UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MYRNA COLÓN-MARRERO; **JOSEFINA ROMAGUERA AGRAIT** Plaintiffs V. **ÁNGEL GONZÁLEZ ROMÁN , et. al** Defendants	Civil No. 12-1749 (CCC) First Amendment Due Process Equal Protection NVRA; HAVA 42 UCS § 1983

MEMORANDUM OF LAW
OF CO-DEFENDANT ÁNGEL GONZÁLEZ ROMÁN
PRESIDENT OF THE PUERTO RICO STATE ELECTIONS COMMISSION

TO THE HONORABLE COURT:

COMES NOW, co-defendant, the Honorable ÁNGEL GONZÁLEZ ROMÁN, as President of the Puerto Rico State Elections Commission, ("CEE" by its Spanish acronym), through the undersigned attorney, and pursuant to the Order issued by this Honorable Court dated March 31, 2014 (Docket No. 138), hereby presents his memorandum of law in support of the denial of the relief sought by plaintiffs in the captioned case.

I. BACKGROUND

The instant action stems from plaintiffs' obstinate attempts to vote in the 2012 Puerto Rico General Election without complying with the requirements set forth in the Puerto Rico Election Code for the 21st Century, Act No. 78 of June 1st, 2011, as amended ("Puerto Rico Election Code).

Since the filing of the original complaint in September 2012, Plaintiffs' entire case has been based on the contention that the deactivation of voters pursuant to Section 6.012 of the Puerto Rico Election Code for their failure to vote in the 2008 General Election constituted an "unlawful removal" from Puerto Rico's General Voter Registry (the "Voter Registry") because such "removal" was contrary to the provisions of the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg et seq; the Help America Vote Act of 2002 ("HAVA), 42 U.S.C. § 15301 et seq; the First Amendment; and the Due Process and Equal Protection clauses of the Fourteenth Amendment. See Amended Complaint (Docket No. 19) at 1-2.

But a closer review of plaintiffs' allegations clearly revels that the real basis for their claim was the NVRA. The NVRA is the **only statute** that specifically places limitations on the ability of States to deactivate or remove voters from the official voter registry for failure to vote in prior elections. As a result, and to a certain degree understandably, plaintiffs built their entire case around CEE's alleged violations of the provisions of the NVRA. The inclusion of claims under HAVA and under certain provisions of the Federal Constitution in the Amended Complaint was really an afterthought, lacking any real basis on the facts of the case.

Since the beginning of the case, the CEE consistently argued that the NVRA did not apply to Puerto Rico. However, the absence of a court ruling on the applicability of this statute to Puerto Rico enabled plaintiffs to pursue their request for injunctive relief until practically the eve of the 2012 General Election. But on November 2, 2012, the United States Court of Appeals for the First Circuit **expressly held that the NVRA does not apply to Puerto Rico.** Colón-Marrero v. Conty-Pérez, 703 F.3d 134, 137 (1st Cir. 2012).

Plaintiffs' insistence in challenging the validity of Section 6.012 of the Puerto Rico Election Code after the First Circuit decision in Colón-Marrero v. Conty-Pérez, supra, is hard to comprehend because the applicability of Section 303 of HAVA (the other Federal statute on which plaintiffs rely) depends upon the incorporation by reference that HAVA makes of the provisions of the NVRA, and that statute does not apply to Puerto Rico.

In the absence of a Federal statute prohibiting the deactivation of voters who fail to vote in a General Election (as Puerto Rico has done for years pursuant to its local election laws) all there is left to support plaintiffs' allegation is their shotgun reliance on the Constitution.

As the CEE will show, plaintiffs' alleged constitutional violations are completely without merit, and as a result, in the absence of a claim arising under Federal law, ". . . a federal court may not inject itself into the mist of every local electoral dispute. "." Bonas v. Town of North Smithfield, 265 F.3d 69, 74 (1st Cir. 2001). The First Circuit has repeatedly and unequivocally reaffirmed this principle: ". . . [e]lection law, as it pertains to state and local elections, is for the most part a preserve that lies within **the**

exclusive competence of the state courts." Bonas v. Town of North Smithfield, supra, at 74, citing Powell v. Power, 436 F.2d 84, 86 (2nd Cir. 1970), reaffirmed in González-Cancel v. Partido Nuevo Progresista, et al., 696 F.3d 115, 119 (1st Cir. 2012). (Emphasis added).

The CEE will address the issues raised by Plaintiffs in the same order as they are presented in the Amended Complaint.

II. PLAINTIFFS' ALLEGED BREACH OF HAVA

A. HAVA's Incorporation of the NVRA

Plaintiffs' reliance on the provisions of Section 303 of HAVA in the instant case is a desperate attempt to hold on to § 1973gg-6(b)(1)(2)(B) of the NVRA that provides that state programs that 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).

See Amended Complaint, ¶ 19, page 5.

Now that the First Circuit has held that the NVRA does not apply to Puerto Rico, plaintiffs are trying to bring these NVRA provisions though the backdoor by stating that Section 303 of HAVA has a similar provision that prevents states from removing voters from the official registry for failure to vote in the preceding general election. See Amended Complaint, ¶ 20, page 5.

But what plaintiffs systematically ignore in making this argument is that Section 303 of HAVA **specifically incorporates by reference the provisions of the NVRA**. This section provides in relevant part:

> § 15483. Computerized statewide voter registration list requirements and requirements for voters who register by mail
>
> (a) Computerized statewide voter registration list requirements
> . . .
>
> (4) Minimum standard for accuracy of State voter registration records
>
> 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 National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.),** 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. (Emphasis added).
>
> . . .

Plaintiffs themselves specifically recognize and acknowledge in the Amended Complaint that HAVA's restrictions on the removal of voters from the election registries for failure to vote stems from the incorporation by HAVA of the provisions of the NVRA. See e.g., "**HAVA, in turns [sic], incorporate by reference the voter registration and list maintenance provisions of NVRA . . . "** Amended Complaint, ¶ 33, page 11. (Emphasis added).

As a result, once the First Circuit decided that the provisions of the NVRA do not apply to Puerto Rico, there is simply no basis to argue that these very same provisions can now be made applicable to Puerto Rico though HAVA.

Absent any statutory basis to support their challenge to Section 6.012 of the Puerto Rico Election Code, Plaintiffs (an now also at least one of the codefendants) try to muddy the waters by arguing that, unlike the NVRA, HAVA expressly applies to Puerto Rico. See e.g., Amended Complaint, ¶ 33, pages 10-11; ¶ 35, page 11; Memorandum of Law of co-defendant Eder Ortiz Ortiz, Elections Commissioner of the Popular Democratic Party ("PPD" by its Spanish acronym), page 2.

But the general applicability of the provisions of HAVA to Puerto Rico has never been the issue.[1] By pointing to HAVA's provisions that expressly include Puerto Rico within the definition of State for applicability purposes, plaintiffs direct their attacks towards the proverbial straw man. The only portions of HAVA that the CEE has consistently claimed not to be applicable to Puerto Rico are those that incorporate the provisions of the NVRA because said provisions are indisputably not applicable to Puerto Rico.

One must not forget that Puerto Rico is not the only State or territory that is not covered by the NVRA requirements. As the CEE indicated it its brief to the United Court States Court of Appeal for the First Circuit in Colón-Marrero v. Conty-Pérez, supra, the United States Department of Justice's website[2] states that six States are exempt from the requirements of the NVRA, namely, Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming. The website also states that Puerto Rico, Guam, the

[1] Like other States, Puerto Rico filed its Plan for the Implementation of HAVA with the Elections Assistance Commission ("EAC"). This plan specifically provides the way in which the CEE complies with the provisions of HAVA that are applicable to Puerto Rico and how computerized list maintenance is performed in accordance with Puerto Rico law since the NVRA does not apply to Puerto Rico. See Puerto Rico's Plan for Implementation of HAVA dated August 14, 2003, pages 9-11.

[2] http://www.justice.gov/crt/about/vot/nvra/nvra_faq.php; NVRA Section, questions and answers.

U.S. Virgin Islands, and American Samoa are also exempt from the provisions of the NVRA.

As a result, it is clear that the CEE had never challenged the applicability of **all** the provisions of HAVA to Puerto Rico but rather only those that, like Section 303, incorporate by reference the provisions of the NVRA.

B. No Private Cause of Action Under HAVA

As the CEE has shown in the preceding section, the provisions of Section 303 of HAVA that require a state to use list cleaning procedures proscribed by the NVRA in administering the computerized list, including 303(a)(2) and 303(a)(4) do not apply to Puerto Rico inasmuch as the NVRA does not apply to Puerto Rico.

But even assuming *arguendo* that such provisions of HAVA were somehow applicable to Puerto Rico, HAVA only authorizes the Attorney General of the United States (not private parties like plaintiffs) to bring enforcement actions.

This reality was acknowledged at the initial stages of this case by plaintiffs themselves and by this Honorable Court in the Order dated September 18, 2012 (Docket No. 11) where the Court points out that Plaintiff Colón-Marrero acknowledged that " . . . 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 § 1983.". See Order at 2.[3]

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[3] In said Order, and quoting from plaintiff's Motion Pursuant to Fed. R. Civ. P. 65 for Preliminary Injunction filed on September 13, 2012 (Docket No. 6) and plaintiff's Memorandum of Law in support thereof (Docket No. 7), this Honorable Court, correctly identifies that plaintiff's claims under HAVA are nothing more that another attempt at enforcing the provisions of the NVRA:

> 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

Regarding enforcement, Section 401 of HAVA specifically provides:

> **§ 15511. Actions by the Attorney General for declaratory and injunctive relief**
>
> **The Attorney General** may bring a civil action against any State or jurisdiction in an appropriate United States District Court for such declaratory and injunctive relief (including a temporary restraining order, a permanent or temporary injunction, or other order) as may be necessary to carry out the uniform and nondiscriminatory election technology and administration requirements under sections 15481 [Section 301], 15482 [Section 302] , and 15483 **[Section 303]** of this title. (Emphasis added).

The Supreme Court has been reluctant to recognize private rights of action to enforce Federal statutes (like HAVA) that do not recognize such private actions. After all, " . . . [l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress. Alexander v. Sandoval, 532 U.S. 275, 286 (2001), citing Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979). In construing a Federal statute in order to determine if Congress indeed intended to create a private right of action, the Supreme Court has indicated that the court must determine if Congress intended " . . . to create not just a private right **but also a private remedy**. Alexander v. Sandoval, supra at 286, citing Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979).

The dispositive question is whether Congress intended to create any such remedy. Alexander v. Sandoval, supra at 286. " Without it, **a cause of action does not**

> 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[s] are complementary, **such that NVRA compliance is mandate[d].** (Emphasis added).

Of course, after the First Circuit's express ruling that the NVRA does not apply to Puerto Rico, this reasoning is no longer valid.

exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. Alexander v. Sandoval, supra at 286-287, citing Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 145, 148,(1985); Transamerica Mortgage Advisors, Inc. v. Lewis, supra, at 23, and Touche Ross & Co. v. Redington, supra, at 575–576.

In the instant case, plaintiffs have not been able to point to any affirmative evidence of Congress's intent to create a private right of action under HAVA. Likewise, the Memorandum of Law filed by PPD's Elections Commissioner cannot identify any evidence of Congressional intention to create a private remedy under HAVA. In fact, all this Memorandum of Law states is that ". . . [w]hile it is clear that the Attorney General has been vested with enforcement authority, the statute [HAVA] **does not create an express ban."** See Memorandum of Law of PPD's Elections Commissioner, page 3. (Emphasis in the original).

That, of course, is not the correct way to construe the statute under Alexander v. Sandoval, supra, and Touche Ross & Co. v. Redington, supra, in order to determine the existence of a private remedy. The court is not to look for an "express ban" but rather for **affirmative evidence** of Congress's intention to create a private remedy under HAVA. In the absence of such evidence, the court is simply not at liberty to create the private cause of action, " . . . no matter how desirable that might be as a policy matter, or how compatible with the statute. Alexander v. Sandoval, supra at 286-287.

Contrary to plaintiffs' contentions, Brunner v. Ohio Republican Party, 555 U.S. 5 (2008) (the only authoritative Supreme Court decision that addresses this issue) suggests that HAVA **does not create a private remedy**. In Brunner, supra, the

Supreme Court granted an application to stay and vacated a temporary restraining order ("TRO") issued by the United States District Court for the Southern District of Ohio directing the Secretary of State of Ohio to update the State's voter registration database in order comply with Section 303 of HAVA.

The Secretary of State of Ohio appealed to the United States Court of Appeals for the Sixth Circuit and said court denied the Secretary's motion to vacate the TRO. The Secretary then filed an application to stay the TRO with Justice John Paul Stevens, as Circuit Justice for the Sixth Circuit, who in turn referred the case to the Supreme Court.

The Supreme Court granted the application to stay and vacated the TRO. While the Supreme Court states in its opinion that it is not expressing an opinion as to whether HAVA was being properly implemented in that case, it nevertheless ruled that " . . . Respondents, however, **are not sufficiently likely to prevail on the question whether Congress has authorized the District Court to enforce § 303 [of HAVA]** in an action brought by a private litigant to justify the issuance of a TRO." Brunner v. Ohio Republican Party, supra, at 6, citing Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002) and Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

The Supreme Court's reliance in Brunner, supra on the decisions of Gonzaga Univ. v. Doe, supra and Alexander v. Sandoval, supra, is very telling. In concluding that the private litigants had not shown likelihood to prevail on the question of whether Congress has intended to create a private remedy to enforce Section 303 of HAVA, the Supreme Court reiterates that " . . . a plaintiff suing under an implied right of action still **must show** that the statute **manifests an intent** to create not just a private right but also **a private remedy**. Gonzaga Univ. v. Doe, supra at 284, citing Alexander v. Sandoval, supra, at 286. In other words, in analyzing whether such manifest intention to create a private remedy exists under HAVA, the Court must do so in keeping with the rules set forth in Alexander v. Sandoval, supra, and Touche Ross & Co. v. Redington, supra, and, an analysis conducted under these precedents leads to the conclusion that no such private remedy exists under HAVA.

In an effort to debilitate the Supreme Court's decision in Brunner v. Ohio Republican Party, supra, the Memorandum of Law filed by PPD's Elections Commissioner cites Indiana Protection and Advocacy Services v. Indiana Family and Social Services, 603 F. 3d 365 (7th Cir. 2010). According to the Memorandum of Law filed by PPD's Elections Commissioner, this case explains the "proper scope of Brunner as not affecting the Sixth's Circuit determination on the possible availability of a personal cause of action for violations of HAVA." See Memorandum of Law filed by PPD's Elections Commissioner at 5. However, close examination of this decision reveals that it does not debilitate in any way the Supreme Court's conclusion in Brunner v. Ohio Republican Party, supra, regarding the absence of Congressional intent to create a private remedy under HAVA.

The issue in Indiana Protection and Advocacy Services v. Indiana Family and Social Services, supra, was whether Federal Protection and Advocacy for Individuals with Mental Illness Act of 1986 42 U.S.C. § 10801 et seq., ("the PAIMI Act"), provided a cause of action for injunctive and declaratory relief to enforce this statute. Following a rehearing *en banc*, the Seventh Circuit held, among other things, that the PAIMI Act **did provide** a private cause of action.

Chief Judge Easterbrook issued a dissention opinion in Indiana Protection and Advocacy Services v. Indiana Family and Social Services, supra, because in his view, the conclusion reached by the *en banc* decision regarding the availability of a cause of a private cause of action under the PAIMI Act was contrary to the Supreme Court's decisions in Brunner supra, Gonzaga Univ. v. Doe, supra and Alexander v. Sandoval, supra. Indiana Protection and Advocacy Services v. Indiana Family and Social Services, supra, at 393-394 (Easterbrook, dissenting).

As a result of Chief Judge Eastebrook's dissent, the *en banc* decision cites and discusses Brunner supra in order to show that its conclusion regarding the existence of a private cause of action under the PAIMI Act was consistent with Brunner supra. See Indiana Protection and Advocacy Services v. Indiana Family and Social Services, supra, at 377. Far from questioning the Supreme Court's holding in Brunner supra, the *en banc* decision goes at great lengths to show that its analysis is consistent with Brunner, supra, essentially because HAVA and the PAIMI Act are different statutes. In that regard, the *en banc* decision specifically states:

> Close examination of the PAIMI Act shows that this lawsuit to enforce IPAS's right of access to records is exactly what Congress intended to authorize. **Unlike the statutes in Sandoval and Brunner and the regulation in Gonzaga**, the PAIMI Act's key language is not directed at an administrator of federal funds or even at the State of Indiana as a funding recipient. Instead, **the Act directly grants rights** and powers to the designated protection and advocacy system that is the plaintiff here. (Emphasis added).

Indiana Protection and Advocacy Services v. Indiana Family and Social Services, supra, at 378.

In light of the foregoing, it is readily apparent that Indiana Protection and Advocacy Services v. Indiana Family and Social Services, supra, does not stand for the proposition that Congress intended to create a private remedy under HAVA. On the contrary, the Seventh Circuit cites Brunner, supra, precisely to show that the Federal statute at issue in that case (the PAIMI Act) did in fact grant rights to the plaintiff **unlike HAVA (the statute at issue in Brunner, supra,), which did not grant such rights.**

III. PLAINTIFFS' ALLEGED BREACH OF THE CONSTITUTION

As previously stated, the provisions of the NVRA lie at the very heart of the claims presented by Plaintiffs in the Amended Complaint, and, it is now settled that this statute does not apply to Puerto Rico.

The remaining claims presented by Plaintiffs are grouped under a generic cause of action for "Breach of the Constitution" See, Third Cause of Action of the Amended Complaint, Amended Complaint at 13.

Out of the entire Amended Complaint, Plaintiffs devote only two (2) paragraphs to these alleged breaches of the Constitution. See ¶ 40 and ¶ 41 of the Amended Complaint at 13-14 . It light of their brevity, they are reproduced in full below:

> 40. Defendant's elimination of the Plaintiff's from the electoral lists for purposes of voting in an federal or state election also deprives plaintiffs of the fundamental right to vote under the first amendment, the due process right to be notified of the exclusion from the electoral lists; and the equal protection right to enjoy the full coverage of federal electoral laws concerning the fundamental right to vote of all American citizens, regardless of place and location. *See Posadas de Puerto Rico v Tourism Company Co.* (No. 84-1903), 487 U.S. 328 (1986).
>
> 41. In the alternative, should the Court determine that NVRA is inapplicable to the American citizens residing in Puerto Rico, said exclusion by Congress would be unconstitutional as it would deprive them of equal protection of the law with respect to a fundamental right. Unlike situation involving the lack of Congressional parity for social programs, which neither affects a suspect class nor infringes a fundamental right, here the statutory exclusion would affect only minority citizens of the United States with respect to a fundamental right, that although circumscribed to the federal election of a Resident Commissioner, is as

> fundamental as the voting right of a person voting for his or her representative to Congress. *See Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986; cf. *Harris v. Rosario*, 446 U.S. 651 (1980); *Califano v. Torres*, 435 US. 1 (1978). This is a violation of the Constitution.

As the CEE will show, these alleged breaches of the Constitution are entirely without merit, and were included in the Amended Complaint in a desperate effort to at least make an allegation about the existence of Federal jurisdiction.

A. Plaintiffs' Claims do not Arise Under the Constitution

The jurisdictional basis pled by Plaintiffs in the Amended Complaint is Federal question jurisdiction pursuant to 28 U.S.C. § 1331. See Amended Complaint, ¶ 1, pages 1-2. 28 U.S.C. § 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

According to Plaintiffs, this Honorable Court has jurisdiction to entertain this action because their claims "arises under" the Constitution and laws of the United States. See Amended Complaint, ¶ 1, pages 1-2. As the CEE has shown in the preceding section, Plaintiffs' claims cannot arise under the laws of the United States cited by in the Amended Complaint (HVRA and Section 303 of HAVA) because these Federal laws do no not apply to Puerto Rico.

Since their action does not arise under Federal law, in order to establish Federal Jurisdiction Plaintiffs have to show that their action arises under the Federal Constitution[4], and the existence of Federal jurisdiction arising under the Constitution

[4] Plaintiffs cannot establish Federal Jurisdiction by merely including a claim under 42 U.S.C. § 1983 because this statute **does not create Federal Jurisdiction**. § 1983 creates a cause of action for deprivation, under color of state law, of any rights, privileges, or immunities secured by the Constitution and laws of the United States. As a result, Federal jurisdiction to entertain §

must be clear from the face of the plaintiffs' complaint. Louisville & Nashville Railroad v. Mottley, 211 U.S. 149 (1908); Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 9-10 (1983); Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S. 480, 494 (1983).

The determination of whether or not an action arises under Constitution, laws, or treaties of the United States is not always easy to make because, " . . . [a]s the Supreme Court has noted, the phrase 'arising under' has "resisted all attempts to frame a single, precise definition for determining which cases fall within, and which cases fall outside, the original jurisdiction of the district courts.' " Ortiz-Bonilla v. Federación de Ajedrez de Puerto Rico, 734 F.3d 28, 34 (1st Cir. 2013), citing Franchise Tax Board v. Construction Laborers Vacation Trust, supra, at 8.

The First Circuit has identified two types of actions that may come within federal question jurisdiction: cases involving "direct" Federal questions and cases involving "embedded" Federal questions. Ortiz-Bonilla v. Federación de Ajedrez de Puerto Rico, supra at 34. Cases involving direct federal questions are those in which " . . . the plaintiff pleads a cause of action that has its roots in federal law (say, a claim premised on the United States Constitution or on a federal statute)." Ortiz-Bonilla v. Federación de Ajedrez de Puerto Rico, supra at 34, citing R.I. Fishermen's Alliance, Inc. v. R.I. Department of Environmental Management, 585 F.3d 42, 47–48 (1st Cir.2009).

1983 cases exists under the general Federal question jurisdiction statute, 28 U.S.C. § 1331. See, Erwin Chemerinsky, Federal Jurisdiction 464 (4th Ed. 2003). Federal jurisdiction cannot be manufactured either by resorting to a declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. "A plaintiff may not circumvent [...] [the well-pleaded complaint] rule by seeking a declaratory judgment. . . . See, Erwin Chemerinsky, Federal Jurisdiction supra at 278. In Skelly Oil Co v. Phillips Petroleum Co., 339 U.S. 667 (1950), the Supreme Court held that "if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking."

Cases involving "direct" Federal questions, which " . . . constitute the 'vast majority' of cases brought under the general federal question jurisdiction of the district courts, are those 'in which federal law creates the cause of action.'" Ortiz-Bonilla v. Federación de Ajedrez de Puerto Rico, supra at 34, citing Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 808 (1986). In such cases, where " . . . a complaint 'is so drawn as to seek recovery directly under the Constitution or laws of the United States,' the federal court must entertain the suit.". Ortiz-Bonilla v. Federación de Ajedrez de Puerto Rico, supra at 34, citing Bell v. Hood, 327 U.S. 678, 681, (1946).

The other category of cases ("embedded" Federal questions) involves " . . . suits in which the plaintiff pleads a state law cause of action that necessarily turns on some construction of federal law." Ortiz-Bonilla v. Federación de Ajedrez de Puerto Rico, supra at 34, citing Templeton Bd. of Sewer Comm'rs v. Am. Tissue Mills of Mass., Inc., 352 F.3d 33, 37 (1st Cir.2003).

Plaintiffs' action purports to be a case involving a "direct" Federal question because according to Plaintiffs, the provisions of Section 6.012 of the Puerto Rico Election Code deprives them of the fundamental right to vote under the First Amendment; the due process right to be notified of the exclusion from the electoral lists; and the equal protection right to enjoy the full coverage of federal electoral laws concerning the fundamental right to vote of all American citizens, regardless of place and location. See Amended Complaint, ¶ 40, page 13.

As the CEE will show, all these allegations lack merit because Plaintiff voluntarily chose not to comply with the provisions of the Puerto Rico Election Code in order to reactivate their electoral records, notwithstanding the fact that they had ample opportunity to do so, and that the CEE had advised them specifically of the procedure to be followed and even offered assistance with the reactivation process.

B. Alleged Breach of The First Amendment

According to ¶ 40 of the Amended Complaint, " . . . [CEE's] "elimination" of the Plaintiff's from the electoral lists for purposes of voting in an federal or state election also deprives plaintiffs of the fundamental right to vote under the [F]irst amendment." See Amended Complaint at 13.

This allegation is false on two accounts: first of all, the CEE does not eliminate any voter from the Voter Registry. Second, Plaintiffs voluntarily chose not to exercise their fundamental right to vote, notwithstanding the fact that they had ample opportunity to reactivate their electoral records pursuant to the provisions of the Puerto Rico Elections Code. We will address these arguments *seriatim*.

i) The CEE does not "eliminate" anyone from the Voter Registry

The CEE maintains and administers one single database that stores the electoral records of every legally registered voter in Puerto Rico. This database is the General Voter Registry. Section 2.003 (84) of the Puerto Rico Election Code defines "General Voter Registry" as a ""Record prepared and kept by the State Election Commission that contains the information of **all the persons in Puerto Rico** who have registered for election related purposes. (Emphasis added).

The General Voter Registry contains the electoral records of both active and inactive voters. As a result, under the provisions of the Puerto Rico Election Code, inactive voters are never "removed" from the General Voter Registry. The CEE keeps in the General Voter Registry all prior voters who are no longer eligible to vote, including those who are no longer Puerto Rico residents or whose electoral files are not otherwise active.

ii) Plaintiffs did not vote because they chose not to do so

The Joint Stipulations of Fact submitted by the parties on April 30, 2014 (Docket No. 140) unequivocally show that Plaintiffs did not vote in the 2012 General Election because they did not comply with the reactivation requirement set forth in in Section 6.012 of the Puerto Rico Election Code. These were among the **only facts stipulated by all parties**:

. . .

- Plaintiff Myrna Colón-Marrero did not comply with the reactivation requirement set forth in in Section 6.012 of the Puerto Rico Election Code for the 21st Century, Act No. 78 of June 1st, 2011, as amended ("Puerto Rico Election Code"), in order to vote in 2012 Puerto Rico General Election.
- Plaintiff Myrna Colón-Marrero did not vote in the 2012 Puerto Rico General Election.

. . .

- Plaintiff Josefina Romaguera-Agrait did not comply with the reactivation requirement set forth in in Section 6.012 of the Puerto Rico Election Code in order to vote in 2012 Puerto Rico General Election.
- Plaintiff Josefina Romaguera-Agrait did not vote in the 2012 Puerto Rico General Election.

See Joint Stipulations of Fact, pages 1-2.

There is absolutely no basis in the record of this case to support Plaintiffs' allegation that the CEE deprived them of their fundamental right to vote under the First Amendment. Since nobody is required to vote in any election under Puerto Rico law, Plaintiffs were at liberty to exercise their so-called "right not to vote", and both did so during the 2008 General Election. See Joint Stipulations of Fact, pages 1-2 ("Plaintiff

Myrna Colón-Marrero did not vote in the 2008 Puerto Rico General Election"; "Plaintiff Josefina Romaguera-Agrait did not vote in the 2008 Puerto Rico General Election").

Once it was determined by the First Circuit that the provisions of the NVRA are not applicable to Puerto Rico, and that to the extent they are incorporated by reference, the provisions of Section 303 of HAVA are not applicable to Puerto Rico either, then there is no basis to challenge the validity of Section 6.012 of the Puerto Rico Elections Code.

In order to vote in Puerto Rico, the Puerto Rico Election Code imposes a series of requirements that **<u>all eligible votes have to comply with</u>**. <u>See</u>, e.g. Section 6.003 of the Puerto Rico Election Code (providing that persons wishing to vote must be citizens of the United States of America and of Puerto Rico, be legally domiciled in Puerto Rico and must be eighteen (18) years old); and Section 6.004 of the Puerto Rico Election Code (providing that voters must vote in the precinct where they are domiciled). The reactivation requirement set forth in Sections 6.012 and 6.013 of the Puerto Rico Election Code for voters who fail to vote in the General Election is one of such requirements.

According to the logic of Plaintiffs' argument, if a person is unable to vote in the Puerto Rico General Election as a result of her failure to comply with the requirements set forth in the Puerto Rico Election Code, the enforcement of such requirements constitutes a deprivation of the right to vote. The flawed logic of this argument is apparent, because there is no such thing as an absolute right to vote without having to comply with the applicable requirements. Requiring a person to reactivate his or her electoral record is no more a deprivation of the right to vote than it is to require that a person be 18 years old, or that he or she has a voter identification card. There is simply no constitutional violation because there is nothing in the Constitution that proscribes the reactivation requirement set forth in Section 6.012 of the Puerto Rico Election Code.

None of the requirements set forth in the Puerto Rico Election Code, including the reactivation requirement at issue this case, are geared towards the disenfranchisement of any particular person or group of persons such as the poll taxes and literacy tests used by several States in the Deep South to prevent African American suffrage following the adoption of the Reconstruction Amendments. During that period, southern States enacted legislation for the specific purpose of depriving African Americans of their right to vote. See Samuel Issacharoff, Pamela Karlan and Richard Pildes, The Law of Democracy, 96-111 (4th Ed. 2012).

Nobody can seriously equate the reactivation requirement set forth in Section 6.012 of the Puerto Rico Election Code with a poll tax or a literacy test. Every eligible voter in Puerto Rico, regardless of his or her race, gender or socioeconomic background has to comply with this simple requirement.[5] Moreover, and apart from the conclusory allegation contained in ¶ 40 of the Amended Complaint, Plaintiff cannot explain in any way how or why complying with this requirement infringes anybody's right to vote. As result, it is apparent this allegation is entirely without merit.

C. Alleged Breach of The Due Process Clause of The Fourteenth Amendment

Plaintiff' also alleged in the Amended Complaint violation of a " . . . due process right to be notified of [their] exclusion from the electoral lists" (Amended Complaint, ¶

[5] Throughout this litigation, both at the District Court and at the Court of Appeals levels, Plaintiff have not even argued that compliance with the reactivation requirement is complicated, expensive or even inconvenient.

40, page 13). Like the preceding allegation of deprivation of the right to vote, this claim is also baseless.

The Amended Complaint does specify if the alleged violation of due process is substantive or procedural, but, as the CEE will show the provisions of Section 6.012 of the Puerto Rico Election Code, and its enforcement by the CEE violate neither.

i) Substantive due process

In order to succeed in a substantive due process claim challenging the constitutionality of certain executive acts, ". . . the plaintiff must show both that the acts were so egregious as to shock the conscience and that they deprived him of a protected interest in life, liberty, or property." Harron v. Town of Franklin, 660 F.3d 531, 536 (1st Cir. 2011) citing Pagán v. Calderón, 448 F.3d 16, 32 (1st Cir.2006); and Martínez v. Cui, 608 F.3d 54, 64 (1st Cir.2010) ("[P]laintiffs must show, not only that the official's actions shock the conscience, but also that the official violated a right otherwise protected by the substantive Due Process Clause.").

The First Circuit has " . . . not adopted a rigid two-step analysis in which one showing necessarily must precede the other, Harron v. Town of Franklin, supra, at 536, citing Martínez v. Cui, supra, at 65 n. 9, [but] typically [has] looked first to whether the acts alleged were conscience-shocking." Id.

While " . . . [t]here is no scientifically precise formula for determining whether executive action is—or is not—sufficiently shocking to trigger the protections of the substantive due process branch of the Fourteenth Amendment." Harron v. Town of Franklin, supra, at 536, citing Pagán v. Calderón, supra at 32, the First Circuit has identified certain principles that emerge from the relevant case law. From these principles, the First Circuit has held that " . . . [e]xecutive acts that shock the conscience must be "truly outrageous, uncivilized, and intolerable," Harron v. Town of Franklin, supra, at 536, citing Hasenfus v. LaJeunesse, 175 F.3d 68, 72 (1st Cir.1999). In addition, ". . . the requisite arbitrariness and caprice must be stunning, evidencing more than humdrum legal error," Harron v. Town of Franklin, supra, at 536, citing Amsden v. Moran, 904 F.2d 748, 754 n. 5 (1st Cir.1990).

The First Circuit has also identified as ". . . [a] hallmark of successful challenges is an extreme lack of proportionality, as the test is primarily concerned with violations of personal rights so severe[,] so disproportionate to the need presented, and so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." Harron v. Town of Franklin, supra, at 536, citing González–Fuentes v. Molina, 607 F.3d 864, 881 (1st Cir.2010).

In this case, it is obvious that the CEE did not performed any actions that can be characterized in any way as "conscience-shocking". As a result, Plaintiffs simply have no basis to invoke the protections of the substantive due process clause of the Fourteenth Amendment. Consequently, this Honorable Court should reject "out of hand" any substantive due process claims made by the Plaintiffs.

ii) ***Procedural due process***

"To establish a procedural due process violation, the plaintiff 'must identify a protected liberty or property interest and allege that the defendants, acting under color of state law, deprived [him] of that interest without constitutionally adequate process."

González-Droz v. González-Colón, 660 F.3d 1, 13 (1st. Cir. 2011) , citing Aponte–Torres v. Univ. of P.R., 445 F.3d 50, 56 (1st Cir.2006).

The First Circuit has held that the examination of procedural due process claims are to be examined in two steps: " . . . the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." Harron v. Town of Franklin, supra, at 537, citing González–Fuentes v. Molina, 607 F.3d 864, 886 (1st Cir.2010).

In this case, Plaintiffs' procedural due process claims cannot get passed the first step of the analysis, because the CEE has not interfered with their liberty or property interest. As discussed in Section III B of this memorandum, Plaintiffs voluntarily chose not to reactivate their electoral records pursuant to the provisions of Section 6.012 of the Puerto Rico Elections Code and not to vote in the 2012 General Election. The CEE did not interfere in any way with Plaintiffs' right to vote.

But even assuming *arguendo* that there was somehow any interference, Plaintiffs cannot claims that they did not have ample opportunity to reactivate their electoral records in order to vote in the 2012 General Election.

The first thing that must be pointed out is that it is undisputed that **both plaintiffs** had knowledge about the provisions of Section 6.012 of the Puerto Rico Elections Code, and **both plaintiffs** knew that it was necessary to reactivate their electoral file in order to vote in the 2012 General Election. See Complaint dated September 12, 2012, ¶ 21, page 6, (Docket No. 1) (Plaintiff Myrna Colón-Marrero wrote a letter dated July 31, 2012 to the CEE claiming that the deactivation of her electoral record was contrary to the Constitution and to the provisions of the NVRA and HAVA a requesting "insertion" in the electoral lists); Proposed Stipulations of Fact, contained in the Joint Stipulations of Fact, dated April 30, 2014, page 3, bullet # 6, (Docket No. 140) (Plaintiff Josefina Romaguera-Agrait wrote a letter dated September 19, 2012 to the CEE claiming that the deactivation of her electoral record was contrary to the Constitution and to the provisions of the NVRA and HAVA a requesting "insertion" in the electoral lists).

As this Honorable Court can readily ascertain, both Plaintiff Myrna Colón-Marrero and Plaintiff Josefina Romaguera-Agrait cannot claim that they were not notified about their "exclusion" from the Voter Registry because **they both admit that they in fact knew** about the alleged exclusion, so much so, that they both requested "insertion" into the Voter Registry.

In light of the foregoing, Plaintiffs' alleged violation of procedural due process is a non-starter. Plaintiffs simply cannot claim that they were not notified **about something that they already knew**. Plaintiffs, like all persons in Puerto Rico, knew that if they did not vote in the preceding General Election they had to reactivate their record in order to vote in the next election.

In addition, one must not overlook the fact that even if Plaintiffs were to be notified again by the CEE about the provisions of the Puerto Rico Election Code, the result would have been the same. What they had to do if they wanted to vote in the 2012 General Election was go to a Permanent Registration Board ("JIP" by its Spanish acronym) and reactivate their electoral record. But it is clear, however, that Plaintiffs wanted to have their electoral records reactivated automatically, and as a result, receiving a personalized notification about the provisions of Section 6.012 of the Puerto Rico Elections Code would have been meaningless.[6]

In light of the foregoing, this Honorable Court should also reject Plaintiffs' procedural due process claims.

D. Alleged Breach of The Equal Protection Clause of The Fourteenth Amendment

In the Amended Complaint, Plaintiffs claim that they have the " . . . equal protection right to enjoy the full coverage of federal electoral laws concerning the fundamental right to vote of all American citizens, regardless of place and location." See Amended Complaint, ¶ 40, page 13. In addition, Plaintiffs claim that if the Court determines that the NVRA is inapplicable to the American citizens residing in Puerto Rico, ". . . said exclusion by Congress would be unconstitutional as it would deprive them of equal protection of the law with respect to a fundamental right." See Amended Complaint, ¶ 41, page 13-14.

Much like the other constitutional claims raised by Plaintiffs in the Amended Complaint, their equal protection argument is equally meritless.

The Equal Protection Clause of the Fourteenth Amendment "contemplates that similarly situated persons are to receive substantially similar treatment from their government." Harron v. Town of Franklin, supra, at 537, citing Tapalian v. Tusino, 377 F.3d 1, 5 (1st Cir.2004). In order to succeed in such claim a plaintiff needs " . . . to allege facts indicating that, compared with others similarly situated, [he or she] was selectively treated ... based on impermissible considerations such as race, religion,

[6] It is ironic that, to this date, Plaintiffs have invested significantly more time and resources at challenging the provisions of Section 6.012 of the Puerto Rico Election Code than it would have taken them to go to a JIP and reactivate their electoral record.

intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." Barrington Cove Ltd. P'ship v. R.I. Hous. & Mortg. Fin. Corp., 246 F.3d 1, 7 (1st Cir.2001).

In this case it abundantly clear that the Congress's exclusion of United States Citizens residing in Puerto Rico from the provisions of the NVRA does not deprive said citizens of equal protection of the law with respect to a fundamental right.

The United States Department of Justice ("DOJ") addressed plaintiffs' equal protection arguments in their brief filed in the case of Colón-Marrero v. Conty-Pérez, supra. On the specific issue of whether the NVRA's exclusion of Puerto Rico violated the equal protection cause, the DOJ stated:

> Plaintiff does not brief an equal protection argument with any detail, making it difficult to respond to this question. But **Congress did not violate the Equal Protection Clause by choosing not to apply to Puerto Rico all of the provisions of the NVRA.** As a general matter, Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions." Harris v. Rosario, 446 U.S. 651, 651-652 (1980) (per curiam); accord Trailer Marine Transp. Corp. v. Rivera Vazquez, 977 F.2d 1, 7 (1st Cir. 1992); United States v. Rivera Torres, 826 F.2d 151, 154 (1st Cir. 1987).
>
> For the reasons described above, **Congress had rational bases for declining to extend the requirements of the NVRA to Puerto Rico, just as it declined to extend them to certain States where the NVRA's purposes would not be served. First, the NVRA – including the specific provision at issue here – would not apply in the same way to Puerto Rico as it would to States that hold general federal elections every two years. Second, applying the NVRA to Puerto Rico would not achieve the same federal goals as does its application to the States and the District of Columbia, since Puerto Rico does not elect Presidential electors, nor Senators and Representatives**. Under those circumstances, and particularly given the complex relationship between Puerto Rico and the United States, see Trailer Marine Transport Corp., 977 F.2d at 6-7 (summarizing history), Congress could rationally decide not to impose the requirements of the NVRA on election officials in Puerto Rico.
>
> It is irrelevant that greater scrutiny attaches to laws that restrict the right to vote, see Appellant's Br. 12, **because neither the NVRA nor Congress's**

> **decision not to extend that law to Puerto Rico does any such thing**. Rather, as this Court found in denying a similar challenge to UOCAVA, "[a]lthough [the NVRA] affects the right to vote, the Act does not infringe that right but rather limits a state's ability to restrict it." Igartúa v. United States, 32 F.3d 8, 10 n.2 (1st Cir. 1994) (per curiam). Indeed, **nothing in the NVRA prevents Puerto Rico from enacting, as a matter of local law, precisely the protections plaintiff seeks.**[]

(Emphasis added).

It is therefore clear that Congress may indeed treat Puerto Rico differently, because there is clearly a rational basis for doing so, since Puerto Rico is not a State of the United States, and as a result, does not elect Presidential electors, U.S. Senators and U.S. Representatives.[7]

In light of the foregoing, this Honorable Court should readily conclude that Plaintiffs equal protection claims does not have any merit.

IV. CONCLUSION

The 2012 General Election was held a year and a half ago. For reasons that defy all rationality, Plaintiffs insist in pursuing an action that should have been withdrawn once the First Circuit decided that the NVRA did not apply to Puerto Rico. Plaintiffs have yet to advance one single justification to support their stubborn refusal to reactivate their electoral record pursuant to the provisions of Section 6.012 of the Puerto Rico Elections Code.

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[7] One must also note that, as a result of a series of law suits filed with this Honorable Court by Gregorio Igartúa, the First Circuit has had ample opportunity to consider whether the inability to vote in presidential elections violated the constitutional rights of United States citizens who were residents of Puerto Rico, or if such inability was contrary to international obligations of the United States. The First Circuit has unequivocally held that it does not. See Gregorio Igartúa-De La Rosa v United States, 417 F.3d 145 (1st Cir. 2005), *cert. denied* , 547 U.S. 1035 (2006); Gregorio Igartúa-De La Rosa v. United States, 386 F.3d 313 (1st Cir.2004); Gregorio Igartúa-De La Rosa v. United States, 229 F.3d 80 (1st Cir.2000); Gregorio Igartúa-De La Rosa v United States, 32 F.3d 8 (1st Cir. 1994), *cert. denied* , 514 U.S. 1049 (1995).

As the CEE has shown in this memorandum, the provisions of the NVRA and those of Section 303 of HAVA that are inconsistent with Section 6.012 of the Puerto Rico Election Code are not applicable to Puerto Rico. In addition, Section 6.012 of the Puerto Rico Election Code does not violate any provision of the Federal Constitution.

In light of the foregoing, Plaintiffs simply have no legal basis to pursue the instant action. If Plaintiffs disagree with the requirements set forth in the Puerto Rico Election Code, they should direct their efforts towards the branch of the government of Puerto Rico charged with the constitutional responsibility of enacting the local election laws.

WHEREFORE, co-defendant, Ángel González Román, as President of the CEE respectfully requests that the relief requested by Plaintiffs in the instant case be denied.

RESPECTFULLY SUBMITTED

In San Juan, Puerto Rico this 30th day of May, 2014.

IT IS HEREBY CERTIFIED, that on this same day the foregoing was filed by uploading to the CM/ECF System which will send automatic notices to the attorneys of record.

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