

Cancellation of Voter Registrations for Not Voting in the Last Election

Colón Marrero v. Conty Pérez
(*Carmen Consuelo Cerezo, D.P.R. 3:12-cv-1749*)

Five days before a September 17, 2012, voter-registration deadline in Puerto Rico, a voter filed a federal complaint challenging the cancellation of her registration because she had not voted in the 2008 general election. The district judge denied the voter immediate relief because (1) the National Voter Registration Act does not apply to Puerto Rico as it does to the states, (2) the Help America Vote Act (HAVA) does not afford a private right of action, and (3) the plaintiff had not justified bringing the case so late. The court of appeals, on the other hand, found probable success on the merits and remanded the case for an evidentiary hearing. On October 18, the court of appeals determined that relief for the plaintiff had become infeasible. In November, the court of appeals vacated an order issued in the plaintiff's favor by the district-court judge under the All Writs Act. After further litigation, the district judge issued a declaratory judgment in favor of plaintiffs, which was affirmed on appeal. The courts ruled that canceling a federal voter registration after missing only one general election violates HAVA. In 2017, the court awarded the plaintiffs \$135,931 in attorney fees.

Subject: Nullifying registrations. *Topics:* Registration challenges; National Voter Registration Act; Help America Vote Act (HAVA); laches; enforcing orders; attorney fees.

Five days before the September 17, 2012, voter-registration deadline in Puerto Rico for the 2012 general election, a voter filed a federal complaint in the District of Puerto Rico challenging the cancellation of her registration because she had not voted in the 2008 general election.¹ On the following day, she filed a motion for a preliminary injunction.²

Judge Carmen Consuelo Cerezo denied the injunction on September 18.³ On the one hand, Judge Cerezo determined that the plaintiff's statutory grounds for requested relief did not support such relief:⁴ the National Voter

1. Complaint, *Colón Marrero v. Conty Pérez*, No. 3:12-cv-1749 (D.P.R. Sept. 12, 2012), D.E. 1; *Colón-Marrero v. Conty-Pérez*, 703 F.3d 134, 135–36 (1st Cir. 2012); *see* Amended Complaint, *Colón Marrero*, No. 3:12-cv-1749 (D.P.R. Sept. 21, 2012), D.E. 19 (adding a second plaintiff).

2. Preliminary-Injunction Motion, *Colón Marrero*, No. 3:12-cv-1749 (D.P.R. Sept. 13, 2012), D.E. 6.

3. Order, *id.* (Sept. 18, 2012), D.E. 11 [hereinafter Sept. 18, 2012, D.P.R. Order].

Judge Cerezo retired on February 28, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

4. Sept. 18, 2012, D.P.R. Order, *supra* note 3, at 2–3.

Registration Act (NVRA)⁵ did not apply to Puerto Rico as it does to the states, and the Help America Vote Act (HAVA)⁶ did not afford the plaintiff a right of action. On the other hand, “No justification has been advanced . . . as to why [the plaintiff waited] until four (4) days before expiration of the voter registration deadline in Puerto Rico to seek a preliminary injunction”⁷

An appeal was heard on October 11, and the court of appeals determined that the plaintiff had demonstrated a likelihood of success on the merits.⁸ Because, however, “the parties have made widely differing claims with respect to the feasibility of granting the request for preliminary relief,” the court of appeals returned the case to the district court for an evidentiary hearing.⁹

From 9:15 in the morning until 9:00 at night on October 15,¹⁰ and then again on October 16,¹¹ Judge Cerezo held an evidentiary hearing.¹² On October 17, she certified findings of fact to the court of appeals.¹³ A key finding was, “The total number of voters who remain inactive at this time for not having participated in the 2008 general elections is 330,902.”¹⁴

On October 18, by a vote of two to one, the court of appeals “concluded that serious feasibility issues preclude the entry of the relief sought by plaintiff-appellant. Hence, the decision of the district court denying the request for a preliminary injunction is affirmed.”¹⁵

The court of appeals issued its opinion on November 2.¹⁶ It agreed that the NVRA does not apply to Puerto Rico.¹⁷ Although the court determined that HAVA protected the plaintiff’s right to vote for Puerto Rico’s representative in Congress, its resident commissioner, “it would be improvident to

5. Pub. L. No. 103-31, 107 Stat. 77 (1993), *as amended*, 52 U.S.C. §§ 20501–20511. *See generally* Robert Timothy Reagan, *Motor Voter: The National Voter Registration Act* (Federal Judicial Center 2014).

6. Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145. *See generally* Marie Leary & Robert Timothy Reagan, *The Help America Vote Act* (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

7. Sept. 18, 2012, D.P.R. Order, *supra* note 3, at 3.

8. Order, *Colón-Marrero v. Conty-Pérez*, No. 12-2145 (1st Cir. Oct. 11, 2012) [hereinafter Oct. 11, 2012, 1st Cir. Order]; *Colón-Marrero v. Conty-Pérez*, 703 F.3d 134, 136 (1st Cir. 2012).

9. Oct. 11, 2012, 1st Cir. Order, *supra* note 8; *see Colón-Marrero*, 703 F.3d at 136.

10. Minutes, *Colón Marrero v. Conty Pérez*, No. 3:12-cv-1749 (D.P.R. Oct. 15, 2012), D.E. 44; Transcript, *id.* (Oct. 15, 2012, filed Oct. 16, 2012), D.E. 53 (transcribing proceedings from 4:45 to 8:56 p.m.).

11. Minutes, *id.* (Oct. 16, 2012), D.E. 51; Transcript, *id.* (Oct. 16, 2012, filed Oct. 16, 2012), D.E. 54 (transcribing proceedings from 9:15 a.m. to 4:35 p.m.).

12. *Colón-Marrero*, 703 F.3d at 136 (“nearly sixteen hours of testimony”).

13. Findings, *Colón Marrero*, No. 3:12-cv-1749 (D.P.R. Oct. 17, 2012), D.E. 60, 2012 WL 5185997; *Colón-Marrero*, 703 F.3d at 136.

14. Findings, *supra* note 13, at 2 (citation omitted).

15. Order, *Colón-Marrero v. Conty-Pérez*, No. 12-2145 (1st Cir. Oct. 18, 2012); *Colón-Marrero*, 703 F.3d at 136.

16. *Colón-Marrero*, 703 F.3d 134.

17. *Id.* at 137–38.

grant plaintiff's requested relief with only eighteen days remaining before the general election."¹⁸

On Saturday, November 3, three days before the election, Judge Cerezo issued an order under the All Writs Act¹⁹ that voters whose registrations had been canceled for not voting be permitted to cast provisional ballots.²⁰ On Monday, the court of appeals, again on a two-to-one vote, "vacated forthwith" Judge Cerezo's order as again improvident.²¹

After additional litigation, Judge Cerezo ruled on January 30, 2015, that Puerto Rico's provision for canceling a voter registration for failure to vote in a general election violated HAVA's registration protection absent notice and a failure to vote in two consecutive general elections.²² On February 1, 2016, the court of appeals affirmed Judge Cerezo's ruling, again agreeing that Puerto Rico is bound by HAVA but not by the NVRA.²³ Judge Cerezo awarded plaintiffs \$135,931 in attorney fees on March 22, 2017.²⁴

18. *Id.* at 138–39; see Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 Election L.J. 203, 210 (2013).

19. 28 U.S.C. § 1651(a).

20. Order, *Colón Marrero v. Conty Pérez*, No. 3:12-cv-1749 (D.P.R. Nov. 3, 2012), D.E. 79.

21. Judgment, *Colón-Marrero v. Conty-Pérez*, Nos. 12-2328 and 12-2329 (1st Cir. Nov. 5, 2012).

22. Declaratory Judgment, *Colón Marrero*, No. 3:12-cv-1749 (D.P.R. Jan. 30, 2015), D.E. 152; Opinion, *id.* (June 4, 2015), D.E. 160, 2015 WL 3508142; see also 52 U.S.C. § 21083(a)(4)(A).

23. *Colón-Marrero v. Garcia Velez*, 813 F.3d 1 (1st Cir. 2016).

24. Opinion, *Colón Marrero*, No. 3:12-cv-1749 (D.P.R. Mar. 22, 2017), D.E. 194, 2017 WL 1088282.