

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

**MYRNA COLON MARRERO
JOSEFINA ROMAGUERA AGRAIT**

Plaintiffs

v.

**HÉCTOR CONTY PÉREZ, President of
the State Elections Commission,
et al.,**

Defendants

CIVIL NO. 12-1749 (CCC)

**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

REPLY BRIEF

COME NOW the Plaintiffs, through the undersigned attorneys, and in compliance with this Court's Order of March 30, 2014 (D. 138), respectfully submit their reply brief, and state, allege and pray as follows:

1. There is no reply to the briefs filed by the NPP and the PDP as they both agree with each other (quite a rarity!). This reply, therefore, briefly addresses some of the allegations in the SEC's brief.

2. The argument that the Court does not have jurisdiction to hear this complaint confuses jurisdictional with substantive issues. First, this Court

has jurisdiction under 28 U.S.C. 1332 to hear the constitutional challenges to the PR Election law under the first amendment; and the NOVORA exclusion of Puerto Rico under the equal protection clause applied to Puerto Rico either through the Fifth or Fourteenth Amendments. *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976). The complaint is not limited, as suggested by the SEC defendant, to declaratory judgment, it also seeks equitable relief. While the Court of Appeals confirmed a preliminary injunction that the NAVORA does not apply to Puerto Rico, once said judgment becomes final, the Plaintiffs are entitled to appeal it to the Supreme Court.

3. As to HAVA, the First Circuit expressly left open the issue of a private cause of action to enforce it in Puerto Rico. Plaintiffs incorporated by reference the PDP's argument in favor of the private cause of action. But, in their Motion for Declaratory Judgment and Injunctive Relief (D. 145), they argued in addition, that HAVA per se does not foreclose a private cause of action, and assumes that many of the provisions of NAVORA are in place, and enforceable through the express cause of action provided by said statute. It would leave HAVA toothless if the Court were to together decide that NAVORA's did not apply to Puerto Rico *and* simultaneously that HAVA was

bereft of a private cause of action.¹ The Complaint in this case, includes the letter to the Secretary of Justice for implementation of HAVA, to this date, ignored. Thus, by the SEC's unconscionable reading, the heart of HAVA - the registration provisions of Section 303 – do not have to be implemented in Puerto Rico. In its words: “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.” **D. 144, at 7.**

4. The legal remedy proposed by the SEC is for the Court to abstain and allow the continuation of this state of insulated capriciousness: the SEC receives Congressional monies to implement HAVA (which assumes the underlying provisions of NAVORA), it fails to comply with the HAVA-NAVORA registration provisions, and operates without any type of citizen, federal or judicial accountability. There is no exact case law on point to cover this situation: it simply mangles statutory goals and cries out loud for judicial relief.

5. With respect to the other arguments raised by the SEC defendant, most were discussed in Plaintiff's Motion (D. 145), but there are a couple

¹ For this reason, the SEC claims judicial immunity, the contradictory situation allows them to argue that: “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.” **D. 144, at 3.**

arguments that merit additional discussion. First, the SEC claims that there are six states that are excluded from NAVORA. The SEC fails to inform the Court, however, that this exclusion is “because, on and after August 1, 1994, they either had no voter-registration requirements or had election-day voter registration at polling places with respect to elections for federal office.” In other words, the voter could simply walk to the polling booth, and vote. Thus, unlike Puerto Rico, these States furthered the vote, instead of hindering it.

6. With respect to the first amendment challenge to Article 6.10 of the PR Electoral Code, we adopt by reference, without waiving it, the arguments made by the PDP. Similarly, with respect to the SEC’s defense of the substantive and procedural due process arguments, they are not relevant to this complaint, only insofar as the failure to notify deactivation is relevant to the first amendment challenge to the PR Electoral Code. Plaintiffs did not raise them as independent constitutional violations.

7. The only new argument raised by the Defendant is their reliance on the letter submitted by the USDOJ to the First Circuit as to the constitutional issues involved. Said letter makes the claim that under rational scrutiny, Puerto Rico’s exclusion from NAVORA satisfies the test of *Harris v. Rosario*, 446 U.S. 651 (1980). Plaintiff’s Motion, claims that the exclusion here, however, involves a fundamental right to vote and should be examined under

strict scrutiny; and, even under the rational basis, it was unreasonable.

8. In the alternative, the USDOJ argues that there is no fundamental right challenged because NAVORA addresses the States, not the right to vote: “[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,” citing to *Igartúa v. United States*, 32 F.3d 8, 10 n.2 (1st Cir. 1994) (per curiam). *Igartúa*, however, is easily distinguishable, as that case involved the constitutional right to vote for President, not applicable to American territorial citizens, because only States have electors to the Electoral College. There was no right to vote involved.

9. The First Circuit also rejected the due process and equal protection challenges to the Uniformed and Overseas Citizens Absentee Voting Act. That Act provides that United States citizens, including residents of Puerto Rico, see 42 U.S.C. Sec. 1973ff-6(6) & (7), who reside outside the United States retain the right to vote via absentee ballot in their last place of residence in the United States, as long as these citizens otherwise qualify to vote under laws of the jurisdiction in which they last resided. 42 U.S.C. Sec. 1973ff-1. It does not apply, however, to citizens who move from one jurisdiction to another within the United States. See 42 U.S.C. Sec. 1973ff-6(5) (defining “overseas voter” as a person “who resides outside the United States”).

10. The plaintiffs in *Igartúa* claimed that the Act illegally discriminates against citizens who have taken up residence in Puerto Rico rather than outside the United States, because the former are not entitled by the Act to vote in their prior state of residence. The Circuit held, however, that the Act does not distinguish between those who reside overseas and those who take up residence in Puerto Rico, but between those who reside overseas and those who move anywhere within the United States. Given that such a distinction neither affects a suspect class nor infringes a fundamental right, it need only have a rational basis to pass constitutional muster.

11. Here on the other hand, American citizens in Puerto Rico have a right to vote for the representative to Congress, such that the exclusion of Puerto Rico from NAVORA does affect a constitutional right to vote for federal office already being exercised. The USDOJ attempts to make a relevant distinction between the fundamental right to vote and the effect of the law, which “does not infringe that right but rather limits a state’s ability to restrict it.” But this is a distinction without a difference, for if Congress allows the State to infringe the fundamental right to vote of its citizens here, the geographic distinction allowed under rational scrutiny does not meet the heightened scrutiny required to survive a right to vote challenge to location rationales permitted under the incorporation doctrine. See *Harris v. Rosario*,

446 U.S. 651 (1980); *Califano v. Torres*, 435 U.S. 1 (1978); *Posadas de Puerto Rico v. Tourism Co.*, 478 U.S. 328 (1985); *cf. Consejo Playa de Ponce v. Rullán*, 556 F.Supp. 2d 74 (D.P.R. 2008). The applicable precedent, therefore, is not *Harris*, but *Posadas de Puerto Rico v. Tourism Co.*, 478 U.S. 328 (1986)(application of first amendment heightened scrutiny to Puerto Rico).

WHEREFORE, Plaintiffs respectfully pray from this Court to issue declaratory and equitable relief: (a) Declaring NAVORA's exclusion of Puerto Rico an Equal Protection violation; (b) ordering the SEC to comply with Section 303 and all other registration provision of HAVA; and (c) declaring Article 6.10 of the Puerto Rico Electoral Code unconstitutional.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this December 18, 2012.

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CERTIFICATE OF CM/ECM SERVICE

I certify that on this same date, the Plaintiffs electronically filed the foregoing motion with the USDC-PR Clerk via the CM/ECF system that will automatically notify to all parties of record.

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