

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

MYRNA COLON MARRERO
JOSEFINA ROMAGUERA AGRAIT

Plaintiffs

v.

HÉCTOR CONTY PÉREZ, as President of the Puerto Rico State Elections Commission; EDWIN MUNDO RIOS, as Electoral Commissioner of the New Progressive Party (NPP); EDER E. ORTIZ ORTIZ, as Electoral Commissioner of the Popular Democratic Party (PDP); ROBERTO I. APONTE BERRIOS, as Electoral Commissioner of the Puerto Rican Independence Party (PIP); JULIO FONTANET MALDONADO, as Electoral Commissioner of the Movimiento Unión Soberanista (MUS); ADRIAN DIAZ DIAZ, as Electoral Commissioner of the Puertorriqueños por Puerto Rico (PPR); and LILLIAN APONTE DONES as Electoral Commissioner of the PARTIDO DEL PUEBLO TRABAJADOR (PPT)

Defendants

CIVIL NO. 12-1749 (CCC)

FIRST AMENDMENT
DUE PROCESS
EQUAL PROTECTION

NVRA, 42 U.S.C. §§ 1973 et seq.,

HAVA, 42 USC §§ 15541 et seq.

CIVIL RIGHTS, 42 U.S.C. § 1983

AMENDED COMPLAINT

COME NOW the plaintiffs Myrna Colón and Josefina Romaguera Agrait, through the undersigned attorneys, and respectfully state, allege and pray as follows:

I. JURISDICTIONAL STATEMENT

1. This is a civil action filed by Plaintiffs, citizens of the United States of America residing in Puerto Rico, alleging that the Defendants - the President and the Electoral Commissioners of the Puerto Rico State Elections Commissions (SEC) – unlawfully removed

her from the Commonwealth electoral register because she exercised their right not to vote in the 2008 election for Resident Commissioner. In so doing, the SEC defendants knowingly breached 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. As this is a civil rights action arising under the Laws, Constitution and Treaties of the United States, this Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1977gg-9(b).

2. 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 6.012 of the Puerto Rico Electoral Law, Law No. 78 of June 1, 2011, unlawful as contrary to the provisions of NVRA and HAVA; (b) enjoining the SEC Defendants from holding any future electoral event concerning a federal office until such time as their acts and conduct comport to the voter registration and list maintenance provisions of NVRA, HAVA and the Constitution; (c) ordering Defendants to immediately activate the plaintiff and all other similarly situated person as registered voters in the General Registry of Voters entitled to vote in the upcoming election for federal office; (d) ordering the SEC Defendants to immediately and individually contact any and all persons who were removed from the General Registry of Voters because they did not vote in the 2008 elections; (e) order the SEC defendants as state officials in charge of implementing the electoral laws to abide by all the voter registration and other applicable mandates of the NVRA, HAVA and the first, due process and equal protection amendments to the Constitution.

II. THE PARTIES

3. Plaintiff Myrna Colón Marrero (“Colón”) is a citizen of the United States residing in Puerto Rico that seeks to vote in the upcoming elections for Puerto Rico’s Resident Commissioner to the United States Congress. Her electoral registration number is 0171778.

3(a). Plaintiff Josefina Romagura Agrait (“Romagura”) is a citizen of the United States residing in Puerto Rico that seeks to vote in the upcoming elections for Puerto Rico’s Resident Commissioner to the United States Congress. Her electoral registration number is 2110736.

4. Defendant Héctor J. Conty Pérez is the current President of the Puerto Rico State Elections Commissions (SEC). He is sued in his official capacity for equitable and declaratory relief.

5. Defendant Edwin Mundo Ríos is the current Electoral Commissioner of the New Progressive Party (NPP). He is sued in his official capacity for equitable and declaratory relief.

6. Defendant Eder Ortiz Ortiz is the current Electoral Commissioner of the Popular Democratic Party (PDP). He is sued in his official capacity for equitable and declaratory relief.

7. Defendant Roberto I. Aponte Berríos is the current Electoral Commissioner of the Puerto Rican Independence Party (PIP). He is sued in his official capacity for equitable and declaratory relief.

8. Defendant Julio Fontanet Maldonado is the current Electoral Commissioner of the Movimiento Unión Soberanista (MUS). He is sued in his official capacity for equitable

and declaratory relief.

9. Adrian Diaz Diaz is the current Electoral Commissioner of the Puertorriqueños por Puerto Rico (PPR). He is sued in his official capacity for equitable and declaratory relief.

10. Lillian Aponte Dones is the current Electoral Commissioner of the Partido Del Pueblo Trabajador (PPT). She is sued in his official capacity for equitable and declaratory relief.

III. STATEMENT OF FACTS

11. Plaintiffs are United States citizen who live in Puerto Rico.

12. All United States citizens who live or move to Puerto Rico are eligible to vote in the federal election for the Resident Commissioner. See See Puerto Rican Federal Relations Act, 48 U.S.C. Sec. 891 (Resident Commissioner chosen by "[t]he qualified electors of Puerto Rico"); 42 U.S.C. Sec. 1973ff-6(3) (defining "[f]ederal office" to include Resident Commissioner); *Igartua De La Rosa v. U.S.*, 32 F.3d 8 (1st Cir. 1994).

13. Plaintiffs are United States citizen who live in Puerto Rico and that in the Commonwealth general elections of 2004 voted for one of the candidates seeking the federal office of Resident Commissioner, as well as for other Commonwealth and municipal government candidates.

14. Plaintiffs exercised the right not to vote in the general elections of 2008.

15. Following the 2008 general elections, the SEC Defendants deactivated plaintiff from the General Registry of Voters of the Commonwealth of Puerto Rico, eliminating their eligibility to vote in the 2012 Commonwealth elections for the federal office of Resident Commissioner to Congress.

16. At no time did the SEC Defendants notify Plaintiffs individually and personally of their deactivation from the General Registry of Voters.

17. By information and belief, the SEC has deactivated approximately 500,000 otherwise qualified voters from the General Registry of Voters for the federal elections of 2012 simply because they did not vote in the 2008 general elections.

18. In removing Plaintiff, as well as other similarly situated persons, from the General Registry of Voters eligible to vote in the 2012 election for federal office in Puerto Rico, the Defendants purported to act pursuant to Article 6.012 of the Commonwealth Electoral Law, Law No. 78 of June 1, 2011, as amended. Said Article provides: “If an elector did not vote in a general election, his name shall be excluded from the electoral lists.”

19. Article 6.012 of Law No. 4 is null and void as a matter of federal law as it is contrary to NVRA, HAVA and the federal Constitution. In its relevant provisions, NVRA provides: “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).

20. HAVA has a similar disposition that provides that under the relevant federal law a qualified voter cannot be removed from the electoral register unless she has *not voted in 2 consecutive general elections for Federal office, has been notified of the intention of*

removal for said reason, and has not responded to said notice.” 42 U.S.C. § 15483(4).

21. On July 31, 2012, Plaintiff Colón wrote to the SEC, claiming that her exclusion from the register of voters for the upcoming election of Puerto Rico’s Resident Commissioner to Congress was contrary to the United Constitution, NVRA and HAVA. The Plaintiff, accordingly, requested their insertion in the electoral lists. **Exhibit A.**

21(a). On September 19, 2012, Plaintiff Romaguera wrote to the SEC, claiming that her exclusion from the register of voters for the upcoming election of Puerto Rico’s Resident Commissioner to Congress was contrary to the United Constitution, NVRA and HAVA. The Plaintiff, accordingly, requested their insertion in the electoral lists. The SEC President has not formally replied to said letter.

22. By Resolution of August 9, 2012, the defendant Hector Conty Perez issued a Resolution on behalf of the SEC denying plaintiff’s Colón request for inclusion in the electoral register. **See Exhibit B.** The Resolution is issued by the President of the Board whenever there is an absence of unanimity in a Board decision. Here, the representatives of the Popular Democratic Party (PDP) and of the Movimiento de Unión Soberanista (MUS) would have granted plaintiffs request; while, it was opposed by the representatives of the New Progressive Party (NPP), the Puerto Rican Independence Party (PIP), the Puertorriqueños for Puerto Rico(PPP) and the Partido del Pueblo Trabajador PPT).

23. By letters of August 13, 2012 and September 7, 2012, the plaintiff Colón notified the U.S. Attorney General of the violations of the federal laws and Constitution of the United States. The plaintiffs petitioned the Attorney General of the United States that pursuant to Article 401 of HAVA to bring an enforcement action against the Puerto Rico State Election Commission for such declaratory and injunctive relief as is necessary to

make the SEC comply with the list maintenance and voter registration provisions of NVRA and HAVA. **See Exhibit C and D.**

24. By interpreting NVRA and HAVA as inapplicable to Puerto Rico, the Defendants are depriving half-a-million 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.

**FIRST CAUSE OF ACTION:
BREACH OF NVRA**

25. Plaintiff voted in the 2004 election for Resident Commissioner to the United States Congress in 2004, but was removed by Defendants from the electoral register of active voters because they did not vote or were perceived as not having voted in the 2008 election. This conduct is in violation of NVRA, which in its relevant parts, provides “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).

26. In addition, the PREC does not follow the registration provisions of NVRA and HAVA that in their relevant part provide as follows:

a. Motor vehicle provisions. NVRA provides that: “Each State motor vehicle driver’s license application (including any renewal application) submitted to the

appropriate State motor vehicle authority under State law 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.” 42 U.S.C. §§ 1973gg-3 (a)(1).

b. Mail registration provisions. NVRA provides that: “Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 1973gg-7(a)(2) of this title for the registration of voters in elections for Federal office.” 42 U.S.C. §§ 1973gg-4(a)(1).

c. Voter registration offices provisions: NVRA provides that: Each State shall designate agencies for the registration of voters in elections for Federal office and mandates the following: (i) all offices in the State that provide public assistance; (ii) all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities; (iii) other voter registration offices such as State or local 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 Federal and nongovernmental offices, with the agreement of such offices. 42 U.S.C. §§ 1973gg-5(a).

27. The PRSEC claims that said provisions of NVRA and adopted in HAVA do not apply to Puerto Rico because NVRA does not include Puerto Rico within the definition of State, as it provides that the term "State" means a State of the United States and the District of Columbia. 42 U.S.C. §§ 1973gg-1(4). This, however, is a hollow and counterfactual argument. 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 applies. 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.

28. It is clear, furthermore, from the Act's prefatory finding and purposes 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.

29. 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.

30. For these reasons, the Defendants removal of the plaintiff from the General Registry of Voters solely because she did not vote in the 2008 elections is a violation of the fundamental right to vote, and protected under NVRA, that this Court is compelled to declare unlawful and remedy.

**SECOND CAUSE OF ACTION:
BREACH OF HAVA**

31. The Plaintiff has not been notified of her removal from the electoral lists because of their actual or perceived failure to vote in the 2008 elections for federal office. By removing them from the electoral lists, without notice and for reasons contrary to federal law, the SEC defendants deprive the Plaintiff of the fundamental right to vote in an election for Federal office. This is a violation of the voter registration, voter maintenance and voter notification provisions of HAVA.

32. The SEC claims that it does not have to abide by the relevant provisions of HAVA because they are inapplicable to election for federal office in Puerto Rico.

33. 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).

34. 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.

35. 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 Exhibit E** (PR 2003 HAVA State Plan, p. 6, Appendix).

36. 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 said letter refers to States where registration can be done on the date of the election, nowhere does it refers to the Commonwealth of Puerto Rico, and is simply not material to the claim of the SEC. See **Exhibit F**.

37. 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 residents 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. 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).

38. For these reasons, the Defendants removal of the plaintiff from the General Registry of Voters solely because plaintiff did not vote in the 2008 elections is a violation of

their fundamental right to vote, and protected under HAVA, that this Court is compelled to declare unlawful and remedy, pursuant to its powers under Section 1983. While HAVA does not create a private cause of action, the same is implied.

**THIRD CAUSE OF ACTION:
BREACH OF THE CONSTITUTION**

39. The right to vote is of “the most fundamental significance under our constitutional structure,” and “other rights, even the most basic, are illusory if the right to vote is undermined” the Supreme Court has recognized the right to vote as a fundamental right “central to the protection of the other rights guaranteed in our society.” See *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 inherently linked to other preferred fundamental rights, such as the first amendment rights of association, expression and to petition the government. See *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

40. Defendants’ elimination of the Plaintiffs from the electoral lists for purposes of voting in a 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 Assoc. v. Tourism Co.* (No. 84-1903), 478 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.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays that this Honorable Court:

1. Declare that the Defendants have violated Plaintiff's rights under NVRA, HAVA, and the first, fifth, fourteenth amendments to the United States Constitution the first amendment and due process clause of the United States Constitution.
2. Declare unlawful and preempted Art. 2.012 of Law No. 4 of December 20, 1977, as amended, P.R. Laws Ann., Tit. 16, §§3301-3383.
3. Grant preliminary and permanent injunctive relief ordering the Defendants to comply with the voter registration, electoral lists maintenance, and voter notification provisions of NVRA and HAVA;
4. Order the reinstatement of plaintiff Colón, and all similiary situated citizens, to the General Registry of Voters;
5. Order any and all declarative and equitable remedy that the Court may deem necessary to implement the provisions of NVRA, HAVA and the Constitution;
6. In the alternative, declare NVRA in violation of the equal protection clause

insofar as it excludes from its coverage American citizens residents in Puerto Rico.

7. Award attorney fees and costs pursuant to 42 U.S.C. § 1988.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 21th day of September, 2012.

S/ Carlos A. Del Valle Cruz

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CERTIFICATE OF CM/ECM

We certify that on this same date we electronically filed the foregoing with the USDC-PR Clerk via the CM/ECF system that will automatically notify to all parties of record that have or may appear.