

**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

MOTION FOR EMERGENCY ORDER

TO THE HONORABLE COURT:

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

1. Today's digital edition of the newspaper El Vocero has a story written by Carmen Milagros Díaz at page 8, <http://issuu.com/vocero.com/docs/v11012012>, claiming that defendant NPP Electoral Commissioner Mundo is 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 dog tagging them for possible fraud and prosecution.

2. This request is a perversion of the objective of both NVRA and HAVA, for it uses defendants' failure to comply with NVRA and HAVA by inactivating voters with the right to vote for the contrary purpose of persecuting and prosecuting these unlawfully removed from the electoral register. The violation of federal law is now use to support the persecution under Commonwealth law. Neither NVRA nor HAVA countenance this statutory aberration.

3. HAVA expressly includes Puerto Rico within the definition of State: "In this Act, the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, and the United States Virgin Islands." 42 U.S.C. § 15541. HAVA, in turns, incorporates by reference the voter registration and list maintenance provisions of NVRA. See, e.g., 42 U.S.C. § 15483(a)(4)(A): "The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following: ... (A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the NVRA,

registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.” This is the language from NVRA, 42 U.S.C. §§ 1973gg-6(b)(1)(2)(B).

4. Section §15482 of HAVA further establishes provisional voting requirements and procedures that enable the validity of said vote to be established and, if qualified, to be counted. Under HAVA any individual who believes is entitled to vote shall be permitted to cast a provisional ballot as follows:

- (1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.
- (2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is-
 - (A) a registered voter in the jurisdiction in which the individual desires to vote; and
 - B) eligible to vote in that election.
- (3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4).

(4) If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law.

(5)(A) At the time that an individual casts a provisional ballot, the appropriate State or local election official shall give the individual written information that states that any individual who casts a provisional ballot will be able to ascertain under the system established under subparagraph (B) whether the vote was counted, and, if the vote was not counted, the reason that the vote was not counted.

See D. 63, PR HAVA Implementation Plan 2003, Ex. 3, Remedial Feasibility Hearing (including provisional ballot relief).

5. The reasons expressed by the NPP Electoral Commissioner for requesting the list, prohibiting voting fraud, is unfounded, and thus pretextual, as voting fraud is already protected by both Puerto Rico and federal law. Individuals who vote illegally are subject to criminal sanctions under Puerto Rico law. *See e.g.*, Law No. 78 of 1 June 2011, Art. 12.005-007. Federal law also imposes severe criminal penalties on persons who commit fraud in federal elections. *See* National Voter Registration Act, 42 U.S.C. sec. 1973gg-10(2a)(B). It has furthermore come to our attention that defendant Conty has received a letter from the U.S. Department of Justice along the lines of the press release that

appears in the webpage of the USDOJ's Civil Rights Division. See <http://www.justice.gov/opa/pr/2010/October/10-opa-1211.html>.

6. Said letter notes that Civil Rights Division's Criminal Section shall be enforcing in Puerto Rico the federal laws that protect the right to vote including: the Voting Rights Act; the National Voter Registration Act; the Uniformed and Overseas Citizens Absentee Voting Act; and the Help America Vote Act. It further states that the Civil Rights Division enforces federal criminal statutes that prohibit voter intimidation and suppression based on race, color, national origin or religion. As it has in the past, on Election Day, Nov. 2, 2010, the Civil Rights Division will implement a comprehensive program to help ensure ballot access. It is more reasonable and appropriate to rely on the threat of criminal prosecution than to limit or infringe the First Amendment rights of voters. *See e.g. Meyer v. Grant*, 486 U.S. 414, 426-27 (1988)(holding that criminal statutes are adequate to minimize the risk of false or misleading statements relating to petitions).

7. Under HAVA, an inactive voter that presents a valid electoral card, but is not on the list of active voters, must be allowed to cast a provisional ballot, and that ballot must be held by the SEC, until it is determined whether individual votes will be counted pursuant to

federal law. These voters cannot be under threat of persecution or prosecution, which is Defendants' Mundo underlining goal.

WHEREFORE, Plaintiffs respectfully request this Honorable Court to issue an Order safeguarding their rights. A Proposed Order is respectfully submitted as an attachment to this motion.

In San Juan, Puerto Rico, this November 1, 2012.

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CERTIFICATE OF SERVICE

The foregoing counsel certify that on October 18, 2012, this document was filed with the Clerk of the Court using the CM/ECF system that will notify all counsel of record.