**UNITED STATES DISTRICT COURT**
**DISTRICT OF RHODE ISLAND**

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| COMMON CAUSE RHODE ISLAND, LEAGUE OF WOMEN VOTERS OF RHODE ISLAND, MIRANDA OAKLEY, BARBARA MONAHAN, and MARY BAKER,<br>*Plaintiffs*,<br><br>v.<br><br>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,<br>*Defendants*,<br><br>REPUBLICAN NATIONAL COMMITTEE and RHODE ISLAND REPUBLICAN PARTY,<br>[*Proposed*] *Intervenor-Defendants*. | Case No. 1:20-cv-00318-MSM-LDA |

**[PROPOSED] INTERVENOR-DEFENDANTS' OPPOSITION TO THE PROPOSED CONSENT DECREE**

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Intervenors are "entitled to present evidence and have [their] objections heard at the hearings on whether to approve a consent decree." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986). Proposed Intervenor-Defendants—the Republican National Committee and the Rhode Island Republican Party—thus submit this opposition "to air [their] objections to the reasonableness of the decree and to introduce relevant evidence" and arguments that the parties will not. *Id.* Following the example recently set in a nearly identical case before a federal district court in Minnesota, this Court should grant the motion to intervene and reject the parties' proposed consent decree.

## BACKGROUND

COVID-19 has sparked an unprecedented number of lawsuits that attempt to invalidate or suspend routine election laws. *2020 Was Already Expected to Be a Record Year for Election-Related Lawsuits—Then Coronavirus Happened*, Newsweek (Apr. 23, 2020), bit.ly/2zMKVOl. Long before COVID-19, Democrats and their allies were pursuing sweeping reforms—expanded mail-in voting, no voter-ID requirements, unlimited ballot harvesting, and the like. Unable to persuade Congress or the Rhode Island Legislature to adopt their legislative agenda, Democrats turned to the courts. Even in the wake of COVID-19, Democrats have been unable to persuade Congress or the Rhode Island Legislature to adopt their legislative agenda. In particular, the Secretary has repeatedly pressed for a waiver of the witness requirement at issue here, even proposing legislation to do just that. Leslie & DaSilva, *RI Secretary of State Announces Legislation for Mail-Based Voting in the Fall*, WPRI (June 12, 2020), bit.ly/3hGFUXR (Leslie & DaSilva). But the General Assembly declined to pass it. Gavigan, *A Battle Over Mail Ballots*, WJAR (July 17, 2020), bit.ly/39BtM7J (Gavigan). So Plaintiffs—with the Secretary's acquiescence—turned to the courts.

Plaintiffs and groups like them contend that, in light of COVID-19, their legislative agenda is *required* by the Constitution. The Democratic Party has used COVID-19 as an excuse for lawsuits

in States across the country. *See, e.g.*, *Where We're Litigating*, Democracy Docket, bit.ly/2V0rF7k. Allied groups have bolstered these effort by filing dozens of copycat suits. For example, Common Cause Rhode Island and the League of Women Voters of Rhode Island (along with three voters) brought this suit in federal court.

When these COVID-19 lawsuits face adversarial litigation, they usually fail. Indeed, courts have blocked the very same relief that Plaintiffs seek here.

Wisconsin provides the first and most prominent example. Three weeks before the April 7 primary, Democrats challenged several Wisconsin laws, including the requirement that voters obtain a witness's signature for their absentee ballot—a voter-ID requirement that Wisconsin enacted to deter fraud and promote election integrity. Democrats argued that COVID-19 made this requirement too dangerous because, to find a witness, voters who lived alone "would have to interact with a non-household member to secure a signature, … placing their health in jeopardy." *Democratic Nat'l Comm. v. Bostelmann*, Doc. 62 at 13, No. 3:20-cv-249-wmc (W.D. Wis. Mar. 27, 2020); *see also id.* at 22 ("[The challenged laws] encourage determined registrants and voters to venture out into the world and interact face-to-face with people, … exposing Wisconsinites to an ailment that has already claimed thousands of lives internationally."). The district court agreed, contending that the "hurdles" associated with finding a witness during COVID-19 "are not overcome by the state's general anti-fraud goals." *Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 1638374, at *20 (W.D. Wis. Apr. 2, 2020) (*DNC I*). It preliminarily enjoined the witness requirement for voters who certified that, despite reasonable efforts, they could not safely find a witness. *See id.*

The district court was swiftly reversed. On appeal, the Seventh Circuit stayed the part of the injunction that suspended the witness requirement. *See Democratic Nat'l Comm. v. Bostelmann*, Doc. 30, No. 20-1538 (7th Cir. Apr. 3, 2020) (*DNC II*). The Seventh Circuit stressed that the district court gave short shrift to "the state's substantial interest in combatting voter fraud." *Id.* at 3. On further

appeal, the U.S. Supreme Court stayed more of the district court's decision. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (*RNC*). The Court relied on "the *Purcell* principle"—the doctrine that courts in equity "should ordinarily not alter the election rules on the eve of an election." *Id.* at 1207.

Similarly, in a case that's virtually a carbon copy of this one, the District of Minnesota permitted the RNC and other Republican entities to intervene and challenge a proposed consent decree agreed to by the League of Women Voters and the Minnesota Secretary of State. *See* Exh. A (Partial Transcript from Fairness Hearing on Stipulation and Partial Consent Judgment and Decree, *League of Women Voters of Minn. Education Fund v. Simon*, No. 20-1205 (June 24, 2020)). Their proposed consent decree, like this one, would have required Minnesota's Secretary to do four things: (1) refrain from enforcing the witness requirement; (2) instruct local officials that no absentee ballot could be rejected for lack of compliance with the witness requirement; (3) take steps to ensure that the instructions accompanying absentee ballots do not direct voters to comply with the witness requirement; and (4) inform the public that the witness requirement will not be enforced for the 2020 primary and general elections. After holding a fairness hearing where Proposed Intervenors made essentially the same arguments they are advancing here, the Court rejected the proposed consent decree. *Id.* at 12:21-22.

What's more, the Supreme Court of the United States has since blocked essentially the same relief Plaintiffs seek here. On July 2, 2020, the Supreme Court entered a stay of a preliminary injunction that would have enjoined the State of Alabama's witness requirement for absentee ballots for the state's primary election runoff. *See Merrill v. People First of Ala*, No. 19A1063 (U.S. July 2, 2020).

This Court should do the same.

Plaintiffs filed this action on July 23, 2020, advancing two claims: (1) that the witness requirement constitutes an unconstitutional burden on the right to vote under the First and Fourteenth Amendments, as applied to Rhode Island's 2020 primary and general elections; and (2) that the witness requirement violates Title II of the American with Disabilities Act. Along with their complaint, Plaintiffs filed a motion for a TRO and a preliminary injunction. Specifically, they sought to "suspend Rhode Island's requirement that citizens who choose to vote by mail ballot sign the certifying envelope which contains their ballot before a notary public or two witnesses pursuant to R.I. Gen. Laws §§ 17-20-2.1(d)(1), 17-20-2.1(d)(4) and 17-20-2.2(d)(1), for the September 8, 2020 Primary Election and the November 3, 2020 General Election." Doc. 5 at 1.

Defendants offered no opposition whatsoever. The Secretary has introduced and spent several weeks promoting legislation that would eliminate the witness requirement. Doc. 1 at 35; *see also* Leslie & DaSilva, *supra*. Plaintiffs and Defendants thus were aligned in their opposition to the witness requirement well before Plaintiffs ever filed their complaint. In fact, it was only after the Secretary failed to persuade the legislature to act that Plaintiffs brought this action. Doc. 1 at 35; *see also* Gavigan, *supra*.

Perhaps not surprisingly, Defendants caved and refused to defend Rhode Island law against Plaintiffs' claims—notwithstanding that the law is overwhelmingly on Defendants' side. Even before Plaintiffs filed their complaint, the Secretary conceded to the relief it sought, advising Plaintiffs that she "will not oppose Plaintiffs' motion for injunctive relief." Doc. 5 at 1; *see also* Doc 5-1 at 1. And within twenty-four hours of the filing of Plaintiffs' complaint, the parties agreed to a proposed consent decree and the Board of Elections called an emergency hearing for the purposes of approving it. Doc. 12-1. In return for their total capitulation to Plaintiffs' demands, Defendants obtained nothing for Rhode Islanders.

Proposed Intervenors promptly moved to enter this case and filed a protective motion for a fairness hearing. The fairness hearing on the proposed consent decree is set for today, Tuesday, July 28 at 3:00 pm.

**LEGAL STANDARD**

Because a consent decree is a "judgment" of this Court, it cannot be entered without the Court's "examin[ation]" and "approval." *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 280 (4th Cir. 2002). As federal appellate courts have explained, approving a consent decree "requires careful court scrutiny," not a "mechanistic[] 'rubber stamp.'" *Ibarra v. Texas Emp't Comm'n*, 823 F.2d 873, 878 (5th Cir. 1987); and *United States v. BP Amoco Oil PLC*, 277 F.3d 1012, 1019 (8th Cir. 2002). After all, "a federal court is more than 'a recorder of contracts' from whom parties can purchase injunctions." *Local No. 93*, 478 U.S. at 525. It is "'an organ of government constituted to make judicial decisions,'" and it cannot "lend the aid of the federal court to whatever strikes two parties' fancy." *Id.*; *Kasper v. Bd. of Election Comm'rs of the City of Chi.*, 814 F.2d 332, 338 (7th Cir. 1987). Instead, every consent decree must be "examine[d] carefully" to ensure that its terms are "fair, adequate, and reasonable." *United States v. City of Miami*, 664 F.2d 435, 440-41 (5th Cir. 1981) (en banc) (Rubin, J., concurring). The court also "must ensure that the agreement is not illegal, a product of collusion, or against the public interest." *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991); *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.").

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).

## ARGUMENT

The parties' proposed consent decree is neither fair nor reasonable nor legal. It suspends a perfectly constitutional law that Plaintiffs had no hope of enjoining. It appears to be, not an arm's-length deal between adversaries, but a sweetheart deal that gives Plaintiffs everything and Rhode Islanders nothing. And it unreasonably injures the rights and interests of third parties, including Proposed Intervenors and their members. This Court should reject it.

### I. The consent decree should be rejected because Plaintiffs identified no probable violation of federal law.

When deciding whether to approve or reject the consent decree, this Court "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). While courts needn't conduct a full-blown trial, they must "reach 'an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated.'" *Flinn*, 528 F.2d at 1173. This Court must determine Plaintiffs' likelihood of success on the merits here for two reasons.

One, the proposed consent decree suspends Rhode Island's witness requirement—a duly enacted state law. "A consent decree is not a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them." *Kasper*, 814 F.2d at 341-42. A "consent judgment in which the executive branch of a state consents not to enforce a law is 'void on its face,'" unless the approving court finds "a probable violation of [federal] law." *Id.* at 342.

A federal judge cannot "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.

Two, the merits are "[t]he most important factor" in determining whether the consent decree is fair, adequate, and reasonable, since these factors can be examined "'only in light of the strength of the case presented by the plaintiffs.'" *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975). Courts can gauge "the fairness of a proposed compromise" by "weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). A decree that gives Plaintiffs with flimsy claims most of what they asked for and gets little in return is neither fair nor reasonable.

Here, the proposed consent decree strikes the following deal: Rhode Island will fully suspend its witness requirement for all voters in both the September primary and the November general elections, issue guidance explaining this change to local election officials, and notify all voters of this change. Plaintiffs will withdraw their motion for a TRO and preliminary injunction (which asked the Court for the very remedy that Defendants now propose to hand them freely). In other words, Plaintiffs would get everything they want for the upcoming primary and general elections and give up nothing in return. Quite obviously, that is not a good deal for Rhode Islanders. For several reasons—all of which have been accepted by the majority of courts to consider these COVID-19/election cases—Plaintiffs had virtually no chance of winning their preliminary-injunction motion or obtaining this kind of relief.

### A. Under the *Purcell* principle, Plaintiffs could not obtain a preliminary injunction for the September primary or November general elections.

Plaintiffs filed this lawsuit on July 23, only a month and a half before the September 8 primary and two months before the commencement of absentee voting for the general election. If Defendants had contested Plaintiffs' right to injunctive relief, Defendant would have easily defeated it under the *Purcell* principle.

Under *Purcell*, "federal courts are not supposed to change state election rules as elections approach." *Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020). Invoking this strong principle of non-interference, the Supreme Court routinely stays lower-court orders requiring States to change election laws shortly before elections. In other words, the Court "allow[s] the election to proceed without an injunction suspending [election] rules." *Purcell*, 549 U.S. at 6. This practice is longstanding. *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968) (denying relief because it would cause "serious disruption of [the] election process" and "confusion" for voters). And it has been invoked in several cases where the amount of time between the court's order and key election deadlines resembles the timeline here. *See, e.g.*, *Husted v. Ohio State Conference of NAACP*, 573 U.S. 988 (2014) (staying a lower-court order that changed election laws 61 days before election day); *Thompson*, 959 F.3d at 813 (election day was "months away but important, interim deadlines … [we]re imminent"); *Perry v. Perez*, 565 U.S. 1090 (2011) (22 days before the candidate-registration deadline); *Purcell*, 549 U.S. at 4-5 (33 days before election day); *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (32 days before election day).

The *Purcell* principle ensures that voters, candidates, and political parties know and adhere to the same neutral rules throughout the election process. As *Purcell* explains, this stability and predictability promotes "[c]onfidence in the integrity of our electoral process," which "is essential to the functioning of our participatory democracy." 549 U.S. at 4. Conversely, courts risk "voter confusion" when they order late-breaking changes to election laws. *Id.* at 4-5. "As an election draws closer, that risk will increase." *Id.* at 5. Voter confusion, in turn, causes a "consequent incentive to remain away from the polls." *Id.* In other words, last-minute "interference by the judicial department with the electoral franchise of the people of this state … might well amount to a substantial destruction of that most important civil right." *Beebe v. Koontz*, 302 P.2d 486, 490 (Nev. 1956).

*Purcell* doesn't care if Plaintiffs are likely to succeed on the merits of their claims. The *Purcell* principle is a *sufficient* basis to deny injunctive relief—one that must be invoked even if Plaintiff's constitutional claims are concededly meritorious. *See Purcell*, 549 U.S. at 5 (vacating a lower court's injunction "[g]iven the imminence of the election" while "express[ing] no opinion here on the correct disposition" of the case); *Short v. Brown*, 893 F.3d 671, 680 (9th Cir. 2018) ("[E]ven if the merits question were close, the district court did not abuse its discretion [by denying a preliminary injunction on *Purcell* grounds]"). "[T]iming … rather than the[] merits" is "the key" under the *Purcell* principle. *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014).

In Wisconsin, for example, the Supreme Court stayed the district court's coronavirus-inspired injunction based solely on *Purcell*, declining to "express[] an opinion" on the merits of the case. *RNC*, 140 S. Ct. at 1206-08. The Court rejected the Democrats' argument that, because "'the electoral *status quo*' *already* has been upended … by the COVID-19 pandemic," *Purcell* has no application in 2020. Resp'ts Br. 16, bit.ly/2AKc1Gt. Even in the face of COVID-19, then, *Purcell* applies with full force. *See Thompson*, 959 F.3d at 813.

This Court—if deciding this case on the merits—would have followed *RNC* and likely denied Plaintiffs' motion for a preliminary injunction. Whatever the merits of their claims, the *Purcell* principle would have prohibited the grant of any injunctive relief.

### B. Under basic equitable principles, Plaintiffs could not obtain a preliminary injunction for the November election.

Plaintiffs asked for injunctive relief "for the September 8, 2020 Primary Election *and* the November 3, 2020 General Election." Doc. 5 at 1. But this Court would not have granted relief for the November election *in July*. *See People First of Ala. v. Merrill*, 2020 WL 3207824, at *5 (N.D. Ala. June 15, 2020) (holding, in a COVID-19/election case, that "it is premature for the court to consider a preliminary injunction for the elections in August and November").

To obtain a preliminary injunction (or any equitable relief, really), Plaintiffs must show "irreparable harm." *Regions Treatment Ctr., LLC v. New Stream Real Estate, LLC*, 2013 WL 4028148, at *2 (D. Minn. Aug. 7, 2013) (citing *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987)). That showing "requires more than a possibility of remote future injury." *Id.* (citing *Rogers v. Scurr*, 676 F.2d 1211, 1214 (8th Cir. 1982)). It "requires a presently existing actual threat of injury"; "'[w]holly speculative' harm will not" do. *Id.* (quoting *Local Union No. 884, United Rubber Workers v. Bridgestone/Firestone, Inc.*, 61 F.3d 1347, 1355 (8th Cir. 1995)). More specifically, Plaintiffs cannot obtain a preliminary injunction unless their irreparable harm "'is certain and great and of such imminence that there is a clear and present need for equitable relief.'" *Roudachevski v. All-Am. Care Centers, Inc.*, 648 F.3d 701, 706 (8th Cir. 2011).

Yet Plaintiffs have no idea whether, and to what extent, COVID-19 will remain a threat in November—let alone what effect it will have on voters' ability to find a witness. No one does. Plaintiffs' only evidence on this question came from a purported expert who admits that the coronavirus is "novel" and that she "cannot say definitively whether its incidence and prevalence will rise and fall based on weather/ambient temperature and humidity/season." Doc. 5-2 ¶¶16-17. The expert also relies on reports by the press and political groups that claim in-person voting in Milwaukee increased COVID-19 transmission there, Doc. 5-2 at ¶20, when academic studies concluded the opposite, *see* Berry et al., *Wisconsin April 2020 Election Not Associated with Increase in COVID-19 Infection Rates*, bit.ly/3gh6OF2.

Indeed, Plaintiffs' claim for injunctive relief rests on a litany of speculative, unknowable assumptions. It assumes that COVID-19 will resurge in November. That it will resurge to a degree that makes finding a witness or voting in person unreasonably dangerous (even with increased social distancing and sanitization). That Rhode Island will make no more adjustments to improve safety. That no vaccine will be created. That no herd immunity will develop. And more. As another court

put it, harms that stem from "potentially contracting COVID-19," "the spread of COVID-19," or the "[inability] to contain it" are simply "too speculative under Eighth Circuit precedent" to warrant a preliminary injunction. *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, 2020 WL 2145350, at *9-10 (W.D. Mo. May 5, 2020).[1]

In short, this Court would have denied Plaintiffs' motion as applied to the November election because it was overly speculative and premature. The Court could have "declined to exercise its equitable jurisdiction upon these grounds alone." *Mo. Pac. Transp. Co. v. Priest*, 117 F.2d 32, 34 (8th Cir. 1941). Doing so would have honored the Supreme Court's observation that, "[e]specially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." *Eccles v. Peoples Bank of Lakewood Vill.*, 333 U.S. 426, 431 (1948).

**C. Plaintiffs could not show that the challenged law is unconstitutional.**

Even assuming Plaintiffs otherwise satisfied the requirements for injunctive relief, their constitutional claims would fail on the merits. The proposed consent decree relies solely on Plaintiffs' claim that Rhode Island's witness requirement violates the constitutional right to vote.[2] As Plaintiffs acknowledge, burdens on voting rights are subject to the balancing test from the Supreme Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992).

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[1] Plaintiffs cannot sidestep this problem by arguing that *fears* of contracting COVID-19 will deter voters from meeting with witnesses, especially given that Rhode Island has among the lowest infection rates of any state in the country, *see* N.Y. Times, *Coronavirus in the U.S.: Latest Map and Case Count*, nyti.ms/333SUTk (58 cases per 100,000 people in the last seven days). Even if speculative fears somehow counted as a burden imposed by the State, these predictions about what voters will think or feel in November are equally too "speculative" to support a preliminary injunction. *Shaw v. Kaemingk*, 2019 WL 6465339, at *2 (D.S.D. Dec. 2, 2019).

[2] Plaintiffs' complaint also raised a claim under the Americans with Disabilities Act. This claim is not mentioned in the proposed consent decree order, and the parties do not rely on it. It is also meritless, for the same reasons it has failed elsewhere. *E.g.*, *People First of Ala.*, 2020 WL 3207824, at *23.

Under the *Anderson-Burdick* test, States can conduct "*substantial* regulation of elections." *Burdick*, 504 U.S. at 432 (emphasis added). *Anderson-Burdick* is a "flexible standard" that "reject[s] the contention that any law imposing a burden" on constitutional rights "is subject to strict scrutiny." *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009); *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 141 P.3d 1235, 1241 (Nev. 2006). Every election law "is going to exclude, either de jure or de facto, some people" from exercising their rights; "the constitutional question is whether the restriction and resulting exclusion are *reasonable* given the interest the restriction serves." *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (emphasis added).

*Anderson-Burdick* requires Plaintiffs to satisfy a two-step inquiry, imposing a heavy burden at each step. First, Plaintiffs must prove that the challenged laws inflict a cognizable burden on their rights and quantify the severity of that burden. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Common Cause/Ga.*, 554 F.3d at 1354. Second, Plaintiffs must show that the burden outweighs the State's interests. *Timmons*, 520 U.S. at 358. Only when an election law "subject[s]" voting rights "to 'severe' restrictions" does a court apply strict scrutiny and assess whether the law "'is narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). Mine-run election laws that "impose[] only 'reasonable, nondiscriminatory restrictions'" are "'generally'" justified by "'the State's important regulatory interests.'" *Burdick*, 504 U.S. at 433. After all, there is no constitutional right to be free from "the usual burdens of voting." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (op. of Stevens, J.).

Rhode Island's witness requirement does not implicate the right to vote at all. Even if it did, it easily satisfies *Anderson-Burdick*. Before, during, or after COVID-19, the law imposes only routine burdens that are amply justified by the State's important interests in deterring fraud and promoting voters' confidence in the integrity of Rhode Island elections.

### i. The witness requirement doesn't burden voting rights because there is no constitutional right to vote absentee.

The witness requirement governs only *absentee* voting. If voters cannot find a witness, they can still vote in-person on election day. Because in-person voting remains available, unburdened by the witness requirement, "the right to vote is not 'at stake'" here. *Tex. Democratic Party v. Abbott*, 2020 WL 2982937, at *10 (5th Cir. June 4, 2020) (quoting *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969)).

The Constitution guarantees *one* viable method of voting. "[T]here is no constitutional right to an absentee ballot." *Mays*, 951 F.3d at 792; *accord Griffin*, 385 F.3d at 1130. When States impose some limitation on absentee voting, but not in-person voting, "[i]t is … not the right to vote that is at stake … but a claimed right to receive absentee ballots"—which is not a constitutional right at all. *McDonald*, 394 U.S. at 807. As the Fifth Circuit recently explained in a COVID-19 case, the Constitution is not violated "unless … the state has 'in fact absolutely prohibited' the plaintiff from voting," and "permit[ting] the plaintiffs to vote in person … is the exact opposite of 'absolutely prohibit[ing]' them from doing so." *Tex. Democratic Party*, 2020 WL 2982937, at *10.

While Plaintiffs insist that in-person voting is too difficult or dangerous during COVID-19, that rejoinder fails for at least two reasons.

***First***, "[constitutional] violations require state action," and Rhode Island is not responsible for COVID-19 or private citizens' responses to it. *Thompson*, 959 F.3d at 810. While COVID-19 has dramatically changed Rhode Islanders' everyday lives, these difficulties are not burdens imposed "*by the State*." *Tex. Democratic Party*, 2020 WL 2982937, at *10 (quoting *McDonald*, 394 U.S. at 808 n.7). These obstacles to voting "are not caused by or fairly traceable to the actions of the State, but rather are caused by the global pandemic." *Mays v. Thurston*, 2020 WL 1531359, at *2 (E.D. Ark. Mar. 30, 2020). To date, most courts have recognized that "COVID-19 … is not the result of any act or failure to act by the Government. And that fact is important" because "[a]ll of the election cases

cited by Plaintiffs in which injunctive relief was granted involved a burden … that was created by the Government. Not so here." *Coalition for Good Governance v. Raffensperger*, 2020 WL 2509092, at *3 n.2 (N.D. Ga. May 14, 2020); *accord Tex. Democratic Party*, 2020 WL 2982937, at *11 ("The Constitution is not offended … even where voting in person may be extremely difficult … because of circumstances beyond the state's control, such as the presence of the Virus." (cleaned up)).

***Second***, even if Plaintiffs' think otherwise, *the State* has determined that in-person voting can be done safely and effectively. The Rhode Island General Assembly rejected a proposal (H7200) to mail an unsolicited mail ballot application to every Rhode Island voter and to waive the witness requirement. Gavigan, *supra*. Governor Raimondo likewise declined requests to waive the witness requirement for the upcoming primary and general elections, after having previously waived it for the June presidential primary. Doc. 1 at ¶¶33-34.[3] Meanwhile, Rhode Island moved into Phase III (Picking Up Speed) of its reopening plan over a month ago, deeming it safe for Rhode Islanders (with social-distancing precautions) to open "[r]etail, restaurants, gyms, museums, close-contact business, office-based businesses, parks, beaches" and attend "[w]eddings, parties, networking events," "[s]ocial gatherings with licensed catering" of up to "50 people," and indoor public events of up to "125 people." *See Reopening RI: Picking Up Speed* (June 18, 2020), bit.ly/2P3tCMQ.[4]

Federal courts cannot and should not second-guess the judgment of Rhode Island's political branches that in-person voting can be done safely and effectively. As the Seventh Circuit explained in Wisconsin, questions about how to "accommodate voters' interests while also striving to ensure

[3] On April 17, 2020, when Governor Raimondo waived the witness requirement for the June presidential primary, the State had not yet even entered Phase I (Testing The Water) of the Governor's reopening plan. *See* bit.ly/30TRjNd. At present, the State has been in Phase III (Picking Up Speed) for over a month. *See Picking Up Speed*, *supra*.

[4] Moreover, the Governor has emphasized the State's intention " to resume in-person instruction in the fall, with all schools starting Aug. 31." *'In Person, In School, Is The Best Option': RI Tackles Reopening*, bit.ly/2DgzP5G.

their safety" are best left to election officials, who are "better positioned … to accommodate the many intersecting interests in play in the present circumstances." *DNC II*, *supra*. "[F[ederal courts make poor arbiters of public health." *Sinner v. Jaeger*, 2020 WL 3244143, at *6 (D.N.D. June 15, 2020). They do "not have the authority 'to act as the state's chief health official' by making the decision" how best to protect "the health and safety of the community." *Taylor v. Milwaukee Election Comm'n*, 2020 WL 1695454, at *9 (E.D. Wis. Apr. 6, 2020). These "decisions are instead best left 'to the politically accountable officials of the States,' not 'an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people.'" *Sinner*, 2020 WL 3244143, at *6 (quoting *S. Bay United Pentecostal Church v. Newsom*, 2020 WL 2813056, at *1 (U.S. May 29, 2020) (Roberts, C.J., concurring in the denial of injunctive relief)).

In short, this Court would likely accept the considered judgment of Rhode Island's political branches that in-person voting is safe and available. That finding would, in turn, entirely defeat Plaintiffs' right-to-vote claim.

**ii. Even if the witness requirement affected voting rights, it easily satisfies the *Anderson-Burdick* test.**

The witness requirement would satisfy *Anderson-Burdick* review even accepting the implausible premise that COVID-19 gives Plaintiffs a constitutional right to vote by mail. Plaintiffs agree that the witness requirement satisfies *Anderson-Burdick* in normal times. *See* Doc. 1 at 17 (claiming only that the witness requirement is unconstitutional "As Applied to Elections During the COVID-19 Pandemic"); *id.* at ¶60 (same). So the question is whether COVID-19 somehow *made* the witness requirement unconstitutional. Setting aside obvious state-action problems, the answer is no. The witness requirement remains a minimal burden on voters that is justified by the State's "'important regulatory interests.'" *Burdick*, 504 U.S. at 433.

**Burden on Voters**: On the individual side of the *Anderson-Burdick* balance, Plaintiffs must introduce "evidence" to "quantify the magnitude of the burden" from the challenged laws. *Crawford*,

553 U.S. at 200. "[T]he extent of the burden … is a factual question on which the [plaintiff] bears the burden of proof," *Democratic Party of Hawaii v. Nago*, 833 F.3d 1119, 1124 (9th Cir. 2016), and the plaintiff must "direct th[e] Court to … admissible and reliable evidence that quantifies the extent and scope of the burden." *Common Cause/Ga.*, 554 F.3d at 1354.

That evidence doesn't exist. If "the inconvenience of making a trip to the [D]MV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote," *Crawford*, 553 U.S. at 198, then neither does finding two qualified persons (or one notary) to witness an absentee ballot. It is no more dangerous than other activities that the State deems safe, like going to the gym, or a networking events or a social gathering "with licensed catering" of up to "50 people." *See Picking Up Speed*, *supra*.

And "[t]here's no reason" why the witnessing process cannot be done "within the bounds of our current situation"—for example, by "witnessing the signatures from a safe distance," staying outdoors, wearing a mask, standing behind glass, or practicing good hygiene. *Thompson*, 959 F.3d at 810. Moreover, the Secretary has already authorized online notarization for the duration of the COVID-19 pandemic, substantially simplifying one of the two ways of satisfying the witness requirement. R.I. Dep't of State, *Remote Online Notarization*, bit.ly/308UhOR. While voting might be somewhat "harder" (as are many tasks during a pandemic), *Thompson*, 959 F.3d at 810, inconveniences are not "severe" burdens that trigger strict scrutiny, *Crawford*, 553 U.S. at 198.

Doubtful, but perhaps there is some tiny, idiosyncratic group of voters who, despite "reasonable effort," cannot find a witness and cannot vote in person. *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (*Frank II*). If that is what Plaintiffs' case turns on, "[z]eroing in on the abnormal burden experienced by a small group of voters is problematic at best, and prohibited at worst." *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016). Evidence that a law uniquely burdens one particular group does not justify enjoining the statute as to all voters. Rather, requests

for facial, statewide relief—like Plaintiffs make here and the Secretary is prepared to give away in the consent decree—fail when the challenged law "has a plainly legitimate sweep." *Crawford*, 553 U.S. at 202-03; *see id.* at 206 (Scalia, J., concurring in judgment) (when assessing a burden's severity, courts must look at the burden's impact "categorically" upon all voters, without "consider[ing] the peculiar circumstances of individual voters"). The "burden some voters face[]" from a challenged law cannot "prevent the state from applying the law generally." *Frank II*, 819 F.3d at 386. Those claims must be vindicated in as-applied challenges that seek relief for "those particular persons." *Id.* Indeed, the parties' attempt to obtain, in essence, facial relief is what led the district court to reject a similar consent decree in Minnesota. *See* Exh. A.

**Interests of the State**: Because the witness requirement imposes little to no burden on voters, Rhode Island's "'important regulatory interests'" more than justify it. *Burdick*, 504 U.S. at 433. Witness requirements for absentee ballots, as the Seventh Circuit explained in Wisconsin, serve the State's "substantial interest in combatting voter fraud." *DNC II*, *supra*; *accord Thompson*, 959 F.3d at 811 ("witness … requirements help prevent fraud"). By requiring "in-person" verification, witness requirements serve the "unquestionably important interests" of "preventing fraud and protecting the integrity of the electoral process." *Sinner*, 2020 WL 3244143, at *7. "These interests are not only legitimate, they are compelling." *Thompson*, 959 F.3d at 811.

It is no answer to say that Rhode Island has other methods to deter fraud, like criminal penalties. *See* Doc. 5-1 at 17-18. Rhode Island does not have to satisfy strict scrutiny here or prove narrow tailoring. *See Burdick*, 504 U.S. at 434. Under *Anderson-Burdick*'s intermediate balancing test, States can supplement post-hoc punishments with measures aimed at "prophylactically preventing fraud." *Sinner*, 2020 WL 3244143, at *7; *see Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) ("Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively.").

It is also no answer to say that absentee-voting fraud is "rare." Doc. 5-1 at 18,36. It's not rare enough. *See infra* III; Cianci, *Politics and Pasta*, at 138, 151 (2011). And absentee voting will occur at unprecedented levels this year. Voter fraud is also notoriously "difficult to detect and prosecute." *Tex. Democratic Party*, 2020 WL 2982937, at *3. The whole reason it's rare, moreover, is precisely *because* States have integrity measures like the witness requirement in place.

Regardless, *Anderson-Burdick* treats the State's interest as a "legislative fact," accepted as true so long as it's reasonable. *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014) (*Frank I*). States are not required to submit "any record evidence in support of [their] stated interests." *Common Cause/Ga.*, 554 F.3d at 1353; *accord ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1323 (10th Cir. 2008) (city need not "present evidence of past instances of voting fraud"). In fact, when responding to an *Anderson-Burdick* challenge, States can rely on "post hoc rationalizations," can "come up with its justifications at any time," and have no "limit[s]" on the type of "record [they] can build in order to justify a burden placed on the right to vote." *Mays v. LaRose*, 951 F.3d 775, 789 (6th Cir. 2020). States can rely on examples from other jurisdictions, court decisions, general history, or sheer logic. *Common Cause/Ga.*, 554 F.3d at 1353; *Frank I*, 768 F.3d at 750. In *Crawford*, for example, the Supreme Court found Indiana's interest in preventing in-person voter fraud compelling even though "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." 553 U.S. at 194.

"[T]here is no suggestion that these widely held concerns about voter fraud will not be present during the pandemic"; to the contrary, COVID-19 makes Rhode Island's interest *heightened*, as record numbers of voters submit absentee ballots while the State's resources are already stretched thin. *Tex. Democratic Party*, 2020 WL 2982937, at *19 (Ho, J., concurring); *see Lawmakers Split Over Mail Ballots*, WJAR (July 14, 2020), bit.ly/2PfLCnz (explaining that Senate President Dominick Ruggerio rejected H7200 because sending absentee ballot applications to all voters "would be an

extraordinary expense during very difficult fiscal times"). States should receive more leeway under *Anderson-Burdick*, not less, when dealing with emergencies that affect elections. These crises give the State new "important interests" like "focus[ing] their resources on recovering from the emergency, ensuring the accuracy of [electoral records] they have received, … and otherwise minimizing the likelihood of errors or delays in voting." Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 Emory L.J. 545, 593 (2018).

An "election emergency" should thus "seldom warrant" changes to election laws by judicial fiat. *Id.*; *see, e.g.*, *Williams v. DeSantis*, Doc. 12, No. 1:20-cv-67 (N.D. Fla. Mar. 17, 2020) (declining to intervene in Florida's primary election in the face of COVID-19); *Bethea v. Deal*, 2016 WL 6123241, at *2-3 (S.D. Ga. Oct. 19, 2016) (declining to extend Georgia's voter-registration deadline in the wake of Hurricane Matthew); *ACORN v. Blanco*, Doc. 58, No. 2:06-cv-611 (E.D. La. Apr. 21, 2006) (denying request to extend the deadline for counting absentee ballots received by mail in New Orleans in the wake of Hurricane Katrina). This Court would likely reach the same conclusion here.

Because Plaintiffs were never entitled to an injunction and identified no violation of federal law, the proposed consent decree is a raw deal for Rhode Islanders. Not only that, but it requires this Court to sanction violations of a valid state law. The decree is thus "'void on its face'" and should be rejected. *Kasper*, 814 F.2d at 342.

## II. The consent decree should be rejected because it does not reflect arm's-length negotiations and gives a windfall to Plaintiffs.

Consent decrees must be not only substantively sound, but also procedurally fair. Procedural fairness is evaluated "from the standpoint of [both] signatories and nonparties to the decree." *United States v. Akzo Coatings of Am., Inc.,* 949 F.2d 1409, 1435 (6th Cir. 1991). Consent decrees are fair when they flow from negotiations "filled with 'adversarial vigor.'" *City of Waterloo*, 2016 WL 254725, at *4. The parties must "negotiat[e] in good faith and at arm's length." *BP Amoco Oil*, 277 F.3d at

1020. Agreements that lack adversarial vigor become "collusive," and are, by definition, not fair. *Colorado*, 937 F.2d 509.

In fact, a consent decree between non-adverse parties "is no judgment of the court. It is a nullity." *Lord v. Veazie*, 49 U.S. 251, 256 (1850). This rule stems from the fundamental constitutional requirement that parties be concretely adversarial before an Article III court can act on their claims. There is "no case or controversy within the meaning of Article III of the Constitution" when "both litigants desire precisely the same result." *Moore v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 47, 47-48 (1971). Put differently, a collusive suit lacks "the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of the constitutional questions by the Court." *United States v. Johnson*, 319 U.S. 302, 305 (1943).

Regrettably, "it is not uncommon for consent decrees to be entered into on terms favorable to those challenging governmental action because of rifts within the bureaucracy or between the executive and legislative branches." *Ragsdale v. Turnock*, 941 F.2d 501, 517 (7th Cir. 1991) (Flaum, J., concurring in part and dissenting in part); *accord* Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions,* 1983 Duke L.J. 1265, 1292, 1294-95 (1983) (discussing phenomenon of "[n]ominal defendants [who] are sometimes happy to be sued and happier still to lose"); Easterbrook, *Justice and Contract in Consent Judgments,* 1987 U. Chi. L. Forum 19, 30-37 (1987). That is why courts should look skeptically at consent decrees used to enact or modify governmental policy. Otherwise, non-adverse parties can employ consent decrees to "sidestep political constraints" and obtain relief otherwise unavailable through the political process. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change,* 1987 U. Chi. Legal F. 295, 317. In particular, "district judges should be on the lookout for attempts to use consent decrees to make end runs around the legislature." *Kasper*, 814 F.2d at 340; *see Dunn v. Carey,* 808 F.2d 555, 560 (7th Cir.

1986) ("A court must be alert to the possibility that a consent decree is a ploy in some other struggle.").

This is precisely what happened here. Given that the Secretary recently failed to convince the legislature to relax absentee-voting rules and then acquiesced in the relief Plaintiffs seek *before this suit was ever filed*, there can be no question that the proposed consent decree is nothing more than an "end run[] around the legislature." *Kasper*, 814 F.2d at 340.

Not only is this sequence of events plainly inconsistent with arm's-length negotiations, but so are the terms of the deal. In return for her complete capitulation to Plaintiffs' demands, the Secretary obtained nothing. She gave Plaintiffs all the relief they were seeking. And while the decree suggests that Plaintiffs will not collect attorney's fees for their work on this matter, Doc. 18-1 at 5 ¶14, that concession adds nothing. Plaintiffs were unlikely to be a "prevailing party" in this case, *supra* I, and they generated few expenses because they filed a complaint and a motion that *they knew would never be opposed*.

Moreover, several narrower compromises were obvious. The Secretary could have suspended the witness requirement only for the named individual plaintiffs. *See Frank II*, 819 F.3d at 386. She could have suspended it only for people who are elderly or immunocompromised. *E.g.*, *People First*, 2020 WL 3207824, at *29. Or he could have required voters to provide a "written affirmation" that they tried, but failed, to find a witness for their ballot. *DNC I*, 2020 WL 1638374, at *20. To be clear, none of these alternatives would have been warranted had the Court reached the merits. But the fact that Defendants got none of them as concessions underscores the fact that the proposed consent decree is a total giveaway that was not actually negotiated in any sense of the term.

Defendants cannot say that Plaintiffs' challenge to the witness requirement was so strong—or that the elections were coming so soon—that she thought settlement was the only option. The Secretary took an oath to defend and uphold the State's elections laws and is obligated to take care

that those laws are faithfully executed. *See* R.I. Const. art. III, §3, art. IX, §2. And the caselaw was on her side: most courts have rejected these COVID-19/election lawsuits, and the Sixth and Seventh Circuits recently wrote persuasive opinions rejecting challenges to similar witness requirements. Even if Defendants were (mistakenly) impressed with the merits of Plaintiffs' arguments, *but see supra* I, the *Purcell* principle was an easy defense that sidesteps the merits and defeats injunctive relief. *Purcell* was low-hanging fruit, especially if Defendants were genuinely concerned with avoiding last-minute changes to the election laws. But they apparently weren't—*consenting* to last-minute changes to election laws is no way to avoid them.

At bottom, a federal court is not a place where parties with mutual interests can "purchase … a continuing injunction." *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993). Yet that is precisely what the proposed consent decree seeks. If the parties want "to alter the manner" in which elections are conducted, this Court should send them back to the "bargaining table" until they can come up with something that is actually fair to all sides. *Hialeah*, 140 F.3d at 983. Better yet, the parties should return to the state legislature—the representative body that Rhode Islanders have entrusted to enact, suspend, and modify their election laws. *See Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986).

## III. The consent decree should be rejected because it unreasonably injures other parties.

Because consent decrees are not mere private contracts between the parties, a "judge has obligations to other litigants … and to members of the public whose interests may not be represented." *Kasper*, 814 F.2d at 338. This Court must reject any consent decree that "affects third parties" where the effect is either "unreasonable" or "proscribed." Doc. 26 at 2 (quoting *City of Miami*, 664 F.2d at 441). Intervenors, moreover, can outright "block approval of a consent decree" if it "adversely affects" their "legal rights or interests." *Johnson*, 393 F.3d at 1107. "[T]he mere threat of

injury to [legal] rights [is] … sufficient." *Hialeah*, 140 F.3d at 982 (citing *City of Miami*, 664 F.2d at 446).

The proposed consent decree directly threatens the legal rights and interests of Proposed Intervenors, their members, and other Rhode Island voters.

For starters, the consent decree unconstitutionally circumvents the legislature's power to make and alter the election rules. The Elections Clause and the Electors Clause of the U.S. Constitution vest state legislatures with the power to control federal elections. The Elections Clause of the U.S. Constitution states that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by *the Legislature* thereof." Art. I, §4, cl. 1 (emphasis added). Likewise, the Electors Clause states that "[e]ach State shall appoint, in such Manner as *the Legislature* thereof may direct, a Number of Electors" for President. Art. II, §1, cl. 2 (emphasis added). Because the Constitution reserves for state legislatures the power to control the manner of federal elections, state executive officers have no authority to unilaterally exercise that power.

In this context, "the Legislature" refers to the body with state "lawmaking authority." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2667-68 & n.17 (2015); *see also Smiley v. Holm*, 285 U.S. 355, 365 (1932). In Rhode Island, the "legislative power" is vested in the General Assembly. R.I. Const. art. VI, §2 ("The legislative power, under this Constitution, shall be vested in two houses, the one to be called the senate, the other the house of representatives; and both together the general assembly.").

The Secretary of State is not the Legislature and has no independent legislative power. *See* R.I. Const. art. IX. In Rhode Island, "[t]he powers of the government" are and "shall be distributed into three separate and distinct departments: the legislative, executive and judicial." R.I. Const. art. V. "[A] constitutional violation of separation of powers [is] an assumption by one branch of powers

that are central or essential to the operation of a coordinate branch." *Moreau v. Flanders*, 15 A.3d 565, 579 (R.I. 2011). As an executive officer, the Secretary is not authorized to exercise legislative power to make or alter the rules of federal elections. Indeed, the state constitution expressly vests this power with the General Assembly. R.I. Const. art. II, §2 ("The general assembly shall provide by law for the nomination of candidates; for a uniform system of permanent registration of voters; … for absentee and shut in voting; for the time, manner and place of conducting elections; for the prevention of abuse, corruption and fraud in voting").[5]

Lacking the power to alter the rules of elections, the Secretary cannot exercise this power by inviting a court judgment against her. Such a naked attempt to circumvent the limits on her authority set by both the U.S. Constitution and the Rhode Island Constitution is unlawful.

This constitutional violation cause real injuries to Proposed Intervenor-Defendants and their members. The Rhode Island legislature enacted the witness requirement to deter fraud and to promote the integrity of elections. *Supra* I.C.ii. Removing this requirement—particularly for an election with unprecedented levels of absentee voting—poses a serious threat that fraudulent or otherwise ineligible ballots will be cast. *See* Doc. 1 at ¶21 (83% of voters cast their ballots in the June 2020 presidential primary by mail versus only 4% in the same primary four years earlier).

As Justice Stevens stated in *Crawford*, "the risk of voter fraud"—particularly with "absentee ballots"—is "real." *Id.* at 195-96; *accord Griffin*, 385 F.3d at 1130-31 ("Voting fraud is a serious problem in U.S. elections … and it is facilitated by absentee voting."); *Veasey v. Perry*, 71 F. Supp. 3d 627, 641 (S.D. Tex. 2014) (finding broad "agreement that voter fraud actually takes place in abundance in connection with absentee balloting"); *Tex. Democratic Party*, 2020 WL 2982937, at *18 (Ho, J., concurring) ("[C]ourts have repeatedly found that mail-in ballots are particularly susceptible

[5] The Secretary understands that she lacks this power. Given her repeated expression of opposition to the witness requirement, she certainly would have waived it by now had she possessed the power to do so.

to fraud."). Groups from across the political spectrum "acknowledge that, when election fraud occurs, it usually arises from absentee ballots." Morley, *Election Emergency Redlines* 2, bit.ly/3aIqiPK. "[E]lection officials can neither exercise control over absentee ballots once they are mailed out to voters, nor ensure that they have been received and cast by the voters entitled to do so." *Id.* at 5. Stated differently, "absentee voting is to voting in person as a take-home exam is to a proctored one." *Griffin*, 385 F.3d at 1131.

The 2005 Commission on Federal Election Reform, co-chaired by former President Jimmy Carter and former Secretary of State James Baker, concluded that expanding mail-in voting "increase[s] the risks of fraud." *Building Confidence in U.S. Elections* 35, bit.ly/2KF3WUE (*Carter-Baker Report*). True, a few States already have all-mail voting. But those States took years to build the proper infrastructure; they didn't "just flip a switch" in the middle of a pandemic. *Washington: Where Everyone Votes by Mail*, N.Y. Times (Apr. 15, 2020), nyti.ms/3ektSlI. These States have only "avoided significant fraud," according to the Carter-Baker Commission, because they "introduc[ed] safeguards to protect ballot integrity, including signature verification." *Carter-Baker Report* 35. "[W]here the safeguards for ballot integrity are weaker," as they would be under the proposed consent decree, "[v]ote by mail is … likely to increase the risks of fraud." *Id.*

Increased fraud and abuse will, in turn, harm the rights of Proposed Intervenors, their members, and other Rhode Islanders. The constitutional right to vote includes, not just the right to "cast … ballots," but also the right to "have them counted." *United States v. Classic*, 313 U.S. 299, 315 (1941). An individual's vote "won't count if it's cancelled by a fraudulent vote—as the Supreme Court has made clear in case after case." *Tex. Democratic Party*, 2020 WL 2982937, at *18 (Ho, J., concurring) (citing, *inter alia*, *Gray v. Sanders*, 372 U.S. 368, 380 (1963)); *accord Reynolds v. Sims*, 77 U.S. 533, 554-55 & n.29 (1964). "Every voter …, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote

fairly counted, without its being distorted by fraudulently cast votes." *Anderson v. United States*, 417 U.S. 211, 227 (1974). Whether the dilution is "'in greater or less degree is immaterial.'" *Id.* at 226. Because "voting fraud impairs the right of legitimate voters to vote by diluting their votes," the consent decree *is* "an impairment of the right to vote." *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007).

Even if the consent decree would not cause any ineligible ballots or vote dilution—an unlikely prospect given the expected surge in absentee voting and the large number of voters that Proposed Intervenors represent—removing "'safeguards'" that help "'deter or detect fraud'" and "'confirm the identity of voters'" undermines "public confidence in the integrity of the electoral process." *Crawford*, 553 U.S. at 197 (quoting *Carter-Baker Report* 18). So do court orders that are issued close to the election. *Purcell*, 549 U.S. at 4-5. "Voters who fear their legitimate votes will be outweighed by fraudulent ones," or who are confused by last-minute court orders, "will feel disenfranchised." *Id.* at 4. That "debasement" denies "the right of suffrage … just as effectively as … wholly prohibiting the free exercise of the franchise." *Id.*

## CONCLUSION

For all these reasons, and any other reasons this Court deems persuasive in its discretion, the proposed consent decree should be rejected.

Dated: July 28, 2020

Respectfully submitted,

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