

A Consent Decree Waiving the Witness Requirement for Voting by Mail in Rhode Island During an Infectious Pandemic

Common Cause Rhode Island v. Gorbea
(Mary S. McElroy, D.R.I. 1:20-cv-318)

For the June 2020 presidential primary election in Rhode Island, the governor suspended the state’s requirement that mail-in ballots be witnessed by a notary or by two other witnesses. A district judge approved a consent decree applying the witness-requirement suspension to elections in Rhode Island in September and November. The court of appeals and the Supreme Court denied a major political party’s motion to stay the consent decree.

Subject: Absentee and early voting. *Topics:* Absentee ballots; Covid-19; intervention; interlocutory appeal; laches; primary election.

Two organizations and three voters filed a federal complaint in the District of Rhode Island on Thursday, July 23, 2020, seeking court nullification of Rhode Island’s requirement that mail-in ballots be witnessed by either a notary or two other witnesses—in light of social distancing made necessary by the global Covid-19 infectious pandemic—for primary elections in September and the general election in November.¹ The plaintiffs observed that Rhode Island’s governor suspended the witness requirement for Rhode Island’s June presidential primary election.² With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.³

Judge Mary S. McElroy set the case for a videoconference on Friday morning, sending connection information to the attorneys by email.⁴

[At the conference,] the parties informed the Court that they would seek to craft a consent decree, due to the defendants’ sharing of the plaintiffs’ concerns and general agreement with the plaintiffs’ request, thus possibly obviating the need to proceed with the plaintiffs’ motion for a preliminary injunction. The parties agreed to discuss a consent decree over the weekend and the Court scheduled a hearing on the plaintiffs’ motion for Monday, July 27, in the event the negotiations failed.⁵

1. Complaint, *Common Cause of R.I. v. Gorbea*, No. 1:20-cv-318 (D.R.I. July 23, 2020), D.E. 1; see Katherine Gregg, *R.I. Voter-Rights Groups Challenge Witness Requirements for Mail Ballots*, Providence J., July 24, 2020, at A2.

2. Complaint, *supra* note 1.

3. Motion, *Common Cause of R.I.*, No. 1:20-cv-318 (D.R.I. July 23, 2020), D.E. 5.

4. Docket Sheet, *id.* (July 23, 2020) [hereinafter D.R.I. Docket Sheet].

For this report, Tim Reagan interviewed Judge McElroy and her law clerk Kevin Rolando by telephone on September 4, 2020.

5. Opinion at 6–7, *Common Cause of R.I.*, No. 1:20-cv-318 (D.R.I. July 30, 2020), D.E. 25 [hereinafter D.R.I. Opinion], 2020 WL 4365608; D.R.I. Docket Sheet, *supra* note 4 (noting that again connection information would be sent to the attorneys by email).

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At about midnight on Sunday, a major political party moved to intervene in the case as a defendant.⁶ Noting that it understood that the parties would be submitting a consent order to Judge McElroy, the political party requested a fairness hearing.⁷ On Monday, Judge McElroy scheduled a fairness hearing for Tuesday.⁸

At the Tuesday hearing, Judge McElroy approved a consent judgment suspending the witness requirement for the remaining 2020 elections, and she denied the intervention motion.⁹ Judge McElroy found that “the settlement is fair, reasonable, and adequate to protect the interests of all of the voters of Rhode Island, and including the proposed intervenors and the Plaintiffs in this case.”¹⁰ Having allowed the political party to file papers and participate in the hearing, Judge McElroy decided that intervention was not justified because of its potential for delaying the case.¹¹

Because of Covid-19, the court of appeals heard the political party’s appeal on August 6 by videoconference.¹² On August 7, the court of appeals declined to stay the consent judgment.¹³ The court of appeals concluded, “The burden imposed by [the witness] requirements in the midst of a pandemic is significant. . . . Taking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote.”¹⁴

On August 13, over three dissents, the Supreme Court also denied the political party a stay of the consent judgment.¹⁵ “The status quo is one in which the challenged requirement has not been in effect, given the rules used in Rhode Island’s last election, and many Rhode Island voters may well hold that belief.”¹⁶

6. Intervention Motion, *Common Cause of R.I.*, No. 1:20-cv-318 (D.R.I. July 26, 2020), D.E. 10; D.R.I. Opinion, *supra* note 5, at 7; see Katherine Gregg, *National GOP Joins R.I. Fight Over Mail Ballots*, Providence J., July 28, 2020, at A1.

7. Fairness Motion, *Common Cause of R.I.*, No. 1:20-cv-318 (D.R.I. July 26, 2020, filed July 27, 2020), D.E. 12.

8. D.R.I. Docket Sheet, *supra* note 4.

9. *Id.*; D.R.I. Opinion, *supra* note 5 (“finding that the proposed intervenors had not timely sought to intervene”); Consent Judgment, *Common Cause of R.I.*, No. 1:20-cv-318 (D.R.I. July 30, 2020), D.E. 26, 2020 WL 4460914; *Common Cause R.I. v. Gorbea*, 970 F.3d 11, 13 (1st Cir. 2020); see Katherine Gregg, *Judge Files Ruling on Mail-Ballot Requirements, National GOP Appeals*, Providence J., July 31, 2020, at A2.

10. Transcript at 86–87, *Common Cause of R.I.*, No. 1:20-cv-318 (D.R.I. July 28, 2020, filed Aug. 11, 2020), D.E. 38.

11. *Id.* at 88–90.

12. Order, *Common Cause of R.I. v. R.I. Republican Party*, No. 20-1753 (1st Cir. Aug. 4, 2020).

13. *Common Cause R.I.*, 970 F.3d 11; see Paul Edward Parker, *Court Won’t Restore Witness Requirement on Mail Ballots*, Providence J., Aug. 9, 2020, at A11.

14. *Common Cause R.I.*, 970 F.3d at 14–15.

15. *Republican Nat’l Comm. v. Common Cause R.I.*, 591 U.S. ___, 141 S. Ct. 206 (2020); see Patrick Anderson, *High Court Backs R.I. Mail-Ballot Rule Change*, Providence J., Aug. 14, 2020, at A1; Amanda Milkovits & Edward Fitzpatrick, *In R.I., Voters Can Use Mail-In Ballots with No Witnesses*, Boston Globe, Aug. 14, 2020, at B2.

16. *Republican Nat’l Comm.*, 591 U.S. ___, 141 S. Ct. 206; see Robert Barnes, *Court Denies*

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On August 24, 2021, the plaintiffs informed the court that the matter had concluded because there was no pending controversy for the court to resolve.¹⁷

Reflecting on the case-management challenges in this case because of Covid-19, Judge McElroy observed that meeting the challenges in previous cases helped.¹⁸

GOP, Allows R.I. Pandemic-Related Relief on Mail-In Ballots, Wash. Post, Aug. 14, 2020, at A10 (reporting that this was the Supreme Court’s first time allowing pandemic-related voter relief); Adam Liptak, *Rhode Island Can Facilitate Mail Voting, Justices Rule*, N.Y. Times, Aug. 14, 2020, at A20 (reporting that it was unusual for the Supreme Court to provide an explanation when it acted on an emergency application).

17. Status Report, *Common Cause of R.I. v. Gorbea*, No. 1:20-cv-318 (D.R.I. Aug. 24, 2021), D.E. 41; *see Order, id.* (Aug. 3, 2021), D.E. 40 (ordering a report on the status of the case); *see also Order, Common Cause of R.I.*, No. 20-1753 (1st Cir. Aug. 17, 2020) (approving voluntary dismissal of the appeal).

18. Interview with Hon. Mary S. McElroy and her law clerk Kevin Rolando, Sept. 4, 2020; *see Acosta v. Restrepo*, 470 F. Supp. 3d 161 (D.R.I. 2020) (concerning ballot-petition signatures); *Yanes v. Martin*, 464 F. Supp. 3d 467 (D.R.I. 2020) (concerning immigration detention).