

## Nullification of an Absentee-Ballot Witness Requirement During a Global Infectious Pandemic

*League of Women Voters of Virginia v. Virginia State  
Board of Elections (Norman K. Moon, W.D. Va. 6:20-cv-24)*

During the global Covid-19 infectious pandemic, seven weeks before a primary election, a district judge approved a consent decree that nullified the witness requirement for absentee ballots in the election. Later, the judge approved a similar consent decree for the general election.

*Subject:* Absentee and early voting. *Topics:* Covid-19; absentee ballots; intervention; primary election; attorney fees.

In light of the global Covid-19 infectious pandemic, the League of Women Voters of Virginia and three voters filed a federal complaint in the Western District of Virginia's Lynchburg courthouse on Friday, April 17, 2020, seeking relief from a witness requirement for absentee ballots.<sup>1</sup> On Tuesday, the plaintiffs filed a motion for a preliminary injunction.<sup>2</sup> Judge Norman K. Moon set the case for a telephonic status conference on April 24.<sup>3</sup>

At the conference, Judge Moon granted the plaintiffs' unopposed motion to expedite briefing and set the case for hearing on May 4.<sup>4</sup> The parties agreed that witness testimony would not be necessary, and the hearing also was held by telephone rather than by video.<sup>5</sup> Judge Moon knew that he

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1. Complaint, *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-cv-24 (W.D. Va. Apr. 17, 2020), D.E. 1; *League of Women Voters of Va. v. Va. State Bd. of Elections*, 481 F. Supp. 3d 580, 584 (W.D. Va. 2020); *League of Women Voters of Va. v. Va. State Bd. of Elections*, 458 F. Supp. 3d 442, 444, 446–47 (W.D. Va. 2020); *League of Women Voters of Va. v. Va. State Bd. of Elections*, 458 F. Supp. 3d 460, 462 (W.D. Va. 2020); see Denise Lavoie, *Virginia Sued Over Witness Requirement for Absentee Ballots*, *Norfolk Virginian*, Apr. 18, 2020, at A3.

2. Preliminary-Injunction Motion, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Apr. 21, 2020), D.E. 18; *League of Women Voters of Va.*, 481 F. Supp. 3d at 584; *League of Women Voters of Va.*, 458 F. Supp. 3d at 447; *League of Women Voters of Va.*, 458 F. Supp. 3d at 462.

3. Minutes, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Apr. 24, 2020), D.E. 30 [hereinafter Apr. 24, 2020, Minutes]; Docket Sheet, *id.* (Apr. 17, 2020) (notice, D.E. 20); see *League of Women Voters of Va.*, 458 F. Supp. 3d at 447.

For this report, Tim Reagan interviewed Judge Moon and his law clerks Rob DeRise and Josh Lefebvre by telephone on September 2, 2020.

4. Order, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Apr. 24, 2020), D.E. 31; Apr. 24, 2020, Minutes, *supra* note 3; Motion, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Apr. 21, 2020), D.E. 18; see *League of Women Voters of Va.*, 481 F. Supp. 3d at 585; Minutes, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. May 4, 2020), D.E. 66.

5. Interview with Hon. Norman K. Moon and his law clerks Rob DeRise and Josh Lefebvre, September 2, 2020.

would have to reach a decision before election officials started mailing out absentee ballots, and his chambers prioritized this case over other matters.<sup>6</sup>

On April 29, Judge Moon granted a political party's motion to intervene in defense of the witness requirement, and he denied motions to intervene by voters in defense of the requirement.<sup>7</sup>

Leaving the preliminary-injunction motion pending, on May 5, Judge Moon approved a consent decree partially resolving the case.<sup>8</sup> The decree stated that voters in the June 23 primary election who did not believe that they could safely have their ballots witnessed did not have to do so, and no ballot would be rejected for lack of a witness.<sup>9</sup>

In ordinary times, Virginia's witness signature requirement may not be a significant burden on the right to vote. But these are not ordinary times. In our current era of social distancing—where not just Virginians, but all Americans, have been instructed to maintain a minimum of six feet from those outside their household—the burden is substantial for a substantial and discrete class of Virginia's electorate.<sup>10</sup>

Judge Moon set the case for a bench trial beginning May 19, 2021.<sup>11</sup> The plaintiffs withdrew their preliminary-injunction motion on May 13, 2020,<sup>12</sup> filed amended complaints on June 19<sup>13</sup> and July 17.<sup>14</sup> They filed a new preliminary-injunction motion on July 24.<sup>15</sup> On August 21, Judge Moon ap-

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6. *Id.*

7. *League of Women Voters of Va.*, 458 F. Supp. 3d 460 (denying intervention to voters, whose interests were shared by all voters, to prevent prejudice to the parties by an influx of intervening voters, but granting permission to participate as amici curiae); Opinion, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Apr. 30, 2020), D.E. 60, 2020 WL 2090678 (granting intervention to a political party but denying intervention to voters); Order, *id.* (Apr. 29, 2020), D.E. 57 (same); Order, *id.* (Apr. 29, 2020), D.E. 55 (denying intervention to voters); *League of Women Voters of Va.*, 481 F. Supp. 3d at 584; *League of Women Voters of Va.*, 458 F. Supp. 3d at 447; see Intervention Motion, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Apr. 24, 2020), D.E. 28 (political party and voters); Intervention Motion, *id.* (Apr. 23, 2020), D.E. 22 (just voters); see also Amy Friedenberger, *GOP Seeking to Retain Ballot Witnessing Rule*, Roanoke Times, May 6, 2020, at 6R.

8. *League of Women Voters of Va.*, 458 F. Supp. 3d 442; *League of Women Voters of Va.*, 481 F. Supp. 3d at 585; see Joint Consent Decree Motion, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Apr. 27, 2020), D.E. 35.

9. *League of Women Voters of Va.*, 458 F. Supp. 3d at 448; see Proposed Partial Consent Decree, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Apr. 27, 2020), D.E. 35-1; see also Amy Friedenberger, *State to Waive Witness Requirement for Voting*, Roanoke Times, Apr. 29, 2020, at 1B; Amy Friedenberger, *Witness Requirement Waived for Absentee Ballots in June Primaries*, Roanoke Times, May 6, 2020, at 2B.

10. *League of Women Voters of Va.*, 458 F. Supp. 3d at 452.

11. Docket Sheet, *supra* note 3 (D.E. 76).

12. Notice, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. May 13, 2020), D.E. 73.

13. Amended Complaint, *id.* (June 19, 2020), D.E. 81.

14. Second Amended Complaint, *id.* (July 17, 2020), D.E. 84; *League of Women Voters of Va. v. Va. State Bd. of Elections*, 481 F. Supp. 3d 580, 584 (W.D. Va. 2020).

15. Preliminary-Injunction Motion, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. July 24, 2020), D.E. 87; *League of Women Voters of Va.*, 458 F. Supp. 3d at 448.

proved a second partial consent decree relaxing the witness signature requirement for the November 3 general election.<sup>16</sup>

“There remains no dispute that, based on the Census Bureau’s 2018 Current Population Survey, over twenty-five percent of Virginians over the age of eighteen live alone. Nor do the parties dispute that some at-risk populations are more likely to live alone, such as Virginians over the age of sixty-five.”<sup>17</sup>

One condition of the consent decree was the plaintiffs’ waiving any entitlement to attorney fees accrued up to Judge Moon’s approval of the consent decree.<sup>18</sup>

Through February 2021, Judge Moon approved two amended consent decrees.<sup>19</sup> On May 3, 2021, he dismissed the action as settled in light of intervening legislation.<sup>20</sup>

Judge Moon observed that the civility of the parties and the interveners in this case greatly helped the court manage the time pressure.<sup>21</sup>

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16. *League of Women Voters of Va.*, 481 F. Supp. 3d 580; Second Partial Consent Decree, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Aug. 21, 2020), D.E. 110; see Order, *id.* (Oct. 9, 2020), D.E. 117, 2020 WL 6365622 (denying a motion for contempt because “the State Defendants’ initial actions and prompt corrective measures show substantial compliance with the consent decree”).

17. *League of Women Voters of Va.*, 481 F. Supp. 3d at 582.

18. *Id.* at 586; Second Partial Consent Decree, *supra* note 16, D.E. 110-1 at 9.

19. Opinion, *League of Women Voters of Va.*, No. 6:20-cv-24 (W.D. Va. Feb. 17, 2021), D.E. 131 (extending coverage of the consent decree to include a special state legislature election on March 23, 2021); Opinion, *id.* (Dec. 23, 2020), D.E. 126 (extending coverage of the consent decree to include two special state legislature elections on January 5, 2021).

20. Order, *id.* (May 3, 2021), D.E. 136.

21. Interview with Hon. Norman K. Moon and his law clerks Rob DeRise and Josh Lefebvre, September 2, 2020.