No. 20A28

IN THE

Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, ET AL.,
Applicants,

v.

COMMON CAUSE RHODE ISLAND, ET AL.,
Plaintiffs-Respondents,

NELLIE M. GORBEA, ET AL.,
Defendants-Respondents.

On Application to Stay to the Honorable Stephen Breyer, Associate Justice of the Supreme Court of the United States and Circuit Justice for the First Circuit

OPPOSITION TO EMERGENCY APPLICATION FOR A STAY

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The Applicants are the Republican National Committee and the Republican Party of Rhode Island. They participated in the District Court proceedings as proposed intervenor-defendants and were the movants-appellants in the Court of Appeals.

There are two sets of Respondents:

1. Common Cause of Rhode Island, League of Women Voters of Rhode Island, Miranda Oakley, Barbara Monahan, and Mary Baker. They were the Plaintiffs in the District Court and Appellees in the Court of Appeals;
2. 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. They were Defendants in the District Court and Appellees in the Court of Appeals.

The related proceedings are:

1. *Common Cause Rhode Island et. al. v. Gorbea, et. al.*, No. 20-cv-318 MSM (D.R.I. 2020), Judgment entered July 30, 2020. *See* 2020 WL 4365608.
2. *Common Cause Rhode Island et. al. v. Gorbea, et. al.*, No. 20-1753 (1st Cir. 2020), Judgment entered August 7, 2020. *See* 2020 WL 4579367.

CORPORATE DISCLOSURE STATEMENT

The Respondents are state governmental entities.

To The Honorable Stephen Breyer, Circuit Justice for the First Circuit Court of Appeals:[1]

OPINIONS BELOW

The District Court's opinion denying intervention and approving the Consent Judgment can be found at *Common Cause Rhode Island v. Gorbea*, 2020 WL 4365608 (D.R.I., July 30, 2020). The Consent Judgment approved by the District Court is reported at *Common Cause Rhode Island v. Gorbea*, 2020 WL 4460914 (D.R.I. July 30, 2020). The First Circuit's opinion granting intervention for purposes of appeal and denying a stay pending appeal is reported at *Common Cause Rhode Island v. Gorbea*, No. 20-1753, 2020 WL 4579367 (1st Cir. 2020).

I. STATEMENT OF THE CASE

Respondent, Nellie M. Gorbea, in her official capacity as Rhode Island Secretary of State (the "Secretary"), and Respondents, 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 (the "Board of Elections"), respectfully submit this opposition to the Emergency Application for Stay filed by the Applicants, the Republican National Committee and Republican Party of Rhode Island (the "Applicants").

[1] The Board and the Secretary recognize and appreciate the emergency nature of this Application and appreciate the Court's consideration. In consultation with the Clerk's Office, legal counsel has represented that the State of Rhode Island will not mail ballots to voters until Friday, August 14, 2020 at 7:00 p.m Eastern Time, unless this Court denies the Application before this point of time.

As this Court is well aware, since approximately mid-March 2020, COVID-19 has wreaked havoc on the United States in a way no one could have previously envisioned. The current pandemic has required state officials to react to an ever changing landscape, protect the public health and safety in ways unimagined, and balance important constitutional rights. This case concerns one of those affected areas where state officials sought to balance these important constitutional interests: the administration of a safe, fair, and accurate election. In Rhode Island, the Secretary and the Board of Elections have different election responsibilities, but both are entrusted with the state-wide responsibility to ensure the fairness of Rhode Island elections. And, no one can doubt that what is a difficult job under normal circumstances is made more challenging in the current COVID-19 environment.

Responding to these challenges, on March 9, 2020, Rhode Island Governor Gina M. Raimondo declared a state of emergency due to the dangers posed by COVID-19 to health and safety. https://governor.ri.gov/documents/orders/Executive-Order-20-02.pdf. Soon thereafter, Rhode Island officials began considering the ramifications of COVID-19 on its election cycle. Recognizing that the COVID-19 pandemic might affect Rhode Islanders seeking to vote in the then-scheduled April 28, 2020 Presidential Preference Primary ("PPP"), the Board of Elections requested that the PPP be rescheduled. Through Executive Order 20-11, the Governor did so, making several determinations, including:

- Rhode Island continues to see an increase in the number of residents who have tested positive for COVID-19;

- Slowing the spread of community transmission of COVID-19 in Rhode Island and the United States is critical to allow our health care providers to help the afflicted;

- The Board of Elections has requested that the 2020 PPP be postponed to June 2, 2020 in order to conduct a predominantly mail ballot election;

- The Secretary of State joins in the Board of Elections request that the PPP be predominantly a mail ballot election; and

- Minimizing contact between individuals, including those who would ordinarily vote at a polling place, will help to slow the spread of COVID-19.

https://governor.ri.gov/documents/orders/Executive-Order-20-11.pdf. As a result of these (and other) considerations, the Governor rescheduled the PPP from April 28, 2020 to June 2, 2020. The Governor also directed both the Board of Elections and the Secretary to "determine a plan to hold a predominately mail ballot Primary." https://governor.ri.gov/documents/orders/Executive-Order-20-11.pdf.

About a month later, the Governor issued Executive Order 20-27, entitled a Supplemental Emergency Declaration – Further Preparations For a Predominantly Mail Ballot Election. Again, the Governor made certain determinations relating to the health and safety of Rhode Islanders:

- The residents of Rhode Island continue to be exposed to a pandemic caused by COVID-19;

- As directed by Executive Order 20-11, the Board of Elections convened meetings on March 26, 2020 and April 14, 2020 to discuss and vote upon procedures to effectuate a predominantly mail ballot Primary; and

- The Board of Elections voted to recommend modification and/or suspension of various sections of the Rhode Island General Laws in order to effectuate Executive Order 20-11 and to also address the public health concerns

presented by the Rhode Island Department of Health during the Board's March 17, 2020 meeting.

https://governor.ri.gov/documents/orders/Executive-Order-20-27.pdf.

In light of these determinations, the Governor directed, among other things, that "[t]he two witness and/or notary requirements for certifying regular and emergency ballots set forth under R.I. Gen. Laws §§ 17-20-2.1 and 17-20-2.2 are hereby suspended." https://governor.ri.gov/documents/orders/Executive-Order-20-27.pdf. The Executive Order continued that in place of the now suspended two witness/notary requirement, "[t]he Board [of Elections] shall take all measures necessary to compare and authenticate the signatures set forth on the application and certification envelopes and may request mail ballot applicants to voluntarily provide the last four digits of the voter's Social Security number or a valid driver's license number." https://governor.ri.gov/documents/orders/Executive-Order-20-27.pdf. COVID-19 presented unique challenges and Rhode Island officials responded. Rhode Island's first experience voting in the COVID-19 era was a success; voters cast an unprecedented number of mail ballots and were afforded the opportunity to do so, if they chose to do so, within the confines of their own homes.

With the PPP concluded, Rhode Islanders turned their attention to the September Primary Election and the November General Election; and Rhode Island's first election lawsuit of the 2020 election cycle ensued. Several candidates seeking state office sued Rhode Island, including the Board of Elections and the Secretary, seeking to declare that the statutory requirement that candidates solicit, collect, and witness the requisite number of signatures to appear on a ballot – in person – unduly

burdened their First Amendment right to access the ballot. *See Acosta v. Restrepo*, 2020 WL 3495777 (D.R.I. 2020). As applied to the 2020 election cycle, plaintiffs asked the district court to enjoin the in person requirements, fearing that such close contact where pens, papers, and conversations were freely exchanged represented a threat to public health and was inconsistent with the social distancing instructions announced by the Governor and the Department of Health. The District Court (the same judge who would later preside over the instant matter) agreed and directed that candidates seeking access to the ballot collect signatures remotely (or electronically) rather than in person for the 2020 election cycle only. *Id.* No person or entity sought to intervene into that case or otherwise challenged the district court's order.

With the experience of the PPP and a recently concluded lawsuit in the rear-view mirror, on July 23, 2020, Rhode Island faced another election-related lawsuit – the instant case wherein Plaintiffs-Respondents sought to suspend the two witness/notary requirement for mail-in ballots for the September Primary Election and the November General Election – the same requirement that Rhode Island suspended via Executive Order without challenge for the PPP. Rhode Island officials did not invite this lawsuit and contrary to some suggestions made below, did not conspire or otherwise work with the Plaintiffs to bring this lawsuit. Nevertheless, as was (and is) their right, Plaintiffs filed this lawsuit in the District Court and the State Defendants – the Secretary and the Board of Elections – responded.

Based upon the on-going state of emergency, Gubernatorial directives to maintain social distancing when possible, and, of course, the Secretary's and the

Board of Elections' recent past litigation history, *see Acosta*, 2020 WL 3495777, the Rhode Island officials charged with administering the state election conferred with each other and the Rhode Island Office of Attorney General and considered how best to respond in the interest of all Rhode Island voters. The Secretary and the Board of Elections entered into a Consent Judgment suspending the two witness/notary requirement for the September Primary Election and the November General Election. The Consent Judgment also provided that the State Defendants could once again solicit from mail-in voters, on a voluntary basis, the voters' drivers' license number and/or last four digits of their social security number. Plaintiffs also agreed to waive their right to seek all costs and attorneys' fees from the State, a decision the Secretary and the Board of Elections determined was in the best interests of the cash-strapped State of Rhode Island. Although the Applicants had been given notice on Friday, July 24, 2020 that the parties were moving towards a Consent Judgment, the Applicants did not file any papers in the District Court until minutes before midnight on Sunday, July 26, 2020.[2]

After reviewing Applicants' lengthy written objection and also hearing from Applicants at the fairness hearing on the motion to enter the Consent Judgment, the District Court determined that the Consent Judgment was lawful as well as fair, adequate, and reasonable. The District Court, acting well within its discretion,

[2] Ordinarily, a two day delay would be inconsequential, but having been advised that the parties were moving towards a Consent Judgment and considering the speed at which this litigation was moving, the delay was more consequential.

entered the Consent Judgment and denied Applicants' motion to intervene in the lawsuit, as well as the Applicants' request to intervene for purposes of appeal.

The Applicants sought a stay pending appeal from the United States Court of Appeals for the First Circuit. After expedited briefing and oral argument, the First Circuit denied Applicants' motion for stay because Applicants failed to show a likelihood of success on the merits or irreparable harm. More specifically, the First Circuit determined that the *Anderson-Burdick* test was satisfied as the "burden imposed by these (two witness/notary) requirements in the midst of a pandemic is significant." Opinion at 5. Most importantly, the Court of Appeals observed, Rhode Island's election officials did not assert any interest in the two witness/notary requirement as the State has not objected to the Consent Judgment. As the First Circuit pointed out, "no Rhode Island official has stepped forward in these proceedings, even as amicus, to tout the need for the rule." Opinion at 7.

Similarly, the First Circuit concluded that Applicants "struggle to establish any significant likelihood of irreparable harm." Opinion at 7. The Applicants "claim that their candidates may be the victims of fraudulent ballots." Opinion at 7. However, the First Circuit pointed out that the State held a successful PPP in June 2020 without the two witness/notary requirement with a record number of mail ballots, "and no evidence of fraud resulted." Opinion at 7. Moreover, the First Circuit recognized that Rhode Island law still provided other safeguards, namely requiring local boards of canvassers to match mail ballot application signatures with a voter's registration card. R.I. Gen. Laws §17-20-10. Furthermore, "[o]nce a voter submits

their ballot, the Board of Elections '[c]ompare[s] the name, residence, and signature [on the ballot] with the name, residence and signature on the ballot application for mail ballots and satisf[ies] itself that both signatures are identical." Opinion at 8 (quoting R.I. Gen. Laws §17-20-26(c)(2)).

The First Circuit also distinguished this case from the cases cited by Applicants as part of their claim that the *Purcell* principle, that federal courts should ordinarily not alter the election rules on the eve of the election, acted as a bar to the entry of the Consent Judgment. The First Circuit correctly noted:

> Rhode Island itself has voiced no concern at all that the consent judgment and decree will create any problems for the state or its voter. To the contrary, 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 would confuse voters. Nor has any other Rhode Island government entity sought to intervene or make its opinion known. This fact materially distinguishes this case from every other case that Republicans cite to illustrate the "Purcell principle".

Opinion at 9.

In addition, the First Circuit pointed out that "Rhode Island just conducted an election without any attestation requirement, in which 150,000 mail-in ballots were requested. So the status quo (indeed the only experience) for most recent voters is that no witnesses are required. . . . [I]n the absence of the consent decree, it is likely that many voters will be surprised when they receive ballots, and far fewer will vote." Opinion at 10-11.

Having unsuccessfully pressed their case in the District Court and the Court of Appeals, Applicants now ask this Court to override the experience and judgment

of the state election officials who determined it was in the best interest of Rhode Island and its voters to enter into a Consent Judgment that suspended the two witness/notary requirement for the September Primary and November General Election, just as Rhode Island had done through Executive Order for the PPP. In doing so, the Applicants not only ask this Court to substitute its collective wisdom for that of the State election officers, but Applicants also ask this Court to ignore the Chief Justice's recent admonition that "[t]he District Court did not accord sufficient weight to the State's discretionary judgments about how to prioritize limited state resources across the election system as a whole." *Little v. Reclaim Idaho*, 591 U.S. ____ (July 30, 2020) (Roberts, C.J., concurring). This Court should deny the Emergency Application.

A. Changes to the Election Laws for the 2020 Presidential Preference Primary

On March 9, 2020, Governor Raimondo declared a state of emergency "due to the dangers to health and life posed by COVID-19."[3] In response, the Board of Elections, the quasi-judicial body charged under Rhode Island law to administer and enforce Rhode Island's election laws, held a series of evidentiary hearings beginning on March 17, 2020, to aid the Board of Elections in framing its response to the COVID-19 pandemic as it pertained to the 2020 PPP. The Board of Elections heard testimony from the Rhode Island Department of Health, the Office of the Secretary of State, the National Guard, the United States Postal Service, from the State's

[3] Executive Order 20-02 at 2 (March 9, 2020), https://governor.ri.gov/documents/orders/Executive-Order-20-02.pdf

thirty-seven local boards of canvassers, and from its own executive director, and also reviewed information and materials prepared by the Centers for Disease Control and Prevention. After weighing this testimony and guidance, the Board concluded that the requirement that mail ballots be witnessed by two witnesses or a notary required voters to remain in sustained close contact with others—the very same close contact that exposes people to the COVID-19 virus. The Board also reviewed the place of this requirement in the State's overall legislative scheme for preventing voter fraud, and considered whether alternative measures were available, feasible, or even necessary. As a result of its deliberations, the Board voted unanimously to suspend these requirements on March 23, 2020.

This was followed by Executive Order 20-11. Following the Governor's promulgation of that Order, the Board of Elections and the Secretary of State worked together to review election laws and prepare to conduct a predominantly mail ballot election for the 2020 PPP. The Board of Elections passed a resolution modifying the two witness/notary requirement further, adding a request that voters voluntarily provide their driver's license number and/or the last four digits of their social security number.[4] Accordingly, the Secretary worked with a printer vendor to prepare certifying envelopes that omitted the two witness/notary requirement and instead

[4] The Help America Vote Act, 42 U.S.C. §15483(a)(5)(A)(i), requires, with limited exceptions, that first time registrants provide either their driver's license number or the last 4 digits of social security number when they register to vote. This information is used to verify the voter's identity. 42 U.S.C. §15483(a)(5)(B)(i)-(ii).

requested voters' provide their driver's license number and/or the last 4 digits of their social security number.

The result of the Governor's Executive Order, as well as the work of the Secretary of State and the Board of Elections, was an enormous increase in the number of Rhode Islanders voting by mail ballot. *See* Proposed Intervenor-Defendants' Opposition to the Proposed Consent Decree ("83% of voters cast their ballots in the June 2020 presidential primary by mail versus only 4% in the same primary four years earlier").[5] (Doc. #21 at 26). Even with this unprecedented increase in mail ballots, the Applicants cannot point to *one* case of voter fraud, and offered no such evidence in the District Court.

B. September Statewide Primary Election and November General Election

On July 13, 2020, the Board reviewed the successfully completed PPP, and after finding that no meaningful change in the circumstances of the disease transmission and the interests of the State, voted unanimously to once again suspend the two witness/notary requirement for the September Primary Election and the November General Election. The Secretary likewise expressed her view, in her official capacity, that the 2020 September Primary Election and November General

[5] By comparison, 38,294 people voted in the 2004 PPP, and 22,670 voted in the 2012 PPP—the two most recent Rhode Island PPPs that also featured an incumbent president of one major party and an ongoing primary for the other party. *See* https://elections.ri.gov/elections/results/2004/preference/ and https://www.ri.gov/election/results/2012/presidential_preference_primary/. By comparison, 125,991 voted in the 2020 PPP, with 83% of those voters voting by mail ballots. https://www.ri.gov/election/results/2020/presidential_preference_primary.

Election should be conducted primarily through mail, including the continued suspension of the two witness/notary requirement on the certification envelopes used in connection with mail ballots.

On July 16, 2020, the Rhode Island House of Representatives passed a bill, H-7200A, which proposed a number of changes to Rhode Island's election laws in connection with the ongoing COVID-19 pandemic. One of these changes would have eliminated the two witness/notary requirement for the 2020 September Primary Election and the November General Election. Others included a directive to the Secretary, requiring her to mail ballot applications to all qualified Rhode Island voters, and the waiver of certain additional certification and eligibility requirements for mail ballots. While this bill passed the House of Representatives, the Rhode Island State Senate failed to act on H-7200A before adjourning on July 17, 2020. The result was this lawsuit filed on July 23, 2020. At the time of this lawsuit, and as of the date of this filing, the Governor has not issued an Executive Order suspending the two witness/notary requirement of the 2020 election cycle. Significantly, neither the Rhode Island Senate, nor the Rhode Island House of Representatives, nor Governor Raimondo, has sought to intervene or object to the entry of the Consent Judgment in this case.

C. Complaint For Temporary Restraining Order, Preliminary and Permanent Injunctive Relief, and Declaratory Judgment

On Thursday, July 23, 2020, less than one week after the Rhode Island Senate adjourned without taking action on H-7200, Plaintiffs-Respondents filed the Complaint in this matter. The next day, Plaintiffs-Respondents and Defendants-

Respondents Secretary and Board of Elections had an in-chambers conference with the district court. Because the Defendants-Respondents did not object to Plaintiffs-Respondents' requested relief, and indeed thought the requested relief was necessary and proper for all the reasons previously articulated herein, the parties worked towards and eventually agreed to the Consent Judgment. The District Court set the matter down for a hearing on Monday, July 27.

After the court conference on Friday, July 24, the Secretary's legal counsel received a text message from one of Applicants' current counsel, which read in relevant part: "Anything happen today with [this case]? National GOP may seek to intervene." The Secretary's legal counsel responded a minute later, in relevant part: "The parties are working on a Consent Judgment so if you want to intervene you should try soon." Applicants' counsel responded in relevant part: "I may reach out to you about Common Cause case but not sure what your (sic) friends at the White House will do, if anything." So, as of 2:32 pm on Friday, July 24, legal counsel for the Applicants had actual knowledge that the parties were working on a Consent Judgment. Despite the suggestion to the contrary, the Applicants knew about the lawsuit and the prospect of an imminent Consent Judgment but made the decision to not immediately intervene.

D. The Applicants' Motion to Intervene

Despite knowing that a Consent Judgment was imminent on July 24, 2020, the Applicants waited until Sunday, July 26, 2020, the literal eleventh hour (at 11:52 p.m.), to file their Motion to Intervene. (Doc. # 10). On Monday, July 27, 2020, the District Court held its scheduled hearing in this matter and directed the Applicants

to perfect their Motion to Intervene by filing a responsive pleading by 7:00 p.m. that evening. The Applicants did so, and also filed a motion for a protective fairness hearing. The District Court directed the Plaintiffs-Respondents, the Secretary, and the Board to file any objections by noon on July 28, 2020, and scheduled a fairness hearing for July 28, 2020 at 3 pm.

E. The Consent Judgment and the Fairness Hearing

At the fairness hearing, the parties described the process leading to the Consent Judgment. The Secretary's legal counsel informed the District Court that he had worked with counsel for the Board of Elections as well as the Rhode Island Attorney General's Office, to revise the Plaintiffs' proposed Consent Judgment. In fact, an Assistant Attorney General was present at the fairness hearing to answer any questions the District Court might have relating to the Attorney General's Office participation in the settlement process or the fairness of the Consent Judgment to the State of Rhode Island. The Secretary's legal counsel also pointed out that, despite the Applicants' assertions that the State of Rhode Island "obtained nothing" from the Consent Judgment, Rhode Island voters obtained certainty – rather than extended litigation – regarding certain mail-in ballot procedures for the September Primary and November General Election, and the Board of Elections and the Secretary secured the ability to ask all mail ballot applicants for their driver's license number and/or last 4 digits of the social security number. Furthermore, at the insistence of the Secretary and the Board of Elections, Plaintiffs waived their right to attorneys' fees and costs. In the view of the State officials defending Rhode Island, this resolution was consistent with a prior unchallenged federal court order (issued by the

same judge), *see Acosta*, 2020 WL 3495777, and advanced social distancing guidelines and the public's health and safety while protecting the State's interest in preserving the integrity of its election process.

In addition, the Applicants raised the *Purcell* principle, claiming that it would be contrary to *Purcell* and its progeny for the District Court to change the election rules so close to an election. However, as the Secretary and the Board of Elections pointed out, the last election (the 2020 PPP) had been conducted primarily through mail ballots without the two witness/notary requirement. Given the vast increase in the use of mail ballots for the PPP, the publicity in educating voters for the PPP, and that the last Rhode Island election (and the only election in the COVID-19 era) was conducted without the two witness/notary requirement, voters were much more likely to be confused by the re-imposition of the two witness/notary requirement than by the entry of the Consent Judgment and the continuation of the *status quo*.

The District Court agreed with the Secretary and the Board of Elections, and granted the Motion for Entry of Consent Judgment. The District Court also denied Applicants' Motion to Intervene. *Common Cause*, 2020 WL 4365608 * 3 n.5. The Applicants sought emergency relief from the Court of Appeals, which reversed the District Court's decision to deny intervention pending appeal but otherwise denied the Emergency Motion for Stay Pending Appeal.

F. Overview of Mail Ballot Voting in Rhode Island

Under Rhode Island law, any voter may vote by mail and the voter does not need a specific reason to do so. R.I. Gen. Laws § 17-20-2(4). The voter must fill out a mail ballot application, sign it (without any witnesses or notary), and return it to the

local board of canvassers. R.I. Gen. Laws §§ 17-20-2.1; 17-20-13. The local board of canvassers is then required to review the application for compliance with the requirements of the law and to check the signature on the mail ballot application against the voter's signature from the voter's original registration card. R.I. Gen. Laws § 17-20-10 (a). If the signature on the application and the voter's original registration card match, the local board of canvassers certifies the application to the Secretary of State through the Central Voter Registrations System ("CVRS"). R.I. Gen. Laws § 17-20-10 (c).[6] The local boards of canvassers maintain a separate list of all voters who applied for a mail ballot, thus ensuring that a person who receives a mail ballot does not also vote in person. R.I. Gen. Laws § 17-20-8.

Once the CVRS has been updated with the board of canvassers' notation that a voter has properly applied for a mail ballot, the Secretary of State mails the voter a mail ballot package, which consists of an instruction sheet on how to complete the ballot, the actual ballot, a certifying envelope within which the voter seals their voted ballot, and a return envelope in which the voter places the completed certifying envelope and which the voter then mails to the Rhode Island Board of Elections. R.I. Gen. Laws §§ 17-20-10 (d)(1); 17-20-12. Rhode Island law explicitly provides that the Secretary "shall cause to be prepared and printed and shall furnish with each mail

[6] "Upon the certification of a mail ballot application to the secretary of state, the local board shall enter on the voting list the fact that a mail ballot application for the voter has been certified and shall cause the delivery of the certified mail ballot applications together with the signed certified listing thereof in sealed packages to the state board of elections." R.I. Gen. Laws §17-20-10(c). This is important because a voter who has applied for a mail ballot is not allowed to vote at the polls. R.I. Gen. Laws §17-20-29.

ballot an envelope for sealing up and certifying the ballot when returned." R.I. Gen. Laws § 17-20-21.[7] The statute also provides that the certifying envelopes "shall be printed in substantially the following form" and includes a form containing a notary signature block as well as spaces for two witness signatures. R.I. Gen. Laws § 17-20-21.

Once mail ballots are returned by the voter, the Board of Elections is responsible for certifying and counting mail ballots. R.I. Gen. Laws §17-20-26. The law requires that the Board of Elections' certification be public and explicitly provides:

> Notice of these sessions shall be given to the public on the state board of elections' website, the secretary of state's website, and announcements in newspapers of general circulation published at least twenty-four hours before the commencing of any session. All candidates for state and federal office, as well as all state party chairpersons, shall be given notice by telephone or otherwise of the day on which ballots affecting that candidate's district will be certified; provided, that failure to effect the notice shall in no way invalidate the ballots.

R.I. Gen. Laws §17-20-26(a)(2).

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[7] The Secretary of State is responsible for furnishing mail ballot supplies. Specifically, R.I. Gen. Laws §17-20-12 provides:

> All mail ballots, application forms, certified envelopes for enclosing ballots, any other envelopes that may be necessary, and instructions as to voting, use of ballots, and affidavits, shall be furnished and supplied by the secretary of state for use in mailing application forms, ballots, and other supplies to mail voters to carry out the provisions of this chapter, but each local board shall print or stamp upon the application form and upon the return envelope the address of the local board. The secretary of state is authorized to interpret and apply the provisions of this chapter in a manner that effects the legislative intention set forth in this chapter.

For mail-in ballots, the Board of Elections is required to "(1) Determine the city or town in which the voter cast his or her ballot and classify accordingly; and (2) Compare the name, residence, and signature of the voter with the name, residence, and signature on the ballot application for mail ballots and satisfy itself that both signatures are identical." R.I. Gen. Laws §17-20-26 (c)(1)-(2). Thus, while Rhode Island law provides procedures and safeguards to compare the *voter's* signature (ensuring the authencity of the voter), there is *no* statutory requirement or process that the Board of Elections, or any other person or entity, examine the *witnesses or notary* signatures on the certifying envelope, and as a matter of practice the Board does not do so. Additionally, because the two witnesses need not be registered voters and their identities need not be otherwise verified, the Board *cannot* use the two witnesses requirement to meaningfully control voter fraud.

II. STANDARD OF REVIEW

Parties applying to this Court for a stay of lower court orders pending final disposition of an appeal must show: "(1) a 'reasonable probability' that this Court will grant a writ of certiorari, (2) a 'fair prospect' that the Court will reverse the judgment below, and (3) a 'likelihood that irreparable harm will result from the denial of the stay.'" *Little v. Reclaim Idaho*, 591 U.S. ___ (2020) (Roberts, C.J., concurring) (quoting *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010)).

III. ARGUMENT

A. The Applicants Have Not Shown a Reasonable Probability That This Court Will Grant Certiorari, Nor Have They Shown a Fair Prospect That This Court Will Reverse Entry of the Consent Judgment

The Applicants rely on this Court's grant of a stay in *Merrill v. People First of*

Alabama in making the claim that there is a reasonable probability that this Court will grant a certiorari in this case. *See* No. 19A1063, 2020 WL 3604049, at *1 (July 2, 2020). However, *Merrill* is fundamentally inapposite to this case, because despite their best efforts to elide the distinction, *Merrill's* posture as an appeal of an injunction imposed upon the State of Alabama renders it fundamentally different from the instant case.

It is true, as the Applicants state, that the witnessing requirement in *Merrill* mirrors the two witness/notary requirement imposed by Rhode Island law. It is also true that neither the Board nor the Secretary may utilize a consent judgment to "agree to take action that conflicts with or violates the statute upon which the complaint was based." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 526 (1986). And likewise, it is true that a consent judgment is, for certain purposes, the same as an injunction. *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83-84 (1981) (holding that district court's decision declining to enter a consent order had the effect of denying injunctive relief, and thus was appealable). However, the similarities end there, and it is the differences between consent judgments and injunctions that control in this case.

The first difference is the source of the authority a court draws on when granting an injunction and when entering a consent judgment. An injunction is derived from the "full coercive powers" of a court. *See Nken v. Holder*, 556 U.S. 418, 428 (2009). It is an "extraordinary remedy" which "should issue only where the intervention of a court of equity 'is essential in order effectually to protect property

rights against injuries otherwise irremediable.'" *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982) (quoting *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)). By contrast, "it is the parties' agreement that serves as the source of the court's authority to enter [a consent judgment]." *Local No. 93*, 478 U.S. at 526. As a result, while courts may only grant injunctions upon finding "irreparable injury and the inadequacy of legal remedies," *Weinberger*, 456 U.S. at 312, a court may enter a consent judgment providing the agreed upon relief so long as "the consent decree is not otherwise shown to be unlawful," even if the court "might lack authority [under the statute] to do so after a trial." *Local No. 93*, 478 U.S. at 526.

In this case, the Applicants have cited numerous cases, including *Merrill*, standing for the proposition that it may well be lawful for Rhode Island to keep the two witness/notary requirement it has decided to suspend. *See, e.g.*, *Merrill*, 2020 WL 3604049, at *1; *Democratic Nat'l Comm. v. Bostelmann*, No. 20-1538, 2020 WL 3619499 at *2 (7th Cir. Apr. 3, 2020); *Thompson v. Dewine*, 959 F.3d 804, 810-12 (6th Cir. 2020). However, they have not cited a *single* case suggesting that it would be *un*lawful for Rhode Island to change its two witness/notary requirement, by means of a consent judgment or otherwise. Indeed, "[o]nly two other states have such a rule, and only a total of twelve require even one witness." Opinion at 6. Absent such a showing, and notwithstanding the Applicants' assertions to the contrary, the District Court was within its discretion to accept a Consent Judgment involving state parties who have determined that the requirement likely is unconstitutional. *See Local No. 93*, 478 U.S. at 526. Therefore, there is no reason for this Court to grant certiorari,

let alone a stay. *See id.*

Likewise, though the Applicants raise a number of cases indicating a growing split between jurisdictions lifting state election law requirements imposed on voters using absentee ballots, none of those cases involved a consent judgment. *See, e.g.*, *People First of Ala. v. Ala. Sec'y of State*, No. 20-12184, 2020 WL 3478093, at *7-8 (11th Cir. June 25, 2020) (denying motion for stay pending appeal) (Rosenbaum, J., concurring); *Bostelmann*, 2020 WL 3619499 at *2 (granting motion to stay injunction lifting requirement that absentee ballots be witnessed). The question of whether it is constitutional for a federal court to order that such requirements be lifted, at all or in the weeks prior to an election, is an important one. Its resolution would implicate the *Purcell* principle and questions of federalism. However, this is not likewise true where the case involves a consent judgment. Unless this Court has questions regarding the *authority* of the federal judiciary to enter such relief, concerns regarding federalism would dictate that this Court defer to the judgment of the Board and the Secretary, who are entrusted under Rhode Island law to make determinations about Rhode Island's election laws. *See Little*, 2020 WL 4360897 at *2 (Roberts, C.J., concurring) (admonishing that courts must defer to state's "discretionary judgments" regarding election administration); *Local No. 93*, 478 U.S. at 526 (authorizing entry of consent decree including relief that is not strictly required by law where parties agreed to relief).

i. The Consent Judgment does not violate the Purcell principle

The Applicants argue that under *Purcell v. Gonzalez*, 549 U.S. 1 (2006), federal courts are not supposed to change state election rules as elections approach. As they

present it, the *Purcell* principle is not a caution that federal courts should avoid making orders that might "result in voter confusion" close to an election, but an impenetrable barrier against interference in state election procedures by the federal judiciary. *See* Emergency Application for Stay at 21 (referring to "*Purcell's* non-interference principle" as "a *sufficient* basis to deny injunctive relief" *even if* the statute enjoined is actually unconstitutional) (emphasis in original).[8] In the present case, however, the District Court is *approving* a Consent Judgment *entered into by the parties including by representatives of the State*, namely the Secretary and the Board of Elections. As discussed, *supra*, this is a Consent Judgment that Rhode Island election officials determined was in the best interests of Rhode Island. The cases cited by Applicants *all* involve government entities requesting stays from injunctions imposed by federal courts *against* the judgment of the states in question. *See e.g.*, Applicants' Emergency Application for Stay at 11 (noting that "*Merrill* involved a preliminary injunction rather than a consent judgment" but dismissing this difference).

In *Purcell,* the State of Arizona and county officials applied for a stay from an injunction imposed by the Ninth Circuit Court of Appeals, which itself reversed the denial of that injunction by the lower court without any deference to the lower court's decision. 549 U.S. at 2. Likewise, in both *Republican National Committee v.*

[8] Notably, this erases the procedural history of *Purcell*—this Court reversed the grant of an injunction by the Ninth Circuit Court of Appeals not because of the caution expressed above, but because the Court of Appeals failed "to give deference to the discretion of the District Court." *Purcell*, 549 U.S at 5.

Democratic National Committee, and *Merrill v. People First of Alabama*, the Wisconsin Legislature and the State of Alabama and Alabama Secretary of State, respectively, applied for stays from injunctions imposed on them against their judgments of the law. *Republican National Committee v. Democratic National Committee*, 589 U.S. ___ (2020); *Merrill v. People First of Alabama*, 591 U.S. ___, 2020 WL 3604049 (July 2, 2020). These cases present a markedly different posture, both on their merits and in terms of federalism, from the instant case.

Indeed, applying *Purcell* as restrictively as the Applicants suggest, it would turn its underlying principles on their head. *See Purcell*, 549 U.S. at 4-6. If *Purcell* stands for any principle broader than a constitutional hold on all election laws in the months prior to elections no matter the circumstances—a conclusion which no part of *Purcell* remotely supports—it is that "'*[a] State* indisputably has a compelling interest in preserving the integrity of its election process'" and that interest must be safeguarded by the states, rather than the courts, on the eve of an election. *See id.* at 4 (quoting *Eu v. S.F. Cnty. Democratic Central Comm.*, 489 U.S. 214, 231 (1989)) (emphasis added); *see also Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205, 1207 (2020) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election."). This Court has also repeatedly stated that the reason for this principle is to mitigate the possibility that an order by a court too close to an election might backfire and create voter confusion. *See Frank v. Walker*, 574 U.S. 929 (2014) (vacating order of Seventh Circuit which stayed injunction issued by district court, allowing election to proceed

under the district court's injunction that suspended voter identification requirement, citing *Purcell*).

Because this case involves a Consent Judgment supported by the Secretary and the Board, it is unique and distinguishable from the cases. Rather than the State or its officers seeking to stay an order by a federal court reversing their considered judgment in administering state election laws, it is the Applicants, a state and a national political party, that seek to use a federal court to stay a Consent Judgment negotiated by the State's responsible bodies and entered into with their consent. Chief Justice Roberts recently admonished a district court, pointing out that: "The District Court did not accord sufficient weight to the State's discretionary judgments about how to prioritize limited state resources across the election system as a whole." *Little v. Reclaim Idaho*, 591 U.S. ___ (July 31, 2020) (Roberts, C.J., concurring). And, after recognizing that 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,'" the Chief Justice noted that when officials "'undertake[] to act in areas fraught with medical and scientific uncertainties' their latitude 'must be especially broad.'" *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (May 29, 2020) (Roberts, C.J., concurring).

The Board and the Secretary determined that the Consent Judgment was appropriate and in the best interest of Rhode Island, after taking into account both the health risks and burdens imposed by the two witness/notary requirement and the need to hold safe and secure elections. It was approved by the District Court on those

terms. The Consent Judgment reflects the wisdom of the Board of Elections and the state-elected Secretary of State on how to prioritize limited state resources and balance conflicting state interests in the midst of a pandemic. Contrary to the Applicants' contention, if the *Purcell* principle is a substantive one, it mandates that this Court *not* intervene to grant a last minute stay. To do so would interfere with the considered decisions of the Rhode Island state election officials tasked with preparing for and running the upcoming September primary and November general elections.

Applicants wrongly contend that the Secretary and Board of Elections are changing the rules on the eve of the election. As pointed out by the District Court: "the Court rejected the proposed intervenors' main argument that 'changing the rules' on the eve of the election would cause voter confusion. In fact, the opposite is true. The last rules explained to voters eliminated the signature and notary requirement for the June 2, 2020, presidential preference primary. Approving the Consent Decree maintained that status quo. *Enforcing* the signature and notary requirement would have 'changed the rules.'" *Common Cause*, 2020 WL 4365608 * 3 n.5. This is a determination that the Court of Appeals endorsed. *See* Opinion at 10 ("So the status quo (indeed the only experience) for most recent voters is that no witnesses are required"). Therefore, there is no reason why this Court would likely reverse. *Purcell* is not, and has never been, a straitjacket on state's own authority to effect changes to their elections laws, and there is no reason why this Court would turn it into one now. *See Purcell*, 549 U.S. at 5-6.

ii. The Consent Judgment is lawful as the witness requirement is unconstitutional as applied during the COVID-19 pandemic

The District Court expressly found: "While the Consent Decree seeks to transgress existing Rhode Island statutory election law, had there been a hearing on the merits of the plaintiffs' prayer 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." *Common Cause*, 2020 WL 4365608 * 4. The District Court's ruling is consistent with a case it had decided merely a month earlier. *Acosta*, 2020 WL 3495777 (D.R.I. 2020).

In applying the *Anderson-Burdick* balancing test, the Court of Appeals properly determined that "[t]he burden imposed by these requirements in the midst of a pandemic is significant." Opinion at 5. In particular, the Court of Appeals observed that unlike the interests at issue in *Anderson* and *Burdick*, in this case a "voter's ability to actually cast a ballot, not just the procedures for getting candidates on a ballot" were at issue. *Id*. The Court continued that these burdens were particularly significant during the COVID-19 pandemic because more voters are likely to want to vote without intermingling with the public and many voters may be deterred by the fear of becoming infected by witnesses or a notary. *Id*.

The Applicants dismiss these concerns, noting that "[w]itnesses can be family, friends, coworkers, congregants, teachers, waiters, bartenders, gymgoers, neighbors, grocers, and more," *see* Emergency Application for Stay, at 18, but therein lies the problem with the two witness/notary requirement. As described earlier, Rhode Island

has no requirement that witnesses be verifiable, and no process to verify witness or notary signatures. In the judgment of Rhode Island elections officials imposing such a requirement – when that requirement plays no role in verifying a voter's ballot or preventing voter fraud – is unconstitutional as applied to this election cycle. The Court of Appeals appropriately summarized that "the incremental interest in the specific regulation at issue (the two-witness or notary rule) is marginal at best." Opinion at 6. Even the Applicants implicitly acknowledge that any process that could rely upon your waiter, bartender, gymgoer, or grocer for verification is no process at all.

Moreover, Applicants' position entirely relies upon a voter having access to two witnesses or a notary during the voting process. It is true that Rhode Island now allows small social gatherings,[9] but some citizens who choose to exercise additional

[9] Applicants do not provide the full picture of Rhode Island's reopening. On June 29, 2020, the Governor did indeed sign an executive order moving to Phase III of the reopening. https://governor.ri.gov/documents/orders/Executive-Order-20-50.pdf. At that time, the Governor set a maximum of 25 people for indoor social gatherings and up to 125 people maximum at "venues of assembly including convention centers, concert halls, performance venues and theaters." *Id.* However, the Governor explicitly wrote: "I urge the public to keep exposure well below the caps set forth in this Executive Order; the lower the attendance and gathering size, the lower the risk." *Id.* Moreover, the Governor's Executive Order also included a section entitled "Vulnerable populations Strongly Advised to Stay Home." *Id.* Less than a month later, on July 29, 2020, the Governor issued Executive Order 20-58, which due to changing conditions, lowered the indoor limit to 15 and continued to urge Rhode Islanders to stay well below the maximum. https://governor.ri.gov/documents/orders/Executive-Order-20-58.pdf. This is an example of the fast changing conditions that Rhode Island and other states face and emphasizes the Chief Justice's admonition that district courts should "accord sufficient weight to the State's discretionary judgments about how to prioritize limited state resources across the election system as a whole." *Little v. Reclaim Idaho*, No. 20A18, 2020 WL 4360897, at *2 (July 30, 2020) (Roberts, C.J.,

caution and not engage in social events due so. Must these voters to choose between their health and their vote? Not to mention, if a voter has COVID-19, believes they may have COVID-19, or is quarantined under a state's laws, Applicants have only one answer: they can obtain access to a notary online. Even this purported solution has its problems because it assumes that a voter has access to the internet and, as the Secretary's website advises, "[t]here are additional costs associated with performing Remote Online Notarizations." Remote Online Notarization, bit.ly/39JG4Lu.

As the Court of Appeals correctly observed, "[c]ould a determined and resourceful voter intent on voting manage to work around these impediments? Certainly. But it is also certain that the burdens are much more unusual and substantial than those that voters are generally expected to bear. Taking an usual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote." Opinion at 6. Nothing the Applicants have argued displaces Rhode Island's decision to enter into a Consent Judgment so that any person who wants to vote may vote *and* protect their health. *See* Applicants' Emergency Application for Stay at 20 ("The only people who cannot vote as a result of Rhode Island's witness requirement are individuals who do not live with two eligible witnesses, will not interact with eligible witnesses outside of their home, will not have eligible witnesses visit their home, cannot access a remote notary for three weeks, and cannot vote in person on any of the 21 available days."). In light of all these considerations, nothing required

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concurring).

the State election officials to stand before the District Court to maintain the constitutional validity of the two witness/notary requirement that the election officials themselves believed was unconstitutional under the present circumstances.

Lastly, the Applicants place great emphasis on the Rhode Island Senate's and Governor Raimondo's "decision" not to statutorily (or through an Executive Order) suspend the witness/notary requirements, as the Governor had done for the PPP. Of course, these actions or inactions make little difference once the Plaintiffs filed this lawsuit and invoked the District Court's jurisdiction. But even more so, this Court has warned that "Congressional inaction lacks 'persusive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

iii. The Consent Judgment is not overbroad and is tailored to protect the State's interest in fair elections

Applicants claim that the Consent Judgment is overbroad and suggest that any exception to the witness/notary requirement should simply apply to the three plaintiffs. The Applicants do not address the administrative challenges of having such narrow proposed relief or the invitation to other Rhode Islanders to sue the State of Rhode Island seeking the same relief.

B. Applicants Will Not Suffer Irreparable Harm Without a Stay

The Applicants claim that they will be irreparably harmed without a stay because their appeal may become moot. It is worth noting that the First Circuit rejected this argument below because the risk of mootness is not unique to the

Applicants. Just as the Applicants would be required to litigate their appeal and apply for certiorari while the September Primary Election and the November General Election take place under the terms of the Consent Judgment, likewise the Board and the Secretary (absent legislation or Gubernatorial action) would be unable to hold those elections under the terms of the Consent Judgment, *which they agreed to* if this Court now stays its entry. To require such a stay would do violence to the State, the power delegated by the Rhode Island General Assembly to the Board and the Secretary, and to the State defendants determination of the burdens (and benefits) placed on Rhode Island voters by the two witness/notary requirement.

Moreover, Applicants claim their voters and candidates will suffer irreparable harm due to potential voter fraud. The Applicants have presented no evidence that they will be irreparably harmed by the Consent Judgment. Looking at Rhode Island's 2020 PPP, which was conducted without the two witness/notary requirement, the data suggests that Applicants can expect an increase in turnout of Republican voters.

Despite the Applicants' alleged fear of "fraud," there has been absolutely no evidence introduced of any mail ballot fraud in the 2020 PPP or any other occasion. As outlined above, Rhode Island law provides numerous safeguards to ensure that a mail ballot applicant is indeed registered to vote. Moreover, the Secretary and Board of Elections required that the Consent Judgment include the ability to ask mail ballot applicants for their driver's license and/or last four digits of their social security number as yet another way to confirm identity in the absence of the two witness/notary requirement.

C. The Balance of Harms and Public Interest Do Not Favor a Stay

The balance of the harms and public interest favors the Consent Judgment, which will allow Rhode Islanders to vote by mail in the same manner that they did for the June 2, 2020 PPP. Rhode Island saw a historic increase in mail balloting in June 2020 and expects to see the same in the September Primary Election and November General Election. Furthermore, given the COVID-19 Pandemic, the public interest is promoted by protecting hundreds of thousands of voters and poll workers from having unnecessary contacts with other people.

IV. CONCLUSION

For the foregoing reasons, the Emergency Application for Stay should be denied.

Dated: August 11, 2020

Respectfully submitted,

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