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

PUERTO RICO ASSOCIATION OF MAYORS; HON. LUIS J. HERNÁNDEZ-ORTIZ, personally and in his Official Capacity as Acting President of the Puerto Rico Association of Mayors; Plaintiffs V.S. **HON. WALTER VÉLEZ-MARTÍNEZ,** in his Official Capacity as Elections Comptroller for Puerto Rico Defendant	**CIVIL NO. : 20-1405** **CIVIL RIGHTS**

MOTION TO REQUEST THE ENTRY OF A PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE COURT:

COMES NOW plaintiff, through the undersigned attorneys and very respectfully **SETS FORTH** and **PRAYS**:

I. INTRODUCTION

On this same date plaintiffs, an organization comprised of 45 mayors and its First Vice-President, have filed a verified complaint challenging the constitutionality of Circular Letter OCE-DET-2020-02, issued by defendant, the Puerto Rico Elections Comptroller (hereinafter referred to as "the Comptroller"). This circular letter, which is now set to become effective on August 17, 2020, broadens the definition of what is considered official electronic media to web/social media pages the content of which is provided by a "principal officer", regardless of whether or not the page is maintained

with public funds. As defendant would have it, such pages may not -under penalty of stiff fines- refer to partisan political matters or otherwise promote the candidate's achievements. In other words, defendant seeks to meddle in what candidates to elective public office place in their **personal** electronic media.

Because mayors do not surrender their First Amendment rights when they are elected to office, because we are in the middle of a pandemic that severely restricts the use of conventional (i.e., face to face) campaigning and because election day is almost upon us, for the foregoing reasons we respectfully move for the issuance of a preliminary and permanent injunction enjoining the application of OCE-DET-2020-02. As allowed by Fed. R. Civ. P. 65(a)(1), we respectfully move for the consolidation of the preliminary injunction hearing and the trial on the merits.

II. DISCUSSION

A) APPLICABLE LEGAL STANDARD

The appearing parties seek to redress a First Amendment violation pursuant to 42 U.S.C. § 1983. It is hornbook law that "Section 1983 **provides for injunctive relief** and the recovery of damages against individuals and governmental entities that deprive a plaintiff of rights, privileges, or immunities secured by the Constitution and laws of the United States". Santos Serrano v. Laboy Alvarado, 169 F. Supp.2d 14, 16 (D.P.R. 2001) (emphasis added). Of course, where -as here- the public officer would otherwise enjoy immunity under the Eleventh Amendment, only prospective injunctive relief may be issued. Edelman v. Jordan, 415 U.S. 651, 677 (1974) ("Though a § 1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power,

consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief").

A plaintiff may not obtain a preliminary injunction unless it is established by a preponderance of the evidence that "(i) the movant's likelihood of success on the merits of its claims; (ii) whether and to what extent the movant will suffer irreparable harm if the injunction is withheld; (iii) the balance of hardships as between the parties; and (iv) the effect, if any, that an injunction (or the withholding of one) may have on the public interest". Corporate Technologies, Inc. v. Harnett, 731 F.3d 6, 9 (1st Cir. 2013). Needless to say, we are cognizant that a preliminary injunction hearing (or videoconference during these COVID-19 days) is required by Rule 65 of the Federal Rules of Civil Procedure. Having said this, **to the extent that we expect defendant to stipulate to the content of his own official documents and given the fact that the fact that public officers maintain electronic media is something of which judicial knowledge be taken, it may be that the matter is susceptible to adjudication on the papers**. This of course, is the Court's call to make.

We now discuss each of the aforementioned elements to show how they are met in this case.

B) LIKELIHOOD OF SUCCESS

It bears noting that, of all of the preliminary injunction factors "[l]ikelihood of success is the main bearing wall of the four-factor framework". Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 16 (1st Cir. 1996); see also New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002) ("The *sine qua non* of this four-part

inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity"). We now discuss the reasons why there is a strong likelihood that this Honorable Court will side with the plaintiffs on the merits of their claims.

When describing the importance of the right to freedom of speech that is secured by the First Amendment, Justice Cardozo observed that said right "is the matrix, the indispensable condition, of nearly every other form of freedom". Palko v. Connecticut, 302 U.S. 319, 327 (1937). Of particular importance to the instant action is the well settled notion that "The First Amendment protects political association as well as political expression". Buckley v. Valeo, 424 U.S. 1, 15 (1976); see also Citizens United v. FEC, 558 U.S. 310, 329 (2010) (describing "political speech" as "speech that is central to the meaning and purpose of the First Amendment"). Not only is political speech at the core of the First Amendment but the ability to disseminate said speech is just as important, since "**[t]he First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference**". New York State Board of Elections v. López Torres, 552 U.S. 196, 208 (2008) (emphasis added).

The challenged circular letter explicitly provides that, once a personal electronic media page is deemed "official" under the loose definition that includes a mayor's **personal** media, said media may not include any references to elections, candidates or even flattering remarks regarding the officer's performance in office. Defendant clearly seeks to regulate the **content** of the speech contained in a candidate's private electronic media. While the government does have more leeway to regulate the time and place in

which speech takes place, when the very substance of the speech is targeted by government regulation, the rule is that "[c]ontent-based regulations are presumptively invalid". RAV v. St. Paul, 505 U.S. 377, 382 (1992). Indeed, it is rare to see the government targeting the content of speech and even rarer to have such restrictions validated by the courts. Recently recently the Court reiterated that:

> When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations of speech. Content-based regulations "target speech based on its communicative content." Reed v. Town of Gilbert, 576 U.S. ___, ___, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). As a general matter, such laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Ibid. **This stringent standard reflects the fundamental principle that governments have "'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"** Ibid. (quoting Police Dep't of Chicago v. Mosley, 408 U. S. 92, 95, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972)).

National Institute of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018) (emphasis added)

Not only is political speech in general fully protected by the First Amendment but communications aimed at informing voters are guarded with particular zeal. As explained by the High Court, "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments". First National Bank v. Bellotti, 435 U.S. 765, 791 (1978). Hence, the wide range of matters that citizens, including those who are running for elective office, may freely speak on "of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes". Mills v. Alabama, 384 U.S. 214, 218-219 (1966). It is therefore settled law that "**[t]he role that elected officials play in our society makes it all**

the more imperative that they be allowed freely to express themselves on matters of current public importance". Wood v. Georgia, 370 U.S. 375, 395 (1962) (emphasis added).

The fact that defendant is proposing this blatant restriction on political speech during an election year (in fact, weeks before an election) is also relevant to the constitutional analysis, as "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office". Eu v. San Francisco Democratic Party Central Committee, 489 U.S. 214, 223 (1989). It goes without saying that a restriction of an individual's political speech is bad enough but restricting such speech just before the individual will submit him(her)self to electoral scrutiny constitutes a particularly offensive brand of First Amendment violation.

In the emerging filed of social media, the Supreme Court has held that said media "allows users to gain access to information and communicate with one another about it on any subject that might come to mind" for which it struck down a North Carolina law that proscribed registered sex offenders from having a media presence, a regulation that a majority of the Court described as "a prohibition unprecedented in the scope of First Amendment speech it burdens". Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017). Hence, restrictions of the speech expressed in these platforms is most definitely subject to First Amendment scrutiny. With regards to the banning of political content from social media, our own Circuit has struck down a New Hampshire law that proscribed the publication in such media of marked ballots, rejecting the state's proffered justifications by holding that "New Hampshire may not impose such a broad restriction

on speech by banning ballot selfies in order to combat an unsubstantiated and hypothetical danger". Rideout v. Gardener, 838 F.3d 65, 76 (1st Cir. 2016).

In the face of a legal presumption that his attempt to limit the political content of plaintiffs' personal electronic media is unconstitutional, the challenged circular letter is limited to incorrectly citing (without the corresponding Federal Reporter volume and page number) to recent out-of-Circuit federal court decisions, to wit: Knight First Amendment Institute at Columbia University v. Trump, 928 F.3d 226 (2d Cir. 2019), rehearing en banc denied at 953 F.3d 916 (2d Cir. 2020) and Davidson v. Randall, 912 F.3d 666 (4th Cir. 2019). None of these cases remotely help defendant's cause.

In Knight First Amendment Institute at Columbia University, the issue was not whether or not President Trump could post whatever content he wished in social media (which the Court may easily take judicial knowledge that the President most certainly does) but rather if, because he uses his social media to deliver public policy, he was allowed to block other social media users that espoused opposing views. Knight First Amendment Institute at Columbia University, 928 F.3d at 233. Indeed, when discussing the President's Twitter presence, the Court observed that "[t]he Account was intentionally opened for public discussion when the President, upon assuming office, repeatedly used the Account as an official vehicle for governance and made its interactive features accessible to the public without limitation". Id. at 237. Upon this finding, it was held that [b]y blocking the Individual Plaintiffs and preventing them from viewing, retweeting, replying to, and liking his tweets, the President excluded the Individual Plaintiffs from a public forum, something the First Amendment prohibits". Id. at 238.

While the Second Circuit's decision in this case is not one we agree with and while other circuits (including our own) may eventually decide differently on the issue of blocking political opponents from personal electronic media, **the hard fact is that the ruling, far from allowing censorship of a politician's online speech provides that the politician cannot censor the speech of those that differ from his views**.

The holding in Davidson is even less helpful to the Comptroller's cause. In that case, the issue was the legality of the use of a Facebook page by the Chair of a County Commission for official purposes, where the officer controlling the account could block citizens from the page. Davidson, 912 F.3d at 673-676. The Court never reached the merits of the issue but rather reversed and remanded the case (originally dismissed on a Fed. R. Civ. P. 12(b) motion), observing that "[n]o court appears to have addressed that novel legal theory" and that "one can conceive of a colorable legal argument that a governmental actor's decision to select a private social media website for use as a public forum—and therefore select that website's suite of rules and regulations—could violate the First Amendment, if the private website included certain types of exclusionary rules". Id. at 691.

In sum, the law is clear with regards to plaintiffs being entitled to express their political views and to advocate for their election/the defeat of their opponents, is a right that extends to their electronic media pages. Any restriction on the content of plaintiffs' **personal** social media pages is deemed unconstitutional unless the government is able to show that there are compelling state interests and that the restriction is the narrowest possible. OCE-DET-2020-02 does not even attempt to satisfy this demanding

constitutional standard. Hence, we respectfully posit that the crucial "likelihood of success on the merits" prong of the preliminary injunction gauntlet is met in this case.

B) IRREPARABLE HARM

The concept of "irreparable harm" in the context of equitable injunctive relief refers to an injury that is not subject to compensation by traditional means such as through monetary compensation. Ross-Simons of Warwick, Inc., 102 F.3d at 18. Precisely that is the type of injury that plaintiffs face.

Shall OCE-DET-2020-02 be allowed to stand, **plaintiffs would lose their First Amendment right** to disseminate their political views in electronic media with an impending election and substantial limitations to traditional in-person campaigning activities due to the COVID-19 pandemic. The law is clear in this regard, "**[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury**". Elrod v. Burns, 427 U.S. 347, 373 (1976) (emphasis added)

C) BALANCE OF THE HARDSHIPS

This part of the analysis requires to compare and contrast how the movant would be affected by the denial of injunctive relief with how the respondent would be affected if the injunction is issued. Mercado-Salinas v. Bart Enters. Int'l, 671 F.3d 12, 19 (1st Cir. 2011). To the extent that plaintiffs do not question defendants legitimate and commendable regulation of government owned/controlled electronic media to ensure that public funds are not perverted for political purposes, there are no hardship on the government's part.

Based on the above, in the instant case there are no hardships to balance as only plaintiffs are affected.

D) PUBLIC INTEREST CONSIDERATIONS

It is settled law that "[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction". Weinberger v. Romero-Barceló, 456 U.S. 305, 312 (1982). This is understandable given the fact that many of the cases in which an injunctive relief is sought involve important government or corporate policy matters that affect many more people than those actually named in the caption of the case. Where First Amendment political speech is involved, public interest considerations will certainly be in play.

Just as the ying and the yang of ancient Chinese philosophy, the logical counterpart to plaintiffs right to disseminate their political views on social media is the electorate right to **receive** that political speech. Regardless of whether or not the public at large believes or agrees with the political messaging of the plaintiff, the fact that that message is out there promotes a full democratic process by allowing voters to take informed decisions at the voting booth.

At the end of the day, we fail to see how the public interest is benefited by the regulation of the content of the expressions that citizens make on the internet, as such regulation is expected in North Korea, the People's Republic of China or similar places, not in Puerto Rico.

WHEREFORE it is respectfully requested from this Honorable Court that the relief requested in the foregoing action be hereby **GRANTED**.

CERTIFICATE OF SERVICE

It is hereby certified that true and exact copy of the foregoing will be served on the defendant along with the service papers.

In San Juan, Puerto Rico this 12th day of August, 2020.

RESPECTFULLY SUBMITTED,

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