UNITED STATES COURT OF APPEALS
For the First Circuit

No. 20-1753

COMMON CAUSE RHODE ISLAND; LEAGUE OF WOMEN VOTERS OF RHODE ISLAND; MIRANDA OAKLEY; BARBARA MONAHAN; MARY BAKER

Plaintiffs – Appellees

v.

NELLIE GORBEA, in her official capacity as Secretary of State of Rhode Island; DIANE L. MEDEROS, in her official capacities as member of the Rhode Island Board of Elections; JENNIFER L. JOHNSON, in her official capacities as member of the Rhode Island Board of Elections; ISADORE S. RAMOS, in his official capacities as member of the Rhode Island Board of Elections; LOUIS A. DIMONE JR., in his official capacities as member of the Rhode Island Board of Elections; WILLIAM E. WEST, in his official capacities as member of the Rhode Island Board of Elections; RICHARD H. PIERCE, in his official capacities as member of the Rhode Island Board of Elections; DAVID H. SHOLES, in his official capacities as member of the Rhode Island Board of Elections

Defendants – Appellants

RHODE ISLAND REPUBLICAN PARTY; REPUBLICAN NATIONAL COMMITTEE

Movants – Appellants

On Appeal from the United States District Court
for the District of Rhode Island, No. 1:20-cv-00318-MSM-LDA

BRIEF OF DEFENDANTS-APPELLANTS MEDEROS, DESIMONE, JOHNSON, PIERCE, RAMOS, SHOLES, AND WEST IN OPPOSITION TO APPELLANTS' MOTION FOR STAY

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TABLE OF CONTENTS

I. INTRODUCTION

Appellants Rhode Island Republican Party and Republican National Committee (the "Appellants") appeal the denial of a motion to intervene and the entry of a consent decree which the District Court granted after a fairness hearing held on July 28, 2020 ("Consent Decree"). The Consent Decree suspends the requirements imposed by R.I. Gen. Laws §§ 17-20-2.1(d)(1), 17-20-2.1(d)(4), 17-20-2.2(d)(1), 17-20-2.2(d)(4), 17-20-21 and 17-20-23(c) that requires two witness or notary public signature on the certifying envelope containing a mail ballot (the "notary or witness requirement") for the 2020 election cycle, in light of the parties' agreement that these requirements impose an undue burden on voters under the existing pandemic.

Appellants have misconstrued the posture of this case, and the nature of the parties to the Consent Decree and have failed to meet the requirements to obtain a stay. The Consent Decree perfects the considered judgment of the Rhode Island Board of Elections (the "Board"),[1] the entity given plenary powers to supervise and administer Rhode Island elections and elections laws, including the requirements suspended by the Consent Decree. *See* R.I. Gen. Laws § 17-7-5. Therefore, the

[1] Defendant-Appellees Diane C. Mederos, Louis A. Desimone Jr., Jennifer L. Johnson, Richard H. Pierce, Isadore S. Ramos, David H. Sholes, and William E. West are the members of the Board.

allegations and cases raised by Appellants are inapposite here, and nothing else presented by Appellants justifies, let alone requires, grant of a stay.

II. BACKGROUND

Rhode Island has been in a declared state of emergency since March 9, 2020 due to the novel coronavirus pandemic. The pandemic involves the severe acute respiratory syndrome coronavirus 2 ("SARS-CoV-2" or "Coronavirus") a novel coronavirus known to cause coronavirus disease ("COVID-19"). The Coronavirus is known to be highly communicable, and upon information and belief is currently believed to be transmitted through respiratory droplets that collect on surfaces or may linger in the air. The highest risk of transmission is believed to be posed by contact with an infected individual. It is also known that a number of individuals are asymptomatic carriers of the Coronavirus, able to transmit the virus despite showing light or no symptoms.

In response, the State, as well as numerous national and international public health agencies, have introduced interventions, primary among them the imposition of "social distancing"—asking individuals outside of their homes to stay at least six feet away from each other and to limit time spent indoors or in close proximity together—as well as limiting the size of social gatherings and asking individuals to wear cloth face coverings while in public.

Besides the numerous interventions by Governor Raimondo, the Rhode Island General Assembly, and state health officials, Rhode Island has also seen significant intervention from the Rhode Island Board of Elections. Under R.I. Gen. Laws § 17-7-5(a), the Board possesses the "functions, powers, and duties that are prescribed by this title or otherwise pursuant to law." The Board is empowered to make "any rules, regulations, and directives that it deems necessary to carry out the objects and purposes of this title …" R.I. Gen. Laws § 17-7-5(c). It has exclusive jurisdiction to decide any "matters pertinent and necessary to the proper supervision of the election laws." R.I. Gen. Laws § 17-7-5(d).

The Board's authority is uniquely broad in the Rhode Island statutory scheme. The Board is a quasi-judicial entity empowered to investigate and decide cases and controversies involving all aspects of elections laws, from voter registration and eligibility, to campaign finance and voter fraud investigations, to appeals of the decisions of local canvasing authorities. *See generally* R.I. Gen. Laws §§ 17-7-5, 17-9.1-30, 17-11-1. The Board is also tasked with final authority over the administration of elections and election laws for all primary and general elections, from the nominating process through the final recount. *See generally* R.I. Gen. Laws §§ 17-7-5, 17-14-1, 17-15-1, 17-19-24. Additionally, the Board is granted subpoena power, is exempted from Rhode Island's Administrative Procedures Act, and its decisions on elections matters are final, subject to review

only by petition of certiorari to the Rhode Island Supreme Court. *See* R.I. Gen. Laws §§ 17-7-8, 42-35-18(7); *Van Daam v. DiPrete*, 560 A.2d 953, 954 (R.I. 1989) ("There is no statutory appeal provided from a decision of the Board of Elections.").

Most importantly for this proceeding, the Board is responsible for the oversight, administration and adjudication of all matters pertaining to the use of mail ballots for any election conducted in Rhode Island. R.I. Gen. Laws § 17-20-1. This includes the process of certifying and counting all mail ballots cast for all elections held in Rhode Island. R.I. Gen. Laws § 17-20-26. Only the Board can, on its own motion, disqualify a mail ballot "which it determines, based upon a preponderance of the evidence, was not voted by the elector who purportedly cast it, or was voted by an elector who was not eligible to vote by mail ballot, or was not obtained and voted in the manner prescribed" by law. R.I. Gen. Laws § 17-20-33.

The Rhode Island Supreme Court has recognized the Board's singular authority to oversee, administer, and modify the election process in order to effectuate a fair and efficient election process. *See generally DeLuca v. R.I. Bd. of Elections*, 376 A.2d 326, 328 (R.I. 1977) (Board has jurisdiction to hear all matters that affect the election process, including the authority to determine if a letter of resignation is legally binding upon the office holder). This authority was perhaps

most broadly recognized in the Rhode Island Supreme Court's decision in *Buonanno v. DiStefano*, 430 A.2d 765, 769 (R.I. 1981), where the Court endorsed the power of the Board to call for a limited new election—a power not expressly granted to the Board—to resolve a problem created by malfunctioning voting machines. The Court noted that "at the same time as there is no express authorization to conduct a new election, there is also no express prohibition of such a power," *id.* at 770, and concluded that the Board has all powers necessary to "fashion a remedy that would generate a valid expression of the will of the voters" and to "carry out the objects and purposes of the elections laws of this state." *Id.* at 771.

Beginning on March 17, 2020, the Board has held a series of evidentiary hearings and heard testimony from the Rhode Island Department of Health ("DOH"), the Office of the Secretary of State ("SOS"), the National Guard, the U.S. Postal Service and the local boards of canvassers, as well as the Board's Executive Director, concerning the transmission and effects of the COVID-19 pandemic on the systems on which elections rely, and how the pandemic affects and interacts with the ordinary requirements and burdens imposed by Rhode Island election laws. The Board also weighed guidance issued by DOH, the U.S. Department of Health & Human Services, and the Centers for Disease Control and

Prevention, with particular emphasis on guidance advising the public to avoid close contact with other people.

Based on this testimony, the Board suspended the notary or witness requirement for the Presidential Preference Primary on March 26, 2020. Board Appendix at 3-4. The Board did so in acknowledgement of the increased burden imposed on voters because of COVID-19, particularly for voters who are quarantined or are vulnerable to the effects of this virus, such as seniors and those people with compromised immune systems. *Id.* The Board recognized that this requirement necessitates very close contact with other people, which potentially exposes voters to the virus. *Id.* The Board also considered alternative measures to safeguard the integrity of the election process, and determined that the comparison of the voter's signature on the certification envelope to their signature on the ballot application was sufficient. *Id.*

Weighing testimony and evidence it had considered beginning in March, as well as the largely unchanged burdens imposed by notary or witness requirement under the conditions imposed by the pandemic, the Board voted unanimously on July 13, 2020 to suspend the signature and notary requirements for the September 8 Statewide Primary and the November 3 General Election. Ten days later, the Plaintiffs-Appellees filed the Complaint in the action below, seeking an order from the District Court which would effectively ratify the Board's July 13 vote.

III. ARGUMENT

A. This Court Should Deny Appellants' Motion to Stay

Appellants request this Court stay entry of the Consent Decree pending this Court's resolution of the instant appeal.[2] This Court must consider:

> (1) whether the applicant has made a strong showing of success on the merits; (2) whether the applicant will be irreparably harmed absent injunctive relief; (3) whether issuance of the stay will injure other parties; and (4) where the public interest lies.

Acevedo-Garcia v. Vera-Monroig, 296 F.3d 13, 16 n.3 (1st Cir. 2002) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776–77 (1987)).

1. Appellants Have Failed to Make a "Strong Showing" of Success on the Merits

In order to make a "strong showing" of success on the merits, Appellants must make a strong showing that they would be able to prevent the entry of the Consent Decree.

As would-be intervenors, Appellants are "entitled 'to present evidence' and 'have [their] objections heard.'" *P.R. Dairy Farmers Ass'n v. Pagan*, 748 F.3d 13, 20 (1st Cir. 2014) (quoting *Local No. 93, Int'l Ass'n of Firefighters, AFL–CIO v.*

[2] Appellants have also briefed an appeal of the denial of their Motion to Intervene, since a precondition of their request for a stay is that they be recognized by this Court as a party. *See* Fed. R. App. P. 8(a). The Board did not oppose Appellants' Motion to Intervene before the District Court, and takes no position regarding that Motion before this Court, save for observing that 1) Appellants made no allegation of collusion between the Board and the Plaintiff-Appellees, and would deny any such allegation.

City of Cleveland, 478 U.S. 501, 529 (1986)). "The key consideration in this type of process inquiry is whether there has been 'a fair opportunity to present relevant facts and arguments to the court, and to counter the opponent's submissions.'" *Id.* (quoting *U.S. v. Cannons Eng'g Corp.*, 899 F.2d 79, 94 (1st Cir.1990). However, "[a]n intervenor lacks the power to block a consent decree merely by withholding its consent," and the intervenor's right to be heard "does not translate into a right to block a settlement." *Id.*

> When reviewing a settlement or consent decree, a district court must:
>
> assure itself that the parties have validly consented; that reasonable notice has been given possible objectors; that the settlement is fair, adequate, and reasonable; that the proposed decree will not violate the Constitution, a statute, or other authority; that it is consistent with the objectives of Congress; and, if third parties will be affected, that it will not be unreasonable or legally impermissible as to them.

Durrett v. Hous. Auth. of City of Providence, 896 F.2d 600, 604 (1st Cir. 1990).

Approval of a consent decree is "committed to the trial court's informed discretion." *Id.* (quoting *Cannons Eng'g Corp.*,899 F.2d at 84). Appellants must show that the court abused its discretion in accepting the settlement. *Id.* To show abuse of discretion, objectors must "demonstrate that the trier made a harmful error of law or has lapsed into 'a meaningful error in judgment' . . . ." *Id.* (quoting *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988)).

Moreover, "[w]oven into the abuse of discretion standard here is a 'strong public policy in favor of settlements . . . .'" *Id.* (quoting *U.S. v. Comunidades*

Unidas Contra La Contaminacion, 204 F.3d 275, 280 (1st Cir. 2000)). This strong public policy interest "has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement." *See Cannons Eng'g Corp.*, 899 F.2d at 84 (citing *F.T.C. v. Standard Financial Mgmt. Corp.*, 830 F.2d 404, 408 (1st Cir.1987); *S.E.C. v. Randolph*, 736 F.2d 525, 529 (9th Cir.1984)). The relevant standard "is not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute." *Id.*

The District Court found the Consent Decree met all criteria for acceptance. *Durrett*, 896 F.2d at 604. As outlined above, the Board is the party "charged with the responsibility to carry out the objects and purposes of the election laws of [Rhode Island]," including the notary or witness requirement at issue in this case. *Buonanno v. DiStefano*, 430 A.2d 765, 772 (R.I. 1981); *see also* R.I. Gen. Laws § 17-7-5(a) & (c). The Board's approval of the decree merits "deference to the [Board's] expertise and to the parties' agreement." *Cannons Eng'g Corp.*, 899 F.2d at 84; *see also Clingman v. Beaver*, 544 U.S. 581, 586 (2005) ("The Constitution grants States broad power to prescribe the Times, Places and Manner of holding Elections for Senators and Representatives, which power is matched by state control over the election process for state offices.") (internal citation omitted).

"The doubly required deference—district court to agency[3] and appellate court to district court—places a heavy burden on those who purpose to upset a trial judge's approval of a consent decree." *Cannons Eng'g Corp.*, 899 F.2d at 84.

2. The Purcell *Principle is Inapposite to This Case*

Appellants claim that it was an abuse of discretion for the District Court to adopt the Consent Decree, because it was contrary to the principle set forth in *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) that federal courts refrain from rewriting state election procedures shortly before elections. *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 no alter the election rules on the eve of an election.") (citing *Purcell*).

Federal courts are cautioned from issuing injunctions modifying state election laws close to elections. *Id.* However, the *Purcell* principle does not refer to a mere arbitrary deadline beyond which federal courts are forbidden to act.[4]

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[3] *Cannons Engineering* involved consent decrees crafted by the Environmental Protection Agency, whose interpretation of the law—including its determination that the consent decrees were appropriate—was owed deference. 899 F.2d at 83-84. Though in this case the Board is a state agency, its determinations are owed similar deference. *Pagan*, 748 F.3d at 20-21 (showing deference to consent decree crafted by Puerto Rican government agency). Moreover, as noted above, this deference is arguably increased even further where the matter at issue is a state's administration of its election laws. *Clingman*, 544 U.S. at 586.

[4] Likewise, *Purcell* says nothing about promoting "the same neutral rules throughout the election process." Appellants' Brief at p. 12. Nothing in *Purcell* addresses, for example, an act of a *state legislature* changing electoral rules on the

549 U.S. at 5-6. Indeed, *Purcell* does not hold that courts *should*—let alone *must*— "allow the election to proceed without an injunction suspending [election] rules." *See* Appellants' Brief at p. 12; *Purcell*, 549 U.S. at 5-6. Rather, the *Purcell* principle refers to the caution expressed by the *Purcell* Court that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."[5] 549 U.S. at 4-5; *see also Republican Nat'l Comm.*, 140 S.Ct. at 1206-07 (noting that "unusual nature" of court's injunction, including the fact that it necessitated a second injunction barring the release of election results, "underscores the wisdom of the *Purcell* principle, which seeks to avoid this kind of judicially created confusion.").

However, Appellants have not presented *any* evidence of voter confusion or the likelihood thereof. Instead, they have treated the *Purcell* principle as simply terminating the authority of federal courts in close proximity to an election. *But see Frank v. Walker*, 874 U.S. 929 (2014) (vacating order of Seventh Circuit which stayed injunction issued by district court, *allowing election to proceed under the*

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eve of an election. *Purcell* simply acknowledges that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." 549 U.S. at 4.

[5] *Purcell* was focused on the appellate court's failure to adequately defer to the judgement of the district court, when it granted an injunction the district court denied. 549 U.S. at 5-6.

district court's injunction which suspended voter identification requirement). Such an oversimplification cannot be the basis of a "strong showing" of success on the merits to justify a stay. *See Acevedo-Garcia*, 296 F.3d at 16 & n.3.

3. Appellants' Arguments Ignore the Deference Owed to the District Court and the Board

Moreover, Appellants make no effort to tailor their argument to the deference this Court owes the District Court or the Board under *Pagan* and *Cannons Engineering*. *Pagan*, 748 F.3d at 20; *Cannons Eng'g Corp.*, 899 F.2d at 84. As noted above, the Consent Decree is "encased in a double layer of swaddling." *Cannons Eng'g Corp.*, 899 F.2d at 84. Therefore, to obtain a stay of the Consent Decree, Appellants would have to make a "strong showing" not only that the District Court has abused its discretion, but also that the Board, as the entity charged with administering elections laws in the State of Rhode Island, has likewise done so. *Id.* at 89-90.

Appellants instead tailored their arguments to the standard that might apply to seek a stay of an *injunction* by the District Court. Appellants focus on the constitutionality of the notary or witness requirement, and on the breadth of the remedy consented to by the parties. However, this is the wrong inquiry. The question before this Court is not whether the *District Court* erred in holding that the notary or witness requirement were unconstitutional, not least of which because it did not do so hold. ADD10. Rather, the question before this Court is whether

the Board erred in its considered judgment—both when it initially voted to suspend the notary or witness requirement, and when it voted to accept the Consent Decree. *Cannons Eng'g Corp.*, 899 F.2d at 89-91. Appellants make no argument even approaching the standard elucidated in *Cannons Engineering*. This is a woeful failing. *Acevedo-Garcia*, 296 F.3d at 16 n.3.

The Consent Decree was the result of a negotiations between the parties. The District Court found that the parties negotiated in good faith. ADD11. Appellants presented no evidence of said collusion. The District Court acted well within its discretion in finding that the agreement was negotiated and consented to fairly. *Durrett*, 896 at 604.

Likewise, Appellants admit that they submitted briefs and participated in the Motion to Intervene on equal footing with the parties. *See* Appellants' Brief at p. 3-4.

Finally, though the terms of the Consent Decree are contrary to the terms of Rhode Island statutes, the District Court's adoption of the Consent Decree reflects both the District Court's and Board's finding that the departure from the suspended notary and witness requirement statutes is appropriate. *Cannons Eng'g Corp.*, 899 F.2d at 84-86. The Board, which first made that finding on July 13, 2020, weighed the interests underlying the notary or witness requirement, and the burden the notary or witness requirement imposes on individual voters in the context of the

COVID-19 pandemic. *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983). The District Court endorsed the Board's finding when it stated that it anticipated reaching the same holding had the parties reached a hearing on the merits. ADD10.

Appellants rely on the fact that a proposal to suspend the notary or witness requirement was considered but did not pass the General Assembly. However, Appellants present no legislative history. *See* Appellant's Brief at p. 2-3, 15. Instead, Appellants present the quoted Tweets of a single member of the minority party in the Rhode Island House—which passed the bill—and the fact that Governor Raimondo did not directly address the notary or witness requirement via executive order prior to the filing of the complaint. *Id.*

Ultimately, the District Court acted within its discretion to accept the Consent Decree. This Court's role is deferential to both the District Court's and the Board's findings, and nothing Appellants has presented is sufficient to overcome that deference. *Cannons Eng'g Corp.*, 899 F.2d at 90-92.

B. Appellants Have Presented No Evidence of Irreparable Harm or Harm to Other Parties

Appellants must present evidence that denial of the stay will cause them irreparable harm. Appellants raise two arguments: that they will suffer irreparable harm if they are denied a stay because the matter may become moot, and that suspending the notary or witness requirement will lead to voter confusion and

voter fraud. However, Appellants fail to present evidence on this point, and the evidence point strongly against a finding that they, or anyone else, will suffer irreparable harm.

1. The Risk of Mootness Cannot Justify Grant of a Stay in This Case

Appellants rely on *Providence Journal Co. v. Fed. Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979). However, their reliance is misplaced. Unlike the defendant and intervenor in *Providence Journal*, Appellants have failed to make a strong showing of success on the merits. *Id.*

Secondly, irreparable harm prevented by the stay must be balanced against the harm the stay may cause. *Id.* (granting stay where harm caused by publication would "irreparably harm[] appellants" but "granting of a stay will cause relatively slight harm to appellee").

Unlike *Providence Journal*, a stay is liable to cause at least as much harm to the Board and the other Appellees as to Appellants. Firstly, the same concern for mootness would apply equally to Appellees—grant of a stay would presumably ensure that at least one election would be subject to the notary or witness requirement, contrary to the will of the parties to the Consent Decree and the determination of the Board. While Appellants' alleged harm implicates their ability to challenge the suspension of the notary and witness requirement as applied in the coming election, the Board's concern implicates nothing less than

the State's "compelling interest in preserving the integrity of its election process." *Purcell*, 549 U.S. at 4 (quoting *Eu*, 489 U.S. at 231). As alleged elsewhere, the Board is the entity empowered to administer Rhode Island elections law, and it is broadly empowered to issue directives "make any rules, regulations, and directives that it deems necessary to carry out the objects and purposes of this title not inconsistent with law." R.I. Gen. Laws § 17-7-5(c). To grant a stay requiring the State to hold an election subject to a requirement which the Board suspended does violence to the State's ability to administer its own elections. *Id.*; *see also Thompson*, 959 F.3d at 812 ("the decision to drastically alter [a state]s election procedures must rest with [that state's elections administration] … not the courts.").

Moreover, the vendor used by the Secretary to prepare the mail ballots required a final design for the mail ballot certification envelopes on July 17, which requirement was already stretched by the Secretary's request to the vendor to print envelopes in compliance with the then-unentered Consent Decree. *See* Affidavit of Robert Rock ("Rock Aff") at ¶¶ 7-11 (Board Appx. 15-16). A stay would further complicate the Secretary's ability to "arrange, print, and distribute" the mail ballots and certification envelopes as called for under R.I. Gen. Laws § 17-6-4. *Id.* at ¶¶ 12-15 (Board Appx. 16). It would impose significant burdens on the Secretary, and would almost certainly be irreversible even if this Court were to affirm the District

Court, at least without potentially causing significant voter confusion—precisely what Appellants claim they wish to avoid. Under these circumstances, this Court should decline to issue a stay on the basis of *Providence Journal*.

2. Appellants Present No Evidence of Irreparable Harm to Other Parties

Appellants also allege irreparable harm caused by voter fraud and/or voter confusion. However, they present no evidence that such fraud or confusion is likely to occur at all, let alone that it is likely to rise to a constitutional violation or affect an election outcome. *Griffin v. Burns*, 570 F.2d 1065, 1079 (1st Cir. 1978) (discussing irregularities in management of election rising to constitutional violations where outcome of election was changed).

Appellants' focus on potential fraud is misplaced. The notary and signature requirement *is not used*, as a rule or a practice, *to prevent voter fraud*.

The Board prevents voter fraud by comparing the signature on the certification envelope with the signature on the voter's mail ballot application, which is done at an open meeting. R.I. Gen. Laws § 17-20-26(c). The voter's mail ballot application signature is itself first verified by the voter's local board of canvassers by comparing to the voter's signature on their voter registration card, before the application can be accepted and the mail ballot issued. R.I Gen. Laws § 17-20-10(a). Unlike the notary or witness requirement, the signature comparison method permits the Board to reliably and securely confirm the identities of voters

prior to counting their ballots—every voter registration, application, and certification envelope must always have the voter's signature, ensuring that the Board will *always* have the information necessary to verify the identity of the voter. R.I. Gen. Laws §§ 17-20-26(c), 17-20-10(a).

Additionally, voters whose mail ballot certification envelopes are found to contain discrepancies—chiefly, a signature which does not match the application signature—are notified that a mail ballot has been received in their name with a discrepancy. 410 RICR § 20-00-23.4(B)(e).

Likewise, voters whose mail ballot applications which are accepted pursuant to R.I. Gen. Laws § 17-20-10 are prohibited from voting in person at polling places unless they surrender their mail ballot or deliver to their local board an affidavit stating that they never received a mail ballot. R.I. Gen. Laws § 17-20-29(a). If a voter were to visit a polling place, that voter would be made aware that they are ineligible to vote a regular ballot because of their accepted mail ballot application, instead only received a provisional ballot. R.I. Gen. Laws § 17-20-29(b).

There is no evidence of voter confusion or likelihood of voter confusion. The Board's determination that the notary or witness requirement ought to be suspended was motivated in part due to the potential confusion that would be caused by only a partial suspension. The Consent Decree does not seek to replace one set of rules with a conflicting set of rules—rather, it seeks to entirely suspend

those rules. Moreover, it does so with considerable publicity, and in concert with the preparation of the materials and instructions voters will actually receive. *See* Rock Aff at ¶¶ 7-11 (Board Appx. 15-16). It is difficult to imagine significant voter confusion where voters would receive instructions and certification envelopes that have been modified to comply with the Consent Decree's requirements, including eliminating notary and witness signature lines on the certification envelopes.

3. The Board's Determinations Regarding Voter Fraud and Voter Confusion are Entitled to Deference by This Court

Finally, Appellants' argument appears to have been framed around an injunction rather than a consent decree, insofar as Appellants treat the Consent Decree as solely an order of the District Court. It bears repeating that the Consent Decree was approved by the Board at a vote held on July 27, 2020. That vote was made pursuant to the Board's findings, after an evidentiary hearing held on July 13, that the COVID-19 pandemic continued to magnify the burden imposed by the notary or witness requirements to unconstitutional proportions. As a result of those findings, the Board voted to suspend the notary or witness requirement for the remainder of the 2020 election cycle.

As the agency empowered to interpret and administer Rhode Island election laws, both the District Court and this Court must defer to the Board's interpretation of state laws. *See Antilles Cement Corp. v. Acevedo Vila*, 408 F.3d 41, 51

("deference is owed to state agency's interpretation of state law"); *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 75 (1st Cir. 2001) ("we owe deference to [state agency's] interpretation of the [state act governing use of state Medicaid funds]). Likewise, Appellants must defer to, or at least rebut, the Board's consideration of those harms in suspending the notary or witness requirement in order to challenge the Consent Decree. S*ee Cannons Eng'g Corp.*, 899 F.2d at 84. Where Appellants have failed to do so, this Court should deny their application for stay.

C. The Public Interest Favors Denial of the Motion to Stay

Finally, the public interest in this case favors denial of the stay. Unlike the cases cited by Appellants, which involved injunctions *imposed* on state officials, the Consent Decree is the work of the Board and the Secretary, respectively the state body charged with administering Rhode Island election laws—including the certification and tabulation of mail ballots—and the state official tasked with preparing and furnishing "[a]ll 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" used by voters. R.I. Gen. Laws §§ 17-7-5 & 17-20-12.

The Consent Decree merely perfects the determination by the Board that the notary or witness requirement ought to be suspended. Appellants neither

meaningfully challenge that determination, nor present any authority that does so. *Compare with Cannons Eng'g Corp.*, 899 F.2d at 84-92.

IV. CONCLUSION

For the reasons stated above, this Court should deny Appellant's Motion for Stay.

Defendants-Appellants,
Diane C. Mederos, Louise A. DeSimone, 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,
By their Attorney,

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CERTIFICATE OF COMPLIANCE

This brief in opposition complies with Rule 27(d)(2) in that it contains 4,920 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) in that it was prepared using a proportionally spaced type, Times New Roman, 14 point font.

/s/ Raymond A. Marcaccio

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Raymond A. Marcaccio