DICKINSON WRIGHT PLLC

INTERNATIONAL SQUARE
1825 EYE STREET, NW, SUITE 900
WASHINGTON, DC 20006
TELEPHONE: 202-457-0160
FACSIMILE: 844-670-6009
http://www.dickinsonwright.com

CHARLIE SPIES
CSpies@dickinsonwright.com
202.466.5964

September 23, 2020

Jeff S. Jordon, Esq.
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
1050 First Street NE
Washington, DC 20463

VIA E-MAIL: cela@fec.gov

Re: MUR 7772: Response for Salvemos A Puerto Rico

We write on behalf of Salvemos A Puerto Rico and Joseph Fuentes, in his official capacity as Treasurer, (collectively "the Respondent") in response to a complaint alleging that the Respondent violated the Federal Election Campaign Act of 1974, as amended ("FECA") and Commission regulations by coordinating communications with Comité Amigos Pedro Pierluisi ("the Campaign"), the campaign committee for Pedro Pierluisi's bid for Governor of Puerto Rico. The Commission has no jurisdiction over this issue, as the candidate allegedly involved is not a candidate for federal office, and assuming *arguendo* that the Commission did have jurisdiction, the Complaint cannot show that any activity conducted by Respondent was at the request or suggestion of Pierluisi or any other candidate. Therefore, we ask the Commission to find no reason to believe and promptly close the file.

I. Facts and Legal Analysis.

Salvemos A Puerto Rico is an independent-expenditure-only political committee registered with the Federal Election Commission.[1] On June 25, 2020, Respondent received two separate contributions from two different entities: Foundation for Progress ($75,000) and Fundación Pro Igualdad ($175,000), both 501(c)(4) social welfare organizations (collectively "The Foundations"). Subsequent to receiving those contributions, Respondent made two expenditures, one for political consulting services and the other for media consulting services.[2] On August 4, 2020, the Foundations' corporate statuses were revoked for alleged deficiencies in

[1] *See* FEC Form 1, Salvemos A Puerto Rico (last updated June 23, 2020), *available at* https://docquery.fec.gov/cgi-bin/forms/C00746594/1414600/.

[2] These payments will be on the Respondent's October Quarterly Report. Contrary to the Complainant's assertions, the Respondent has not made any independent expenditures supporting the Campaign.

their initial filings with Puerto Rico. However, on September 1, 2020, the Foundations' corporate statuses were restored, with the Judge in the matter stating that there was circumstantial evidence that showed that the State Department's action to cancel the corporate registrations of the Foundations were "an act of retaliation for the content of the political message" the Foundations were supporting.[3]

The Complaint claims that Respondent has several ties to the Campaign. First, it alleges that Fuentes is close personal friends with Pierluisi. Second, it states that Pierluisi's sons, Anthony and Michael Pierlusi donated to a previous independent-expenditure-only political committee, PRP INC PAC,[4] operated by Fuentes. Last, it claims "available evidence presumably indicates" that a Campaign staffer, Luis Anthony Pacheco, tweeted the same general slogan previously used by Respondent: "Necesitamos un verdadero estadista."

Based on this information above, the Complaint alleges that the Respondent is impermissibly coordinating with the Campaign, and that the Respondent was being used to "funnel funds" from 501(c)(4) organizations to the Campaign. However, there are two significant issues with these accusations: (1) the Commission does not have jurisdiction over this Complaint, as the allegations do not involve a federal candidate for office; and (2) this allegation is inaccurate, speculative, and without merit.

An expenditure or communication is considered coordinated under Commission regulations if it is made "in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents."[5] Based on the statutory text alone, it is abundantly clear that this Complaint should be dismissed.

First, the Commission lacks jurisdiction over the facts at issue in this matter. Under Commission regulations, a candidate is defined as "an individual seeking nomination for election, or re-election, to a *federal office* who receives contributions or makes expenditures that exceed $5,000."[6] Further, FECA defines a "federal office" as the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress.[7] Pierluisi, the candidate at issue, is running for Governor of Puerto Rico, which is not a federal office.[8] Therefore, regardless of the merits of this claim, the Commission has no enforcement jurisdiction in this matter.

Even assuming *arguendo* that the Commission has enforcement jurisdiction and FECA applies to the described activity, the Complaint's allegations are not accurate. Respondent

---

3 *See Fundación Pro Igualdad and Foundation for Progress v. Commonwealth of Puerto Rico*, Case No. 04243 (Sept. 1, 2020), attached as Exhibit A.

4 We will not waste the Commission's time by discussing PRP, INC PAC in the body of the Response. However, the Complaint has used PRP INC. PAC as "evidence" for its coordination claim, by claiming that PRP "presumably" stood for named after Pedro Rafael Pierluisi. This is inaccurate. PRP stands for Progreso de Puerto Rico, and was in no way affiliated with Pierluisi. We are happy to provide the Commission with documentation to show as much if the Commission needs it.

5 11 C.F.R. § 109.20(a)

6 11 C.F.R. § 100.3

7 52 U.S.C. § 30101(3).

8 *Id*.

legally accepted contributions from the Foundations, and then made two expenditures, one for political consulting and the other for media consulting services, completely independent of the Campaign. The Respondent has been in full legal compliance with applicable FECA and Commission regulations and will report these expenditures with the Commission in a timely manner on its next quarterly report.

Additionally, the Complaint has not provided a shred of evidence that *any* of Respondent's activities were done "in cooperation, consultation, concert with, or at the request or suggestion of" Pierluisi or any of the Campaign's agents. In fact, the Campaign is not mentioned having *any* affiliation with Respondent other than so-called "close personal ties" with Mr. Fuentes, Respondent's treasurer, and a Campaign staffer that happened to use the same phrase in a tweet that had previously used by Respondent.

With regards to Mr. Fuentes' personal relationship with Pierluisi, a friendship with a candidate does not equate to a campaign finance violation. There is no evidence to indicate that Mr. Fuentes was in any way an agent for the Campaign while serving as Treasurer for Respondent. An "agent" is defined as "any person who has actual authority, either express or implied, to engage in [certain] activities on behalf of the candidate or officeholder."[9] "Actual authority" is created by "*manifestations of consent* (express or implied) made by the principal to the agent." [10] Mr. Fuentes has and has never been an agent of the Campaign and his activities on behalf of Respondent are completely independent of his personal relationship with Pierluisi. There is also no Commission rule or regulation that prohibits individuals with friendly personal relationships with a candidate from independently supporting them. Certainly, such regulation would have significant First Amendment concerns. Finally, and most importantly, there is no evidence provided by the Complaint that shows that any of Mr. Fuentes' activity on behalf of Respondent was done in violation of FECA or Commission regulations. Given the lack of evidence to show that Mr. Fuentes' relationship with Pierluisi goes beyond a personal friendship, any investigation is without merit.

On the issue of the Campaign staffer's use of Respondent's supposed catch-phrase, "Necesitamos un verdadero estadista," this is nothing more than speculation on the Complainant's end. Respondent does not have a "slogan" or "catch phrase," and the mutual use of such phrase to describe Pierluisi by Respondent and the Campaign staffer was purely a coincidence. The phrase "necesitamos un verdadero estadista" translates to "we need a true statehooder," which is used frequently to describe Puerto Rican candidates that support statehood for Puerto Rico. It not a unique phrase that is only identifiable with the Respondent, such as President Donald Trump's "Make American Great Again" or President Barack Obama's "Yes We Can."[11] Stating that Puerto Rico needs "a true statehooder" is nothing more than a shared opinion by the Campaign staffer and the Respondent, and does not create a link that the Respondent is illegally coordinating with the Campaign.

---

[9] 11 C.F.R. §§ 109.3(b) and 300.2(b)(3).

[10] Explanation and Justification (E&J): Definitions of ''Agent'' for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, FEC (2006), *available at* https://transition.fec.gov/law/cfr/ej_compilation/2006/2006-1.pdf.

[11] *See generally* Culture Desk, *Yes We Can, A History*, THE NEW YORKER (Nov. 3, 2008) (calling "Yes We Can" President Obama's "catchphrase" and "slogan.").

Finally, and most importantly, the Complaint *still* needs to show that Respondent's acceptance of the contributions and its subsequent expenditures were made in concert with, or at the request or suggestion of the Campaign. While the Complaint is extensive, that necessary information to warrant an investigation is nowhere to be found.

II. Conclusion.

Ultimately, the Complainant is hoping that the Commission will create substance of its threadbare and unsupported Complaint. That is not the Commission's job. The Commission may find "reason to believe" only if a Complaint sets forth sufficient specific facts which, if proven true, would constitute a violation of FECA or Commission regulations.[12] The Complaint provides no facts beyond its own assumptions and speculation to show that Respondent engaged in any violation of FECA or Commission regulations. Therefore, we ask the Commission to dismiss this Complaint and promptly close the file.

Respectfully submitted,

Charlie Spies
Katie Reynolds
Counsel to Salvemos a Puerto Rico

[12] Statement of Reasons of Commissioners Mason, Sandstrom, Smith, and Thomas at 1, MUR 4960.

EXHIBIT A

COMMONWEALTH OF PUERTO RICO GENERAL
COURT OF JUSTICE
COURT OF FIRST INSTANCE
SAN JUAN PART

FUNDACIÓN PRO IGUALDAD, INC., FOUNDATION FOR PROGRESS, INC., through their authorized representative Alvaro Pilar Vilagrán **PLAINTIFF PARTY** V. COMMONWEALTH OF PUERTO RICO; STATE DEPARTMENT **DEFENDANT PARTY**	**CIVIL NO.**: SJ2020CV04243 **SESSION** ROOM: 907 **RE**: DECLARATORY JUDGMENT; PRELIMINARY AND PERMANENT INJUNCTION

RESOLUTION AND ORDER

The Court has before its consideration a *request for preliminary injunction* filed by Fundación Pro Igualdad, Inc. Foundation and the Foundation for Progress, Inc. for the purpose of ordering the State Department to immediately restore the certificates of incorporation of the claimant entities that were issued on June 10, 2020. As alleged, the then Secretary of State, Mr. Elmer Román González, cancelled those certificates with the intention and effect of illegally suppressing the free exercise of political expression of these foundations. At the time of the governmental action at issue, the applicants carried out a campaign to publish announcements and contributions to political action committees expressing the disapproval of the governor and candidate in primary to the governorship, Hon. Wanda Vazquez Garced.

After examining the request for preliminary injunction under remedy of Rule 57 of Civil Procedure, *infra,* and the applicable constitutional rules, we conclude that the claimant has demonstrated that it is likely to prevail in its claim and that, if the remedy requested is not granted in the face of the imminence of the holding of an election event, this case could become academic. It arises from the file and the facts determined at this stage of the procedures that, although the certificates of incorporation may have had deficiencies, the unilateral action of the then Secretary of State to cancel the registration certificates of those foundations — without prior notice or notification — had the direct consequence of unconstitutionally suppressing the political expression of those foundations.

Therefore, in order to restore the fundamental right to freedom of expression that shelters those entities and for the purpose of preventing the constitutional damage caused by such governmental action from being aggravated during the remaining proceedings of the case, the Court issues the preliminary injunction requested by the applicant. In particular, the Secretary or acting Secretary of State is ordered to immediately restore registration certificates for Fundación Pro Igualdad, Inc. and

Foundation for Progress, Inc. If there are any deficiencies in the administrative record of such corporate entities, it must then issue a notification and grant them the opportunity to be heard, in accordance with the requirements of due process of law.

Below, we outline the relevant procedural actions regarding the matter brought before this court for our consideration.

I.

On August 13, 2020, Fundación Pro Igualdad, Inc. and Foundation for Progress, Inc., through their authorized representative Mr. Alvaro Pilar Vilagrán ("plaintiff"), filed a sworn complaint against the Department of State of the Commonwealth of Puerto Rico, through the then Secretary of that entity, Mr. Elmer Román González, in his official capacity. In summary, they argued that this government agency arbitrarily canceled, in violation of due process of law, the corporate registration of the plaintiff entities in order to deprive them of the exercise of the fundamental right to free expression/freedom of speech.

Thus, after examining the lawsuit filed in this case, and in accordance with Rule 57 of Civil Procedure, 32 LPRA Ap.V, on the same day the Court issued an Order and Citation in which it scheduled a hearing via video conference for August 26, 2020, for the purpose of determining whether the preliminary injunction remedy should be granted, which it warned could be consolidated with the permanent injunction hearing. The Court requested that plaintiff personally serve the defendant with said Order and Summons along with a copy of the complaint, its attachments and the summons in accordance with Rule 4.4 Civil Procedure, *supra.*

In turn, by means of said Order and Citation, the plaintiff was required to prove to the Court the personal service of these documents prior to the celebration of the referred hearing, in the same manner allowed for the service and amendment of the summons under Rules 4.7 and 4.8. We note that Rule 57.2 of Civil Procedure, *supra*, provides that notice shall be made in the same manner as provided in Rule 4.4, *supra*, by delivering to the adverse party a copy of the order together with a copy of the petition for injunction. In the aforementioned Order and Citation, the Court required the legal representative of the defendant to file a notice of appearance and answer the complaint through the Unified Case Management and Administration System (SUMAC) at least three (3) days prior to the hearing.

The next day, the plaintiff filed a *Motion Certifying Service of Summons and Notice of Order*. In this motion, it stated that on August 14, 2020 "the defendant's summons was served with a copy of the Complaint and all its attachments. Moreover, a copy of the Order and subpoena issued on August

13, 2020 was served together with the Instructions on Videoconferencing, as ordered by the Court". In addition, it indicated that "in compliance with Rule 4.4(g) of Civil Procedure (32 LPRA App. V), the Secretary of the Department of Justice was notified by delivery of the copy of the summons and Complaint, with all attachments, as filed with the Department of State. A copy of the Order and subpoena was also delivered along with the Instructions on Video Conferencing, as filed with the Department of State." Entry No. 6 of the electronic file. In support of the foregoing, plaintiff attached to the motion the summons and other documents, as filed with the Department of State, and which service was sworn to at the San Juan Judicial Center at 2:25 p.m. on August 14, 2020, and the same documents as filed and stamped as received at the Department of Justice on the same day at 2:52p.m. See Attachments 1 and 2, entry No. 6 of the electronic file.

After several procedural steps taken by the plaintiff that are not pertinent at this time, on the same day of the injunction hearing - and about an hour and a half prior to the hearing - "the Government of Puerto Rico, itself and on behalf of Department of State," appeared for the first time in this case through a *Motion* to *Dismiss*. See entry No. 16 of the electronic file, filed at 11:48 a.m. In essence, defendants argued that they were not submitting to the jurisdiction of the Court, since they asserted that the Department of State did not have legal personality of its own and the plaintiffs had failed to include an indispensable party, namely, the Commonwealth of Puerto Rico and failed to issued and served a summons on the Commonwealth of Puerto Rico.

Additionally, defendants argued that the plaintiffs lacked standing to sue because these were entities that never acquired legal personality, thus the lawsuit was not justiciable. In connection with this approach, which seeks to demonstrate the lack of legal standing of the plaintiff, the State asserted that the plaintiffs "intend to ignore-as they did when they completed the failed Certificate of Incorporation-the statutory provisions relating to the incorporation of a corporation" under the umbrella of the General Law on Corporations, Law No. 3, which was passed in December 2000. 164-2009, as amended, and *Regulations No. 8688 of January 14, 2016, Regulations of the Electronic Registry of Corporations and Entities General Law of Corporations of Puerto Rico Law No. 164-2009, as amended* ("Regulations 8688"). In response to this argument, defendant added that the statutory and regulatory requirements set forth for the creation of corporations in Puerto Rico are exhaustive and indispensable, and therefore the Secretary of State has "the power to qualify the documents" and even to "cancel and revoke any certificate of incorporation that does not meet the minimum requirements set forth in the Act and the Regulations." *Id.* p. 3.

Finally, the State requested that the captioned claim be dismissed pursuant to the provisions of Rule 10.2 of Civil Procedure, *supra*, particularly on the following grounds (2) lack of jurisdiction over the person; (5) failure to assert a claim justifying the granting of a remedy; and, (6) failure to accumulate an indispensable party.

Upon receipt of that motion and another motion filed by the defendant to quash a subpoena addressed to the former Secretary of State, the Court issued an Order that same day stating that "both motions filed by the defendant in the past few minutes shall be discussed at today's video conference hearing."

At the aforementioned hearing, the legal representatives of the plaintiff and of the State appeared, the latter without submitting to the jurisdiction of the Court. The Court warned that, since the *Motion to Dismiss* had been filed shortly before the hearing and was outside the time period provided for in the Order and Citation, it had not yet had the opportunity to examine its arguments with the thoroughness that this warranted. Furthermore, we emphasized that even though the motion to dismiss had been filed outside of the term provided for it, we recognized that the State made some jurisdictional arguments that may be invoked at any time.

In view of this clarification, the Court granted both parties ample opportunity to state their position on the jurisdictional issues invoked by the State in the motion to dismiss, as well as on the preliminary injunction requested by plaintiff and the evidence they requested we take into consideration for these purposes.

In relation to the merits of the request for injunction, it emerged from that hearing that here was no controversy between the parties regarding the authenticity and admissibility of the attachments that accompanied the lawsuit, in reference to the different documents issued by the State Department during the administrative process regarding the incorporation and subsequent cancellation of the plaintiff corporations. In addition, the *Motion to Take Judicial Notice of Adjudicative Facts* filed by the plaintiff on August 25, 2020 was discussed. Entry No. 14 of the electronic file, as well as the documents attached to such motion. Such documents consist of a *Report of Income and Expenses* before the Federal Elections Commission from a political action committee called Salvemos a Puerto Rico and a sworn complaint filed before said federal entity by the director of the Governor's primary campaign. With respect to these, the defendant affirmed that it had no objection to the Court's evaluation of the attachments contained in the brief and that we grant them the evidentiary value that we should grant these the probatory weight we deemed them to have, within the context of the controversy presented, although it did express object with respect to the certain facts proposed by the

plaintiff.

In order to allow us to carefully examine the parties' submissions at the above-mentioned hearing along with the entirety of the documents in the electronic file, including the motion to dismiss filed by the Commonwealth shortly before the hearing, we reserve our determination on such disputes.

Thus, after a rigorous analysis of the jurisdictional issues invoked by the State and the answers given by the plaintiff in the aforementioned hearing, on August 27, 2020, we issued a Resolution and Order. In summary, we resolved that the State was right in its jurisdictional argument of lack of an indispensable party in view of the applicable procedural rules, since in any case it is the Commonwealth of Puerto Rico that has the capacity to sue and be sued when allegations are made to question or challenge the actions of the Department of State.

In turn, we provided that the manner of acquiring jurisdiction over the Department of State was governed solely by the provisions of Rule 4.4(f) of Civil Procedure, 32 LPRA App. In other words, the Commonwealth of Puerto Rico was to be included as a defendant and to effectuate the process of serving the summons -and also the Order and Citation issued under Rule 57.2- on that indispensable party "delivering a copy of the summons and complaint to the Secretary of Justice or his designee. Rule 4.4(f) of Civil Procedure, *supra*. See also, *Cirino González v. Adm. Corrección et al*. 190 DPR 14, 31-35 (2012); *Fred et al. v. ELA*, 150 DPR 599, 606-607 (2000).

Now, in the Resolution and Order of August 27, 2020, we clarified that the absence of an indispensable party in a lawsuit does not imply that a case should be automatically dismissed without further consideration. After all, Rule 18 of Civil Procedure, *supra*, provides that "any party may be added or removed by order of the court, on the initiative of the court or through a motion by a party at any stage of the proceedings under conditions that are fair."

In light of this, by means of the referred Resolution and Order we granted the plaintiff a term of 24 hours to file an amended complaint that would include as defendant the indispensable party that had not been included in the complaint, namely the Commonwealth of Puerto Rico, and to submit the corresponding summons form for its issuance by the Clerk. We warned that once this occurred, in view of the nature of the allegations in the complaint and the fundamental constitutional rights invoked by the plaintiff, the Court would shorten the terms to answer the complaint and show cause as to why the requested remedy should not be granted. We further warned that if plaintiff failed to comply with this mandate, the lawsuit would be dismissed as requested by the State in the motion to dismiss filed on August 26, 2020 and in accordance with the applicable procedural rules.

In compliance with this mandate, on August 27, 2020 the plaintiff filed an amended complaint

for the sole purpose of adding the Commonwealth of Puerto Rico as a defendant. It should be noted, however, that all allegations regarding the facts demonstrating the cause of action are analogous to those asserted in the original complaint. In addition, the same documents of the original complaint were attached to the amended complaint, including -at the request of the party and by authorization the Court- the affidavit signed on August 12 , 2020 by Mr. Álvaro Pilar Vilagrán.[1] Likewise, the plaintiff filed a summons form addressed to the Commonwealth of Puerto Rico, through the Secretary of Justice.

After reviewing the amended complaint, we issued an Order that same day authorizing the amendment of the allegations and ordering the Clerk to issue the attached summons. See entry No. 26 in the electronic file. In addition, pursuant to Rule 68.2 of Civil Procedure, *supra*, we shortened the applicable terms and granted the defendant until August 31, 2020 to appear in writing and show cause why the preliminary injunction requested by the plaintiff should not be issued, pursuant to Rule 57 of Civil Procedure, *supra*.[2]

On the other hand, we requested the plaintiff to personally serve said Order on the defendant, together with a copy of the Amended Complaint and its attachments and of the summons, as well as of the *Original Complaint*, the *Motion for Judicial Notice of Adjudicating Facts* and the *Motion for Proof of Representative Capacity*, with their corresponding attachments, as provided in Rule 4.4 of Civil Procedure, *supra*. In the interest of promoting the fair, speedy, and cost effective resolution of the captioned proceeding and the exercise of due diligence parties in a case that raises fundamental constitutional rights, the Court shortened the term provided in Rule 4.3 (c) of Civil Procedure, *supra*, and established a 24-hour deadline for the plaintiff to personally notify[3] the aforementioned

[1] See entries 21 and 22 of the electronic file. In this regard, it should be borne in mind in any event that Rule 57.1 of Civil Procedure, *supra*, requires only an affidavit for consideration of a provisional injunction issued without prior notice to the adverse party. On the other hand, a request for a preliminary *injunction* such as the one before us must be accompanied by "any document or affidavit necessary for its resolution, such as, for example, all documentary evidence which, together with the affidavits , **if** any, support the petition. D. Rivé Rivera, *Recursos Extraordinarios*, 2nd revised edition, Programa de Educación Jurídica Continua de la Universidad Interamericana de Puerto Rico, San Juan, p. 35 (1996) (emphasis added). In turn, and pursuant to Rule 57.2 of Civil Procedure, supra, and Rule 103(d)(2)(E) of Evidence, 32 LPRA App. VI, in order to hear a petition for preliminary *injunction* , the Court may consider "affidavits, depositions, and any other documentary evidence which, although inadmissible at trial, may lead the court to determine that the petitioner is entitled to the remedy claimed. D. Rivé Rivera, *supra*, p. 37. We therefore conclude that the affidavit supporting the allegations in the original complaint - which were not modified by the amended complaint beyond including the Commonwealth as a defendant - is a document that can be considered by the Court along with the other annexes to the complaint and whose authenticity and content has not been disputed by the defendant.

[2] In turn, we referred in the aforementioned Order that in the preliminary *injunction* hearing held on August 26, 2020, although the defendant had appeared a special manner, said party presented its arguments regarding the merits of all the claims in the captioned case for the record. Therefore, we granted the defendant an opportunity to present its argument the Court within that period as to whether in its opinion, it was necessary to hold an additional *injunction* hearing or whether the hearing held previously was sufficient to set forth its reasons for the appropriateness of the preliminary *injunction* requested by the plaintiff. Likewise, during the same term and at the defendant' option , we granted him the opportunity to inform the Court if he formally incorporated as his written appearance the *Motion to Dismiss* filed on August 26, 2020 by the Commonwealth of Puerto Rico through a special appearance, since in that *motion* he presented arguments regarding the merits of the appropriateness of the preliminary injunction, as well as the totality of the other claims filed by the plaintiff. In the event that the defendant adopts and formally incorporates the aforementioned dispositive motion, we clarify that the Court will consider the order to show cause complied with.

documents and prove that they have been served on the defendant in the manner set forth in Rule 4.7 of the Civil Procedure, *supra*.

The record shows that on August 28, 2020 the plaintiff personally served the summons and the referenced Order to show cause to the Commonwealth of Puerto Rico, through the Secretary of Justice. In addition, the plaintiff stated that he filed the amended complaint along with all of its attachments, as well as a copy of the original complaint and all of its attachments, including the affidavit that accompanied it.

On August 31, 2020, the *Commonwealth* of Puerto Rico appeared through a *Motion to Dismiss Amended Complaint*. First, it stated that it had been summoned in accordance with applicable law and that the jurisdictional issues had been corrected; correspondingly, it requested that the case be dismissed on substantive merits.[3]

The defendant reiterated its statements regarding the fact that the plaintiff foundations lacked active legitimation because they did not exist, since their incorporation did not comply with the minimum and indispensable requirements of the General Corporations Law. Defendant stated that plaintiffs did not suffer specific damages, since having been notified of the cancellation, they could have registered again according to the law in order to continue expressing themselves freely. Defendant also emphasized that since plaintiffs do not exist or have legal personality, they are not covered by constitutional rights such as due process of law and freedom of expression.

On the same date, the defendant also filed an *Opposition to Motion* for *Judicial Awareness of Adjudicative Facts*. In summary, it held that it was opposed to this court taking judicial knowledge of the facts proposed by plaintiff in said motion, because it understood that these are unrelated or impertinent to the controversy at hand, and therefore do not constitute adjudicative facts.

Shortly thereafter, the plaintiff filed a *Brief Reply to the "Motion to Dismiss the Amended Complaint and Opposition to Application for Judicial Awareness of Adjudicative Facts."* In particular, it held that the defendant's argument that the plaintiff foundations do not have standing to sue is simplistic and circular, since it would imply that the plaintiff would be in a state of defenselessness before a government action aimed at stripping it of its legal personality without granting it due process of law. As to the opposition to our taking judicial notice of certain proposed facts, it argued that these are pertinent to the controversies and litigious matters at hand, and being supported by official documents before a federal agency (FEC), their content is undisputable and easily corroborated.

---

[3] We emphasize that the defendant did not request another hearing, in accordance with what had been indicated to it that it could make this necessary in the Order of August 27, 2020. In any event, the arguments on the merits of the lawsuit included in this motion to dismiss are essentially the same as those that said party had already presented in its first motion and oral appearance at the hearing held on August 26, 2020.

Therefore, we consider that both the preliminary injunction request presented by the plaintiff and the motion of dismissal presented by the defendant have been submitted.

II.

Having evaluated the amended complaint and the motion to dismiss with the accompanying attachments, the documents included with the *Motion for Judicial Review of Adjudicative Facts* filed by the plaintiff and the opposition filed by the defendant,[4] as well as the arguments of the plaintiff foundations and of the Commonwealth at the hearing held on August 26, 2020, the Court makes the following findings of fact under Rule 57 of Civil Procedure, *supra*:

1. Salvemos a Puerto Rico is a Political Action Committee (P.A.C.) registered with the Federal Election Commission (FEC) under number C00746594.[5]

2. This political action committee published political ads disfavoring the candidacy of the Hon. Wanda Vázquez Garced of the New Progressive Party for Governor, in the context of the recently held primary elections in Puerto Rico.[6]

3. On June 10, 2020, the plaintiffs Fundación Pro Igualdad, Inc. and the Foundation for Progress, Inc. registered with the Department of State as domestic nonprofit corporations organized under the laws of Puerto Rico.[7]

4. The *Certificate of Incorporation of a Corporation Not Authorized to Issue Capital* on behalf of both foundations was filed and signed on June 10, 2020 under penalty of perjury by Mr. Alexiomar Rodriguez " in accordance with the law of Puerto Rico.[8]

5. In both certificates of incorporation, Fundación Pro Igualdad, Inc. and the Foundation for Progress, Inc. were designated as the resident agent and incorporator of these entities, respectively, and a PO Box was provided as their physical and mailing address.[9]

6. On June 10, 2020 and after payment of the fees, **the then Secretary of State, Elmer L. Román González, issued under his signature and seal two Certificates of Registration, in which he certified that the Fundación Pro Igualdad, Inc and the Foundation for Progress, Inc., respectively, are domestic nonprofit corporations organized under the laws of Puerto Rico.**[10]

---

4 As to the documents attached to the *Motion for Judicial Review of Adjudicative Facts*, we take them into consideration not necessarily on the basis proposed by the plaintiff, but rather on the basis of the standard provided in Rule 57.2 of Civil Procedure, *supra*, and Rule 103(d)(2)(E) of Evidence, *supra*, for the purpose of a preliminary *injunction.* We reiterate that, at this stage of the proceedings, the Court may consider "affidavits, depositions, and any other documentary evidence which, although inadmissible at trial, may lead the court to determine that the petitioner is entitled to the remedy claimed. D. Rivé Rivera, *supra*, p. 37.

5 *Motion to Take Judicial Notice of Adjudicative Facts* and *Motion Crediting Representative Capacity,* Attachment 1.

6 *Motion to Take Judicial Notice of Adjudicative Facts* and *Motion for Proof of Representative Capacity,* Attachment 2, p. 37.

7 See Attachments 1 and 8 of the amended complaint.

8 See Attachments 2 and 7 to the amended complaint.

9 See Attachments 2 and 7 to the amended complaint.

10 See Attachments 1 and 8 the amended complaint; Attachments I and II of the defendant 'Motion to dismiss.

7. According to the *income and expense* filed by the political action committee Salvemos a Puerto Rico before the Federal Elections Commission, the plaintiff Foundación por Igualdad, Inc. made a contribution in the amount of $75,000.00 in favor of the political action committee Salvemos a Puerto Rico, while the plaintiff Foundation For Progress, Inc. made a contribution in the amount of $175,000.00 in favor of the same committee. Both donations were made on June 25, 2020.[11]

8. On July 30, 2020, the Comptroller of Elections sent a communication to the Secretary of State, in which he referred to the fact that he had received a sworn request for an investigation stating that the plaintiff foundations were making electoral expenditures in Puerto Rico, despite the fact that they were registered in violation of the provisions of the General Corporations Law.[12]

9. On July 31, 2020, the campaign director of the Hon Wanda Vázquez Garced, Mr. Jorge Davila, signed a Sworn Complaint at the Federal Elections Commission that was filed with the FEC on August 5, 2020, alleging violations of the Federal Election Campaign Act (FECA) and the Federal Revenue Code (FRC).[13]

10. In the communication sent to the Secretary of State by the Electoral Comptroller, it appears that -after complainant Jorge Davila filed a complaint with the Office of the Comptroller of the Elections- that entity requested the Department of State to evaluate the compliance of Fundación Pro Igualdad, Inc. and Foundation for Progress, Inc. with the provisions of the General Corporations Law, Law No. 164 of December 16, 2009, as amended.[14]

11. On August 4, 2020, at 3:36pm, both petitioning foundations filed with the Department of State *a Certificate of Change of a Corporation's Designated Office* and a *Certificate of Change of a Corporation's Resident Agent*. On these certificates of change, a physical office address and a separate entity was provided as their resident agent.[15]

12. These four changes of certificates were signed by Mr. Alvaro Pilar Vilagrán, as an authorized officer of the claimant foundations.[16]

13. Despite having submitted the certificates of change of designated office and change of resident agent, the documents were not incorporated into the file of the aforementioned corporations, as it emerges from the electronic Registry of Corporations managed by the Department of State.[17]

---

11 *Motion for Judicial Review of Adjudicative Facts* and *Motion for Certification of Representative Capacity, Exhibit* 1.
12 *Motion for Judicial Review of Adjudicative Facts* and *Motion* for Certification of *Representative Capacity,* Attachment 2, p. 49; Attachment III of the defendant's motion for dismissal.
13 *Motion to Take Judicial Notice of Adjudicative Facts* and *Motion for Proof of Representative Capacity,* Exhibit 2, pp. 1-5
14 *Motion to Take Judicial Notice of Adjudicative Facts* and *Motion for Proof of Representative Capacity,* Attachment 2, pp. 3, 49.
15 See Attachments 3, 4, 9 and 10 of the amended complaint; Attachments VI and VII of the defendant's motion to dismiss.
16 See Attachments 3, 4, 9 and 10 of the amended complaint.
17 See Attachments 5 and 11 to the amended complaint.

14. On August 4, 2020, at 7:46 p.m. and 7:49 p.m., the Department of State issued two certifications signed by then-Secretary Elmer L. Roman Gonzalez by which he cancelled the certificates of incorporation of both Foundation for Progress, Inc. and Fundación Pro Igualdad, Inc. "as provided in Articles 1.01 and 1.02 of the General Corporation Law [...] because the entity did not meet the requirements for incorporation."[18]

15. As also indicated identically in both documents:

> The aforementioned Article establishes those minimum requirements that every certificate of incorporation shall contain. After conducting an investigation on the corporation, we conclude that the mandatory and/or indispensable requirements were not met. First, the physical address of the designated office and the resident agent were completed with postal addresses. In addition, the same entity whose incorporation was intended was appointed as incorporator, so that such entity lacks legal capacity to act as incorporator. A natural person or legal entity that has not been created cannot appear as incorporator.[19]

16. The Department of State did not officially notify the plaintiff corporations of any defects or errors in the documents submitted prior to the cancellation of their corporate registration. Likewise, it did not require the correction of any document submitted for the incorporation process prior to the cancellation of the mentioned certificates.

17. As of the date of cancellation of the certificates of incorporation of the petitioning foundations, they were actively participating in the publication of advertisements and contributions to political action committees, which expressed disapproval of the governor and gubernatorial primary candidate, Hon Wanda Vazquez Garced, to occupy the position she aspired to.[20]

18. The cancellation of their certificates of incorporation had the effect of preventing the plaintiff entities from continuing to participate in the political process.

19. On August 5, 2020, Mr**.** Jorge Davila**,** campaign director for the Hon**.** Wanda Vazquez Garced, filed with the Federal Election Commission the complaint that he signed under oath on July 31, 2020. **This sworn complaint refers to the investigation conducted by the Department of State and includes as attachments some documents that were generated after the date of his oath, such as the certificates of cancellation of the plaintiff entities that were issued by the Secretary of State on August 4, 2020**.[21]

18 See Attachments 6 and 12 to the amended complaint; Attachments IV and V to the defendant's motion to dismiss.
19 See Attachments 6 and 12 of the amended complaint.
20 See paragraph 17 of the amended complaint and Attachment 13 of the amended complaint.
21 *Motion to Take Judicial Notice of Adjudicative Facts* and *Motion for Proof of Representative Capacity,* Attachment 2, pp. 3, 47.

20. There is no specific administrative process or remedy for requesting a review of the cancellation of incorporation records - in the circumstances in which it occurred in this case - with the Department of State itself.

21. The gubernatorial primaries - for which the petitioning foundations made campaign expenditures and contributions - were held on August 9 and 16, 2020.

22. After the filing of the captioned lawsuit, Mr. Elmer Román González resigned as Secretary of State.

23. The plaintiffs, as they have done previously, intend to continue to freely and voluntarily exercise their rights of political expression, in view of the general elections scheduled for November 3, 2020 in the jurisdiction of Puerto Rico.[22]

In light of the above findings of fact, we shall proceed to examine the law applicable to preliminary injunction request before the consideration of this Court.

III.

Rule 53 of Civil Procedure, 32 LPRA App. V, R.53, provides that the issuance of a preliminary injunction shall be governed solely by Rule 57 and special laws applicable in any case where the principal remedy sought is a permanent injunction. In turn, in the context of a lawsuit whose principal purpose is not the granting of an injunction, the issuance of an order to do or desist from doing as a provisional and supplementary remedy to secure judgment shall be governed by the provisions of Rule 56.

On the other hand, the preliminary injunction is an extraordinary resource in equity that today is governed in procedural terms by the provisions of Rule 57 of Civil Procedure, 32 LPRA App. V, as well as by Articles 675 to 695 of the Code of Civil Procedure, 32 LPRA §§ 35-66. According to the Supreme Court's decision, the requirements for its issuance are stricter and more rigorous than those provided by Rule 56 on provisional remedies in securing a judgment. See *Asoc. de Vecinos de Villa Caparra v. Asoc. Fomento Educativo*, 173 DPR 304 (2008).

In essence, the main purpose of this recourse is to maintain the *status quo* between the parties until the trial is held on its merits, in order to avoid the actions of the defendant turning the eventual judgment into an academic one, or causing the petitioner significant damages during the course of the case. *Cobos Liccia v. De Jean*, 124 DPR 896 (1989) *Mun. de Loiza v. Sucn. Marcial Suárez*, 154 DPR333 (2001); *Municipality of Ponce v. Rosselló*, 136 DPR 776 (1994). In Puerto Rico, the granting of an injunction is not *ex debito justitiae*, but rests on the sound discretion of the court and should only be granted with great caution and in those cases where the need and reasons for issuing it are clear. *A.P.P.R. v. Superior Court*, 103 DPR 903, 906 (1975).

[22] See paragraph 19 of the amended complaint and Attachment 13 of the amended complaint.

That discretion shall be exercised by weighing the needs and interests of all parties involved in the dispute. *Mun. de Ponce v. Rosselló, supra*.

In determining whether or not to issue the preliminary injunction , the court must weigh the following criteria: (1) the nature of the damages that may be caused to the parties if the injunction is granted or denied ; (2) its irreparability or the existence of an adequate legal remedy; (3) the likelihood that the party seeking the injunction will eventually prevail upon resolution of the case; (4) the likelihood that the case will become academic if the injunction is not granted ; and (5) the possible impact on the public interest of the remedy sought. Rule 57.3 of Civil Procedure, 32 LPRA App. V; *Pérez Vda. Muñiz v. Criado*, 151 DPR 355 (2000); *Mun. de Ponce v. Rosselló*, *supra*. Such requirements must be present in order for the Court to grant a request for injunction and it is the plaintiff's duty to prove their existence. *P.R. Telephone Co. v. Superior Court*, 103 DPR 200 (1975).[23]

However, not all of the above criteria need to be present to grant a remedy such as the one requested. Rather, these factors must be applied taking into consideration the specific situation before the Court. It is a remedy in equity and its granting rests on the exercise of sound judicial discretion, which will be exercised by weighing the needs and interests of all parties involved in the dispute. *Autoridad de Puerto Rico v. Superior Court*, 103 DPR 903 (1975). Judicial discretion is the fundamental factor in determining the balance of expediency.

To establish the balance of interests between the parties, it is necessary to take into consideration if the plaintiff will suffer irreparable damages if the preliminary injunction is not issued before the merits of the controversy are resolved. Wright &Miller, *Federal Practice and Procedure*, § 2948, p.431. Regarding this, Moore states "what constitutes a showing of irreparable harm in particular cases is, of course, highly circumstantial." Moore's *Federal Practice*, § 65.04(1), p. 65-42. The job of the judge of the facts in cases in which a provisional remedy is requested must be characterized by flexibility and creativity: "In exercising its discretion the court ordinarily takes into consideration the relative importance of the rights asserted and acts sought to be enjoined, the irreparable nature of the injury allegedly following from the denial of preliminary relief, the probability of ultimate success or failure of suit, and the balancing of damage and convenience generally." *West's Federal Practice Manual*, Vol. (1970). Sec. 7654, p. 630.

---

23 In turn, Rule 57.2(b) of Civil Procedure, *supra*, provides that

> Before or after the commencement of the hearing to consider a preliminary *injunction* petition, the court may order that the trial on its merits be consolidated with such a hearing. Even if no consolidation is ordered, any evidence admitted at the preliminary injunction hearing that is admissible at trial on the merits becomes part of the case file and does not have to be presented again on the day of the trial. The court, upon issuing its decision, shall immediately issue an order, specifying the facts it has determined to be proven at that stage and ordering further proceedings that are fair in the lawsuit.

Therefore, the Supreme Court has been emphatic in requiring primarily that before issuing an injunction, whether preliminary or permanent, the courts consider the existence of some other effective, complete and adequate remedy in law. If it exists, then the damage will not be considered irreparable. *Perez v. Muniz v. Criado*, 155 DPR 355 (2000), citing A.*P.P.R.* v. *Superior Court*, 103 DPR 903 (1975); *Franco v. Oppenheimer*, 40 DPR 153 (1929); *Martinez v. P.R. Ry. Light & Power Co.* 18 DPR 725 (1912). For example, an adequate legal remedy is considered to be that which may be granted in an action for damages, in a criminal action, or in any other available action. See *Mission Ind. P.R. v. J.P. and A.*A.A. 142 DPR 656 (1997).

Indeed, the guiding principle in granting an application for an injunction is the existence of a real threat of suffering some harm for which there is no adequate remedy in law. See *Franco v. Oppenheimer*, 40 DPR 153 (1929); *Martinez v. P.R. Ry. Light & Power Co*. 18 DPR 725 (1912). Although there is no definition of the concept of "adequate remedy in law," the Supreme Court has developed certain parameters to guide it. It is considered that there is no adequate remedy in law, if: (1) the remedy provided for in the ordinary, judicial or administrative proceedings is not sufficiently prompt and adequate to prevent the granted remedy from being academic when the final judgment is rendered, *Compañía Popular de Transporte v. Suárez*, 52 DPR 250 (1937); (2) the remedy in damages cannot compensate the plaintiff because the latter is exposed to irreparable damages, *Loíza Sugar Company v. Hernaiz y Albandoz*, 32 DPR 903 1924); (3) the petitioner is exposed to a multiplicity of litigations - not that the petitioner will likely have to file several lawsuits against the defendant, but that none of these will definitively end the dispute between the parties, *Central Cambalache, Inc. v. Cordero, Admor*. 61 DPR 8 (1942); (4) it is difficult to specify the amount of compensation that might provide an adequate remedy to the petitioner, 32 LPRA § 3523; and; (5) it is in the interest of preventing violation of constitutional rights. 32 LPRA § 3524; *Arroyo v. Rattan Specialties, Inc.* 117 DPR 35 (1986).

The determination of what constitutes an adequate remedy in law will depend on the facts and circumstances of each particular case. *Auth. of Lands v. Moreno Dev. Corp.* 174 DPR 409 (2008). The granting of an *injunction* rests on the exercise of sound judicial discretion that be exercised by weighing the needs and interests of all parties involved in the dispute. *Mun. de Ponce v. Governor*, 136 DPR 776 (1994). Since this is a remedy that in the ordinary procedure is not obtained until it is the plenary trial, it must be issued with sobriety and only upon a demonstration of clear and intense violation of a right. *A.R.P.E. v. Superior Court*, 103 DPR 903 (1975).[24]

[24] In that regard, in an opinion issued in 1830, Justice Baldwin expressed the following:

> There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction: but that will not be awarded in doubtful cases, or new ones, not coming within well-established principles; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it. It will be refused till the court are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act; in such a case the court owes it to its suitors and its own principles, to administer the only remedy which the law allows to prevent the commission of such act. See, *Bonaparte v. Camden & A.R. Co., 3* F.Cas. 821, 827 (C.C.N.J. 1830), quoted in Wright &Miller, *Federal Practice and Procedure* § 2942.

It is known that in order for the party claiming to have suffered actual harm must prove it. Mere allegations are not sufficient to prove that an injury was suffered. Thus**,** it is a well-established rule in our jurisdiction that allegations do not constitute evidence. It is imperative that it be proven with reliable evidence that the person did in fact suffer an injury that impaired his/her rights. The plaintiff cannot merely rest on its allegations, but must put the court in a position to determine, without having to resort to speculation, the damages actually suffered. Wright & Miller, *Federal Practice and Procedure* § 2948.1.

It is known that in order for the party claiming to have suffered actual harm it must so prove it. Mere allegations are not sufficient to prove that an injury was suffered. Thus**,** it is a well-established rule in our jurisdiction that allegations are not proof. It is imperative that it be proven with reliable evidence that the person did in fact suffer an injury that impaired his rights. The plaintiff cannot merely rest on its allegations, but must put the court in a position to determine, without having to resort to speculation, the damages actually suffered. See *Rodriguez v. Serra*, 90 DPR 776, 779 (1964).

Finally, the permanent injunction is the remedy that is issued in "the final judgment rendered in the suit after the trial on the merits. See David Rivé Rivera, *El injunction en Puerto Rico*, 53 REV. JUR. UPR 341, 352, 354 (1984); see also, 11A Wright& Miller, *Federal Practice and Procedure § 2941* (3d ed.) ("A preliminary injunction is effective until a decision has been reached at a trial on the merits. A permanent injunction will be issued only after a right thereto has been established at a trial on the merits"). "The factors [for the granting of the permanent injunction] are (1) whether the plaintiff has prevailed in the trial on the merits; (2) whether the plaintiff has any appropriate remedy in law; (3) the public interest involved; and (4) the balance of fairness." *Santini Gaudier v. EEC*, 185 DPR 522, 530 (2012). The permanent injunction is the final remedy a party may obtain from the court if it prevails on the merits of its claim. This feature of the permanent injunction distinguishes it substantially from the injunction *pendente lite*, since the latter:

> [T]his is a resolution issued by the court before the trial is held on its merits and, usually, after a hearing in which the parties have the opportunity to present evidence in support of and against the issuance of the judgment. The main purpose of this resource is to maintain the current state of affairs until the trial is held on its merits. The purpose of

> this is to ensure that the defendant does not use his or her conduct to promote a situation that would make the court's final decision academic. Eventually, the applicable substantive law in question will be heard in a plenary trial, as in any other type of action. *Next Step Medical v. Bromedicon*, 190 DPR 474, 486 (2014).

On the other hand, the Supreme Court has been emphatic in stating that when the administrative forum is not vested with legal authority to grant a remedy, the petitioner can go directly to the judicial forum to present his claim. *Guzmán et al. v. ELA, supra*, at 715. For example, in the context of a claim for damages, our highest judicial forum has stated that the award of damages by an administrative agency must be specially recognized in its organic law or when the award constitutes a remedy that promotes the public policy that the agency must implement. *Id.*

In accordance with the procedural rules set out above, the Court is in a position to rule on the preliminary injunction application filed by the plaintiff

IV.

A. Active legitimation of a corporate entity and due process of law

As a matter of threshold, the defendant in this case argued that the plaintiff entities never came to legal life, since the defects in their certificates of incorporation caused the incorporation itself of these entities to constitute a legal event or business *nulo ab initio*. In that sense, the defendant argued that the co-plaintiffs never existed as corporate entities and, therefore, argued that they lacked standing or substantive constitutional rights to bring the claims of caption. Since it is the same approach aimed at both challenging the active legal standing of the co-plaintiffs as well as to justify - on the merits - the validity of the contested government actions, we will consider these issues together.

Certainly, the courts only have the authority to resolve cases and disputes that are justiciable. "The doctrine of justiciability imposes certain limitations on our legal system's exercise of judicial power so that the courts can determine the appropriate moment for their intervention. *Speaker of the House v. Governor*, 167 DPR 149, 157 (2006)." [A] case is not justiciable when the parties do not have active standing, when the case is not mature, when a political question arises, or when the dispute has become academic. *Id*. Thus, we must examine whether appropriate to dismiss the captioned case due to the lack of standing of the co-plaintiffs, in accordance with the standard of adjudication applicable under Rule 10.2 of Civil Procedure.

Standing "is the legal reason that assists the plaintiff to appear in court and obtain a binding sentence". Rafael Hernández Colón, *Civil Procedural Law* § 1002 (2010). This requirement seeks to ensure "that the plaintiff is one whose interest is such that, in all likelihood, he will pursue his cause of action vigorously and bring the issues in dispute to the attention of the court." *Hernández Agosto v. Romero Barceló*, 112 DPR 407, 413 (1982). To satisfy the requirement of legitimate standing, a party

must demonstrate that (1) it has suffered clear and palpable harm; (2) the harm is real, immediate, and precise, not abstract or hypothetical; (3) there is a reasonable causal relationship between the action being brought and the alleged harm; and (4) the cause of action must arise under some law or the Constitution. Thus, in those lawsuits where there is no real dispute between the litigants, the courts must immediately order the dismissal of the case. *ELA v. Aguayo*, 80 DPR 552, 562 (1958).

With respect to the legal provisions relevant to the creation of a corporation or legal entity in Puerto Rico, Article 1.01(C) of the General Corporations Act establishes that the incorporation of a corporate entity is materialized and becomes effective "by the filing with the Department of State of a certificate of incorporation to be granted, certified, filed and registered pursuant to Article 1.03" of the Act. *LGC,* 14 LPRA sec. 3503. In this regard, Article 1.03 of the Act establishes the form and requirements for the filing of documents with the Department of State whose filing is required by legal mandate.

Subparagraph (A) of this article establishes who must sign any corporate document filed with the Department of State. On the other hand, with respect to documents that the law requires to be certified for filing, subsection (B) provides the forms in which such certification must be made. Similarly, Section 1.03(C) clarifies the obligations that arise from any requirement under the General Corporation Law for a particular document to be filed with the Department of State. To that end, Section 1.03(C) provides that the requirement for a document to be filed means that (1) in the case of a deed or certificate issued before a notary, the original signed document or certified copy shall be filed with the office designated by the Department of State; (2) that the corresponding fees shall be paid to the Department of State; (3) that, once the document has been filed and the fees paid, the date and time of the filing shall be recorded and that, after the document has been recorded and filed, such record of the date and time shall be conclusive as to the date and time of filing.

Subparagraph (C)(4) of the aforementioned Article 1.03 allows the Secretary of State to register a document at a later date and time, to the extent practical and if requested on or before filing. However, **it should** be **noted that the aforementioned subsection (C)(4) expressly prescribes the course of action to be taken by the Secretary of State in the case with a document containing an error or having any imperfection in its content.** In such cases, according to said article 1.03(C)(4), **the Secretary may refuse to accept such defective document and may withhold it and keep it in abeyance** "until a new corrected document is filed within five (5) days **after notice of the abeyance**, in which case the Secretary shall use the date and time of filing of the original document as 'the date of filing.'" *LGC*, Sec. 1.03(C)(4), 14 LPRA sec. 3503 (emphasis supplied). This subsection further

provides that "[t]he Department of State shall not issue a certificate of compliance while a corporation has any document on hold." *Id.* To complement the above, subsection (F) of Article 1.03 allows for the correction of a document filed when it constitutes "an inaccurate report of the corresponding corporate action or was issued, stamped, or certified, erroneously or defectively." *Id.*

Regulation 8688 reiterates this procedure to address and correct imperfections in documents filed before the Department of State. To that end, Article 11 of the referenced regulations allows the Secretary of State or designated official to refuse to register a document because it contains an error, omission or imperfection in its content. *Reg. No. 8688, Art. 11*. Note that both Article 1.03(F) of the General Corporations Law and Article 11(b) of Regulation 8688, provide that corrections of defective documents shall be effective as of the date of filing of the original document, "except for persons substantially and adversely affected by the correction" for whom the corrected document shall be effective as of the date of its filing *LGC, Art. 1.03(F); Reg. No. 8688, Sec. 11(b)*.

As examined, **the General Corporation Law does not provide authority to the Secretary of State to unilaterally cancel without prior notice a corporate entity after the Secretary himself issues the certificate of incorporation of such entity**. The law also does not prescribe an administrative proceeding before the Department of State for the correction of any defect in a certificate of incorporation, subsequent to the issuance of the certificate by the Secretary of State, the outcome of which may result in the cancellation of the certificate by the Secretary without prior notice. The Act only authorizes the Secretary to refuse to register documents that are filed with defects or imperfections. This power of the Secretary of State to refuse to register a document exists *prior to the registration and issuance of the document* by the Secretary, and in such cases, the Secretary has a duty to give notice of the defects in the document so that they may be corrected within five (5) days, as provided by Article 1.03(C)(4) of the Act.

In fact, it should be noted that the General Corporations Law only empowers the Secretary of State to cancel or revoke the certificate of incorporation of a corporate entity after registration, inscription, and issuance of same by the Secretary when (1) the corporation does not appoint a new resident agent due to the resignation the previous resident agent, pursuant to Section 3.06 the Law, and when (2) the annual report required by law is not filed two consecutive years .*LGC, Sections 3.06, 15.02, 14 LPRA §§.3546*, *3852*.

For example, with respect to the resignation and appointment of a resident agent, Section 15(b)(ii) of Regulation 8688 provides that, "[i]f the corporation designates a new resident agent within thirty (30) days after the filing of the certificate of resignation of the resident agent, the Secretary shall

void the Certificate of Incorporation … if it is a domestic entity." *Reg. No. 8688, sec. 15*. Similarly, with respect to the failure to file annual reports, sec. 23 of the regulations provides that, in first place, when an entity fails to comply with the submission of the annual report, the Secretary may impose a fine. *Id. Sec. 23(a*). Second, the entity may request a payment plan to satisfy the fine imposed and the annual report filing fee. *Id. Sec. 23(b)(i)(a*). The Secretary shall evaluate the proposed plan and may approve or deny it. Third, after approving the payment plan, the Secretary may cancel the entity's certificate of incorporation if the entity fails to comply.

However, in order to do so, the Secretary must first notify the corporation of the non-compliance and of the intention to cancel the certificate of incorporation or of authorization to do business in Puerto Rico. *Id. Sec. 23(a)(b)(i)(d*). This notification must be made by electronic mail to the resident agent's last known address. If the digital file does not have the resident agent's e-mail, the notification will be sent to the mailing address contained therein. The entity must become current with the payment plan within 60 calendar days as of the notice of default. After that time, the entity will be cancelled. *Id*.

On the other hand, it should noted that Article 9.13 of the General Corporations Law, 14 LPRA § 3713, gave the Superior Chamber of the Court of First Instance the power to revoke or cancel any certificate of incorporation by reason of abuse, misuse or disuse of corporate powers, privileges or franchises. That provision requires that such actions to seek such revocation or cancellation be brought in court by the Commonwealth through the Secretary of Justice.[25] In addition to the above-mentioned statutory and regulatory provisions, the Court has not been able to identify any other authorization for the administrative cancellation or revocation of the certificate of incorporation by the Secretary of State.

Once the document has been registered, recorded and issued by the Secretary of State, by mandate of law, it is presumed that the incorporation of the legal entity organized by means of said certificate is valid and correct. Therefore, paragraph (a) of Article 1.5 of the General Corporations Law provides that "[o]nce the certificate of incorporation is granted, ... and the fees required by law are paid, the person or persons who associate themselves in this way ... shall constitute, as of the date of said filing ... a corporate entity with the name appearing on the certificate." 14 LPRA sec. 3505. In turn, the subsection (B) of the cited Article 1.05 highlights the fact that **a corporate entity comes into legal life once the Secretary of State issues the certificate of incorporation of the same,**

[25] Note that the epithet lawsuit is not the procedure referred to in the aforementioned Article 9.13 of the General Law on Corporations, *supra*.

since this provision expressly establishes that "[t]he issuance of the certificate of incorporation by the Secretary of State shall constitute conclusive evidence that all the conditions required by this Law for incorporation have been satisfied, except in proceedings initiated by the Commonwealth to cancel or revoke the certificate of incorporation or to dissolve the corporation." *Id*. Thus, the cited provision reiterates what is established by Article 1.04 of the General Corporations Law, which states that **"[t]he copy certified by the Secretary of State of a certificate of incorporation or of any other certificate filed with the Department of State, as required by this Act, shall be *prima facie* evidence of (1) grant and production; (2) performance of all acts necessary to make the document effective; and (3) any other acts permitted or required by the document.** *14 LPRA § 3504.*

In this case, the plaintiffs Fundación Pro Igualdad, Inc. and Foundation for Progress**,** Inc. **were registered with the Department of State on June 10, 2020 as domestic nonprofit corporations under the laws of Puerto Rico, as evidenced by the Secretary of State's issuance of the corresponding certificates of registration.** Pursuant to aforementioned Articles 1.04 and 1.05 of the General Corporation Law**,** *supra***,** the certificates of incorporation - signed and stamped by the Secretary of State - are presumed to be valid and correct**. Once this occurred, a proprietary interest was generated in favor of the plaintiff foundations, and any divestment of such proprietary interest must comply with due process of law**.[26]

Undoubtedly, the proprietary interest or vested right that derives from a government certification- such as the one issued by the then Secretary of State in this case -is analogous to that generated by a license, authorization or permit issued by a government entity, after an application has been considered and approved. As explained by the Supreme Court, "while an application for a building permit does not grant an acquired right for approval, once said the permit has been issued and the applicant acts in accordance with the granted permit and incurs substantial expenses, it has acquired a right." *San Geronimo Caribe Project v. ARPE*, 174 DPR 640, 659 (2008).

We are aware that in its motion to dismiss, the defendant minimized the importance on the legal effect that the issuance of such certifications could have had in arguing that the plaintiffs "obtained a Certificate of Registration by means of the Department of State's electronic platform, knowing that their application did not comply with the legal requirements.[27] However, the fact is that said document is an official certification issued under the signature and seal of the Secretary of State.

---

[26] In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the U.S. Supreme Court established the criteria to be considered determining whether any protected rights exist and what process should be used prior to deprivation of such interests. These are: (1) the individual interest affected by must be determined; (2) the risk of an erroneous determination depriving the individual of the protected interest through the process used and the likely value of additional or different safeguards; and (3) the government interest protected summary action and the possibility of using alternative methods. See *Rivera Rodriguez & Co. v. Stowell Taylor*, 133 DPR 881 (1993).

[27] Electronic file entry no. 33, pp. 14-15

Regardless of the technical capabilities that the referenced electronic platform may have to discern whether a document filed by an applicant complies with the law or has deficiencies, the Court cannot ignore that the General Corporations Law requires that the referenced Certificates of Incorporation be presumed valid and as *prima facie* evidence that all the conditions required for incorporation have been satisfied, "except in proceedings initiated by the Commonwealth to cancel or revoke the certificate of incorporation or to dissolve the corporation." See *LGC, Sections 1.04, 1.05 (B)*. However, it arises from the facts determined at this stage that such certifications generated a proprietary interest in favor of the claimant foundations and that the Commonwealth did not initiate any legal proceedings to cancel or revoke the certificate of incorporation that complied with the requirements of due process of law. As a matter of fact, it did not even give Notice of any defect in the documents that would allow the Secretary to refuse to register documents pursuant to Article 1.03(C)(4).

In such circumstances, "[a]ny time an individual's interest in liberty or property is at stake, it must be determined *what process is due*, which will depend on the circumstances, while safeguarding that it is a fair and impartial, non-arbitrary process. *Almonte et al. v. Brito*, 156 DPR 475, 481 (2002). Although the procedural due process standards are applied with greater flexibility in proceedings before administrative agencies, the relevance of competing interests has required extending to such procedural scaffolding "the following guarantees that traditionally acknowledge: the right to a timely, adequately notified hearing, the right to be heard, confront the witnesses, present verbal and written evidence in their favor and the presence of an impartial adjudicator." *Id*., pgs. 481-82. See also, *Fuentes v. Shelvin*, 407 U.S. 67, 81-82 (1972) ("If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. …. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.").

Notwithstanding the foregoing, it arises from the findings of facts above that, without prior notice and without complying with any of the administrative procedures arising therefrom in accordance with the law and the regulations mentioned above, the respective registration certificates were cancelled on August 4, 2020 by the then Secretary of State. Likewise, it is an incontrovertible fact that the Department of State never officially notified the existence of defects in the documents filed for the registration and incorporation of the entities prior to their cancellation, neither did it consider the amendments filed that same day nor did it provide the plaintiffs with an opportunity to be heard or to request a revision of such administrative action.

In short, it is evident that the injury to the constitutional rights of the plaintiff foundations in the face of the election processes - who had acquired a proprietary interest in doing business in Puerto Rico as set forth in the above findings of fact-, constitutes real, immediate, clear and concrete damage. The causes of action for declaratory judgment and the injunctive relief requested, under the constitutional provisions limiting the scope of government action, are reasonably related to the constitutional offenses to freedom of expression and due process of law alleged by the co-plaintiffs. We therefore conclude that the co-plaintiffs Fundación Pro Igualdad, Inc. and Foundation for Progress, Inc. - regardless of the deficiencies in the certificates of incorporation filed and certified by the Secretary of State on June 10, 2020 - have standing to bring the claims in the captioned case.

B. Freedom of speech and expression

The First Amendment to the United States Constitution and Section 4 of Article II of the Constitution the Commonwealth of Puerto Rico, LPRA Volume 1, establish the fundamental right to freedom of expression and association. In fact, the Supreme Court of Puerto has emphasized that

> Among the individual freedoms, freedom of expression is probably the most essential, once the right to life and physical liberty is guaranteed. It has as its foundation freedom of conscience, on which both freedom of religion and freedom of expression of thought are based, and involves the attempt to legally protect the free development of the personality through the most effective and habitual means of exteriorizing the contents of conscience. The *New Constitution of Puerto Rico*, Río Piedras, U.P.R., 1954, Part II, p. 250. It is a guarantee aimed at protecting the right of individuals to express the contents of their conscience as they wish, while at the same time establishing the indispensable premise for the formation of public opinion, on whose regime the democratic government is founded.
>
> To think and express thought freely, by the spoken or written word, is not only in human nature, but the unique means of human progress. The immediate consequence of the natural freedom of thought is that men come together for the purpose of public and private life, formulate their thoughts and express them freely seeking to persuade their fellows. 1 *Diary of Sessions of the Constituent Convention* 389 (1951), quoting Baldorioty. *Asoc. de Maestros v. Sec. de Educación*, 156 DPR 754, 766-69 (2002).

Undoubtedly, freedom of expression enjoys a particular primacy in our democratic constitutional order, and therefore requires its most zealous protection. *Id.; Emp. Pur. Des., Inc. v. H.I.E.TEL.*, 150 DPR 924 (2000); *Coss and U.P.R. v. C.E.E.*, 137 DPR 877, 886 (1995); *Rodriguez v. Sec. de Instrucción*, 109 DPR 251, (1979); *Mari Bras v. Casañas*, 96 DPR 15 (1968). Although it is not an absolute right, any limitation or restriction on freedom of expression will be interpreted restrictively, so as not to encompass more than necessary. *Asoc. de Maestros v. Sec de Educación*, *supra; Muñiz v. Admin. Deporte Equestre*, 156 DPR 18 (2002).

Certainly, in analyzing disputes arising under the right to freedom of expression, it is necessary to distinguish between regulations that address the content of expression and regulations of time, place and manner of expression, which are content neutral. *Asoc. de Maestros v. Sec. de Educación*, *supra*

(*citing* K. Sullivan and G. Gunther, *First Amendment Law*, New York, Ed. Foundation Press, 1999, p. 193; R. Serrano Geyls, *Derecho Constitucional de Estados Unidos y Puerto Rico*, San Juan, Ed. P.R., 1998, Vol. II, p. 1278 et seq).

On the one hand, regulation that is content-oriented or discriminates due to a point of view has to be subjected to strict judicial scrutiny. Whoever defends the regulation has the burden of proving that it is strictly necessary to advance a compelling state interest. *Id*.; *Muñiz v. Admin. Deporte Eccuestre, supra*. This would apply when a regulation limits the content of an expression or when it favors a certain expression over another, because of the ideas or points of view that are transmitted. Similarly, strict scrutiny would apply if the purpose of the government regulation is to restrict the content of the expression or if the regulation cannot be justified without reference to it. *Id., citing Turner Broadcasting System Inc. v. FCC*, 512 U.S. 622 (1994) and *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

On the other hand, when the regulation in dispute appears to be neutral, but limits the right to freedom of expression in terms of time, place and manner of expression, the applicable judicial scrutiny will depend on the forum to which it refers. *Asoc. de Maestros v. Sec. de Educación*, *supra; Coss and U.P.R. v. C.E.E., supra*; *Pacheco Fraticelli v. Cintron Antonsanti*, 122 DPR 229 (1988). In such cases, strict scrutiny is applicable in traditional or designated public forums, or traditional or reasonableness scrutiny in non-traditional public forums. *Id.*

In the case at hand, it should be noted that the right to freedom of expression covers legal persons as well as individuals. *Asoc. de Maestros v. Sec. de Educación*, supra, p. 766. In turn, the U.S. Supreme Court has held that this right is most relevant in the context of political expression related to an electoral campaign. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). In addition, the right to political expression held by corporations - and individuals - manifests itself in various ways, such as the use of money and campaign donations for the dissemination of a political discourse or ideal. *Id.; Buckley v. Valeo*, 424 U.S. 1 (1976).

Finally, it should be noted that in the face of a claim of freedom of expression, the courts must examine with more rigor and haste the procedures established by the State that could have an impact on this fundamental right. Professor Henry Paul Monaghan explained in in an influential article on this subject published in the *Harvard Law Review*: "The first amendment due process cases have shown that first amendment rights are fragile and can be destroyed by insensitive procedures; in order to completely fulfill the promise of those cases, courts must thoroughly evaluate every aspect of the procedural system which protects those rights". H. P. Monaghan, *First Amendment "Due Process"*, 83

Harv. L. Rev. 518, 551 (1970).

In this case, the plaintiff foundations are challenging the constitutionality of a government action that impacted their right to freedom of expression, but not of a particular regulation. Nevertheless, it is a clearly established rule of federal constitutional law that, if the government action in dispute was intended to or had the effect of suppressing, deterring or punishing political expression against the government, this is presumed to be unconstitutional and must be subject to strict scrutiny. See *Rosenberger v. University of Virginia*, 515 U.S. 819, 830 (1995); *Grosjean v. American Press Co*., 297 U.S. 233, 250 (1936) (a government action that constitutes "a deliberate and calculated device. to limit the circulation of information" is unconstitutional).

Similarly, **it is unconstitutional for the government to condition or revoke the issuance of government permits, licenses, or benefits for the purpose of punishing or intervening with the exercise of freedom of expression, particularly in the context of political expression.** See *Board of County Comm'rs v. Umbehr, 518* U.S. 668 (1996); Perry *v. Sindermann*, *408* U. S. 593 (1972). If it is concluded that the government action in dispute was in retaliation against the complainant for exercising his fundamental right to freedom of expression, it is presumed to be invalid and carries legal liability. See, persuasively , *Powell v.* Alexander, 391 F.3d 1, 16-17 (1st Cir. 2004) (citing *Mt. Healthy City School Dist. Bd. of Educ. V. Doyle*, 429 U.S. 274 (1977); *El Dia, Inc. v. Rossello*, 165 F.3d 106 (1st Cir. 1999) ("Clearly established law prohibits the government from conditioning the revocation of benefits on a basis that infringes constitutionally protected interests [...] in retaliation for exercising its First Amendment rights"). In fact, this constitutional provision applies even in circumstances where there might be some neutral and permissible basis for the adverse action, to the extent that the adverse action would not have been taken but for the unconstitutional reason. See, by way of illustration, *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508 (1st Cir. 2009); *Ackerley Com. of Mass., Inc. v. City of Somerville*, 878 F.2d 513, 521 (1st Cir. 1989).

In view of this constitutional doctrine, it is pertinent to emphasize that it arises from the facts determined under Rule 57 of Civil Procedure, *supra*, that the action of the Secretary of State in canceling the registration of both plaintiff foundations had the effect of impeding them from continuing to exercise the right to freedom of expression in the political context of an electoral battle. By cancelling the government certifications that acknowledged them as legal entities, the Department of State prevented these entities from continuing to make political donations or media expenditures to carry their political message, acts that are protected by the First Amendment of the Constitution of the United States and Section 4 of Article II of the Constitution of the Commonwealth of Puerto Rico. See

also, *Citizens United v. F.E.C., supra*.

Moreover, it appears circumstantially and predominantly from the documents evaluated by the Court, as well as from the facts determined by the Court under Rule 57, that such government action was - in all likelihood - an act of retaliation for the content of the political message of the campaign ads financed by the plaintiff corporations against the Governor. **Note that the Governor's campaign director, Mr. Jorge Davila, in his sworn complaint before the Federal Elections Commission on July 31, 2020 to denounce the aforementioned political ads**, **made reference to the cancellations of the registration of the plaintiff corporations**. **However, this governmental action by the then Secretary of State did not occur and the plaintiff foundations were not formally notified until August 4, 2020, that is, four days later.** From such a chronology of events and from Mr. Davila's sworn knowledge of future official actions, it can be inferred that there is a likelihood that some coordination or communication on this matter occurred between the Governor's aforementioned campaign team and the Department of State. Furthermore, it arises from the above findings of fact that **the outcome of these events had the direct effect of preventing or discouraging the petitioning foundations from continuing to exercise their right to freedom of political expression in the context of the primaries that were to be held and the upcoming general elections**.

Undoubtedly, the plaintiff demonstrated a high probability of prevailing, in accordance with the standards of Rule 57 of Civil Procedure, in its claim that the action of the then Secretary of State to cancel the certificates of incorporation of the plaintiff foundations -without prior notice to the affected party- constituted a reprisal for the content of the political expression. Such action was clearly unconstitutional and the public interest tilts the balance in favor of a preliminary injunction to restore the *status quo* in the next stages of the case of caption. This becomes even more imperative in light of the allegation that it is the intention of the plaintiff foundations to continue to exercise their right to political expression in the face of the general elections to be held in the coming months, so that if a preliminary injunction is not granted, they would suffer irreparable harm and the controversy could become academic.

In addition, there is no adequate remedy in law since no administrative mechanism to review the government actions challenged by the plaintiff arises from the General Corporation Law or the Department of State's current regulations. Note that none of the certifications by which the then Secretary of State canceled the plaintiff foundations contain any warning of the availability of judicial review of those administrative actions.[28]

[28] In any case, it must be borne in mind that the court has the power to relieve a petitioner from having to exhaust any or all of the administrative remedies provided when requiring their exhaustion would result in irreparable harm to the petitioner and the balance of interests does not justify the exhaustion of such remedies and when the substantial violation of constitutional rights is alleged, which merits prompt claim; among others. See *Guzmán et* al. *v. ELA*, 156 DPR 693, 711 (2002).

However, we emphasize that the defendant maintains that the plaintiff foundations have another adequate remedy in law consisting in that they could be incorporated again. See *Motion to Dismiss Amended Complaint*, p. 38. However, it is clear *Citizens United v. Federal Election Commission*, *supra*. However, it is evident that this alternative does not provide an adequate remedy given that it disregards the legal fiction of what constitutes a corporation under our current legal framework. As a matter of law, the organization of other corporate entities with separate and distinct legal personality does not constitute a remedy to the constitutional harm that has been brought upon the plaintiff foundations, which are protected by the constitutional rights which were violated by the government acts that give rise to this controversy. See *Citizens United v. Federal Election Commission, supra.*

Finally, we reiterate that regardless of the deficiencies that could be identified in the certificates of incorporation of the petitioning foundations, the then Secretary of State issued certificates of incorporation by which he accredited that these corporations were duly organized under the laws of Puerto Rico. Such certificates of incorporation were issued under the signature and seal of this public official, thus generating a proprietary interest in favor of the petitioning foundations. It was precisely by virtue of that government authorization that the petitioning entities made political donations and participated in the debate of ideas in the context of a primary contest, acts that are protected by the constitutional regulations mentioned above.

Therefore, once the existence of this proprietary interest was established in favor of the plaintiff, any attempt to divest that protected interest by cancellation had to meet the minimum requirements of due process of law. See *San Geronimo Caribe Project v. ARPE*, *supra; Rivera Rodriguez & Co. v. Stowell Taylor*, *supra*. In other words, it must notify the complainant of the adverse decision and the party must be provided with a real and meaningful opportunity to be heard before a determination to divest the complaining party of its proprietary interest takes effect. *Mathews v. Eldridge, supra*; *Almonte et al. v. Brito*, *supra*.

V.

In view of the foregoing, the present **Resolution and Order** issues the preliminary *injunction* requested by the plaintiff **and the acting Secretary of State** is **ORDERED to immediately restore, under penalty of contempt, the certificates of registration of Fundación Pro Igualdad, Inc. and Foundation for Progress, Inc.** while the remaining stages of the present case are tended to**. Should [the Secretary of State] believe that there is a deficiency in the administrative record of such corporate entities, it shall subsequently issue a notice and give them an opportunity to be heard,**

in accordance with the requirements of due process of law.

In compliance with Rule 57.4 of the Civil Procedure, *supra*, a **bond of $500.00 is set for the plaintiff** for the payment of costs and damages that may be incurred or suffered by any party during the term of the preliminary injunction issued in this case.

In turn, for the reasons set forth in this Resolution and Order, the motion of dismissal filed by the defendant on August 31, 2020 is hereby declared Denied. Consequently, we grant a term of 30 days to answer the amended complaint and order the continuation of the proceedings.

NOTIFY.

In San Juan, Puerto Rico, September 1, 2020.

s/ALFONSO S. MARTÍNEZ PIOVANETTI
SUPERIOR COURT JUDGE