No. 20A28

In the Supreme Court of the United States

REPUBLICAN PARTY OF RHODE ISLAND AND REPUBLICAN NATIONAL COMMITTEE,
Applicants,

vs.

COMMON CAUSE RHODE ISLAND; LEAGUE OF WOMEN VOTERS OF RHODE ISLAND; MIRANDA OAKLEY; BARBARA MONAHAN; MARY BAKER; NELLIE M. GORBEA, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE OF RHODE ISLAND; AND 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
Respondents,

**TO THE HONORABLE STEPHEN G. BREYER,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND
CIRCUIT JUSTICE FOR THE FIRST CIRCUIT**

RESPONDENTS' OPPOSITION TO THE EMERGENCY APPLICATION FOR STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29.6, respondents Common Cause Rhode Island ("CC-RI") (a nonprofit association), and the League of Women Voters of Rhode Island ("LWV-RI") (a nonprofit association), certify as follows:

CC-RI is a state office of Common Cause and has no parent company or publicly-held company with a 10% or greater ownership interest in it.

LWV-RI has no parent company or publicly-held company with a 10% or greater ownership interest in it.

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TO THE HONORABLE STEPHEN G. BREYER, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIRST CIRCUIT:

INTRODUCTION

Following briefing and a fairness hearing in which the Republican National Committee and the Rhode Island Republican Party (together, the "Republican Party") fully participated, the District Court approved a consent decree between the Rhode Island Secretary of State, the Rhode Island Board of Elections, and Plaintiffs-Respondents (the "Consent Decree"), which continued Rhode Island's recent suspension of its requirement that an eligible voter cast their mail-in ballot before two witnesses or a notary (the "two-witness requirement") for the September 8, 2020 primary and November 3, 2020 general elections. Application for Stay ("AFS") App. 3. The Consent Decree reflects the considered judgment of Rhode Island election officials that, in light of the COVID-19 pandemic, voters should not have to face a choice between their health and their fundamental right to vote.

In other words, Rhode Island election officials have determined that suspending the two-witness requirement is: (1) necessary to providing a constitutional manner of voting to its citizens and (2) an important public health measure at a time when Rhode Island continues to urge its most vulnerable citizens to avoid social contact. Four federal court judges have unanimously agreed that the State's judgment was a prudent and proper action to protect constitutional rights. This Court should not disrupt that considered judgment. Doing so would be a usurpation of the state officials' authority to balance the public health and facilitate

the safe exercise of our most fundamental right, the right to vote. *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (Roberts, C.J., concurring) ("Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'").

Rhode Island's Governor, relying on her emergency powers in response to the national and local health crisis, had previously suspended the two-witness requirement shortly before the State's June 2, 2020 presidential primaries. The Republican Party did not object to that suspension. *See* AFS App. 15. In that election, the Republican Party readily accepted ballots in favor of their candidates that were executed outside the presence of two witnesses or a notary. More than 105,000 Rhode Islanders chose to vote by mail in the June 2020 primaries, representing 83% of the ballots cast in those elections[1]—including 99% of the votes cast by the Greatest Generation, 94% of the votes cast by the Silent Generation, and 88% of the votes cast by the Baby Boomer Generation.[2] It is undisputed that the primaries were conducted without voter confusion regarding the suspension of the witness requirement, and without a single report of voter fraud or abuse. *See* AFS App. 7; *see also* AFS 1.

Given that recent experience, and faced with overwhelming evidence of health risks to Rhode Island voters, it was reasonable for the State officials empowered by

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[1] *Previous Election Results*, R.I. BD. OF ELECTIONS, https://elections.ri.gov/elections/preresults/index.php (last visited Aug. 10, 2020).
[2] *2020 Presidential Primary Election Task Force Presentation*, R.I. DEP'T OF ST., 5 (July 9, 2020), https://vote.sos.ri.gov/Content/Pdfs/PPP%20Task%20Force%20July%209%202020%20Final.pdf.

Rhode Island law to administer State elections, to enter into a consent decree to extend the suspension of Rhode Island's two-witness requirement for the September and November 2020 elections as well. *See* AFS App. 26-32 (Consent Judgment and Decree). The Rhode Island Secretary of State and Members of the Board of Elections, mindful of their oaths to uphold the law, concluded in the face of the Plaintiffs-Respondents' claims for declaratory and injunctive relief, that the burdens placed on voters in the form of the risks to life and health presented by the novel coronavirus imposed an unconstitutional burden on the voting rights of Rhode Island citizens. They concluded that existing protections for applying for and receiving mail-in ballots are sufficient to safeguard the integrity of the voting process under these conditions. The result was a proposed consent order to suspend the two-witness requirement for Rhode Island's remaining 2020 elections, embodied in the Consent Decree.

As the District Court and Court of Appeals concluded, and the Republican Party conceded before the Court of Appeals, the Consent Decree was not the product of any collusion between the Plaintiffs and the State Defendants. AFS App. 12 (First Circuit order); AFS App. 20 n.5 (district court order). Rather, the Consent Decree reflects a commonsense resolution to carry forward the same proven process that had worked in the primary just months before, ensuring that all voters, regardless of political opinion or party, were able to cast their ballots by mail in record numbers without risking their health unnecessarily.

The Republican Party, however, would supplant the judgment of Rhode Island's elections officials with their own, and have this Court impose their view on

the State. That suggestion is plainly at odds with the Chief Justice's recent admonition that federal courts should refrain from "second-guessing" the "politically accountable officials of the States" when it comes to judgments about "[t]he safety and the health of the people." *S. Bay United Pentecostal Church v. Newsom,* 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief). This Court should be very reluctant to upend the considered decision of the State's elected officials responsible for running the election about what is required during the pandemic to ensure a meaningful opportunity to vote.

The Applicant's request is also contrary to the objective facts. The Republican Party contends that in-person voting is perfectly fine and safe in Rhode Island because the State has provided "sanitizer," and that there are no health risks to any Rhode Islanders from coming into close proximity with two witnesses as they cast a ballot and handle an envelope signed by those witnesses. AFS 4-5. They bizarrely assert that the fact that Rhode Island has not taken the drastic and unprecedented step of cancelling its elections for the remainder of 2020 is evidence that the election officials "must believe in-person voting is safe[.]" AFS 16. Tellingly, the Republican Party has presented *no* evidence—not at the fairness hearing, not at the First Circuit, not before this Court—to refute Plaintiffs-Respondents' extensive factual record, with which the State agrees, as to the severity and scope of the burden imposed by the two-witness requirement. While the Republican Party dismisses Rhode Island voters concerned about their health in the pandemic as "idiosyncratic," there is simply no evidence in the record that the State can conduct its elections safely with the two-

witness requirement in effect. The State agrees it cannot; it needs a substantial population of its voters to vote by mail without interacting with non-household members to operate safe election. And not only is Plaintiffs-Respondents' factual showing uncontested, *see* App. 18, but the COVID-19 situation in Rhode Island has *worsened* since this the outset of this litigation. In fact, Rhode Island's Governor recently announced that she has decided *not* to allow Rhode Island to exit Phase III of Re-Opening;[3] has imposed additional restrictions in view of new outbreaks of the COVID-19 pandemic;[4] and several States have actually imposed travel restrictions on Rhode Islanders in view of the State's recent outbreaks.[5]

The Republican Party also says that because the State Assembly and Governor *decided* not to suspend the two-witness requirement as an emergency matter, the parties were unable to agree to do so by a consent decree here. *See* AFS 7. As an initial matter, there is no political exhaustion requirement before a constitutional violation can be found. The Consent Decree—which resolves a temporary constitutional problem based on extraordinary, albeit temporary, circumstances—was supported by politically accountable actors including the Secretary of State, the

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[3] *Rhode Island COVID-19 Information*, R.I. DEP'T OF HEALTH (last updated Aug. 8, 2020), https://health.ri.gov/covid/.
[4] *Id.* (announcing that limit for social gatherings has been reduced to 15 people).
[5] *Travel Advisory Requiring Possible Quarantine,* NBC CONN. (Aug. 4, 2020) https://www.nbcconnecticut.com/news/coronavirus/ri-added-to-list-of-covid-19-hot-spots-requiring-14-day-quarantine/2313200/; *Governor Cuomo Announces Individuals Traveling to New York from an Additional State Will Be Required to Quarantine for 14 Days*, N.Y. GOV. (Aug. 4, 2020), https://www.governor.ny.gov/news/governor-cuomo-announces-individuals-traveling-new-york-additional-state-will-be-required.

Board of Elections and the Attorney General. Moreover, it was not challenged by *any member* of the Rhode Island Assembly or the Governor. Legislative bodies and elected officials act, and fail to act, for a myriad of reasons. Courts exist as a bulwark to protect constitutional rights precisely when political institutions fail to address or resolve specific constitutional violations. Neither political inaction, nor partisan calculation, can prevent State officials from agreeing to suspend a statute that in operation, due to a unique and unprecedented health crisis, imposes significant health burdens on all regardless of political party that arise to a constitutional level.

Despite more than 161,000 Americans dead from COVID-19,[6] including more than 1,000 Rhode Islanders,[7] the Republican Party now asks this Court for the unprecedented relief of staying a *consent decree* on two primary legal grounds, namely, (1) that, under *Purcell v. Gonzalez,* 591 U.S. 1 (2006)*,* no election procedures can *ever* be set aside as a matter of law for any reason shortly before an election, *even if* the State is responding to an historic health crisis and has concluded that no confusion or harm will result and there was no evidence of voter confusion in an election conducted just two months ago without the requirement, and (2) the risk of potential voter fraud*, and irreparable harm to the Republican Party should be conclusively presumed, notwithstanding unrebutted record evidence* that Rhode

[6] *Cases & Deaths in the US*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Aug. 10, 2020), https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/us-cases-deaths.html

[7] *Rhode Island Coronavirus Map and Case Count*, N.Y. TIMES (last updated Aug. 10, 2020), https://www.nytimes.com/interactive/2020/us/rhode-island-coronavirus-cases.html.

Island just conducted a free and fair election without the two-witness requirement, with no evidence of voter fraud and election officials' considered judgment that the anti-fraud mechanisms in place are sufficient. Neither argument merits the extraordinary relief requested here.

The Republican Party maintains that this case should be controlled by *Merrill v. People First of Ala.,* 2020 WL 3604049 (U.S. July 2, 2020). While they assert that all cases should be treated exactly the same way, and that this case is somehow controlled by *Merrill v. People First of Ala.,* 2020 WL 3604049 (U.S. July 2, 2020), they refuse to acknowledge that this case is entirely different, because (1) it arises from a consent decree uniformly supported by the State officials charged with administering Rhode Island's elections; (2) the consent decree was entered on the record of a very recent election conducted without the two witness or notary requirement, (3) without any voter confusion about the absence of the witness requirement, (4) without fraud, and (5) without objection. On this unique, full and substantial record, the District Court properly accepted the Consent Decree, and the First Circuit properly declined to stay its effect. *Merrill* at its core was a preliminary injunction case that involved a variety of voting matters, including a judicial order lifting a statewide ban on roadside voting (not just a witness requirement), *to which the State of Alabama vigorously objected*. This Court's recent election stay decisions underscore that courts generally should accord great weight to the judgments of the State election officials charged with administering them who are immersed in the facts and local conditions, particularly during these rapidly changing times. The

peoples' representatives of Rhode Island are entitled to *at least* the same degree of respect and deference here as were the objecting state officials in Alabama.

This Court has never stayed a consent decree under the guise of *Purcell* or its progeny, and the Republican Party suggests no reason why this case should be the first in which the Court should do so.

STATEMENT OF THE CASE

Plaintiffs-Respondents filed their Complaint and Motion for a Temporary Restraining Order and Preliminary Injunction on Thursday, July 23, 2020, Doc. 1, seeking to extend the state's suspension of the two witness requirement for absentee voting that had been in place for the June presidential primary. The lawsuit made the local news that evening. The next day, the Court held a conference where Plaintiffs and Defendants for the first time discussed the possibility of a consent order. As a courtesy, counsel for the Secretary of State alerted the State Republican Party to the pending negotiations. AFS App. 22. The parties worked diligently over the following weekend to negotiate the terms of the proposed order. *Id.* at 22.

Late in the evening of Sunday, July 26, 2020, the Republican Party moved to intervene in the matter. *Id.* at 19. On Monday, July 27, after receiving the approval of the Secretary of State and Board of Elections, Respondents moved for the Court to enter the Consent Decree. *Id.* The Republican Party briefed the Court on its objections to the Consent Decree, and on Tuesday, July 28, the Court held a fairness hearing on the Republican Party's Motion to Intervene and Respondents' Motion for Entry of the Consent Decree. *Id.* at 20. After considering the Republican Party's objections, Judge McElroy ruled from the bench, entering the Consent Decree as an order of the Court and denying the Republican Party's Motion to Intervene, which was then followed by a written opinion. *Id.* at 13, 26.Judge McElroy explained that "[t]he adequacy and reasonableness of the Consent Decree also is evident by the fact that it sets forth the exact mail-ballot protocols successfully used during the June 2, 2020, presidential preference primary." *Id. at* 23. The District Court rejected the Republican Party's

argument that the Consent Decree was legally impermissible, finding that "[h]ad the parties not reached a Consent Decree to suspend the witness or notary requirements for the remaining 2020 elections, this Court is empowered to find that the requirements, as applied in the current pandemic, unconstitutionally limits voting access, and therefore order precisely what the Consent Decree achieves." *Id.*

Late on Friday, July 31, the Republican Party filed an Emergency Motion with the First Circuit Court of Appeals requesting a stay of the Court's Order entering the Consent Decree pending appeal. *Id.* at 9. Following briefing and oral argument, in which the Republican Party fully participated, on Friday, August 7, the First Circuit in a written opinion denied the Republican Party's Motion to Stay, and granted the Republican Party's Motion to Intervene for the purpose of appeal. *Id.* at 12. The First Circuit observed that "[t]aking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote." *Id.* at 6. The First Circuit also noted that "Rhode Island officials charged with the conduct of fair elections apparently view the regulation's possible benefits as far outweighed by its burdens in this unusual circumstances." *Id.* at 7. Moreover, the First Circuit stated that "the elected constitutional officers charged with ensuring free and fair elections favor the consent judgment and decree and credibly explain how setting aside the consent judgment and decree would confuse voters." *Id.* at 9. That is because "the status quo (indeed the only experience) for most recent voters is that no witnesses are required." *Id.* Finally, the First Circuit rejected any concern that the State's support for the Consent Order will somehow "open any floodgates" because "as experience shows, states will be quick

to defend election laws they see as important and worth keeping, even when they might burden voting." *Id.* at 11.

On Monday, August 10, the Republican Party filed an application with this Court requesting a stay of the District Court's Order pending appeal.

REASONS FOR DENYING THE APPLICATION

In assessing a stay application pending the filing and disposition of a petition for writ of certiorari, the "judgment of the court below is presumed to be valid," and this Court defers to the judgment of the court of appeals "absent unusual circumstances." *Wise v. Lipscomb*, 434 U.S. 1329, 1333 (1977) (Powell, J., in chambers). "Denial of . . . in-chambers stay applications" is the "norm; relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers). "The party requesting a stay bears the burden of showing that the circumstances justify" such extraordinary relief. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009).

Applicants—who bear the burden here—do not remotely satisfy this Court's exacting standards with respect to the Consent Decree. Applicants fail to show (1) a likelihood that irreparable harm will result from the denial of the stay; (2) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; or (3) a fair prospect that a majority of the Court will vote to vacate the Consent Decree. *See Conkright,* 556 U.S. at 1402. And even if Applicants could satisfy these prongs—and they cannot—"the conditions that are *necessary* for issuance of a stay are not necessarily ***sufficient***." *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers). "It is ultimately necessary, in other words, 'to "balance the equities"—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* at 1305 (cit. omitted). Here, the consequences of granting a stay would be severe: not only would it disrupt the *status quo* before an upcoming

presidential election, it would permit the Republican Party to impose a requirement opposed by state election officials on voters that would force them to risk their health or forgo their right to vote.

I. The Republican Party Lacks Standing to Appeal the Decision Below

As an initial matter, the Republican Party, as an Intervenor, lacks standing to pursue an appeal of the decision below. "To appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019); *see also Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016) ("[A]n intervenor cannot step into the shoes of the original party . . . unless the intervenor independently fulfills the requirements of Article III") (internal citations and quotations omitted). To qualify for Article III standing, parties must establish that 1) they have suffered an injury-in-fact that is "concrete and particularized" and "actual or imminent," 2) "the injury is fairly traceable to the challenged action", and 3) "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000).

To establish a concrete and particularized injury-in-fact, a party "must possess a *direct stake* in the outcome of the case," meaning that the injury must "affect[] him in a personal and individual way." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2015) (emphasis added); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 44 (1997) ("Standing to defend on appeal in the place of an original defendant demands that the litigant possess a direct stake in the outcome") (internal quotations omitted). Litigants that press only a "generalized grievance"—in which they "claim[]

only harm to his and every citizen's interest in proper application of the Constitution . . . and seek[] relief that no more directly and tangibly benefits him than it does the public at large"—fall short of meeting the Article III requirement. *Hollingsworth*, 133 S. Ct. 2662 (internal quotations and citations omitted). The injury-in-fact requirement prevents "concerned bystanders" who are not especially harmed by the challenged conduct from using the court "as a vehicle for the vindication of value interests." *Id.* at 2663; *see also Diamond v. Charles*, 476 U.S. 54, 62 (1986).

This is precisely what the Republican Party seeks to do here. In its application for a stay to this Court, the Republican Party states only that the failure to enforce the witness requirement in upcoming elections "increases the risk of ineligible and fraudulent voting," AFS App. 5, and that the requirement deserves protection because it was "lawfully enacted" by the legislature," *id. at* 26.[8] These are generalized grievances that affect all Rhode Islanders equally, and the Republican Party nowhere demonstrates that the Consent Decree particularly burdens their interests. To the contrary, it essentially concedes that it is not *particularly* harmed here, acknowledging that enforcing the consent decree will cause the same harms to all "voters" and "Rhode Islanders." *Id.* at 26. The Republican Party seeks only "to

[8] Private parties such as Defendant-Intervenors also cannot intervene merely to vindicate the state's interest in defending a statute. In *Karcher v. May*, the Speaker of the New Jersey General Assembly and President of the New Jersey Senate were permitted to intervene in their official capacities to defend the constitutionality of a state statute. 484 U.S. 72 (1987). However, once they left the legislature, "they lack[ed] authority to pursue [the] appeal" because they were no longer in office. *Id.* at 81. As private parties, Defendant-Intervenors are foreclosed from acting as a proxy to defend whatever state interest may exist in enforcing the witness requirement.

vindicate the constitutional validity of a generally applicable [state] law," the suspension of which does not especially burden them in any way. *Hollingsworth*, 133 S. Ct. at 2662. Given that this Court has held that, when state officials decline to appeal a redistricting decision that changes the composition of legislative districts, intervenor state legislators who represent those districts lack independent standing to appeal, *see Bethune-Hill*, 139 S. Ct. at 1951, the Republican Party's generalized grievance fails a fortiori.

Indeed, this Court has "never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to." *Id.* at 2668. To do so presents not only Article III case or controversy concerns, but federalism concerns as well. There is no reason to permit the Republican Party to stand in for the State, when the State itself is a party, and the Party alleged only the most generalized of injuries. The Republican Party thus lacks standing in this litigation.

II. The District Court Properly Determined that the Consent Decree is Fair and Reasonable.

The fact that the State voluntarily entered into the Consent Decree at issue weighs heavily against this Court upending that decree on an emergency stay application. This is not a case in which a District Court unilaterally ordered a State, over its objections, to adopt novel voting procedures, move ballot mailing deadlines, establish curbside voting, or forgo requiring voters to present their I.D.s. Rather, the Consent Decree reflects a negotiated settlement with the State, endorsed by relevant Rhode Island voting officials, to dispense with the same two-witness requirement that

Rhode Island had recently suspended in view of the COVID-19 epidemic in a successful presidential primary election.

The standard for approving a consent decree does not require that a Court conclude the plaintiffs would meet the exacting standards for establishing entitlement to a temporary restraining order or preliminary injunction (even though the District Court so concluded on an unrebutted record). Rather, a consent decree "embodies an agreement of the parties" and is "an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Frew v. Hawkins*, 540 U.S. 431, 437 (2004). The court entering a consent decree must ensure the terms are "fair and not unlawful." *Aronov v. Napolitano*, 562 F.3d 84, 91 (1st Cir. 2009). Approval of a consent decree is "committed to the trial court's informed discretion." *Puerto Rico Dairy Farmers Ass'n v. Pagan*, 748 F.3d 13, 20 (1st Cir. 2014). "Woven into the abuse of discretion standard here is a 'strong public policy in favor of settlements[.]'" *Id.* (quoting *U.S. v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 280 (1st Cir. 2000)). When reviewing a consent decree,

> the district 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.

AFS App. 22 (citing *Durrett v. Hous. Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990)). While Applicants argue that a consent decree is simply an injunction

by another name, they provide no reason as to why this well-established standard of review should not apply in this case.

Applicants make no allegation that the Consent Decree is the product of fraud, nor that either party failed to validly consent to its terms. In fact, while Applicants alleged collusion between the parties at the District Court, Applicants explicitly abandoned this unsupported assertion at oral argument before the First Circuit. AFS App. 11, 20. The Consent Decree is the product of arms-length discussions between the parties, negotiated shortly after the case was filed and presented to the District Court on Monday, July 27, 2020. Applicants were given notice of the parties' pending negotiations on the Friday before, and were given the opportunity to contest its entry with written briefs and at the fairness hearing held Tuesday, July 28. AFS App. 40; *see also* Doc. 21, Response In Opposition to Joint Motion to Approve Consent Judgment.

Over the course of negotiations each party compromised in the interest of reaching an agreement that would not delay the State's preparation for the September 8, 2020 primary election. Plaintiffs-Respondents waived attorney fees, and Defendants-Respondents reserved the right to request voters' personal information for additional identification verification, though Plaintiffs-Respondents would have excluded those requirements. AFS App. 30. Both parties believed that suspending the two-witness requirement during the pandemic was in the best interests of the voters, as evidenced by the Board of Elections' votes on March 26,

2020 and on July 13, 2020 to suspend the two-witness requirement for upcoming elections. App. 147.

The Board of Elections' approval of the decree merits "deference to the [Board's] expertise and to the parties' agreement." *Cannons Eng'g Corp.,* 899 F.2d at 84; *see also Clingman v. Beaver,* 544 U.S. 581, 586 (2005) ("The Constitution grants States broad power to prescribe the Times, Places and Manner of holding Elections for Senators and Representatives, which power is matched by state control over the election process for state offices.") (internal citation omitted). The Board of Elections is the party "charged with the responsibility to carry out" the election laws of Rhode Island, including the two-witness requirement at issue here. *Buonanno v. DiStefano,* 430 A.2d 765, 771 (R.I. 1981); *see also* R.I. Gen. Laws § 17-7-5(a) & (c). "The doubly required deference—district court to agency and appellate court to district court—places a heavy burden on those who purpose to upset a trial judge's approval of a consent decree." *Cannons Eng'g Corp.,* 899 F.2d at 84. The Board is well-suited to make judgments as to how to tailor the remedy for the constitutional violation it identified. *See Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 389 (1992) (holding that the district court did not abuse its discretion in entering the consent decree). The District Court in this case was entitled to rely in part on the Board's judgment when assessing the fairness and reasonableness of the Consent Decree. *See Swift & Co.*, 276 U.S. 311, 324 (1928); *see also Rufo*, 582 U.S. at 394-395. Nonetheless, the District Court reached its own conclusion that, had it been obliged to rule on Plaintiffs-Appellees' Motion for Injunctive Relief, "the Court would have found that the mail-

ballot witness or notary requirement, as applied during the COVID-19 pandemic, is violative of the First and Fourteenth Amendments to the United States Constitution because it places an unconstitutional burden on the right to vote." AFS App. 22.

Applicants have cited many cases, but *not one* in which an appellate court stayed, let alone reversed, a consent decree temporarily suspending a provision of a state's election laws. The deference courts give to such agreements between plaintiffs and state officials materially distinguishes this matter, and places the burden on Applicants to demonstrate that it is not fair and reasonable. Applicants make hardly any attempt.

III. The Facts of This Case Distinguish it From Those in Which this Court Granted a Stay.

A. The Two-Witness Requirement Indisputably Burdens Plaintiffs-Appellees' Constitutional Rights.

Putting aside that the Court should respect the judgments of the State and the District Court regarding the Consent Decree under the applicable deferential standard of review, Applicants' contention that Rhode Island's two-witness requirement does not "impact . . . the fundamental right to vote" is wrong as a matter of law and fact. ATS at 15 (citing *McDonald v. Bd. of Election Comm'rs of Chicago,* 394 U.S. 802, 807 (1969)). All qualified voters have a constitutionally protected right to vote. *Reynolds v. Sims*, 377 U.S. 533, 554-555 (1964), *Harper v. Virginia State Bd. Of Elections*, 383 U.S. 663 (1966), *Griffin v. Burns*, 570 F.2d 1065, 1074 (1st Cir. 1978) (holding that the State's refusal to count valid absentee and shut-in ballots was unconstitutional, thereby ordering a new election). And the privilege of absentee voting is certainly "deserving of due process."*See Carrington v. Rash*, 380 U.S. 45, 50

(1959); *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990). Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted. *See Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018); *see also Reynolds*, 377 U.S. 554-555. Where, as here, a historic pandemic makes vote-by-mail the only realistic recourse for many citizens to cast their ballots, it is essential that the opportunity be a real one.

In defense of the proposition that restrictions on voting by mail can *never* burden the right to vote, Applicants reflexively rely on *McDonald v. Bd. of Election Comm'rs of Chicago,* 394 U.S. 802, 807 (1969). *McDonald* cannot support their arguments. While there is no absolute right to vote by absentee ballot, the right to vote by absentee ballot *is* protected where meaningful alternative means are unavailable. The Supreme Court specifically so cabined *McDonald* three times shortly after it was issued. *See Goosby v. Osser*, 409 U.S. 512, 521 (1973) (permitting a claim by Philadelphia pretrial detainees seeking absentee ballots to proceed); *O'Brien v. Skinner*, 414 U.S. 524, 529, 531 (1974) (stressing that "[t]he Court's disposition of the claims in *McDonald* rested on failure of proof" that alternative means of voting were unavailable); *American Party of Texas v. White*, 415 U.S. 767 (1974) (striking down a discriminatory absentee ballot law). Moreover, *McDonald* predates this Court's formulation of the *Anderson-Burdick* test, which applies a balancing test to burdens on the means of voting. 460 U.S. 780 (1983). Unlike *McDonald*, there is no "failure of proof" as to the inadequacy of in-person voting as a reasonable alternative for

Plaintiffs in the midst of a global pandemic. *O'Brien*, 414 U.S. at 529. Indeed, Plaintiffs-Respondents have no alternative. They must risk their health and violate the State's health guidelines, or they must forego their fundamental right to vote. *See Thomas v. Andino*, 2020 U.S. Dist. LEXIS 90812, at *46 n.20 (D.S.C. May 25, 2020) (noting that during the COVID-19 pandemic "other means of exercising the right" to vote are not easily available, and in-person voting "forces voters to make the untenable and illusory choice between exercising their right to vote and placing themselves at risk of contracting a potentially terminal disease"). These are not the "usual burdens" of voting." AFS 17 (citing *Crawford*). Applicants provide no explanation for why the *Anderson-Burdick* test should not apply except a reflexive citation to *McDonald*, which cannot support their position. As the Supreme Court set forth in *Anderson v. Celebrezze* and *Burdick v. Takushi,* courts must balance the character and magnitude of any law burdening the right to vote against the relevant government interest served by the law.[1] *Burdick v. Takushi,* 504 U.S. 428, 434 (1992) (citing *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983)). Courts consider both the reach and severity of the burden on those impacted in determining the applicable level of scrutiny under *Anderson-Burdick*. *See Barr v. Galvin,* 626 F.3d 99, 109 (1st Cir. 2010).

Plaintiffs-Respondents have challenged the two-witness requirement not on its face, but *as applied* in the midst of the COVID-19 pandemic. Plaintiffs-Respondents have offered sworn statements from medical professionals as to the critical necessity

[1] *See* Doc. 5-1, Ex. C at 23-25 (Motion for TRO).

of social distancing generally, App. 67, Doc. 5-1, ¶ 11 (Declaration of Dr. Arthur L. Reingold), and the risks posed by the two-witness requirement in particular. App. 111, Doc. 5-3, ¶¶ 9, 10 (Declaration of Dr. Michael Fine). In addition, the State's online notarization process (not to mention finding a qualified notary) is so impractical as to be effectively unavailable to the large majority of Rhode Island voters. *See* Doc. 5-1, Ex. C at 32-33. Applicants' attempt to analogize the burden to an administrative nuisance akin to Indiana's photo ID requirement is refuted by the Declarations submitted in support of the Motion for Temporary Restraining Order and Preliminary Injunction. *See* AFS 17-18 (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008)).

The burden placed on Rhode Island voters by the two-witness requirement is not only severe but widespread. Based on U.S. Census estimates from 2018, 197,000 Rhode Islanders aged 18 and over live alone, and a further 289,000 live with only one other person. App. 129 (CPS Data for 2018). Of this 486,000, an estimated 138,000 are aged 65 and over. *Id.* These Rhode Islanders will normally not be able to comply with the two-witness requirement while observing the State's social distancing guidelines. This number is also highly under-inclusive, failing to account for the many potential voters who live in households of three or more yet do not live with two other adults capable of serving as witnesses. If Rhode Island's two-witness requirement is enforced in the State's remaining 2020 elections, hundreds of thousands of voters, including tens of thousands of the most vulnerable, will be forced to put their health at risk in order to exercise their constitutional rights. Doc. 5-1, Ex. C at 19-22. As the

First Circuit observed, "it is . . . certain that the burdens are much more unusual and substantial than those that voters are generally expected to bear. Taking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote." AFS App. 6. The clear and present burden on Rhode Island citizens' rights materially distinguishes this matter from prior stays of injunctions issued by this Court. *See Little v. Reclaim Idaho*, 2020 WL 4360897 (U.S. 2020) ("This is not a case about the right to vote, but about how items are placed on the ballot in the first place.").

Applicants' attempts to argue that Rhode Islanders can vote safely in a pandemic are anecdotal and conclusory, completely failing to rebut Plaintiffs-Respondents' factual showing. For instance Applicants assert that the fact that Rhode Island has not taken the drastic and unprecedented step of cancelling its elections for the remainder of 2020 is evidence that the election officials "must believe in-person voting is safe[.]" AFS 16. The very Phase III guidance Applicants quote, far from demonstrating voters' safety, provides that "[a]ll vulnerable populations identified by the Centers for Disease Control and Prevention (CDC), including anyone age 65 and older, are still strongly advised to stay at home unless they must go to work; travel for medical treatment; or get other necessities such as groceries, gas, or medication."[9] And conditions in Rhode Island are getting *worse*. *See* App. 20-22. As recently as July 29, Gov. Raimondo announced the State would remain in Phase III until August 28

[9] R.I. Exec. Order No. 20-50 (June 29, 2020) (emphasis added), https://governor.ri.gov/documents/orders/Executive-Order-20-50.pdf.

with a *lowered* social gathering limit of 15 people as "social gatherings have been the source of many positive cases."[10]

The *Anderson-Burdick* test is a highly fact-specific inquiry. *See, e.g., Gill v. Scholz*, 962 F.3d 360, 364-65 (7th Cir. 2020); *American Ass'n of People with Disabilities v. Hererra*, 690 F.Supp.2d 1183, 1197 (D.N.M. 2010) (citing *Libertarian Party v. Herrera*, 506 F.3d 1303, 1308 (10th Cir.2007); *see also Crawford*, 553 U.S. 181, 190 (2008) ("court[s] must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule" instead of "applying a[ ] 'litmus test' that would neatly separate valid from invalid restrictions"). On this record, both sides of the *Anderson-Burdick* test weigh heavily in Plaintiffs' favor. The evidence of severe burden is uncontested and the State agrees that its minimal interests in the regulation are overcome.[11]

B. Rhode Island Election Officials Determined that the Two-Witness Requirement Burdens Rhode Island Voters.

In the face of this evidence, the Rhode Island Secretary of State and Board of Elections exercised their considered judgement and determined that the Consent Decree was a fair and reasonable measure to reduce the undue burden on Rhode Islanders' right to vote. This judgment was not made lightly. The Board of Elections

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[10] *Rhode Island Covid-19 Information*, STATE OF R.I. DEPT. OF HEALTH, https://health.ri.gov/covid/ (last updated Aug. 3, 2020).

[11] Indeed, the Rhode Island law at issue here already contains exemptions for those who would find it difficult in ordinary times to obtain two witness signatures demonstrating that the Legislature did not intend to impose an undue burden by requiring two witnesses and did not believe it was crucial where it would pose a hardship. But under current circumstances, vulnerable Rhode Island citizens staying at home will likely find it far more difficult to comply than those out-of-state or abroad.

held a series of public hearings beginning March 17, 2020, where the Board heard testimony from the Rhode Island Department of Health (DOH), the SOS, the National Guard, the U. S. Postal Service, and the local boards of canvassers. App. 146. In these hearings the Board heard testimony "concerning the transmission and effects of the COVID-19 pandemic on the systems on which elections rely, and how the pandemic affects and interacts with the ordinary requirements and burdens imposed by Rhode Island election laws." *Id.* The Board also reviewed and weighed guidance issued by U.S. Department of Health & Human Services, and the CDC. App. 146-147. After considering this evidence, on July 13, 2020 the Board voted unanimously to recommend suspending the two-witness requirement for the State's September primary and November general election. App. 147.[12] This judgment was seconded by the Secretary of State, tasked with printing and distributing ballots, among other election-related duties. App. 188 ("[T]he Secretary and the Board of Elections seek to prevent the Court from entering a last-minute stay so that the 2020 September primary and November general election may be conducted in a fashion that they deem safe.").

Unquestionably, "Rhode Island officials charged with the conduct of fair elections apparently view the [two-witness requirement's] possible benefits as far outweighed by its burdens in this unusual circumstance." AFS App. 7. As this Court has repeatedly recognized, "[s]tates retain 'considerable leeway to protect the

[12] *See also* R.I. State Board of Elections Minutes of Meeting, Monday July 13, 2020, https://opengov.sos.ri.gov/Common/DownloadMeetingFiles?FilePath=\Minutes\132\2020\370106.pdf

integrity and reliability of the initiative process.'" *Reclaim Idaho*, 2020 WL 4360897, at *1 (Roberts, C.J., concurring) (citing *Buckley v. Am. Const. L. Found., Inc.*, 525 U. S. 182, 191 (1999)).

The rest of Rhode Island's government either actively concurs with the judgment of Respondent-Defendants or has at the very least failed to "step[] forward in these proceedings, even as amicus, to tout the need for the rule." AFS App. 7. Rhode Island's Attorney General, who by law is obligated to act as legal advisor for all state agencies and officers acting in their official capacity and to defend them against suit, R.I. Gen. Laws § 42-9-6, advised the Secretary of State and Board of Elections throughout this litigation. Further, Applicants cite no legislative history or any probative evidence to suggest that the State legislature holds a contrary view to the rest of the government.

Applicants suggest that the speed with which the agreement to a Consent Decree was reached is evidence that it was an attempt to circumvent the normal legislative process.[13] But "[t]he fact that two agencies with expertise independently reached the conclusion that the health risk was real, that the signature and notary requirements unduly burdened the right to vote, and that the parties could reach a workable solution that protected the integrity of the election, does not show collusion. If anything, it points to the reasonableness and fairness of the Consent Decree." AFS

[13] Applicants' insinuation that the Secretary of State "turned to this lawsuit" to overturn the requirement, AFS 27, is a bald attempt to resurrect Applicants' baseless allegations of "collusion" between Plaintiffs and Defendants, which Applicants themselves explicitly dropped during oral arguments before the First Circuit. AFS App. 11-12.

App. 20 n.5. "And it would be odd indeed to say that a plaintiff cannot get relief from an unconstitutional law merely because the state official charged with enforcing the law agrees that its application is unconstitutional." AFS App. 12.

Respondents-Defendants' full-throated support for the Consent Decree entered by the District Court in this matter is among several factors materially distinguishing this Court's stay of the district court's injunction in *Merrill v. People First of Alabama*, No. 19A1063, 2020 U.S. LEXIS 3541 (July 2, 2020). In that case, the district court injunction was opposed by the Secretary of State and Attorney General, serving as representatives of the state. *See* Emerg. Stay App. 1, *Merrill*. State officials in that case averred *both* that they could provide safe voting absent the injunction *and* that the injunction interfered with their ability to safeguard the integrity of the election. Emerg. Stay App. 6-7. Here, state officials aver the opposite. In addition, in *Merrill,* the injunction covered not only the state's witness requirement, but also enjoined the state's photo identification requirement and overturned the state's de facto ban on curbside voting. *People First of Alabama v. Merrill*, No. 2:20-cv-00619, 2020 U.S. Dist. LEXIS 104444, at *8 (N.D. Ala. June 15, 2020). The injunction would have enabled individual counties to implement an entirely new method of voting, and was thereby much more likely to cause confusion than the Consent Decree here, which merely continues the same rule that applied during the prior election. *See* Emerg. Stay App. 27-28, *Merrill* (explaining the Alabama Secretary of State's "hesitancy to allow curbside voting to be rolled out for the first time during a pandemic under short notice and with minimal planning").

Indeed, the active opposition of state actors distinguishes not only *Merrill* but every case cited by Applicants. In *Thompson*, the state opposed the plaintiff's motion to enjoin the State from enforcing the in-person signature requirement for petitions to put an initiative on a ballot. 959 F.3d at 806-807. In *North Carolina v. League of Women Voters of Norther Carolina*, the State of North Carolina and the members of its Board of Elections challenged the enjoining of the legislation that would set new voting rules. 574 U.S. 927 (2014). In *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, the Wisconsin state legislature joined the Republican National Committee is seeking to stay the district court's order. 140 S. Ct. 1205, 1209 n.1 (2020) (Ginsburg, J., dissenting). In *Ohio State Conf. of N.A.A.C.P. v. Husted*, the Ohio Secretary of State and the Ohio Attorney General challenged a district court injunction enjoining the state election officials from prevention individual counties from setting additional voting hours. 768 F.3d 524, 529 (6th Cir. 2014). In *Perry v. Perez*, the State of Texas opposed an interim redistricting plan adopted by the district court. No. SA-11-CA-360-OLG-JES-XR, 2011 U.S. Dist. LEXIS 155597, *1-2 (W.D. Tex Nov. 23, 2011). Finally, in *Purcell v. Gonzalez*, the State of Arizona sought relief from a Ninth Circuit injunction regarding the state's voter identification laws. 549 U.S. 1, 2 (2006). In all of these cases, the state fought to protect or opposed changes to the administration of their elections, so providing a stay furthered the state's interests and the interests of federalism. By contrast, granting a stay here would constitute this Court's substitution of its judgment for that of the State itself.

IV. The Consent Decree Extends the Same Election Procedures Recently Employed by the State and a Stay Therefore Would Confuse the Public and Disenfranchise Voters.

Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006) cautions that federal courts refrain from rewriting state election procedures shortly before elections so as to avoid confusion. However, the *Purcell* principle does not impose an arbitrary deadline beyond which federal courts are forbidden to act. Rather, it expresses the caution that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* Here, the Republican Party has failed to explain how any voter will be confused if the return envelope for their mail-in ballot does not require signature lines for two witnesses or a notary. This is precisely what occurred just two months ago in the Rhode Island presidential primary, and there is no evidence of voter confusion regarding the absence of a witness requirement. And unlike many other cases where changes occur in the midst of the casting of ballots, the changes here are being made in advance of the fall elections, before mail-in voting even commences.

On the contrary, the record demonstrates that it is a stay of the Consent Decree that is likely to confuse voters. The First Circuit Court identified two "unique factors" that make *Purcell* inapplicable to this case. Namely, the State's endorsement of the relief provided by the Consent Decree, and the expectations of voters who recently voted in an election where the two-witness requirement was absent. AFS App. 9.

First, the Court of Appeals observed that "Rhode Island itself has voiced no concern at all that the consent judgement and decree will create any problems for the state or its voter." *Id.* at 9. This fact alone "materially distinguishes this case from

every other case the Republicans cite to illustrate the 'Purcell principle.'" *Id.* (listing cases). Applicants' statement that "the governor and legislature both deliberately declined to suspend [the two-witness requirement] for the upcoming elections" is supported by no legislative history or other record evidence. *See* AFS 22. Indeed, the legislature has only been in session for a limited period since onset of the pandemic, with a myriad set of issues to address. During those few days of legislative session, the only bill addressing this issue was packaged with other reforms that legislators found objectionable and thus did not pass. Equating a lack of action, particularly in these circumstance, to a deliberate decision supporting the witness requirement is "pure speculation." *Id*And yoyo-ing of the two-witness requirement would certainly sow confusion among voters . This Court should not disrupt Rhode Island's ability to administer its own elections.

In contrast, Applicants cite to *no case* where the injunction of the election law in the matter was stayed where the state itself supported the injunction. Here, the State has not only failed to oppose the Consent Decree but has actively endorsed its provisions protecting voters. When state officials make decisions "in areas fraught with medical and scientific uncertainties, their latitude must be especially broad." *S. Bay United Pentecostal Church ,* 140 S. Ct. at 1614 (internal quotations omitted) (Roberts, C.J., concurring in denial of application for injunctive relief). As such, the Secretary of State and Board of Elections' endorsement of this remedy greatly reduces the risks of voter confusion and unwarranted administrative burdens.

Second, the Court of Appeals rightly concluded that the Consent Decree is far more likely to *reduce* the likelihood of voter confusion due to voters' experience in the State's last election. As in many states, prior to this year voting by mail was utilized by only a small subset of Rhode Island voters. For instance, in the State's 2016 presidential primary less than 4% of voters cast their ballots by mail. App. 26 & n.54. However, faced with the risk of contracting COVID-19 by voting in person, and unburdened by the two-witness requirement, 83% of voters cast their ballot by mail in the State's presidential primary held on June 2, 2020. *Id.* at 25 & n.52. As the First Circuit noted, "the status quo (indeed the only experience) for most recent voters is that no witnesses are required." AFS App. 10. Indeed, "[i]nstructions omitting the two-witness or notary requirement have been on the state's website since at least mid-July." *Id.* The Consent Decree merely extends the State's policy for the remaining elections in 2020, thereby ensuring that "voters know and adhere to the same neutral rules." AFS 21.

From the standpoint of voter confusion this case stands in stark contrast to the injunction this Court considered in *Republican Nat'l Comm v. Democratic Nat'l Comm*. In that case, this Court granted a stay of a district court order that allowed absentee mail ballots mailed and postmarked after Election Day to be counted so long as they were received within six days of election day. 140 S. Ct. 1205, 1206-07 (2020). As this Court noted, this change "fundamentally alter[ed] the nature of the election." *Id.* at 1207. Compounding this extraordinary relief, the majority stressed, was the fact that Plaintiffs in that case did not request it in their complaint. *Id.* at 1206. Here,

by contrast, the Consent Decree merely suspends a requirement *the state itself* suspended only two months ago. The fact that this relief is not "extraordinary" is further attested to by election officials' ready agreement to it. The State's consent here provides the further assurance that allowing the Consent Decree to stand will not "open any floodgates[,]" as "experience shows, states will be quick to defend election laws that they see as important and worth keeping, even when they might burden voting." AFS App. 11.

The First Circuit's decision also does not undermine *Crawford*. The Court in *Crawford* did not have before it, much less address, an as-applied challenge. 553 U.S. at 186-87. Instead, *Crawford* held that certain photo-ID laws pass muster under the Fourteenth Amendment balancing approach applied to facially neutral election laws. *See id.* at 189-90. The Court did not foreclose ***other*** challenges to photo-ID laws, such as discriminatory-intent claims. And it is not uncommon for courts to invalidate facially neutral laws (that might otherwise be permissible) as applied.

The District Court considered the "unique factors" of this case and ultimately "rejected [Applicants'] main argument that 'changing the rules' on the eve of an election would cause voter confusion[,]" finding that "[i]n fact, the opposite is true." AFS App. 20 n.5. With such clear and insurmountable evidence supporting its decision, it is "necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court." *Purcell*, 549 U.S. at 5.

Applicants' convoluted recitation of *Frank v. Walker*, 574 U.S. 929 (2014) is misleading. In fact *Frank* counsels *against* issuing a stay of the Consent Decree. In

that case, the district court's order enjoining Wisconsin from enforcing its voter ID law protected voters' expectations by preventing the state from implementing the requirement, which had already been enjoined by Wisconsin state courts for over two years, close to the state's pending elections. *Frank v. Walker*, 17 F. Supp. 3d 837, 842 n.1 (E.D. Wis. 2014). The Seventh Circuit stayed the district court's order. *Frank v. Walker*, 766 F.3d 755 (7th Cir. 2014). This Court vacated the Seventh Circuit's stay without opinion. *Frank*, 574 U.S. at 929. However, the dissent noted that there was "a colorable basis for the Court's decision due to the proximity of the upcoming general election," clearly suggesting that the decision to vacate the stay was motivated by the *Purcell* principle. *Id.* (Alito, J., dissenting). Taken in context, *Frank v. Walker* demonstrates that where a court's order maintains the status quo, it is the stay of that decision which violates *Purcell*.

V. A Stay Will Cause Irreparable Harm to Respondents, Not to Applicants.

At each stage of this litigation, Applicants have "struggle[d] to establish any significant likelihood of irreparable harm." AFS App. 7. Here, the State's successful June 2, 2020 presidential primary conducted without the two-witness requirement dooms Applicants' chances of establishing irreparable harm on two counts. The Republican Party, which did not even object to the lifting of the two witness requirement in that election, was unable to identify *any* harm to them in the last election, much less "irreparable" harm. The failure to object in that last election, together with the success of the election, forecloses the argument that the two-witness requirement is essential to combatting fraud. Indeed, Applicants' failure to defend their interests in the past election confirms they had no interest to defend.

Irreparable harm occurs where it "would be difficult—if not impossible—to reverse the harm," *Hollingsworth*, 558 U.S. at 195, or where an applicant cannot "be afforded effective relief" even if she eventually prevails on the merits, *Nken v. Holder*, 556 U.S. 418, 435 (2009). Where a stay wrongfully denies the right to vote, it causes irreparable harm because of the "strong interest" in the right to vote. *See Purcell* , 549 U.S. at 4. To stay such an order, Applicants must demonstrate not just the possibility of irreparable harm, but that such harm is "likely." *Respect Me. PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008)). The chance of success on the merits cannot merely be "better than negligible." *Nken*, 556 U.S. at 434.

The harms inflicted upon Respondents are so clear that Applicants failed to acknowledge or otherwise rebut them throughout this litigation. *See* AFS 25-27. As the Secretary of State's office has indicated on multiple occasions, granting a stay at this stage would result in having to reverse the current printing process, which already began four weeks ago. App. 186-87 (Secretary of State's Response to Emergency Motion for Stay Pending Appeal). Thousands of ballots currently without the two-witness requirement would have to be discarded and Respondents would then face the challenge and expense task of printing tens of thousands of new ballots in a matter of days. This would very likely lead to delays in voters, including Plaintiffs-Respondents, receiving their ballots. As Respondent Secretary Gorbea argues, "time is of the essence to make sure all Rhode Islanders who request a mail ballot obtain one and are able to safely vote by mail." Doc. 22, at 3, Secretary of State's Objection

to Emergency Motion to Intervene. As each day passes and the printing process is disrupted, the rights of thousands of Rhode Islanders to vote are threatened.

Applicants also fail to acknowledge the confusion that would result if the two-witness requirement was now to be enforced. For the June 2, 2020 presidential preference primary, 150,000 mail-in ballots were requested, AFS App. 10, and 83% of the ballots cast were cast by mail-in ballot. App. 169. For the vast majority of these voters, it was likely their first and only experience with mail-in voting, and they were informed that they did not need two witnesses or a notary. Since at least mid-July, the vote by mail instructions on the state's website have omitted the two-witness or notary requirement. AFS App. 10. The many voters who voted by mail for the first time on June 2 would be surprised to discover they must comply with a witness requirement unenforced only months earlier, particularly given press coverage that has covered the Consent Decree, confirming the continued suspension of the requirement. As a result, far fewer citizens will vote. *Id.* at 11.

Applicants repeatedly make unsupported arguments that the Consent Decree compromises the integrity of the State's upcoming elections and that their harms will become moot without a stay. AFS 25-26. As the First Circuit noted, concerns over the integrity of elections are "surely correct as a matter of theory." AFS App. 7. However, Applicants fail to acknowledge that this is the same interest Respondents are "statutorily required to protect." AFS App. 20 n.5. Further, this theory is "dubious as a matter of fact and reality." AFS App. 7. In this litigation "[t]here is no information in the record, nor was any brought forth, that recent Rhode Island elections are

susceptible to fraud." AFS App. 18. On the contrary, Rhode Island's successful June 2, 2020 primary election, in which over 100,000 ballots were cast without the two-witness or notary requirement, is the best possible evidence that the two-witness requirement is not necessary to alleviate Applicants' concerns. *See* App. 185.

Respondents' interest in the integrity of the ballot is well-protected by other measures that Rhode Island employs. Most notably, Rhode Island law requires that signatures on applications and mail ballot certifying envelopes be matched to the voter's signature. R.I. Gen. Laws. § 17-20-10(a). Further, Rhode Island law requires that Applicants are given a copy of the mail ballot list, oral notice at least 24 hours before mail ballot certification begins, and the right to be present at the certification of mail ballots and to object to any mail ballot. App. 186. Rhode Island election officials have determined that their system works absent a two-witness requirement. Applicants are not the experts in Rhode Island elections—Defendant-Respondents are—and they have presented no evidence to overcome the deference due to the State on this count. To the contrary, they have disclaimed any responsibility to proffer evidence of likely fraud, the anti-fraud benefits of the two-witness requirement, or the inadequacy of Rhode Island's alternative anti-fraud measures. Applicants merely ask this Court to presume that Applicants are somehow better situated to assess the risk of fraud than Defendant-Respondents. Applicants cannot demonstrate even a suggestion (much less a likelihood) of irreparable harm in the absence of a stay. In fact, they made no claims or arguments that they were harmed by the suspension of this same requirement during the June 2, 2020 presidential primary.

Applicants also allege that this Court's failure to issue a stay will forfeit their ability to appeal the consent judgment. AFS 25. But even accepting *that* as an independent, cognizable harm—and it is not—granting Applicants a stay would deprive Respondents of the benefit of their bargain in entering into the Consent Decree, namely, the right to vote without fear of unnecessary risk to their health. At all events, Applicants failed to make any objection when the two-witness requirement was suspended during the aforementioned June 2, 2020 presidential primary. By failing to defend their "interests" when they were first threatened, it is Applicants who in fact have waited to seek relief at "the eleventh hour." AFS 25.

Nor is Applicants' invocation of *Reclaim Idaho* of any relevance. In that case, unlike here, the state opposed relief. Moreover, the district court imposed an "entirely new" signature verification system "under extraordinary time pressures." And the case did not involve voting rights, as Chief Justice Roberts was at pains to emphasize. *Id.* at 5. Here, of course, the State has *consented* to relief, that relief would *maintain* the status quo, and the right to vote is directly at issue.

Applicants cannot demonstrate harm, only an "imposition upon their preference for in-person voting—as opposed to mail-in voting." *Paher v. Cegavske*, 2020 U.S. Dist. LEXIS 76597, *20 (D. Nev. 2020). This generalized preference is not enough to give them standing, much less to establish irreparable harm. Applicants "cloak their preference," *Id.* at 21, in a claim of preserving election integrity and "other irreparable harms" that they fail to elaborate upon. AFS 26. Unlike the irreparable harm alleged in *Democratic Nat'l Comm. v. Bostelman,* Doc. 30, No. 20-

1538 (7th Cir. 2020), here the State's September primary is still nearly one month away, and there has been no abrupt change to Rhode Island election law that could conceivably burden Applicants. After all, even if voters are "expecting the two-witness or notary requirement," it is hard to "imagine that it will pose any difficulty not to have to comply with it." AFS App. 10-11.

Balancing the equities and harms, it is the District Court's entry of the Consent Decree that will best promote the integrity of the September 8, 2020 primary and November 3, 2020 general elections. Granting a stay will significantly burden all of the state officials tasked with administering the elections since they will have to reinstitute the requirement, print new ballots that Applicants have already delayed, and reeducate Rhode Island voters of the changes on the eve of a statewide election. It is far too late in the day for this Court to permit tens of thousands of eligible voters to be denied the right to vote, much less to override the considered decision of the State's election officials that the Consent Decree is essential to preserve that right.

CONCLUSION

Applicants are seeking to employ a one-size fits all approach to voting litigation that they are importing from cases in which States have opposed preliminary injunctions entered by lower courts. Here, the unique facts in Rhode Island, including the fact that election officials support the Consent Decree and that the same suspension of the witness requirement was in effect in a very recent election without incident, distinguishes this case from all others. Rhode Island voters and their elected representatives are entitled to the same deference that this Court has afforded other State officials in election cases. The Consent Decree should not be stayed. For the

foregoing reasons, Plaintiffs-Respondents respectfully request that the Court deny Applicants' Emergency Application for Stay.

Dated: August 11, 2020

Respectfully Submitted,

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