IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 04-2610, 04-2611

PEDRO ROSSELLÓ; LUIS FORTUÑO; MIRIAM RAMÍREZ; NANETTE GUEVARRA; ARNOLD GIL CARABALLO; LARRY SEILHAMER; JOSÉ SANCHEZ; JUAN F. RAMÍREZ; and JAVIER RODRIGUEZ-HORTA,	)	From the United States District Court for the District of Puerto Rico Case No. 3:04-cv-2251-DRD
Plaintiffs-Appellees,	)	
v.	)	
SILA CALDERÓN ET AL.,	)	
Appellants-Appellants.	)	

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INTRODUCTION

The district court acted well within its discretion in requiring, as part of the ongoing recount, that the disputed "overvotes" be identified and safely set aside pending its resolution of the Rosselló Plaintiffs' constitutional claims. That order simply does not constitute reversible error: this Court has repeatedly emphasized that district courts have broad and virtually unfettered authority to take provisional steps to protect their jurisdiction. The nonadjudication order does precisely that and should be affirmed for that reason.

Rather than address the propriety of the nonadjudication order, Appellants essentially seek review of the whole case—from abstention to the merits—by squeezing every conceivable issue (whether decided by the district court or not) into this interlocutory appeal. But the district court has not decided or granted relief—not even preliminarily—on the *merits* of the Rosselló Plaintiffs' claims. The district court's nonadjudication order protects its jurisdiction to *reach* the merits. Accordingly, the district court's order need not, and should not, be reviewed under the standards traditionally applied to preliminary injunctions on the merits.

In any event, even if this Court were inclined to review the nonadjudication order under those standards, affirmance would be required. A dispassionate appraisal of the record convincingly demonstrates that the election process has

been arbitrarily and deliberately manipulated; that the rules have been changed after the election; and that the Appellants have adjudicated and seek to continue adjudicating the disputed overvotes in a manner that unconstitutionally dilutes the Rosselló Plaintiffs' right to vote. The Rosselló Plaintiffs have clearly demonstrated a likelihood of success on the merits, as well as the irreparable harm and equities necessary to support a preliminary injunction on the merits.

The appeal of the district court's abstention ruling also is baseless. That order is not reviewable under the doctrine of pendent appellate jurisdiction and in any event was entirely correct on the merits. Indeed, if Appellants are correct that the Supreme Court of Puerto Rico's decision has "authoritatively" resolved the relevant state-law questions, there is no conceivable reason for the district court to abstain at all.

* * *

The district court's nonadjudication order is an eminently sensible step that protects the district court's jurisdiction to decide the case before it. Reversal of that order would likely throw the district court proceedings into turmoil and certainly would require the recount process to incorporate new procedures mid-stream or to be started from scratch. None of the Appellants contests or objects to the district court's order *requiring* the recount in the first place. This Court should allow the recount to proceed in the manner prescribed by the district court.

I. The Nonadjudication Order Protects The District Court's Jurisdiction

Neither of Appellants' briefs devotes more than a few passing paragraphs to the jurisdiction-preserving rationale actually articulated by the district court in support of its nonadjudication order. *See* Acevedo Vilá Br. 52-53; EC Br. 5. As demonstrated in the Rosselló Plaintiffs' Opening Brief, those reasons are entirely sound and do not constitute an abuse of discretion. Rosselló Br. 27-29.

The nonadjudication order protects the district court's jurisdiction to resolve the Rosselló Plaintiffs' claims: The district court based its nonadjudication order in part on its candid and well-justified concern that any adjudication of the disputed overvotes could give rise to yet another jurisdictional conflict between the Supreme Court of Puerto Rico and the district court. The circumstance envisioned by the district court is entirely foreseeable: after completion of any state-wide recount that included the disputed overvotes, an individual voter could file a complaint in state court requesting that the Supreme Court of Puerto Rico declare the election officially certified or direct the Election Commission to certify Mr. Acevedo Vilá as the winner. As the district court pointed out, an order issued by the Supreme Court of Puerto Rico in such a case would lead to "tension between jurisdictions." Docket No. 150 (JA 74-85).

The Election Commission contends that the nonadjudication order is unnecessary to protect the district court's jurisdiction because "[i]f new plaintiffs

were to initiate an action in Puerto Rican courts seeking to have the election certified, the District Court has the power to protect its jurisdiction by, if necessary, even enjoining such proceedings." EC Br. 4-5. It also contends that the district court "should not presume that the Puerto Rico Supreme Court would violate any direct order the District Court might impose upon it." *Id*.

But these breezy assertions simply blow past the fact that the district court might not be apprised of any such state court litigation until after the fact, when any order "enjoining" the Supreme Court of Puerto Rico would come too late. The Supreme Court of Puerto Rico decided the *Suárez* matter within 72 hours of receiving a certification request and did not even wait for all the defendants to be *served*. Moreover, contrary to Appellants' suggestion, the district court has every reason to doubt that the Supreme Court of Puerto Rico would obediently comply with an injunction issued directly to it. In *Suárez*, the Supreme Court of Puerto Rico ordered a statewide recount, even though the parties in that case had not requested such relief, and even though the district court had already ruled that the disputed ballots should be segregated and taken into federal custody. As the district court recognized, the *Suárez* order by its very nature conflicted with the federal court order. There is no reason to believe this would not happen again; indeed, every available indicator suggests that it would.

Moreover, Appellants' suggestion that the district court lay in wait to spring a direct injunction on the Supreme Court of Puerto Rico simply underscores the amount of restraint reflected in the nonadjudication order. Rather than protect its jurisdiction by issuing an extraordinary injunction to the Supreme Court of Puerto Rico, the district court has simply ordered the parties before it to segregate and safely set aside the disputed ballots. The district court has repeatedly made clear that its only concern is to protect its jurisdiction to resolve the Rosselló Plaintiffs' constitutional claims. The order temporarily precluding the adjudication of the disputed ballots accomplishes this goal through means far less intrusive than what even the Election Commission and Appellant Cruz would apparently contemplate.

Appellants' skeptical views about the district court's need to protect its jurisdiction are also suspect in light of the positions they have taken in the district court. Nowhere in the Election Commission's extended discussion of abstention principles and federal-state "comity" is there mention of the fact that the Election Commission itself is currently under a *federal* court order to conduct the recount that it never would have conducted on its own accord, and from which it has not appealed.

As the Rosselló Plaintiffs' explained in their Opening Brief, two days after the election the President of the Election Commission unilaterally decided to "amend" the election regulations to require that the general canvass proceed before

the recount. As it existed on election day, the regulation required a recount to proceed *simultaneously* with a general canvass. The President's after-the-fact change in the rules jeopardized any chance that the recount could be completed before January 2, 2004 and was evidently designed to cement the victory of Mr. Acevedo Vilá by ensuring that no recount would occur.

Tellingly, the Election Commission decided it could not defend this post-election "change of the rules" in the district court proceedings. Indeed, *no* defendant has appealed from the district court order requiring a recount to proceed, even though *every* defendant—invoking the very same maxims about the need to defer to the "wisdom" and "discretion" of state authorities on issues of state election law—originally opposed it in the district court, on the ground that the President's "resolution" was a valid interpretation of state law. For the Election Commission now to say that the district court's nonadjudication order represents a "dramatic," "premature," and "legally unjustified" intrusion into state election procedures is simply preposterous. Appellants have conceded the validity of the recount order; the district court obviously possesses authority to ensure that its own recount order is implemented in a manner that protects its jurisdiction to resolve the constitutional disputes about the "overvote" ballots.

The Acevedo Vilá Appellants take a somewhat different tack to the jurisdictional protection afforded by the nonadjudication order and contend that it

was "gratuitous" because the district court had already entered an order precluding a "final certification" of the election until such time as it had reached the merits of the Rosselló Plaintiffs' claims. They also contend that the district court could have adopted alternative measures to protect its jurisdiction, such as requiring the recount to move forward using a "special tally sheet" prepared by the Appellants that would allow for "provisional" adjudication of the ballots.

But the district court carefully considered and rejected these "eclectic" solutions (JA 2) and concluded that the best way to protect its jurisdiction, and to prevent a federal-state jurisdictional conflict, was to segregate the overvotes until it could rule on the merits. That type of "judgment call" is quintessentially the type of discretionary decision to which this Court accords substantial deference. *See, e.g.*, *Public Serv. Co. v. Patch*, 167 F.3d 15, 22 (1st Cir. 1998). Indeed, Appellants' suggestion that the district court should have used a "special tally sheet" implicitly concedes that the district court possessed authority to do *something* to protect its jurisdiction. This Court simply does not second guess "judgment calls, by the district court, such as those that involve the weighing of competing considerations." *Id.*

The district court's order prevents degradation of the ballots: The district court's nonadjudication order also prevents degradation of the ballots. Appellants contend that this rationale is "facially implausible" because this case does not

involve "delicate punchcards, with chads hanging by a thread." Acevedo Vilá Br. 56. But these are paper ballots, marked in pencil, which are disputed precisely because they bear multiple (and sometimes dissimilar) marks in unexpected places on the ballot. JA 1001-1002. The district court's requirement that these ballots be segregated—and therefore protected from degradation, spoliation, or tampering by party officials, floor supervisors, and members of the election commission (*see* Acevedo Vilá Br. 16-17)—is squarely supported by the record. *See* Op. Br. 29-30. Appellants simply have no response to this point, and it alone supports the district court's order.[1]

The district court's ruling is consistent with Bush v. Gore: Appellants contend 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 Appellants, that principle does not apply to this case because the disputed overvotes have already been "adjudicated," and because a recount that excludes those ballots from

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[1] District courts are permitted to issue injunctions that assist in the securing of evidence on which federal proceedings will be based. *See ITT Community Development Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978); *Harris v. Nelson*, 394 U.S. 286, 298-300 (1969) (courts may issue injunctions that aid in the gathering of evidence in federal inquiries).

consideration could alter "the status quo of the election results." Acevedo Vilá Br. 54.

Appellants 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. The overwhelming weight of the evidence establishes that overvotes were adjudicated on election night in an inconsistent manner: some overvotes were adjudicated as straight ballots for the Independence Party while others were adjudicated as a split ballot for two candidates, in the overwhelming majority of cases, Acevedo Vilá and Prats Palerm. *See* Rossello Br. 45 n.8. Even Appellant Gracia Morales could not bring himself to testify that ballots were treated uniformly. JA 322-323. The district court itself made such a finding. *See* Order No. 150 at 10 (an "inference has been created that these split ballots were not being equally or uniformly treated at high levels of the Commission . . . [and] at individual polling paces and further that for two full days equal votes from different areas of Puerto Rico were not being uniformly and equally treated") (JA 83).

It is unquestionably clear that the preliminary election results are wrong and that *any* recount, using *any* procedure, will "threaten[] to arrive at a . . . different

result." App. Br. 47; *see also* JA 322-323, 343-344. There is no way to prevent that. Indeed, the possibility of arriving at a "different result" is inherent in the very nature of a recount. 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.

Appellants' objectives here are not difficult to divine. Since the moment Mr. Acevedo Vilá was preliminarily certified as the victor on the early morning hours of November 3, 2004, the Appellants have sought to manipulate the election process and the election rules to "lock-in" the public relations advantage of maintaining a lead in the election returns for as long as possible: this explains the extraordinary post-election decisions to cancel the recount until after the general canvass and to issue a new "resolution" that requires the vast majority of overvotes to be adjudicated in favor of Mr. Acevedo Vilá. Appellants' resistance to the district court's nonadjudication order is so intense precisely because they believe preservation of the preliminary tally will generate intolerable pressures on the federal judiciary not to resolve the Rosselló Plaintiffs' constitutional claims on the merits.

The district court was appropriately attuned to these considerations and rejected a recount procedure in which the overvotes would be adjudicated, even

preliminarily. That order not only minimizes the likelihood of its being drawn into a jurisdictional conflict with state courts; it also protects against a circumstance in which the federal judiciary is required to discharge its obligation to resolve this controversy in an environment that unnecessarily invites the possibility that its orders will not receive widespread public acceptance.

II. The Rosselló Plaintiffs Are Likely To Succeed On The Merits

A. This Court Need Not Conduct A Full-Blown Preliminary Injunction Inquiry

Appellants dedicate almost the entirety of their briefs to arguing that the Rosselló Plaintiffs' federal constitutional claims have no "likelihood of success on the merits." Acevedo Vilá Br. 6-19, 23-51. As the Rosselló Plaintiffs explained in their opening brief, their constitutional claims are clearly meritorious. Rosselló Br. 32-45. But whether the Rosselló Plaintiffs have established a sufficient "likelihood of success on the merits" simply has no bearing on this interlocutory appeal.

The district court order under appeal here is not a preliminary injunction on the merits. Rather, it is an injunction "in aid of jurisdiction" pursuant to the All Writs Act, 28 U.S.C. § 1651(a). The inquiry for granting such injunctions is precisely that which the district court undertook in its opinion, and which Appellants have ignored here: whether the injunction is necessary to protect the integrity of an ongoing proceeding. *United States v. New York Tel. Co.*, 434 U.S. 159, 174 (1977); *see also ITT Community Development Corp. v. Barton*, 569 F.2d

1351, 1359 (5th Cir. 1978) ("it must be shown that [the injunction] was directed at conduct which, left unchecked, would have had the practical effect of diminishing the court's power to bring the litigation to a natural conclusion").

This standard is entirely unrelated to the four-part test for granting a preliminary injunction—including the substantial likelihood of success and irreparable injury inquiries—around which Appellants have structured their briefing. Although "traditional injunctions are predicated upon some cause of action," injunctions in aid of jurisdiction are dependent on the pendency, rather than the ultimate merits, of federal court proceedings. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100 (11th Cir. 2004). Accordingly, the requirement that a party demonstrate a "substantial likelihood of success of the merits" simply does not apply: "while a party must 'state a claim' to obtain a 'traditional' injunction, there is no such requirement to obtain an All Writs Act injunction—it must simply point to some ongoing proceeding, or some past order or judgment, the integrity of which is being threatened by some action or behavior." *Id.* And courts of appeals have made clear that turning to the four traditional requirements for preliminary injunctions is error: "the requirements for a traditional injunction do not apply to injunctions under the All Writs Act because a court's traditional power to protect its jurisdiction, codified by the Act, is grounded in entirely separate concerns." *Id*.

Consistent with this reasoning, the federal courts have not applied the four-factor test on which Appellants are so focused when determining whether an injunction in aid of jurisdiction was appropriate. *See, e.g.*, *New York Tel.*, 434 U.S. 159, 174 (1977) (affirming injunction issued under the All Writs Act without mentioning the four factors for granting traditional injunctions); *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 219 (1945) (reviewing a lower court's All Writs Act injunction without reference to the four traditional factors).

Under the auspices of assessing the "likelihood of success on the merits," Appellants have presented a litany of factual assertions on which evidence continues to be taken in ongoing evidentiary hearings. But this inquiry is irrelevant to determining whether the district court's injunction was appropriately issued "in aid of its jurisdiction." Appellants' lengthy presentation effectively seeks premature appellate review of decisions on the merits that have not been made. This Court has repeatedly rebuffed attempts by litigants to use the review of preliminary injunctions as a means to obtain a final decision on the merits. *See, e.g.*, *Sierra Club v. Marsh*, 907 F.2d 210, 214 (1st Cir. 1990) (warning against free ranging interlocutory appellate review of merits issues "just because an injunction was in the picture"); *Birmingham Firefighter Ass'n 117 v. Jefferson County*, 280 F.3d 1289, 1293 (11th Cir. 2002) (appellate courts must not permit interlocutory review of injunctions to "collapse . . . into a decision on the merits"). The reason

for that rule is all the more compelling here, where the ultimate merits of the underlying causes of action do not affect whether an injunction "in aid of jurisdiction" was appropriate.

Indeed, Appellants' argument in this appeal is suffused with factual questions the district court has not yet resolved. Resolving those factual questions is not what appellate courts do—on interlocutory review or otherwise. Courts of appeals do not decide questions that require them to make factual findings, even when there is a undisputed basis for appellate jurisdiction over an interlocutory order. *See, e.g.*, *Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1, 10 (1st Cir. 2000) (even with interlocutory appellate jurisdiction, appellate courts only decide "abstract issues of law," not "factual issues"). That task is for the district court, and the district court has not yet acted here.[2]

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[2] Indeed, the nonadjudication order may not come within the meaning of "injunction" under 28 U.S.C. § 1292(a)(1). Under this Court's decision in *Chronicle Publishing Co. v. Hantzis*, 902 F.2d 1028 (1st Cir. 1990), an order is not an appealable injunction unless it grants the claimant some measure of the *merits* relief sought in the complaint. *See id.* at 1030; *see also* 16 Wright et al., Federal Practice and Procedure § 3922 at 65-68 (2d ed. 1996). The nonadjudication order does not grant the Rossello Plainitffs' the relief they are seeking. This Court has made clear that not all "coercive" orders are appealable under 1292(a)(1). *See Chronicle Publishing Co.*, 902 F.2d at 1030.

B. State Law Does Not Control Disposition Of This Case

In any event, the Rossello Plaintiffs have demonstrated a strong likelihood of success on the merits. Appellants' principal claim to the contrary is that the Rossello Plainitffs' constitutional claims are somehow foreclosed or preempted by the decision of the Supreme Court of Puerto Rico holding that the disputed ballots are "valid" under Puerto Rico law. Of course, even Appellants concede that the decision of the Supreme Court of Puerto Rico is void. But more importantly, Appellants simply misunderstand the nature of the Rosselló Plaintiffs' federal constitutional claims. With respect to their Due Process and Equal Protection challenges, the Rossello Plainitffs are entitled to a *federal* court adjudication of their claims that the state election rules do not conform to federal requirements, and their right to a federal court adjudication of these issues does not evaporate simply because the Election Commission or the Supreme Court of Puerto Rico has expressed its views on the meaning of state law.

This Court has repeatedly recognized the vital role of federal courts in protecting federal constitutional rights in similar circumstances. For example, in *Griffin v. Burns*, this Court held that efforts to change the rules governing the validity of a type of ballot or a given voting method after an election are an affront to federal due process guarantees. 570 F.2d 1065, 1075 (1st Cir. 1978). Such retroactive changes in the rules of the election are particularly suspect where, as

here, consistent practice or even explicit instructions from state authorities induced the public to follow a certain set of rules going into the election, only to have those rules changed after the fact. *Id*.

In *Griffin*, this court considered the claims of Rhode Island voters whose absentee and shut-in ballots cast in a state primary election were invalidated by the Rhode Island Supreme Court in a decision sought and obtained after the election had been held. This Court held that the retroactive ruling invalidating them violated due process.

Significantly, the *Griffin* Court did not deem itself powerless to address the constitutional claims before it simply because the Rhode Island Supreme Court had opined on the meaning of state law; under Appellants' view of this case, however, that is precisely what the *Griffin* court should have done. Instead, the *Griffin* Court reasoned that the federal challenge arose from the fact that the change wrought by the state court decision was unexpected, and that giving it retroactive force would fundamentally change the rules after the election was over. *Id*. at 1076.

Under the law of this Circuit, and under parallel decisions from other courts of Appeals, plaintiffs who demonstrate that they have suffered such "fundamental unfairness" as a result of the manipulation of the election process by state officials

are entitled to relief. *Griffin*, 570 F.2d at 1077.[3] Such unfairness was readily apparent in *Griffin*, and it is readily apparent here.

Two years after *Griffin*, the United States District Court for the District of Puerto Rico concluded that due process guarantees had been violated by a decision of the Supreme Court of Puerto Rico changing the manner in which ballots were adjudicated. *Partido Nuevo Progresista v. Barreto Perez*, 507 F. Supp. 1164 (D. P.R. 1980). The District Court found no meaningful distinction between the ex post invalidation of ballots presumed to be valid in *Griffin* and the retroactive validation of facially invalid ballots in *Barreto Perez*. As the district court put it:

> [C]hanging the rules of the game after it has been played and the score is known[] violates fundamental rules of fair play. . . . The counting of ballots after an election which, under the rules prevalent at the time of the vote-casting were considered void and invalid, is the practical and functional equivalent of alteration of ballots or of stuffing the ballot-box, because as in those cases, it amounts to the counting of legally inexistent votes.

Id. at 1174.[4]

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3 *See also Bonas v. Town of N. Smithfield*, 265 F.3d 69, 77-78 (1st Cir. 2001) (finding due process violated where town officials changed town charter after having submitted only a related question to a town-wide referendum); *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995) (finding federal constitutional violations, even though the Alabama Supreme Court had issued authoritative pronouncements on the meaning of state law); *Briscoe v. Kusper*, 435 F.2d 1046, 1055 (7th Cir. 1970) (invalidating on due process grounds a post hoc rule announced by the Chicago City Board of Election Commissioners); *Brown v. O'Brien*, 469 F.2d 563, 569-70 (D.C. Cir. 1972) (finding political party's retroactive application of rule violated constitutional guarantees).

These principles make clear that, contrary to Appellants' contentions, the Rossello Plainitffs have every right to a decision on the merits of their federal constitutional claims, regardless of the position that the Election Commission or the Supreme Court of Puerto Rico may take on the validity of these ballots under Puerto Rico law. The district court has both the authority and the duty to resolve the merits of these federal claims, and to enter orders (like the one at issue here) that ensure it retains the ability to do so.

C. The Record Demonstrates That Plaintiffs' Claims Are Meritorious

The Rossello Plainitffs have compiled a compelling record demonstrating that the rules for adjudicating the "overvotes" have been changed after the election, and that adjudication of the votes as suggested by the Election Commission would

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[Footnote continued from previous page]

4 This decision was reversed in *Partido Nuevo Progresista v. Barreto Perez*, 639 F.2d 825 (1st Cir. 1980). The court of appeals held that *Griffin* did not apply to the facts of *Barreto Perez* on the grounds that the election manipulation at issue in *Griffin dis*enfranchised voters while the demonstrated manipulation of the election at issue in *Barreto Perez* purportedly *en*franchised them. To the extent this decision stands for the proposition that constitutional claims based on vote dilution are impermissible, or that state officials can change the rules after an election so long as they count previously invalid votes as valid, it does not survive *Bush v. Gore*, 531 U.S. at 105, which (among other things) reiterated the principle announced in *Reynolds v. Sims*, 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 (377 U.S. at 554), and that state officials may not manipulate the election process by changing the rules after the election. 531 U.S. at 105.

violate federal equal protection guarantees. There is no credible evidence in the record indicating that these overvotes were ever considered legitimate votes in past years. Nowhere did any of the official instructional materials prepared by the Election Commission direct voters to vote a split ballot by making a mark under the insignia of a party and then making marks for other parties' candidates in all races listed on the ballot. Nor has any candidate for office ever urged voters to mark their ballots in this way. The consistent pattern and practice until this election—one consistent with voter information materials and voter expectation—has been to adjudicate these ballots as void.

There is no credible evidence that these overvotes have been adjudicated as valid split ballots in the past: Appellants' claim that the disputed overvotes have been adjudicated as valid "routinely" in the past is frivolous. Appellants rely exclusively upon the testimony of Benicio Carmona Marques, Danny Gonzales Miranda and Juan Sosa Rosada for this assertion. *See* Acevedo Vilá Br. 14, 48-9. This testimony amounts to nothing more than the bald assertions of PDP party functionaries, and the district court will not credit it. *See* (Carmona Marques) (JA 601); (Gonzales Miranda) (JA 829); (Sosa Rosada) (JA 846). Moreover, each of these witnesses is a low-level election worker, and the testimony at best suggests that in past elections some overvotes were adjudicated as valid in one or two *colegios* (of which there are approximately 7,000) and at one or two canvassing

tables (of which there are 70). JA 818, 837; JA 846. The singular conduct of a polling place or a handful of canvassers does not even suggest a "routine," much less "overwhelming evidence" of one.

Mr. Carmona Marques' testimony is also devoid of any meaningful value as he has "never adjudicated a single ballot in the canvass." JA 576; *see also* JA 562, 560, 561, 563. Indeed, he admitted that if there were a controversy regarding an adjudication, he would not "even get near [it]." *Id*. at 140:13-14 (JA 844). It is unclear how the testimony of a witness who has *never adjudicated a single ballot* and keeps his distance from this process lends any support to Appellants' argument.

Appellants' witnesses also undermine the assertion that overvotes were routinely adjudicated as valid. For example, Mr. Sosa Rosada claimed that he saw "hundreds and hundreds" of similar overvotes during the general canvass in 1996. JA 848. But ballots are not removed from the sealed boxes sent by the precincts unless they are disputed at the precincts or there is a recount. *Id*. (JA 849). Thus, unless the ballots were being vigorously disputed—which supports the position of the Rossello Plaintiffs—Mr. Sosa Rosada would not have had reason to see them. Moreover, in 1996, Mr. Rosselló defeated Mr. Acevedo Perez for Governor by well over 100,000 votes; thus, no recount was required. (JA 835, 842); Pl. Ex. 30 (JA 1060). Consequently, very few uncontested ballots would have been reviewed

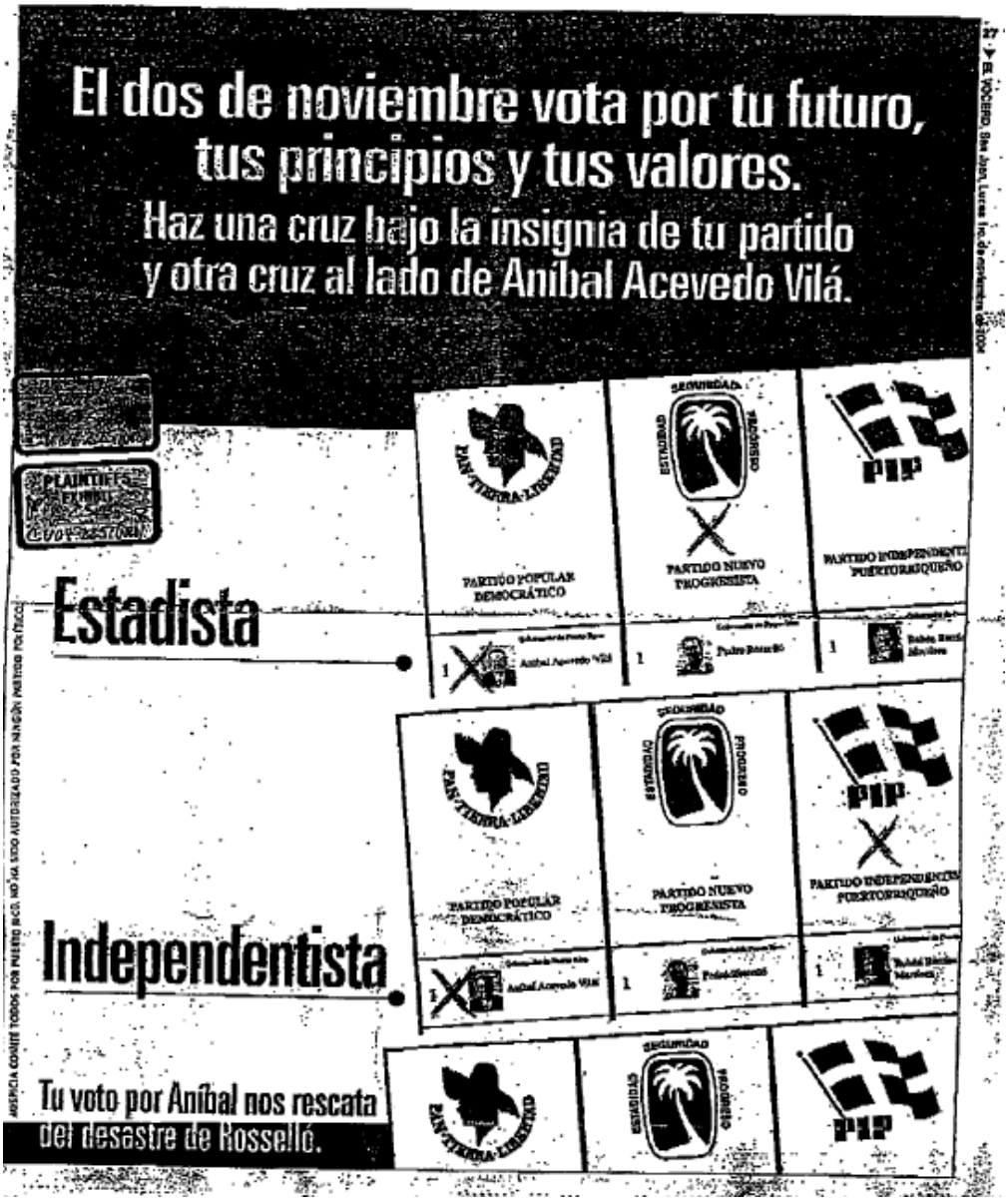
from the 1996 election. It is inconceivable that Mr. Sosa Rosada would have seen "hundreds and hundreds" of overvote ballots unless they had been *consistently and widely contested* by officials at polling places across Puerto Rico.

This testimony—from four low level party loyalists whose testimony is self-contradictory and patently inconsistent with objectively verifiable facts—is the entirety of what Appellants describe as their "overwhelming evidence" that overvotes have been "routinely adjudicated as valid." The Rossello Plaintiffs, on the other hand, presented the testimony not only of polling place and canvassing officials, but also of the President of the State Election Commission during the 1996 and 2000 elections. All of these witnesses clearly and unequivocally testified that these ballots either had never been seen before or were not considered valid in the 1996 and 2000 elections. (Garcia Rivera) (JA 877); (Santiago Acosta) (JA 881).

Moreover, the Rossello Plaintiffs introduced the uncontradicted testimony of the official in charge of the *entire electoral process* during the elections in question. The Honorable Juan Malecio stated unequivocally that he would have adjudicated the type of overvote in dispute in this election as null and void during his tenure as Election Commission President. *See, e.g.*, (JA 934). This necessarily ends the question of what the past practice was in 1996 and 2000 because, as

Appellants are fond of observing, "the President of the Commission [ ] ultimately determines . . . how such ballots should be adjudicated." Acevedo Vilá Br. 17.

Voters Have Not Been Instructed To Vote For Parties: The record also demonstrates that the voters have never been told that they can vote for parties. Appellants claim that "voter education materials disseminated widely by the Commission" clearly instructed voters that they could vote for parties. But this assertion is meritless. No party ever told voters that they possessed this incredible electoral "flexibility" of voting for candidates *and* parties. (JA 803, 878). To the contrary, the advertisements of Mr. Acevedo Vilá in this very election unambiguously confirmed that voters could case a valid split state ballot only by voting under the party emblem of the Independence Party or the New Progressive Party and by making *one* mark for Mr. Acevedo Vilá alone. The advertisement itself speaks louder than words:

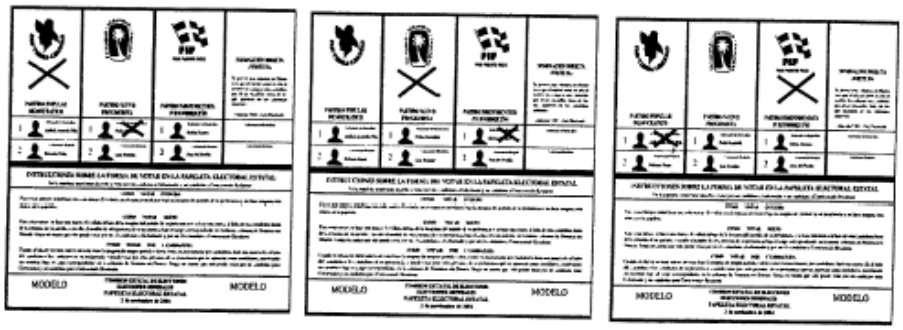


Ex. 25 (JA 1056) ("The second of November vote for your future, your principles and your values. Make one X under the insignia of your party and another X next to Aníbal Acevedo Vilá").

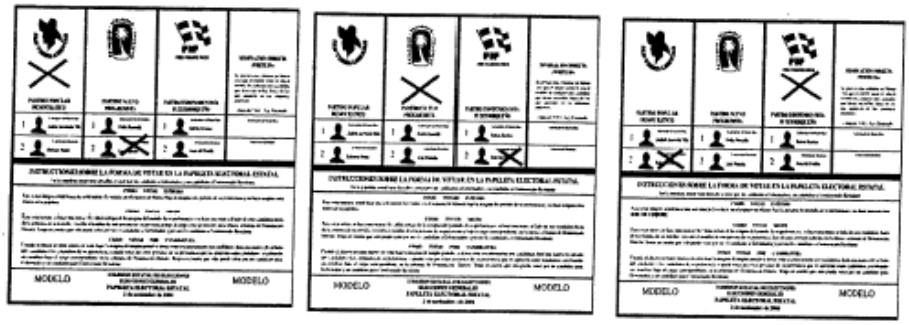
Moreover, the official Election Manual prepared by the Election Commission to instruct election officials how to adjudicate ballots on election

night and during the general canvass contains *six* separate "sample ballots" reflecting the Commission's view of a *valid* split vote.

Direct Nomination or "Write-in" for Governor, the gubernatorial candidate directly marked or written receives one vote and the gubernatorial candidate that is under the insignia for which [the elector] voted loses one vote.
Examples of "Split-ticket" Commonwealth Ballots



This same criterion applies when the mark is for a candidate for Resident Commissioner other than the one that appears beneath the insignia under which the [elector] voted.
Example of "Split-ticket" Commonwealth Ballots



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Not one of these samples from the Election Commission's own authoritative manual depicts the type of overvote ballot that the Appellants claim has been "routinely adjudicated as valid." Indeed, nowhere in the entire Manual is it

possible to identify a ballot in *any* race in which the vote for a party emblem does not count—somewhere—as a vote for a candidate.

This evidence—combined with evidence recounted in the Rossello Plaintiffs' Opening Brief (*see* pp. 7-18, 32-46)—squarely rebuts Appellants' contention that the disputed overvotes have been routinely adjudicated in the past. To the contrary, it has been universally understood and accepted by election officials, candidates, and the electorate that these overvotes would be considered null and void. As the Rossello Plainitffs' have contended, the Election Commission's arbitrary and retroactive departure from prior law, practice, and voter expectations clearly impinges on the Rossello Plaintiffs' constitutional rights as articulated in *Griffin* and its progeny.

III. Appellants Offer No Basis For This Court To Disturb The District Court's Abstention Ruling

A. Appellants' Reliance On Pendent Appellate Jurisdiction Is Unavailing

Though they acknowledge that a district court's refusal to abstain is generally not an appealable event under Section 1291, Appellants nevertheless continue to press the notion that this Court's jurisdiction (under Section 1292) to review the nonadjudication order somehow extends so far as to reach the district court's subsequent denial of Appellants' abstention motion. This argument stretches the doctrine of pendent appellate jurisdiction beyond recognition.

The Commission matter-of-factly cites this Court's recent decision in *Maymo-Melendez v. Alvarez-Ramirez*, 364 F.3d 27 (1st Cir. 2004), for the novel and sweeping proposition that this Court, when it reviews an injunction under Section 1292(a), also may take jurisdiction over any abstention ruling preceding the injunction's issuance. *See* EC Br. 23 ("[T]he Court here has jurisdiction under § 1292 to review the preliminary injunction. That is sufficient for this Court to have jurisdiction over the abstention order."). *Maymo-Melendez* says no such thing. In that case, this Court, reviewing an injunction of state licensing enforcement proceedings, did indeed also review an abstention ruling, and ultimately vacated the injunction on abstention grounds. *See* 364 F.3d at 31-38. This Court could do that, however, only because the injunction and the abstention ruling were located in *the same order*. *See id.* at 31; *Maymo-Melendez v. Alvarez-Ramirez*, D.P.R. No. 02-2001, Opinion and Order (D.E. 41) at 16-20, 23-54 (D.P.R. Nov. 16, 2002).

By taking appeal from the injunction, the *Maymo-Melendez* appellant had also afforded this Court appellate jurisdiction over all the other rulings in the injunction order, including that concerning abstention. *Maymo-Melendez* thus says nothing about *pendent* appellate jurisdiction, but instead stands only for the unremarkable proposition that this Court's Section 1292 jurisdiction extends to all questions fairly included in the order under review. *See* 28 U.S.C. § 1292(a)(1)

(appellate jurisdiction extends to "[i]nterlocutory *orders* . . . granting . . . injunctions" (emphasis added)); *cf. Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996).

The other cases cited by the Commission are fully distinguished in Plaintiffs' Opening Brief (at 51-52). Of them, only *Meredith v. Oregon*, 321 F.3d 807, 816 (9th Cir. 2003) and *Sierra Club v. City of San Antonio*, 112 F.3d 789, 793 n.11 (5th Cir. 1997) are even arguably relevant. But those cases—like the doctrine of pendent appellate jurisdiction itself—are outliers, taking a very different view of the *Swint* test than this Court. *See Limone v. Condon*, 372 F.3d 39, 50, 52 (1st Cir. 2004). In this Circuit, pendent appellate jurisdiction is *prohibited* if the Court is *able* to review the "linchpin" issue without addressing the pendent issue. *See id.* As described *supra* at 5-14, nowhere in the Court's review of the district court's exercise of inherent authority to protect its jurisdiction must it encounter the question of whether the district court was required to abstain in favor of state proceedings. That comprehensively defeats Appellants' attempts to invoke pendent appellate jurisdiction here.

B. Appellants' "Mandatory" Abstention Arguments Are Spurious

Having finally abandoned their *Pullman* abstention arguments (EC Br. 26-28) Appellants still quixotically cling to the notion that the district court's jurisdiction over the Rossello Plaintiffs' federal claims is foreclosed by *Younger* or

Burford abstention. The time has come for Appellants to let go. Even the Appellants (at long last) admit that Plaintiffs have a *federal* case. EC Br. 19. The district court is thus oath-bound to see this case through to its conclusion, whatever it may be. *See New Orleans Public Serv., Inc. v. Council of City of New Orleans* ("*NOPSI*"), 491 U.S. 350, 358-59 (1989).

1. *Younger* Has No Application Here

It is difficult to imagine a less likely candidate for *Younger* abstention. Though the *Younger* doctrine has been extended to some state administrative proceedings, that extension has never probed beyond civil proceedings that are "coercive" in character. *E.g.*, *Esso Standard Oil Co. v. Cotto*, 2004 U.S. App. LEXIS 23894, *15 (1st Cir. Nov. 16, 2004); *Maymo-Melendez*, 364 F.3d at 31. Even if, as the Commission claims: (1) there are judicial and quasi-judicial proceedings in favor of which the federal court could abstain; (2) those proceedings were ongoing at the time the Rosselló Plaintiffs commenced their federal court action; and (3) the state proceeding is a viable forum for the Rossello Plaintiffs' federal claims—*absolutely none of which is true*, *see* Rosselló Br. 54-55—Appellants' *Younger* argument still founders because the state proceedings here are not *coercive*, and thus cannot implicate the doctrine.

A civil proceeding is coercive for *Younger* purposes only when it is a "state enforcement proceeding[]," *Majors v. Engelbrecht*, 149 F.3d 709, 712 (7th Cir.

1998), that is, a proceeding: (1) brought by state authorities, (2) against the putative federal claimant, (3) to punish violations of state law. *See, e.g.*, *Esso Standard Oil Co.*, 2004 U.S. App. LEXIS 23894 at *15 (applying doctrine to administrative proceeding against Esso for violations of state environmental regulations, resulting in $76 million fine); *Maymo-Melendez*, 364 F.3d 29-31; *see generally Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 623-27 (1986). By contrast, *Younger* abstention is not available where the state proceedings are remedial, *i.e.*, brought by an individual to vindicate a wrong perpetrated by state authorities. *See generally NOPSI*, 491 U.S. at 368. This is entirely in keeping with the *Younger* doctrine's origins in the protection of state criminal prosecutions from federal court interference. *See Maymo-Melendez*, 364 F.3d at 31.

Here, the Commission contends that the district court should have abstained in favor of either the Commission's administrative proceeding or the *Suárez* state court action. Neither is coercive. The Commission's proceeding, in which no Rosselló Plaintiff was a party, did not seek to enforce Puerto Rico law—only to interpret it. There was no defendant or respondent. *See* Election Commission Resolution (Nov. 12, 2004) (JA 135-141). The *Suárez* action similarly fails to trigger *Younger* abstention because it was brought by private individuals—not state authorities—and is, by its terms, remedial, *i.e.*, it ostensibly seeks redress of a

wrong committed by the Election Commission. Moreover, since Dr. Rosselló was never served in the action, it was not brought against any of the Rosselló Plaintiffs. Here, as in *NOPSI*, Appellants' vision of *Younger* abstention "would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." 491 U.S. at 368.

2. *Burford* Abstention Is Inapplicable

Burford abstention generally is available only when the federal case raises "difficult [and] complex [issues] of state law." *FDIC v. Sweeney*, 136 F.3d 216, 219 (1st Cir. 1998); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996). As Appellants' abandonment of their *Pullman* abstention arguments amply demonstrates, there may well be no unresolved issues of state law at this time. This case raises only the purely *federal* causes of action asserted by the Rossello Plainitffs. The absence of any state law questions compels the conclusion that *Burford* abstention is wholly inappropriate. *See Dunn v. Cometa*, 238 F.3d 38, 43 (1st Cir. 2001) ("If state law were clear, there would be no reason to abstain in this case.").

Appellants nevertheless maintain that *Burford* abstention is compelled because resolution of these purely federal questions will be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public

concern." EC. Br. 41 (quoting *NOPSI*, 491 U.S. at 361).[5] Appellants point to no case from this Court or any other court of appeals (presumably because none exists) that has required abstention under *Burford* in the absence of a question of state law. Indeed, this Court suggested that exactly the obverse is true, holding that "*Burford* abstention does not bar federal court injunctions against state administrative orders where there are predominating federal issues that do not require resolution of doubtful questions of local law and policy." *Public Service Co. of New Hampshire v. Patch*, 167 F.3d 15, 24 (1st Cir. 1994); *see also Zablocki v. Redhail*, 434 U.S. 374, 380 n.5 (1978) ("there is . . . no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy"). Moreover, Appellants assertion that abstention is required because litigation of the federal claims in federal court will hinder the Commission's ability to "establish a coherent policy" is nothing short of ironic in light of the substance of the Rossello Plaintiffs' federal claims: The Commission changed the rules after the game had been played.

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5 Appellants are certainly wrong in their contention that *Burford* abstention is mandatory. *See Quackenbush*, 517 U.S. at 725 (with respect to *Burford* abstention, locating "the *power* to dismiss based on abstention principles in the *discretionary power* of a federal court sitting in equity" (emphasis added)).

CONCLUSION

For the foregoing reasons, the district court's nonadjudication order should be affirmed.

Dated: December 8, 2004

Respectfully Submitted.

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CERTIFICATE OF COMPLIANCE

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December 8, 2004

CERTIFICATE OF SERVICE

I, Mark A. Patton, hereby certify that a true and correct copy of the foregoing has been served by email upon the individuals listed below, on this 8th day of December, 2004.

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