

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO**

**MYRNA COLON MARRERO  
JOSEFINA ROMAGUERA AGRAIT**

*Plaintiffs*

**v.**

**HÉCTOR CONTY PÉREZ, et al.,**

*Defendants*

**CIVIL NO. 12-1749 (CCC)**

**FIRST AMENDMENT  
DUE PROCESS  
EQUAL PROTECTION**

**NVRA, 42 U.S.C. §§ 1973 et seq.,**

**HAVA, 42 USC §§ 15541 et seq.**

**CIVIL RIGHTS, 42 U.S.C. § 1983**

**SUPPLEMENTAL MOTION  
FOR EMERGENCY ORDER**

**TO THE HONORABLE COURT:**

Come now Plaintiffs, through the undersigned attorneys, and respectfully state, allege and pray as follows:

1. Yesterday, the Plaintiffs filed a Motion for Emergency Order noting that defendant NPP Electoral Commissioner Mundo was requesting the Commonwealth Court to require Defendant Conty, the President of the State Elections Commission, to order that the list of inactive voters be sent to every electoral unit, not for the purpose of allowing their vote, but for the purpose of identifying for possible

challenge, fraud and prosecution. The Motion noted that these inactive voters, known in this case as the I-8, had right under Section §15482 of HAVA to cast a provisional vote pursuant to the procedures, provisions and precaution provided therein. The motion noted that the defendants Mundo was pushing for the perverse objective not only of denying these voters their right to vote under HAVA, but also possibly prosecuting them for fraud and thus punishing the exercise of their fundamental right to vote under the First Amendment and the federal law.

2. Yesterdays fears are compounded by subsequent pronouncements by Supreme Court of Puerto Rico that tend to show that the Commonwealth Court will side with defendant Mundo's request, regardless of these voters right under federal law. See *Edwin Mundo v. Comisión Estatal de Elecciones*, Resolution of November 1, 2012. **Exhibit A.** While the resolution is technically limited to denying an intrajurisdictional certiorari to the Supreme Court, six members of the Court expressed opinions as to the merits of the controversy and sided with Mundo's argument that Article 6.012 of the Electoral Law provides for the exclusion of voters from the electoral process, without the right to cast a provisional ballot. HAVA was not mentioned in these

expressions. See “expressions” of Justice Martinez Torres, joined by Kholtoff Caraballo and Estrella Martinez, (“no voter in the list of excluded voters can vote without a prior authorization issued by the SEC”); and expressions of Justice Rivera García, joined by Pabón Charneco and Feliberti Cintrón (“only those voters with a valid right to vote can go to the polls”).

3. The Supreme Court of Puerto Rico nowhere acknowledges the existence of the excluded voters’ right to cast provisional ballots under HAVA. In sum, through a go-around procedure the Defendant Edwin Mundo seems likely to obtain an objective that is a monstrous evasion of federal law. The Court is entitled to detain this evasion of federal law, for while the First Circuit did not find the proposed remedy feasible, it did not back down from its finding that Plaintiff had shown likelihood of prevailing on the merits of their federal claim. While the First Circuit has yet to issue its promised opinion on the matter, the application of HAVA to Puerto Rico is statutorily expressed, and thus Plaintiffs as well as 330,902 other American citizens residing in Puerto Rico will be effectively deprived of their right under HAVA to cast a provisional ballot unless this Court takes immediate and unmistakable action to protect their federal rights. Plaintiffs

respectfully submit that the failure to provide a timely remedy will otherwise allow the most massive stealth of the fundamental right to vote under the First Amendment and federal law in Puerto Rico's history.

4. Plaintiffs' prayer for relief is a restatement of what the SEC has already pledged, but failed, to perform in its 2003 HAVA Compliance Plan with respect the provisional ballot provision of HAVA.

See Attachment B, ps. 7-9. . Said Plan provides:

***Achieving Compliance with New Polling Place Requirements in §302***

Puerto Rico currently administers both a provisional ballot process and a challenge ballot process to protect the rights of eligible voters.

Under the process for administering provisional ballots (called *añadidos a mano*, a reference to the process of manually adding names to the list), voters who show up in a polling place but whose names are not on the voter registration list are directed to a special college within the election unit. They are issued a regular ballot that is set aside in a special envelope and counted only if the voter is found to be eligible. Each polling place has multiple colleges, this special college is somewhat like an absentee ballot precinct, which has no voters regularly assigned, but on Election Day has votes assigned to it for reporting purposes.

Provisional ballots are kept separate from other ballots when they are sent to the Commission office for the official canvass of the votes. Following Election Day, Commission staff will research the eligibility of each provisional ballot voter. Once the investigation is completed, those votes cast for offices for which a voter is eligible to vote are counted. The research of the voter's eligibility and the counting of provisional votes are carried out by separate officials in order to preserve the secrecy of the ballots. All the parties are represented in both processes.

Following the election, all voters who cast ballots in this special college can access information on the disposition of the ballot either by means of a toll-free automated phone system or by visiting the local office. Only the voter who cast the provisional ballot has access to information on whether the ballot was counted. Challenged voters vote in the regular college, but their votes are segregated from regular ballots. The college inspectors review the challenge at the polling place on Election Day after the polls close. If the inspectors come to a unanimous decision the ballot is added to the college's voted ballots for counting.

If the inspectors cannot come to a unanimous decision, or if they unanimously decide not to count the ballot, the challenged ballot will be kept separate in a specially identified envelope from other ballots of the college when they are sent to the Commission office for a final review. Following Election Day, Commission staff will research the eligibility of each challenged ballot voter. This investigation process is open to public viewing. Once the investigation is completed, if the voter is eligible, his or her vote is added to the other votes counted within the college. All the parties are represented in this process. Only the Commission can invalidate a ballot, though the local commission can unanimously decide to count a ballot and this decision does not proceed to the Commission. If the Commission cannot come to a unanimous decision, the President decides whether a ballot will be counted....

While Puerto Rico is largely in compliance with the provisional ballot requirement under §302, some minor changes are necessary.

To meet the requirements of §302(a) of HAVA –

**While in practice all voters who claim to be eligible are allowed to vote a ballot either by voting in the special college or voting a challenged ballot, the law specifies certain circumstances under which voters are denied the right to cast a ballot. The law will need to be amended to ensure that every voter meeting the circumstances defined in HAVA §302 is issued a ballot.**

The Commission will amend the challenge ballot to ensure the protections given to the voters who cast ballots in the special college, such as the protection of secrecy, are given to challenged voters as well.

5. In sum, the Plaintiff is requesting a remedy that is already the SEC's legal obligation under HAVA and part of its Compliance Plan. The Commonwealth entities cannot act like an ostrich in ignorance of their fidelity to uphold the laws and Constitution of the United States. This Court already has jurisdiction over the SEC's defendants, and all that Plaintiffs request is that as part of its duty to enforce the laws and Constitution of the United States, this Court order said defendants to abide by their HAVA obligations under the Supremacy Clause of the United States Constitution.

WHEREFORE, Plaintiffs respectfully request this Honorable Court to issue an Order safeguarding Plaintiff's rights to cast provisional ballots on Election Day, and any other remedy appropriate under the circumstances.

In San Juan, Puerto Rico, this November 2, 2012.

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### **CERTIFICATE OF SERVICE**

The foregoing counsel certify that this document was filed with the Clerk of the Court using the CM/ECF system that will notify all counsel of record.