IN THE UNITED STATE COURT OF APPEALS
FOR THE FIRST CIRCUIT

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PEDRO ROSSELLÓ, et. al.,)
Plaintiff-Appellees)
v.) Nos. 04-2610, 04-2611, 04-2612, 04-2613
SILA A. CALDERON, et al.,)
Defendant-Appellants.)
____________________________________)

PETITION FOR PANEL REHEARING OR REHEARING EN BANC

Appellees respectfully seek rehearing or rehearing en banc. The panel decision raises issues of exceptional importance and conflicts with decisions of the Supreme Court of the United States, other courts of appeals, and this Circuit. *See* Fed. R. App. P. 35, 40. Rehearing is also necessary to prevent an extraordinary injustice to the voters of Puerto Rico who cast valid ballots on election night and who rightfully elected Dr. Pedro Rosselló as their Governor. The panel improperly made their own findings of fact, resulting in conclusions completely unsupported by the record below. The panel's decision thus wrongly endorses a post-election change in the voting rules which gives more weight to the ballots of certain voters than to the votes cast by nearly two million voters who followed the pre-election rules. Neither the panel nor the full Court should allow such manifest constitutional violations to decide the election in Puerto Rico.

The reasons given for the dismissal of the Rosselló Plaintiffs federal constitutional claims are patently erroneous. *First*, the panel decision impermissibly and unaccountably makes factual finding that are essential to its disposition of this case. The panel opinion states that there was no post-election "change" in Puerto Rico's election rules governing the disputed triple-X ballots at issue in this appeal—only a "clarification" of those rules. As explained in detail below, that conclusion is simply and flat-out incorrect. But more to the point, this Court and other circuits have held that the question whether a post-election rule departs from prior law and practice presents an issue of *fact* that should not be resolved by an appellate court in the first instance. The district court conducted 12

days of evidentiary hearings on this precise question but was precluded by the panel's decision from entering findings of fact and conclusions of law. The evidence introduced in the district court regarding the instructions on the state ballot, the contents of the Election Manual, the relevant state regulations, and the practice in prior elections overwhelmingly establishes that the Puerto Rico Election Commission dramatically *changed* the rules governing the disputed ballots at issue here *after* the election. Whatever skepticism the panel might have toward federal-court intervention in local election disputes, it should not—and, in any event, *cannot*—resolve the disputed factual predicates of valid federal constitutional claims without the benefit of any findings by the district court.

Second, the panel opinion creates a presumption against federal court "jurisdiction" in election disputes unless the plaintiff challenges a state practice that "disenfranchises" a discrete group of voters. That presumption cannot be reconciled with the Supreme Court's vote-dilution cases and has been expressly repudiated by other courts of appeals.

Third, the panel decision wholly ignores and yet dismisses with prejudice the Rosselló Plaintiffs' vote dilution claim under the Equal Protection Clause of the Fourteenth Amendment. Wholly apart from whether the Puerto Rico Election Commission changed the rules governing the disputed ballots, the Election Commission's post-election resolution constitutes a quintessential form of vote dilution—it accords more weight and significance to some votes than to others. In particular, it creates a special category of ballots in which voters were free to "vote" for a political party even though they did not support *any* of that party's candidates for Governor and Resident Commissioner. Every other state ballot cast in the election counts as "credit" toward party re-certification only if the voter actually voted for at least one of that party's candidates. The Rosselló Plaintiffs' vote dilution claim independently warrants district court "intervention" here, and the panel decision does not even mention it.

Fourth, the panel orders the entirety of the Rosselló Plaintiffs' case dismissed, even though the only ruling before it was an interlocutory appeal addressing a collateral order to segregate and not adjudicate the triple X votes. The Rosselló Plaintiffs asserted two other claims (1) they alleged that the Election Commission violated their due process and equal protection rights by deciding—after the election—to suspend a recount until after a "general canvass" of tally sheets had been completed; and (2) they alleged that the Election Commission had improperly

disenfranchised thousands of absentee voters by mailing ballots out late and refusing to adjudicate ballots received after election day. Relief was secured on both claims: the district court ordered the recount to begin immediately, and the Election Commission was forced to stipulate that it would adjudicate "late" absentee ballots. By ordering these specific claims dismissed, the panel exceeded its authority. There is simply no basis for dismissing the entire case in this manner.

* * *

The panel decision unquestionably reflects the panel's view that federal constitutional challenges to the conduct of state officials during an election should be disfavored. But even accepting the parameters of "non-intervention" rule as articulated by the panel, the Rosselló Plaintiffs are clearly entitled to a federal forum. The Rosselló Plaintiffs have *undeniably* stated cognizable equal protection and vote dilution claims. In an apparent rush to bring certainty and finality to the gubernatorial election, however, the panel simply did not directly address the core legal and factual arguments presented to it. "A desire for speed is not a general excuse for ignoring equal protection [and due process] guarantees." *Bush v. Gore,* 531 U.S. 98, 108 (2000). That principle applies with special force here. Rehearing is warranted.

STATEMENT OF THE COURSE OF PROCEEDINGS, DISPOSITION, AND FACTS NECESSARY TO RESOLVE ISSUES

This case arises out of Puerto Rico's disputed gubernatorial election on November 2, 2004. On election night, candidates from the New Progressive Party swept to victory across the island, winning a substantial majority in the Puerto Rico legislature, dominating municipal elections, and securing the office of Resident Commissioner, Puerto Rico's non-voting member of Congress. Returns also showed the New Progressive Party's candidate for Governor, Dr. Pedro Rosselló (himself a former Governor), leading the Governor's race throughout the night. In the early morning hours of November 3, 2004, however, Anibal Acevedo Vilá, the candidate of the Popular Democratic Party, pulled ahead in the voting for the first time, by 3,880 votes. Although 30,000 ballots still had not been counted, and although Puerto Rico law makes clear that a "preliminary certification" of the election results need not occur for a full 72 hours after the election, the Puerto Rico Election Commission—which, as presently constituted, is controlled by the Popular Democratic Party[1]—immediately issued a preliminary certification of the election results. This was the first of many steps taken by the Election Commission and the Popular Democractic Party to prevent full security of the election results and to portray Mr. Acevedo Vilá as the undisputed and permanent winner of the election.

The New Progressive Party requested an immediate recount pursuant to Election

[1] The President of the Election Commission was appointed by the current Governor.

Regulation 118, which requires an automatic recount in a close election.[2] But the President of Election Commission purported to issue a "resolution" stating that a "general canvass" (*i.e.*, checking tally sheets) should precede any recount. That resolution constituted an express change in the law and was plainly calculated to prevent a recount from moving forward.

On November 10, 2004, the Rosselló Plaintiffs filed a complaint in the United States Court for the District of Puerto Rico under 42 U.S.C. § 1983 asserting claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The complaint alleged that the Election Commission's decision to suspend the recount pending completion of the general canvass infringed on their federal constitutional right to vote. It also alleged that the Election Commission had not sent ballots to absentee voters in a timely manner and that these voters stood to be disenfranchised.

The Overvotes: On November 12, 2004, the President of the Election Commission issued a second "resolution" declaring that certain ballots with three Xs—one X under the party insignia, and two Xs for candidates—would be treated as valid split votes. These votes have never been deemed valid under Puerto Rico law. As a consequence, several thousand ballots that were invalid under the rules in effect on election night were revived and deemed to count as valid votes for Anibal Acevedo Vilá.[3]

The Rosselló Plaintiffs amended their complaint to include an allegation that the November 12, 2004 resolution violated their federal constitutional rights by changing the rules after the election in a blatantly partisan effort to tip the election to their candidate. The amended complaint also alleged that the Election Commission's November 12, 2004 resolution gave certain voters the power to cast three votes—one for a political "party" and two for candidates from another party—while all other voters could only vote for candidates.

The district court proceedings: The district court conducted 12 days of evidentiary hearings on the

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[2] Rule 118(8) (Canvass): "In the event the preliminary results for given positions show evidence of a close election . . . *a simultaneous recount shall be effected*." (J.A. 120) (emphasis added).

[3] The Election Commission has repeatedly asserted that there are 28,000 disputed ballots. The results of the recount to date show that with approximately 80% of the precincts counted, the total sum of Triple X state ballots was approximately 5,000. These ballots are being given more weight than the nearly 2 million state ballots that were correctly cast.

Rosselló Plaintiffs' request that the recount proceed immediately and that the disputed overvotes be declared invalid. On November 23, 2004, over the objection of the Election Commission, the district court ordered the recount to proceed. The Election Commission did not appeal that order. The district court also ordered that, as part of the recount, the disputed overvotes subject to the Election Commission's November 12, 2004 resolution be identified, segregated, and temporarily withheld from adjudication while the district court took evidence on the Rosselló Plaintiffs' constitutional challenges to them. The Commission appealed that ruling.

The panel decision: Although the only issue before the panel was the propriety of the district court's order to segregate the disputed ballots, the panel ordered the Rosselló Plaintiffs' entire federal case dismissed. The panel agreed that the district court had subject matter jurisdiction over the dispute, but it concluded that the district court abused its discretion by not "abstaining" at the outset of the litigation.[4] According to the panel, a federal district court abuses its discretion when it proceeds to hear federal constitutional challenges arising from "local" election disputes *unless* "the party requesting intervention can[] show that a discrete group of voters has been disenfranchised by the challenged local action." Slip op. 29. The panel opined that the Election Commission's "clarification" of state law stood only to

[4] A federal court's decision not to abstain from a case within its jurisdiction is not an immediately appealable order. *Public Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 210 (1st Cir. 1998). Nonetheless, the Election Commission sought review of the district court's order denying abstention in this Court under the doctrine of "pendent appellate jurisdiction." That doctrine is nowhere mentioned in the panel's decision, even though the panel reviewed and reversed the district court's abstention ruling. The panel purported to find authority to review the district court abstention ruling in a 1973 Fifth Circuit decision and a 1973 Ninth Circuit decision (slip op. 26) but never explains how its assertion of pendent appellate jurisdiction over the abstention question is consistent with First Circuit precedent.

*en*franchise (and not *dis*enfranchise) certain voters.

Significantly, the panel stated that it would not "foreclose the possibility of a case in which intervention would be appropriate *without* disenfranchisement," and that the "most obvious" example of such a case "would be a case involving vote dilution." Slip op. 30 n.28 (emphasis added). But the panel concluded that "the Rosselló Plaintiffs' claim that the Commission's 'change in the rules' after the election somehow 'diluted' their vote is without merit because *there was no clear rule prior to the election that the three-mark split ballots were invalid."* Slip op. 20 n. 28 (emphasis added); *see also id.* at 34 ("At most, the decision of the Commission merely *clarified* previously unsettled law."). The panel decision nowhere addresses the Rosselló Plaintiffs' vote dilution claim that the Election Commission's "resolution" unconstitutionally dilutes the votes of large swaths of the electorate by giving a special and select set of voters the ability to cast a third vote for a political party separate and apart from two votes for the candidates for Governor and Resident Commissioner.

REASONS FOR GRANTING REHEARING

I. The Panel Decision Impermissibly Makes A Factual Finding On The Issue Central To Its Disposition Of The Rossello Plaintiffs' Constitutional Claims.

The panel's disposition of the case is squarely predicated on its erroneous factual finding that the Election Commission's November 12, 2004 decision validating the disputed three-vote ballots amounted—not to a "change in the rules"—but only to a "clarification" of those rules. *See* slip op. at 30 n.28, 34, 36 (Torruella, J., concurring), 41 (Howard, J., concurring). That factual finding was beyond the authority and the competence of the panel to make and should have been made by the district court in the first instance.

On its face, the panel opinion purports to address the abstention question by "tak[ing] all claims alleged [in the Rosselló Complaint] as proven." Slip op. 26. But if the panel meant what it said, it could not possibly have required abstention here. The Rosselló Plaintiffs did not merely allege that the Election Commission had "clarified" existing rules relating to the disputed overvotes. To the contrary, the Rosselló Plaintiffs expressly alleged that the Commission's post-election resolution constituted a departure from an established pattern and practice of counting such three-vote ballots as null. *See* Second Amended Complaint ¶¶ 28, 58, 73 (JA 42, 47, 49). Had the panel correctly understood the allegations in the Second Amended Complaint, it could not have ordered abstention under

the standard of review it purported to adopt.

In any event, it was plainly improper for the panel in the first instance to make a factual finding on whether the Commission's November 12, 2004 resolution reflected a change in Puerto Rico practice. Appellate tribunals do not find facts in the first instance. "Factfinding is the basic responsibility of district courts, rather than appellate courts," and it is well settled that courts of appeals "should not . . . resolve[] in the first instance [a] factual dispute which ha[s] not been considered by the District Court." *DeMarco v. United States*, 415 U.S. 449, 450 (1974); *see also* Advisory Committee notes to F.R.C.P. 52 ("the trial court, not the appellate tribunal, should be the finder of the facts"). "To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority." Advisory Committee Notes, F.R.C.P. 52.[5]

Nor is there any doubt that the question whether the Election Commission changed prior law or practice presents an issue of fact that must be resolved in the first instance by the district court. *See Roe v. Alabama*, 52 F.3d 300, 301-02 (5th Cir. 1995) (remanding for trial and requesting "findings of fact" on past practice of counting type of absentee ballot there in controversy); *see also Bazemore v. Friday*, 478 U.S. 385, 397-98 (1st Cir. 1986) (finding of existence of pattern or practice of racial discrimination was factual finding subject to clearly erroneous standard of review). Indeed, it was the central factual question litigated before the district court. At least one member of the panel appeared to agree that the existence of a pattern and practice is a factual question. *See* slip op. at 41 (Howard J., concurring) ("I agree with Judge Torruella that, *on the pleadings and the record* only one conclusion is possible: the Commission's ruling involved only the *clarification* of previously unsettled law.") (first emphasis added).

This Court and other courts of appeals have expressly held that voters allege valid federal constitutional claims when state election officials announce

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[5] *Mercury Motor Express, Inc. v. Brinke*, 475 F.2d 1086, 1091 (5th Cir. 1973) and *Aerojet–General Corp. v. Am. Arb. Ass'n*, 478 F.2d 248, 252 (9th Cir. 1978) (cited by slip op. at 26) are not to the contrary. In neither case did the appellate court resolve a disputed factual question on an interlocutory appeal, as the panel here did.

post-election rules that depart from existing practice, and that courts must ascertain voting practices by building an evidentiary record. For example, in *Griffin v. Burns*, 570 F.2d 1065, 1075 (1st Cir. 1978), this Court held that the post hoc change in the "longstanding practice" of issuing and counting the absentee ballots in primaries rendered "the election itself . . . a flawed process." *Id.* at 1076. The change in "longstanding practice" was established in *Griffin* through an evidentiary hearing in which the district court was afforded an opportunity to make factual findings.

Similarly, in *Roe v. Alabama*—a case strikingly similar to this one—the plaintiffs alleged that their rights under the Fourteenth Amendment were violated by a post-election state-court decision holding that certain absentee ballots should be counted. The plaintiffs claimed that the state-court decision retroactively changed a long-established Alabama pattern and practice of counting only those absentee ballots that were accompanied by the signature of a notary or that of two witnesses. *See Roe*, 43 F.3d at 579. The district court preliminarily enjoined the counting of these ballots, and the Eleventh Circuit affirmed on the ground that "failing to exclude the contested absentee ballots will constitute a post-election departure from previous practice in Alabama." *Id.* at 581.

In the interest of promoting federal-state comity, the Eleventh Circuit certified to the Alabama Supreme Court the question whether Alabama law as it stood on election day required the disputed absentee ballots to be counted. The Alabama Supreme Court concluded that such ballots *should* be counted under state law *and* that it had been the uniform practice throughout the State to count un-notarized and un-witnessed absentee ballots as valid. *Roe v. Mobile County Appointment Bd.*, 676 So.2d 1206 (Ala. 1995). Nonetheless, the Eleventh Circuit remanded the case to the district court for trial on the merits and ordered the district court to make factual findings on whether it in fact had been the past practice in Alabama to count absentee ballots of the contested type as invalid. *See Roe*, 52

F.3d at 301-02. When the district court found that it had been the uniform practice to *exclude* such deficient absentee ballots, the Eleventh Circuit affirmed the district court order requiring the election to be certified without including the disputed absentee ballots—notwithstanding the decision of the Supreme Court of Alabama holding that the absentee ballots were valid under state law. *See* 68 F.3d at 408 & n.6.

Griffin and *Roe* make clear that determining the existence and nature of prior election practice is a question of fact that should be resolved by district courts in the first instance. The panel decision squarely conflicts with *Griffin* and with *Roe* by failing to afford the Rosselló Plaintiffs' their right to obtain the district court's findings as to whether the Commission's November 12, 2004 resolution departed from past practice. The case should be remanded for those findings to be made.

II. The Panel Erred In Concluding That There Had Been No "Change" In Puerto Rico Law.

In any event, the panel clearly erred in concluding that there had been no "change" in the rules. The Election Commission and other Appellants have expended much effort attempting to mischaracterize the nature of the Rosselló Plaintiffs' claims on the overvotes and have tried at every turn to describe that claim as "complicated" and "difficult to understand." Alternatively, they have suggested, in Court and in the press, that the Rosselló Plaintiffs seek to outlaw *all* split ballots. That this campaign of obfuscation and mischaracterization has apparently succeeded is striking because the Rosselló Plaintiffs' claim is extremely simple, easy to understand, and inarguable: on a ballot with candidates for two offices, a voter cannot vote more than twice. Three marks on that ballot is an overvote, and is not allowed. Two offices: two votes. Period.

There are, of course, different ways in which a voter can cast his or her two votes, including by a *valid* "split ballot," which consists of a mark under the insignia of a party and *one* other mark for a candidate. J.A. 124-25. Or, a voter can cast his or her two votes with a single mark under the insignia, which constitutes a straight ticket vote for both candidates of that party. JA 123. Or, the voter can eschew the party insignias and simply place marks in the two candidates' boxes. J.A. 160.

What Appellants propose, however, is that voters get *three* votes—even though only two offices are being contested.[6] And, despite the overwhelming and *undisputed* evidence presented to the district court that voters were never informed by the Election Commission that they could cast three votes on election day, the panel concluded that this astounding proposition is not a departure from prior practice, but rather a "clarification" of state law. That conclusion is demonstrably wrong, as that panel would have recognized had it waited for factual findings from the district court.

A. The Record Evidence

The evidence below demonstrated that the Election Commission had *never* informed voters that they could cast these three-vote ballots. The ballot itself says that only two votes may be cast. J.A. 87. The Election Commission has never issued any literature, advertisement or other material saying that more than two votes can be cast. *See*, *e.g.*, J.A. 150-62. Both immediate past presidents of the Election Commission—including one appointed by *Appellants'* party (the Popular Democratic Party)—stated in no uncertain terms that only two votes were allowed

[6] The only circumstance in which three marks on a ballot are allowed is when they are redundant, *i.e.*, a mark under the insignia and under both candidates of the same party. In such a case, there is no conflict with the ballot instructions or electoral law. J.A. 741. 1050.

on the state ballot. J.A. 937.

In an attempt to justify their post-election decision, however, the Appellants cite the right of voters to vote by marking a party insignia, and purport to explain away the mark under the party insignia on the disputed overvotes by characterizing it as a vote for a party cast with an eye on the party recertification process whereby parties receive millions of dollars in funding and a place on the state ballot if their candidates garner a certain percentage of votes during an election. Slip op. 6-8. Remarkably, the panel relies upon and adopts this rationale wholesale, even though it was concocted by the Appellants *after* the President of the Election Commission ruled that the overvote ballots would be counted. There is *no* reference whatsoever to the recertification process or to "party votes" in President Gracia's November 12 resolution counting the disputed ballots as valid. J.A. 135-36. The *post hoc* rationalization appears in *only* one place: the decision of the Supreme Court of Puerto Rico—a decision that this Court has concluded is void and that was made without the benefit of *any* briefing from any of the Rosselló Plaintiffs.

A moment's reflection makes clear how frivolous the "party certification" rationale is. Under the Appellants' view, a political party could be repeatedly certified as a major political party in Puerto Rico, election after election, even though its candidates fail to receive a single *vote*. Appellants would simply turn the recertification process on its head by claiming that voters can vote for party recertification separate and apart from their votes for candidates. Moreover, absolutely nothing in the record supports this contorted reading of the Electoral Law, and indeed even Appellants' witnesses had to concede the point fatal to this argument: *voters were never told by the Electoral Commission that the law had changed (or been "clarified") to allow such votes.* The reason is simple: Puerto Rico law has never allowed voting for a party, rather than for that party's candidates. Recertification is based upon the votes received by a party's *candidates*. *See* 16 L.P.R.A. § 3003(42).

Faced with undisputed evidence that the Election Commission has never previously endorsed three-vote ballots, Appellants attempted to muddy the record below with a series of witnesses who professed to believe that such votes were valid. Some of those witnesses, including those proffered as "experts," were utterly nonbelievable—which is exactly why the district court, as fact-finder, is charged with assessing the credibility of the witnesses. At best, Appellants' evidence established that some individuals had different views about the validity of the triple X ballot.

That is hardly a surprising proposition—indeed, it would be much more surprising if there were no such disagreement. The important—indeed, the *only*—question is what voters were told on the ballot and before the election by the officials charged with conducting that election. On this point, the record is undisputed, but it was regrettably disregarded by the panel.

B. The Election Code and Regulations

Also missing from the panel's analysis is any reference to the fact that the state ballot at issue in this case came into existence only as recently as 1996. J.A. 687, 847. The state ballot has been used only in the 1996, 2000 and 2004 gubernatorial elections. *Id.* Before 1996, there were two ballots and before that, there was only one lengthy ballot in which all of the candidates for elective office appeared. J.A. 233. As Judge Juan Melecio (who served as President of the Electoral Commission for the 1996 and 2000 elections) testified, the general definitions of the various types of votes (straight, mixed and candidacy) date back to the 1970s—well before the state ballot first appeared on the scene—and were "refined" after 1996 *by specific election regulations that address how split votes on the state ballot should be adjudicated*. J.A. 936. *See* Regulation 81 ("Criterion For Adjudicating Split-Ticket Votes on the State Ballot) (J.A. 112). Moreover, the Electoral Manual approved by the Elections Commission in 2004 contains a section that *specifically* refers to Regulation 81 and unambiguously illustrates how to adjudicate a split-ticket vote on the state ballot. See Section 59.2 (illustrating Regulation 81) (J.A. 123-24). Nowhere else in the laws or regulation is there any reference to split votes on the state ballot that could contradict the evidence proffered by the Appellees on this score.

The instructions on the state ballot and the specific regulation governing the adjudication of split votes *on the state ballot* provide—expressly and unambiguously—that *on the state ballot* voters may cast a split vote by making a mark under the party insignia and making a mark for *a* candidate from another

party. J.A. 86-91, 112. Thus, the regulations support this conclusion (J.A. 112); the official electoral manual of the Commission supports this conclusion (J.A. 86-91); the ballot supports this conclusion (J.A. 123-24); and the testimony of the former President of the Commission who served during the relevant time-frame (1996 and 2000) also supports this conclusion (J.A. 936).

The panel clearly should have waited for the district court to issue its findings on these claims. But at a minimum, if it remains intent on resolving these core disputed factual questions in the first instance, it should not disregard the most probative evidence in the record in support of the Rosselló Plaintiffs' claims.

III. The Panel's Holding That Federal Courts Can Presumptively Entertain Only Challenges To State Election Practices That "Disenfranchise" Voters Conflicts With Decisions Of The Supreme Court And Other Circuits.

The panel's conclusion that federal courts must presumptively abstain from deciding federal constitutional challenges to post-election rule changes that have the effect of "enfranchising" voters cannot be reconciled with *Bush v. Gore*, 531 U.S. 98, 108 (2000), or with the decisions of other circuits, most notably the Eleventh Circuit's decision in *Roe v. Alabama*, 68 F.3d at 408.

The "enfranchisement-disenfranchisement" distinction adopted by this Court in *Partido Nuevo Progresista v. Perez*, 639 F.2d 825 (1st Cir. 1980), is premised on the view that changing the rules after an election to count previously invalid votes as valid somehow has a benign effect on the rest of the electorate. But "it must be remembered that 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Bush*, 530 U.S. at 105(quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). A post-election decision to count previously invalid votes as valid unconstitutionally dilutes the votes of voters who cast valid votes on election day. If an election is decided by a post-election decision to count ballots that are clearly invalid, it is just as grave a constitutional violation as a post-election decision *not* to count ballots that should have been counted.

Indeed, the Eleventh Circuit has expressly held that "counting ballots that were not previously counted

would dilute the votes of those voters that had met the requirements [in effect on election day]," and it squarely rejected the argument that a challenge does not "rise to the level of a constitutional violation" simply because it concerns "*enfranchisement* of those who cast the contested . . . ballots, rather than a disenfranchisement of qualified voters." *Roe*, 43 F.3d at 581 (emphasis added). That holding cannot be reconciled with the panel's "heavy presumption" that federal courts should *not* hear federal constitutional claims that do not "show that a discrete group of voters has been disenfranchised by the challenged local action." Slip op. 29. Rehearing is warranted to address this conflict.

IV. The Panel Disregarded The Rosselló Plaintiffs' Vote Dilution Claim

The panel also unaccountably failed to address (and yet dismisses with prejudice) the Rosselló Plaintiffs' vote dilution claim that exists wholly apart from whether there was a "change in the rules" after election day. *Bush v. Gore* makes plain that vote dilution can occur not only through the debasement of votes of a class by the accordance of greater weight to another advantaged class. *See Bush v. Gore*, 531 U.S. at 105. That is precisely the situation here.

Under the Commission's November 12, 2004 resolution, the disputed ballots are the only ballots in the whole of Puerto Rico where the vote under the party insignia is deemed *not* to count for *any* candidates. They are also the *only* ballots in the whole of Puerto Rico where a political party is credited toward certification even though *none* of its candidates receives any votes. It is absolutely clear that the Election Commission's resolution gives a select and special set of voters the opportunity to vote for a party without voting for any of its candidates. No other voters had this voting power. Appellants have never been able to explain otherwise.

The panel expressly acknowledges that "vote dilution" claims are sufficient to justify "intervention" in election cases. The Rosselló Plaintiffs' state a valid vote dilution claim wholly apart from any claim that state election officials have changed the rules. The panel decision does not address this claim anywhere in its decision. Rehearing is warranted for that reason alone.

V. The Panel Erred By Dismissing The Entire Case

The panel also erred in dismissing the entire case. The Rosselló Plaintiffs asserted compelling claims that

(1) the President of the Election Commission changed the rules of the game by postponing a recount; and (2) the Election Commission threatened to disenfranchise absentee voters by refusing to count as valid absentee votes received after the election as a result of their being sent to voters late by the Election Commission. The Rosselló Plaintiffs' achieved success on *both* claims. The Appellants did not appeal these issues. And yet the panel orders all of these claims dismissed.

A. The Recount Order

Prior to the November 2 election, Puerto Rico law clearly required that, in the event of a very close election, a recount was to be conducted simultaneously with the general canvass. JA 120. After Mr. Acevedo Vilá had been preliminarily certified as the winner, the Commission ignored its own regulation and decided that a full recount could be conducted only after the completion of the general canvass. JA 131-34. The district court correctly concluded that this post-election change in the recount rules raised a significant possibility that there would not be adequate time to conduct the recount to which Dr. Rosselló was entitled under state law, before the inauguration of the new governor on January 2, 2005. JA 72-73. The change in how and when votes would be counted and recounted raised obvious concerns about the fundamental fairness of the electoral process. The district court therefore ordered the Commission to begin the recount immediately.

It is difficult to understand how the panel, faced with this record, could order the dismissal of the Rosselló Plaintiffs' claims pertaining to the timing of the recount (and with prejudice, no less). The record before this Court demonstrates, at a minimum, that the Rosselló Plaintiffs were entitled to the relief they were granted on this claim. Indeed, the panel itself recognized that on election night the disputed ballots were counted in inconsistent ways and acknowledges that this "presents a much stronger claim for federal intervention." Slip op. 30. But in the very next sentence the panel says this claim is moot because "all ballots will be adjudicated in the same manner during the recount." Slip op. 30 n.28. Of course, the only reason there *is* a recount is that the district court—on the basis of the federal claims presented to it—ordered one. No party—not the Election Commission, Governor Calderon, or Mr. Acevedo-Vilá—ever appealed or contested the recount order. Quite apart from the issue of the overvote ballots, the case should be reinstated at least to the Rosselló Plaintiffs' claim requiring the recount to move forward.

B. The Absentee Ballots

The dismissal of the Rosselló Plaintiffs' claims regarding the absentee ballots is equally unjustified. The Election Commission was prepared to enter into a stipulation that in theory would have authorized absentee ballots received after election day to be counted. The Election Commission entered into that stipulation in response to the Rosselló Plaintiffs' federal claims. Remarkably, the panel decision states that these claims are now "moot," even though the panel was advised at oral argument that the Election Commission had not tendered a specific plan or proposal for counting the absentee ballots, and even though those ballots *have not yet been counted*. A dismissal on this claim could be read as voiding any stipulation or as negating any reason for the Election Commission to count the absentee ballots. There simply was no basis in law for the panel to order this relief on this claim.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that rehearing or rehearing en banc be granted.

Dated: December 21, 2004

Respectfully Submitted.

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I hereby certify that a true and correct copy of the foregoing has been served by email upon the individuals listed below, on this 21st day of December, 2004.

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