

Enjoining Misleading Postal Information About Absentee Ballots in Colorado

Colorado v. DeJoy

(William J. Martínez, D. Colo. 1:20-cv-2768)

A federal district judge enjoined misleading mailings by the postal service about voting by mail in Colorado during a global infectious pandemic.

Subject: Absentee and early voting. *Topics:* Absentee ballots; Covid-19; early voting.

Colorado and its secretary of state filed a federal complaint in the District of Colorado on Saturday, September 12, 2020, against the U.S. Postal Service and three senior officials alleging that a notice that the postal service intended to send to Colorado voters included false statements about voting in Colorado.¹ With their complaint, the plaintiffs filed a motion for a temporary restraining order.²

When the clerk's office informed them about the case, Judge William J. Martínez and the law clerk assigned to the case were engaged in weekend family activities.³ The judge and the law clerk dropped what they were doing and met at the courthouse.⁴ Because apparently false notices were being sent out as he was working on the case, Judge Martínez concluded that relief could not wait until Monday.⁵ In nearly ten years on the bench, this was approximately the second time that Judge Martínez had issued a temporary restraining order without a hearing.⁶

Judge Martínez granted the plaintiffs relief on the day that the complaint was filed, concluding that the notice provided patently false information jeopardizing Colorado's constitutional right to manage its election.⁷

The Notice provides false or misleading information about the manner of Colorado's elections by stating that voters should request their mail-in ballot (often called absentee ballot) at least 15 days before Election Day and mail their ballot at least 7 days before Election Day. In reality, [because ballots will

1. Complaint, *Colorado v. DeJoy*, No. 1:20-cv-2768 (D. Colo. Sept. 12, 2020), D.E. 1; *Colorado v. DeJoy*, 487 F. Supp. 3d 1061, 1063 (D. Colo. 2020); see Luke Broadwater & Kenneth P. Vogel, *Colorado Official Sues Postal Service, Saying Election Mailer Misleads Voters*, N.Y. Times, Sept. 13, 2020, at A22.

2. Temporary-Restraining-Order Motion, *Colorado v. DeJoy*, No. 1:20-cv-2768 (D. Colo. Sept. 12, 2020), D.E. 8; *Colorado v. DeJoy*, 487 F. Supp. 3d at 1064.

3. Interview with Hon. William J. Martínez, Oct. 27, 2020.

Tim Reagan interviewed Judge Martínez for this report by telephone.

4. *Id.*

5. *Id.*

6. *Id.*; see Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges (noting that Judge Martínez received his commission on December 21, 2010).

7. *Colorado v. DeJoy*, 487 F. Supp. 3d at 1064–65; see Sam Tabachnik, *Federal Judge Blocks USPS from Sending Mailers with Misleading Information*, Denver Post, Sept. 13, 2020, at 2B.

be mailed to all registered voters,] Colorado voters do not need to request a ballot at any time. Voters who receive a ballot do not need to mail the ballot back at least 7 days before the election; they may alternatively deposit that ballot at a drop-box or may choose to vote in person up to and including on election day.⁸

Judge Martínez set the temporary restraining order to expire at the end of the day on September 22, and he set the case for hearing on September 18.⁹ “Given that Plaintiffs also request an injunction in their prayer for relief in their Complaint, the Court will construe the Motion as seeking both a temporary restraining order and a preliminary injunction.”¹⁰

On Sunday, September 13, the defendants moved for immediate reconsideration:

[T]he Postal Service, upon learning of Plaintiffs’ lawsuit, ceased its processing of the Colorado-bound postcards that had not yet been dispatched for delivery, but a particular set of over 200,000 postcards had already been partially processed for delivery. As to that set of postcards, the [temporary restraining order] will be extraordinarily difficult and perhaps impossible for Defendants to fully comply with at this juncture.¹¹

Concluding that the plaintiffs objected to the defendants’ notice as early as September 10 and “[i]n the face of all this, Defendants steadfastly held to their previously-planned course of conduct and continued to mail the Notice to Colorado households,” Judge Martínez denied the defendants reconsideration on Monday, September 14.¹²

On the day before the scheduled hearing, the parties submitted a settlement agreement, which specified that Colorado and the postal service would cooperate on messaging about voting to Colorado voters.¹³

A September 15 docket-sheet order specified that the hearing would be held in Judge Martínez’s courtroom, which would be closed to the public because of social distancing made necessary by the global Covid-19 infectious pandemic.¹⁴ A telephone number was provided for the public to have audio access to the hearing.¹⁵

8. *Colorado v. DeJoy*, 487 F. Supp. 3d at 1064 (citations, quotation marks, and quotation-alteration marks omitted).

“[N]ine states and the District of Columbia are mailing absentee ballots to every registered voter, making it unnecessary for the voters to request one. In nine other states, election officials are mailing an absentee ballot request to every registered voter.” Broadwater & Vogel, *supra* note 1.

9. *Colorado v. DeJoy*, 487 F. Supp. 3d at 1067–68.

10. *Id.* at 1064.

11. Reconsideration Motion, *Colorado v. DeJoy*, No. 1:20-cv-2768 (D. Colo. Sept. 13, 2020), D.E. 12.

12. Opinion, *id.* (Sept. 14, 2020), D.E. 21, 2020 WL 5513567; see Shelly Bradbury, *Majority of Flyers Already Delivered*, Denver Post, Sept. 15, 2020, at 1A.

13. Settlement Agreement, *Colorado*, No. 1:20-cv-2768 (D. Colo. Sept. 17, 2020), D.E. 30-1.

14. Docket Sheet, *id.* (Sept. 12, 2020) (D.E. 22).

15. *Id.*

Following a twenty-five-minute discussion of the settlement agreement, the case was terminated on the plaintiffs' voluntary dismissal.¹⁶

16. *Id.* (D.E. 32); Minutes, *id.* (Sept. 18, 2020), D.E. 31.