UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	06 Civ. 15173 (SCR)
Plaintiff,	:	**BENCH DECISION**
-against-	:	****NOT VERBATIM****
VILLAGE OF PORT CHESTER,	:	
Defendant.	:	

STEPHEN C. ROBINSON, U.S. District Judge:

I. Introduction

In light of the fact that the Village of Port Chester's "off-cycle" elections for Mayor and two Trustee positions are scheduled for March, 20, 2007, I previously indicated to the parties that I intended to rule from the bench in this matter. I believe that this is the appropriate procedure here since I do not have the relative luxury of drafting a written opinion on this motion. Each day that the parties await this Court's determination is another day that the Village of Port Chester is held in limbo, unable to determine whether the March Trustee election is to go forward and whether the requisite campaigning and accompanying financial expenditure should continue. For each day that this uncertainty continues, all citizens in the Village of Port Chester – both Hispanic and non-Hispanic – the candidates, and the political parties are placed in an increasingly difficult position. So it is my opinion that under these circumstances this oral decision is the best approach.

I have spent the last week reviewing my notes, reviewing the exhibits admitted during the hearing and the memoranda submitted by the parties, reading the expert reports, and examining the relevant case law. Counsel for both sides have done a commendable job placing thorough

and compelling arguments before this Court. Those submissions, in addition to the live testimony, have given this Court a full picture of the electoral system in Port Chester and the range of residents' views about it. I want to take this moment to thank the attorneys not only for their careful and thoughtful presentations, but also for their cooperative and professional demeanor in the midst of their zealous advocacy.

In addition, I want to say that there is no question that the expert witnesses presented by both parties are learned in their areas of expertise, and nothing said in the course of this decision is meant to imply otherwise. These scholars have been called upon many times to share their expertise with courts and parties trying to determine if a particular voting scheme violates the Voting Rights Act, and their testimony and patience with this Court as we explored their positions was helpful and appreciated. This bench decision is, of necessity, not meant to be an exhaustive review and analysis of the testimony, expert or otherwise, the data, or the reports and declarations submitted in this case. It is simply this Court's conclusions after a review of the evidence. For the purposes of this decision, I am assuming familiarity with the entire record in this case, including the eight days of hearing testimony.

I should first state that this Court fully recognizes that the intrusion by a federal court in a state election system is a grave matter and is not to be done without due consideration to the rights of States and their political subdivisions to determine how and when their electoral processes should be conducted. However, as a Federal District Judge, I am called upon to consider the Plaintiff's claim that the Village of Port Chester's present at-large voting system violates the Voting Rights Act. I take this responsibility humbly and very, very seriously.

Plaintiff, the United States of America, has brought this action for a preliminary injunction pursuant to the Voting Rights Act of 1965, 42 U.S.C. Section 1973, against defendant

Village of Port Chester, challenging the method the Village uses to select its Trustees. The United States contends that Port Chester's at-large system of representation denies the Hispanic population of the Village an equal opportunity to participate in the political process and to elect representatives of their choice, in violation of Section 2 of the Voting Rights Act, and seeks an order enjoining the March 2007 Trustee election.

II. Background

The Village of Port Chester is located in Westchester County, New York. According to the 2000 United States Census, Port Chester's population was 27,867, an increase of 12 percent from the 1990 Census. From 1990 to 2000, Port Chester's Hispanic population grew by 73 percent, and the Hispanic community now constitutes a plurality of Port Chester's residents. As of the 2000 Census, Port Chester's population was 46.2 percent Hispanic, 42.8 percent non-Hispanic white, and 6.6 percent non-Hispanic black. Of Port Chester's voting age population of 21,585, however, 45.7 percent are non-Hispanic white, 43.4 percent are Hispanic and 6.1 percent are non-Hispanic black. More importantly for our purposes, according to the 2000 Census Port Chester had a total citizen voting age population, or "CVAP," of 13,990, of whom 65.5 percent are non-Hispanic white, 21.9 percent are Hispanic and 8.9 percent are non-Hispanic black. Although there was some anecdotal evidence presented that the 2000 Census might not have placed every voter in the exact block of their residence, this Court recognizes that Census data is presumptively accurate, see Valdespino v. Alamo Heights Indep. Sch. Dist., 168 F.3d 848, 853-54 (5th Cir. 1999), and accepts the 2000 Census data as reliably accurate, if not perfect, in this case. Plaintiff's expert, Dr. Andrew Beveridge, estimated that as of July 2006, Port Chester's CVAP totaled 14,259, of which Hispanics constituted 27.5 percent.

Port Chester is governed by a Mayor and a Board of Trustees. There are six Trustees in the Village, all of whom are elected through a staggered at-large voting scheme. The Trustees serve three-year terms, and two Trustee positions stand for election each year; the Mayor serves a two-year term, and thus must stand for election every other year. In this at-large voting system, each resident of the Village of Port Chester who is registered to vote may cast up to two votes for Trustee candidates. Voters cannot select the same candidate twice – such "cumulative" voting is not permitted – but a voter may opt to cast just one of his or her two votes, a practice known as "single shot" or "bullet" voting. Village elections for Mayor and Trustees are held "off cycle" – that is, they are not conducted in November alongside other County, State and national elections, but instead are held in the spring, usually on the third Tuesday in March. As I stated previously, this year's Trustee and Mayoral elections are scheduled for March 20, 2007. It is undisputed that no Hispanic or Black candidate has ever been elected Mayor or to the Board of Trustees in Port Chester.

III. Preliminary injunction standard

In order to obtain a preliminary injunction in a government action taken in the public interest pursuant to a statutory scheme, the Plaintiff must demonstrate (1) irreparable harm; (2) a likelihood of success on the merits; and (3) a balance of hardships tipping decidedly in the Plaintiff's favor. See Bridgeport Coalition for Fair Representation v. City of Bridgeport, 26 F.3d 271, 274 (2d Cir. 1994). A preliminary injunction is an extraordinary remedy, and should not be routinely granted.

A. Irreparable harm

Where Congress has provided for governmental enforcement of a statute by way of an injunction, as it has with the Voting Rights Act, irreparable harm is presumed. See, e.g., United States v. Berks County, 277 F. Supp. 2d 570, 578 (E.D. Pa. 2003). Further, multiple courts within the Second Circuit have held that "the deprivation or dilution of voting rights constitutes irreparable harm." See, e.g., Coleman v. Bd. of Ed. of the City of Mt. Vernon, 990 F. Supp. 221, 226 (S.D.N.Y. 1997). I therefore conclude that the Plaintiff has demonstrated that there will be irreparable harm if this election is allowed to proceed under a structural framework that violates the Voting Rights Act.

B. Balance of the hardships

To examine the balance of the hardships, I will consider two scenarios: (1) the preliminary injunction is denied and I later determine after trial that Plaintiff is entitled to relief; and (2) the preliminary injunction is granted, and I later determine that Defendant has succeeded on the merits.

If the preliminary injunction is denied and I later determine after trial that Plaintiff is entitled to relief under the Voting Rights Act, there would be several options. Under almost any scenario, this Court would be forced to declare the March election null and void and order a new election after a districting plan has been drawn. This alternative would, in my opinion, further disenfranchise the Hispanic community by forcing that community to endure another instance where its rights have been violated. This always seems like a small price to pay by those who are not being asked to give up their rights. In the opinion of this Court, there is no way to fully

compensate a citizen whose vote was allowed to be diminished simply for the convenience of others.

To declare this election illegal only a few weeks after the election is held would also create a muddled and wasteful situation. All candidates for Trustee and their respective political parties would have already spent considerable money to campaign for the position, and the Village would have spent considerable money to hold the election, only to find out that they need to do it all over again. Individuals and businesses who donated time and money to various campaigns would rightly feel that the Court allowed their money to be spent and their time to be used for nothing. Additionally, the candidates who are currently scheduled to run for Trustee might not even be the candidates for Trustee if a district plan is put in place. All of their time, efforts and money would have been wasted.

On the other hand, if the preliminary injunction is granted and I later determine after trial that the Defendant has succeeded on the merits, what is the harm? The election would have been postponed. Instead of being held in March 2007, the election could be called as soon as the Village deems it appropriate. Presumably, the current Trustee candidates would continue to seek office and the citizens of Port Chester would be in virtually the same position as they are in today with the ability to vote, at-large, for the candidate of their choice. Under this scenario, as we have heard, there would also be some wasted time and money, but not nearly to the extent there would be if the election were allowed to go forward only to be declared illegal.

Given these choices, the harms that would be suffered if this Court refused to grant the preliminary injunction only to later find a Section 2 violation far outweigh the harms that would be suffered if the election were enjoined with a later determination that the Voting Rights Act

indeed has not been violated. Therefore the balance of harms militates in favor of granting an injunction.

The Village has suggested at various points that it has been harmed because of Plaintiff's timing in deciding when to bring this lawsuit; I find this argument unpersuasive in terms of balancing the harms. It is clear that part of the reason for the delay was Plaintiff's effort to resolve this matter short of litigation, and the only reason we are sitting here on March 2nd instead of late January is because this Court granted Defendant time to prepare its response in this matter. Though the scheduled election date is close at hand, federal courts have enjoined elections less than 18 days prior to the scheduled date; I therefore find that the timing of this action and the proximity of the scheduled election is not itself a reason to deny preliminary injunctive relief.

C. Likelihood of success on the merits

I will now turn my attention to the most complex of these three factors – whether Plaintiff has shown a likelihood that it will succeed on the merits of its claim at trial.

IV. Legal framework

A. Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act of 1965, as amended, reads:

> (a) No voting qualification or pre-requisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered; provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

B. Gingles preconditions and Senate factors

The Supreme Court construed this statute in its amended version for the first time in an action challenging a multi-member at-large districting scheme. See Thornburg v. Gingles, 478 U.S. 30 (1986). In Gingles, 478 U.S. at 34, the Supreme Court set out three "preconditions" that must be met for a challenge under Section 2 of the Voting Rights Act to be successful:

(1) the minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district;

(2) the minority group must be politically cohesive and vote as a bloc; and

(3) the white majority must vote sufficiently as a bloc to enable it, in the absence of special circumstances, to defeat the minority's preferred candidate.

An analysis of the three Gingles factors and whether each has been proven by a preponderance of the evidence is the first step in a two-part analysis of a voter dilution claim on behalf of minority voters. If the Gingles preconditions are established, then courts must consider the additional factors set forth in the Senate Judiciary Committee Report accompanying the 1982 amendments to Section 2 of the Voting Rights Act, the so called "Senate factors." S. Rep. No. 97-417, 97th Cong. 2nd Sess. 28 (1982).

The Senate Report identifies seven factors that are relevant to a court's analysis of the totality of the circumstances. The additional factors listed in the Senate Report are:

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

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

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;

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

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 the ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals; [and]

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

The Senate Report adds two other considerations that may be helpful for courts to consider:

(1) whether there is a significant lack of responsiveness on the part of the elected officials to the particularized needs of the members of the minority group; and

(2) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

There is no dispute here that Section 2 of the Voting Rights Act applies to the Village of Port Chester's Trustee elections. As such, the Plaintiff must establish the existence of all three Gingles factors. If Plaintiff can demonstrate the applicability of the Gingles preconditions, the United States then must establish its case under the totality of the circumstances analysis set forth in the Senate Report.

V. Gingles preconditions

A. The minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district

As to the first Gingles precondition, this Court finds that Dr. Beveridge's illustrative six-district plan, entitled Proposed Plan A as Modified, demonstrates that Hispanics in Port Chester are sufficiently large in number and geographically compact to constitute a majority in a single-member district in the Village. It should be noted that this Court also believes Dr. Beveridge's initial Plan A would meet the requirements for the first Gingles precondition, but at this time, for the purposes of this decision, I will not analyze the original Plan A.

Dr. Beveridge followed traditional districting principles in putting together Proposed Plan A as Modified – he first sought to ensure that each district had reasonable equality of total population, then made sure the districts were reasonably compact, and then, finally, sought to keep together a portion of the Hispanic community. Dr. Beveridge testified that he pursued this final goal to avoid inappropriately "packing" or "cracking" the Hispanic community of Port Chester. Here, as to equality of population, the total deviation of 3.34 percent was within acceptable bounds, and according to Dr. Beveridge's unrebutted testimony, the districts in this plan were reasonably compact. Within Proposed Plan A as Modified, District 4 is the district that embodies the first Gingles requirement for the Hispanic community.

I should emphasize again here that I follow the guidance of several Circuit Courts and presume that Census data is accurate until proven otherwise. I note that "proof of changed figures must be thoroughly documented, have a high degree of accuracy, and be clear, cogent and convincing to override the presumptive correctness of the prior decennial census." Valdespino, 168 F.3d 848, 854 (5th Cir. 1999). As part of his analysis, Dr. Beveridge estimated the demographic changes that he believes have occurred in Port Chester since 2000 based on an

extrapolation from the 2000 census figures. This Court takes Dr. Beveridge's 2006 estimates for what they are – estimates provided by a demographics expert that, while not endowed with the same presumption of reliability as the decennial census, may nevertheless be used by this Court to understand relevant population trends in the Village.

Though he admits that he used race as part of his districting process, Dr. Beveridge did not, as Defendant suggests, use race as his only criteria in drawing Plan A as Modified. As with his initial Plan A, the Modified Plan was the product of an analysis rooted in the traditional districting principles of population balancing and compactness. Based on my preliminary analysis of this issue, there does not appear to be any packing or cracking of either the Hispanic or the non-Hispanic white population. Hispanic CVAP for Port Chester as a whole in 2000 was 21.9 percent and, according to Professor Beveridge's estimates, was 27.5 percent in 2006. Proposed Plan A as Modified created three other illustrative districts in addition to District 4 that have a greater Hispanic CVAP than Port Chester as a whole based on both the 2000 and the 2006 measurements. Meanwhile, based on both the 2000 data and the 2006 estimates, the non-Hispanic white population remains a majority of CVAP in four of the remaining five districts, and is the plurality in the fifth.

While traditional districting principles require the use of total population in drawing district boundaries, in determining whether the minority group at issue has a sufficient majority in an illustrative district to satisfy the first Gingles precondition, courts typically look to the voting age population, or VAP, and in particular to the CVAP as the relevant population in the district. See, e.g., Rodriguez v. Pataki, 308 F. Supp. 2d 346, 378 n.38 (S.D.N.Y. 2004) (three-judge panel) (citing Valdespino, 168 F.3d at 851-53; Negron v. City of Miami Beach, 113 F.3d 1563, 1569 (11th Cir. 1997); and France v. Pataki, 71 F. Supp. 2d 317, 326 (S.D.N.Y. 1999)). In

addition to this extensive legal support, testimony from both Dr. Beveridge and Defendant's expert Dr. Peter Morrison made clear to this Court that voter registration data would be too unreliable a measure here for determining whether a minority group could constitute an effective majority in District 4. I also reject the notion, offered in Dr. Morrison's report, that a proper measure of an effective majority includes a consideration of voter turnout; it seems very likely to me that a dramatic change in the electoral structure to create districts would likely result, for myriad reasons, in a marked change in voter turnout. Accordingly, I examined the VAP and CVAP data for Proposed Plan A as Modified. As of the 2000 Census, the Hispanic VAP in District 4 is 77.27 percent of the population there, and the Hispanic CVAP is 56.27 percent of the district. When Dr. Beveridge extrapolated the data for this district to 2006, the Hispanic CVAP was an even more striking 70.35 percent of the CVAP in District 4. Dr. Morrison conceded that even taking into account possible data errors, Hispanics would constitute a majority of CVAP in District 4 in Plan A as Modified.

Dr. Morrison spent a significant portion of his testimony attempting to call Dr. Beveridge's calculations into question. He did that in part by advancing his position that voter registration data is a "true measure of actual people" in a given district, and also by suggesting that CVAP numbers may not be fully accurate because there is some evidence that there is over-reporting of citizenship data in the Census in general. Dr. Morrison did admit, however, that he had no evidence showing any over-reporting of citizenship status in Port Chester specifically, and did not take into account counter-balancing information that the Census generally has been shown to generally undercount Hispanics. Lastly, Dr. Morrison conceded that his numbers and calculations were "tentative" and not yet fully formed. Finally, even considering his critiques, Dr. Morrison allows that there is no question that the Hispanic CVAP in District 4, under

Proposed Plan A as Modified, is greater than 50 percent. Accordingly, I accept Dr. Beveridge's analysis at this stage, and find that based on either the 2000 or the estimated 2006 data, the Hispanic CVAP in District 4 under Proposed Plan A as Modified is more than sufficient to show an effective majority, and for Plaintiff to demonstrate a likelihood of success on the merits for the first Gingles precondition.

B. The minority group must be politically cohesive and vote as a bloc

As to the second Gingles precondition, I am persuaded that the Hispanic community in Port Chester is politically cohesive and tends to vote as a bloc for the same candidates. Plaintiff's expert, Dr. Lisa Handley, used well-established methods of statistical analysis that have been accepted by numerous courts in voting rights cases to reach her conclusion that Hispanic voters in Port Chester were cohesive, particularly in elections for the Mayor and Board of Trustees from 2001-2006. This was especially true in 2001, when the Trustee election featured a Hispanic candidate; Dr. Handley found that 100 percent of Hispanics who voted in that election cast one of their votes for the Hispanic candidate, Cesar Ruiz. Hispanics also voted cohesively in endogenous elections where there was no Hispanic candidate, as well as in exogenous elections where there were Hispanic candidates. For the purposes of this decision, I have given very little weight to the Trustee elections held between 1995 and 2000, because both Dr. Handley and Defendant's expert Dr. Ronald Weber found that the data for these contests were not as reliable as they were for the more recent elections.

Dr. Weber testified that the Hispanic community is not cohesive, in his view, because with the exception of the 2001 Trustee election, the turnout of the Hispanic group is lower than the minimum threshold required to constitute cohesion. Dr. Weber defines the "minimum

threshold" for cohesion as "ten percent of the citizen voting age population." This rule is his brainchild, and is a bright-line rule to be applied in all cases. However, when questioned, Dr. Weber conceded that the 10 percent figure was arbitrary. The Court inquired: "But why ten? Why is ten the magic number and not 12 and not 8? ... Is there any science; is there any statistical data that supports a 10 percent number? Versus a 9 percent, versus an 11 percent number?" Dr. Weber's candid response was "No. No there isn't. No." Dr. Weber further conceded that he knew of no court that has explicitly adopted his 10 percent rule, and did not cite this Court to a single other expert in the field who has adopted any bright-line turnout threshold in this context.

This Court declines to adopt Dr. Weber's position that the Hispanic community in Port Chester cannot be considered cohesive unless 10 percent of the Hispanic CVAP votes in a given election. This Court does not believe that there should be any arbitrarily fixed percentage for CVAP participation in order to find cohesion in this case; such a bright-line threshold for minority CVAP is not helpful or appropriate here.

In his testimony, Dr. Weber conceded that if this Court were to reject his 10 percent turnout requirement, then the Hispanic voters in Port Chester were cohesive in 13 of 15 Trustee and Mayoral elections between 2001 and 2006. Additionally, Dr. Weber conceded that if his arbitrary fixed CVAP participation percentage were not adopted by this Court, then in 10 of those 15 elections Hispanic voters were "strongly cohesive." In sum, without his 10 percent participation rule, Dr. Weber conceded that the Hispanic voters of Port Chester are cohesive. Accordingly, I find that the United States has demonstrated a likelihood of success with respect to, and will likely be able to prove the second Gingles factor.

C. The white majority must vote sufficiently as a bloc to enable it, in the absence of special circumstances, to defeat the minority's preferred candidate

As to the third Gingles precondition, this Court finds that the United States has shown a substantial likelihood of being able to prove that the non-Hispanic majority in Port Chester votes sufficiently as a bloc to enable it to defeat Hispanic candidates of choice.

The parties' experts offered substantially different views of which elections this Court should consider most important in analyzing the third Gingles precondition, though both sides agreed that the 2001 Trustee race in which Mr. Ruiz was a candidate was the most significant of the elections they studied. We heard a considerable amount of testimony about several countywide races, including one in which Judge Nilda Morales Horowtiz became the first person of Hispanic ancestry ever to win election to a countywide office in Westchester, and two in which Anthony Castro, a candidate of Portuguese ancestry, was defeated in his bids to become Westchester's District Attorney. We even heard some testimony about a statewide race in which a Hispanic candidate, who was not the candidate of choice of the Hispanic community, was defeated in her attempt to become New York's Attorney General. The parties' experts analyzed the results of votes cast in Port Chester in these elections, and reached divergent conclusions about their relevance. Plaintiff also attempted to introduce evidence of non-Hispanic bloc voting by presenting information regarding the outcomes of various elections for School Board.

For the purposes of this decision, I focused my attention on the endogenous elections – for Mayor and for various Trustee positions – that were held exclusively within the Village of Port Chester. While recognizing that the 2001 Trustee race took on special significance because of the involvement of Mr. Ruiz, I also paid close attention to the "white versus white" Mayoral and Trustee elections held between 2001 and 2006. In choosing to focus my attention on these races, I was guided in part by the Second Circuit decision in NAACP v. City of Niagara Falls, 65

F.3d 1002, 1016 (2d Cir. 1995), which made clear that in this Circuit, at least, it is important for district judges to consider "white versus white" elections in a Section 2 analysis.

While I did not disregard evidence of the exogenous elections involving Hispanic candidates, I found evidence from the endogenous contests to be both more convincing and less fraught with factual disputes about, for example, whether candidates were or were not perceived to be Hispanic and how that may or may not have factored into the electoral outcomes. Further, it is clear to this Court that in general, countywide and statewide elections interject a host of different influences and variables into the electoral analysis, not the least of which is that those elections are held "on cycle" in November. In addition, I did not accept Plaintiff's evidence about the School Board elections in support of the third Gingles precondition; because those elections could not be analyzed statistically, and because fact witnesses offered conflicting, and unverifiable, opinions about which candidates had the support of which communities in those elections, I did not find that evidence to be probative on this question. For all of these reasons, I have concentrated for now on the endogenous elections in the Village.

In all 10 Trustee contests between 2001 and 2005, the Hispanic candidates of choice were different from the non-Hispanic candidates of choice; the candidates of choice of the non-Hispanic voters won 9 of those 10 elections. The only year in which a Hispanic candidate of choice was elected was 2001, the year in which Mr. Ruiz was a candidate; notably, Mr. Ruiz was the Hispanic community's top candidate of choice in that election according to Dr. Handley's data, but he still was defeated. In 2006, the only year in the past six in which Hispanic candidates of choice were elected in both Trustee races, it is no coincidence that those candidates were also the candidates of choice of non-Hispanic voters.

The same pattern held true for the Mayoral elections in Port Chester in 2001, 2003, and 2005. In each of these endogenous contests, the Hispanic candidate of choice differed from the non-Hispanic candidate of choice; in each, the Hispanic candidate of choice was defeated. Taking the Trustee and Mayoral elections together, candidates of choice of Hispanic voters were defeated by candidates of choice of non-Hispanic voters in 12 out of 15 endogenous elections between 2001 and 2006 – a total of 80 percent of the time. From this, it is clear to this Court that Hispanic voters and non-Hispanic voters in Port Chester prefer different candidates, and that non-Hispanic voters generally vote as a bloc to defeat the Hispanic-preferred candidates. I do not mean to suggest here that the United States has proven that the non-Hispanic community in Port Chester voted this way out of any sort of racial bias; indeed, with the exception of Mr. Ruiz, all of the candidates in these campaigns were white. Racial bias is not a prerequisite for a Section 2 violation – what is required is racial polarization in voting, and such polarization is present in Port Chester.

Defendant attempts to explain these differences by claiming that partisan politics, and not racial polarization, is the cause of these electoral outcomes. The Second Circuit has counseled, however, that arguments concerning the causes of these racially polarized outcomes are to be considered as part of the totality of the circumstances analysis, and not as part of the Gingles determination. See Goosby v. Bd. of the Town of Hempstead, 180 F.3d 476, 493 (2d Cir. 1999).

Dr. Weber believes that in order for there to be non-Hispanic bloc voting, 60 percent or more of non-Hispanics have to coalesce or vote for a particular candidate, though he concedes that there is no judicial precedent in support of this view. This Court has not been able to find a case to support this proposition. Dr. Weber again concedes that his choice of percentage is an arbitrarily assigned number that is "simply a number that he feels comfortable with." Dr. Weber

put forth no scientific or statistical basis from which this Court could conclude that there is reason to believe that 60 percent is the correct number as opposed to 55 percent or 65 percent or some other number, even if it accepted the concept of a minimum threshold requirement for non-minority bloc voting. On this point, Dr. Weber is out, alone, on a rather thin branch. Not only could he point us to no court in the United States that has accepted his cohesion requirement for non-minority bloc voting, but he also admits that he knows of no other expert in the field who has adopted or agreed with his non-minority cohesion requirement. Therefore, it goes without saying that no court or expert in the field has ever endorsed a 60 percent cohesion requirement for non-minority bloc voting. This Court declines to be the first.

Dr. Handley put forth a different analysis of the requirements of Gingles in this regard. She said in her book that "What is clearly established by Gingles is that white bloc voting is legally significant, regardless of the actual percentage of whites voting against minority-preferred candidates, when it usually results in the defeat of the minority-preferred candidates." Even Dr. Weber agrees with this statement as long as there is reliable data to review. This Court believes that a more flexible, functional test, like that proposed by Dr. Handley, is appropriate when considering whether there has been non-minority bloc voting. Applying that analysis to the elections described above, this Court concludes that Plaintiff has offered enough evidence to demonstrate a likelihood of success on the merits for the third Gingles precondition.

In conclusion, I find that the United States has shown a likelihood of success on the merits as to all three Gingles preconditions, and I will now turn to the totality of the circumstances.

VI. Senate factors – totality of the circumstances

A. The seven Senate factors

The Second Circuit has recognized that "it will only be the very unusual case in which the plaintiffs can establish the existence of the three Gingles factors but still have failed to establish a violation of Section 2 under the totality of the circumstances." Niagara Falls, 65 F.3d at 1019, n.21. Nevertheless, the Supreme Court has found that the satisfactory establishment of the three Gingles preconditions alone is not sufficient for a Section 2 vote dilution claim to succeed. See Johnson v. DeGrandy, 512 U.S. 997, 1011 (1994). Accordingly, this Court must "consider whether, under the totality of the circumstances, the challenged practice impairs the ability of the minority voters to participate equally in the political process." Goosby v. Bd. of the Town of Hempstead, 956 F. Supp. 326, 329 (E.D.N.Y. 1997) (hereinafter "Goosby I") (citing Niagara Falls, 65 F.3d at 1007). Judicial assessment of the totality of the circumstances requires a "searching practical evaluation of the past and present reality." Gingles, 478 U.S. at 79.

I will now discuss how the Senate factors apply in this case, based on the evidence presented at this hearing. I should point out that Plaintiff need not prove a majority of these factors, or, indeed, any particular number of them in order to sustain its claim. Gingles, 478 U.S. at 45. Instead, "these factors are simply guideposts in a broad-based inquiry in which district judges are expected to roll up their sleeves and examine all aspects of the past and present political environment in which the challenged electoral practice is used." Goosby I, 956 F. Supp. at 331.

1. The extent of any history of official discrimination in the state or 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

Plaintiff's expert Professor Robert Courtney Smith testified concerning the history of

discrimination against Hispanics in New York State, Westchester County, and Port Chester. Some of that testimony was related to historical events that occurred 30 or 40 years ago – including evidence of New York State's literacy test for voting (abolished in 1966), and a New York City case from the early 1970s concerning Spanish language assistance at polling places. Of greater probative value to this Court were some of the more recent examples from Westchester County – including the 1985 Yonkers housing and education discrimination case, the 2005 Consent Decree between the Untied States and Westchester County pertaining to language assistance at polling sites in the County, and the 2006 State Senate race in Yonkers. From these data points and others, Professor Smith was able to offer the general conclusion that there has been discrimination against Latinos in Westchester County.

While the evidence presented in support of this conclusion is not overwhelming, I accept it as supportive of Plaintiff's position in this case, particularly because of two Port Chester-specific examples. First, Nelson Rodriguez testified to the circumstances surrounding his 1991 campaign for a seat on the School Board (the School Board is elected by Port Chester and Town of Rye residents); according to Rodriguez, more than 40 Hispanic voters were turned away from the polls because of poll workers' inability to locate their names on voter lists. Rodriguez lost that election by 37 votes. It is fair to assume that had the approximately 40 votes been lodged and counted, the outcome of this election could have been different. While there may not have been discriminatory intent on the part of the election workers, the conduct of local officials here resulted in a discriminatory effect so severe that the New York State Commissioner of Education ordered a new election to be held. In the new election in 1992, Rodriguez was defeated by 374 votes; one can only imagine the effect this sequence of events had on the Hispanic community's sense of enfranchisement.

Further, Professor Smith analyzed the Consent Decree entered in the federal courtroom directly beneath this one in United States v. Westchester County, 05 Civ. 0650 (CM), as a guidepost for what type of language assistance would be required at polling sites in Port Chester. Using this guidepost, Professor Smith concluded that Port Chester failed to provide sufficient language assistance at polling sites in Port Chester in the Trustee elections from 2001-2006. In a related matter, this Court heard testimony from Richard Falanka, the former Village Clerk and Village Manager of Port Chester, that made clear that there are no Spanish-speaking employees at the Village Hall who would be able to take a complaint from a Spanish-speaking voter at the beginning of the polling day (from 7:00 a.m. until 9:00 a.m.) or and the end of the polling day (from 4:30 p.m. until 9:00 p.m.), though English-speaking employees are available to receive complaints during those times. This Court was also struck by an excerpt from one of the public hearings, where a citizen of Port Chester suggested that Port Chester's representatives in Congress should introduce an amendment to exempt the Village from the requirements of the Voting Rights Act. That a lawyer would make such a suggestion is unusual enough, but the fact that the Village subsequently named this individual as the counsel to the newly formed Voting Rights Commission in the Village was, to say the least, a surprise.

I am persuaded that there is some history of official discrimination that continues to touch the rights of Hispanics to participate in the democratic process; however; I am far more influenced by other Senate factors.

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

The Gingles Court cited this as one of the two most important Senate factors, and I find it very significant that this factor strongly supports Plaintiff's position in this matter. The Supreme Court held in Gingles, 478 U.S. at 53 n.21, that "racial polarization exists where there is a

consistent relationship between [the] race of the voter and the way in which the voter votes." Such a consistent relationship clearly exists in Port Chester. As explained earlier in the discussion of the second and third Gingles factors, this Court concludes that voting in Port Chester is racially polarized – Hispanic voters vote cohesively, and the non-Hispanic community tends to vote as a bloc, generally resulting in the defeat of the Hispanic preferred candidates. In election after election – particularly in the Village's endogenous contests – Hispanic candidates of choice have been defeated by white bloc voting. I should also note that in the data presented by Dr. Handley in support of her conclusions of polarization, African-American and other minority voters are grouped in with the "non-Hispanic" voting bloc for purposes of her analysis. Thus, to the extent, if any, that African-American voters actually tend to vote in a manner more comparable to the Hispanic citizens of Port Chester than the non-Hispanic white citizens of Port Chester, the polarization data actually understates the separation between the Hispanic and non-Hispanic white communities in the Village.

Because of the lack of statistical data for the elections for the School Board, I have not considered evidence of those contests in my determination that voting in Port Chester is racially polarized; even though various witnesses testified that they believed they had the support of the Hispanic community in their bids for the Board, there is no straightforward way to confirm or refute such statements. Regardless, there is ample evidence from other elections that can be statistically analyzed to support this conclusion.

One additional note here: though it does not speak to the issue of whether *voting* in Port Chester is racially polarized, I did take note of the evidence from the two public hearings, which were designed to solicit the views of Port Chester residents concerning the Department of Justice investigation. From Professor Smith's analysis of these public meetings, along with the

recordings of the meetings themselves, it was clear to me that the Village is rather polarized along racial lines when it comes to this issue. The fact of racial divisions in the political subdivision is not a Senate factor, but evidence of such divisions that can be tied directly to issues of voting and political participation is nevertheless instructive.

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

Port Chester's practice of holding local elections "off-cycle" in March and staggering its Trustee elections combines to enhance the opportunity for discrimination against the Hispanic voting population. Experts on both sides agree that generally, voter turnout is considerably lower in March elections than in November elections, and that this general principle is true of the off-cycle elections in Port Chester for both the Hispanic and the non-Hispanic populations of the Village.

Where the experts differ is in how these data should be interpreted. Defendant has emphasized the low March turnout throughout this hearing in an effort to demonstrate that the real problem for the Hispanic community in Port Chester is apathy, not the discriminatory effect of a structurally flawed system. In my view, however, the low March turnout is indicative of the Section 2 violation here; holding local elections at a time when only the most engaged and politically astute citizens – those citizens who feel the most enfranchised – are likely to vote will almost certainly result in the diminished influence of groups who feel generally excluded from the political fabric of the community. Professor Ronald Keith Gaddie, for example, agreed that data suggest that moving elections to November could increase turnout. Without question, in my view, the timing of the March elections has an unintended consequence of increasing the discriminatory effect on the Hispanic community.

The Supreme Court has recognized that staggered elections may enhance the discriminatory effect of certain voting systems. See, e.g., Lockhart v. United States, 460 U.S. 125, 143 (1983). Particularly given that many of Port Chester's Trustee elections have been close in terms of number of votes received, it is substantially less likely that white bloc voting could defeat all Hispanic-preferred candidates if all six trustees were chosen at one time.

I am not suggesting here that Port Chester adopted either of these practices with the intention of discriminating against Hispanic citizens – indeed, testimony received in this hearing suggests that many communities in New York State hold local elections in March – but as I have stated previously, intent is not the touchstone of a Section 2 violation. What is important here is that off-cycle and staggered Trustee elections contribute to the Hispanic community's difficulty in electing its candidates of choice and "enhance the opportunity for discrimination" against Hispanics.

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

Though the selection process of Port Chester's two major political parties formally allows for candidates to have open access to the ballot through the party caucus system, the reality of local politics in this community is that virtually binding decisions are made at closed meetings of the parties' respective nominating committees, which allow limited access to outsiders or upstart candidates. Leaders of both the Democratic and Republican parties in the Village described very similar approaches to selecting Trustee candidates. Prospective candidates are asked to interview before the parties' nominating committees, which then select their two preferred individuals and forward those names to the parties' caucuses for ratification. At each caucus, a majority of caucus attendees must vote in favor of a particular candidate for that candidate to formally receive the party's nomination for Trustee. In theory, a candidate who did not win

approval from the nominating committee could "storm" the caucus by bringing enough supporters to challenge the nominating committee selections – the formal rule is that the individuals who receive the most support at the caucus become the nominees. For both parties, however, the nod from the nominating committee is the critical step to getting onto the March ballot – no witness could identify a single instance where the nominating committee's selections were defeated by a "storming" of the caucus. Indeed, no witness ever identified a bona fide *attempt* to storm the caucus.

In fact, Dr. Janusz Richards, the Chairman of Port Chester's Republican Committee, initially testified that he believed that candidates were required to interview with the nominating committee in order to receive the Republican nomination. Though he ultimately clarified this testimony to make clear that there was no party rule or regulation that required an appearance before the nominating committee, the fact that this political "insider" was not completely clear about the possibility of winning the nomination through the caucus alone makes this Court question whether the "storming" option is known to exist among the general population, much less the Hispanic community.

Again, this system greatly favors those with existing political ties or other institutional support. Members of the Hispanic community have few positions of leadership within the major political parties in Port Chester; with the exception of a brief "renegade" effort led by Mr. Ruiz to seat Hispanic-preferred district leaders in the Democratic Party in 2004, very few Hispanics have served at even this entry level leadership position in either party. Even when the parties purported to have made outreach efforts to find Hispanic candidates, the evidence is clear that only two Hispanics made it through the nominating committee process and onto the ballot for Port Chester trustee between 1992 and 2006. Of note, this Court also heard testimony that at

least one recruited potential candidate made clear at the October 5, 2006 public hearing that she believed a Hispanic could never be elected under the current at-large system.

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

Professors Smith, Gaddie and Morrison all acknowledge that Hispanics in Port Chester have lower levels of educational attainment on average than non-Hispanics, and also have lower incomes on average than non-Hispanics despite comparable levels of labor force participation. Dr. Morrison documents these differences in his most recent report in this case. These facts are not changed at all by the declarations submitted by Defendant from Hispanic residents of Port Chester who have thrived in the Village – the aggregate data, based on information collected for the 2000 Census, clearly points to these disparities. The outstanding question for me is what to do with this information.

Even Dr. Handley concedes in her report that factors other than socioeconomic status must contribute to our understanding of participation rates in Port Chester, in part because the level of participation fluctuates greatly between March and November elections, even within the same calendar year. It is not clear whether the fluctuation in the rates of participation can be accounted for by the fact of the Village's use of "off-cycle" elections. Professor Smith agreed that the fact that the Hispanic community is on average younger and more recently arrived in the United States than the non-Hispanic citizens of Port Chester could contribute to lower Hispanic voter turnout. He also testified, however, that the presence of other factors does not negate the effects of socioeconomic status.

Professor Gaddie testified that socioeconomic status ("SES") factors such as age, wealth, education and literacy alone are not enough to predict rates of political participation, though he

freely admitted that the SES model is a foundation and starting point for such an analysis and that SES is the baseline upon which all other factors operate. Professor Gaddie also conceded that empirical studies have repeatedly shown that individuals who score lower on socioeconomic status criteria are less prone to participate in politics. He offered the proposition that in addition to the SES factors that contribute to one's "civics skills set," it is important to take into account mobilization efforts. Political mobilization, he suggested, is not determined by socioeconomic status, but rather by the degree of in-person campaigning and other get-out-the-vote efforts in communities of lower socioeconomic status. But Professor Gaddie's theories concerning mobilization are accompanied by his recognition that "if you build it they will come" – that is, a district-based system with a majority-minority district would likely increase the number of Hispanic candidates who would run for office (and the number who would win), and that such candidates would likely stimulate increased voter registration among Hispanics.

In my view, Plaintiff offers enough evidence to suggest that they would likely be able to demonstrate by a preponderance of the evidence that the effects of Hispanics' socioeconomic status, when combined with the structure of elections in Port Chester, combines to limit the opportunities of the Hispanic community to participate in the political process and to elect candidates of choice. While a switch to a district-based system would not cure all of these effects, it seems that even Professor Gaddie would agree that the effects could be substantially ameliorated.

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

The Plaintiff attempted to demonstrate through the testimony of Dr. Maria Munoz Kantha that the 2005 contest for Westchester County District Attorney between Janet DiFiore and Anthony Castro was characterized by subtle racial appeals in the form of a campaign flyer.

While Dr. Kantha's testimony made clear that there were some in the Hispanic community who viewed this document as a racial appeal, I am not persuaded that the flyer amounted to anything more than partisan political propaganda in the midst of a hard-fought campaign. For the purposes of this proceeding, I do not find this flyer to be relevant evidence of the existence of racial appeals in elections that took place in Port Chester. Plaintiff also offered testimony from Mr. John Reavis and Mrs. Doris J. Bailey-Reavis about racial epithets that were spoken or written at two points during Mr. Reavis's 1996 run for the School Board. While these episodes certainly do suggest that race may have played some role in certain voter behavior and political campaigns in Port Chester over the years, they do not rise to the level, quantity, and type of racial appeal that would lead me to find that the Plaintiff has proven this Senate factor to my satisfaction.

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

The Gingles Court also cited this as one of the two most important Senate factors, and it is, in my view, one of the key factors supporting the Plaintiff's case on the totality of the circumstances. Defendant does not dispute that no member of the Hispanic community in Port Chester has ever been elected to public office – not Mayor, not the Board of Trustees, and not the School Board.

Indeed, in all the Trustee elections studied by both sides in this case through 2006, only two Hispanics have ever been on the ballot in a Port Chester trustee election – Jose Santos in 1992 and Cesar Ruiz in 2001 – and both finished last in their respective fields. Incidentally, Rico Dos Anjos, a candidate of Portuguese descent who many voters may have perceived to be Hispanic because of his name, ran for Trustee in 1998 – he also finished last. While I noted before that I did not consider the outcome of the School Board races as evidence of racial

polarization in Port Chester, I do take note of the School Board elections as part of this Senate factor. Three Hispanic candidates ran a total of five times (Nelson Rodriguez ran three times), and all were defeated. In addition, though African-Americans are not the specific minority group at issue in this proceeding, it is also worth noting that no African-American has ever been elected Mayor, or to the Board of Trustees or to School Board in Port Chester.

The Village attempted to elicit testimony concerning various theories for why no Hispanics have been elected, and also endeavored to show that both major political parties in Port Chester made concerted efforts to recruit Hispanic candidates to run for office. At this stage, however, it is not helpful to this Court to engage in decades-old, self-serving speculation as to why certain elections turned out the way they did. Further, as to the recruitment of Hispanic candidates, it appeared to me that some of that recruiting was conducted at least in part as a response to the Justice Department's investigation here; more importantly, it is striking that so few Hispanic candidates ultimately were put forward by the parties, despite these purported recruiting efforts.

I conclude that this important factor strongly favors Plaintiff's position in this case, and supports my finding of a likelihood of success on the merits of this litigation.

B. The two additional factors

The 1982 Senate Judiciary Committee report also set forth two "additional factors" that have, in some cases, had probative value in an analysis of whether a Section 2 violation had occurred. I will briefly discuss these additional factors.

1. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group

The United States has not attempted to make an issue of Port Chester's lack of responsiveness to the particularized needs of members of the Hispanic community. The Senate

Report makes clear that the issue of a political subdivision's responsiveness has little probative value, particularly where the plaintiff has not made it an issue in the case – "defendants' proof of some responsiveness would not negate plaintiff's showing by other, more objective factors enumerated here that minority voters nevertheless were shut out of equal access to the political process." See United States v. Marengo County Com., 731 F.2d 1546, 1572 (11th Cir. 1984) (citing Senate Report). Thus, while Defendant has attempted to demonstrate through testimony and, in particular, through many of its declarations, that the Village government is in fact sensitive to the needs of the Hispanic community, that alone is not nearly enough to overcome my preliminary findings with regard to the more objective Senate factors.

2. Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous

Plaintiff puts forward no real evidence to suggest that the policy rationales underlying Port Chester's voting system are tenuous. Port Chester has had an at-large system of elections in place since 1868, more than a century before the Hispanic population became a plurality. The Village has offered evidence that it holds local elections in March to insulate them from the vagaries of the national election cycle and, in part, to bring the Village in line with other New York State localities. Further, Defendant notes that the staggered system of electing trustees, when combined with the two-year term of office for the Mayor, is designed in part to reduce the power of incumbency by forcing any Mayor who is re-elected to serve with different combinations of trustees. Thus, the current Port Chester system is not a marked departure from past practices in the Village, nor is it necessarily a significant departure from the structure employed by other localities in New York State. Plaintiff does not appear to contest these representations at this point.

C. Conclusion – totality of the circumstances

Though Plaintiff need not prove all, or even a majority of the Senate factors in order to demonstrate a likelihood of success on the merits under the totality of the circumstances, the United States has presented evidence that solidly supports a Section 2 violation for several of the enumerated factors, including the two dubbed "most important" by the Gingles Court. Thus, I conclude that the Plaintiff has established a likelihood of success on the merits under the totality of circumstances analysis.

VII. Conclusion – preliminary injunction

As I have described here today, this Court concludes that the United States has put forward enough evidence to indicate that Plaintiff is likely to succeed on the merits of its claim that the Village of Port Chester's system for electing its Board of Trustees violates Section 2 of the Voting Rights Act. Plaintiff has shown that it likely will be able to demonstrate all three Gingles factors, and will be able to prove that the totality of the circumstances favors a finding of a Section 2 violation. Accordingly, Plaintiff's request for a preliminary injunction is GRANTED. I order that the Village of Port Chester is hereby enjoined from holding its Trustee election, currently scheduled for March 20, 2007, pending a trial on the merits in this matter. This Court is aware, of course, that Port Chester's Mayoral election is also scheduled for March 20; the Mayoral election is not implicated by this decision, and the Village is free to proceed with that election if it chooses to do so. I will have copies of my remarks here today available for counsel at the conclusion of these proceedings.

VIII. Timing of next phase of proceedings

As we briefly discussed on Monday, the next step for us is a trial on the merits in this matter. It is my intention to take into evidence at the trial all 1,600+ pages of transcripts from this preliminary injunction hearing so that the witnesses who testified here will not have to testify again, unless they have new information to provide at that time. Though this opinion does not contain the type of factual detail that a written opinion would, it should demonstrate to the parties that I have absorbed the evidence presented in this matter and have given it careful and detailed consideration. All of this should make it easier to expedite the trial phase.

I know that there was also a request by the Defendant that I visit Port Chester as part of this hearing; the tight schedule of this matter did not permit such a visit, but I will consider whether such a visit might be of use to this Court as part of the trial. My trial schedule in the spring is, quite frankly, very busy, but I have set aside the week of April 16 through April 20 for you. If counsel have specific problems with those dates, please contact my chambers by Tuesday of next week so that we can discuss alternatives, but I want to get this in soon so that there is no unnecessary delay in reaching a resolution. I should also note that attorneys for Cesar Ruiz have filed an Order to Show Cause wherein Mr. Ruiz seeks to intervene as a party plaintiff in this matter. I have set that down for a conference next Thursday morning, March 8, at 10:00.

I believe this covers everything that I intended to cover today.