

Spanish-Language Ballots for Puerto Rican Voters Outside Puerto Rico

Rivera Madera v. Detzner
(*Mark E. Walker, N.D. Fla. 1:18-cv-152*)

A federal district judge ordered counties in Florida with English-only ballots and a substantial population of voters from Puerto Rico to prepare Spanish-language sample ballots to bring the counties in compliance with section 4(e) of the Voting Rights Act.

Subject: Voting procedures. *Topic:* Ballot language.

A voter, who was born and educated in Puerto Rico, and five organizations filed a federal class action complaint against Florida’s secretary of state and a county supervisor of elections on behalf of other county supervisors of elections on Thursday, August 16, 2018, in the Northern District of Florida.¹ The complaint alleged a failure by approximately half of Florida’s counties to provide “Spanish-language ballots, registration and other election materials and assistance” in violation of section 4(e) of the Voting Rights Act.²

Completion of requisite grade level of education in American-flag schools in which the predominant classroom language was other than English

(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Co-

1. Complaint, *Rivera Madera v. Detzner*, No. 1:18-cv-152 (N.D. Fla. Aug. 16, 2018), D.E. 1; *Rivera Madera v. Detzner*, 325 F. Supp. 3d 1269, 1275 (N.D. Fla. 2018); see Steve Bousquet, *Citing Hurricane in Puerto Rico, Lawsuit Seeks Bilingual Ballots in 32 More Florida Counties*, Tampa Bay Times, Aug. 16, 2018; Arelis R. Hernández, *Florida Suit Seeks Spanish-Language Voting Services*, Wash. Post, Aug. 17, 2018, at A2.

2. Complaint, *supra* note 1, at 1.

lumbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.³

With their complaint, the plaintiffs filed a motion for a preliminary injunction,⁴ a motion to certify a plaintiff class,⁵ and a motion to certify a defendant class.⁶ Judge Walker denied these motions without prejudice in 2019: “Put simply, the classes are not necessary.”⁷

On the day that the case was filed, Judge Mark E. Walker set it for a telephonic scheduling conference on Tuesday, August 22, 2018.⁸ Judge Walker does not want his inaction to determine the outcome of a case, so he embraces active case management.⁹ “This Court recognizes that Defendants have not been served and thus counsel for Defendants have not made an appearance. However, time is of the essence and counsel for Plaintiffs can certainly contact the [defendants’ attorneys].”¹⁰

Following a September 5 hearing,¹¹ Judge Walker issued a preliminary injunction on September 7.¹² “Due to the timeline of this lawsuit and the looming deadlines Florida election officials face, this Court does not order all of Plaintiffs’ requested relief. Rather, it orders attainable compliance with Section 4(e).”¹³ “[T]he Counties shall not be required to provide official Spanish-language ballots and such other relief requested by Plaintiffs which this

3. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 437, 437, *as amended*, 52 U.S.C. § 10303(e) (2016).

4. Preliminary Injunction Motion, *Rivera Madera*, No. 1:18-cv-152 (N.D. Fla. Aug. 16, 2018), D.E. 2.

5. Plaintiff Class Motion, *id.* (Aug. 16, 2018), D.E. 4.

6. Defendant Class Motion, *id.* (Aug. 16, 2018), D.E. 5.

7. Order, *id.* (Mar. 5, 2019), D.E. 107.

8. Scheduling Order, *id.* (Aug. 16, 2018), D.E. 6; *see Minutes, id.* (Aug. 22, 2018, filed Aug. 22, 2018), D.E. 27; *Minutes, id.* (Aug. 22, 2018), D.E. 27.

A docket entry gave parties and the public dial-in information. Docket Sheet, *id.* Aug. 16, 2018) (D.E. 7).

Tim Reagan interviewed Judge Walker for this report by telephone on December 12, 2018.

9. Interview with Hon. Mark E. Walker, Dec. 12, 2018.

10. Scheduling Order, *supra* note 8, at 1–2.

11. Minutes, *Rivera Madera*, No. 1:18-cv-152 (N.D. Fla. Sept. 5, 2018), D.E. 55; *see* Steve Bousquet, *Spanish-Language Ballots an “Impossibility,” 32 Counties Say*, Tampa Bay Times, Sept. 5, 2018; Jim Saunders, *Judge to Weigh Spanish-Language Ballot Dispute*, Daytona Beach News-Journal, Sept. 5, 2018, at C4.

The Florida State Association of Supervisors of Elections was permitted to participate as an amicus curiae. Order, *Rivera Madera*, No. 1:18-cv-152 (N.D. Fla. Aug. 23, 2018), D.E. 31; Motion, *id.* (Aug. 23, 2018), D.E. 30; *see* Brief, *id.* (Aug. 30, 2018), D.E. 40.

12. Opinion, *Rivera Madera*, No. 1:18-cv-152 (N.D. Fla. Sept. 7, 2018), D.E. 57, *amended*, *Rivera Madera v. Detzner*, 325 F. Supp. 3d 1284 (N.D. Fla. 2018); *see* Steve Bousquet, *Judge Orders 32 Counties to Provide Bilingual Sample Ballots*, Tampa Bay Times, Sept. 7, 2018; Martin E. Comas, *Judge: Counties Must Offer Spanish Sample Ballots*, Orlando Sentinel, Sept. 8, 2018, at B1.

13. *Rivera Madera*, 325 F. Supp. 3d at 1284.

“I can’t enjoin somebody or order somebody to do the impossible.” Transcript at 11, *Rivera Madera*, No. 1:18-cv-152 (N.D. Fla. Sept. 5, 2018, filed Sept. 8, 2018), D.E. 58.

Court deems infeasible at this late juncture.”¹⁴ Instead, Judge Walker ordered the preparation of Spanish-language sample ballots, and if the counties mailed out sample ballots, the Spanish-language versions had to be included.¹⁵

Puerto Ricans are American citizens. Unique among Americans, they are not educated primarily in English—and do not need to be. But, like all American citizens, they possess the fundamental right to vote. The issue in this case is whether Florida officials, consistent with longstanding federal law, must provide assistance to Puerto Rican voters who wish to vote. Under the plain language of the Voting Rights Act, they must.

... This Court is issuing this Order on an expedited basis to give the Secretary and the Scott administration ample opportunity to appeal if they seek to block their fellow citizens, many of whom fled after Hurricane Maria devastated Puerto Rico, from casting meaningful ballots.¹⁶

In emergency cases, Judge Walker likes to rule promptly so that his rulings are not beyond appellate review.¹⁷

Judge Walker concluded that of Florida’s 67 counties, 27 already provided Spanish-language election materials, and the plaintiffs identified 32 of the remaining counties with substantial Puerto Rican populations.¹⁸ The individual plaintiff, who was not fluent in English, moved to Florida following the 2017 devastation in Puerto Rico caused by Hurricane Maria.¹⁹

Florida’s governor notified news media that Florida would comply with Judge Walker’s preliminary injunction,²⁰ and the secretary filed a notice of compliance a few days later.²¹

Two days before election day, at 11:57 p.m. on Sunday, November 4, after the end of the early-voting period and on the eve of Election Day, Plaintiffs have filed an emergency motion seeking to ensure compliance with this Court’s order on preliminary injunction. The cause of this motion was Duval County Supervisor of Elections Mike Hogan’s strained and selective reading of this Court’s preliminary injunction order. His reading, which inexplicably ignored this Court’s unambiguous language to “make available a facsimile sample ballot in Spanish to voters who fall within the ambit of Section 4(e) of the Voting Rights Act” apparently, and unfortunately, resulted in no Spanish-language sample ballots being provided during the early-voting period in Duval County. With early voting now concluded, remedies related to early voting have left the station.²²

14. *Rivera Madera*, 325 F. Supp. 3d at 1284.

15. *Id.*

16. *Id.* at 1273–74.

17. Interview with Hon. Mark E. Walker, Dec. 12, 2018.

18. *Rivera Madera*, 325 F. Supp. 3d at 1274–75, 1280.

19. *Id.* at 1275.

20. See Bousquet, *supra* note 12.

21. Notice of Compliance, *Rivera Madera v. Detzner*, No. 1:18-cv-152 (N.D. Fla. Sept. 11, 2018), D.E. 61.

22. Injunction Enforcement Opinion, *id.* (Nov. 5, 2018), D.E. 79 (citation omitted); see Motion, *id.* (Nov. 4, 2018), D.E. 77.

Considering the motion without a hearing and deciding it before 1:00 p.m. on November 5, Judge Walker ordered Florida's secretary of state to notify election officials in the 32 counties covered by Judge Walker's injunction that compliance was not optional.²³ The secretary filed a notice of compliance that day.²⁴

Judge Walker often requires notices of compliance in election litigation so that there is a public record of compliance with election requirements.²⁵ On January 22, 2019, Judge Walker ordered the newly appointed secretary of state

to collect from the 32 counties at issue in this litigation the following information: (1) what specific steps each individual county took to comply with this Court's order granting preliminary injunction, ECF No. 59, in the November 2018 elections; and (2) how many sample Spanish ballots each county distributed, to the extent each county kept track of this information.²⁶

According to the 178-page notice of compliance filed on February 28 and including data from all 32 counties, all complied with Judge Walker's order and 17 counties provided additional resources.²⁷

Discovery in the case continues.²⁸

23. Injunction Enforcement Opinion, *supra* note 22, at 1, 5.

24. Notice of Compliance, *Rivera Madera*, No. 1:18-cv-152 (N.D. Fla. Nov. 5, 2018), D.E. 80.

25. Interview with Hon. Mark E. Walker, Dec. 12, 2018; *see* *Rivera Madera v. Detzner*, 325 F. Supp. 3d 1269, 1284 (N.D. Fla. 2018); Injunction Enforcement Opinion, *supra* note 22, at 5–6.

26. Order, *Rivera Madera*, No. 1:18-cv-152 (N.D. Fla. Jan. 22, 2019), D.E. 95.

The secretary resigned a couple of days later because photographs surfaced of him in a 2005 blackface Halloween costume mocking victims of Hurricane Katrina. *See* Adeel Hassan, *New Florida Secretary of State Quits After Offensive Photos Emerge*, N.Y. Times, Jan. 25, 2019, at A18; Elizabeth Koh, *Black face Pics Lead Secretary of State to Resign*, Miami Herald, Jan. 25, 2019, at 1A. The governor then appointed Circuit Judge Laurel Lee secretary of state, and she was substituted as a defendant. Notice, *Rivera Madera*, No. 1:18-cv-152 (N.D. Fla. Feb. 5, 2019), D.E. 98; *see* Lawrence Mower, *DeSantis Taps Local Judge*, Tampa Bay Times, Jan. 29, 2019, at A1.

27. Notice of Compliance, *Rivera Madera*, No. 1:18-cv-152 (N.D. Fla. Feb. 28, 2019), D.E. 105.

28. *See* Joint Status Report, *id.* (Mar. 1, 2019), D.E. 106.