No. 20A28

**In the Supreme Court of the United States**

REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY OF RHODE ISLAND,

*Applicants*,

v.

COMMON CAUSE RHODE ISLAND, LEAGUE OF WOMEN VOTERS OF RHODE ISLAND, MIRANDA OAKLEY, BARBARA MONAHAN, and MARY BAKER; NELLIE M. GORBEA, in her official capacity as Secretary of State of Rhode Island; and DIANE C. MEDEROS, LOUIS A. DESIMONE JR., JENNIFER L. JOHNSON, RICHARD H. PIERCE, ISADORE S. RAMOS, DAVID H. SHOLES, and WILLIAM E. WEST, in their official capacities as members of the Rhode Island Board of Elections,

*Respondents*.

**REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY**

**To the Honorable Stephen Breyer,
Associate Justice of the Supreme Court of the
United States and Circuit Justice for the First Circuit**


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Very little about this stay application is in dispute. In *Merrill*, this Court stayed another injunction, against another witness requirement, entered in similar proximity to an election. Respondents concede that this case involves an injunction. Respondents concede that Rhode Island's witness requirement is indistinguishable from Alabama's. Respondents admit that, as a general matter, an injunction entered this close to September and November would violate *Purcell*. Respondents never dispute that the questions in this case are certworthy, and they cannot argue that there's no "fair prospect" of reversal without contradicting *Merrill*.

Respondents ask this Court to depart from *Merrill* not based on the merits of Applicants' arguments under the stay factors, but based solely on *who Applicants are*—voters, candidates, and political parties, rather than state officials. But the problems with federal courts enjoining valid state laws on the eve of elections do not go away just because some state defendants like the injunction. A federal court has no power to enter a consent judgment that enjoins a state law unless that law is likely unconstitutional—a settled proposition that Respondents conceded below. And state consent does not resolve a *Purcell* violation, as state consent does nothing to diminish *Purcell*'s concerns with voter confusion, the integrity of elections, the proper role of federal courts, or undue delay by plaintiffs.

State officials who are unhappy with an election law can seek to change it through the political process. While it might be politically easier to procure an injunction from a federal court, federal courts cannot transgress longstanding limits on their authority. Because the judgment below does that, this Court should stay it.

## ARGUMENT

Because time is short, Applicants will limit this reply to five key points. This case remains indistinguishable from *Merrill*, notwithstanding Respondents' attempt to draw unpersuasive distinctions concerning Article III standing, the merits, *Purcell*, the June suspension of the witness requirement, and the equities.

### I. Respondents' brand-new challenge to Applicants' standing fails.

The private respondents argue that Applicants lack standing to appeal the consent decree. This is the first time they've made this argument; and even now, the state respondents do not join it. That the private respondents lead with it does not signal much confidence in the rest of their opposition.

Because the state respondents refuse to defend Rhode Island law, it is true that Applicants, as intervenors, must "independently demonstrate standing" to maintain this appeal. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). The First Circuit knew this, asked about it at oral argument, and ultimately found standing, as it granted Applicants intervention for purposes of appeal. It was correct to do so.

Applicants have never asserted a bare desire to defend state law. Pltfs-Opp. 14 n.8. As they have explained all along, D.Ct. Dkt. 11 at 6, 11-12, they are major political parties whose members include candidates and voters. Last-minute changes to the election rules harm them and their candidates by forcing them to abruptly change their campaign strategies, divert resources to educate their voters, and increase spending to prevent harms to their electoral prospects. Such diversions of resources are a classic form of Article III injury. *Havens Realty Corp. v. Coleman*,

455 U.S. 363, 379 (1982). Indeed, courts routinely accept that political parties can litigate changes in the election rules that govern their upcoming contests. *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008); *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006); *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 841 (D. Ariz.), *rev'd only on merits*, 948 F.3d 989 (9th Cir. 2020) (en banc); *Ohio Democratic Party v. Blackwell*, 2005 WL 8162665, at *2 (S.D. Ohio Aug. 26, 2005). Indeed, the Republican Party relied on these same injuries when it successfully obtained a stay of a preliminary injunction just months ago in *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (*RNC*).

The private respondents know all this. Indeed, they asserted diversion-of-resources injuries as the basis for *their* standing. D.Ct. Dkt. 1 at ¶11 ("CC-RI has diverted resources and will need to continue to divert resources"); ¶13 ("LWVRI has diverted and will need to continue to divert resources"). Their belated attempt to contest Applicants' standing undermines their own, was rejected by the First Circuit, rests on a mischaracterization of Applicants' injuries, and would upend numerous precedents recognizing political parties' concrete, individualized interests in the rules governing elections.

## II. The consent judgment cannot stand unless the witness requirement is likely unconstitutional.

This case is not meaningfully different from *Merrill* because, like a preliminary injunction, a consent judgment that suspends state law is void unless the state law likely violates federal law. Stay App. 11. Respondents did not contest

this basic proposition in the district court. The district court agreed that, because "the Consent Decree seeks to transgress existing Rhode Island statutory election law," it had to "f[ind] that the [witness] requirement … is violative of the First and Fourteenth Amendments." App. 22. On appeal, Respondents again did not contest that they had to prove likely unconstitutionality. The First Circuit expressly acknowledged that "[t]he parties agree[d]" on this proposition. App. 4-5.

While Respondents now try to dispute what they waived below, *see* Pltfs-Opp. 16-19; Defts-Opp. 20-21, their arguments elide the key point. The "usual" consent judgment—for example, *every* consent judgment in the cases that Respondents cite—does not override a state statute. *Overton v. City of Austin*, 748 F.2d 941, 956 (5th Cir. 1984). Courts review these consent judgments to determine whether they are fair, reasonable, negotiated at arm's length, the product of collusion, etc.—all questions that are committed to the district court's discretion. But when a consent judgment overrides a state law, "a probable violation of [federal] law [is] a condition to the entry of th[e] decree." *Kasper v. Bd. of Election Comm'rs of Chicago*, 814 F.2d 332, 342 (7th Cir. 1987).

A "consent decree is not a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them…. An alteration of the statutory scheme may not be based on consent alone; it depends on an exercise of federal power, which in turn depends on a violation of federal law." *Id.* at 341-42; *accord LaShawn A. by Moore v. Barry*, 144 F.3d 847, 855 (D.C. Cir. 1998); *Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997); *LULAC, Council No.*

*4434 v. Clements*, 999 F.2d 831, 847 (5th Cir. 1993). Without a "probable violation of federal law," there is "no basis for entering a consent decree" and "regulation of election procedures should be left to the political process." *Evans v. City of Chicago*, 10 F.3d 474, 480 (7th Cir. 1993). This rule means that "'public officeholders [must] return to other branches of government or to the voters for permission to engage in certain acts'"—as they should. *Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995).

When Applicants petition for certiorari, they will not ask the Court to review whether the consent judgment was fair, reasonable, or negotiated adequately; they will ask the Court to review whether Rhode Island's witness requirement likely violates the Constitution. That is the same question this Court reviews in preliminary-injunction cases like *Merrill*. *See Ry. Employees v. Wright*, 364 U.S. 642, 650 (1961) (explaining that whether an injunction rests on a violation of federal law is the same inquiry "'whether the decree has been entered after litigation or by consent'"). And it is a purely legal question that this Court would review de novo. *See Swift & Co. v. United States*, 276 U.S. 311, 331 (1928) (explaining that, "[i]f the court" enters a consent judgment that "enjoin[s] acts" that do not violate federal law, "it erred" and that error is "corrected on appeal").

Because this consent judgment suspends Rhode Island's witness requirement, the merits of this case are no different from the many election cases where this Court stays preliminary injunctions. Respondents cite no contrary

authority, and Applicants are not aware of any. *Merrill* thus cannot be distinguished on the merits.

## III. The consent judgment cannot stand if it violates *Purcell*.

*Merrill* cannot be distinguished for purposes of *Purcell* either. Respondents agree that the consent judgment *is* an injunction. Defts-Opp. 19. And Respondents do not deny that *Purcell* is an equitable defense, or that consent judgments are subject to such defenses. Stay App. 11-12. Finally, Respondents do not deny that, in *Frank v. Walker*, this Court applied the *Purcell* principle (at the urging of one of Respondents' counsel) over the objection of every state party in the case. 574 U.S. 929 (2014). Their attempt to compare the law in *Frank* (which had always been enjoined and never been enforced) with the witness requirement here (which has been in force in every election for the last four decades except one uncontested primary) is unpersuasive. Pltfs-Opp. 32-33.

*Frank* thus disproves Respondents' insistence that, instead of applying *Purcell*, this Court should unilaterally defer to the Secretary's and Board's judgment that this federal injunction won't actually confuse voters or undermine the integrity of the election. For starters, the Secretary and Board do not speak for the State of Rhode Island. They are creatures of the legislature, and the legislature has spoken through its laws—including the witness requirement that is still on the books. The governor, too, does not share the state respondents' view, given how easy it would be for her to issue another order suspending it. At most, then, this case involves a few state officials who disagree with the State's existing policy. But that was also true in *Merrill* (where several county officials refused to defend the

challenged laws), and in *RNC* (where the state election commission refused to defend the challenged laws); yet this Court granted stays in both cases.

In any event, the purposes behind the *Purcell* principle are implicated even when state defendants are willing to violate it. Nothing about the State's consent decreases "voter confusion" or the "consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). (In fact, the State's willingness to circumvent the democratic process by going to federal court and arguing that its own laws are unconstitutional might *further* undermine voters' confidence.) Nothing about the State's consent makes it more appropriate for "lower federal courts" to inject themselves into the mechanics of state elections. *RNC*, 140 S. Ct. at 1207. And nothing about the State's consent reduces the "laches" component of *Purcell*, *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016), which deems it inequitable for plaintiffs to wait to challenge laws until the eve of an election, where there is no time left for reasoned decisionmaking. *See Purcell*, 549 U.S. at 5-6; *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). So too here.

## IV. That the Governor suspended the witness requirement for the June primary, and the June primary only, changes nothing.

Respondents contend that the Governor's waiver of the witness requirement for the June presidential primary makes this case different from *Merrill* with respect to the merits, irreparable harm, and *Purcell*. It does not. If anything, it makes this case a stronger candidate for a stay.

On the merits, Respondents suggest that, while other witness requirements might be legitimate attempts to prevent fraud, Rhode Island's is not because no

reported fraud occurred in the June primary. Pltfs-Opp. 7. Left unexplained is why anyone would commit fraud in an *uncontested* presidential primary where both parties had already selected their nominees. Also left unexplained is why the June primary is a good model for what will happen in the contested primary in September or the contested general election in November, where turnout and absentee voting will be much higher.[1] Nor do Respondents attempt to cite any law suggesting that States need concrete proof of fraud to enact prophylactic election-integrity measures. That's because the law is the opposite. Stay App. 19-20. After all, "voter fraud" is notoriously "difficult to detect and prosecute." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 396 (5th Cir. 2020). But "the risk" is no doubt "real," *Crawford*, 553 U.S. at 196, which is why Rhode Island's legislature has maintained the law for decades and Rhode Island's legislative branch has "strictly applied [it] to assure the integrity of the electoral system," 410 R.I. Code R. 20-00-9.3(E).[2]

On irreparable harm, the idea that Applicants slept on their rights by not challenging the governor's order in June is unserious. Pltfs-Opp. 33. The legal questions presented by the governor's suspension of the witness requirement (which invoked emergency powers delegated by the legislature, E.O. 20-27) and a *federal*

[1] Based on past trends, more than 2.5 times more Rhode Islanders will vote in the general election compared to the presidential primary. *Compare 2016 General Election*, bit.ly/2PKfAQD, *with 2016 Presidential Preference Primary*, bit.ly/3iyFKSG.

[2] Although Respondents claim (without evidence) the June primary went off without a hitch, that's not what they told Rhode Islanders. The executive director of Common Cause Rhode Island identified "real problems" with the primary, including "reports of mail ballot applications that were sent to old addresses"—undoubtedly because of the need "to clean our voter rolls." *R.I. Presidential Primary Holds Lessons for November*, Providence J. (June 11, 2020), bit.ly/33QrPmR.

*court's* suspension of the witness requirement (which claims no such authority) are not the same. And no one should be wishing for *more* election-year litigation, particularly over the rules governing an uncontested primary. In any event, the Republican Party *did* complain about the governor's suspension of the witness requirement. Gregg, *R.I. GOP Warns of Potential Mail Ballot Fraud in Presidential Primary*, Providence J. (Apr. 14, 2020), bit.ly/30GSPU4. But the Board's Vice Chair assured it and the public that the June suspension was "a one time emergency response to an emergency of unprecedented proportions" and that "[n]o precedent is being set for the fall primary or the November election in any way." Stay App. 6.

Finally, Rhode Island's witness requirement is plainly the "status quo" for purposes of *Purcell*. Pltfs-Opp. 10, 37; Defts-Opp. 8, 25. All agree that the witness requirement *is* the law. Courts assume that citizens know the law, not the opposite. At the very least, Respondents would need powerful evidence to prove their counterintuitive assertion that Rhode Islanders incorrectly believe the witness requirement is still suspended. But they have none. They do not dispute that the witness requirement has been on the books in *every* election for decades, with the lone exception of June 2020. They do not dispute that the Board explicitly assured voters that the June suspension was "a one time emergency" and that "no precedent is being set" for September or November. Stay App. 6. And they do not dispute that Rhode Island's elected officials had a very public debate over whether to suspend the witness requirement for September and November—and *decided not to do it*. Stay App. 6-7.

It takes chutzpah to tell the public that the June suspension was "no precedent … in any way" and to plead with the legislature to repeal the witness requirement for September and November, and then to turn around and tell courts that the June suspension *is* a precedent and suggest that perhaps the legislature "already" repealed the witness requirement. Defts-Opp. 29. Yet here we are. This Court shouldn't countenance Respondents' attempt to have it both ways. *Purcell* bars federal courts from changing voting laws on the eve of elections, and the consent injunction approved by the lower courts changes voting laws on the eve of elections—indeed, that's the whole reason Respondents pursued it.

## V. The equities favor a stay.

No one disputes that, in constitutional cases like this one, the equities rise and fall with the merits. Given that the merits weigh heavily in favor of a stay, so do the equities. No one is harmed by the enforcement of a likely constitutional law, or the denial of an injunction that likely violates *Purcell*. *See Pavek v. Donald J. Trump for President, Inc.*, 2020 WL 4381845, at *3 (8th Cir. July 31, 2020). By the same token, Applicants, their members, and their voters will face "[s]erious and irreparable harm" if the State "cannot conduct its election in accordance with its lawfully enacted [election] regulations," *Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020)—a form of irreparable injury that Respondents never address. All of the equitable factors thus favor a stay. *See Tex. Democratic Party*, 961 F.3d at 412. This Court concluded as much in *Merrill*.

The only equitable argument not tied to the merits is the private respondents' assertion that a stay would interfere with the Secretary's printing of

mail-ballot envelopes for the September primary. Pltfs.-Opp. 34 (asserting it "would result in having to reverse the current printing process"). The private respondents claim that "[t]housands of ballots currently without the two-witness requirement would have to be discarded and Respondents would then face the challenge and expens[iv]e task of printing tens of thousands of new ballots in a matter of days." *Id.*

Notably, the state respondents do not join in this argument. That's because they previously admitted to having "approximately 60,000 mail ballot certificate envelopes (with the witness requirement) in stock," ready to be sent out. D.Ct. Dkt. 23 ¶12. And recent election data—which no Respondent disputes—indicates that these 60,000 ballots will cover *everyone* who wants to vote in the September primary. *See* Stay App. 4 (noting that, in the most recent comparable primary, approximately 61,000 people voted in total, including both in person and absentee). What's more, the Secretary assured the First Circuit that she would be able to abide by any stay it entered by August 10, then advised this Court that she could delay mailing ballots until August 13, and now informs the Court that she can delay mailing ballots until 7 p.m. on August 14. Defts.-Opp. 1 n.1. And just yesterday, the Secretary told the press that, at this time, "nearly 11,000 ballots are ready to be mailed out," meaning her current stock of 60,000 correct envelopes is far more than she needs to comply with a stay. Machado, *GOP Asks US Supreme Court to Block RI from Relaxing Mail Ballot Rules*, WPRI, bit.ly/30Oulsb. The Secretary's printing process is a nonissue as far as a stay is concerned.

## CONCLUSION

This Court should grant the application for a stay.

Respectfully submitted,

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