

Modifying the Postmark Requirement for Mailed Ballots in New York

Gallagher v. New York State Board of Elections
(*Analisa Torres, S.D.N.Y. 1:20-cv-5504*)

New York’s allowance for voting by mail during the global Covid-19 infectious pandemic of 2020 had a postmark requirement, but pre-paid mail was not always postmarked, so a district judge ordered that ballots received by the day after the election would be counted without a postmark and ballots received by the following day would be counted unless they had a postmark after election day.

Subject: Absentee and early voting. *Topics:* Absentee ballots; Covid-19; intervention; primary election; class action.

Fifteen voters, including two candidates, filed a federal class-action complaint in the Southern District of New York on Friday, July 17, 2020, alleging that New York’s enacted provisions for voting by mail in light of the global Covid-19 infectious pandemic, including a requirement that postage be prepaid by election authorities, would require postmarks for mailed ballots to be counted, but the post office would not postmark prepaid mail.¹ With their complaint, the plaintiffs filed a motion for a preliminary injunction.²

Noting “the counting of absentee ballots currently under way from the June 23, 2020 New York State Democratic primary,” the plaintiffs also filed a letter request for an accelerated schedule and “permission to—given the pandemic—serve Defendants by reliable electronic means.”³ Judge Edgardo Ramos granted the letter motion that day, noting, “If oral argument or a hearing is appropriate, it will be scheduled when a judge is assigned to the case.”⁴ Briefing was to be completed on July 23.⁵

On Monday, the court assigned the case to Judge Analisa Torres.⁶ On Thursday, she allowed two additional candidates to intervene in the case.⁷ On Sunday, July 26, she set the case for a videoconference hearing on July 29, allowing members of the public to attend by telephone.⁸ Because time was of the essence, Judge Torres provided detailed information in advance of the hearing about factual questions that would help her resolve the injunction motion.⁹

1. Complaint, *Gallagher v. N.Y. State Bd. of Elections*, No. 1:20-cv-5504 (S.D.N.Y. July 17, 2020), D.E. 1.

2. Preliminary-Injunction Motion, *id.* (July 17, 2020), D.E. 3.

3. Letter Motion, *id.* (July 17, 2020), D.E. 5.

4. Endorsed Order, *id.* (July 17, 2020), D.E. 6.

5. Endorsed Order, *id.* (July 22, 2020), D.E. 15.

6. Docket Sheet, *id.* (July 17, 2020).

Tim Reagan interviewed Judge Torres for this report by telephone on September 1, 2020.

7. Opinion, *Gallagher*, No. 1:20-cv-5504 (S.D.N.Y. July 23, 2020), D.E. 20, 2020 WL 4261172; *see* Intervenor’s Complaint, *id.* (July 25, 2020), D.E. 40.

8. Hearing-Agenda Order, *id.* (July 26, 2020), D.E. 48; *see* Order, *id.* (July 27, 2020), D.E. 52 (noting that the court would use Skype for Business for the videoconference).

9. Hearing-Agenda Order, *supra* note 8; Interview with Hon. Analisa Torres, Sept. 1, 2020.

The evidentiary hearing lasted two days.¹⁰ Each day began with an admonition against recording the proceeding.¹¹ At the beginning of the first day, Judge Torres declined a request from one of the attorneys to address standing immediately: “We will not be addressing standing issues at this hearing. This is a purely fact-based hearing. Of course, Counsel, when the hearing is over, I will hear legal arguments, but not beforehand.”¹²

If not for Covid-19, the hearing would have been conducted in person.¹³ Before the hearing, Judge Torres consulted with two colleagues who had already presided over bench trials by video.¹⁴ Among the most helpful advice was how important it was for attorneys to test their and their witnesses’ equipment in advance.¹⁵

One disadvantage of the videoconferencing platform used was a delay between when someone started to speak and when their video showed up on the screen, which meant that short answers were never seen.¹⁶

On August 3, Judge Torres ordered New York’s election officials to count all otherwise valid absentee ballots cast in the June 23 Primary which were (1) received by June 24, 2020, without regard to whether such ballots are postmarked by June 23, 2020 and (2) received by June 25, 2020, so long as such ballots are not postmarked later than June 23, 2020.¹⁷

On October 23, reviewing an amended complaint, Judge Torres declined to extend her injunction to cover the November 3 general election, finding that the plaintiffs’ concerns, despite legislative changes to voting by mail made since the primary election, were speculative.¹⁸ Judge Torres signed a stipulated settlement on September 9, 2021.¹⁹

Before becoming a federal judge, Judge Torres spent thirteen years as a state judge, and she found her familiarity with New York’s election laws and procedures very helpful in presiding over this case.²⁰

10. *Gallagher v. N.Y. State Bd. of Elections*, 477 F. Supp. 3d 19, 27 (S.D.N.Y. 2020).

11. Transcript at 225, *Gallagher*, No. 1:20-cv-5504 (S.D.N.Y. July 30, 2020, filed Aug. 3, 2020), D.E. 88; Transcript at 3, *id.* (July 29, 2020), filed Aug. 3, 2020), D.E. 86 [hereinafter July 29, 2020, Transcript].

12. July 29, 2020, Transcript, *supra* note 11, at 9.

13. Interview with Hon. Analisa Torres, Sept. 1, 2020.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Gallagher v. N.Y. State Bd. of Elections*, 477 F. Supp. 3d 19, 27 (S.D.N.Y. 2020); *see Gallagher v. N.Y. State Bd. of Elections*, 496 F. Supp. 3d 842, 845 (S.D.N.Y. 2020); *see also* Katie Honan, *Judge’s Ruling Spurs Calls for Improved Voting Procedures*, Wall St. J., Aug. 5, 2020, at 10A.

18. *Gallagher*, 496 F. Supp. 3d 842; *see* Amended Complaint, *Gallagher v. N.Y. State Bd. of Elections*, No. 1:20-cv-5504 (S.D.N.Y. Sept. 11, 2020), D.E. 109.

19. Stipulated Settlement, *Gallagher*, No. 1:20-cv-5504 (S.D.N.Y. Sept. 9, 2021), D.E. 149.

20. Interview with Hon. Analisa Torres, Sept. 1, 2020; *see* Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.