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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

CRIMILDA PEREZ-SANTIAGO, VOLUSIA COUNTY HISPANIC ASSOCIATION, JOEL ROBLES, CARMEN FORTIS, EDWIN FORTIS, MADELYN PEREZ, Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 6:08-cv-1868-Orl-28KRS
VOLUSIA COUNTY,	)	
	)	Assigned: Hon. John Antoon II
Defendants.	)	

Notice of Motion for Summary Judgment for Plaintiffs

1. Based on the Declaration of Diana Sen submitted herewith and the Memorandum of Law below, Plaintiffs hereby move this Court pursuant to Fed. R. Civ. P. 56 for an order granting

them Summary Judgment.

2. Plaintiff commenced this action on November 4, 2008 seeking declaratory and injunctive relief pursuant to Section 4(e) of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973b(e) with respect to the conduct of elections in Volusia County.

3. Plaintiffs were all educated in an American-flag school of which the predominant language of instruction was Spanish. All Plaintiffs are limited-English proficient and all had difficulty understanding their English ballot.

4. Volusia County has never provided a Spanish-language ballot in its elections, including the November 2008 election and the September 2009 elections. Defendant does not dispute this fact.

5. As a matter of law, Section 4(e) requires a Spanish-language ballot. Given that no material issue of fact exists with respect to Volusia County's failure to provide a Spanish-language ballot, Plaintiffs respectfully move for Summary Judgment.

6. Plaintiffs respectfully request this Court to enter an order granting Summary Judgment for Plaintiffs and for the Court thereafter to hold a hearing as to appropriate relief, which shall include, but not be limited to a Spanish-language ballot in all future Volusia County elections.

Memorandum in Support of Plaintiffs' Motion for Summary Judgment

I. INTRODUCTION

This is an action to require that Defendant meet its obligations under section 4(e) of the Voting Rights Act of 1965 to ensure that persons born and educated in Puerto Rico and now living in the United States are provided the requisite assistance to enable such persons to vote effectively. In the November 2008 elections, Defendant failed to meet those obligations because only an English-language ballot was available. Plaintiffs, all born in Puerto Rico and all with

limited-English proficiency, were unable to vote effectively because Defendant failed to provide ballots translated into Spanish. Despite Defendant's knowledge of a substantial Puerto Rican population living within Volusia County, Defendant refused to provide a Spanish translated ballot and thus denied its Puerto Rican Spanish-speaking citizens an equal opportunity to participate in the election process. This failure by Defendant warrants the granting of Summary Judgment to Plaintiffs.

II. STATEMENT OF FACTS

A. Puerto Rican Population and Language Ability in Volusia County.

From 2000 to 2008, the Puerto Rican population in Volusia County has nearly doubled in size and constitutes the single largest national origin of Hispanics in the County. *See,* Declaration of Diana Sen in Support of Plaintiffs' Motion for Summary Judgment, ¶ 14. In the year 2000, Volusia County had a total population of 443,343, of which 29,111 were Hispanic and 13,546 were persons of Puerto Rican descent, according to the 2000 Census. *Id.* at ¶ 12. By 2008, according to the American Community Survey Estimates, the Puerto Rican population in Volusia County had grown to 25,276 – nearly doubling in size and constituting over 5% of the total population and 47% of the Hispanic population. *Id.* at ¶14. Many of these persons were educated in Puerto Rico, where the primary language of classroom instruction is Spanish. The 2000 Census states that 53% (7,214) of persons of Puerto Rican descent living in Volusia County were born in Puerto Rico. *Id.* at ¶13. Defendant had access to information on the large number of Puerto Ricans residing in Volusia County.

B. Section 4(e)

Persons born in Puerto Rico are considered natural-born citizens of the United States and they are the special group for which Section 4(e) was created. Section 4(e) of the Voting Rights

Act of 1965 protects the right to vote of United States citizens educated in American-flag schools, in a language other than English. 42 U.S.C. § 1973(e)(1, 2). The legislative purpose behind section 4(e) "makes clear that the Puerto Rican community residing in the United States is the group sought to be protected by the terms of the Act." *Arroyo v. Tucker,* 372 F. Supp. 764, 766 (E.D. PA 1974); *see also*, Decl. Sen at ¶¶ 3-5.

C. Volusia County Election Practices

1. There was only an English language ballot available in Volusia County for the 2008 election.

Defendant admits that there was only an English language ballot available on November 4, 2008 in Volusia County. Decl. Sen at ¶ 18. Volusia County Supervisor of Elections Ann McFall has the authority to have the County's ballots translated into Spanish, but chose not to. *Id.* Moreover, the sample ballot mailed to voters by Defendant was only in English. In addition, Defendant has never translated the ballot to Spanish in any election held in Volusia County. *Id.* As a result, citizens of Puerto Rican descent with limited English proficiency have been unable to understand the ballot in English and thus unable to fully exercise their right to vote.

2. Plaintiffs experienced difficulty voting and understanding their vote because only an English language ballot was available.

Plaintiffs are all United States citizens. Decl. Sen at ¶ 8. Plaintiff Crimilda Perez-Santiago and Madelyn Perez were born in Puerto Rico. *Id.* Carmen Fortis and Edwin Fortis were born in Chicago and moved to Puerto Rico when they were small children. *Id.* Plaintiffs were all educated in American-flag schools in Puerto Rico where the predominant classroom language was Spanish. *Id.* at ¶ 9. Their English proficiency is therefore limited. Plaintiffs all migrated to Florida and are residents of and registered to vote in Volusia County. *Id.* Each Plaintiff wanted to exercise his or her right to vote on November 4, 2008, but was unable to cast

the vote effectively and knowledgeably, because his or her vote was conditioned on the ability to speak and/or understand English. *Id.* at ¶¶ 20-24. Because the voting ballot was only available in English, not in Spanish, Plaintiffs had difficulty voting and understanding their vote, or were too intimidated to attempt a vote in English. *Id.*

Plaintiff Crimilda Perez-Santiago attempted to vote on November 4, 2008 in Deltona, FL in Volusia County and Plaintiff Carmen Fortis and Edwin Fortis attempted to vote in Orange City, FL in Volusia County. Decl. Sen at ¶¶ 20-21. At the poll, Perez-Santiago requested a Spanish ballot, but was told that it was unavailable. *Id.* When she requested assistance in translating the state constitutional amendments, the poll worker advised her to leave that portion of the ballot blank. *Id.* Because of her inability to understand her English ballot, she was unable to vote for several constitutional amendment and city referenda. *Id.* Perez-Santiago was not able to vote on the entire ballot because only an English ballot was available. *Id.*

Plaintiff Carmen Fortis did not see any Spanish materials or signage while at her poll, nor were any Spanish-speaking poll workers available to help her. Decl. Sen at ¶ 22. Since the ballot was in English she incorrectly filled the ballot the first time and when the voting machine would not take it, she had to get a new ballot. *Id.* A poll worker then attempted in English to explain how to fill the ballot. Ms. Fortis stated she "filled it out as best as I could." *Id.* However, she was not able to vote for all offices and left constitutional amendment votes blank because she did not understand her ballot, since only an English ballot was available. *Id.*

Plaintiff Edwin Fortis attempted to vote on November 4, 2008 in Orange City, FL in Volusia County. Decl. Sen at ¶ 23. His first ballot was rejected by the voting machine because he did not understand his English ballot and therefore filled in too many bubbles. *Id.* Fearing that his second ballot would be rejected, he only voted for President and left the remaining

portions of his ballot blank against his wishes. *Id.* He therefore was not able to vote on the entire ballot because only an English ballot was available. *Id.*

Plaintiff Madelyn Perez did not vote on November 4, 2008 because she felt intimidated by the electoral process in Volusia County. Decl. Sen at ¶ 24. She did not feel comfortable reading the complex Florida constitutional amendments in English. *Id.* Had a Spanish ballot been available she would have voted. *Id.*

Defendant's use of an English-only election ballot effectively conditions the right to vote for Volusia County's Puerto Rican community, many of whom attended school in Puerto Rico, on the ability to read, write, and understand English.

III. ARGUMENT

A. Standard of Review for a Motion for Summary Judgment

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986). But "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The moving party initially bears the burden of demonstrating that no genuine issues of material fact remain. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once this showing is made, the non-moving party may not rely solely on "[c]onclusory, allegations, conjecture, and speculation," but must present specific facts demonstrating that there is a genuine issue for trial.

Niagara Mohawk Power Corp. v. Jones Chem. Inc., 315 F.3d 171, 175 (2d Cir. 2003) (citations and internal quotation marks omitted); *see also* Fed. R. Civ. P. 56(e). The Court resolves all ambiguities and draws all factual inferences in favor of the non-moving party, but "only if there is a 'genuine' dispute as to those facts." *Scott v. Harris,* 550 U.S. 372, 380 (2007) (citing Fed. R. Civ. Pro. 56(c)); *see also, Kingsland v. City of Miami*, 382 F.3d 1220, 1225 (11th Cir. 2004).

B. In Failing to Provide Ballots Translated into Spanish, Volusia County Violated the Voting Rights Act of 1965, Section 4(e)

The Voting Rights Act of 1965, Section 4(e) prohibits Volusia County from "conditioning the right to vote . . . on ability to read, write, understand, or interpret any matter in the English language" by any person educated in an "American-flag school," including the Commonwealth of Puerto Rico, where the predominant classroom language is Spanish. *See* 42 U.S.C. § 1973b(e)(1). Federal courts "speak with a united and consistent voice" in upholding Section 4(e) and have "broadly" interpreted it "to prohibit both the explicit conditioning of the right to vote on the ability to speak English and the conduct of English-only elections." *United States v. Berks County*, 250 F. Supp. 2d 525, 535-537 (E.D. Pa. 2003) [hereinafter "Berks I"]. *See, Arroyo v. Tucker*, 372 F. Supp. 764, 766 (E.D. Pa. 1974); *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974); *Puerto Rican Org. for Political Action (PROPA) v. Kusper*, 490 F.2d 575, 580 (7th Cir. 1973).

In *Katzenbach v. Morgan*, the Supreme Court upheld the constitutionality of § 4(e), stating that:

> "Congress explicitly declared that it enacted § 4 (e) 'to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English.' The persons referred to include those who have migrated from the Commonwealth of Puerto Rico to New York and who have been denied the right to vote because of their inability to read and write English. . . . More specifically, §

> 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government.

384 U.S. 641, 652 (1966); *see also,* 111 Cong. Rec. 11160 (According to Sen. Robert F. Kennedy, Section 4(e)'s main sponsor, the purpose was to bring the citizen of "Puerto Rican origin into a status of equality with his fellow citizen[s].").

Moreover, in 2006 Congress reauthorized the Voting Rights Act and specifically referred to Section 4(e) in its finding that "racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965." H.R. 9, 109th Cong. (2006). Congress stated: "Evidence of continued discrimination includes . . . the litigation pursued by the Department of Justice since 1982 to enforce sections 4(e), 4(f)(4), and 203 of such Act to ensure that all language minority citizens have full access to the political process." Id.

The case law makes clear that ballots must be provided in Spanish, and that failure to provide Spanish-language ballots is in violation of § 4(e). A Section 4(e) challenge in *Arroyo v. Tucker* was brought over 30 years ago. In that case two Puerto Rican citizens objected to the voting procedures in Philadelphia. The Court granted a permanent injunction pursuant to Section 4(e) compelling the County Commissioners to prepare all written election materials, including the ballot in English and Spanish. The Court stated:

> The 'right to vote' means more than mechanics of marking a ballot or pulling a lever. Here, plaintiffs cannot cast an 'informed' or 'effective' vote without demonstrating an ability to comprehend the registration and election forms and the ballot itself. The English-only election materials therefore constitute a device 'conditioning the right to vote' of plaintiffs on their ability to 'read, write, understand, or interpret any matter in the English language.' Such an election process cannot withstand scrutiny under the Voting Rights Act.

372 F. Supp. at 767.

That same year, in *Torres v. Sachs*, the Puerto Rican citizens living in New York City who were limited in English proficiency challenged the defendant's English-only elections as violative of Section 4(e). Here again, the Court issued an injunction ordering that all elections be conducted on bilingual ballots. 381 F. Supp. at 312.

In *PROPA v. Kusper*, the Section 4(e) contest involved voting in Chicago. In 1973 the Seventh Circuit upheld the 4(e) claim, ordering that election materials be printed in Spanish and stating "'the right to vote' encompasses the right to an effective vote. . . . so a Spanish-speaking Puerto Rican is entitled to assistance in the language he can read or understand." 490 F.2d at 580. The district court ruled that, "[i]f voting instructions and ballots or ballot labels on voting machines are printed only in English, the ability of the citizen who understands only Spanish to vote effectively is seriously impaired." *Puerto Rican Organization For Political Action v. Kusper*, 350 F.Supp. 606, 610 (D.C. Ill. 1972). The *PROPA* district court decision was appealed by the Chicago City Board of Election Commissioners. The Seventh Circuit affirmed reiterating the rationale supporting the 4(e) requirements: "Puerto Ricans are not required, as are immigrants from foreign countries, to learn English before they have the right to vote as U.S. citizens." *PROPA*, 490 F.2d at 578.

Recently, in *Berks I*, the United States sued Reading, Pennsylvania alleging that the city had violated the rights of its Puerto Rican community members, by holding English-only elections in violation of § 4(e). As in *Berks I*, Plaintiffs here are limited English proficient and were educated in American-flag schools in Puerto Rico in which the predominant classroom language was Spanish. *See*, Decl. Sen at ¶¶ 8-9. Like Berks County in *Berks I*, the Defendant here made only English-language ballots available. *See*, *Id.* at ¶ 18. Analyzing the plain meaning of § 4(e), the *Berks* Court determined that "Defendants' use of an English-only election

process violates Section 4(e) by conditioning the right to vote" on "the ability to read, write, and understand English." *Berks I*, 250 F.Supp.2d at 538. Confirming the importance that the voter be able to understand the ballot, the Court issued a preliminary injunction directing that Berks County provide Spanish-language ballots:

> Voting without understanding the ballot is like attending a concert without being able to hear. Even if the voter, illiterate in English, may be able to distinguish one candidate's last name from another, the voter illiterate in English may not understand the office for which the various candidates are running, and surely cannot understand the various propositions, ranging from bond authorizations to constitutional amendments.

Id. at 527.

Subsequently the Court in *Berks II* issued a permanent injunction which required among other things that Reading provide in English and Spanish the official ballots, sample ballots, and absentee and alternative ballots. *United States v. Berks County, Pennsylvania ("Berks II")* 277 F. Supp. 2d 570, 583 (E.D. Pa. 2003). The Court again spoke to the significance and viability of Section 4(e):

> The right to vote encompasses more than the right to gain physical access to a voting booth, to mark a ballot or pull a lever. Persons must have the opportunity to comprehend the registration and election forms and the ballot itself to cast an informed and effective vote.
>
> The meaningful right to vote extends beyond the four corners of the voting machine. If voters cannot understand English-only ballot language such as the offices for which candidates are running, propositions, bond authorizations, and constitutional amendments . . . and sample ballots, their right to vote effectively is diminished.
>
> * * *
>
> Defendant's failure to provide Spanish-language oral and written assistance for Readings' large Puerto Rican population denies this group their right to effectively register a political choice in violation of Section 4(e).

Id. at 579-580.

In all of the aforementioned decisions, the courts emphasized the failure of an "English only" ballot to provide equal access to a Spanish speaking Puerto Rican voter. Signage and availability of translators is not enough. The very act of seeking out an interpreter/translator for assistance creates a burden on the voter. The act of asking for separate documents that would assist the voter understand the ballot by its very nature also creates a burden on the voter. Moreover, even beyond the burden created, compelling the use of a translator invades the privacy of the voter and undermines our tradition of the private nature of the ballot box.

There is no dispute that the defendant Volusia County failed to provide the ballot in Spanish. *See,* Decl. Sen at ¶18. This was confirmed by the Superintendent of Elections for the County, Ann McFall. *Id.* As a result of this failure, Plaintiffs could not understand the ballot and were unable to fully exercise their voting rights. *Id.* at ¶¶ 20-27. Given the well and long-established case law and the plain language of the statute, Plaintiffs have clearly proven their § 4(e) claim. As in *Berks I*, Plaintiffs are limited English proficient and were educated in American-flag schools in Puerto Rico in which the predominant classroom language was Spanish. *See,* Decl. Sen at ¶¶ 8-9. Like *Berks I,* the Defendants unfairly conditioned the voting rights of U.S. citizens on the ability to speak and/or understand English by failing to translate the ballot into Spanish. *See, Id.* at ¶ 18. Individual Plaintiffs and members of Plaintiff VCHA were unable to cast their vote effectively and knowledgeably during the November 2008 election. Taken together, these facts establish conclusively that Volusia County violated § 4(e).

Defendant Volusia County's failure to provide bilingual ballots in the November 2008 election was a clear violation of Section 4(e) and Plaintiffs are entitled to summary judgment on their claim.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court to enter an order granting Summary Judgment for Plaintiffs and for the Court thereafter to hold a hearing as to appropriate relief, which shall include, but not be limited to a Spanish-language ballot in all future Volusia County elections.

Dated: October 16, 2009

Respectfully Submitted,

_/s/__________________

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY to the accuracy of the foregoing and I certify that on October 16, 2009, I electronically filed the attached Notice of Motion for Summary Judgment and Diana Sen's Declaration with the Clerk of Court by using the CM/ECF system and a copy enclosing the aforementioned pleading will also be sent by me via U.S. Mail to Nancye R. Jones, Assistant Volusia County Attorney, 123 W. Indiana Ave., DeLand, FL 32720.

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