

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

MYRNA COLON MARRERO

Plaintiffs

v.

**HÉCTOR CONTY PÉREZ,
et al.**

Defendants

CIVIL NO. 12-1749

**FIRST AMENDMENT
DUE PROCESS
EQUAL PROTECTION**

NVRA, 42U.S.C. §§1973 et seq.,

HAVA, 42 USC §§ 15541 et seq.

CIVIL RIGHTS, 42 U.S.C. § 1983

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

COME NOW the plaintiff, through the undersigned attorneys, and respectfully moves this Court to issue a preliminary and permanent injunction in this case on the following grounds:

I. PROCEDURAL AND FACTUAL BACKGROUND

The facts grounding this civil rights action are not in controversy, and the case presents a pure controversy of law. Plaintiff Myrna Colón Marrero, a citizen of the United States of America residing in Puerto Rico, voted in the Commonwealth general elections of 2004, but not in those of 2008. As a result, the Defendants – the president and electoral commissioners of the State Elections Commission (SEC) - electronically deactivated Plaintiff, as well as approximately 500,000 other American citizens similarly situated, from the General Registry of Voters eligible to vote in the for the upcoming 2012 election for the federal office of the Resident Commissioner to Congress. In so doing, the SEC purports to follow Commonwealth law, which provides: “*If an elector did not vote in a general election, his name shall be excluded from the electoral lists.*” Article 2.012 of the Electoral Law, Law No. 4 of December 20, 1977, P.R. Laws Ann., Tit. 16, §§3301-3383 (Article 2.012).

In her complaint, Plaintiff argues that the Defendants conduct under color of state law is contrary to the laws and Constitution of the United States, specifically the National Voter Registration Act of 1993 (NVRA), the Help America Vote Act of 2002 (HAVA), and the first amendment, due process and equal protection clauses of the United States Constitution. The Constitution recognizes that Plaintiff enjoys a fundamental right to vote, and NVRA and HAVA protect and enhances that right by prescribing providing multiple voter registration vehicles (not observed in Puerto Rico) and enjoining states from taking away a person right to vote through obsolescent party-controlled state laws (such as Article 2.012) that have been superseded by federal law. In particular, as pertains to this case, NVRA specifically provides that “Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office— (2) *shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person’s failure to vote, [unless the person] ... (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.*” 42 U.S.C. §§ 1973gg-6(b)(1)(2)(B). Said provision has also been incorporated in HAVA.

Defendant’s principal line of defense is legal: they claim that neither NVRA nor the relevant HAVA provisions apply to Puerto Rico.¹ Said position is specious. While NVRA does not include Puerto Rico within the definition of State, because its principal aim is Congressional elections, it does include other elections for federal office within the coverage of its provision,

¹ Plaintiff has exhausted all administrative remedies available at law, to no avail. On July 30, 2012, Plaintiff filed a grievance with the SEC Defendants, alleging that the elimination from the electoral register pursuant to Commonwealth law is contrary to the provisions of the NVRA of 1993, the HAVA of 2002, and the due process, equal protection and first Amendment clause of the Constitution. **See Complaint, ¶ 21, Exhibit A.** On August 9, 2012, the Defendants denied said complaint. **See Complaint, ¶22, Exhibit B.** By letters of August 13, 2012 and September 7, 2012, Plaintiff notified the U.S. Attorney General of the violations of the federal laws and Constitution of the United States. **See Complaint, ¶ 23, Exhibits C and D.**

particularly that for Resident Commissioner, and there is only one under the American flag, ours. Furthermore, it incorporates the Federal Election Campaign Act, and Puerto Rico is explicitly covered there. In addition, HAVA, which requires compliance with NVRA in order to received federal funding, expressly applies to Puerto Rico. Thus, one way or the other, the SEC's compliance with the requirement of NVRA is mandated by federal law and defied in Puerto Rico.

As relief, Plaintiffs pray that the Court issue the following equitable and declaratory relief under the Civil Rights Act of 1871, 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. §§2201-02: (a) declaring Article 2.012 of the Puerto Rico Electoral Law unlawful as contrary to the provisions of NVRA and HAVA; (b) ordering Defendants to immediately electronically activate the plaintiff and all other similarly situated persons to the General Registry of Voters entitled to vote in the upcoming election for federal office; (c) enjoining the SEC Defendants from holding any future electoral event concerning a federal office until they comply with the voter registration and list maintenance provisions of NVRA and HAVA; and (d) ordering the SEC defendants to immediately take all steps necessary to implement the voter registration and electoral list maintenance provisions of NVRA.

II. APPLICABLE STANDARD OF LAW

In considering the issuance of a preliminary injunction, the judiciary must consider the following four factors: (1) plaintiff's likelihood of success on the merits; (2) the potential for irreparable harm in the absence of an injunction; (3) whether issuing an injunction will burden the defendants less than denying an injunction would burden the plaintiff; and (4) the effect, if any, on the public interest.” *Gonzalez–Droz v. Gonzalez–Colon*, 573 F.3d 75 (1st Cir.2009); *Boston Duck Tours, LP v. Super Duck Tours, LLC*, 531 F.3d 1, 11 (1st Cir.2008)). Of the four

criteria listed above, a showing of the likelihood of success on the merits has been held to be “the touchstone of the preliminary injunction inquiry.” *Philip Morris, Inc. v. Harshbarger*, 159 F.3d 670, 674 (1st Cir.1998). “[I]f the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.” *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir.2002).

III. DISCUSSION:

A. THE PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS BECAUSE NVRA PROTECTS THE FUNDAMENTAL RIGHTS OF VOTERS IN ANY ELECTION FOR FEDERAL OFFICE, AND THE COMMONWEALTH ELECTION FOR RESIDENT COMMISSIONER CONCERNS A FEDERAL OFFICE UNDER NVRA

1. Constitutional Principle Applicable to Review State Regulation of Federal Elections

The Supreme Court has recognized that the right to vote is of “the most fundamental significance under our constitutional structure,” because “other rights, even the most basic, are illusory if the right to vote is undermined.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Gonzalez v. Arizona*, 624 F.3d 1165, 1170 (9th Cir. 2010). Thus, the right to vote, while not mentioned directly in the Bill of Rights, has been found to be a fundamental right “central to the protection of the other rights guaranteed in our society” and inherently linked to other preferred fundamental rights, such as the first amendment rights of association, expression and petitioning the government. See *Burdick*, *id.*, *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Given that plaintiffs’ right to vote is of a fundamental nature, any State restrictions on said right to vote must satisfy the strict scrutiny of judicial review: that is, the state law must be narrowly drawn to advance a state interest of compelling importance. *Burdick*, *Anderson*, *Storer*

v. Brown, 415 U. S. 724, 730 (1974). In cases of constitutional challenges to a state election law, the judiciary must: (a) first consider the character and magnitude of the asserted injury to the fundamental right plaintiff seeks to vindicate; (b) then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule; (c) then not only determine the legitimacy and strength of each of those interests, but also consider the extent to which those interests make it necessary to burden the plaintiff's rights. *Anderson*, 460 U.S. at 789. In all cases, a State "may not choose means that unnecessarily restrict constitutionally protected liberty" and must adopt the least drastic means to achieve their ends. *Kusper v. Pontikes*, 414 U. S. 51, 58-59 (1973)(state cannot lock in voters to one party for extended periods); *Williams v. Rhodes*, 393 U. S. 23 30-31 (1988)(strict scrutiny applied to party registration provisions); *Bullock v. Carter*, 405 U.S. 134, 142-143 (1972)(excessive filing fees violate EP); *American Party of Texas v. White*, 415 U. S. 767 (1974)(modicum support requirements are constitutional); *Illinois Elections Bd. v. Socialist Workers Party*, 440 U. S. 173, 183 (1979)(different support requirements violates equal protection).

In reviewing the constitutionality of a state election law, the Court has marked a further distinction between election laws that involve state or federal office. In the case of federal office, a State has an attenuated interest in regulating the same, given that Congressional will predominates. This is because with respect to federal office the Constitution grants Congress plenary authority to regulate the "Times, Places, and Manner of holding Elections for Senators and Representatives." Const. art. I, § 4, cl. 1. Thus, "the power of Congress over the subject [of federal elections] is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." *Gonzalez*, 624 F.3d at 1172, citing *Ex parte Siebold*, 100

U.S. 371, 384 (1979). Because federal elections are creatures of the Congress, and arise from the Constitution itself, they do no broach “a reserved power if the States.” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-805 (1995). States, therefore, “have no inherent or preexisting authority over this domain” and all federal elections are ultimately “committed to the exclusive control of Congress.” *Colegrove v. Green*, 328 U.S. 549 (1946).

Any interest Puerto Rico may have in regulating an election to federal office such as that of the Resident Commissioner is subject to the same principle that applies in the case of a State: it is entirely subordinated to Congressional will. See *Igartua de la Rosa v. U.S.*, 626 F.3d 592 (2010)(no right to vote for Congressional members); *Igartua de la Rosa v. U.S.*, 417 F.3d 145 (1st Cir. 2005)(en banc)(no right to vote for President and Vice-president); *Igartua de la Rosa v. U.S.*, 229 F.3d 80 (1st Cir. 2000); *Igartua de la Rosa v. U.S.*, 32 F.3d 8 (1st Cir 1994) (presidential elections). Simply put, even in we consider Puerto Rico to be a self-governing entity akin to a State within a federalist scheme, with a legitimate interest in regulating elections for Commonwealth positions, *Rosselló-González v. Calderón-Sierra*, 398 F.3d 1 (1st Cir. 2004), said interest completely dissipates when it comes to the regulation of federal elections. Congress’ mandate over any federal election - be it for a Representative, Senator or Resident Commissioner - is simply supreme. For such reason, neither a State nor the Commonwealth “may vitiate an action of Congress by adopting a system if regulations to undo congressional efforts” and “in all instances, ‘the law of the State [and of the Commonwealth], insofar as they are inconsistent with the laws of Congress on the same subject, cease to have effects as laws.’” *Gonzalez*, 624 F.3d at 1175, citing *Siebold*, 100 U.S. at 397(italics added).

2. Failure of the Fifteenth Amendment to Remedy Obstruction to Voter Registration and Voter Disenfranchisement

Although the Constitution is the most memorable tablet in the history of democracy, the

original moment contained several exclusions with respect to participation in the electoral process, the most notable being the exclusion of non-propertied white men, women, and slaves from democratic processes. The history of civil rights in America has been the chronicle of the efforts to redress these wounds, and realize a vision of democracy that makes whole the initial fracture. With respect to Afro-American the story is well-known. The price of massive exclusion in democratic life was a Civil War that took close to a million lives. As a result, the Civil War Amendments were enacted and the Constitution was essentially forged again from a confederate to a federalist structure. Although this is old history, its principles and lessons are very much alive today, and play more than a cameo role in this case.

The Civil War Amendments embedded the essential democratic principles of liberty, equality and political participation not only for emancipated slave, but also to all persons under the Constitution's umbrella. The Thirteenth Amendment abolished slavery, the Fourteenth Amendment granted due process and equal rights under law, and the Fifteenth Amendment extended the right to vote to all persons of color or race.

The two statutes at play here - NVRA and HAVA - are part and parcel of a historic and evolving effort following the enactment of the Fifteen Amendment to eliminate discriminatory and unfair registration laws and to make participation in federal elections wider, easier and fairer. The first century following the enactment of the Fifteen Amendment has been regarded as a failure since early enforcement laws were inconsistently applied and repealed with the rise of Jim Crow. See *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966) (discussing the Civil Rights Act of 1957, which "authorized the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds," and the Civil Rights Act of 1964, which "expedited the hearing of voting cases before three-judge courts and outlawed some of the

tactics” used to disqualify African Americans from voting in federal elections).

Another series of enforcement statutes in the 1950s and 1960s depended on individual lawsuits filed by the Department of Justice. Said efforts were also ineffectual. Litigation is slow and expensive, and the States were creative in "contriving new rules" to continue violating the Fifteenth Amendment "in the face of adverse federal court decrees." *Katzenbach*, 383 U.S., at 335; *Riley v. Kennedy*, 553 U.S. ___, 128 S.Ct. 1970, 1976-1977 (2008); *Northwest Austin. Mun. Utility Dis. No. One v. Holder (NAMUDNO)*, 557 U.S. 193(2009). To limit voter registration, some local officials defied court edicts or “simply closed their registration offices to freeze the voting rolls.” *Katzenbach*, 383 U.S. at 314. Congress's attempts to “authoriz[e] registration by federal officers ... had little impact on local maladministration.” *Id.* A hundred years after the Civil War, the constitutional objectives were still thwarted. Registration of African American voters had not been achieved, and in some states was still fifty percentage points lower than that of eligible white voters. *Shaw v. Reno*, 509 U.S. 630, 640 (1993).

In the 1960's, the Johnson administration Congress pushed for radically different enactments to address the problem of minority exclusion and disenfranchisement. In 1964, the Civil Rights Act of 1964 was passed to outlaw discrimination based on race, color, religion or national origin in employment and public accommodations as to all business enterprises engaged in interstate commerce. 42 U.S.C. 2000e et seq.

To address, electoral disenfranchisement conditions, in 1965, Congress passed the Voting Rights Act of 1965 (VRA), 42 U.S.C. § 1973 et seq. The VRA is “a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant.” *Katzenbach*, 383 U.S. at 308, 315. As enacted, the VRA suspended the use of literacy tests, § 4(a)-(d), required covered jurisdictions to pre-clear changes in voting procedures and practices, § 5, and provided

for the appointment of federal examiners to assist in registering qualified citizens to vote, §§ 6, 7, 9, 13. Section 2 of the VRA also permits actions to be brought to void voting qualifications or prerequisites “resulting in the denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” See *NAMUDNO* (VRA history 1965 to present).

While considered on the whole to be a successful tool in eliminating the more egregious discriminatory voting procedures, the VRA failed to address voter registration procedures that imposed a “complicated maze of local laws and procedures, in some cases as restrictive as the outlawed practices, through which eligible citizens had to navigate in order to exercise their right to vote,” H.R.Rep. No. 103–9, at 3 (1993), 1993 U.S.C.C.A.N. 105, 107. For these reasons, between 1988 and 1993, Congress held a series of hearings focused on reforming the voter registration process to address the increasingly pressing issue of low voter turnout in federal elections. *Condon v. Reno*, 913 F.Supp. 946, 949 n. 2 (D.S.C.1995). In said hearings, Congress found that while over eighty percent of registered citizens voted in Presidential elections, only sixty percent of eligible voters were registered. H.R.Rep. No. 103–9, at 3. Public opinion polls showed that the primary reason eligible citizens were not voting was the failure to register. *Id.*

3. Enactment of NVRA to Promote Voter Registration and Forbid Facile Elimination of Voters from Election Registration List.

While acknowledging that this failure was attributable to many factors outside its control, Congress enacted the NVRA to address those situations that were within its control, *namely those barriers to registration that were imposed by state governments*. See *Young v. Fordice*, 520 U.S. 273, 275 (1997). Congress therefore enacted the NVRA to remove these obstacles and “to provide simplified systems for registering to vote in federal elections.” *Id.* In enacting NVRA, Congress held that: (1) the right of citizens of the United States to vote is a fundamental right; (2) it is the duty of the Federal, State, and local governments to promote the exercise of

that right; and that (3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.” 1973gg-(a). See *Welker v. Clarke*, 239 F.3d 596, 598–99 (3d Cir.2001) (“One of the NVRA's central purposes was to dramatically expand opportunities for voter registration”); *United States v. Lara*, 181 F.3d 183, 191-192 (1st Cir. 1999)(“The NVRA is addressed to heightening overall popular participation in federal elections....”); *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 285 (4th Cir.1998) (“Congress passed the NVRA ... to encourage increased voter registration for elections involving federal offices” and “to make it easier to register to vote.”); *ACORN v. Miller*, 129 F.3d 833, 835 (6th Cir.1997) (“In an attempt to reinforce the right of qualified citizens to vote by reducing the restrictive nature of voter registration requirements, Congress passed the [NVRA].”).

In the Statement of Objectives, NVRA provides that: “The purposes of this Act are: (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; (2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office; (3) to protect the integrity of the electoral process; and (4) to ensure that accurate and current voter registration rolls are maintained.” 1973gg-(b).

Section 1973gg, setting forth the act's “Findings and Purposes,” provides an overview of the NVRA. The “findings” subsection, § 1973gg(a), articulates Congress's intent to promote voter registration and to address “discriminatory and unfair registration laws.” The “purposes” subsection, § 1973gg(b), provides a preview of the operative sections of the NVRA, listing Congress's goals of increasing voter registration and enhancing the participation of eligible

voters (relating to Sections 2 through 5, § 1973gg-2–§ 1973gg-5) and the goals of ensuring the accuracy of registration rolls and protecting the integrity of the electoral process (relating to Section 6, § 1973gg-6).

The NVRA seeks to advance these goals by a comprehensive scheme that centers on **three significant changes** to federal election registration procedures nationwide: (1) it creates a standard “Federal Form” for registering federal voters; (2) it requires states to establish procedures to register voters for federal elections according to three prescribed methods; and (3) it regulates maintenance of voting lists. See 42 U.S.C. § 1973gg et seq.

Section 2, § 1973gg-2, sets forth the scope and applicability of the act. Each state (except for those that do not require voter registration as a prerequisite to voting) “shall establish procedures to register” voters for federal elections according to the NVRA's three methods “notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law.” § 1973gg-2(a). The first method of voter registration is described in Section 3, § 1973gg-3. This section provides that any application for a driver's license submitted to a state motor vehicle authority “shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application.” § 1973gg-3(a)(1).

This provision earned the statute its informal title, the “Motor Voter Law.” *United States v. Lara*, 181 F.3d 183, 191 (1st Cir.1999). Under the statute, the voter registration form must be part of the driver's license application, and generally “may not require any information that duplicates information required in the driver's license portion of the form.” § 1973gg-3(c)(2)(A). Section 3 also limits the content of the form to the minimum necessary to prevent duplicate voter registrations and to enable the state to assess the eligibility of the applicant.

The second method of voter registration, set forth in Section 4, § 1973gg-4, requires states to register federal voters by mail using the Federal Form. Section 4(a)(1) states that “[e]ach State shall accept and use the [Federal Form] for the registration of voters in elections for Federal office.” Section 4(a)(2) provides that, “[i]n addition to accepting and using [the Federal Form], a State may develop and use a mail voter registration form that meets all the criteria” of the Federal Form. Section 4(b) discusses the availability of the Federal Form and the state equivalent: States must make the mail registration form “available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs.” § 1973gg-4(b). With certain exceptions not pertinent here, the statute permits states to require citizens who register by mail to vote in person if they have not previously voted in the jurisdiction. § 1973gg-4(c).

The third method of federal voter registration is mandated by Section 5, § 1973gg-5, which requires states to designate certain state offices for voter registration. Targeting “the poor and persons with disabilities who do not have driver's licenses and will not come into contact with” motor vehicle agencies, H.R.Rep. No. 103-66, at 19 (1993), as reprinted in 1993 U.S.C.C.A.N. 140, 144, this section requires states to provide for federal registration at “all offices in the State that provide public assistance,” § 1973gg-5(a)(2)(A), and “all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities,” § 1973gg-5(a)(2)(B). The state may also designate additional government offices such as “public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, unemployment compensation offices, and [other offices] that provides services to persons with disabilities” as voter registration agencies. § 1973gg-5(a)(3).

Section 5 requires each designated agency to provide applicants with the Federal Form, help them complete it, and mandates “[a]cceptance of completed voter registration application forms for transmittal to the appropriate State election official.” § 1973gg-5(a)(4)(A). As in Section 4, the designated state agency may also distribute a state form, but only “if it is equivalent” to the Federal Form. § 1973gg-5(a)(6)(A)(ii).

Section 6, § 1973gg-6, establishes procedures to enhance the accuracy and integrity of the official voting lists both by removing ineligible voters and preventing the mistaken removal of eligible voters. As pertains to this case, NVRA specifically provides that “Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office— (1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and **(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person’s failure to vote, [unless the person] ...(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.**” 42 U.S.C. §§ 1973gg-6(b)(1)(2)(B).

Section 7, § 1973gg-7, describes how the federal and state governments will determine the contents of the Federal Form, and otherwise coordinate administration of the NVRA's procedures. This section delegates the creation of the Federal Form to the federal Election Assistance Commission (EAC).² § 1973gg-7(a). The section requires the EAC to work “in consultation with the chief election officers of the States” in crafting the Form's contents. *Id.*

Section 7 also sets out parameters for what the Federal Form may, shall, and cannot include. Among other things, the Federal Form “may require only such identifying information”

² The responsibilities of the EAC were formerly held by the Federal Election Commission (FEC). When Congress passed the Help America Vote Act (HAVA) in 2002, it created the EAC, 42 U.S.C. § 15321, which eventually absorbed the FEC's duties under the NVRA.

as is necessary to allow the state to determine the eligibility of the applicant and to administer the voter registration and election process. § 1973gg-7(b)(1). The Federal Form must inform the applicant as to every eligibility requirement “including citizenship” and require the applicant to attest that the applicant meets each requirement. § 1973gg-7(b)(2). The form “may not include any requirement for notarization or other formal authentication.” § 1973gg-7(b)(3).

Section 8, § 1973gg-8, requires states to designate an officer to serve as chief election official. Section 9, § 1973gg-9, regulates civil enforcement of the NVRA's provisions and designates a private right of action under the statute. Section 10, § 1973gg-10, sets forth the criminal penalties for election fraud or other non-compliance with the statute.

As this overview indicates, the thrust of the NVRA is to increase federal voter registration by streamlining and amplifying the registration mechanisms. In this vein, the NVRA requires states to make registration opportunities widely available, at the motor vehicle bureau, § 1973gg-3, by mail, § 1973gg-4, and at public assistance, disability service, and other designated state offices, § 1973gg-5. Along with increasing the opportunities for registration, the NVRA eases the burdens of completing registration forms. At the motor vehicle authority, for instance, voter registration must be included as part of the driver's license application and the combined form cannot require duplicative information. § 1973gg-3(c)(2)(A). The NVRA also regulates the Federal Form to meet its goal of eliminating obstacles to voter registration. See § 1973gg(b)(1)-(2). Thus, the NVRA forbids the Electoral Assistance Commission (EAC) from including any identifying information beyond that “necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.” § 1973gg-7(b)(1).

4. **NVRA Applies To Puerto Rico**

There is little to margin to question the defendants in compliance with all the central provisions of the NVRA. In Puerto Rico, Commonwealth law forbids what NVRA mandates. While the SEC allows registration at specific Permanent Inscription Boards, it does not allow registration via mail, or at motor vehicle or driver's license registration, or at public assistance, disability service, and other designated state offices. Moreover, NVRA explicitly outlaws what Article 2.012 calls for: eliminating from the electoral register all voters that fail to vote in a single election. In sum, there is no factual dispute that the SEC Defendants operate in total disregard of NVRA's requirements.

The SEC Defendants claim that they can disobey NVRA and HAVA because NVRA does not include Puerto Rico within the definition of State, as it defines "State" to mean a State of the United States and the District of Columbia. 42 U.S.C. §§ 1973gg-1(4). In this day and age, said myopic reading of a federal statute is inconceivable. While NVRA does not include Puerto Rico in the definition of State, ostensibly because Puerto Rico does not select state representative to Congress, it does include the position of Resident Commissioner within the definition of federal office, and to which the NVRA provisions apply. NVRA specifically defines "[f]ederal office" to include Resident Commissioner, 42 U.S.C. Sec. 1973ff-6(3). There is only one Resident Commissioner in the whole federal office landscape, and it is the Resident Commissioner of Puerto Rico.

Both history and statute confirm the federal nature of this Resident Commissioner position. The position is a creature of federal law. It came into existence following the Treaty of Paris of 1898, by Article 39 of the Foraker Act of 1900, Organic Act of April 12, 1900. Said Article provided that the qualified voters of Puerto Rico shall elect every two years a Resident

Commissioner to Congress. In 1917, Congress repealed the Foraker Act and enacted the Jones Act., granting *inter alia* United States citizenship to the citizens of Puerto Rico. The term of the Resident Commissioner to Congress, elected by qualified voters, was enlarged from 2 to 4 years.

. The Puerto Rico-Federal Relations Act of 1950 (PRFRA), 48 U.S.C. § 731 et seq., regulates the actual relationship between the U.S. and Puerto Rico. The Commonwealth Constitution does not mention the position of Resident Commissioner. Section 891 of PRFRA provides that “the qualified electors of Puerto Rico shall choose a Resident Commissioner to the United States at each general election, whose term of office shall be four years from the 3d of January following such general election, and who shall be entitled to receive official recognition as such commissioner by all of the departments of the Government of the United States, upon presentation, through the Department of State, of a certificate of election of the Governor of Puerto Rico.” 48 U.S.C. Sec. 891. The federal nature of this office is further underlined by Section 894 of PRFRA that provides that “the salary and traveling expenses of the Resident Commissioner from Puerto Rico to the United States shall be paid by the Chief Administrative Officer of the House of Representatives in the same manner as the salaries of the members of the House of Representatives are paid.” 48 U.S.C. Sec. 894. In sum, there can be little doubt that Resident Commissioner is other than a creation of Congress and that Congress’s will as to its overrides Commonwealth law.

The NVRA’s prefatory finding and purposes make further clear that the Act considers voting for federal office a fundamental right and that the Act is meant to protect and enhance the right of all American citizens participating in all federal election across the Nation. Thus, the exclusion of Puerto Rico from the definition of “State” is simply irrelevant, as the Act specifically includes the election for federal office of the Resident Commissioner. Although

Puerto Rico is not a State, the registration and list maintenance provisions of NVRA applicable to the federal election of a State's representative to Congress, apply exclusively to the election for the federal office of the Resident Commissioner to Congress in a like manner as if Puerto Rico were a State. For as we have seen, whether State or Commonwealth, in this area Congress rules supreme.

If there were any doubt, note furthermore that NVRA defines "election" with reference to the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. § 431 et seq. FECA, in turn, defines: (1) the term "candidate" under FECA means an individual who seeks nomination for election, or election, to Federal office, section, 2 U.S.C. § 431(2); (2) the term "election" under FECA has the meaning stated in 2 U.S.C. § 431(1), that is: "(A) a general, special, primary or runoff election, (B) a convention or caucus of a political party that has authority to nominate a candidate; (C) a primary election held for the selection of delegates to a national nominating convention of a political party; and (D) a primary election held for the expression of preference for the nomination of individuals for election to the office of the President; (3) the term "Federal office" under FECA has the meaning stated in 2 U.S.C. 431(3), that is, the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress; and (4) *the term "State" has the meaning stated in section 301(12), 2 U.S.C. 431(12), that is, a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.*" 2 U.S.C. 431(12). In sum, NVRA applies to the federal election of Puerto Rico's Resident Commissioner because it both includes the office directly or by its incorporation of FECA, which not only applies to federal elections in Puerto Rico, but also to federal primaries, conventions, and related federal nominating and electoral events.

Plaintiff further notes the default rule that applies to the application of federal law in Puerto Rico. According to the First Circuit in *United States v. Acosta Martinez*, 252 F.3d 13 (1st Cir. 2001), *cert. denied*, 535 U.S. 906 (2002) the rules of statutory construction determine that all federal laws apply to Puerto Rico, unless explicitly excluded. "The Congressional intent behind the approval of the Puerto Rico Constitution was that the Constitution would operate to organize a local government and its adoption would in no way alter the applicability of United States laws and federal jurisdiction in Puerto Rico." *Acosta*, 252 at 19, citing *United States v. Quinones*, 758 F.2d 40, 43 (1st Cir. 1985). In *Acosta*, the Circuit held that Federal Death Penalty Act applied to Puerto Rico, although the island is not expressly mentioned in the law. According to *Acosta*, under the PRFRA the default rule is that all federal law applies to PR; and there, as here, the federal interest behind federal law is manifest. See *U.S. v. Laboy-Torres*, 553 F.3d 715, 722 (3rd Cir. 2009)(courts routinely conclude that Congress intended to include Puerto Rico even when a statute is silent on that front, citing cases).

We finally note that HAVA requires Puerto Rico to comply with NVRA in order to receive federal funding to better the electoral system. The SEC defendants have received millions of dollars in HAVA funds, while claiming not to be bound by the relevant provisions of NVRA. See **Complaint, Exhibits B, E and F**. This claim, as with the NVRA claim, is completely without merit. 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).

HAVA also incorporates NVRA’s: (a) motor vehicle driver’s license application, 42 U.S.C. §§ 1973gg-3 (a)(1); (b) mail registration provisions, 42 U.S.C. §§ 1973gg-4(a)(1); and (c) the voter registration offices provisions, 42 U.S.C. §§ 1973gg-5(a). Although the Commonwealth receives Congressional monies for the SEC to implement HAVA, the SEC has made no effort to implement these voter registration provisions in Puerto Rico.

Although HAVA expressly applies to Puerto Rico, the SEC makes the unconceivable claim that the U.S. Attorney General personally exempted Puerto Rico from coverage of Section 303 of HAVA and the dispositive provisions of NVRA. Thus, in Puerto Rico’s 2003 HAVA Compliance State Plan, the SEC claims that by virtue of the U.S. Attorney letter of March 17, 2003, Puerto Rico is exempt from Section 303 of HAVA, which in turns incorporates the substantive electoral maintenance list and voter registration provisions of NVRA. According to Puerto Rico’s HAVA State Plan: “Puerto Rico is exempt from the National Voter Registration Act (NVRA), and therefore, exempt from the provisions of §303 that require a state to use list-cleaning procedures prescribed by NVRA in administering the computerized list, including § 303(a)(2) and § 303(a)(4). The U.S. Department of Justice has confirmed this exemption in a letter to the Secretary of State of Alabama on March 17, 2003. (Bold added).” **See Complaint, Exhibit E** (PR 2003 HAVA State Plan, p. 6, Appendix). The Defendants’ position is a brassy

misrepresentation of the position of the U.S. Attorney General. A review of the U.S. Attorney March 17, 2003 letter shows that nowhere does it refer to the Commonwealth of Puerto Rico, or gives grounds for an exemption contrary to NVRA. Said letter in no way portrays the exemption that the SEC claims it grants it. See Complaint, **Exhibit F**.³

While HAVA does not seem on its face to grant Plaintiff a private cause of action, and it is unclear whether there is an implied cause of action under Section 1983, there is no doubt that HAVA explicitly requires and assumes compliance with all the NVRA provisions for all participating States that solicit funds, and Puerto Rico has applied and received funds for purposes of HAVA. See Complaint, **Exhibit E**. Under rules of statutory construction, the express inclusion of Puerto Rico in the definition of State in HAVA and HAVA's objective of assuring compliance with NVRA, give favor to the construction that Puerto Rico's obligation under both statute are complementary, such that NVRA compliance is mandated.

We see a doctrinal analogy in *Examining Board v. Flores de Otero*, 426 U.S. 527 (1976) the issue was whether Puerto Rico was a State under the jurisdictional statute, 28 U.S.C. § 1343, necessary for implementation of the Civil Rights Act of 1871. Said statute granted the district courts original jurisdiction for civil rights actions. The Court found that although the jurisdictional statute did not mention Puerto Rico by name, Congress intended no such restriction given that Section 1983 was applied to the Commonwealth. The failure of both Section 1343 and § 1983 to coincide in its terminology was found to be inconsequential because their relationship “suggests that the two provisions were meant to be, and are, complementary.” Said logic

³ It is unconceivable that the Commonwealth is relying on the authority of the U.S. Attorney General to accomplish said purpose, for the Attorney General is an federal officer at the service of the President, and the President, Barack H. Obama, was one of the leading attorneys in advocating for the application of the voter registration and voter maintenance list provisions of NVRA to the State of Illinois. See *ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1995). We assume that the White House is not pushing for lesser electoral rights for the Puerto Rican American citizens in Puerto Rico than he does for Puerto Rican American citizens in Chicago.

suggests also that NVRA and HAVA also be read in a complementary manner.

In sum, the Puerto Rico SEC's position that neither HAVA nor NVRA apply to Puerto Rico is nothing but a furtive attempt to deprive American citizens residing in Puerto Rico of their fundamental right to vote in the Commonwealth elections for federal office in the manner ordained by Congress for the rest of the American citizens. Given the forgoing provisions of law, the plaintiffs submit that they have established a substantial likelihood of prevailing on the merits of this case. Defendants could only prevail if they extirpate from NVRA the inclusion of the position of Resident Commissioner from the definition of "federal office"; if they delete from NVRA the statutory reference to the Federal Election Campaign Act; if they eliminate from the FECA the provisions including Puerto Rico; if they misrepresent the letter of the U.S. Attorney General as to grant them a statutory exemption; and if they rewrite the HAVA, removing Puerto Rico's obligations to comply with NVRA in order to obtain the millions of dollars in federal monies they have already received. Since Defendants cannot genuinely argue these bizarre hermeneutics, and the history, language and goal of NVRA and HAVA reveal the complementary goal of enfranchising citizens, rather than "deactivating" them from electoral registers for federal office, Plaintiff complies with the probability of success criteria for a preliminary injunction.

B.

The deprivation of their right to vote in the next election for federal office constitute irreparable harm per se

In cases raising First Amendment concerns, the likelihood of success on the merits will often be the determinative factor because the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (plurality opinion), citing to *New York Times Co. v. United States*, 403 U.S. 713 (1971);

Romero Feliciano v. Torres Gaztambide, 836 F.2d 1, 4 (1st Cir. 1987)(Torruellas: “the chilling effect of the lost of employment due to political discrimination is a penalty that cannot be addressed after the fact”); *Mariani Girón v. Acevedo Ruiz*, 834 F.2d 238 (1st Cir. 1987)(same). *Joelner v. Village of Washington Park, Ill.*, 378 F.3d 613, 620 (7th Cir.2004). Where the loss of First Amendment freedoms, for even minimal periods of time, is unquestionably at issue, and the injury is both actual and prospective, and the movant sufficiently demonstrates a probability of success on the merits, the denial of preliminary injunctive relief is an abuse of discretion. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

C-D.

The Balance Of Harms And Public Interest Favors The Plaintiffs Because There Is No Public Interest In Enforcing An Unconstitutional Statute

Moreover, if the moving party establishes a likelihood of success on the merits, the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is likely unconstitutional. *Joelner*, 378 F.3d at 620. Stated differently, “injunctions protecting First Amendment freedoms are always in the public interest.” *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 859 (7th Cir.2006).

CONCLUSIONS

The right to vote is intrinsically interwoven with the right to life and the right to liberty. The knot is such that a Civil War was fought over its meaning, and more American lives were lost in that conflicts that have been lost in every other war, combined. We do not think it necessary to rehearse again the political relationship between Puerto Rico and the United States, as the tale has been well told by others. See, e.g., See Juan B. Torruella, *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal* (1985); José Trias Monge, *Puerto Rico:*

The Trials of the Oldest Colony in the World (1999); *Igartua de la Rosa v. U.S.*, 626 F.3d 592 (2010)(no right to vote for Congressional members); *Igartua de la Rosa v. U.S.*, 417 F.3d 145 (1st Cir. 2005)(en banc)(no right to vote for President and Vice-president); *Igartua de la Rosa v. U.S.*, 229 F.3d 80 (1st Cir. 2000); *Igartua de la Rosa v. U.S.*, 32 F.3d 8 (1st Cir 1994) (presidential elections); *United States v. Acosta Martinez*, 252 F.3d 13 (1st Cir. 2001), *cert. denied*, 535 U.S. 906 (2002)(applying death penalty in Puerto Rico).

Puerto Ricans, or alternatively, American citizens residing in Puerto Rico, have no voting representation in Congress.⁴ They elect no voting member to the House of Representative or to the Senate. Under these conditions, Puerto Ricans residing in their homeland, have just one voice to roar in Congress on their behalf. That voice is of the Resident Commissioner to Congress. The Resident Commissioner has no vote in Congress, and only half a voice in the chamber, the House, not the Senate. The Commissioner, thus, has little political power. But when the Congress decides to engage in war – as in WWII, Korea, Vietnam, Irak and Afghanistan – wars in which thousands of Puerto Ricans fight and die on behalf of the democratic values enshrined in the Constitution, that Commissioner is the only voice on behalf of the approximately 3 million otherwise disenfranchised citizens residing on the island. Similarly, the Commissioner does not vote in the enactment of federal laws. But when Congress enacted the laws adopting the death penalty, and the First Circuit ruled that it is to be applied in

⁴ Puerto Ricans is the same as the term “citizens of Puerto Rico” as set forth in § 5a of the Puerto Rican Federal Relations Act, 48 U.S.C. § 733a (defining “citizens of Puerto Rico” as “[a]ll citizens of the United States who have resided or who shall after March 4, 1927, reside in the island for one year”). Puerto Ricans were granted United States citizenship in 1917, with the enactment of the Organic Act of 1917, commonly known as the Jones Act, 39 Stat. 951 (1917). Subsequently, in 1952, Congress enacted the Immigration and Nationality Act, 8 U.S.C. §§ 1110 *et seq.* (hereinafter the “INA”). The INA defines “[t]he term ‘United States,’ ... [as] the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.” *Id.* at § 1101(a)(38). The INA further declares all persons born in Puerto Rico to be “citizens of the United States at birth.” *Id.* at § 1402. For a history of the granting of United States citizenship to Puerto Rico, see generally José Cabranes, *Citizenship and the American Empire* (1979). As to the existence and nature of Puerto Rican citizenship, see *Ramírez de Ferrer v. Mari Bras*, 144 DPR 141, --- P.R.Dec. ---- (1997)

Puerto Rico, despite its repudiation in the Commonwealth Constitution, we have only one voice in Congress to express our view on said imposition, the Resident Commissioner. For these reasons, in Puerto Rico, the election of the Resident Commissioner is, literally, a matter of life and death.

It is not much, but Roman captives in the Coliseum had it worse. “Ave Cesar, morituri te salutant.” Hail Emperor, those who are about to die salute you.” Because of the Resident Commissioner, we have it better than gladiators, to whom the Imperial response was: “Avete vos.” Fare you well. For the presence of the Resident Commissioner in Congress, although weak in political power, is the thread that legitimizes the representations made to the United Nations that Puerto Rico is no longer a colony of the United States. For these reasons, our legitimacy as a democratic entity under international law also hinges on the figure of the Resident Commissioner.

Representational fissures are not exclusive to American citizens living in Puerto Rico, mostly Puerto Ricans. As we have seen, Afro-American required a Civil War and a constitutional amendment. Women also needed the XIX Amendment to the Constitution in 1921. And the District of Columbia, required the XXIII Amendment to partake of the selection of the President. But Defendants’ claim that neither NVRA nor HAVA apply to Puerto Rico is indefensible. NVRA and HAVA were adopted by Congress in pursuance of full electoral participation by all person in all federal elections by eliminating state obstacles to voter registration and establishing safeguards against the facile elimination of voters from the state registration lists. The purpose of NVRA and HAVA is to transform voter registration and electoral participation from a state franchise subject to restrictions and manipulation by state entities in control of political parties and to a federal right achieved through diverse and ample

means of voter registration and stringent prohibitions on the elimination of citizens from electoral registers. While the SEC defendants are not animated by the racial biases that required federal electoral reforms, it is still nonetheless driven by the obsolete party-centered biases and restrictions that NVRA meant to eliminate. Because the right to vote is a fundamental right of all American citizen, because Congress has declared that the fundamental right to vote shall no longer be subject to these pernicious practices, and because the Resident Commissioner plays such a fundamental role in the representation of the Puerto Rican community before Congress, it is necessary to enhance to the highest and protect to the utmost the popular participation in the election of the same. This is what NVRA does.

WHEREFORE, for the foregoing reasons, the Plaintiff asks this Honorable Court to declare Article 2.012 unlawful and to take all the necessary action under NVRA required to resuscitate the right to vote of the American citizens residing in Puerto Rico.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 13th day of September, 2012.

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