IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 04-2610, 04-2611

PEDRO ROSSELLÓ; LUIS FORTUÑO; MIRIAM RAMIREZ; NANETTE GUEVARRA; ARNOLD GIL CARABALLO; LARRY SEILHAMER; JOSE SÁNCHEZ; JUAN F. RAMÍREZ; and JAVIER RODRÍGUEZ-HORTA, Plaintiff-Appellees, SILA CALDERON ET AL., Defendant-Appellants.	)	Dist Ct. No: 3:04-2251(DRD) (D.P.R.)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

Plaintiffs-Appellees Pedro Rosselló, Luis Fortuño, Miriam Ramírez, Nanette Guevara, Arnold Gil Caraballo, Larry Seilhamer, Jose Sánchez, Juan F. Ramírez, and Javier Rodríguez-Horta (collectively "Plaintiffs"), by and through undersigned counsel, submit this memorandum of law in opposition to Defendants' emergency motion for a stay pending appeal of the district court's order directing the Puerto Rico Election Commission ("Commission"), in connection with a statewide recount, to safely set aside and withhold from "adjudication" a category of

disputed "overvote" ballots that are the subject of a federal constitutional challenge by Plainitffs.

INTRODUCTION

Defendants' emergency request for a stay is predicated entirely on an inaccurate and one-sided account of the recount now underway in Puerto Rico's gubernatorial race. All parties agree that this recount should go forward. The only dispute concerns whether the district court somehow abused its broad discretion by ordering the Commission—as a part of the recount—to safely set aside a category of ballots whose validity Plaintiffs have challenged under *federal* constitutional standards. These ballots—which Plaintiffs refer to as "overvotes"—range from 7,000 to 28,000 in number, and are a small percentage of the 1.9 million ballots cast on election night.

The district court's order is a narrowly tailored and eminently sound response to the evidence it has received in the eight days (thus far) of marathon evidentiary hearings it has conducted on Plaintiffs' claims. The record establishes that a considerable number of these "overvote" ballots bear suspicious indicia of fraud; that on election night, these "overvotes" were adjudicated across Puerto Rico in inconsistent and sometimes diametrically opposite ways; that the gubernatorial candidates and senior election officials understood before the election that ballots cast in this way would be null and void; and that, ten days after

the election, and shortly before the recount was about to begin, the Commission issued a "resolution" declaring that all such "overvotes" would be considered valid votes. Under the terms of that "resolution," almost all of the overvotes will be counted as valid votes for the Popular Democratic Party's candidate for governor, Anibal Acevedo-Vila, and will tip the election away from Pedro Rossello of the New Progressive Party and deprive him of a victory in the gubernatorial race.

Defendants devote the bulk of their emergency stay motion to alarmist descriptions that mischaracterize the recount process. Contrary to these suggestions, the district court's order does *not* hold that the overvotes are invalid. As the district court has repeatedly made clear, it continues to receive evidence on the merits of Plaintiffs' constitutional claims; it has not decided the merits yet. Nor will the temporary nonadjudication of the overvotes delay the Commission's effort to complete a recount well in advance of January 2, 2005, the date on which the Governor-elect must assume office. The parties agree that the recount of the nearly 2 million *undisputed* ballots will take at least two weeks (within which time the merits of Plaintiffs' constitutional challenge will be resolved), and that, if necessary, the disputed ballots can be adjudicated in one day. Indeed, the validity of the disputed ballots under federal law may not even need to be determined if the recount of the *un*contested ballots shows a margin for one of the gubernatorial candidates that is larger than the overall number of the overvotes.

The Defendants also contend that an emergency stay is necessary because the district court's order disrupts "the ability of Commonwealth officers and authorities to carry out their solemn and lawful responsibilities" to conduct the recount in the manner specified by the Commission and endorsed (albeit in a decision Defendants agree is void) by the Supreme Court of Puerto Rico. But what Defendants have consistently been unable or unwilling to recognize is that this case involves *federal* constitutional challenges—under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and under the First Amendment—to the manner in which state officials are attempting to adjudicate the disputed overvotes. The district court has both the authority and the duty to resolve the merits of Plaintiffs' constitutional claims, and to enter orders (like the one at issue here) that ensure it retains the ability to do so. Indeed, a key predicate for the district court's ruling was its factual finding that ballot degradation would be prevented by segregating and not adjudicating the overvotes during the already hotly contested recount process. Amended Order, Nov. 23, 2004 (Docket No. 99).

Defendants also claim that the district court's "nonadjudication" rule will create public confusion and anxiety about the recount election results. But just the *opposite* is true. There is no question that the overvotes were counted under conflicting standards on election night and in the preliminary canvass, and that the election is incredibly close; accordingly, there is already public uncertainty about

which candidate will prevail. A recount conducted in the manner prescribed by the district court ensures that the only votes included within the final tally are those about which there is no genuine controversy. The district court's order protects against a circumstance in which the federal judiciary could be required to resolve Plaintiffs' constitutional claims in a manner that contradicts the publicly-announced results of a complete statewide recount.

Finally, Defendants can point to no harm that the district court's order causes them. If the Defendants' position on the merits of Plaintiffs' constitutional claims is correct, the overvotes will be adjudicated to Mr. Acevedo-Vilá in due course, *after* their constitutionality has been determined. But in the meantime, the recount is proceeding, and the district court is working diligently to bring the case to a resolution on the merits.

Under these circumstances, an emergency stay would be unwarranted and unwise. A stay from this Court would likely throw the district court proceedings into turmoil and would require the recount process to incorporate new procedures mid-stream or to be started from scratch. This Court should allow the recount to proceed in the manner prescribed by the district court. At a minimum, it should not stay the district court's order until such time as it considers the propriety of that order on the merits.

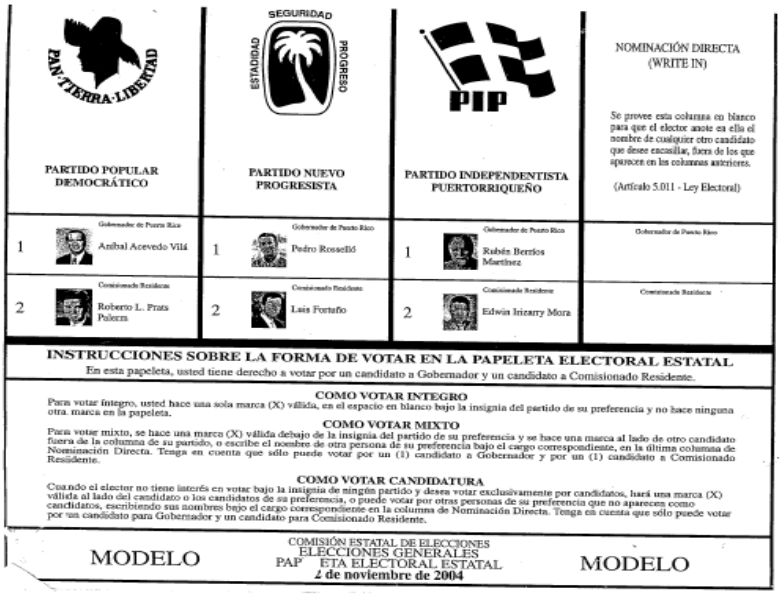
II. BACKGROUND

A. The Election

On November 2, 2004, the Commonwealth of Puerto Rico held its general elections for several federal, state, and local offices, including the offices of Governor and Resident Commissioner. Each voter was presented with three ballots on which to cast his or her votes: a state ballot, municipal ballot, and a legislature ballot. The state ballot listed only candidates for the offices of Governor and Resident Commissioner; no other office could be voted using that ballot. Candidates from Puerto Rico's three major political parties participated in the governor's race: Pedro Rosselló González, from the "Partido Nuevo Progresista," or New Progressive Party, which favors statehood for Puerto Rico; Aníbal Acevedo-Vilá, from the "Partido Popular Democrático," or Popular Democratic Party, which favors preserving Puerto Rico's commonwealth status; and Rubén Berríos Martínez, from the "Partido Independentista Puertorriqueño," or Independence Party, which favors independence for Puerto Rico (and which does not recognize the jurisdiction of the United States federal court on Puerto Rican soil).

The state ballot instructed voters to cast *one* vote for Governor and *one* vote for Resident Commissioner. An example is shown here and reproduced in Exhibit A. Voters could vote for candidates in one of three ways: "voto integro" (a

"straight vote"), "voto mixto" (a "split vote"), or "voto por candidatura" (a "vote for candidates").



PAN·TIERRA·LIBERTAD

PARTIDO POPULAR DEMOCRÁTICO

SEGURIDAD ESTABILIDAD PROGRESO

PARTIDO NUEVO PROGRESISTA

PIP

PARTIDO INDEPENDENTISTA PUERTORRIQUEÑO

NOMINACIÓN DIRECTA (WRITE IN)

Se provee esta columna en blanco para que el elector anote en ella el nombre de cualquier otro candidato que desee encasillar, fuera de los que aparecen en las columnas anteriores.

(Artículo 5.011 - Ley Electoral)

1	Gobernador de Puerto Rico: Aníbal Acevedo Vilá	1	Gobernador de Puerto Rico: Pedro Rosselló	1	Gobernador de Puerto Rico: Rubén Berríos Martínez		Gobernador de Puerto Rico
2	Comisionado Residente: Roberto L. Prats Palerm	2	Comisionado Residente: Luis Fortuño	2	Comisionado Residente: Edwin Irizarry Mora		Comisionado Residente

INSTRUCCIONES SOBRE LA FORMA DE VOTAR EN LA PAPELETA ELECTORAL ESTATAL

En esta papeleta, usted tiene derecho a votar por un candidato a Gobernador y un candidato a Comisionado Residente.

COMO VOTAR INTEGRO

Para votar íntegro, usted hace una sola marca (X) válida, en el espacio en blanco bajo la insignia del partido de su preferencia y no hace ninguna otra marca en la papeleta.

COMO VOTAR MIXTO

Para votar mixto, se hace una marca (X) válida debajo de la insignia del partido de su preferencia y se hace una marca al lado de otro candidato fuera de la columna de su partido, o escribe el nombre de otra persona de su preferencia bajo el cargo correspondiente, en la última columna de Nominación Directa. Tenga en cuenta que sólo puede votar por un (1) candidato a Gobernador y por un (1) candidato a Comisionado Residente.

COMO VOTAR CANDIDATURA

Cuando el elector no tiene interés en votar bajo la insignia de ningún partido y desea votar exclusivamente por candidatos, hará una marca (X) válida al lado del candidato o los candidatos de su preferencia, o puede votar por otras personas de su preferencia que no aparecen como candidatos, escribiendo sus nombres bajo el cargo correspondiente en la columna de Nominación Directa. Tenga en cuenta que sólo puede votar por un candidato para Gobernador y un candidato para Comisionado Residente.

MODELO

COMISIÓN ESTATAL DE ELECCIONES
ELECCIONES GENERALES
PAPELETA ELECTORAL ESTATAL
2 de noviembre de 2004

MODELO

A straight vote is one in which a voter places a mark under a party insignia, thereby voting for all the candidates in that party's column. *See* Regulations for the General Elections and Canvass of 2004 ("Regulations") 50, 80. *See also* 16 P.R. Laws Ann. § 3003(31).

PAN·TIERRA·LIBERTAD

PARTIDO POPULAR DEMOCRÁTICO

SEGURIDAD ESTABILIDAD PROGRESO

PARTIDO NUEVO PROGRESISTA

PIP

PARTIDO INDEPENDENTISTA PUERTORRIQUEÑO

NOMINACIÓN DIRECTA (WRITE IN)

1	Aníbal Acevedo Vilá	1	Pedro Rosselló	1	Rubén Berríos Martínez	1	
2	Roberto L. Prats Palerm	2	Luis Fortuño	2	Edwin Irizarry Mora	2	

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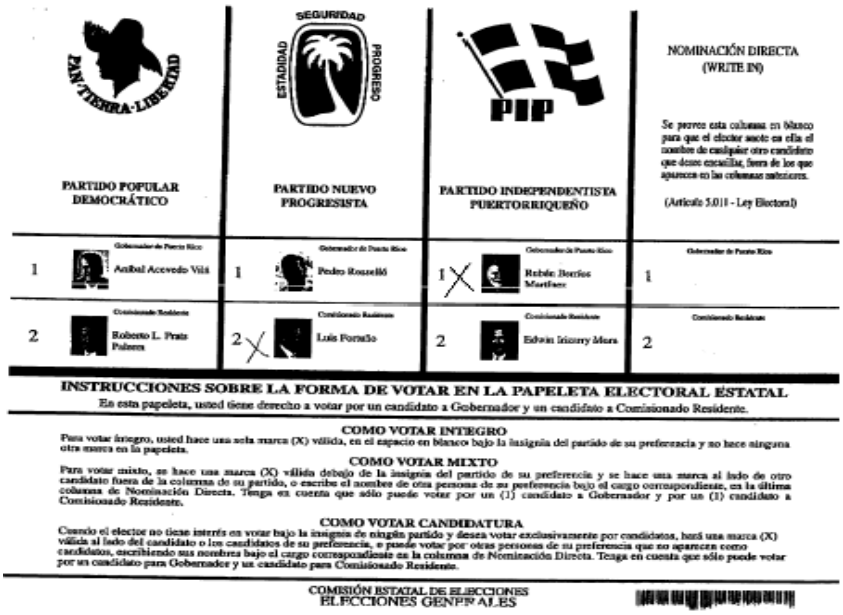
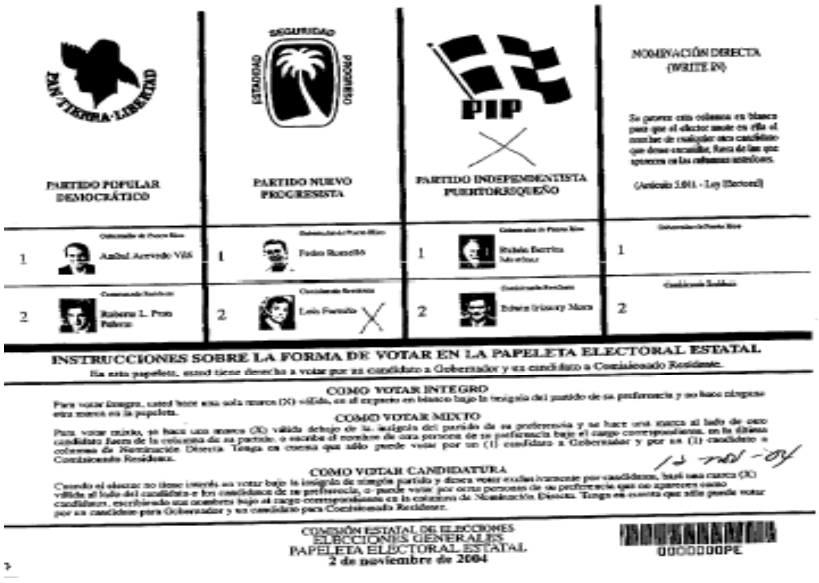
COMISIÓN ESTATAL DE ELECCIONES
ELECCIONES GENERALES

A "vote by candidacy" occurs when a voter enters marks directly for one or more candidates *without* making a mark under a party insignia. *See* Regulations 50, 82.



Finally, a "split vote" occurs when a voter makes a mark in the quadrant of the party insignia and also makes one other mark next to the name of *one* candidate from another party. *See* 16 P.R. Laws Ann. § 3003(33). An example of a valid split vote would be a ballot on which a voter placed an "X" below the Independence Party insignia and an "X" next to Luis Fortuño's name. Under that ballot, Fortuño would receive one vote for Resident Commissioner and the Independence Party candidate for Governor, Rubén Berríos Martínez—as the only remaining candidate in the Independence Party column—would receive one vote:

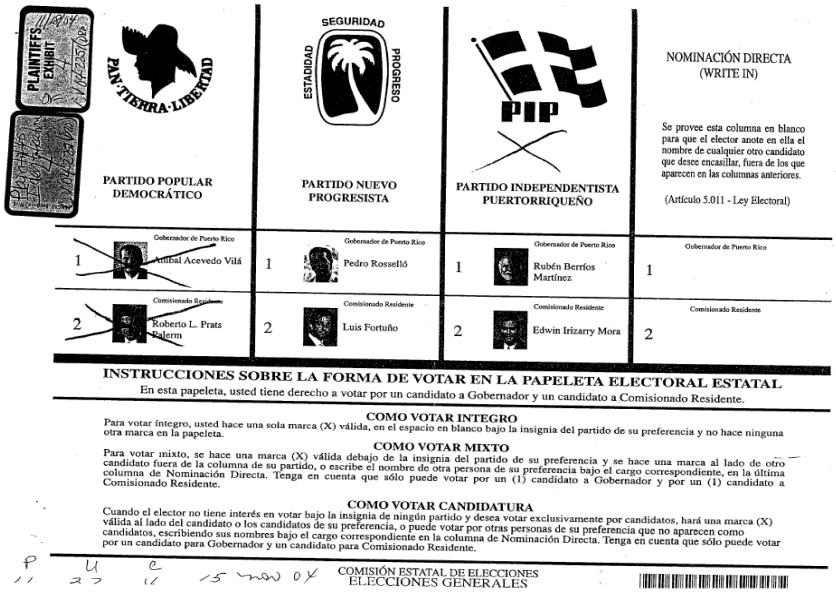


A voter cannot simply vote for a party. The ballot provides that a vote must be for a candidate: "On this ballot, you have the right to vote for a Gubernatorial candidate and a Resident Commissioner candidate." *See* Exhibit A. Accordingly, a vote under a party insignia combined with separate votes for two candidates would constitute a legal nullity.

C. The Recount

Puerto Rican law authorizes the Commission, upon written request, to order a recount when the election results show that one candidate leads the other by one-half of a percent or less of the votes. Article § 6.011 of the Puerto Rico Electoral Code, 16 P.R. Laws Ann. § 3271. Accordingly, after early morning election returns showed that Mr. Acevedo-Vilá was leading by a margin of 3,880 votes out of approximately 2 million cast, Commissioner Rivera Schatz of the New Progressive Party filed such a recount request with the Commission.

As the canvassing began, troubling reports of irregularities began to emerge. Hundreds of citizens who had properly requested absentee ballots had not received them by election day. *See* Exhibit M, ¶ 24-25 (Amended Complaint, D. P.R. No. 04-2251, Nov. 12, 2004); *see also* Exhibit O at 35, 49 (D. P.R. No. 04-2251 Tr. (Nov. 18, 2004)). At least one election official from the Popular Democratic Party was caught in the act of marking unused ballots. *See* Minutes of Meeting of Commonwealth Electoral Commission, Nov. 17, 2004, at 5, Exhibit C. Moreover, New Progressive Party officials at many polling places reported an abnormally high number of ballots marked with a strange "overvote" configuration that is at the core of this case—a mark under the party insignia of the Independence Party, and marks for the Popular Democratic Party's candidates for Governor and Resident Commissioner, Acevedo-Vilá and Prats, as shown below.



These "overvote" ballots with three marks are anomalous in two respects: (1) virtually all of the ballots with three marks had the same configuration—a mark under the insignia of the Independence Party, and additional marks for each of the Popular Democratic Party's candidates; and (2) on some of the disputed ballots, the mark under the Independence Party insignia was made in pencil, while the marks for Acevedo-Vilá and Prats were made in pen and appear to have been made by someone other than the original voter. *See* Exhibit D.

On November 12, 2004—ten days after the election—the President of the Commission, Aurelio Gracia-Morales, over the objection of the New Progressive Party's representative, declared that these unusual "overvotes" would be deemed valid "split" votes. *See* Exhibit E.

Neither the regulations, the election code, nor the ballot itself permits voters to cast votes in this way. To the contrary, the election regulations specify that a person can only vote a "split ballot" by placing an "X" under the insignia of their party and an "X" for one other candidate on the ballot, thereby ***"splitting***" their vote. *See* Regulations 81. Indeed, the Commission's own Election Manual, which includes samples of valid split ballots, makes clear that a "split vote" has one "X" under the party insignia and only one "X" next to a candidate. *See* Manual of Procedures: General Election of 2004 § 59.2, Exhibit F at 4-5. Further, Mr. Acevedo-Vilá actively campaigned for this type of vote through a newspaper

advertisement published before the election. The advertisement shows two sample ballots, each of which contains only two "X"s—one under the party insignia for either the Independence Party or the New Progressive Party, and one next to his name. *See* Exhibit G.

It also became clear during the post-election canvass that the "overvote" ballots had not been adjudicated in a uniform and consistent manner at the polling centers on election night, or during the initial post-election canvass. Some of these votes had been declared null and void; some had been adjudicated as straight votes for the Independence Party; and some had been adjudicated as candidate votes for Acevedo-Vilá. 11/18/04 Tr. 126, 194, Exhibit O.

C. Initial Proceedings in the District Court

On November 10, 2004, Plaintiffs filed an action in the United States Court for the District of Puerto Rico, seeking to enjoin the unconstitutional counting of overvote ballots under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.[1] This case is captioned *Rosselló v. Calderón*, Civil No. 04-2251 (the "*Rosselló*" litigation).

A show cause hearing commenced before the district court on November 18. The main factual question the Court is considering in these ongoing hearings is

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1 An amended complaint was filed on November 12, 2004.

whether or not the November 12 resolution of the Electoral Commission changed its policies and practices with respect to the adjudication of the overvote ballots in dispute in this litigation. In eight days of marathon hearings, the Plaintiffs have presented compelling evidence that there has been such a change. The evidence falls into two main categories: the testimony of Plaintiffs' witnesses, who have stated they had adjudicated similar ballots as null and void in the past, and would have continued to do so absent the November 12 ruling of the Commission, and documentary evidence, including the Commission's regulations, its Manual of Procedures, the ballots themselves, and its advertisements to voters, *absolutely none* of which suggests that a ballot of the type here in dispute is valid, and much of which suggests precisely the opposite.

On November 19, "to safeguard and protect its jurisdiction" over the overvote ballot controversy, the district court took the ballots in controversy into "the custody of the Federal Court," and ordered the Commission "to set aside and segregate" those ballots "within the Commission." Order of Nov. 19, 2004 (Docket No. 80). The Court further ordered that "NO FINAL CERTIFICATION by the State Electoral Commission is to be issued" until the Court had resolved Plaintiffs' constitutional claims. After hearing further testimony on Saturday, November 20, and after imploring Defendants to enter into a stipulation agreeing to an immediate recount, *see* 11/20/04 Tr. 36:22-37:6, the district court ordered

that the requested recount begin at 9:00 a.m. on Monday, November 22. *See* 11/20/04 Tr. 206:22-207:13 (later memorialized in Order of Nov. 24, 2004, Docket No. 99). The district court further ordered the members of the Commission to appear before the Court on November 22 at 5:00 p.m. to describe its plan for implementing the Court's orders to segregate the overvote ballots. The Defendants have not and do not now seek a stay of any of the foregoing orders.

D. Proceedings in the Supreme Court of Puerto Rico

Meanwhile, on November 16, 2004, four voters filed suit in the Court of First Instance of Puerto Rico on November 16, 2004. *See Suárez v. Comisión Estatal de Elecciones*, Civil Action No. KPE04-3568 (the "*Suárez* action"). These individuals claim to have cast the "overvote" ballots described above and allege that the failure to count their ballots as votes for Acevedo-Vilá and Prats would deprive them of their "right to due process of law and to equal protection under the law." *See Suárez* Complaint ¶ 12, attached as Exhibit H. They seek a declaratory judgment that overvote ballots are valid, and a permanent injunction ordering the Commission to count all such disputed ballots as votes for Acevedo-Vilá and Prats. Nowhere do the *Suárez* Plaintiffs expressly disclaim reliance on federal law. Nor are the claims set out in their complaint presented as arising under the Puerto Rico Constitution.

On November 18, the Court of First Instance dismissed the *Suárez* action without prejudice on mootness grounds. According to the Court of First Instance, no actual controversy existed between the *Suárez* Plaintiffs and the Commission because the Commission (over the objection of the New Progressive Party and its representative, Commissioner Rivera Schatz) had already passed a resolution (*see* Exhibit E) declaring such ballots valid. On November 18, 2004, at approximately 2 p.m., the *Suárez* plaintiffs filed in the Supreme Court of Puerto Rico a request for certification and a motion seeking expedited review of the Court of First Instance's dismissal order. On November 19, 2004 at 12:30 p.m., Commissioner Rivera Schatz, a Respondent and *Suárez* defendant, was served with an order to file a response to the request for Certification by ***3:00 p.m.*** that day. Mr. Rivera Schatz requested an extension, which the Supreme Court granted until noon on Saturday, November 20, 2004—less than 24 hours after the court had accepted the case for such review.

On the morning of November 20, 2004, Respondents Rivera Schatz and the New Progressive Party removed the *Suárez* action to the United States District Court for the District of Puerto Rico. Notice of the removal was properly filed in Puerto Rico Supreme Court at 11:48 a.m. Under 28 U.S.C. § 1446(d), all

proceedings in the state case must cease until the issue of removal is determined by the federal district court.[2]

Notwithstanding the removal to federal court that morning , the Supreme Court of Puerto Rico nevertheless purported to enter a judgment in the *Suárez* action at 6:40 p.m. on Saturday night, November 20, 2004. *See* Supreme Court of Puerto Rico Opinion, November 20, 2004, Exhibit I. The court did not have the benefit of any brief filed by a defendant. Indeed, two of the defendants still had not been served with the complaint when the judgment was issued.

By a vote of 4 to 3, the Supreme Court of Puerto Rico ordered all "overvote" ballots to be counted and adjudicated as votes for the individually marked Governor and Resident Commissioner as well as a vote of support for the "party." Although the *Suárez* plaintiffs had not even requested such relief, the Supreme Court of Puerto Rico *also* ordered that a statewide recount of all ballots begin "immediately." *Suárez* Opinion in the Supreme Court of Puerto Rico, November 20, 2004, at 18, Exhibit I. Justice Jaime B. Fuster Berlingeri issued a concurring

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2 The statute provides:

> Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

28 U.S.C. § 1446(d).

opinion, and therein discussed the removal to the federal court. Treating the *Suárez* Defendants' notice of removal merely as a *petition* for removal, Justice Berlingeri found the "petition" to be "tardily" filed, notwithstanding the fact that the removal had been noticed just three days after the *Suárez* complaint had been filed. Concurring Opinion of Justice Fuster Berlingeri, November 20, 2004, at 4 n.1. Three justices dissented on the ground that the court was without jurisdiction to decide the case because of the removal. Exhibit I at 19-20

On November 23, three days later, Justice Fuster Berlingeri issued *sua sponte* a *second* opinion purporting to address the merits of the removal. *See* Exhibit J. After insinuating that the district court was a "ventriloquist's puppet" who had a poorer grasp on the law governing removal than "[a]ny first year law student," Justice Fuster Berlingeri pronounced the removal "not valid" because, in his view, the removal standards established by "the United States Supreme Court itself" made clear that the case should have remained in state court. Exhibit J at 4-7. Justice Fuster Berlingeri criticized the district court—which, of course, played no role in the removal—for "acting first" in "an astonishing attempt to preclude the Puerto Rico Supreme Court from performing its . . . duty." *Id.* at 5, 9. That same day, Justice Efraín E. Rivera Perez issued an impassioned 27-page dissent, stating that the majority had given perfunctory treatment of the merits of the case and acted without jurisdiction, and observing that "[t]he highly irregular and hurried

actions by this Majority deprive this Court of legitimacy." Exhibit K at 24. Justice Rivera Perez also stated that, in comparing the *Suárez* and *Rosselló* pleadings, "the undersigned has no doubt, upon examining the briefs submitted by some of the plaintiffs . . . and those submitted by some of the defendants . . . that there is a collusion among them to try to affect the federal court's jurisdiction of the matter submitted there." *Id.* at 23.

E. Further Proceedings in the District Court

News of the Puerto Rico Supreme Court's actions reached the federal court late Saturday night, November 20th. Hearings on the motions for a temporary restraining order and preliminary injunction were still ongoing. The district court indicated that it would be required to review the jurisdictional basis for the Puerto Rico Supreme Court's decree, given that the case had been removed to federal court prior to the issuance of the Puerto Rico court's opinion. Concluding that the Supreme Court of Puerto Rico lacked jurisdiction to issue any ruling in the *Suárez* case, the district court reaffirmed its earlier order that the recount was to begin at 9:00 a.m. on Monday, November 22, and that he expected to hear from the Commission as to its vision of how the recount would proceed at 5:00 p.m. that same day. 11/20/04 Tr. 226:1-4; 232:22-233:4.

Having considered the presentation of Commission President Gracia and the Commissioners from the Popular Democratic Party and the New Progressive

Party,[3] on November 23, the district court announced that it was considering ordering the Commission, in conducting the recount, to count the *number* of overvote ballots in dispute, but otherwise to withhold them temporarily from adjudication for one candidate or another, pending the district court's determination of their constitutionality. After hearing argument from counsel on the topic the following day, the Court announced that it would indeed order that the overvote ballots in controversy, once identified, be withheld temporarily from adjudication. 11/23/04 Tr. 18:23-2 (memorialized in Docket No. 98, and amended by Docket Nos. 100, 101 and 102). The Court emphasized that this additional measure was necessary first to protect the Court's jurisdiction over the federal constitutional questions, and also to prevent the infliction "irreparable harm" to the Plaintiffs and the public though the creation of a false "expectancy of certainty" that would flow naturally from the Commission's adjudication of that ballots.[4] 11/23/04 Tr. 17-18, Exhibit ___; Docket No. 98. President Gracia, in the

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3 Refusing to acknowledge the jurisdiction of the United States courts in Puerto Rico, the Commissioner from the Independence Party did not appear as ordered. *See* 11/22/04 Tr.

4 The district court further ruled that the November 20 order of the Puerto Rico Supreme Court was lacking in jurisdiction and therefore "*coram non judice*." Docket No. 98 at 3. The court elaborated on this holding the following in an order in the removed case, holding that under the First Circuit's decision in *Hyde Park Partners L.P. v. Connolly*, 839 F.2d 837 (1st Cir. 1988) and the United States Supreme Court's decision in *Steamship Co. v. Tugman*, 106 U.S. 118, 122 (1882), the decision of the Supreme Court of Puerto Rico was void *ab initio* because it had been rendered without jurisdiction. *See* Order, No. 04-2288, (Nov. 23, 2004) (Docket No. 12) (made part of the record in No. 04-2251 at Docket No. 108).

meantime, had suspended the recount until November 29, supposedly because "tension increased in the recount building." 11/23/04 Tr. 17:12; *see also* Gracia Decl. ¶ 12, Def. Exhibit C. After one day of recounting on November 29, the recount was again suspended on November 30 when the Popular Democratic Party recount officials adopted the position that a ballot with a single mark under an insignia counted as a "vote" only for the party indicated, and not as a straight ballot.

ARGUMENT

Before granting a stay pending appeal, the Court must look to "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776-77 (1987); *see also Acevedo-Garcia v. Vera-Monroig*, 296 F.3d 13, 16 n.3 (1st Cir. 2002) (citing *Hilton*). Defendants make their required showing on none of these four factors.

A. Likelihood of Success on the Merits

The "sine qua non" of any stay pending appeal is a strong showing of a likelihood of success on the merits. *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993). This Court has noted that "[i]n the absence of clear, countervailing

appellate court precedent, or statutory proscription, a showing of probability of success on the part of the appellants is difficult, if not impossible, to achieve." *Martinez-Rodriguez v. Jiminez*, 537 F.2d 1, 2 (1st Cir. 1976). The Defendants have failed to demonstrate any likelihood of success on appeal, much less the "strong showing" required for a stay. *Hilton*, 481 U.S. at 776.

Plaintiffs spend much of their brief deriding the district court's order, but never bother to state the relevant legal standard that will guide this Court's analysis of it. That omission is telling. This court reviews the entry of a preliminary injunction only for abuse of discretion. *See*, *e.g.*, *Bl(a)ck Tea Society v. City of Boston*, 378 F.3d 8, 11 (1st Cir. 2004). A district court abuses its discretion only when "it base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990). This is a deferential standard of review, and the deference it requires is at its zenith when reviewing "judgment calls, by the district court, such as those that involve the weighing of competing considerations." *Public Serv. Co. v. Patch*, 167 F.3d 15, 22 (1st Cir. 1998).

Here, the Defendants do not appeal the District court's order that the disputed ballots be impounded and counted (Docket No. 84), and they have no quarrel with the district court's order that a full recount proceed immediately (Docket No. 99). Defendants rather appeal only the district court's order that the

ballots in dispute be temporarily withheld from adjudication while the district court considers their constitutionality. Far from constituting an abuse of discretion, the district court's order is a quintessential "judgment call," *Patch*, 167 F.3d at 22, and an entirely proper exercise of the broad authority accorded to trial courts to tailor preliminary relief to the particular facts and circumstances of a case.

1. The Premises Of The District Court's Orders Are Not Defective

Defendants err in suggesting that the premises of this Court's order are "defective." Defendants claim that this Court has somehow misapplied the teaching of *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J. concurring), that to "[c]ount first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance that democratic stability requires." According to the Defendants, that principle does not apply to this case because the disputed "split ballots" have already been "adjudicated," and because a recount that excludes those ballots from consideration could alter "the status quo of the election results." Mot. 4.

Defendants simply fail to grasp the rationale for the stay issued in *Bush v. Gore.* A stay was issued there—*not* to preserve the status quo at all costs—but to ensure that a recount potentially subject to federal constitutional attack did *not* go forward until the merits of the constitutional challenges were decided. That is *precisely* the circumstance here. Although some of these overvotes were

adjudicated on election night and during the general canvass, the record establishes that those ballots were counted in an arbitrary and inconsistent manner. 11/18/04 Tr. 126:3-9. It is obvious that *any* recount, using *any* procedure, will "threaten[] to arrive at a . . . different result." Mot. 5. There is no way to prevent that. Under these circumstances, it is entirely consistent with *Bush v. Gore* to ensure that the recount proceeds in a manner that ensures that the only votes included within the final vote tally are those about which there is no genuine controversy.

Defendants also dispute this Court's finding that the nonadjudication would reduce the risk of ballot degradation. In its Amended Recount Order the Court credited the testimony of Mr. Bauza who stated that the greater the handling of the ballots, the greater the likelihood of their degradation. *See* Amended Order, Nov. 23, 2004, at 2 (Docket No. 99). This finding is not clearly erroneous, and it alone supports the Court's nonadjudication order. If the two days of the recount process thus far are any indication, the recount could be fraught with intense emotions. *See*, *e.g.*, Gracia Decl. ¶ 12, Def. Exh. C. Rather than subject the most crucial evidence in this case to a process in which political party operatives hotly dispute the validity of the ballots in controversy—and thereby subject the ballots to increased handling at the canvassing table, from line and floor supervisors, and other election officials—the Court correctly found that the ballots would be best safeguarded by identifying and segregating them immediately. Contrary to

Defendants' suggestion that "the disputed ballots will simply be left to perish," they will be sealed and deemed to be under the custody of the district court.

2. A Stay Protects The District Court's Jurisdiction

The Court's temporary withholding of the disputed ballots from adjudication also protects the Court's jurisdiction and significantly reduces the chance of any further and unnecessary disputes between the federal and state courts of Puerto Rico. As set forth above, the Supreme Court of Puerto Rico has injected itself into this case with alacrity, even when it clearly and expressly lacked jurisdiction.

In these circumstances, the Court's jurisdiction is obviously protected by a temporary suspension of the adjudication of the disputed ballots. That feature of the recount effectively precludes a state court from pretermitting this Court's consideration of Plaintiffs' federal constitutional claims by certifying a victor in the election *before* this Court has completed its resolution. Defendants claim that this Court's jurisdiction is adequately protected by its order preventing "final" certification of the election results, but the proceedings in the state court to date demonstrate that it is far from clear that such an order would stand as an effective obstacle to another state-court decision that once again draws the state and federal systems into conflict.

3. The Court of Appeals Lacks Jurisdiction to Review Defendants' Abstention Arguments Which are Baseless in Any Event

Contending that their arguments in favor of abstention "provide an independent ground for an immediate stay and subsequent reversal of the court below" (Mot. 46), Defendants urge this Court to exercise discretionary pendent appellate jurisdiction over the denial of their abstention claims. This Court should decline the invitation.

a. This Court Lacks Jurisdiction To Decide The Defendants' Abstention Claims

It is well-settled that a district court's refusal to abstain generally is not an immediately appealable interlocutory order either under the collateral order exception of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), or as a denial of an injunction under 28 U.S.C. § 1292(a). *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 278 (1988) (finding no jurisdiction over denial of *Colorado River* abstention); *Public Serv Co. of New Hampshire v. Patch*, 136 F.3d 197, 210 (1st Cir. 1998) (denials of *Pullman* and *Burford* abstention "not an immediately appealable event"). Defendants do not suggest otherwise, but rather seek to have their abstention issues piggyback on their Section 1292(a) appeal under the doctrine of pendent appellate jurisdiction. This effort is unavailing.

Pendent appellate jurisdiction is disfavored by this Court. *See*, *e.g.*, *Feliciano v. Rullan*, 378 F.3d 42, 48 n.3 (1st Cir. 2004) ("With only isthmian exceptions, the courts of appeals are prohibited from exercising pendent appellate jurisdiction."); *Limone v. Condon*, 372 F.3d 39, 50, 52 (1st Cir. 2004) (characterizing pendent appellate jurisdiction as a "seldom-used doctrine" that has been endorsed by this Circuit "quite sparing[ly]"). Because the doctrine essentially operates as an exception the final judgment rule, the Supreme Court has mandated that, like all such exceptions, it be narrowly construed lest "parties parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 49-50 (1995).

A party urging the exercise of pendent appellate jurisdiction must demonstrate, "at a bare minimum," either: (1) that that the pendent issue is "inextricably intertwined with the issue conferring the right of appeal"; or (2) that review of the pendent issue is "essential to ensure meaningful review of the linchpin issue." *Limone*, 382 F.3d at 52 The "issue" presented here is whether the district court abused its discretion by temporarily withholding the disputed ballots from adjudication. Defendants' abstention arguments are neither inextricably intertwined with nor necessary to the meaningful review of that very narrow question.

The entirety of Defendants' argument with regard to the *Swint* factors is that their abstention arguments "are closely bound up with the district court's decision to exercise its equitable powers." Mot. 46. This conclusory statement is insufficient to invoke this Court's pendent appellate jurisdiction. Far from being "closely bound up," the abstention analysis in this case is wholly distinct from the issue whether the district court abused its discretion by issuing an order to protect its jurisdiction. *Cf. Poulos v. Caesars World, Inc.*, 379 F.3d 654, 669 (9th Cir. 2004) ("Two issues are not 'inextricably intertwined' if we must apply different legal standards to each issue."). That the court's denial of the abstention motion resulted in the district court having jurisdiction to protect is not sufficient; the fact that the abstention decision is logically antecedent to the recount order does not mean it is inextricably intertwined with it. *See Crockett v. Cumberland Coll.*, 316 F.3d 571, 580 (6th Cir. 2003) (internal quotations and citation omitted) (only where the pendent claim is "conterminous with, or subsumed in, the claim before the court on interlocutory appeal" will the court find that they are "inextricably intertwined").

Nor are the abstention arguments necessary to this Court's review of the district court's order. Defendants have elected to appeal *only* the order temporarily withholding the disputed ballots from adjudication —not the order to segregate and impound the disputed ballots and not the recount order. Perhaps it could have been

said that the question of whether the "district court should have abstained at the outset" (Mot. 45) was bound up with the district court's initial exercises of jurisdiction, such as its impoundment of the disputed ballots or its order of a recount. But the Defendants should not—after they have chosen not to appeal those decisions "at the outset"—now be heard to argue that their abstention arguments are somehow necessary (or relevant) to the review of Order 102. Defendants cannot be permitted to sneak in, under the guise of pendent appellate jurisdiction, their principal arguments against orders Defendants have chosen not to appeal. Otherwise, Defendants have just the "multi-issue interlocutory appeal ticket[]" the Supreme Court sought to foreclose. *Swint*, 514 U.S. at 50. This Court should accordingly decline pendent appellate jurisdiction over the abstention issues.

b. Defendants' Abstention Arguments Are Meritless

Even if Defendants' abstention arguments were properly before this Court, reversal of the district court's November 30 abstention ruling is plainly unwarranted. As the district court recognized, Plaintiffs' claims concerning the disputed ballots are brought only under *federal* law, Opinion and Order, Nov. 30, 2004, at 2 (Docket No. 150), and as such they are claims over which the district court has subject matter jurisdiction, *id.* at 1, 12. Federal courts have a "virtually unflagging" mandate to adjudicate such claims. *Deakins v. Monaghan*, 484 U.S.

193, 203 (1988); *see also New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358-59 (1989) ("[T]he courts of the United States are bound to proceed to judgment and afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." (quotations and citations omitted)).

In light of that mandate, "abstention . . . is the *exception*, not the rule." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14 (1983) (emphasis added). Indeed, abstention is "an *extraordinary* and *narrow* exception to the duty of a District Court to adjudicate a controversy properly before it." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) (emphases included). And voting cases are particularly inappropriate candidates for abstention. *See*, *e.g.*, *O'Hair v. White*, 675 F.2d 680, 694 (5th Cir. 1982) ("[abstention] should be applied only in the most extraordinary circumstances when fundamental rights such as voting rights are involved").

Defendants will concede this much, but they nevertheless argue that abstention is mandated here because Plaintiffs' legal theories "unavoidably and centrally turn on disputed questions of Puerto Rico law." Mot. 48. As demonstrated above, that statement is simply incorrect. Plaintiffs' claims that the overvotes violate the Equal Protection Clause, the Due Process Clause, and the

First Amendment do not depend on the post-election interpretation of Puerto Rico law by the Commission, or even the Puerto Rico Supreme Court. Those claims will be resolved under federal constitutional standards on the basis of the extensive evidentiary and testimonial record compiled to date. Once that is acknowledged, Defendants' abstention arguments collapse of their own weight.

i. *Younger* Abstention Is Not Applicable To This Case

Younger abstention is appropriate "whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 237 (1984). Defendants' argument that "this case falls within the teeth of the *Younger* doctrine" (Mot. 51) is utterly baseless. First, there is no ongoing state proceeding. And whatever "proceeding" that took place at the Commission concerning the split ballots: (1) had not started when Plaintiffs filed their complaint on November 10 (*see* 11/12/04 Commission Decision); (2) was most certainly not quasi-judicial; and (3) provided no forum for the adjudication of Plaintiffs federal claims; indeed, the November 12 proceeding is the source of Plaintiffs' federal claims. *Younger* abstention is not applicable.[5]

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[5] To the extent that Defendants argue that *Younger* requires a federal plaintiff to exhaust state remedies (Mot. 53), they are mistaken. Litigants asserting Section 1983 claims—like the Plaintiffs—are not required to exhaust state administrative remedies before asserting federal

[Footnote continued on next page]

ii. *Pullman* Abstention Is Not Appropriate

Pullman abstention is warranted when "there is substantial uncertainty over the meaning of the state law at issue" and "a state court's clarification of the law would obviate the need for a federal constitutional ruling." *Ford Motor Co. v. Meredith Motor Co.*, 257 F.3d 67, 71 (1st Cir. 2001). The district court correctly held that *Pullman* abstention was unavailable in this case because the relevant state law questions pertaining to the legality of the Commission's November 12 Decision could not be certified to the Supreme Court of Puerto Rico. *See Cuesnongle v. Ramos*, 835 F.2d 1486 (1st Cir. 1987). In *Cuesnongle*, this Court certified a question of state law to the SCPR, but that court declined to answer the question on the ground that it would have to analyze whether the state act violates provisions of the Puerto Rican constitution that are analogous to those in the federal Constitution, and that such scrutiny would require "federal analysis" that the federal district court would then be free to reject. *Id*. at 1482 The Supreme Court of Puerto Rico explained that "[t]his possibility would have the impermissible effect of having the federal court review our decision, when the only court that may review a decision of this Court, in appropriate cases, is the U.S.

[Footnote continued from previous page]
constitutional claims in federal court. *See, e.g.*, *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 500 (1982); *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255, 259 (1st Cir. 1987) (expressly rejecting argument that *Younger* required Section 1983 claimant to exhaust state administrative proceeding).

Supreme Court." *Id*. (quotations omitted); *see also National Pharmacies, Inc. v. Feliciano-De Melecio*, 221 F.3d 235, 241 (1st Cir. 2000) ("The Puerto Rico Supreme Court has indicated that it does not favor certifications from the federal courts where the referred issue involves federal constitutional considerations on which the supreme court's opinion would appear to be merely advisory.").

Of course, the Supreme Court of Puerto Rico has done everything in its power—and quite a bit beyond its power—to opine on the state law question the Defendants would have the district court certify. Though the decisions of the Supreme Court of Puerto Rico in the removed case are without legal effect, Defendants contend that resolution of the state law issues that relate to Plaintiffs' claims have been resolved. If the Defendants are correct, then there is no reason for the district court to abstain. The district court could then fairly conclude that there is no "substantial uncertainty" remaining on any state law issue, exercise his discretion not to abstain, and proceed to resolve the federal constitutional challenge to the validity of the overvotes. *See Schneider v. Colegio de Abogados de Puerto Rico*, 187 F.3d 30, 45 (1st Cir. 1999) ("*Pullman* abstention is a discretionary practice of federal courts" (citing *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. at 496, 500-01 (1941)).

iii. *Burford* Abstention Is Not Warranted

Finally, Defendants reliance on *Burford* abstention is misplaced. In *Bath Memorial Hospital v. Maine Health Care Finance Commission*, 853 F.2d 1007 (1st Cir. 1988), this Court explained that *Burford* abstention is warranted in order to avoid "the awkward circumstance of turning the federal court into a forum that will effectively decide a host of detailed state regulatory matters, to the point where the presence of the federal court, as regulatory decision-making center, makes it significantly more difficult for a state to operate its regulatory system." *Id*. at 1012. Such entanglement with the intricacies of Puerto Rico's electoral regulatory body is not threatened here. Instead, Plaintiffs assert that the Commission, and specifically its President, have created a process that plainly violates the Equal Protection and Due Process Clauses of the Constitution, precisely by failing to create a consistent, *uniform* method or counting and adjudicating certain ballots, and by changing the rules after the election occurred by declaring that overvotes would be counted in a way that favors one candiate. "[A]bstention in the *Burford* line of cases rested upon the threat to the proper administration of a *constitutional* state regulatory system." *Id*. at 1013 (emphasis added). *Burford* concerns are not triggered here because "[i]f plaintiffs succeed, what will occur is not an ongoing intermeddling with [the election regulatory process] but a prohibition of an unconstitutional process." *Planned Parenthood League of Mass. v. Bellotti*, 868 F.2d 459, 465 (1st Cir. 1989).

To the extent that Plaintiffs request the district court to involve itself in Puerto Rico's administration of its elections, such intervention is hardly unusual and has, in fact, frequently been required when necessary to ensure federal constitutional rights. Few areas of state and local regulation have received as much intervention by the federal courts as those that concern voting rights. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

In any event, "*Burford* abstention does not bar federal court injunctions against state administrative orders where there are predominating federal issues that do not require resolutions of doubtful questions of local law and policy." *Patch*, 167 F.3d at 24.

4. Plaintiffs' Underlying Claims Are Compelling And Meritorious

A stay is also unwarranted because the district court's order is substantially supported by the preliminary injunction record. Although this issue will be addressed at greater length at the merits, the district court's order has heard much testimony that unequivocally supports Plaintiffs' contention that the counting of the overvotes has violated Plaintiffs' Due Process, Equal Protection, and First Amendment rights under the federal constitution.

The record establishes that a considerable number of these "overvote" ballots bear suspicious indicia of fraud; that on election night; that these

"overvotes" were adjudicated across Puerto Rico in inconsistent and sometimes diametrically opposite ways; that the gubernatorial candidates and senior election officials understood before the election that ballots cast in this way would be null and void; and that, ten days after the election, and shortly before the recount was about to begin, the Commission issued a "resolution" declaring that all such "overvotes" would should be considered valid votes. *See supra* pp. 6-20. The record confirms that under the terms of that "resolution," almost all of the overvotes would be counted as valid votes for the Popular Democratic Party's candidate for governor, Anibal Acevedo-Vila, and would tip the election away from Pedro Rossello of the New Progressive Party and deprive him of a victory.

This record thus establishes that Plaintiffs have made a compelling showing that their right to have their votes counted equally with other votes and not subjected to dilution by an electoral count (or recount) that treats similarly situated ballots inconsistently or unequally, and their due process rights not to have state election rules changed after the election. The record also clearly establishes that the manner in which overvotes have been counted, and the manner in which the Commission contends they should be recounted, violates Plaintiffs' constitutional rights. At an absolute minimum, the Plaintiffs have raised a sufficiently compelling constitutional case as to justify the district court's order safeguarding the disputed ballots until such time as it rules on Plainitffs' constitutional claims.

B. Irreparable Harm To The Parties Or Others

Nor can Defendants demonstrate that they or other parties will incur irreparable harm. Defendants have *no* quarrel with the district court's orders that the ballots be impounded, that the recount proceed immediately, or that the Electoral Commission grant no final certification of the election until the district court has ruled on the substance of Plaintiffs' constitutional claims. Defendants seek a stay *only* of the order that temporarily sets aside the disputed "overvotes" until the constitutionality of the Commission's rules for the adjudication of such ballots has been determined. For the reasons set forth above, that process does not "harm" anyone—it simply safeguards the disputed ballots until Plaintiffs' claims can be resolved on the merits.

C. The Public Interest Is Served By This Court's Order

A stay of the order, on the other hand, is tantamount to the order's withdrawal, and would permit the Electoral Commission to count as valid the ballots in controversy prior to this Court's ultimate determination of their constitutionality and risk the further inflammation of already overheated public passions. The consequences of Defendants' suggested course are predictable and dire: day by day, as the recount proceeds, the interim election results will be made available to the public. Whatever tabulations emerge from this process will be incurable in the public consciousness. Once a final tally is announced, the results

could not be retracted absent public confusion and upset. The hydraulic pressure created by the interim recount results could well discourage the district court from granting the Plaintiffs the relief to which they are entitled. Even if the Court can withstand such pressures, there remains a significant risk that any decision by this Court or the district court on the merits of Plaintiffs' claims that contradicts publicly-announced recount results will not receive widespread public acceptance.

CONCLUSION

For the foregoing reasons, Defendants' emergency request for a stay should be denied.

Dated: December 1, 2004

Respectfully Submitted.

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