

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

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.

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

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 Mark E. 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 Walker set it for a telephonic scheduling conference on Tuesday, August 22, 2018.⁸ He did not want his inaction to determine the outcome of a case, so he embraced 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 Court deems infeasible at this late juncture.”¹⁴ Instead, Judge Walker ordered the preparation of Spanish-language sample ballots, and if the counties

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, 2019 WL 1054671.

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

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).

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 (Sept. 7), 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.

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

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 liked to rule promptly so that his rulings were not beyond appellate review.¹⁷

Judge Walker concluded that of Florida's sixty-seven counties, twenty-seven already provided Spanish-language election materials, and the plaintiffs identified thirty-two 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

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

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, 2018 WL 7506109 (citation omitted); see Motion, *id.* (Nov. 4, 2018), D.E. 77.

notify election officials in the thirty-two 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 required notice of compliance in election litigation so that there would be 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 thirty-two counties, all complied with Judge Walker's order, and seventeen counties provided additional resources.²⁷

Following an April 11 notice by Florida's secretary of state of pending rules bringing Florida into compliance with section 4(e),²⁸ Judge Walker extended his injunction in the case as feasible to govern until the effective date of the state's final rules.²⁹

In an action against Florida's secretary of state over the order of candidates on ballots, the U.S. Court of Appeals held on April 29, 2020, that because the secretary was not the one who applied Florida law to determine

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; *see also* Notices of Compliance, *id.* (May 13, Aug. 1, Sept. 3, Oct. 1, Nov. 1, and Dec. 2, 2019, and Jan. 2 and 22, Feb. 3, Mar. 2, Apr. 3, May 1, June 1, July 2, and Aug. 3, 2020), D.E. 132 to 138, 144, 148, 151, 155, 160, 166, 168 (updated compliance notices).

28. Notice of Rulemaking, *id.* (Apr. 11, 2019), D.E. 114.

29. Opinion, *id.* (May 10, 2019), D.E. 131, 2019 WL 2077037; *see* Transcript at 4, *id.* (May 6, 2019, filed May 7, 2019), D.E. 128 (Judge Walker's noting that lengthy telephonic proceedings are very hard on a court reporter, so the preliminary-injunction hearing was conducted in person).

candidate order on ballots, she was not a proper defendant.³⁰ So Judge Walker dismissed her as a defendant in the ballot-language case.³¹

With one county supervisor of elections as the only remaining defendant, Judge Walker ordered briefing on possible certification of a defendant class.³² Judge Walker invited optional amicus curiae input from the Florida State Association of Supervisors “addressing the issue of whether this Court should certify a defendant class or require Plaintiffs to join all 31 additional supervisors who are the subject of this litigation.”³³ On December 14, Judge Walker decided not to certify a defendant class because of “differences in factual circumstances between counties, such as there being 4,505 Puerto Rico-born registered voters in Pasco County compared to four in Taylor County. And there may be differences in the availability of Spanish-speaking poll workers across counties, as well as other relevant variables.”³⁴

On February 1, 2021, Judge Walker dismissed the case as settled.³⁵

Plaintiffs have entered into a settlement agreement with 31 of the 32 county Supervisors of Elections whom Plaintiffs alleged were in violation of Section 4(e) of the Voting Rights Act, [excluding Charlotte County’s.]

Pursuant to the settlement agreement, the 31 Supervisors of Elections (the “Supervisors”) have agreed to provide Spanish-language ballots, election materials, and assistance as required by the Secretary of State’s current rules. In addition, the Supervisors have further agreed to provide Spanish-language vote-by-mail applications, ballots, and materials; Spanish translations of the Supervisors’ websites; access to county-specific Spanish-language hotlines for voter assistance; and signage at the Supervisors’ offices informing voters of the availability of these Spanish-language resources.³⁶

30. *Jacobson v. Fla. Sec’y of State*, 957 F.3d 1193 (11th Cir. 2020).

31. Order, *Rivera Madera*, No. 1:18-cv-152 (N.D. Fla. Aug. 7, 2020), D.E. 170.

32. Order, *id.* (Sept. 16, 2020), D.E. 172.

Judge Walker ruled on December 9, 2020, that “Defendant’s promise to abide by the new rules and the terms of the injunction is insufficient to make the case moot.” Opinion at 2, *id.* (Dec. 9, 2020), D.E. 188, 2020 WL 7350208.

33. *Id.* at 3.

34. Opinion at 4, *id.* (Dec. 14, 2020), D.E. 190, 2020 WL 6391287.

35. Order, *id.* (Feb. 1, 2021), D.E. 196 (“not retain[ing] jurisdiction to enforce the settlement agreement, or for any other purpose”).

36. Voluntary-Dismissal Motion at 1–2, *id.* (Feb. 1, 2021), D.E. 195 (citation omitted).