UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

COMMON CAUSE RHODE ISLAND, LEAGUE OF WOMEN VOTERS OF RHODE ISLAND, MIRANDA OAKLEY, BARBARA MONAHAN, and MARY BAKER, *Plaintiffs*, v. NELLIE M. GORBEA, in her official capacity as Secretary of State of Rhode Island; DIANE C. MEDEROS, LOUIS A. DESIMONE JR., JENNIFER L. JOHNSON, RICHARD H. PIERCE, ISADORE S. RAMOS, DAVID H. SHOLES, and WILLIAM E. WEST, in their official capacities as members of the Rhode Island Board of Elections, *Defendants*, REPUBLICAN NATIONAL COMMITTEE, and RHODE ISLAND REPUBLICAN PARTY [*Proposed*] *Intervenor-Defendants.*	Case No. 1:20-cv-00318-MSM-LDA

[PROTECTIVE] MOTION FOR FAIRNESS HEARING

Movants, the Republican National Committee and the Rhode Island Republican Party, have sought to intervene as defendants in this case. Movants understand that the parties will be submitting to the Court on Monday a proposed consent order. Though they have not yet been granted intervention, Movants respectfully request that the Court hold a fairness hearing before determining whether to enter the proposed consent

order. *See League of Women Voters of Minn. Educ. Fund v. Simon*, Doc. 26, No. 0:20-cv-1205 (D. Minn. June 16, 2020) (sua sponte calling for a fairness hearing to assess a proposed consent decree in a similar case).

On Thursday, July 23, 2020, Plaintiffs filed this case against the Secretary of State of Rhode Island and the individual members of the Rhode Island Board of Elections. Plaintiffs challenge the State's requirement that by-mail voters "have their mail-in ballot envelopes signed by either two lay witnesses or one notary." Complaint ¶1. At base, plaintiffs' theory is that COVID-19 renders this otherwise lawful signature requirement an unconstitutional burden on the right to vote. *Id.* ¶¶58-63.

The day after Plaintiffs filed their Complaint, the Board of Elections called an emergency meeting to "discuss and vote upon the entry of a consent order, including possible modification to the witness/notary public requirements for mail ballots, set forth under Chapter 20 of Title 17 of the General Laws, in the lawsuit pending in the United States District Court for the District of Rhode Island, captioned, *Common Cause Rhode Island, et al. v. Nellie M. Gorbea, et al.*, C.A. No. 1:20-cv-00318-MSM-LDA." Exhibit A (State of Rhode Island Board of Elections, Emergency Meeting Agenda (July 24, 2020)).

Movants' understand that the Board of Elections is likely to vote in favor of this "consent order" and that the parties will promptly submit it for the Court's approval. Movants thus request that the Court hold a fairness hearing and allow Movants to present arguments in opposition to the proposed consent order, as the Republican Party

did in a virtually identical case in Minnesota. *See League of Women Voters of Minn.*, No. 0:20-cv-1205. Like that case, Movants will likely provide the *only* adversarial testing of Plaintiffs' claims here.

"Approval of a consent decree requires careful court scrutiny." *Ibarra v. Texas Emp't Comm'n*, 823 F.2d 873, 878 (5th Cir. 1987). "Even though the [proposed] decree is predicated on consent of the parties," *United States v. City of Miami*, 664 F.2d 435, 440-41 (5th Cir. 1981) (Rubin, J., concurring), a district court cannot "mechanistically 'rubber stamp' the consent decree," but must "consider the underlying facts and legal arguments" that support or undermine the proposal, *United States v. BP Amoco Oil PLC*, 277 F.3d 1012, 1019 (8th Cir. 2002). The consent decree must be found to "spring from and serve to resolve a dispute within the court's subject matter jurisdiction, . . . come within the general scope of the case made by the pleadings, . . . and must further the objectives of the law upon which the complaint was based." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (cleaned up). Moreover, the proposed order must be "examine[d] carefully to ascertain not only that it is a fair settlement but also that it does not put the court's sanction on and power behind a decree that violates Constitution, statute, or jurisprudence." *City of Miami*, 664 F.2d at 441; *see Aronov v. Napolitano*, 562 F.3d 84, 91 (1st Cir. 2009) ("A court entering a consent decree must examine its terms to be sure they are fair and not unlawful. "); *e.g.*, *Illinois v. City of Chicago*, 912 F.3d 979, 987 (7th Cir. 2019); *Smyth v. Rivero*, 282 F.3d 268, 280

(4th Cir. 2002); *United States v. Oregon*, 913 F.2d 576, 581–82 (9th Cir. 1990); *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983).

Particularly where a proposed consent decree "contains injunctive provisions or has prospective effect, the district court must be cognizant of and sensitive to equitable considerations." *Ibarra*, 823 F.2d at 878 (citing *Donovan v. Robbins,* 752 F.2d 1170, 1176 (7th Cir. 1985)). Moreover, "[i]f the decree also affects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed." *City of Miami*, 664 F.2d at 441; *see also, e.g.*, *Bass v. Fed. Sav. & Loan Ins. Corp.*, 698 F.2d 328, 330 (7th Cir. 1983). In short, the Court "must assure itself that the parties have validly consented; that reasonable notice has been given possible objectors; that the settlement is fair, adequate, and reasonable; that the proposed decree will not violate the Constitution, a statute, or other authority; that it is consistent with the objectives of Congress; and, if third parties will be affected, that it will not be unreasonable or legally impermissible as to them." *Durrett v. Hous. Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990). The Court would have the duty to hold a fairness hearing sua sponte, even if Movants were not here objecting.

In order to carry out its duty to scrutinize the proposed consent order, the Court should hold a fairness hearing and allow Movants to participate in it. Movants would explain to the Court that the witness requirement is lawful; that the parties' attempt to do away with it is unlawful; and that, in any event, under the *Purcell* principle, "federal courts are not supposed to change state election rules as elections approach," *Thompson*

v. Dewine, 959 F.3d 804, 813 (6th Cir. 2020), because such orders "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

Given that Defendants are capitulating rather than defending the laws that the Secretary is duty bound to enforce, Movants are the only parties willing and able to make such a presentation. Movants' participation will thus assist this Court; indeed, after Movants intervened and participated in the fairness hearing in Minnesota, the district court rejected the proposed decree. *League of Women Voters of Minn.*, Doc. 52, No. 0:20-cv-1205. Accordingly, the Court should hold a fairness hearing and allow Movants to present argument opposing the proposed consent order before the Court determines whether to enter it as an order of the Court.

Dated: July 26, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and that paper copies will be sent to all those non-registered participants on July 27, 2020.

/S/ BRANDON S. BELL