No. 06 CV 15173 (SCR)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT

UNITES STATES OF AMERICA,

Plaintiff,

v.

VILLAGE OF PORT CHESTER,

Defendant.

TRIAL IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE

John W. Carroll
WOLFSON & CARROLL
233 Broadway - Suite 2200
New York, NY 10279
T: 212.233.0314
F: 212.349.4911

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Ninth Circuit Rule 26.1, Amicus Curiae FairVote hereby states that it is a non-profit corporation organized under the laws of the District of Columbia. FairVote has no parent corporation, and no publicly traded company owns 10 percent or more of the stock of FairVote, given that FairVote issues no stock and thus has no shareholders.

Dated: June 14, 2007

_____
John W. Carroll NYSB# JC6810
WOLFSON & CARROLL
233 Broadway - Suite 2200
New York, NY 10279
T: 212.233.0314
F: 212.349.4911
Attorney for Amici Curiae
FairVote

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IDENTITY AND INTEREST OF AMICUS CURIAE

FairVote is a national 501(c)(3) non-profit organization incorporated in the District of Columbia, whose mission is to advocate for fair representation through voting systems changes. FairVote files this brief to ensure consideration of the availability and legality of the full range of potential remedies, should this court find the Village of Port Chester, New York to be in violation of Section 2 of the Voting Rights Act.

SOURCE OF AUTHORITY OF AMICUS CURIAE TO FILE

"Federal courts have discretion to permit participation of amici where such participation will not prejudice any party and may be of assistance to the court." Strougo v. Scudder, Stevens & Clark, Inc., 1997 WL 473566 (S.D.N.Y. Aug. 18, 1997) (citing Vulcan Society of New York City Fire Dep't, Inc. v. Civil Service Comm'n, 490 F.2d 387, 391 (2d Cir. 1973)); United States v. Gotti, 755 F.Supp. 1157, 1158 (E.D.N.Y 1991) (amici may "provide supplementary assistance to existing counsel and insur[e]a complete and plenary presentation of difficult issues so that the court may reach a proper decision").

SUMMARY OF THE ARGUMENT

Modifying an at-large system to provide for cumulative or choice voting can often meet the goals of fair representation better than alternative remedies. Both methods have been adopted in dozens of communities throughout the United States as a result of consent decrees in Voting Rights Act (hereinafter "VRA") litigation, and these systems have a track record of serving as an effective remedy. No federal Court of Appeals has held that a cumulative voting consent decree is per se unlawful, and in the

Second Circuit the option remains for a judicially imposed cumulative voting remedy.

At the same time, cumulative and choice voting avoid the necessity for deliberately drawing districts along racial lines, with the attendant problems that can cause. As a result, a geographically dispersed minority group may be able to gain representation otherwise unavailable through district or at-large winner-take-all systems.

This court should give consideration to a modified at-large voting system, such as cumulative or choice voting, should defendants be found liable for violations of Section 2 of the VRA.

ARGUMENT

I. Background Information

The Village of Port Chester is located in the state of New York and has a population of 27,867. (Comp. ¶6.) The Village is governed by a Board of Trustees comprised of six Trustees and the Mayor. (Comp. ¶9.) Although forty-six point two percent (46.2%) of the population is Hispanic (Comp. ¶6.), and twenty-one point nine percent (21.9%) of the citizen voting age population is Hispanic (Comp. ¶8.), the Village has never elected a Hispanic person to the Board of Trustees. (Comp. ¶13.) Plaintiffs seek representation through this litigation, with a proposed remedy being single member districts. Notably, Hispanics are dispersed throughout the village.

The election system currently in use is an at-large, winner-take-all system with staggered voting that holds elections for two Trustee positions per year. (Comp. ¶18.) At-large, winner-take-all elections are those in which all candidates run together for several seats and voters may vote for enough candidates to fill the

seats. For example, if there are six seats to be filled and twelve candidates running, each voter can cast one vote each for up to six candidates, and the six candidates with the most votes win.

With this electoral structure, a very slim majority can potentially elect the entire government. If a fifty-one percent (51%) majority votes for the same candidates, they can elect one hundred percent (100%) of the board. This can leave up to forty-nine percent (49%) of voters unable to elect candidates of choice.

It is the winner-take-all aspect of this type of at-large system that causes disproportional representation. There are other types of modified at-large systems in use throughout the United States, such as cumulative voting and choice voting, that can result in representation for more groups in a community. These systems avoid the winner-take-all aspect of at-large voting by allocating votes in a more proportional way. Each of these systems, for reasons described herein, are effective at giving minority groups representation in their local government, especially when voters are geographically dispersed. They also have some significant benefits over single-member district systems.

II. Single-Member Districts are a Common Remedy for Illegal Voting Schemes.

The traditional, and most popular, remedy for Section 2 violations is the creation of single-member districts with a district containing a majority population of the affected minority group. See, e.g., Steven J. Mulroy, Alternative Ways Out: A Remedial Roadmap for the Use of Alternative Electoral Systems as VRA Remedies, 77 N.C. L. 1867, 1871 (1999); Michael E. Lewyn, When is Cumulative Voting Preferable to Single-Member Districting?, 25

N.M.L. Rev. 197, 198 (1996). Single-member districts have several marked benefits, such as voters' familiarity with this type of system and the potential benefits of geographic representation. Despite these benefits, single-member districts can be difficult to draw, their effectiveness is subject to population shifts, and they require redistricting. This can create large expenditures of time and money, and often leads to litigation.

III. If Liability is Found, a Modified At-Large System May Be a More Effective Remedy.

Modified at-large election systems are often a preferable choice for jurisdictions because they can represent diverse and geographically dispersed groups within a community without a need to create districts. Cumulative voting is one type of at-large voting that helps to ensure that minorities' interests are represented. In a cumulative voting system, each voter is given as many votes as there are positions to fill (for example, if there are six seats on the city council, each voter would have six votes). Each voter is then able to allocate their votes among candidates as they see fit, including giving all six votes to one candidate ("plumping") or one vote each to six candidates. The candidates with the highest number of votes win, but a minority of voters, by "plumping" their votes onto one candidate, may earn a fair share of representation. See Richard H. Pildes and Kristen A. Donghue, Cumulative Voting in the United States, 1995 U. Chi. Leg. Forum 241, 272 (describing how cumulative voting in Chilton County, Alabama "has worked just as predicted ex ante with respect to enhancing black representation even in the face of racially polarized voting"); Steven J. Mulroy, The Way Out: A Legal Standard

for Imposing Alternative Electoral Systems as Voting Rights Remedies, 33 Harv. C.R.-C.L. L. Rev. 333, 349 (1998) (cataloging the success of cumulative voting in elections in Illinois, New Mexico, South Dakota, and Alabama for a variety of racial groups).

Another modified at-large election system with a rich history is choice voting, which allows voters to rank candidates in order of preference, while allocating seats proportionally. For example, for a six-seat council, candidates need to reach a "threshold" of one seventh of the total votes cast to win.[1] Votes are counted in a series of rounds. In the initial round, candidates whose first place votes exceed a certain "threshold" are elected. The portion of each winner's votes that exceed the threshold is then redistributed to remaining candidates based on voters' second choices. When no candidate has met the threshold, the candidate with the fewest votes is eliminated, and his ballots are redistributed to the other candidates. This process of redistribution and elimination is repeated in subsequent rounds until all seats are filled. Mulroy, The Way Out, supra at 349.

This system was in use for New York City community school board elections until restructuring in 2003, and the Department of Justice refused to preclear a change to a less representative

[1] Choice voting is also known as "single transferable vote." To calculate the percentage of voters needed to guarantee a seat in choice or cumulative voting, use the following formula: If there are 'x' number of positions on a board to be filled, each person on the board will require 'y'% of the total number of votes to be elected. If each member of a minority group gave all x of their votes to the same candidate, a minority group comprised of only y% of the population could achieve representation on the board. This number "y" is calculated using the formula "y = 1/(1+(number of seats)) x 100% + 1 voter." This minimum percentage of voters needed to elect a candidate is known as the "threshold of inclusion."

system in 1999. Letter from DOJ to Eric Proshansky, Assistant Corporation Counsel, New York City (Feb. 4, 1999). Choice voting is also listed as an effective option for city governments in the National Civic League's Model City Charter. National Civic League, Model City Charter, (National Civic League Press, 8th ed. 2003). In jurisdictions where it has been employed, choice voting has successfully provided fair representation for minorities. See id. at 1893; Douglas Amy, Real Choices, New Voices 137-38 (1993). See also McSweeney v. City of Cambridge, 665 N.E.2d 11, 15 (Mass. 1996) (noting that choice voting "seeks more accurately…to provide for the representation of minority groups") (internal quotations omitted). Though this brief focuses on cumulative voting, the arguments below apply equally to choice voting.

As will be discussed below, a consent decree between the parties agreeing to a modified-at large system would be preferable for all parties involved. Courts uniformly allow these types of consent decrees, and the methods are effective remedies for Section 2 violations. Alternatively, FairVote believes that the court may impose these remedies. There are numerous reasons, discussed below, that show these methods to be viable and appropriate remedies. Based Supreme Court dicta, see infra Part IV(c)(i), a circuit split on the ability of courts to impose these methods, see infra Part IV(c)(ii), and the novelty of this question in the Second Circuit, we believe that a district court in the Second Circuit may legally impose these remedies.

a. Cumulative Voting Increases the Opportunity for Representation of Minority Groups.

Cumulative voting increases the opportunity of minority groups to gain representation in government. See Richard Briffault, Book Review: Lani Guinier and the Dilemmas of American Democracy, 95 Colum. L. Rev. 418 (1995). By giving voters as many votes as seats to be filled, and allowing them to cast those votes behind one or several candidates, a minority group can gain representation.

This system provides representation for minority groups regardless of where they live in the city. When single-member districts are present, the minority group has to be living in a concentrated manner, such that they comprise over fifty percent (50%) of a single district. A minority group as high as forty-nine percent (49%) could receive no representation if the community is racially integrated. Cumulative voting jurisdictions give representation to any politically cohesive minority group with numbers higher than the threshold of inclusion, regardless of that group's race, religion, political views, or any other factor.

b. Cumulative Voting Would be an Effective Remedy for the Village of Port Chester.

Cumulative voting would allow the Hispanic voters of the Village of Port Chester to gain representation on the city's board if the elections for Trustees were unstaggered. At present, each Trustee serves a three-year term and two Trustees are elected each year. (Comp. ¶9.) If only two seats are being voted on each year, the threshold of inclusion, i.e. the minimum percentage of the minority voters needed to gain one seat, would be thirty-three point four percent (33.4%). Because only twenty-one point nine percent (21.9%) of the citizen voting age population is Hispanic, (Comp. ¶8.), maintaining the system in this staggered fashion would

likely result in an inability of the Hispanic population to elect any representatives. If the elections become unstaggered and all six trustees were up for a vote every three years, the threshold of inclusion would be only fourteen point three percent (14.3%) and the Hispanic community would be likely to elect a representative.

c. Cumulative Voting Has Been a Viable Option for Both Government and Corporations for Over a Century.

Cumulative voting is neither new nor radical in America. It is an especially popular voting method on corporate boards because of how well it represents the diversity of a company's shareholders. See Jeffrey N. Gordon, Institutions as Relational Investors: A New Look at Cumulative Voting, 94 Colum. L. Rev. 124, 144-145 (1994). It also has an extensive history in American politics.

i. Cumulative Voting Has a Rich History in American Politics.

Support for cumulative voting dates back to 1859, when commentators praised cumulative voting for protecting "minority party representation while discouraging the proliferation of minor parties that might occur under proportional representation." Michael E. Lewyn, When is Cumulative Voting Preferable to Single-Member Districting?, 25 N.M.L. Rev. 197, 204-205 (1996). In 1870, Illinois adopted cumulative voting as a means for electing members to its lower house. Id. at 205. Cumulative voting reduced the geographical divisions between the political parties in the state, and increased minority party representation in the house. Id.

In 1980, Illinois voters abandoned cumulative voting in the lower house. Id. Commentators suggest, however, that this move was a reflection of the voters' displeasure with the current Illinois

legislature and their subsequent reduction in legislative seats, rather than with the cumulative voting system in general. Id.

Despite Illinois' abandonment of cumulative voting in 1980, cumulative voting gained substantial popularity throughout the 1980's and 1990's. Id. at 207. In this surge of popularity, the focus shifted from gaining representation for political minorities to gaining representation for racial minorities. Id.

ii. Cumulative Voting is Frequently Implemented in Voting Rights Act Consent Decrees.

The judiciary became flooded with lawsuits challenging election schemes under the VRA, and jurisdictions across the country recognized cumulative voting as an effective means of settling the lawsuits out of court. Id. During this period, cumulative voting was adopted by jurisdictions in Alabama, New Mexico, North Dakota, Texas, and West Virginia. Id.

Cumulative voting is currently used in several states across the nation. At least sixty-four jurisdictions have adopted cumulative voting through consent decrees in VRA Section 2 litigation for their city councils, county commissions, school boards, and charter review commissions. See FairVote webpage, http://fairvote.org/?page=230. The vast majority continue to use this system today. Id. Jurisdictions that have adopted cumulative voting to achieve fair representation have seen positive results. For example, under the cumulative voting plan in Dillard v. Chilton County Commissioners, 447 F.Supp. 2d 1273 (M.D. Ala. 2006),[2] the first cumulative election held resulted in an African-American

[2] The plan in this case was overturned by the Eleventh Circuit after nine successful election cycles, but the case is currently undergoing appeals. Dillard, 447 F.Supp. 2d 1273.

candidate from each jurisdiction being elected when none had been elected in the previous election. Lewyn, supra at 207. Another example of cumulative elections resulting in minority candidates being elected is in Amarillo, Texas. William H. Seewald, How Well is AISD's Cumulative-Voting System Working? District is in Vanguard or Reform, Amarillo Globe-News, July 5, 2002. In the two decades preceding the change to cumulative voting, no minority candidates were elected, despite a minority voting age population of over twenty percent (20%). Id.

iii. The Department of Justice Has a History of Supporting Cumulative Voting Consent Decrees.

The Department of Justice is responsible for preclearing any change to the election scheme of a jurisdiction covered under Section five of the VRA. U.S. Department of Justice Civil Rights Division Voting Section Homepage, http://www.usdoj.gov/crt/voting/. The Attorney General must examine proposed election plans to determine if they have a discriminatory purpose or effect on minority groups in the jurisdiction. 28 C.F.R. 51.52(b). If the proposed plan is free from discriminatory purpose and effect, the Attorney General must approve the plan.

The Department of Justice (hereinafter "DOJ") has supported cumulative voting for over twenty-five years. See Steven J. Mulroy, When the U.S. Government Endorses Full Representation: Justice Department Positions on Alternative Electoral Schemes, www.fairvote.org/?=542. Since 1985, fifty-two jurisdictions have submitted modified at-large election plans to the Department of Justice for preclearance. Id. Of these, eighteen proposed cumulative voting. Id. The DOJ approved all but one of these plans,

which was rejected for the lack of voter education accompanying the plan, not because of an objection to cumulative voting itself. Id.

The DOJ also expressed written support for cumulative voting on at least two occasions. In its Reply Brief in the case of Georgia v. Reno, the DOJ listed cumulative voting among the viable options a jurisdiction could choose from to remedy an unconstitutional voting scheme. Georgia v. Reno, United States District Court, District of Columbia, No. 90-2065, (Reply Br.)(1995). The DOJ repeated its support of cumulative voting when it noted in an amicus brief to the Fourth Circuit Court of Appeals that cumulative voting was among the accepted remedies for a violation of Section 2. Cane v. Worcester County, Maryland, 4th Cir. No. 95-1122, Brief of Amicus Curiae (1995).

IV. Cumulative Voting is an Appropriate Remedy Under the VRA.

Cumulative voting is an appropriate remedy under the VRA. It is an accepted method of elections for many jurisdictions across the country, and it achieves the goals of the VRA as well as or better than other remedies. Cumulative voting affords voters protected by Section 2 an equal opportunity to elect candidates of choice, which is the purpose behind Section 2. See 42 U.S.C. § 1973b. By allowing voters to "plump" multiple votes in favor of one heavily preferred candidate and thus register the intensity of voter preference, cumulative voting gives voters in a minority group a better chance to elect a candidate of choice. This principle applies to voters in politically cohesive racial minority groups as well as all other self-defined political minorities.

a. Cumulative Voting Ensures the Equal Protection Principle of "One-Person One-Vote."

Cumulative voting is fully consistent with the Equal Protection Clause's "one-person one-vote" requirement. This requirement means there must be "equal representation for equal numbers of people." Wesberry v. Sanders, 376 U.S. 1, 18, 84 S.Ct. 526, 535 (1964). Cumulative voting satisfies this requirement because all voters are given an identical number of votes, and are able to use these votes however they choose. See McCoy v. Chicago Heights, 6 F. Supp. 2d 973, 984 (1998)(cumulative voting), rev'd on other grounds sub nom.; Kaelin v. Warden, 334 F. Supp. 602, 605 (1971)(limited voting).

b. Cumulative Voting is Race-Neutral.

A significant benefit of the cumulative voting system is that it allows for full representation of all minority groups while remaining blind to race. To create a jurisdiction with single-member districts that are responsive to minority groups, the districts must be drawn with a keen eye to those groups.

> Blacks are drawn into "black districts" and given "black representatives"; Hispanics are drawn into "Hispanic districts" and given "Hispanic representatives"; and so on. . . . Under our jurisprudence, rather than requiring registration on racial rolls and dividing power purely on a population basis, we have simply resorted to the somewhat less precise expedient of drawing geographic district lines to capture minority populations and to ensure the existence of the "appropriate" number of "safe minority seats." Holder v. Hall, 512 U.S. 874, 905-906, 114 S.Ct. 2581, 2598-2599 (1994)(concurrence).

A cumulative voting system allows all groups to be represented without placing the members of a group into a single district. Any remedial measure boasting positive results that remains race-neutral is especially important since the United States Supreme Court declared that strict scrutiny must be used to evaluate any

district drawn using race as a "predominate factor". Miller v. Johnson, 515 U.S. 900, 916 (1995).

c. Case Law Supports Cumulative Voting.

The discussion of cumulative voting in our legal system is marked more by absence than by binding precedent. While the field lacks an unequivocal approval of cumulative voting consent decrees, it also conspicuously lacks disapproval of them. The ability of courts to impose modified at-large election systems has been more controversial than consent decrees, with split decisions among the circuit courts. Nevertheless, as discussed herein, in some circuits, this remains an option.

i. United States Supreme Court Justices Have Voiced Their Support for Cumulative Voting.

While the United States Supreme Court has yet to rule on the constitutionality of cumulative voting in local elections, several individual justices have voiced their support of this system. In a concurring opinion, Justices Stevens and Breyer proposed that federal courts may be able to design cumulative voting systems for congressional districts. Branch v. Smith, 538 U.S. 254, 309-310 (2003). Justices Thomas and Scalia also showed their support for cumulative voting in a concurring opinion that stated that

> . . . nothing in our present understanding of the VRA places a principled limit on the authority of federal courts that would prevent them from instituting a system of cumulative voting as a remedy under § 2, or even from establishing a more elaborate mechanism for securing proportional representation based on transferable votes.
> Holder, 512 U.S. at 910-911.

ii. The Circuit Courts Are Split on Whether Cumulative Voting May be Imposed, but None of Them Forbid Cumulative Voting Consent Decrees.

The circuit courts are split on when and how cumulative voting may be used. The Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits have all held that cumulative voting may not be *imposed* against parties' wills. Cane v. Worcester County, 59 F.3d 165 (4th Cir. 1995)(unpublished); League of United Latin American Citizens v. Clements, 999 F.2d 831 (5th Cir. 1993); Cousin v. Sundquist, 145 F.3d 818 (6th Cir. 1998); Harper v. City of Chicago Heights, 223 F.3d 593 (7th Cir. 2000); Dillard v. Baldwin, 376 F.3d 1058 (11th Cir. 2004). None of these circuits, however, stated that cumulative voting consent decrees were unlawful.

The Eighth Circuit Court of Appeals has held that cumulative voting may be judicially imposed. Cottier v. City of Martin, 445 F.3d 1113 (2006). The City of Martin was found to have a voting scheme that violated Section 2 of the VRA by diluting the vote of Native Americans in the city. Id. at 1115-1116. The Eighth Circuit held that if the defendant in the case failed to offer a legal remedy, the district court must impose one. Id. at 1123. The court remanded the case back to the district court and held that if redistricting the area appeared to be unworkable, adopting a cumulative voting plan would be an acceptable remedy. Id. The district court relied on this ruling, holding that cumulative voting was the best remedy in this situation, and imposed cumulative voting on the City of Martin. Cottier v. City of Martin, 475 F.Supp. 2d 932, 941 (2007).

The Second Circuit has not yet ruled on the issue of modified at-large voting systems, but should be persuaded by the Eighth Circuit's Approach, which is the most recent Court of Appeals treatment of this issue.

d. Federal Liability Allows Remedies that are Not Explicitly Authorized by State Statute.

Although courts often look to states' laws to provide guidance when fashioning a remedy to a Section 2 violation, a remedy need not be explicitly authorized by state law to be valid. See, Mulroy, Alternative Ways Out at 1887-1888. It would be a surprisingly prophetic state law that explicitly authorized each of the many election systems that could provide remedy to these violations when these systems are often new or not widely known. When a variety of alternative methods would provide workable solutions to a violation, the court merely needs to choose a method that does the "least violence" to the state law. Id. The exception to this rule is when the only workable solution to a violation is prohibited by state law. In this circumstance, the VRA preempts the state law and the court must instate the remedy. See, e.g., Voinovich v. Quilter, 507 U.S. 146, 156, 113 S.Ct. 1149, 1157 (1999); Sexson v. Servaas, 33 F.3d 799, 802-803 (7th cir. 1994).

CONCLUSION

Modified at-large systems are an effective remedy for Section 2 violations. Courts uniformly allow parties to implement these measures through consent decrees. In the absence of a consent decree, a court in the Second Circuit could impose a modified at-large method based on the Circuit Split, support from the Supreme Court, and the novelty of this question in the Second Circuit.