTS

A. BACKGROUND

Port Chester is located in what is commonly referred to as the Sound Shore of Westchester County. Port Chester has always been an immigrant “gateway community”. Successive waves of immigrants have settled in the Village, many soon after arriving in the United States. Likewise, many have remained as residents of Port Chester. The latest wave of foreign born newcomers to Port Chester have been Hispanic persons from Mexico and numerous countries in Central and South America. (See **Falanka Decl.**)

B. PORT CHESTER SYSTEM OF GOVERNMENT AND ELECTIONS

Port Chester is a charter Village, one of only twelve charter villages in the State of New York. Port Chester’s Charter is State Law. The governing body of the Village is a Board of Trustees which consists of six Trustees and a Mayor. The Mayor and the Board of Trustees are elected at-large. This method of conducting at-large elections has been in place since the inception of the Village in 1868. The six Trustees are elected for three year terms. Each year, Port Chester elects two Trustees. The Mayor has a two year term with an election for Mayor every other year. This electoral mechanism requires that an incumbent Mayor run for re-election with different Trustees, reducing the power of the incumbency and increasing the opportunities for citizen

participation in the political process. In the Trustee races, each voter can cast up to two votes for two Trustees candidates, or can vote for only one if they wish, (i.e. single shot voting is allowed).

**C. PORT CHESTER'S ALLEGED FAILURE TO COMPLY
WITH THE VOTING RIGHTS ACT**

On April 20, 2006, Plaintiff sent the Village a letter, alleging that the Village's at-large system of electing Trustees violated Section 2 (See **Kennedy Decl., Ex 5**). The initial investigation commenced following the March 2001 Village Election presumably in response to a complaint filed by Cesar Ruiz. (See **Pisc. Decl. Ex. 12, 18 & 19**).

The Village entered into discussions with Plaintiff's attorneys to resolve this matter. Despite repeated requests, Plaintiff's attorneys waited until October 23, 2006 to provide data and analysis that they represented strongly supported their case. The Village then retained three experts to analyze Plaintiff's data and analysis. The Village's experts concluded that Plaintiff's data and analysis did not support a Section 2 violation. On December 15, 2006, the Plaintiff instituted this action. The Village's election is scheduled to be conducted on March 20, 2007.

ARGUMENT

**PLAINTIFF'S REQUEST FOR A PRELIMINARY INJUNCTION ENJOINING THE
VILLAGE MARCH 2007 TRUSTEE ELECTION SHOULD BE DENIED**

Plaintiff seeks to enjoin the Village from conducting its 2007 Trustee election. Since Plaintiff has not asked this Court to enjoin the Mayoral election from proceeding on March 20, nor is the Mayoral position a subject of this litigation, the Mayoral election will go forward.

A Preliminary Injunction is a "drastic and extraordinary remedy that is not to be routinely granted." *Nat'l Steel Car, Ltd. v. Canadian Pac. Ry.Ltd.*, 357 F.3d 1319, 1324 (Fed.Cir. 2004). "Plaintiff would be entitled to a Preliminary Injunction if it can show (1) reasonable likelihood of success on the merits; (2) irreparable harm; (3) that the balance of hardships tips in its favor; and

(4) the impact of the injunction on the public interest.” Jack Guttman, Inc. v. Kopycake Enter. Inc., 302 F. 3d 1352, 1356 (Fed Cir. 2002); Goosby v. Town of Hempstead, 981 F. Supp. 751 (E.D.N.Y. 1997) *aff’d*, 180 F.3d 476 (2d Cir. 1999).

In order to enjoin the March election where "the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction will be granted only if the moving party meets the more rigorous likelihood-of-success standard." No Spray Coalition, Inc. v. City of N.Y., 252 F. 3d 148, 150 (2d Cir. 2001) (*per curiam*).

A. ALLEGED VIOLATION OF THE RIGHT TO VOTE DOES NOT CONSTITUTE IRREPARABLE HARM IN THIS INSTANCE

The Court must address whether the harm to Plaintiff is irreparable and whether or not such harm outweighs the likelihood of harm to the Village and further whether the harm to the Village is irreparable. This is a balancing test that the Court must employ in determining whether to grant a Preliminary Injunction.

As a threshold matter, Plaintiffs are unable to demonstrate irreparable harm. If Plaintiffs are ultimately successful at a trial in this matter, this Court would have the absolute authority to void the 2007 Trustee election and order a Special Election for those two positions. (See Goosby, supra). Therefore any harm to Plaintiff can be repaired, i.e. by the conduct of a Special Election. Quite the contrary, the only persons who will suffer irreparable harm are the residents of the Village if the election is stopped. The harm to the residents is irreparable irrespective of whether or not Plaintiff ultimately wins at a trial in this case.

In the particular setting of this case, the Mayoral election should go forward, irrespective of how this Court decides the Preliminary Injunction issue. As such, there certainly will be voter confusion and disenfranchisement of some voters if the election for the Board of Trustee positions

is enjoined. That harm can never be remedied. If Plaintiff's application for an injunction is granted and if the Defendant is ultimately successful on the merits after trial, a Special Election would then have to be conducted for the two Trustee seats that were enjoined.

Plaintiff's own expert, Dr. Lisa Handley, produced several exhibits at her deposition on January 18, 2007, one of which is germane to this issue. Annexed hereto as **Pisc. Decl. Ex. 3** is Handley Exhibit B, a document prepared and produced by Dr. Handley. As the Court can see, the number of voters who signed in for the Mayoral elections was usually higher than the number of persons who signed in to vote in the "off years", i.e. the years with no Mayoral election. Therefore, if the Court enjoins this election and Plaintiff is not successful on its underlying claim, a special election will have to be held for two at-large Trustee seats without the benefit of the Mayoral election drawing out votes for those seats. As such, the candidates and the residents of Port Chester will be disenfranchised. That harm is irreparable.

Plaintiff argues that allowing the election to go forward constitutes irreparable harm to voters. That position simply does not have merit. Were this Court to enjoin the March Trustee elections from going forward, presumably the two Trustee members whose positions expire on April 1, 2007 would have to continue in office beyond the expiration of their term with the caveat that one Trustee, whose term expires, is running for Mayor. Another Trustee, whose term does not expire, has announced his intention to run for Mayor as well. These two Trustees, using Plaintiff's logic, were elected pursuant to an election scheme that violated Section 2. Therefore, that would be no different than electing two new Trustees in 2007, whose elections could be voided were Plaintiff ultimately to prevail at trial.

In this instance, Plaintiff fails to explain why, if it ultimately prevails on the merits, for example, invalidating the Village's election and voting anew fails to provide an adequate remedy.

See *Goosby, supra*, (denying an injunction because “if plaintiffs prevail on appeal, there is nothing to prevent a special election to remedy the Section 2 violation”). Likewise, in this case, Plaintiff’s alleged injury can be repaired by voiding the March Trustee election and ordering a Special Election, were this Court to find for Plaintiff after trial.

It is important to note that in *Goosby, supra*, the Court declined to grant a Preliminary Injunction **even after a full trial had been conducted on the merits months earlier** and the Court had already decided that the Defendants were in violation of Section 2 and a remedial plan had to be imposed. By Decision dated October 20, 1997, the Court denied a Preliminary Injunction to enjoin an upcoming election scheduled for November 7, 1997, even though in that same Decision and Order, the Court ordered that a six district apportionment plan be implemented. The Court in *Goosby* stated,

“In deciding whether to enjoin the upcoming election, I am required to “act and rely upon general equitable principles.” *Reynolds v. Sims*, 377 U.S. 533, 585, 84 S.Ct. 1362, 1394, 12 L.Ed.2d 506 (1964). Consequently, to prevail on their request for preliminary injunctive relief, plaintiffs must demonstrate that “(1) they will suffer irreparable injury if relief is not granted; (2) there is a substantial likelihood of success on the merits; and (3) the public interest favors issuance of the injunction.” *Diaz v. Silver*, 932 F. Supp.462, 465-66 (E.D.N.Y. 1996). In addition, in determining whether a balance of the equities favors the issuance of an injunction, I am “entitled to and should consider the proximity of a forthcoming election.” *Reynolds*, 377 U.S. at 585, 84 S. Ct. at 1394. Finally, I note that “intervention by the federal courts in state elections has always been a serious business,” not to be lightly engaged in.” *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988) *Goosby supra* at Page 763.

In *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988), the Fifth Circuit cautioned federal courts to “jealously guard and sparingly use [their] awesome powers” to intervene in state elections.

In *Goosby*, after deciding the case after a full trial on the merits and finding a Section 2 violation on the part of the Defendants, the District Court stated,

“Even defendants concede that if plaintiffs prevail on appeal, there is nothing to prevent a special election to remedy the Section 2 violation. Plaintiffs therefore have failed to establish that irreparable injury will result if I decline to grant the relief they request. In addition, the election plaintiffs ask me to enjoin is, at this point, only three weeks away. I find that the balance of the equities does not support the issuance of an order enjoining the upcoming election. The motion for such an order is therefore denied.” (*Goosby, supra* at Page 763).

Plaintiffs, in *Goosby*, moved for an Order enjoining the November election, slightly less than two months prior to the election, and the injunction was denied.

In the instant case, Plaintiff commenced this proceeding a little more than three months prior to the scheduled March 2007 election. Plaintiff did this knowing full well that briefs would have to be submitted and a hearing would have to be conducted on its request for a preliminary injunction. Nothing prevented Plaintiff from commencing this matter earlier than December 15, 2006, especially in light of the fact that Plaintiff’s investigation commenced almost 6 years ago sometime before **June 29, 2001**. (See **Pisc. Decls. Ex. 4 through 11**.)

For Plaintiff to have waited until December 15, 2006 to commence this litigation knowing full well that it would seek a Preliminary Injunction to stop the March 2007 Trustee election is unconscionable. Certainly, a balance of the equities does not favor the issuance of an injunction, especially considering the proximity of the election. (See *Reynolds, supra, Goosby, supra*.)

Even if Plaintiff is able to show irreparable harm and a likelihood of success on the merits, the Court must then consider whether it is against the public interest to grant injunctive relief faced with an impending election. See *Diaz v. Silver*, 932 F. Supp. 462, 468-69 (E.D.N.Y. 1996).

B. THE PLAINTIFF IS NOT SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIM THAT PORT CHESTER’S AT-LARGE SYSTEM VIOLATES SECTION 2 OF THE VOTING RIGHTS ACT

There are three pre-conditions that a plaintiff must prove in order to have the Court even consider its claim. Those pre-conditions were set forth in *Gingles, supra*. In order to make out a

Section 2 claim, a plaintiff must first demonstrate: (1) the minority group is sufficiently large and geographically compact to constitute an effective majority in a single-member district; (2) the minority group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate. *Gingles, supra*. Defendant asserts that Plaintiff cannot satisfy any of the above *Gingles* pre-conditions as shown in more detail below.

1. PLAINTIFF IS UNABLE TO MEET ITS BURDEN OF PROOF THAT THE MINORITY GROUP IS SUFFICIENTLY LARGE AND GEOGRAPHICALLY COMPACT TO CONSTITUTE A MAJORITY IN A SINGLE-MEMBER DISTRICT

Under the first *Gingles* pre-condition the Plaintiff fails to meet its burden of proof.

The Plaintiff has proposed a plan to break the Village up into six election districts, with one trustee being elected from each district. See Declaration of Prof. Andrew Beveridge, Exhibit "F", attached to Plaintiff's moving papers (the "Beveridge chart"). For the Court's convenience, an additional copy of the Beveridge chart is annexed to **Pisc. Decl., as Ex. 13**. An area of interest on the Exhibit has been circled for ease of reference. Plaintiff contends that proposed "District 4" in the Beveridge chart is a majority Hispanic district and satisfies the first *Gingles* pre-condition. This is not the case.

According to the Beveridge chart, proposed District 4 includes a HCVAP of 688 individuals out of a total Citizen Voting Age Population, ("CVAP") of 1,362 individuals. The Beveridge chart indicates Hispanics constitute 50.51 percent of the total CVAP in proposed District 4. At his January 16, 2007 deposition (see Beveridge deposition transcript annexed to the **Pisc. Decl. as Ex. 14**), Prof. Beveridge conceded that the proposed District 4 is just eight HCVAP individuals away from not being a majority/minority district (**Bev. Tr. P. 115, L. 22 -- P. 116, L. 8**). Beveridge also admitted that the eight person majority is merely an estimate (**Bev. Tr. P. 72, L. 14 -- P. 74, L. 14**) and that it was based on a sample (**Bev. Tr. P. 75, L. 23 -- P. 76, L. 24**). He

further admitted that the sample was subject to rounding of seven or eight people (**Bev. Tr. P. 75, L. 23 – P. 76, L. 24**). He also admitted that there is an unknown margin of error in his own estimates (**Bev. Tr. Pg. 110, LL 2-15**), and he did confirm that the margin of error is greater than eight CVAP people. (**Bev.Tr. P. 117, L 17 -- P. 118, L. 20**).

In this context, Plaintiff fails to show a substantial likelihood of success on the merits for the first Gingles pre-condition. To establish the first Gingles pre-condition, a plaintiff must demonstrate a proper and workable remedy exists. Stabler v. County of Thurston, 129 F.3d 1015, 1025 (8th Cir. 1997). The Plaintiff herein has failed to meet this threshold.

The Village's expert, Dr. Peter Morrison's preliminary report indicates that the proposed District 4 does not constitute an effective majority district. (**Morr. Report, pg. 3**). More importantly, Morrison's report also indicates that the proposed District 4 violates traditional redistricting criteria for drawing a fair and balanced plan and causes the votes of individual electors in certain districts to be grossly devalued. (**Morr. report, pgs. 3-4**). One of the key problems with Plaintiff's District 4, according to Morrison, is "packing" non-citizens in the Hispanic concentration district. (**Morr. Report, pg. 29**). The voting strength of a politically cohesive minority group can be diluted either "by fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them, or by packing them into one or a small number of districts to minimize their influence in the districts next door." Johnson v. De Grandy, 512 U.S. 997, 1007, 114 S. Ct. 2647, 2655, 129 L. Ed. 2d 775 (1994). Plaintiff's plan packs District 4 to the detriment of all voters and especially Hispanic Citizens Village wide.

Plaintiff MUST satisfy all 3 (three) Gingles pre-conditions for the Court's analysis to go further to analyze the Senate factors. If all three Gingles pre-conditions are not met, the Court's inquiry ends there. Failure to establish all three preconditions defeats a Section 2 claim. Clay v. Bd.

of Educ., 90 F.3d 1357, 1362 (8th Cir. 1996). Plaintiff clearly fails to carry its burden on the first *Gingles* pre-condition.

2. THE HISPANIC POPULATION IN PORT CHESTER IS NOT POLITICALLY COHESIVE

To satisfy the second *Gingles* pre-condition, Plaintiff must demonstrate that the minority group is politically cohesive. "If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests." *Gingles, supra*, at 51. Evidence of political cohesiveness is shown by minority voting preferences, distinct from the majority, demonstrated in actual elections, and can be established with the same evidence plaintiffs must offer to establish racially polarized voting, because "political cohesiveness is implicit in racially polarized voting." *Sanchez v. Colorado*, 97 F.3d 1303, 1312 (10th Cir., 1996). Proving political cohesiveness requires evaluating elections through statistical and non-statistical evidence. Cf. *Grove v. Emison*, 507 U.S. 25, 41, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993). Plaintiff has only proffered statistical evidence in support of the second *Gingles* prong.

The Village has retained Prof. Ronald E. Weber as an expert in this case. Due to time constraints (the action filed on December 15, 2006 and Weber leaving for a pre-planned vacation on January 10), Weber has only issued a preliminary report analyzing two contests in Port Chester. Weber's report ("**Weber Report**") states at page 7; "...evidence exists that Hispanic surnamed voters were not cohesive in the 2004 and 2005 endogenous general elections for Board of Trustees and Mayor At-Large positions in the Village of Port Chester. And I found no evidence of racial polarization..."

Weber determined that the turnout rate of Hispanic Voters as a percentage of 2000 HCVAP in the 2004 and 2005 Village elections was less than one-half the turn out rate of Non-Hispanic

Voters. In 2004, the Hispanic Voter rate of turnout in 2004 was 6.7% and in 2005 it was 9.4%. The Non-Hispanic rate of turnout in 2004 was 17% and in 2005 it was 22.1%. (See **Weber Report, Table 1, pg. 20**). Weber found that in these elections, “the level of Hispanic surnamed turnout low enough to conclude that at neither election was a significant number of the Hispanic minority group present at the polls” (See **Weber Report, Pgs. 22-23**). Plaintiff’s expert, Dr. Lisa Handley indicated in Exhibit B at her deposition (See **Pisc. Decl. Ex. 16**) that in the 2004 Village election, 202 Hispanic surnamed persons signed in to vote and that 285 signed in at the 2005 election.

With Hispanic turnout at such low rates, i.e. 202 Hispanic voters in 2004 and 285 in 2005, one cannot characterize Hispanics in Port Chester as politically cohesive. Low turnout is not the only measure of the lack of cohesiveness in the Hispanic population in Port Chester. Port Chester is unlike other areas of the country where Hispanics from the same country or Puerto Rico have settled. Port Chester has Hispanics from many different countries. (See **Delisa Dec., ¶ 7**). There is not one Hispanic group in Port Chester that feels the same way about all issues. (See **Ceballos Decl., ¶(6)**).

3. THE MAJORITY DOES NOT VOTE SUFFICIENTLY AS A BLOC TO ENABLE IT TO AFFECT THE MINORITY’S PREFERRED CANDIDATES

The theory that Hispanics always vote for Hispanics is not only insulting to the intelligence of the Hispanic population, but this theory is not supported by evidence. (See **Pisc. Decl. Ex. 17**). Plaintiff’s expert, Dr. Lisa Handley, at her deposition and also in her report on Page 5, Footnote 13, (**Handley Tr. is attached to Pisc. Decl. Ex. 16**) admits that during the Attorney General race of 2002, between Democrat, Eliot Spitzer and Republican, Dora Irizarry (a Hispanic), Hispanics in Port Chester did not support the Hispanic candidate. According to Handley’s calculations, Spitzer was supported by an overwhelming majority of Hispanic voters in Port Chester. (See **Handley Tr.**

Pg. 248, L 25 - Pg. 249, L17). According to Handley, the Democrats were always the preferred choice of the Hispanics in Port Chester. **(Handley Tr. Pg. 178, L 5 -24).**

In Port Chester, the percentage of Hispanic voters who turn out to vote on Election Day is much less than half of the percentage of non-Hispanic voters. The number of votes deciding a Trustee or a Mayoral race in Port Chester is generally incredibly low **(Rang Decl ¶ 12,Ex. 2).**

Non-Hispanic voters do not vote just for Republicans candidates, they also vote for Democratic candidates. To characterize the white voters of Port Chester as voting as a bloc against alleged Hispanic preferred candidate is incorrect and not supported by the numbers, as seen below.

Handley admits instances where the difference between a Democratic loss and a Republican win was incredibly low in Village elections. Handley admitted that in the 2002 Trustee race, if **five (5)** Hispanics who voted for Republican candidate Crane instead voted for Democratic Saline or if **five (5)** more Hispanics came out to vote and voted for Saline, Saline would have won the election **(See Handley Dep. Tr. Pg. 156, L2-20).** This simply is not white bloc voting. According to Handley, in the 2001 Mayoral race between Republican Logan and Democrat Korff, Logan beat Korff by 16 votes. According to Handley's bivariate ecological regression estimates, 16 Hispanics voted for Logan. If nine (9) of those Hispanic voters who voted for Logan, voted for Korff, Korff would have won the election. **(See Handley Dep., Pg. 156, L 6 - 25 and Pg. 159, L 4 - 23).** When one talks about white bloc voting; overwhelming numbers come to mind; numbers of votes that would overwhelm the will of a minority group irrespective of any reasonable turnout by the minority group at the polls. The spread between winning and losing the elections that Handley cites, for her identified Hispanic preferred candidate of choice, certainly does not demonstrate a defeat due to white bloc voting.

4. UNDER THE TOTALITY OF THE CIRCUMSTANCES, PORT CHESTER'S AT-LARGE SYSTEM DOES NOT VIOLATE THE VOTING RIGHTS ACT

In analyzing the Senate factors, a court must engage in a “searching practical evaluation of the past and present reality”. *N.A.A.C.P. v. City of Niagara Falls, N.Y.*, 65 F.3d 1002, 1008 (2d Cir. 1995); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1115 (3d Cir. 1993). “The question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality and on a functional view of the political process.” *Gingles, supra* at 45. The court also acknowledged that the ultimate determination that a plaintiff has proven a violation of Section 2 must be made by the district court in light of all the circumstances. Although it may be an unusual case where a plaintiff proves each of the *Gingles* factors and failed to prevail under the Totality of the Circumstances, the possibility of a defendant prevailing cannot be ruled out. *Jenkins, supra*, at 1116; see also, *Baird*, 976 F.2d 357, 359 (7th Cir. 1992), *cert. denied*, 508 U.S. 907, 113 S.Ct. 2334 (1993). This is not to say that Plaintiff has proved each of the *Gingles* factors, in fact it is quite the contrary. In analyzing the Senate factors, most especially in the instant case, the failure of Plaintiff to meet its burden is disturbing. Each Senate factor is now addressed:

“1. The extent of any history of official discrimination in the state of political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;”

There is no history of official discrimination in Port Chester, and certainly no such history that has affected Hispanics’ rights to register, vote or participate in the democratic process. Plaintiff has failed to offer any compelling evidence of such history or impingement of rights.

While it is difficult to prove a negative – in this case, to prove a lack of a history of exclusionary practices – Port Chester can certainly point to its affirmative history of inclusion of all newcomers and immigrants, including its Hispanic population. A close review of the record

will confirm access of Hispanics to governmental employment and service opportunities. (See **Krzeminski Decl. & Marino Decl. & Coletti Decl.**)

The Village has retained Dr. Ronald Keith Gaddie as one of its experts in this case. Gaddie's report discusses lack of Latino participation and turnout and criticizes Prof. Smith's report and offers non-discriminatory reasons for lack of Latino participation in Village Elections. (See **Gaddie Report.**)

Attached hereto are various Declarations from a number of local business owners and residents who came to Port Chester as immigrants, and who hail from a diverse cross-section of Hispanic backgrounds. These individuals attest to the fact that they selected Port Chester as their destination for, among other reasons, its openness and opportunity. For example, attached to these papers are declarations from Dominican, Cuban and Uruguayan immigrants. These individuals attest that they have not experienced a history of discrimination in Port Chester. In fact, their experiences have been just the opposite (See **Decls. of Ceballos & Delisa**). It is for this very reason that many Hispanic immigrants choose to come to Port Chester in the first place.

The fact that Hispanics in Port Chester emigrated from such a diverse number of countries underscores an important but overlooked infirmity in the government's cohesion argument. (See **Decl. of Ceballos.**) Further, a Cuban-American stated:

"I remember the 2001 Village of Port Chester election. I distinctly remember that I did not vote for Cesar Ruiz, a Hispanic candidate for Trustee. Instead I cast my vote for the two individuals I believed were most qualified. I believe that the Latino community should work within the system to accomplish any goals and not be separated or divided." (See **Decl. of Leovi Fumero.**)

Perhaps the most tangible and symbolic example of Port Chester's pride and history of inclusion of Hispanic immigrants, which is demonstrative of their participation in the democratic process is the fact that there stands a monument and tribute to the great Cuban patriot, Jose Marti,

in the Village. This statue was dedicated over 30 years ago, a testament to how long Port Chester has not just tolerated and accepted but has celebrated and honored the diversity of its residents
(See Decl. of Fumero.)

“2. The extent to which voting in the elections of the state or political subdivision is racially polarized;”

See discussion regarding cohesiveness and white bloc voting above.

“3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;”

Plaintiff’s submission is devoid of Port Chester specific allegations which would even remotely prove, much less touch on the allegations required to be proved as set forth above. The Plaintiff relies upon the expert report of Prof. Robert Smith, which indicates a complete lack of familiarity with the political process, much less with Port Chester. Smith’s Curriculum Vitae is devoid of any professional experience in these areas. The Village argues that no basis exists for the acceptance of the Smith report by the Court.

Under the Subtitle, Discriminatory Election Laws, Practices and Policies in New York, Smith cites four primary ways that Hispanics have been discriminated against in politics in New York State Westchester County or Port Chester. The ways will be refuted separately.

Linguistic Discrimination: The only item cited at Paragraph 9 of Smith’s report is an outright distortion, specifically a 2005 Consent Decree signed by Westchester County, the Defendant in another case. The consent decree is mischaracterized in the Smith report. This mischaracterization was so egregious, that Senior Westchester County Attorney, Carol F. Arcuri, wrote to the Plaintiff, stating in relevant part, “Insofar as the Department of Justice, has, by its submission of this Declaration to the Court, violated the express language of the Consent Decree.

It is imperative that your Department take any and all action necessary to correct this mischaracterization.” (See **Pisc. Decl., Ex. 15.**) The consent decree should be stricken from the record.

Redistricting: The at-large district system has been in place in the Village since it was created in 1868. There has been no redistricting. The references to redistricting are disingenuous and incorrect. All references in the Smith Report are to New York City. This Court can take judicial notice that the Village of Port Chester does not lie within the borders of New York City.

Political Parties, Clubs and Cliques – the Slating Process: These references are devoid of any specific reference that remotely applies to the Village of Port Chester. They are even devoid of any reference to the Slating Process, whatever Prof. Smith thinks that is. The process for candidate nomination will be addressed later in this Memo, but it is nothing like what Smith describes.

Problems in how New York State and its subunits have conducted elections, or allowed others to influence the conduct of elections, that have led to negative impacts on Latino participation: Once again, these sections of the Smith report contain nothing that is Port Chester specific. All references are to New York City, except for a section entitled Contemporary Cases in Westchester County, and this references a contentious State Senate Race in Yonkers, 10 miles away. Village Elections are held in March, separately from all others, and therefore are not subject to any outside distortion.

The Village consists of 2.4 square miles. There are no majority vote requirements. Individuals can run on major, minor or independent party lines. Candidates do not run head to head. The two top vote getters are elected. Single shot voting is allowed and there are no anti-single shot provisions in the Village. The record is devoid of any discrimination in practice or

procedure against Hispanics in any Village election, except for one disgruntled losing candidate and his allegations are untrue. **(See Decl. of Rubino.)**

Smith then analyzes the public hearing held on the proposed district Plan to find evidence of racial and ethnic polarization. To use snippets of testimony from a Public Hearing, when the purpose of such a hearing was to elicit public comments on this issue can only serve to have a chilling effect on the conduct of future hearings, and should not be countenanced by this Court.

“4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;”

The Village has a most open candidate selection process with no barriers to running for Village office. There are no literacy tests, no political experience requirement, and more importantly, a potential candidate does not even have to be a member of a certain party to run on that party line. One must only attend a major or minor party’s caucus with a sufficient amount of supporters, or circulate an independent petition and one’s candidacy is underway. **(See attached Decl. of Richards, Rubino, Paniccia & Rang.)**

Candidates for Village office in New York on major or minor party lines are designated either by party caucus, or by petition, N.Y.S. Election Law §15-108 2-a. In Port Chester, candidates are nominated by the least restrictive way, namely by an “open meeting” party caucus, defined in Election Law 1-104 28. Any individual can be nominated at a Party Caucus. **(See Decl. of Richards.)**

There are no petitions to be collected or signed, and no door to door or other solicitation of party members needed, thereby eliminating a “byzantine and an onerous network of nominating phase regulations” *Lopez v. New York State Board of Elections*, 462 F3d 161 (2nd Cir. 2006).

In fact, low numbers of registered voters are needed to secure a designation. **(See Decl. of**

Richards.) The number of attendees who signed in at the party caucuses is low. (See Decl. of Rang Ex 1.)

There has been no denial of access to the political process to anyone in the Village, and Hispanic candidacies have been encouraged. Hispanics have been asked to become district leaders and candidates for office, but many have declined. (See Decls. of Rubino, Richards, and Paniccia.)

“5.The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;”

Hispanics in Port Chester have not suffered from discrimination in such areas as education, employment and health, and their ability to participate in the political process has therefore not suffered. Hispanics in Port Chester have been the beneficiaries of numerous governmental and community programs to enhance the general welfare.

The Port Chester School District (“District”) is one of the most highly-regarded, respected and successful school systems of its kind in the country, having received national and state recognition for its innovative programs and high levels of student achievement. In 2005, the Middle School was one of twelve in the United States to receive a Blue Ribbon School of Excellence Award. In 2002-03, the District was named by Standard & Poor’s as one of New York’s Outperforming School Districts. (See Decl. of Coletti.)

The District encourages parents of students to participate in the budget process and School Board elections. The District offers a high school course aimed at participation in government, which required students to attend District Board and Village Board meetings, and which awarded extra credit to voting age students who registered to vote. (See Decl. of Mutino.) The District has even sent buses out to various locations in the community – including public housing and

predominantly Hispanic areas – to bring people to the polls. **(See Decl. of Irving.)** The District also engages in regular voter registration efforts, and of late an increase in new Hispanic registrants with each School Board/Budget election has been noted. **(See Decl. of Farrington)**

In addition to providing for the educational needs of its children, the Port Chester community also strives to meet the educational and employment needs of its working age population, including Hispanics. **(See Decl. of Logan.)**

Regarding community health needs of its residents, including Hispanics, the Open Door walk-in health care facility operates in downtown Port Chester and in the District. **(See Decl. of Logan and Bencivenga.)**

Regarding Public Safety of its residents, Port Chester runs a highly-professional and well-trained Police Department that is responsive to the needs of all residents, including Hispanics. **(See Decl. of Krzeminski.)**

Regarding public works, Port Chester has been a wise steward of Federal monies for the benefit of its residents, particularly Hispanics. **(See Decl. of Falanka.)**

Participation in youth soccer, baseball and basketball programs, as well as free summer and after school programs, have all dramatically increased, **(See Decl. of Hroncich)** and several parks enhanced. **(See Decl. of Falanka.)** The District's award winning marching band has received national acclaim and which counts many Hispanics among its members. **(See Decl. of Gasparini.)**

In regard to affordable housing, the Port Chester Housing Authority manages a total of 340 units, with 86 being leased to Hispanics. **(See Decl. of McMahon.)**

Rather than a history of any discrimination against Hispanics in the important facets of life, Port Chester has a tradition of responsiveness to the needs of Hispanics. It cannot be said that

discrimination in these areas that has prevented Hispanics from participating in the political process.

Port Chester should be praised and lauded as a role model for other municipalities for its proactive and unrelenting attempts at integrating a minority group into the community in every aspect possible. No community can be expected to do more for any segment of its population.

“6. Whether political campaigns have been characterized by overt or subtle racial appeals;”

As can be seen by the June 29, 2001, letter from the U.S. Department of Justice to the Village, (See **Pisc. Ex. 4**), an investigation was commenced to investigate possible Section 2 violations in at least 2001, almost six (6) years ago. Plaintiff had almost six years to discover any supposed violations since Trustee elections are held each and every year.

Plaintiff relies on political consultant Ruiz. He describes as “arcane election rules” what it takes to run for Democratic Committeeman, signatures on a sheet of paper totaling 5% of the Democrats in that election district. Ruiz ignores the fact that he helped Hispanics become Democratic district leaders. (See **Decl. of Rubino.**)

Plaintiff provides no evidence how any alleged appeals relate to their “theory of how the alleged voting practices dilutes the voting strength of minority voters and limits their opportunity to participate in the political process.” *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, at 127 (S.D.N.Y. 2003) or that the complained of event “is attributable to anything other than ordinary partisan politics” in light of “the relatively limited nature of the evidence about racial polarization” (id at 138 of the decision) and lack of “voting irregularities” (id at 144). There is simply no support for this Senate factor.

“7. The extent to which members of the minority group have been elected to public office in the jurisdiction.”

No Hispanic has been elected Trustee in the Village. This is not due to “white bloc voting”. This is not due to any discriminatory action or inaction on the part of the Village. This is not due to a lack of effort on the part of political leaders to attract Hispanic candidates to run, or to encourage their participation in the political process. There have simply not been any numbers of Hispanic candidates available or willing to run for office. (See Decl. of Richards, Paniccia & Rubino.)

There are several Hispanic citizens currently holding or who have held the political positions as District leader in the Village. (See Decl. of Lopez Decl.¶ 9, Richards & Rubino.) Since 1977, it is the Village’s understanding that there have been approximately 187 Hispanic individuals that have been appointed to various Boards and Commissions in Port Chester, including re-appointments for the same individual. (See Decl. of Marino.) The current Chairman of the Zoning Board of Appeals, arguably one of the most important non-elected positions in Port Chester, is Hispanic.

The assertion in Rafael Vega’s Declaration that he was unable to become a District leader belies the fact that he could have circulated a petition, and procured a tiny number of signatures (See Decl. of Richards.)

The fact that no Hispanics have been elected as a Trustee does not mean that the Voting Rights Act has been violated. See, *Uno v. City of Holyoke*, 72 F 3d 973 (1st Cir. 1995). If minority voters have not made reasonable efforts to organize and participate in the electoral system, courts cannot accurately gauge the effects of the system on the minority group’s political aspirations. *Id* at 987. Case in point is Plaintiff’s witness, Ruiz, a Hispanic who ran in 2001 for Trustee against two highly popular incumbents. One incumbent was a Democrat and one was a Republican. Mr.

Ruiz received the lowest votes in that race. Ruiz claims that he lost because he is Hispanic, but the truth is he was not as popular as the two incumbent trustees (See Decl. of Napoli & Rubino.), nor was he unanimously popular within the Hispanics (See Decl. of L. Fumero and E.C. Fumero Decls.)

C. PLAINTIFF FAILS TO MEET THE THRESHOLD FOR A VIOLATION OF SUBSECTION (a) OF 42 U.S.C. § 1973 (“Section 2”)

A Section 2 violation, “is established if, based on the Totality of Circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by Subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process **and** to elect representatives of their choice...” (emphasis supplied) Plaintiff cannot demonstrate that the political process leading to nomination or election in Port Chester is not equally open to participation by members of the Hispanic citizens in Port Chester. The attached declarations overwhelmingly demonstrate “that the political processes leading to nomination or election in the” Village are “equally open to participation by members of a class of citizens”, i.e. Hispanics.

Plaintiffs must demonstrate that these processes are not equally open to participation by Hispanics in Port Chester. Plaintiffs have failed to do so. The text of Subsection (b) of Section 2 requires that both political processes leading to nomination or election, are not equally open to participation by Hispanics **AND** that Plaintiffs also prove that Hispanics are unable “to elect representatives of their choice.” Plaintiff has failed to do so. From the plain meaning of Section 2, the Plaintiff’s burden is clear. Plaintiffs must prove both components of Subsection (b) of Section 2. Neither component was proven by Plaintiff, and therefore Plaintiff’s motion must be denied.

CONCLUSION

The Plaintiff has not shown the likelihood of success on the merits. The District #4 that the Plaintiff has created is **eight (8) residents plus or minus** away from absolutely failing the first Gingles pre-condition. Plaintiff has further not demonstrated that the Hispanic population in Port Chester is cohesive and they have not demonstrated that their identified Hispanic preferred candidates have been defeated by White Bloc Voting. Even if they had proved all of these factors, which we submit they have not, the threshold question which they absolutely cannot show is irreparable harm. Under the standards enunciated under Goosby, this Court should not issue a Preliminary Injunction enjoining the March 20, 2007 election. To do so would be to disenfranchise all the voters of the Village of Port Chester.

Dated: Rye, New York
January 24, 2007

Respectfully submitted,

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