

## Close Vote in Puerto Rico

*Rosselló v. Calderón (3:04-cv-2251)*  
*and Suárez Jimenez v. Comisión Estatal de Elecciones*  
*(3:04-cv-2288) (Daniel R. Domínguez, D.P.R.)*

The 2004 election of Puerto Rico's governor depended upon a recount. One of the candidates filed a federal complaint seeking enforcement of a prompt and just resolution of the recount. The district court began evidentiary hearings in mid-November. One issue to be resolved was how to count ballots in which a voter cast a vote for one party generally but for candidates of other parties for all individual offices. A commonwealth case on this issue was removed to the federal court before it was resolved, but Puerto Rico's supreme court resolved the case anyway. The district court vacated the commonwealth court's postremoval ruling and commenced additional hearings. The court of appeals determined that removal was improper. In December, the court of appeals ordered a halt to the district court's intervention in the local electoral dispute.

*Subject:* Recounts. *Topics:* Matters for state courts; enjoining certification; removal; recounts; absentee ballots; intervention; attorney fees.

The November 2, 2004, election of Puerto Rico's governor was very close, and the result depended on a recount, including all absentee ballots.<sup>1</sup> The prostrate New Progressive candidate, former governor Pedro Rosselló, and eight other voters, filed a federal action at 4:25 p.m. on November 10 against the incumbent governor, Sila Calderón, and the apparent winner, Aníbal Acevedo-Vilá, both of whom were members of the Popular Democratic Party—the party favoring Puerto Rico's retaining its status as a territorial commonwealth—as well as the transition committee and the electoral commission, complaining that supporters of Acevedo-Vilá were proceeding quickly with the transition but slowly with the vote certification.<sup>2</sup> The complaint included a prayer for a temporary restraining order.<sup>3</sup>

The court assigned the case to Judge Daniel R. Domínguez, who issued an order on November 11 that on November 15 the defendants show cause why relief should not be granted and the plaintiffs provide specific jurisdictional bases for relief.<sup>4</sup> At the defendants' request, Judge Domínguez ordered,

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1. *Rosselló-González v. Calderón-Serra*, 398 F.3d 1, 4–6 (1st Cir. 2005); see Abby Goodnough, *Governor's Race Keeps Puerto Rico in Suspense*, N.Y. Times, Nov. 17, 2004, at A16.

2. Complaint, *Rosselló v. Calderon*, No. 3:04-cv-2251 (D.P.R. Nov. 10, 2004), D.E. 1 [hereinafter *Rosselló Complaint*]; *Rosselló-González v. Acevedo-Vilá*, 483 F.3d 1, 4 & nn.2–3 (2007); *Rosselló-González*, 398 F.3d at 5, 7; see Katie Zezima, *Puerto Rico Governor's Race Moves to Higher Court*, N.Y. Times, Dec. 14, 2004, at A20.

3. *Rosselló Complaint*, *supra* note 2, at 14–15; see also Motion, *Rosselló*, No. 3:04-cv-2251 (D.P.R. Nov. 16, 2004), D.E. 39; *Rosselló-González*, 398 F.3d at 7.

4. Order, *Rosselló*, No. 3:04-cv-2251 (D.P.R. Nov. 11, 2004), D.E. 2.

on November 15, that the plaintiffs also file, on November 16, a brief supporting their prayers for relief.<sup>5</sup>

On November 17, a lawyer and voter for Rosselló filed a pro se motion to intervene,<sup>6</sup> which Judge Domínguez denied that day, because the lawyer's allegations were already included in the complaint.<sup>7</sup>

After evidentiary hearings on November 18<sup>8</sup> and 19,<sup>9</sup> Judge Domínguez enjoined certification of the election pending resolution of certain issues, including an issue pertaining to split ballots, on which Judge Domínguez decided to further explore his jurisdiction.<sup>10</sup> Judge Domínguez also wanted more evidence on the extent to which the outcome of the election depended upon resolution of the plaintiffs' constitutional claims.<sup>11</sup>

Meanwhile, on November 16, four voters filed an action in Puerto Rico's superior court in San Juan, seeking a ruling validating the split ballots.<sup>12</sup> Puerto Rico's ballot allowed voters to vote for a party or for its individual candidates.<sup>13</sup> The only two candidates on the ballot at issue were candidates for governor and for Puerto Rico's nonvoting representative to the U.S. Congress, known as Puerto Rico's resident commissioner.<sup>14</sup> In addition to the New Progressive Party and the Popular Democratic Party, the Puerto Rico Independence Party appeared on the ballot.<sup>15</sup> Voters could vote only for a party, in which case all of its candidates would receive votes.<sup>16</sup> Or voters could mark only individual candidates, and they would receive the votes.<sup>17</sup> Or voters could vote for a party and one or more individual candidates in other parties, in which case the individual candidates selected would receive votes and candidates in the selected party for other offices would receive

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5. Order, *id.* (Nov. 15, 2004), D.E. 33.

6. Motion to Intervene, *id.* (Nov. 17, 2004), D.E. 43.

7. Docket Sheet, *id.* (Nov. 10, 2004) (D.E. 44).

8. Transcript, *id.* (Nov. 18, 2004, filed Nov. 24, 2004), D.E. 103 [hereinafter Nov. 18, 2004, Transcript]; Minutes, *id.* (Nov. 18, 2004), D.E. 79.

9. Transcript, *id.* (Nov. 19, 2004, filed Nov. 26, 2004), D.E. 118 [hereinafter Nov. 19, 2004, Transcript]; Minutes, *id.* (Nov. 19, 2004), D.E. 82.

10. Second Amended Order, *id.* (Nov. 20, 2004), D.E. 84; Amended Order, *id.* (Nov. 20, 2004), D.E. 83; Order, *id.* (Nov. 19, 2004), D.E. 80.

11. Transcript at 10, *id.* (Nov. 20, 2004, filed Nov. 29, 2004), D.E. 119 [hereinafter Nov. 20, 2004, Transcript] ("I am not going to jump into that fray unless I realize that those votes are the votes that are going to decide the election"); Nov. 19, 2004, Transcript, *supra* note 9, at 159–60 ("the doctrine of case and controversy does not allow me to start writing opinions all over the place unless I am satisfied that the opinion will have an outcome determinative result"); Nov. 18, 2004, Transcript, *supra* note 8, at 227 ("the Court does not want to be making academic decisions").

12. *Rosselló-González v. Calderón-Serra*, 398 F.3d 1, 5, 8 (1st Cir. 2005); *see Zezima, supra* note 2.

13. *Rosselló-González*, 398 F.3d at 5–6.

14. *Id.* at 5, 21 & n.4.

15. *Id.* at 5, 21.

16. *Id.* at 5.

17. *Id.* at 5–6.

votes.<sup>18</sup> The biggest question for this election was how to count the several thousand ballots on which one party was selected but other parties' candidates were selected for both of the individual offices.<sup>19</sup> These became known as three-mark split-vote ballots.<sup>20</sup>

The superior court dismissed its action as moot, but Puerto Rico's supreme court granted review.<sup>21</sup> While that review was pending, at 11:09 a.m. on Saturday, November 20, the defendants removed the action to the federal court, which assigned the case to Judge Domínguez.<sup>22</sup> That evening, Puerto Rico's supreme court purported to resolve the action by declaring the three-mark split-vote ballots valid votes for each of the candidates marked and also valid votes for the marked party for purposes of the party's status as a principal party.<sup>23</sup>

On November 23, Judge Domínguez declared void the ruling by Puerto Rico's supreme court, because removal had stripped the supreme court of jurisdiction over the case.<sup>24</sup> On November 26, Judge Domínguez set a hearing on December 10 for a pending remand motion.<sup>25</sup> On December 15, the federal court of appeals determined that removal was improper.<sup>26</sup> Rather than order a remand by mandamus, the appellate court expressed confidence "that the District Court will immediately remand the Suárez action back to the Supreme Court of Puerto Rico without the need for mandamus."<sup>27</sup>

For the first action, Judge Domínguez held proceedings on November 20, 22, and 23.<sup>28</sup> On November 23, Judge Domínguez ordered a recount;<sup>29</sup> he also

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18. *Id.* at 6 n.6.

19. *Id.* at 6–7; see Nov. 18, 2004, Transcript, *supra* note 8, at 37–47; see also Manuel Roig-Franzia, *Puerto Rico Is Caught in Throes of Recount*, Wash. Post, Dec. 11, 2004, at A3.

20. *Rosselló-González*, 398 F.3d at 6.

21. *Id.* at 5, 8.

22. Notice of Removal, *Suárez Jimenez v. Comisión Estatal de Elecciones*, No. 3:04-cv-2288 (D.P.R. Nov. 20, 2004), D.E. 1; *Rosselló-González*, 398 F.3d at 5, 8 (noting that the notice of removal was filed with Puerto Rico's supreme court at 11:48 a.m.); see Nov. 20, 2004, Transcript, *supra* note 11, at 61, 223 (Judge Domínguez's in-court announcement of the removal and expression of doubt that there is a federal question in the removed case).

23. *Suárez v. Comisión Estatal de Elecciones*, 163 D.P.R. 347 (2004); Orders, *Rosselló v. Calderon*, No. 3:04-cv-2251 (D.P.R. Nov. 29 & Dec. 1 & 8, 2004), D.E. 120, 158, 193 (English translation); *Rosselló-González*, 398 F.3d at 8; see Nov. 20, 2004, Transcript, *supra* note 11, at 218–19; see also Ray Quintanilla, *Recount Delayed in Puerto Rico*, Wash. Post, Nov. 25, 2004, at A11.

24. Order, *Suárez Jimenez*, No. 3:04-cv-2288 (D.P.R. Nov. 23, 2004), D.E. 12; see Nov. 20, 2004, Transcript, *supra* note 11, at 220–25 (observing that the Puerto Rico court's deciding the question of removal was unprecedented and illegal); see also Quintanilla, *supra* note 23.

The court of appeals agreed that the ruling by Puerto Rico's supreme court was void. *Rosselló-González*, 398 F.3d at 8 n.23.

25. Order, *Suárez Jimenez*, No. 3:04-cv-2288 (D.P.R. Nov. 26, 2004), D.E. 17.

26. *Rosselló-González*, 398 F.3d at 10–13.

27. *Id.* at 13.

28. Minutes, *Rosselló*, No. 3:04-cv-2251 (D.P.R. Nov. 23, 2004), D.E. 95; Minutes, *id.* (Nov. 22, 2004), D.E. 93; Nov. 20, 2004, Transcript, *supra* note 11; Minutes, *Rosselló*, No. 3:04-cv-2251 (D.P.R. Nov. 20, 2004), D.E. 85.

29. Further Amended Order, *Rosselló*, No. 3:04-cv-2251 (D.P.R. Nov. 23, 2004), D.E. 102;

ordered that the three-mark split-vote ballots be segregated but that their validity not yet be adjudged.<sup>30</sup> Proceedings continued from November 29 through December 1 and on December 7.<sup>31</sup>

On December 15, the federal court of appeals vacated the November 23 orders and ordered the action dismissed because “the federal courts will not intervene in a local electoral dispute such as this.”<sup>32</sup> Acevedo-Vilá was thereafter certified the winner.<sup>33</sup>

On January 17, 2006, Judge Domínguez denied motions by both sides for attorney fees,<sup>34</sup> a decision that the court of appeals affirmed on March 13, 2007.<sup>35</sup>

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Amended Order, *id.* (Nov. 23, 2004), D.E. 99; Order, *id.* (Nov. 23, 2004), D.E. 96; *see* Zezima, *supra* note 2.

30. Amended Order, *Rosselló*, No. 3:04-cv-2251 (D.P.R. Nov. 23, 2004), D.E. 100; Order, *id.* (Nov. 23, 2004), D.E. 98; *see* Quintanilla, *supra* note 23; Zezima, *supra* note 2.

31. Minutes, *Rosselló*, No. 3:04-cv-2251 (D.P.R. Dec. 7, 2004), D.E. 191; Minutes, *id.* (Dec. 1, 2004), D.E. 171; Minutes, *id.* (Nov. 30, 2004), D.E. 157; Minutes, *id.* (Nov. 29, 2004), D.E. 135.

32. *Rosselló-González*, 398 F.3d at 13–18; *see* Abby Goodnough, *Disputed Ballots in Governor’s Race*, N.Y. Times, Dec. 16, 2004, at A40.

33. *See* Abby Goodnough, *Officials Call Disputed Race for Governor of Puerto Rico*, N.Y. Times, Dec. 29, 2004, at A16.

34. Minutes, *Rosselló*, No. 3:04-cv-2251 (D.P.R. Jan. 17, 2006), D.E. 245.

35. *Roselló-González v. Acevedo-Vilá*, 483 F.3d 1 (2007).