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

MYRNA COLON-MARRERO

Plaintiff

vs

HECTOR CONTY-PEREZ, as President of the Puerto Rico State Elections; EDWIN MUNDO-RIOS, as Electoral Commissioner of the New Progressive Party; EDER E. ORTIZ-ORTIZ, as Electoral Commissioner of the Popular Democratic Party; ROBERTO I. APONTE-BERRIOS, as Electoral Commissioner of the Puerto Rican Independence Party; JULIO FONTANET-MALDONADO, as Electoral Commissioner of the Movimiento Unión Soberanista; ADRIAN DIAZ-DIAZ, as Electoral Commissioner of Puertorriqueños por Puerto Rico; CARLOS QUIROS-MENDEZ, as Electoral Commissioner of Partido del Pueblo Trabajador; NORMAN PARKHURST

Defendants

CIVIL 12-1749CCC

ORDER TO PRESERVE THE COURT'S JURISDICTION PURSUANT TO THE ALL WRITS ACT, 28 U.S.C. § 1651(a)

Before the Court is a Motion for Emergency Order filed by plaintiffs on November 1, 2012 (**docket entry 69**), supplemented by docket entry 73, in which they seek "safeguards" which would ensure that they, as well as other voters similarly situated, commonly referred to "I-8's" or "I-A voters," are not prevented from casting a provisional ballot during the November 6, 2012 election. An opposition was filed by defendant Edwin Mundo as Electoral Commissioner for the New Progressive Party.[1] Having considered the matters raised and

[1]Defendant Mundo alleges that this case has not been judicially certified as a class action. It should be noted that the Court of Appeals in the November 2, 2012 Per Curiam decision stated that:

> Two plaintiffs initially filed this action in the district court, but only one appeals. Plaintiffs brings a facial challenge to Article 6.012, requesting equitable and declaratory relief under 42 U.S.C. § 1983. Though plaintiff did not seek class certification, her requested relief would have applied to all similarly situated voters. See City of Chicago v. Morales, 527 U.S. 41, 55 (1999) ("When

particularly taking into account the stage of the proceedings at this moment, the order set forth below is issued as necessary and for the sole purpose of protecting the Court's existing jurisdiction.

The All Writs Act, 28 U.S.C. §1651(a) provides that:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

The Supreme Court of the United States in 1969 fully addressed the purpose of the All Writs Act in Harris v. Nelson, 394 U.S. 286, 299-300, 89 S.Ct. 1082, 1090-1091 (1969). The following excerpt describes the scope and function of this statute upon which this District Court relies today to defend its jurisdiction: ". . . the Courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. Where their duties require it, this is the inescapable obligation of the courts. Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. 1651. This statute has served since its inclusion, in substance, in the original Judiciary Act as a 'legislatively approved source of procedural instruments designed to achieve the rational ends of law'."

The Act authorizes a Court to issue writs any time "the use of such historic aids is calculated in its sound judgment to achieve the ends of justice and trusted to it." Adams v. U.S., 317 U.S. 269, 273, 63 S.Ct. 237, 239 (1942). In U.S. v. New York Tel. Co., 434 U.S. 159, 174, 98 S.Ct. 364, 373 (1977), the Supreme Court observed that the Act invests federal courts with the authority to prevent parties and non-parties from frustrating a Court's exercise of its jurisdiction: "**the power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a Court order or the proper administration of justice and encompasses those who have not**

> asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question."

taken any affirmative action to hinder justice." (Our emphasis.) The Court of Appeals for the First Circuit has cautioned that in other "for a Court to invoke Section 1651(a) and issue an injunction to protect its jurisdiction over an action, there must be at least a possibility that the complaint states a justiciable federal claim," Roselló-González v. Sila M. Calderón, 398 F.3d 1, 14 (1st Cir. 2004).

Lower courts have expressed themselves on the role of the Act as an instrument against those who would undermine the court's power to bring a case to judgment. An order issued under the Act is directed at conduct which, if left unchecked, would have the effect of diminishing the court's power to bring the litigation to a natural conclusion. See Cinel v. Connick, 792 F.Supp. 492 (E.D. La. 1992). The court's power under the Act is limited to that which is necessary to facilitate the federal court's effort to manage that case to judgment. ITT Community Development Corp. v. Barton, 457 F.Supp. 224 (M.D. Fla. 1978).

Applying these principles to the present case, we conclude that an order is necessary, indeed required, under the Act at this critical stage of the proceedings precisely to protect this Court's power to bring the present litigation to its natural conclusion. Let this be clear: the writ being issued is wholly unrelated and separate from the "Acevedo Proposal" on the **feasibility** of reinstating the affected voters in time for the November 6 Election. **That proposal was determined to be not feasible and this District Court is in no way attempting to resurrect it in contravention of the Court of Appeals' decision.** Our writ does not contemplate the actual, immediate reactivation on November 6 of any I-8 voter, as proposed by Professor Acevedo. What it does pursue is to preserve the power and authority of the Court to decide the merits of the plaintiffs' First Amendment and HAVA claims, raised since the inception of this lawsuit and which are the object of the Court's ultimate resolution, after full briefing and argument.

This case has evolved since the undersigned's first encounter with it on September 18, 2012 which resulted in the conclusion that the statutory construction

components related to the applicability of NVRA and HAVA to Puerto Rico did not allow for a favorable determination on likelihood of success. Since then the Court of Appeals has determined "that plaintiff has established a likelihood of success on the federal election claim under HAVA" (Per Curiam Opinion dated November 2, 2012). The appellate court stated that it is an "open and difficult question . . . whether HAVA would provide a basis for a federal court ordering the reinstatement of voters in Commonwealth elections," page 9 of opinion. These and other issues, for example, whether the electoral system of the Commonwealth of Puerto Rico has received federal funding under HAVA and, if so, whether it has failed to comply with a HAVA provision are yet to be decided.

The ultimate resolution of this case will turn on whether plaintiffs' fundamental right to vote under the First Amendment and/or HAVA, in the general election or only for the federal office of Resident Commissioner, was violated by the enforcement of a local electoral law, specifically Article 6.012 of P.R. Law No. 78, which removed them and others similarly situated from the voter registration roll because they did not vote in the 2008 general election. If plaintiffs prevail **on the merits** at the end of this litigation, the remedy to redress the constitutional violation would no longer exist. Notwithstanding that the preliminary injunction was denied, this action to declare a plaintiff's rights under the First Amendment and HAVA remains active. Given the time constraints, the Court understands that an order, analogous to that requested, must be issued to preserve its power to ultimately resolve the controversies before it instead of engaging in an exercise of futility. For this Court is not just declaring the rights of future voters to participate in future elections. The voters seeking redress are classified as I-8 voters precisely because they were removed from the active registry for not participating in the 2008 election and they claim they are entitled to participate in the 2012 election under the protection of the First Amendment and HAVA.

Accordingly, the Court issues the following relevant findings and ORDER, pursuant to the All Writs Act, 28 U.S.C. 1651(a):

1. The provision of the Puerto Rico Electoral Code, Law No. 78-2011 (the Code), under constitutional scrutiny in this case is Section 6.012 which in its relevant part states that" "If a voter fails to exercise his/her right to vote in a General Election, his/her file in the General Voter Registry shall be inactivated."

2. Plaintiffs and other voters similarly situated were inactivated pursuant to Section 6.012 of the Code because they did not participate in the 2008 general election.

3. These voters are referred to by the parties in this case as I-8 voters, the acronym to signify inactive voters for the 2008 election.

4. The principal claim raised by them is that they are entitled to be reinstated as active voters in the General Voter Registry in order to vote in the November 6, 2012 election because they were illegally removed in violation of HAVA and the First Amendment of the U.S. Constitution.

5. Such claim is precisely the one **ultimately to be resolved on the merits** by this Court.

WHEREFORE, given the importance of the constitutional and the federal statutory questions pending ultimate resolution on the merits before the Court, and, in order to preserve our power to bring this litigation to its natural conclusion, IT IS HEREBY ORDERED that all I-8 voters, who show up on November 6, 2012 to vote shall be allowed to cast a provisional ballot in accordance with Section 9.042 of the Electoral Code of Puerto Rico, Law No. 78-2011, which provides:

> **Those persons who demand the right to vote but did not appear on the voters' list may be provisionally added in accordance with the procedure established by the Commission through regulations.**

IT IS FURTHER ORDERED that, pursuant to the regulations promulgated under the Code, I-8 voters be allowed to cast a provisional vote at an "added-by-hand"

polling station, following the established procedure used for all other added-by-hand voters in conformity with the Commission's regulations.

Neither the parties in this case nor any official, employee or agent of the Puerto Rico State Electoral Commission (SEC) or poll watchers or persons rendering services at the different polling stations or at the special "added-by-hand" units may hinder the casting of provisional votes by I-8 voters in the November 6, 2012 election.

When these provisional ballots cast by the I-8 voters on November 6, 2012 reach the State Electoral Commission (SEC), their adjudication shall be postponed to allow for this Court's resolution of the merits of the I-8 voters' constitutional challenge now pending before it.

A separate order establishing an expedited timetable for the disposition of this case will be entered.

This order shall be personally notified forthwith by the U.S. Marshal of this District to Héctor Conty-Pérez, as President of the Puerto Rico State Elections Commission and notified electronically to all parties in this case.

SO ORDERED.

At San Juan, Puerto Rico, on November 3rd, 2012.

S/CARMEN CONSUELO CEREZO
United States District Judge