Case Nos. 04-2612, 04-2613

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN RE: GERARDO CRUZ, Petitioner

IN RE: GRACIA, Petitioner

United States District Court for the District of Puerto Rico
Case No. 3:04-cv-2288-DRD

APPELLEE'S BRIEF IN OPPOSITION TO EMERGENCY PETITION FOR WRIT OF MANDAMUS FROM THE DISTRICT COURT OF PUERTO RICO

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TO THE HONORABLE COURT:

Respondents Pedro Rosselló, Thomas Rivera Schatz, and the New Progressive Party, through the undersigned counsel, respectfully submit this Response to the Emergency Petition For Writ Of Mandamus From The District Court Of Puerto Rico in the matter of *Suárez v. Comisión Estatal de Elecciones*, Civil Action No. 04-2288 ("*Suárez*"). This Response addresses the arguments raised in *In re: Gerardo Cruz, et. al.*, Civil Case No. 04-2612 and *In re: Gracia, et. al.*, Civil Case No. 04-2613. [1]

I. INTRODUCTION

The mandamus relief sought by Petitioners is unwarranted and unnecessary. Mandamus is an extraordinary remedy that is appropriate only in those rare circumstances in which a district court has patently and unaccountably departed from accepted procedures. This case does not come remotely close to meeting those standards.

Petitioners claim that mandamus relief is necessary because the district court has not decided their motion to remand on an "expedited basis." But mandamus is

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[1] Pedro Rosselló, former Governor of Puerto Rico and a current candidate for that office, is named as a defendant in the *Suárez* complaint. He has never been served with the Complaint and is not appearing in these proceedings. The New Progressive Party also contests service of process in this case but is filing this brief pursuant to the Court's order of November 28, 2004.

not an appropriate remedy to address disputes over a district court's management of its docket, particularly where the district court has *not* departed from local scheduling rules, and indeed has established an expedited briefing schedule. To be sure, the district court has not "jumped" as high as Petitioners would like by deciding the remand motion immediately (no doubt because it has been holding daily 12-hour hearings in a related case), but it *has* ordered a response to the remand petition by December 3, 2004, and it will hold a hearing on that petition next Wednesday, December 8, 2004. If past practice is any guide, an order will be issued soon thereafter. Under these circumstances, issuing mandamus to a district court that is responsibly and dutifully managing complex election litigation would be unfair and manifestly improper under this Court's precedents.

Moreover, Petitioners' request for mandamus is premised on the flawed assumption that a ruling of the Supreme Court of Puerto Rico on the election dispute at issue here will conclusively "determine who will be the next Governor of Puerto Rico." Cruz Petition at 2. As Petitioners view the world, the district court is deliberately "sitting" on their remand motion in order to forestall a ruling from the Supreme Court of Puerto Rico that would reach the validity of the disputed "over-vote" ballots under *state* law. But as the district court itself has repeatedly said, even if it determines that remand is appropriate, the federal constitutional issues raised in the related *Rosselló* case will still need to be decided.

Because an order remanding *Suárez* to the state court could not conceivably bring an end to the litigation in this matter, there is no reason to deny the district court the opportunity to hear Petitioners' motion for remand in the first instance. Moreover, if the district court determines that removal *was* proper—*i.e.*, that the *Suárez* plaintiffs did allege federal claims—this does not prohibit the Supreme Court of Puerto Rico from adjudicating claims raised by the presumably many other potential voter plaintiffs who have or could bring similar state suits. The record speaks for itself about the inclination of the Supreme Court of Puerto Rico to resolve these issues. Petitioner Cruz's contention that "the district court is effectively frustrating the authority of the Supreme Court of Puerto Rico to rule on issues of Commonwealth law" is therefore clearly false. Cruz Petition at 11.

Finally, Petitioners are simply wrong that the removal in this case was improper. The remand motion presents both legal and factual questions that ought to be resolved in the first instance by the district court. But it is patently obvious that the complaint neither expressly and exclusively pleads causes of action under state law nor expressly disclaims reliance on the federal constitution, and that its substantive allegations are federal in character. Because alignment of the parties in federal court must be construed under *federal* standards, and because the *only* case-or-controversy arguably presented by the *Suárez* complaint is between the *Suárez* plaintiffs and Thomas Rivera Schatz and the New Progressive Party (which has not

been served), those defendants were the *only* two defendants whose consent to removal would have been appropriate or required. Petitioners' arguments to the contrary are self-serving and reflect a fundamental misunderstanding of federal re-alignment rules.

* * *

Petitioners' mandamus petitions go to great lengths to portray the district court and its treatment of this case in an unflattering light. But for all Petitioners' selective and misleading quotations about the district court's "smiles" about the remand question (all of which are refuted herein), and their suggestion that the district court is arrogating to itself exclusive authority to resolve all issues (state and federal) pertinent to this dispute, the district court was not responsible for the Supreme Court of Puerto Rico's 4-3 decision on the evening of Saturday, November 20, 2004, purporting to decide a case that had been removed earlier in the day to federal court and which even *Petitioners* concede was rendered without jurisdiction. Since being confronted with that judgment, the district court has worked assiduously through the complicated and politically-charged jurisdictional issues that decision created, and its approach to the remand motion has been careful and proactive. There certainly is no warrant for mandamus here.

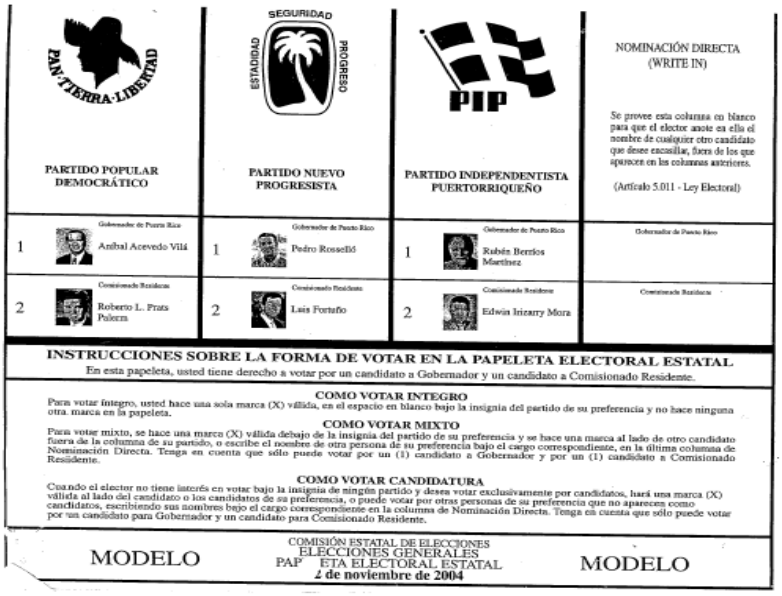
II. BACKGROUND

A. The Election

On November 2, 2004, the Commonwealth of Puerto Rico held its general elections for several 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 on 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).

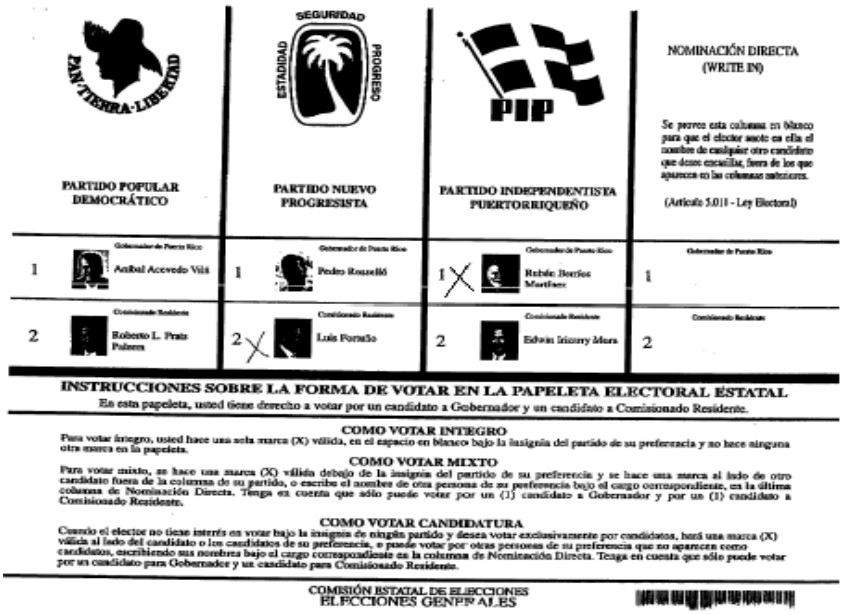
The state ballot instructed voters to cast no more than *one* vote for Governor and *one* vote for Resident Commissioner. An example is shown here and reproduced in Exhibit A. Voters could vote for candidates in one of three ways:

"voto íntegro" (a "straight vote"), "voto mixto" (a "split vote"), or "voto por candidatura" (a "vote by candidacy").



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* Exhibit B, Regulations 50, 80 (Regulations for the General Elections and Canvass of 2004 ("Regulations")). *See also* 16 P.R. Stat. Ann. § 3003(31).

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* Exhibit B, Regulations 50, 82.



PAN-TIERRA-LIBERTAD

SEGURIDAD ESTABILIDAD PROGRESO

PIP

PARTIDO POPULAR DEMOCRÁTICO	PARTIDO NUEVO PROGRESISTA	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 escoger, fuera de los que aparecen en las columnas anteriores. (Artículo 3.011 - Ley Electoral)
1 Aníbal Acevedo Vilá	1 Pedro Rosselló	1 X Rubén Berríos Martínez	1
2 Roberto L. Prats Palerm	2 X Luis Fortuño	2 Edwin Irizarry Mora	2

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

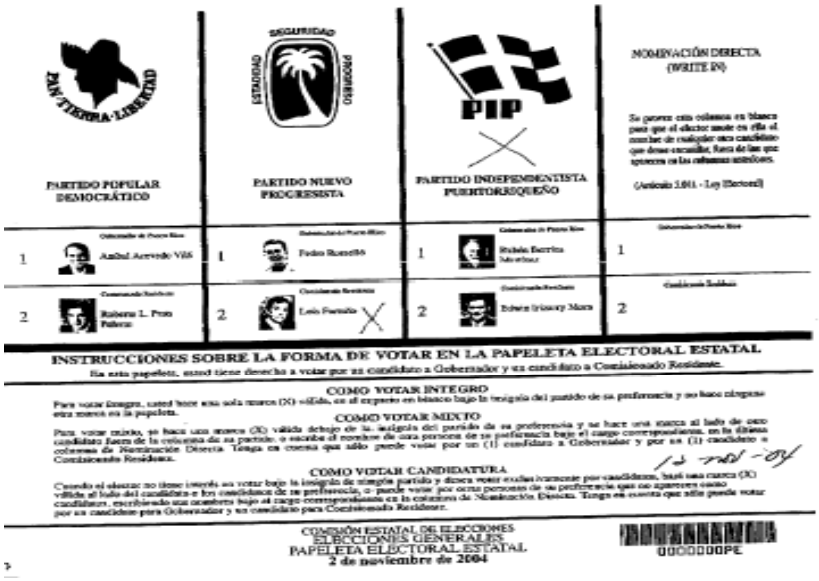
Para votar mixto, se hace una marca (X) válida debajo de la insignia del partido de su preferencia y se hace una marca al lado de otro candidato fuera de la columna de su partido, o escribe el nombre de otra persona de su preferencia bajo el cargo correspondiente, en la última columna de Nominación Directa. 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.

COMISIÓN ESTATAL DE ELECCIONES
ELECCIONES GENERALES

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. Stat. 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:



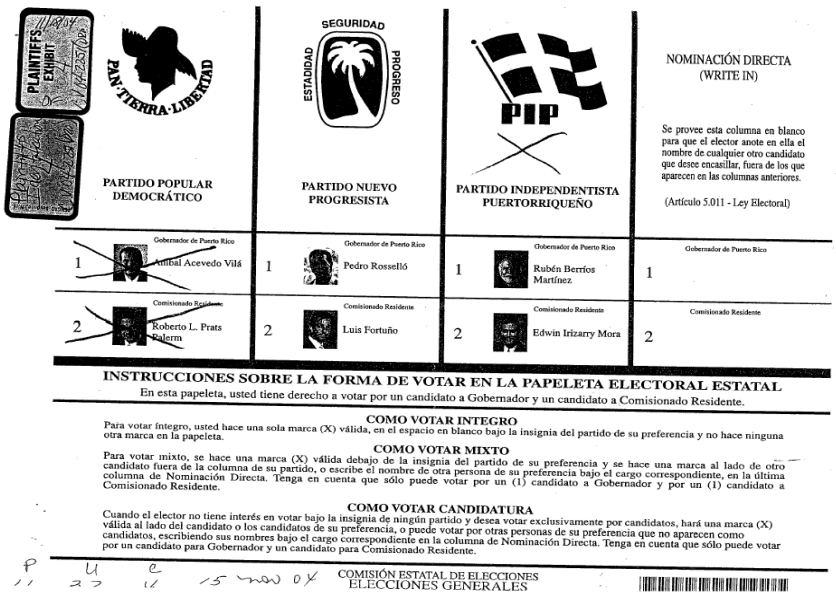
A voter cannot simply vote for a party. The ballot provides that: "On this ballot, you have the right to vote for a Gubernatorial candidate and a Resident Commissioner candidate." *See* Exhibit A. Accordingly, a vote under a party insignia combined with separate votes for two candidates would constitute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

B. The Recount

Puerto Rican law authorizes the Commonwealth Election Commission ("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. Stat. 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, Election 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 C, ¶ 24-25 (Amended Complaint, D. P.R. No. 04-2251, Nov. 12, 2004); *see also* Exhibit D 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 marking unused ballots. *See* Exhibit E (Minutes of November 17 meeting of the Commonwealth Electoral Commission). Moreover, New Progressive Party officials at many polling places reported an abnormally high number of ballots marked with a strange "over-vote" 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.



PLAINTIFF'S EXHIBIT

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)

	PARTIDO POPULAR DEMOCRÁTICO	PARTIDO NUEVO PROGRESISTA	PARTIDO INDEPENDENTISTA PUERTORRIQUEÑO	NOMINACIÓN DIRECTA (WRITE IN)
Gobernador de Puerto Rico	1 Aníbal Acevedo Vilá	1 Pedro Rosselló	1 Rubén Berríos Martínez	1
Comisionado Residente	2 Roberto L. Prats Palerm	2 Luis Fortuño	2 Edwin Irizarry Mora	2

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.

COMISIÓN ESTATAL DE ELECCIONES
ELECCIONES GENERALES

These "over-vote" 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 F.

On November 12, 2004, the President of the Commission, Aurelio Gracia-Morales, over the objection of the New Progressive Party's representative, declared that these unusual "over-votes" would be deemed valid "split votes." *See* Exhibit G (November 12 Commission Resolution).

Neither the regulations, the election code, nor the ballot itself had previously permitted 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 a candidate from another party on the ballot, thereby ***"splitting***" their vote. Exhibit B, Regulation 81. Indeed, the Commission's own manual of election procedures, 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 another party's candidate. *See* Exhibit H, at 4-5 (Manual of Procedures: General Election of 2004 ("Manual")). Further, Mr. Acevedo Vilá's supporters 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 I.

It also became clear during the post-election canvass that the "over-vote" 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. November 18 hearing transcript, Exhibit D at 126, 194.

C. Initiation of Court Proceedings

On November 10, 2004, Respondent Tommy Schatz and others filed an action in the United States Court for the District of Puerto Rico, alleging claims under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.[2] This case is captioned *Rosselló v. Calderón*, Civil No. 04-2251 (the "*Rosselló*" litigation).

On November 16, 2004, four voters filed the suit at issue in this mandamus petition 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 "over-vote" 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* Exhibit J at ¶ 12 (*Suárez* Complaint). They seek a declaratory judgment that over-vote 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.

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[2] An amended complaint was filed on November 12, 2004.

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 G) declaring such ballots valid.

D. Proceedings in the Supreme Court of Puerto Rico

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 with the Supreme Court of Puerto Rico 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.[3]

Even though the case had been removed to federal district court, 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 L. The court did not have the benefit of any brief filed by a defendant. Indeed, only one of the defendants had 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 "over-vote" 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

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[3] 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).

20, 2004, at 18, Exhibit L. Three justices dissented on the ground that the court was without jurisdiction to decide the case because of the removal. Exhibit L at 19-20

On November 23, three days later, Justice Jaime B. Fuster Berlingeri issued *sua sponte* a *second* opinion purporting to address the merits of the removal. *See* Exhibit M. After insinuating that the district court was a "ventriloquist's puppet" with 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 M 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 N 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. 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. On November 24, 2004, the federal district court issued an opinion, 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. 04-2251 (Nov. 23, 2004) (Docket No. 12).

Three days later, Petitioner Cruz, a nominal defendant in *Suárez*, filed in the district court a motion for remand in the *Suárez* case (Docket No. 4). A response is due Friday, December 3, 2004, and a hearing is scheduled for December 8, 2004.

III. ARGUMENT

Petitioners assert that either mandamus or advisory mandamus is an appropriate remedy in this case. But it is clear that mandamus is unwarranted here for several reasons.

A. The Legal Prerequisites For A Writ Of Mandamus Have Not Been Established

First, the legal prerequisites to mandamus simply are not present here. There is no question "that the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980); *see Ex parte Fahey*, 332 U.S. 258, 259 (1947) ("Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies."). Mandamus is "not a substitute for interlocutory appeal" and should be "dispensed sparingly and only in pursuance of the most carefully written prescription." *In re Recticel Foam Corp.*, 859 F.2d 1000, 1005 (1st Cir. 1988) (citing *United States v. Sorren*, 605 F.2d 1211, 1215 (1st Cir. 1979)).

A moment's reflection on the circumstances of this case demonstrates that this extraordinary remedy is inappropriate here. According to Petitioners, mandamus is warranted because the district court did not grant its motion to remand immediately upon receipt. Instead, the district court set an *expedited*

briefing schedule for the motion, with briefing completed only two days from now, and a hearing for the motion only five days thereafter.[4] This Court has employed the mandamus remedy against district courts that recalcitrant refuse to decide a legal question in an effort to insulate it from appellate review. *See, e.g.*, *In re Certain Special Counsel to Boston and Maine Corp.*, 737 F.2d 115, 118 (1st Cir. 1984) (mandamus for failure to decide motion for "several years"). But the district court has not "delayed" the decision of the motion for a year, or a month—but has set a date certain *only two days from now* when decision process will commence. This is not the type of intractable inaction against which this or any other Court employs extraordinary mandamus relief.

Federal appellate courts have established two demanding requirements for mandamus: the party who seeks the writ must prove that he has no other adequate means to attain the relief he desires, and that the right to issuance of the writ is "clear and indisputable." *See Mallard v. U.S. Dist. Court for the Southern Dist. of Iowa*, 490 U.S. 296, 309 (1989) (citing *Kerr v. United States Dist. Court for*

[4] The plaintiffs in *Suarez* filed their motion to remand on November 22, 2004. Under Local Rule 7.1(b), a party opposing a motion has 10 days within which to file a response. Because the time prescribed for filing a response is less than 11 days, weekends and holidays are excluded in the computation. Fed. R. Civ. P. 6(a). Thus, defendants' opposition to the motion to remand would normally have been due on December 7, 2004. The district court instead required that defendants submit their opposition by December 3, 2004, with a hearing to commence on December 8, 2004.

Northern Dist. of California, 426 U.S. 394, 403 (1976)); *Allied Chemical*, 449 U.S. at 35; *Sorren*, 605 F.2d at 1215.

Petitioners cannot satisfy either criteria here. To begin with, Petitioners do not have a "clear and indisputable" right to have the district court decide the remand motion at the time and place of their choosing. The Supreme Court has made clear that a litigant's right to a particular result is *not* "clear and indisputable" where, as here, the matter is one relating to an issue, like docket management, that is committed to the district court's discretion. *Allied Chemical*, 449 U.S. at 36 ("Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable'").

This Court has repeatedly held that mandamus is inappropriate in matters involving a district court's exercise of discretion. The *In re Insurers Syndicate for Joint Underwriting* Court, for example, denied mandamus sought by a party that objected to a district court's protective orders. 864 F.2d 208, 211-212 (1st Cir. 1988). The Court explained that "[t]rial courts enjoy a broad measure of discretion in managing pretrial affairs," and that "[i]nterlocutory procedural orders . . . rarely will satisfy the precondition necessary for mandamus relief." *Id.* (quoting *In re Recticel Foam Corp.*, 859 F.2d at 1006 (1st Cir. 1988)). The Court stated that mandamus would "disserve the proper relationship between trial and appellate courts in the federal system, and wreak havoc with the taxing demands of modern-

day case management" and that it is not appropriate for "the court of appeals gratuitously to inject itself as a super-navigator of sorts, second-guessing the district court from turn to turn." *Id.* (quoting *In re Recticel Foam Corp.*, 859 F.2d at 1007 (1st Cir. 1988)).

Similarly, in *Bridge Constr. Corp. v. Berlin*, 705 F.2d 582 (1st Cir. 1983), this Court denied a mandamus to a party that contested a district court decision to stay the action pending the outcome of a similar state case. The plaintiff claimed that the stay order "effectively terminate[d]" the litigation. *Id.* at 583-84. Then-Judge Breyer, writing for this Court, disagreed that the stay effectively terminated the litigation, and pointed out that "[t]here is no point in ordering a hearing on the stay when the district court has indicated it will grant one." *Id.*

This Court is not alone in holding that mandamus is inappropriate in situations, like this, where a disappointed litigant challenges a district court's discretionary acts of docket management. The Fourth Circuit has held that "[m]andamus cannot be utilized to order a judicial officer to perform or refrain from performing discretionary acts" and that "the district court has discretion to manage its civil docket in the best interests of judicial economy [and] *to set and enforce time limitations for deciding cases brought before it*." *In re Kim,* 829 F.2d 35, 1987 WL 44733, at *1 (4th Cir. Aug. 31, 1987) (emphasis added).

Indeed, courts have routinely held that mandamus was unavailable even where the district court postponed consideration of a particular motion by issuing a stay. *See*, *e.g.*, *Lunde v. Helms*, 898 F.2d 1343, 1345 (8th Cir. 1990) ("Treating this part of the appeal as a petition for writ of mandamus, we hold the district court did not clearly abuse its discretion in staying the federal case pending resolution of the on-going state proceedings. In our view, this is a matter of docket management.").

Of course, the district court in this case has not stayed consideration of the remand question. It simply has exercised its discretion in scheduling briefing and a hearing on the issue, and it has done so in a shorter time-frame than that contemplated by the local and federal rules. The district court's decision to deny Petitioners' request to hear this case on an even more expedited track is not a basis for mandamus. *Allied Chemical*, 449 U.S. at 36.

Mandamus is also inappropriate because Petitioners' have an adequate alternative remedy. Their motion to remand has been filed and will be heard by the district court on December 8, 2004. In the event that mandamus is denied, Petitioners may challenge the denial by "interlocutory appeal if the refusal to remand is certified by the district court and accepted by the court of appeals under Section 1292(b) of Title 28, or as an adjunct to a judgment entered pursuant to

Federal Rule 54(b)." 14C Charles A. Wright et al., Federal Practice and Procedure § 3740 at 548 (1998).

Petitioners have not cited a single case—presumably because none exist—where a court has issued a writ of mandamus commanding that a lower court remand when a motion to remand is still pending before the lower court. Mandamus is altogether unavailable in cases like this.

1. Advisory Mandamus Is Not Appropriate In The Present Case

Petitioners' suggestion that so-called advisory mandamus is appropriate in the present case is equally unavailing, if not frivolous. Whereas supervisory mandamus is utilized in extraordinary and extremely limited instances where a district court has usurped its authority as to a nondiscretionary matter, advisory mandamus is an even *more extraordinary* and sparingly used remedy for those "hen's-teeth rare" situations where a "novel" legal question presents a "matter of first impression" that will "aid other jurists, parties, and lawyers." *In re Justices of the Superior Court Dep't of the Mass. Trial Court*, 218 F.3d 11, 15-16 (1st Cir. 2000). It is inconceivable that the doctrine of advisory mandamus is triggered by the docket management issue presented by this case.

This Court's cases make clear that advisory mandamus applies in truly exceptional circumstances. For instance, in deciding that advisory mandamus was

appropriate in *In re Justices of the Superior Court Dep't of the Mass. Trial Court*, this Court found it critical that the issue presented—which involved the availability of pretrial federal habeas relief for "disinterested prosecutor" claims—was one of first impression that "had never before been squarely decided" and that resolution of the issue would "aid other jurists, parties, and lawyers." *Id.* Similarly, in *United States v. Horn*, 29 F.3d 754, 770 (1st Cir. 1994), this Court found that a previously undecided issue relating to sovereign immunity warranted the use of advisory mandamus. The Court made clear that "[a]dvisory mandamus is not meant to allow review of 'interstitial matters of case administration' or to circumvent limits on appellate review of discretionary interlocutory rulings." *Id.* (internal citations omitted).

This case comes nowhere close to meeting those standards. It does not involve a matter of first impression or a novel legal issue but instead involves precisely the kind of "interstitial matter[] of case administration" that this Court has expressly stated is not appropriate for advisory mandamus. *Id.*

2. The Issues Presented In The Remand Motion—And In The *Suárez* Case Generally—Will Not Be Dispositive In The *Rosselló* Action

Mandamus is not appropriate in this case because Petitioners have not established the legal prerequisites for such a writ, and because, as explained in detail below, the removal of the *Suárez* action was proper under 28 U.S.C. § 1441.

Moreover, even if there were evidence to support Petitioners' claim that removal was improper, a mandamus order remanding the case to the state court will not, as Petitioners evidently believe, compel the disposition of the serious federal constitutional issues raised by the recount and now pending in the district court.

Underlying Petitioners' motions before this Court is the faulty assumption that mandamus will leave the Supreme Court of Puerto Rico as the final arbiter over the remaining election issues, thus bringing about a speedy resolution to the recount. But even if the district court determines that remand is appropriate, the federal constitutional issues raised in *Rosselló* will remain. Indeed, the district court has made it clear that its jurisdiction over the federal constitutional issues in *Rosselló* is in no way dependent on the ultimate resolution of *Suárez*. Exhibit R at 26-31 (11/20/04 Tr., No. 04-2251 (Nov. 20, 2004))**.** This Court's decision on the issue of mandamus will not bring an end to either the federal or state claims arising out of the November 2 election. Under these circumstances, the use of such an extraordinary remedy is not appropriate.

B. Removal Was Appropriate Under 28 U.S.C. § 1441

Mandamus is also unwarranted because removal was proper on the merits. Although the remand motion should be decided by the district court in the first instance, the conclusion is inescapable that removal was proper here.

1. The *Suárez* Complaint Was Properly Removed

Congress has provided that cases filed in state court may be removed to federal court when they contain claims "arising under the Constitution, treaties or laws of the United States." 28 U.S.C. § 1441(b). As with standard federal question jurisdiction under 28 U.S.C. § 1331, the federal courts will decide whether a case arises under the laws of the United States by looking to the plaintiff's well-pleaded complaint; the anticipated or actual existence of a federal defense is not sufficient. *See, e.g., Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10-11 (1983).

Where the complaint filed in state court is ambiguous as to the source of the plaintiff's claims for relief, courts will look to the context of the case, considering "the facts disclosed on the record of the case as a whole." 14C Charles A. Wright et al., *Federal Practice and Procedure* § 3734 at 370 (1998); *BIW Deceived v. Local S6, Industrial Union of Marine and Shipbuilding Workers of America*, 132 F.3d 824, 832 (1st Cir. 1997) (district court may review the complaint in the context of the record to determine whether the requirements for removal are satisfied). The focus remains on the grounds the plaintiff relies upon for relief, pursuant to the well-pleaded complaint rule, and the case is evaluated as of the time that notice of removal is filed. *Ching v. Mitre Corp.*, 921 F.2d 11, 13 (1st Cir. 1990) (nature of plaintiff's claims evaluated on the basis of the complaint as it

stood at the time the petition for removal was filed); *Espino v. Volkswagen de Puerto Rico, Inc.*, 289 F. Supp. 979 (D.P.R. 1968) ("When a court has before it a motion to remand, the pleadings at the time of removal are the ones the Court has before it.").

The *Suárez* complaint does not contain any claim for relief expressly invoking rights arising under state law. Exhibit J. *See also* District Court Opinion and Order of November 30, 2004, No. 04-2551, at 3 n.2, attached as Exhibit K ("Plaintiffs' complaint alleges due process and equal protection in ¶¶ 12 and 26 but in such broad forms failing to specify the source under the Puerto Rico and/or Federal Constitution.") (addressing the remand issue in *Suárez*). Nor does it expressly disclaim reliance on federal law. Petitioners now strain mightily to insist that the asserted causes of action stand exclusively on Puerto Rico law, but there is simply no support for this assertion in the record as of the time of removal, and Petitioners' protestations in their Motion to Remand come too late. [5]

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[5] In their Motion for Remand below, and in their petition for mandamus before this Court, Petitioners assert that the Notice of Removal filed by Respondents concedes that the *Suárez* complaint rests entirely on Puerto Rico law. Cruz Petition at 14, 15 n.6. This is incorrect. Paragraph 7 of the Notice of Removal explicitly states that the Petitioners' claims "arise under the Constitution and laws of the United States." Paragraph 8 of the Notice states that to the extent Petitioners "*attempt* to base" their claims on Puerto Rico law, that attempt cannot conceal the essentially federal nature of their claims." Notice of Removal at 2 (emphasis added).

Petitioners find it "inconceivable" that a federal district court would have had original jurisdiction over the *Suárez* complaint had it been filed initially in federal court. Mandamus Petition at 14. There can be little doubt, however, that the *Suárez* complaint would have satisfied the standard "notice pleading" requirements of Fed. R. Civ. P. 8. "Under that rule, a complaint need only include a short and plain statement of the claim showing that the pleader is entitled to relief. This statement must give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Educadores Puertorriqueños en Acción v. Hernandez*, 367 F.3d 61, 66 (1st Cir. 2004) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)) (quotation marks omitted). Moreover, "[i]n civil rights actions, as in the mine-run of other cases for which no statute or Federal Rule of Civil Procedure provides for different treatment, a court . . . may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.* The *Suárez* complaint is more than adequate to satisfy the removal statute's requirement that any removed case be one "of which the district courts have original jurisdiction." 28 U.S.C. § 1441(b).

The substance of this particular complaint, moreover, provides ample support for reading the *Suárez* complaint as invoking federal law. The *Suárez* case was filed in reaction to, and as an attempted end-run around, the federal action

initiated by Rosselló and the New Progressive Party against the Commission and the representatives of the other parties. The *Rosselló* complaint was filed first and alleged that the due process and equal protection clauses of the Fourteenth Amendment prohibit counting the contested "over-vote" ballots as three votes—one for a party and two for individual candidates from a different party. Amended Complaint, Exhibit C at ¶¶ 57 and 71, filed November 12, 2004. The *Suárez* complaint was filed four days later in the Puerto Rico trial court, ***attaching*** the federal complaint in *Rosselló*, and making reference to that complaint as evidence that the New Progressive Party, Rosselló, and Rivera Schatz were attempting to deprive Suárez and the other individual plaintiffs of their right to vote. *Suárez* Complaint, Exhibit J at ¶ 14, filed November 16, 2004.

The *Suárez* plaintiffs' constitutional arguments are a perfect mirror-image of those advanced in the *Rosselló* action in federal court. Relying on those same constitutional guarantees of equal protection and due process, the *Suárez* plaintiffs request that the "over-vote" ballots be counted precisely in the way that the *Rosselló* plaintiffs contend is prohibited. *Suárez* Complaint, Exhibit J at ¶¶ 14, 26. The *Suárez* plaintiffs' choice to file in the Puerto Rico trial court was evidently motivated not by any decision to rely on Puerto Rico ***law*** but rather by a desire for a more hospitable ***forum*** in which to present their constitutional case.

1. The *Suárez* Claims Raise Substantial Federal Questions Even If They Are Construed As Invoking Puerto Rico Law

Even if the *Suárez* plaintiffs' claims expressly invoked and relied upon state law causes of action (which they do not), federal jurisdiction would still be proper, because the Supreme Court of Puerto Rico has concluded—as a matter of Puerto Rico law—that the interpretation of state constitutional provisions that have federal analogues raises federal questions.

Under the rule announced by the Supreme Court in *Franchise Tax Board*, removal is appropriate "if a well-pleaded complaint established that [the plaintiff's] right to relief under state law ***requires resolution of a substantial question of federal law***. . . ." 463 U.S. at 13 (emphasis added); *see also City of Chicago v. International College of Surgeons*, 522 U.S. 156, 164 (1997) (case arises under federal law when "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law") (quoting *Franchise Tax Bd.*, 463 U.S. at 27-28).[6]

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[6] *Franchise Tax Board* also announced "an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." 463 U.S. at 22. When faced with the possibility that a plaintiff has engaged in "artful pleading" in order to evade removal, the federal courts "look beneath the face of the complaint to divine . . . whether the plaintiff has sought to defeat removal by asserting a federal claim under state-law colors. . . ." *BIW Deceived*, 132 F.3d at 831 (citations omitted). *See also Popular Democratic Party v. Com. of Puerto Rico*,

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In *Metheny v. Becker*, this Court reiterated that the doctrine of "federal ingredient" jurisdiction for purposes of removal "remains vibrant in this circuit." 352 F.3d 458, 460 (1st Cir. 2003). A claim sounding in state law may be removed so long as "resolution of the claim necessarily requires resolution of [a] federal issue" and that federal issue in question is a "substantial" one. *Id.* at 460-61.

These principles demonstrate that—even if the *Suárez* complaint explicitly asserted that the plaintiffs' claims rested on state law—removal would still be proper if resolution of the state law claims would requires resolution of a federal law ingredient. That is precisely the case here. Under a long-standing rule established by the Supreme Court of Puerto Rico, federal law ***is*** an ingredient of any claim that turns on an interpretation of Puerto Rico constitutional provisions that have analogue in a specific provision of the Federal Constitution.

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24 F. Supp. 2d 184, 189 (D.P.R. 1998); 14B Charles A. Wright et. al. *Federal Practice and Procedure* § 3722 at 469 (1998). Although Petitioner attempts to confine this rule to cases dealing with state claims that have been completely preempted by federal legislation, *see* Petition for Writ of Mandamus at 18, both this Court and the Supreme Court continue to be concerned with artful pleading in cases that raise state claims with substantial "federal ingredients." *See City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997); *Metheny v. Becker*, 352 F.3d 458, 460 (1st Cir. 2003); *see also* 14B Charles A. Wright et. al., *Federal Practice and Procedure* § 3722 at 439-47 (discussing argument that artful pleading doctrine might cover only complete preemption cases as "simply . . . implausible").

The Supreme Court of Puerto Rico has held that the Puerto Rico Constitution must be construed "in a manner compatible with the protections of these basic liberties and guarantees offered by equal or similar sections of the U.S. Constitution." *R.C.A. Communications, Inc. v. Govt. of the Capital*, 91 P.R.R. 404, 414-15 (P.R. 1964). This principle was recently reaffirmed in *Ramírez de Ferer v. Mari Brás*, where, in the context of analyzing constitutional issues involving Puerto Rico election law, the Supreme Court of Puerto Rico recognized that the local "Constitution and its Bill of Rights . . . must [be] construe[d] in harmony with the United States Constitution." 1997 P.R.-Eng. 870836 (P.R. 1997).

These cases do not merely reflect the principle, common in many states, that state courts look to federal court decisions for guidance in interpreting state constitutional provisions that have analogues in the Federal Constitution. *Compare, e.g.*, *People v. Sienkiewicz*, 208 Ill. 2d 1, 5 (Ill. 2003); *Edelstein v. City and County of San Francisco*, 29 Cal. 4th 164, 168 (Cal. 2002); *Bacon v. Lee*, 353 N.C. 696, 721 (N.C. 2001); *Wertz v. Chapman Tp.*, 559 Pa. 630, 641 (Pa. 1999); *Planned Parenthood League of Massachusetts, Inc. v. Attorney General*, 424 Mass. 586, 590 (Mass. 1997). Instead, these cases make clear that an adjudication of ***federal*** issues is a necessary component of certain areas of Puerto Rico constitutional adjudication, because in order to properly construe the Puerto Rico Constitution, a determination must be made—as part of the state law analysis—

that the Puerto Rico Constitution is not at odds with analogous provisions of federal law.

To be clear, this is ***not*** simply a statement of basic preemption principles. There is no question that the federal constitution preempts conflicting state constitutional rules. U.S. CONST. art. VI, § 1, cl. 2; *Reynolds v. Sims*, 377 U.S. 533, 584 (1964). Nor does it mean that the Puerto Rico courts lack the power to interpret provisions of the Puerto Rico Constitution that are unique to Puerto Rico. Where the provisions of the Puerto Rico and Federal Constitutions run in parallel tracks, however, Puerto Rico itself has integrated federal standards into its *own* state constitutional analysis—and thus the resolution of claims grounded expressly in the Puerto Rico Constitution necessarily entails consideration of substantial federal issues.

This principle is demonstrated by the Puerto Rico Supreme Court's approach to accepting certification questions from the federal courts. The Puerto Rico Supreme Court will not accept questions of state law certified to them by federal courts precisely because, in that court's view, any decision by the court could be subject to "reversal" by the federal court on the federal ingredient of the state constitutional issue. In *Pan American Computer Corp. v. Data General Corp.*, the Supreme Court of Puerto Rico found that the due process and equal protection

clauses of the Puerto Rico Constitution were analogous to those set forth in the Fourteenth Amendment of the Federal Constitution, and stated:

> [W]hen the question before us refers to the validity of a state law under a clause of the state constitution that is similar to a clause in the federal Constitution, as is the case here, ***the issue is a mixed question of federal and state rights that must be resolved by the federal court,*** because the validity of the statute under the federal Constitution necessarily disposes of the question under state law.

112 D.P.R. 780, 793-94 (1982) (emphasis added). In the Puerto Rico Supreme Court's view, the practice of deferring to federal courts is not merely recommended. Such deference is instead mandatory:

> In these circumstances we must refuse certification, **since our decision would be only advisory.** The federal court could ignore it and resolve the same issue under federal criteria different from ours, or even under the same criteria could reach a different result.

Id. (emphasis added). Thus, the Supreme Court of Puerto Rico responds only to certified questions regarding a statute's validity under the Puerto Rico Constitution "when the validity of a statute falls under a state constitutional clause that has no equivalent with the Federal Constitution." *Id.*[7]

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[7] This principle was reiterated and applied in *Cuesnongle, O.P., v. Ramos*, 835 F.2d 1486 (1st Cir. 1987), to a question touching on the Puerto Rico Constitution's guarantees of freedom of speech and religion, equal protection, and due process. 19 P.R. Offic. Trans. 493, 501-02 (P.R. 1987). Since the certified questions dealt with provisions of the Puerto Rico Constitution the

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Indeed, this Court has recognized the unique integration of federal and commonwealth law in Puerto Rico constitutional jurisprudence. In *Cuesnongle, O.P., v. Ramos*, 835 F.2d 1486 (1st Cir. 1987), this Court addressed what it saw as a potential misunderstanding embedded in the Supreme Court of Puerto Rico's certification jurisprudence, and suggested that the authority of a federal district court to announce an interpretation of a federal constitutional provision that conflicts with the Puerto Rico Supreme Court's interpretation of an analogous state constitutional provision does not constitute an "overruling" of the state court on an issue of state law. *Cuesnongle, O.P., v. Ramos*, 835 F.2d 1486, 1492 n.6 (1st Cir. 1987).[8]

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court considered "analogous to those enshrined in the First Amendment to the Constitution of the United States," the court found it was faced with a "mixed question of federal and state law that must be ruled upon by the federal court because the validity of the statute under the federal Constitution necessarily disposes of the question under the state law. Our decision would be purely advisory." *Id.* at 501-02 (emphasis added).

[8] This Court did observe, however, that the chances for inter-jurisdictional conflicts could be further minimized if cases asking for constitutional judgments involving parallel sections of federal and state constitutions were not be certified at all, analogizing from Supreme Court decisions in which that Court "determined that abstention is not required for interpretation of parallel state constitutional provisions." *Cuesnongle, O.P., v. Ramos*, 835 F.2d 1486, 1492 n.6 (1st Cir. 1987) (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237 n.4 (1984)). *See also Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976) (rejecting argument that

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Nevertheless, the Supreme Court of Puerto Rico subsequently ***reaffirmed*** its position that the provisions of the Puerto Rico Constitution with close federal analogues should be interpreted by the federal courts and are not appropriate for certification to the Supreme Court of Puerto Rico. *Romero v. Puerto Rico,* 2001 P.R.-Eng. 670083 (P.R. 2001) ("There being no constitutional clause applicable to this case without an equivalent in the United States Constitution, we will abstain from engaging in constitutional interpretation.").

The Puerto Rico Supreme Court's certification decisions make clear that, as a matter of local law, where the federal and Commonwealth constitutional provisions are parallel, questions regarding the proper interpretation of the Puerto Rico constitution necessarily contain a federal element. Were this not so, the Supreme Court of Puerto Rico would not consider its own interpretations of the state constitution to be "advisory," or to be at risk of "reversal" by a federal court in the certification process—as this Court observed in *Cuesnongle*. If the interpretation of Puerto Rico law by the Supreme Court of Puerto Rico were purely a state-law exercise, there would be no reason for the Supreme Court of Puerto

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federal court should abstain to allow Puerto Rico courts to evaluate constitutionality under Article II, §7 of Puerto Rico Constitution).

Rico to be concerned that its pronouncements on state-law questions could be overruled by federal courts.[9]

These cases make clear that because the due process and equal protection clauses of the Puerto Rico Constitution are parallel to those contained in the Fourteenth Amendment of the United States Constitution, interpreting those claims under *state* law will turn on how the requirements of the Federal Constitution will be applied to the dispute at hand. Thus, even if the complaint could be read as alleging purely state-claims (which it cannot), the outcome of the *Suárez* action necessarily would require disposition of embedded federal law issues.

2. All Parties With Whom Plaintiffs Have an Actual Controversy Have Consented to Removal

Petitioners also err in suggesting that the removal is invalid because all of the nominal defendants in this action did not join in the removal. Generally, courts

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[9] The federal courts in Puerto Rico are attuned to this principle and have repeatedly concluded that election disputes purportedly resting exclusively on Commonwealth law necessarily raised significant federal questions that qualified them for removal under 28 U.S.C. § 1441. *See Hernandez-Lopez v. Commonwealth of Puerto Rico*, 30 F. Supp. 2d 205 (D. P.R. 1998); *Hernandez v. State Elections Board*, 30 F. Supp. 2d 212 (D. P.R. 1998); *Arroyo v. State Election Board*, 30 F. Supp. 2d 183 (D. P.R. 1998). In each case, the District Court observed that the plaintiffs seeking remand had based their claims on the Puerto Rico Constitution's analogues to the First or Fourteenth Amendments of the Federal Constitution, and in each case the District Court found that the plaintiffs' invocation of the Puerto Rico Constitution necessarily required the court also to analyze and apply federal constitutional law.

have required all defendants to join a notice of removal. But which parties are "defendants" that must join a notice of removal is a matter of *federal* law that is not controlled by the designations in the complaint. *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 580 (1954). *See also Yakama Indian Nation v. State of Wash. Dept. of Revenue*, 176 F.3d 1241, 1248-49 (9th Cir. 1999) (same).

The fundamental federal standard for determining who are defendants for purposes of the removal statute turns on the existence of a controversy between the parties. When parties styled as plaintiffs and defendants do not have between them an actual case or controversy, the court considering removal will realign the parties according to their real interests. *See Safeco Ins. Co. of Am. v. City of White House*, 36 F.3d 540, 545 (6th Cir. 1994) ("a federal court must look beyond the nominal designation of the parties in the pleadings and should realign the parties according to their real interest in the dispute"). Accordingly, a party is not considered a "defendant" for purposes of determining jurisdiction when that party shares the same legal position as the plaintiff. Federal courts have repeatedly inquired which parties are actually adverse to the plaintiff for determining the identity of the defendants for purposes of federal jurisdiction. *See, e.g.*, *In re Texas Eastern Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1241 (3d Cir. 1994) ("where party designations have jurisdictional consequences, the

principle of 'realignment' obliges the court to penetrate the nominal party alignment and to consider the parties' actual adversity of interest").

This outgrowth of the Article III "case or controversy" requirement is not just a requirement of diversity jurisdiction cases. Instead, federal courts have realigned the parties for federal jurisdiction purposes according to their real interests, whether the basis for jurisdiction is under the diversity or federal questions statutes or otherwise. *See Texas Eastern Transmission Corp.*, 15 F.3d at 1240-41. The adversity of interest requirement is "a fundamental principle of federal jurisdiction, a principle associated with, *but not limited to*, diversity jurisprudence." *Development Finance Corp. v. Alpha Housing & Health Care, Inc.*, 54 F.3d 156, 159 (3d Cir. 1995) (quoting *Indianapolis v. Chase Nat'l Bank,* 314 U.S. 63, 69 (1941)) (quotation marks omitted and emphasis added). As the Third Circuit has explained, in determining the alignment of the parties for jurisdictional purposes, the courts have a duty to look beyond the pleadings and arrange the parties according to their sides in the dispute. Opposing parties must have a collision of interests over the principal purpose of the suit." *Id.*

Indeed, the realignment principle has been applied to the precise situation at issue here. In *Minot Builders Supply Ass'n v. Teamsters Local 123*, 703 F.2d 324 (8th Cir. 1983), the plaintiff argued that there was no removal jurisdiction because all defendants had not joined in the notice of removal. *Id.* at 327. The court

determined, however, that one party was "the only 'defendant' in the real sense of the word." *Id.* Petitioners' assertion that the realignment principle is categorically inapplicable to determining which defendants must join a notice of removal cannot be reconciled with these decisions.

The need for judicial vigilance against the joinder of defendants to whom the plaintiffs are not adverse is heightened by the fact that the Complaint seeks only declaratory judgments against the four parties that Petitioners contend are indispensable to a proper notice of removal.[10] Under the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2, there must be an "actual," justiciable controversy between the parties arrayed on opposing sides. "[T]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). When plaintiffs do not seek monetary damages against certain defendants, there is always a risk that they are colluding to achieve a judicial declaration of law, untested by adversarial argument. In declaratory judgment cases, realigning

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[10] Of the four claims for relief presented in the *Suárez* complaint, only three request relief against the Electoral Commission, Dalmau Ramírez, or Petitioners Gracia-Morales and Cruz, and in each of those claims for relief, the Plaintiffs request a declaratory judgment.

the parties so that those that are truly adverse to one another may litigate their dispute in the proper forum is of particular importance.

As the record of this case before the Puerto Rico courts clearly shows, there is no actual controversy between the *Suárez* plaintiffs on one hand, and the Commission, Dalmau Ramírez, and Petitioners Gracia-Morales and Cruz on the other. These purported defendants are clearly on record as agreeing with the position of the *Suárez* plaintiffs regarding the validity of, and proper counting method for, the disputed "over-vote" ballots.

Petitioner Cruz asserts that these parties' personal opinions are not relevant in considering whether they have an actual dispute with the *Suárez* plaintiffs. But the agreement of these parties with the position of a defendant on the key issue in this case is not merely a matter of "personal opinion." At the time this case was removed, the law of the case was that these parties agreed with the plaintiffs that their "over-vote ballots" should be counted. *Suárez v. Commonwealth Election Comm.*, No. KPE04-3568 at 4 (P.R. Ct. of First Instance Nov. 18, 2004) (translation attached as Exhibit Q). Because of this finding, the Court of First Instance of Puerto Rico mooted the case, holding that there was no controversy between plaintiffs and the parties that Petitioners now claim are indispensable to any removal. *Id.* at 4-5. This is precisely the finding that is required to determine the relevant defendants for purposes of removal jurisdiction. Far from mere

speculation about personal opinions, their legal position in the case had been decided by the Puerto Rican courts at the time of removal.[11]

Moreover, the parties in question have endorsed Plaintiffs' position in filings before the Supreme Court of Puerto Rico, and in the decisions they made while acting in their official capacities. *See* Exhibit G. The district court correctly observed that "the remand has imbued problems as to the realignment of the parties since both Plaintiffs and some Defendants in the removed case have the same interests (the validity of the split ballots)." Exhibit K (*Rosselló v. Calderón*, No. 04-2251 (DRD) at 3 n.2 (Nov. 30, 2004)). The mountain of material—from the defendants' pleadings to judicial decisions from both Puerto Rican and federal courts—demonstrating the identity of interest between plaintiffs and the nominal defendants at issue forecloses any claim that removal was improper.

Petitioner Cruz also argues that the Commission must be treated as a defendant because it would be "impossible" for the *Suárez* plaintiffs to implement the remedy they seek without an injunction against the Commission. Cruz Petition at 23. Again, neither the record nor the *Suárez* complaint supports this assertion.

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[11] Importantly, removal jurisdiction is assessed at the time of removal. *See Rosario Ortega v. Star-Kist Foods, Inc.*, 370 F.3d 124, 138 (1st Cir. 2004). That the Supreme Court of Puerto Rico later revisited this mootness decision, after removal, does not affect the removal jurisdiction analysis. In any event, the Supreme Court of Puerto Rico never contested that the parties in question agreed with Plaintiff and intended to count the contested ballots.

The Commission has already officially adopted the decision that the *Suárez* plaintiffs would enforce by means of an injunction. On November 12th, the Commission announced, at the command of Commission President Gracia-Morales and with the assent of two of its three party commissioners (Dalmau Ramírez and Cruz), that the disputed "over-vote" ballots were valid. Exhibit G. The Commission also decided, prior to the commencement of this litigation, to suspend the recount until the general canvass was finished—as the *Suárez* plaintiffs request in their second plea for relief. November 5th Resolution, Exhibit O. Although Puerto Rico law requires unanimous consent from the members of the Commission before the Commission can change its regulations governing such procedures, *see* 16 P.R. Laws Ann. § 3013 (l), the only Commissioner opposed to these decisions is defendant Rivera Schatz, who is without question adverse to the *Suárez* plaintiffs and thus a legitimate defendant. Accordingly, in order to achieve every objective of their Complaint, plaintiffs need only obtain an injunction against Rivera Schatz—who is one of the two defendants that oppose plaintiffs' legal position and who have correspondingly joined in the notice of removal.[12]

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[12] Rivera Schatz's refusal to consent to the preferences of the CEE president and the other two commissioners appears to have been to no avail in any event, as the Commission made these two decisions (which the *Suárez* Plaintiffs' support) without paying any heed to Rivera Schatz's objections.

Aside from whether the parties are sufficiently adverse to support a case or controversy in this matter, federal courts have not permitted the collusive naming of parties in an action in order to defeat federal jurisdiction. *McCulloch v. Valez*, 346 F.3d 1, 6 (1st Cir. 2004). Justice Rivera Perez of the Puerto Rico Supreme Court was convinced that precisely this type of improper collusion was occurring in this matter, stating that he had "no doubt . . . that there is a collusion among [the Plaintiffs and certain Defendants] to try to affect the federal court's jurisdiction over the matter submitted there . . ." *See Suárez* dissent by Rivera Perez, J., Exhibit N at 23.

Justice Perez was right to be concerned. The *Suárez* complaint, on its own terms, demonstrates that the joinder of the nominal defendants at issue is the product of collusion between those defendants and the plaintiffs. The *Suárez* plaintiffs are all individual voters who claim that they cast "over-vote" ballots and who seek to have those ballots counted in a particular manner. But plaintiffs also seek relief completely unrelated to their individual interests, including "a declaratory judgment . . . that, prior to recounting the votes, a general review of the vote count must be carried out." *Suárez* Complaint at ¶ 24.

Suspending a recount while a general canvas is conducted has no relationship with the counting of plaintiffs' individual ballots, but is an apparent attempt to short circuit the previously filed federal litigation in the *Rosselló* case.

The *Rosselló* complaint objects to the suspension of the recount as a violation of the plaintiffs' due process rights under the Fourteenth Amendment, *see* Exhibit C at ¶¶ 47, 55, 70, and seeks an order against the Commission and against its individual members requiring the recount and general canvass to proceed simultaneously. *Id.* Prayer for Relief 1. The *Suárez* plaintiffs' claim seeking to suspend a recount is a direct counter-claim against the *Rosselló* plaintiffs for seeking to enjoin the nominal defendants in this case to conduct a recount, and takes a position on an issue in which the *Suárez* plaintiffs would have no interest were they not in fact colluding with the Commission and Gracia-Morales, Dalmau Ramírez, and Cruz to divert litigation about the propriety of a recount into Puerto Rican courts. This collusion between these nominal defendants and plaintiffs demonstrates that they cannot stand as an obstacle to the district court exercising removal jurisdiction over this matter.

Because there is no actual controversy between the *Suárez* plaintiffs and the nominal defendants who object to removal, the Commission, Gracia-Morales, Dalmau Ramírez, and Cruz should be realigned with the plaintiffs. In addition, the inclusion of these nominal defendants in the case at all is the product of invalid collusion and should be ignored. All of the legitimate defendants then remaining in this case have consented to removal, and thus removal was proper under 28 U.S.C. § 1441.

IV. CONCLUSION

For the foregoing reasons, we respectfully request that the Court to deny the petitions for a writ of mandamus.

DATE: December 1, 2004

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Dated: December 1, 2004

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been served by upon , on this 1st day of December, 2004.

_____

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