No. 20-1753

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMON CAUSE RHODE ISLAND, LEAGUE OF WOMEN VOTERS OF RHODE ISLAND, MIRANDA OAKLEY, BARBARA MONAHAN, and MARY BAKER,
Plaintiffs-Appellees,

v.

NELLIE M. GORBEA, in her official capacity as Secretary of State of Rhode Island, DIANE C. MEDEROS, LOUIS A. DESIMONE JR., JENNIFER L. JOHNSON, RICHARD H. PIERCE, ISADORE S. RAMOS, DAVID H. SHOLES, and WILLIAM E. WEST, in their official capacities as members of the Rhode Island Board of Elections,
Defendants-Appellees,

REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY OF RHODE ISLAND,
Movants-Appellants

On Appeal from the United States District Court
for the District of Rhode Island
No. 1:20-cv-318-MSM

EMERGENCY MOTION FOR STAY PENDING APPEAL

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RULE 26.1 DISCLOSURE STATEMENT

Appellants, the Republican National Committee and Republican Party of Rhode Island, have no parent corporation and no publicly held corporation owns 10% or more of their stock.

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INTRODUCTION

Many States require absentee voters to sign their ballots in front of witnesses, and many plaintiffs have argued that, in light of COVID-19, these witness requirements are unconstitutional. Many appellate courts have disagreed. When Wisconsin's witness requirement was enjoined shortly before the April primary, the Seventh Circuit stay that injunction. *Democratic Nat'l Comm. v. Bostelmann*, Doc. 30, No. 20-1538 (7th Cir. 2020) (*DNC*). When Alabama's witness requirement was enjoined one month before the June runoff, the Supreme Court stayed that injunction. *Merrill v. People First of Ala.*, 2020 WL 3604049, at *1 (U.S. 2020).

Even though it had the benefit of these decisions, the court below approved a consent decree that enjoins Rhode Island's witness requirement shortly before the September and November elections. Worse, the court refused to let Movants intervene. This Court should rectify the denial of intervention and stay the consent decree. Because the window to print and mail ballots for September is quickly closing, Movants respectfully request a decision on this motion **before August 10, 2020**.

BACKGROUND

Rhode Island has two upcoming elections: a primary on September 8, and the general on November 3. *Upcoming Elections*, bit.ly/3jYkWpe (all websites last visited July 31, 2020). Each will be in person, but voters can participate remotely if they request a mail ballot in advance and return it by election day. *Id.*; *Mail Ballot*, bit.ly/3hQgnLU; *Emergency Mail Ballot*, bit.ly/33lfWFz.

When ballots are cast remotely, no one is watching—which increases the risk of ineligible and fraudulent voting. *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004). One way Rhode Island addresses this concern is by requiring voters to sign their mail ballot in the presence of two witnesses or a notary. 17 R.I. Gen. Laws Ann. §17-20-2.1(d)(1), (4); §17-20-2.2(d)(1), (4); §17-20-21; §17-20-23(c). This witness requirement does not apply to voters who are out of state, overseas, hospitalized, or in a nursing home. §17-20-2.1(d)(2)-(3).

Rhode Island has taken several steps to make voting easier in light of COVID-19. It has "procur[ed] sanitizers, cleaning materials and other personal protective equipment to ensure polling places are safe," *Ltr. from Gorbea to Harrington* (Apr. 8, 2020), bit.ly/33hXopH, and provided "staff and poll worker training on prevention processes," *Progress Narrative Report* (June 22, 2020), bit.ly/33fYcLx. As for the witness requirement, Rhode Island will allow voters to teleconference with remote notaries. *Remote Online Notarization*, bit.ly/39JG4Lu. The governor also suspended the witness requirement for the June presidential primary, when it was already clear who the Democratic and Republican nominees would be. E.O. 20-27 (Apr. 17, 2020), bit.ly/33dwoYq.

Both the governor and the legislature have declined, however, to suspend the witness requirement for September or November. Rhode Island's Secretary of State championed legislation to that effect, but the bill failed in the senate. Compl. (Doc. 1) ¶35. The Secretary criticized the senate for "fail[ing] the people of our state by not

addressing [the] legislation." *Secretary of State Gorbea Criticizes Senate for Neglecting Mail-Ballot Bill*, Providence J. (July 17, 2020), bit.ly/2PdfPmV. The senate's rejection was "not a 'lack of action,'" one senator responded, but "an affirmative action to do nothing." *Id.*

The Secretary found another way to suspend the witness requirement. Plaintiffs filed this lawsuit against the Secretary and Board of Elections on July 23, challenging the constitutionality of the witness requirement during COVID-19 and asking the court to "restrain Defendants from enforcing [it]." Compl. 21-22. Plaintiffs simultaneously sought a TRO and preliminary injunction. In their motion, Plaintiffs stated that the Secretary "will not oppose Plaintiffs' motion for injunctive relief." Doc. 5 at 2.

On Friday, July 24, the parties told the Court they would work over the weekend to negotiate a consent decree (and report back to the Court on Monday, July 27). ADD6. Knowing the state Republican party planned to intervene, the Secretary's counsel informed the party on Friday about the potential consent decree. ADD7. (The Republican party was not invited to participate in the negotiations.) Movants then joined forced and worked all weekend to find counsel and draft emergency motions. They moved to intervene late Sunday night—less than one business day after they learned of the consent-decree negotiations, and only three days after the complaint was filed.

The parties submitted a proposed consent decree on Monday, July 27. ADD7. The decree suspended the witness requirement for all Rhode Islanders during the

September and November elections. ADD19. While the State could still ask voters to provide their driver's license number, social security number, or phone number, voters could opt not to provide that information. ADD18.

The district court ordered Movants to answer the complaint by 7 p.m. on Monday, gave the parties one day to respond to the intervention motion, and scheduled a fairness hearing for Tuesday, July 28. ADD33. While the Board of Elections took no position on intervention, the other parties opposed it. The Secretary argued that intervention would cause undue delay and prejudice, Doc. 22, and Plaintiffs argued that Movants lacked an interest that was not adequately represented by the Secretary, Doc. 24. Neither party argued that the motion was filed too late.

At Tuesday's fairness hearing, the district court let Movants participate "in equal measure to the parties," ADD8, but denied their motion to intervene. The court found Movants "had not timely sought to intervene" and their interests were "adequately represented by the existing [defendants]." ADD8 n.5. On timeliness, the court noted that, instead of filing their motion and memorandum of law on Sunday night, Movants could have filed a bare motion to intervene "on Saturday night" and then filed their memorandum later. ADD8 n.5. The court did not explain what difference that would have made, other than giving the parties more "notice." ADD8 n.5. On adequacy, the court stated that Movants' interests—defending the witness requirement, deterring fraud, and preventing last-minute changes to election rules—were "no different" from the interests that Defendants "are statutorily required to protect." ADD8 n.5. The court

also disagreed that the consent decree "would cause voter confusion," since the Governor had suspended the witness requirement once before in June. ADD8-9 n.5.

The district court approved the consent decree. Recognizing that these decrees cannot "'violate the Constitution, a statute, or other authority,'" ADD10, the district court concluded, without analysis, that the law "as applied during the COVID-19 pandemic … places an unconstitutional burden on the right to vote." ADD10. The court also denied Movants' request for a stay pending appeal. ADD34. The court ended the fairness hearing by stating, "Order to issue." ADD34.

The district court issued written orders on July 30, and Movants immediately appealed. ADD34. After Movants filed their notice, the court amended the orders to backdate them to July 28 (the date of the fairness hearing). ADD34. Movants filed an amended notice of appeal to reflect that change. ADD35. Movants are now here on an interlocutory appeal of the intervention denial and a protective appeal of the consent decree. ADD23-24.

ARGUMENT

When "final judgment is entered with or after the denial of intervention," the proposed intervenor can appeal intervention and "file a protective notice of appeal as to the judgment, to become effective if the denial of intervention is reversed." *Mausolf v. Babbitt*, 125 F.3d 661, 666 (8th Cir. 1997) (quoting 15A Fed. Prac. & Proc. Juris. §3902.1). In other words, once this Court concludes that Movants are entitled to intervention, it can consider the merits of the consent decree, including whether to stay

it pending appeal. *E.g.*, *DNC*, *supra* (reversing the denial of intervention and partially granting an emergency motion for stay); *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 574 (7th Cir. 2009) (reversing the denial of intervention and, instead of remanding, "treat[ing] the intervenor as the appellant from the judgment on the merits"); *United States v. Imperial Irrigation Dist.*, 559 F.2d 509, 523-24 (9th Cir. 1977) (granting "intervention," "validating the protective notice of appeal," and "proceed[ing] to consider the merits").

Following that procedure, this Court should reverse the denial of intervention, validate the protective notice of appeal, enter a stay, and set this case for briefing and argument on the merits.

I. Movants are entitled to intervene as defendants.

A district court "must permit" intervention when

1. The motion is "timely."
2. The movant has "an interest" in the action.
3. That action "may as a practical matter impair" the movant's interest.
4. The parties do not "adequately represent" the movant's interest.

Fed. R. App. P. 24(a)(2). While all denials of intervention are reviewed for abuse of discretion, "the district court has less discretion to deny intervention as of right." *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 41 (1st Cir. 1992). The district court's legal analysis receives little to no deference, and this Court reverses misapplications of the intervention requirements. *See id.*; *Cotter v. Mass. Ass'n of Minority Law Enf't Officers*, 219 F.3d 31, 34 (1st Cir. 2000).

The district court's reasons for denying intervention are, frankly, baffling. It held that a motion filed *less than two business days* after the complaint was untimely. And it held that defendants who *immediately abandoned the law and entered a consent decree* adequately represented Movants' interests. The Court should rectify this plain abuse of discretion.[1]

A. Movants' rapidly filed motion is timely.

Timeliness is "'determined from all the circumstances,'" rather than some "bright line." *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 784 (1st Cir. 1988). Courts evaluate "the length of time" the movant waited, any "prejudice to existing parties" from the "delay," "prejudice" to the movant "if it were not allowed to intervene," and any "extraordinary circumstances." *Id.* at 785-87.

Movants could not have intervened any faster. Even sacrificing weekends and sleep, it takes time to coordinate with other intervenors, retain counsel, review the law and facts, and draft intervention papers. *See United States v. City of Chicago*, 870 F.2d 1256, 1263 (7th Cir. 1989) ("Six weeks [i]s not an excessive period" to "retain counsel," evaluate "law and fact," and "prepare the motion to intervene."). Movants filed their motion on Sunday, July 26—less than two business days after the complaint, less than one business day after the parties mentioned a consent decree, and *before* the proposed decree was even filed, *see Fiandaca v. Cunningham*, 827 F.2d 825, 834 (1st Cir. 1987). In

[1] Even if the Court ultimately denies a stay pending appeal, Movants respectfully ask it to resolve intervention so Movants can know whether they are parties when they ask the Supreme Court for similar relief.

the annals of intervention motions, this is surely one of the fastest. *E.g.*, *Navieros Inter-Americanos, S.A. v. M/V Vasilia Exp.*, 120 F.3d 304, 322 (1st Cir. 1997) (motion "clearly" timely when movant took three days to retain counsel and file).

Movants were fast even compared to other time-sensitive election cases. *E.g.*, *Issa v. Newsom*, 2020 WL 3074351, at *2 (E.D. Cal. 2020) (eleven days after complaint); *Thomas v. Andino*, 2020 WL 2306615, at *3 (D.S.C. 2020) (nine days); *League of Women Voters of Va. v. Va. State Bd. of Elections*, 2020 WL 2090678, at *3 (W.D. Va. 2020) ("just seven days"); *Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 1505640, at *5 (W.D. Wis. 2020) (four days). Indeed, no party argued that Movants waited too long.

While the district court faulted Movants for not filing "on Saturday night," ADD8 n.5, it never explained why filing one day earlier mattered. The court gave the parties all weekend to negotiate, and the proposed consent decree was not filed until Monday. ADD6-7. The parties suffered no prejudice from the Sunday filing: their consent decree was finalized Monday and approved Tuesday. In fact, the court allowed Movants to brief and argue the consent decree "in equal measure to the parties," ADD8, making it "difficult to see how granting intervention would have materially increased either delay or prejudice." *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997). Denying intervention, however, prejudices Movants' ability to appeal the consent decree—an order that injures them by upending a key safeguard shortly before the elections.

At the very least, the district court should have granted Movants' request to intervene *for purposes of appeal*. These motions are appropriate when the existing parties will not appeal, and are timely if filed "within the time period in which the [original parties] could have taken an appeal." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 & n.16 (1977); *see Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572-74 (7th Cir. 2009). Movants filed well before then; indeed, the time to appeal *still* hasn't expired. Timeliness is an easy call here.

B. Movants' interests are not adequately represented by defendants who wouldn't defend the challenged law and immediately settled.

The adequacy requirement is "minimal." *Trbovich v. UMWA*, 404 U.S. 528, 538 (1972). While a government defendant "defending the validity of the statute is presumed to be representing adequately the interests of all citizens who support the statute," that presumption can be rebutted if the movant shows "adversity of interest," "collusion," "nonfeasance," or other relevant circumstances. *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999).

Like timeliness, adequacy is an easy call here. Defendants are not "defending the validity of the statute"; their "acquiescence in [the] consent decree" is proof of "actual conflict of interests" with Movants. *Id.* Because "both parties negotiated a settlement that would have been contrary to the interest of the prospective intervenors and affirmatively sought to block the attempted intervention," adequacy is not "a legitimate basis" for denying intervention. *Fiandaca*, 827 F.2d at 833. Defendants "did not file an

Answer to the … complaint," "accepted the consent decree which provides for virtually all the relief sought," and did not oppose Movants' intervention on adequacy grounds. *Mosbacher*, 966 F.2d at 44. Their "silence … is deafening." *Id.*; *accord U.S. House of Representatives v. Price*, 2017 WL 3271445, at *2 (D.C. Cir. 2017).[2]

The district court erred by suggesting that Movants' interests are "not … different from" Defendants'. For starters, Rule 24 requires "an interest that is *independent of* an existing party's, not *different from* an existing party's." *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 806 (7th Cir. 2019) (Sykes, J., concurring); *accord id.* at 798 (majority op.). The movant's interest need only be "direct" and "bear a sufficiently close relationship to the dispute." *Mosbacher*, 966 F.2d at 42 (cleaned up). Political parties indisputably have such "an interest" in cases involving "changes in voting procedures." *Ohio Democratic Party v. Blackwell*, 2005 WL 8162665, at *2 (S.D. Ohio 2005). Regardless, Movants *do* have unique interests in this case that are not shared by Defendants, including conserving their resources, mobilizing their voters, and promoting their electoral prospects. Doc. 11 at 12; *see Issa*, 2020 WL 3074351, at *3. As government entities "charged by law with representing the public interest of its citizens," Defendants

[2] In their motion to intervene, Movants explained the various ways Defendants do not represent their interests. Doc. 11 at 10-13. Their nuanced arguments cannot be chalked up to a "naked assertion" of "'collusion' between [the parties]." ADD8 n.5.

would "shirk [their] duty were [they] to advance the[se] narrower interest[s]." *Mosbacher*, 966 F.2d at 44.[3]

This is one of the strongest cases for intervention that a court will ever see. This Court should reverse, declare that Movants are now parties, and proceed to consider the stay motion.

II. The Court should grant a stay pending appeal.

When evaluating motions for a stay pending appeal, appellate courts ask

1. Whether movants are likely to succeed on the merits.
2. Whether movants will be irreparably injured absent a stay.
3. Whether a stay will substantially injure the other parties.
4. Where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). These factors all favor Movants.

A. Movants will likely succeed on the merits.

This Court will review the consent decree for "abuse of discretion or error of law." *Durrett v. Hous. Auth. of City of Providence*, 896 F.2d 600, 603 (1st Cir. 1990). Because they are judgments, consent decrees cannot be "unlawful." *Aronov v. Napolitano*, 562 F.3d 84, 91 (1st Cir. 2009). A "consent decree is not a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them."

[3] The district court's confidence that suspending the witness requirement would not confuse voters, ADD8 n.5, was misplaced, since the governor and legislature publicly refused to suspend the witness requirement for the upcoming elections. It also contradicted Supreme Court precedent, *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006), and conflated the merits of Movants' defenses with their right to intervene, *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999).

Kasper, 814 F.2d at 341-42. A decree in which "the executive branch of a state consents not to enforce a law is 'void on its face'" unless the court finds "a probable violation of [federal] law." *Id.* at 342; *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (en banc) (Rubin, J., concurring).

The decree below has many flaws, but to streamline this motion, Movants will focus on three. The consent decree is likely unlawful because it violates the *Purcell* principle, suspends a constitutional state law, and is fatally overbroad.

i. The consent decree violates the *Purcell* principle.

Under *Purcell*, "federal courts are not supposed to change state election rules as elections approach." *Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020). Courts routinely invoke *Purcell* to stay lower-court orders requiring States to change election laws shortly before elections; the Court "allow[s] the election to proceed without an injunction suspending [election] rules." *Purcell*, 549 U.S. at 6. The *Purcell* principle ensures that voters, candidates, and political parties know and adhere to the same neutral rules throughout the election process. This stability promotes "[c]onfidence in the integrity of our electoral process," which "is essential to the functioning of our participatory democracy." 549 U.S. at 4. Conversely, courts risk "voter confusion" when they order late-breaking changes to election laws. *Id.* at 4-5. And voter confusion causes a "consequent incentive to remain away from the polls." *Id.*

Because it's a "general equitable principle," *Reynolds v. Sims*, 377 U.S. 533, 585 (1964), *Purcell* applies as much to consent decrees as it does to injunctions. A consent

decree is a "judicial" order that is "subject to the rules generally applicable to other judgments." *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 378 (1992). When it "commands or prohibits conduct," a "consent decree *is* an injunction." *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996) (emphasis added); *accord Durrett*, 896 F.2d at 602; *Aronov*, 562 F.3d at 91. It is "an *equitable* order … subject to the usual equitable defenses," including "laches" and other defenses related to the timing of the relief. *Cook v. City of Chicago*, 192 F.3d 693, 695 (7th Cir. 1999); *accord Brennan v. Nassau Cty.*, 352 F.3d 60, 63-64 (2d Cir. 2003). Those defenses include *Purcell*'s equitable "considerations specific to election cases." 549 U.S. at 4.

The order below, by suspending Rhode Island's witness requirement as election deadlines rapidly approach, violates *Purcell*. Plaintiffs filed this lawsuit on July 23, only six weeks before the September 8 primary. It is now only 39 days until the primary—and only days before voters start casting mail ballots. It is also less than two months before voters can do the same for the general. This is well within the window of time where *Purcell* attaches. *See, e.g.*, *Husted v. Ohio State Conference of NAACP*, 573 U.S. 988 (2014) (staying order that changed election laws 61 days before election day); *Thompson*, 959 F.3d at 813 (election day was "months away but important, interim deadlines … [we]re imminent"); *Perry v. Perez*, 565 U.S. 1090 (2011) (22 days before the candidate-registration deadline); *Purcell*, 549 U.S. at 4-5 (33 days before election day); *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (32 days before election day). Regardless of the merits of the decree, then, *Purcell* requires a stay.

ii. The consent decree is unlawful because the witness requirement is constitutional.

The proposed consent decree relies solely on Plaintiffs' claim that Rhode Island's witness requirement violates the constitutional right to vote. ADD10. As Plaintiffs acknowledge, burdens on voting rights are subject to the balancing test from the Supreme Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). Under *Anderson-Burdick*, courts weigh the burden that a law imposes on voting rights against the state's interests. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Only when an election law "subject[s]" voting rights "to 'severe' restrictions" does a court apply strict scrutiny. *Burdick*, 504 U.S. at 434. Mine-run election laws that "impose[] only 'reasonable, nondiscriminatory restrictions'" are "'generally'" justified by "'the State's important regulatory interests.'" *Id.* at 433.

Here, Rhode Island's witness requirement does not implicate the right to vote at all. The witness requirement governs only *absentee* voting, and "there is no constitutional right to an absentee ballot." *Mays*, 951 F.3d at 792; *accord Griffin*, 385 F.3d at 1130. If voters cannot find a witness, they can still vote in-person on election day. Because in-person voting remains available, unburdened by the witness requirement, "the right to vote is not 'at stake'" here. *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 404 (5th Cir. June 4, 2020). The Constitution is not violated "unless … the state has 'in fact absolutely prohibited' the plaintiff from voting." and "permit[ting] the plaintiffs to vote in person … is the exact opposite of 'absolutely prohibit[ing]' them from doing so." *Id.*

In-person voting is not too difficult or dangerous during COVID-19. The State has determined that in-person voting can be done safely and effectively. As explained, the legislature rejected legislation that would waive the witness requirement, and the governor likewise declined to waive it. Indeed, Rhode Island is in Phase III of its reopening plan, deeming it safe (with social distancing) to open "[r]etail, restaurants, gyms, museums, close-contact business, office-based businesses, parks, beaches" and to attend "[w]eddings, parties, networking events," "[s]ocial gatherings with licensed catering" of up to "50 people," and indoor public events of up to "125 people." *See Reopening RI: Picking Up Speed* (June 18, 2020), bit.ly/2P3tCMQ. If these activities can be done safely, so can voting—especially in light of the extra precautions Rhode Island is taking. Because "federal courts make poor arbiters of public health," they should not second-guess the State's judgment on in-person voting. *Sinner v. Jaeger*, 2020 WL 3244143, at *6 (D.N.D. 2020); *accord Taylor v. Milwaukee Election Comm'n*, 2020 WL 1695454, at *9 (E.D. Wis. 2020); *S. Bay United Pentecostal Church v. Newsom*, 2020 WL 2813056, at *1 (U.S. 2020) (Roberts, C.J., concurring).

Even if the witness requirement implicated the right to vote, any burden would be minimal. If "the inconvenience of making a trip to the [D]MV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden," *Crawford*, 553 U.S. at 198, then neither does finding two qualified persons (or one notary) to witness an absentee ballot. Again, doing so is no more dangerous than other activities that the State deems safe. And "[t]here's no reason" why the witnessing

process cannot take place "within the bounds of our current situation"—for example, by "witnessing the signatures from a safe distance," staying outdoors, wearing a mask, standing behind glass, or practicing good hygiene. *Thompson*, 959 F.3d at 810; *see* Gorbea, *Notarizing While Social Distancing*, bit.ly/3gkIVN5. The Secretary has even authorized remote notaries, creating an entirely contact-free experience. While voting might be somewhat "harder" (as are many tasks) during a pandemic, *Thompson*, 959 F.3d at 810, inconveniences are not "severe" burdens that trigger strict scrutiny, *Crawford*, 553 U.S. at 198.

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

It is no answer to say that Rhode Island has other methods to deter fraud, like criminal penalties. Rhode Island need not satisfy strict scrutiny or prove narrow tailoring. *Burdick*, 504 U.S. at 434. Under *Anderson-Burdick*'s intermediate balancing test, States can supplement post-hoc punishments with measures aimed at "prophylactically

preventing fraud." *Sinner*, 2020 WL 3244143, at *7; *see Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986).

It is also no answer to say that absentee-voting fraud is rare. *Anderson-Burdick* treats the State's interest in election integrity as a "legislative fact," accepted as true so long as it's reasonable. *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014). That's why the Supreme Court found Indiana's interest in preventing in-person voter fraud compelling even though "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." *Crawford*, 553 U.S. at 194.

Plaintiffs concede that the witness requirement is constitutional in normal times, and it is constitutional now as well. Before and after COVID-19, the law imposes only minimal burdens that are easily justified by the State's regulatory interests.

iii. The consent decree is overbroad.

The consent decree suspends the witness requirement for *all* Rhode Islanders—including the overwhelming majority that Plaintiffs concede can comply with it. "Zeroing in on the abnormal burden experienced by a small group of voters is problematic at best, and prohibited at worst." *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016). Facial, statewide relief is impermissible when the challenged law "has a plainly legitimate sweep." *Crawford*, 553 U.S. at 202-03; *see id.* at 206 (Scalia, J., concurring in judgment). Accordingly, where there is some evidence that a small, idiosyncratic subset of voters who, despite "reasonable effort," cannot find a witness and cannot vote in person, *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016),

their claims must be vindicated in as-applied challenges that seek relief for "those particular persons." *Id.*

The District of Minnesota recently rejected a virtually identical consent decree because of the same overbreadth problems plaguing this one. There, the court found that the burdens on particular voters could not possibly support "the Secretary's blanket refusal to enforce [Minnesota's] witness requirement." ADD46-47. As the Court put it, "the consent decree is not substantively fair or reasonable because it would, if approved, impose relief that goes well beyond remedying the harm Plaintiffs allege to suffer in support of their as-applied challenge to Minnesota's witness requirement." ADD45.

Here, the parties relied on affidavits from three voters to craft statewide relief. ADD5. As the Minnesota court explained, such an order is unlawful because it "violates [the] settled legal principle that … injunctive relief must be narrowly tailored to remedy only the specific harms established by the plaintiff." ADD46.

B. Movants will suffer irreparable harm without a stay.

Movants face irreparable harm because, without a stay, this appeal will likely become moot. *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979). Voting begins for the September primary in a matter of days. This appeal will likely not be resolved by then, and this Court "cannot turn back the clock and create a world in which [Rhode Island] does not have to administer the [2020] election under the strictures of the injunction." *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015). This mootness problem is classic irreparable harm and is "'[p]erhaps the most compelling

justification"' for a stay pending appeal. *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers). A stay is warranted to prevent "the total and immediate divestiture of appellants' rights to have effective review in this court." *Providence Journal*, 595 F.2d at 890.

Movants' members and voters will also suffer irreparable harm without a stay. Rhode Islanders rely on the legislature to regulate elections. R.I. Const. art. II, §2. Yet the consent decree suspends the witness requirement that their elected representatives believe is necessary "to assure the integrity of the electoral system," 410 R.I. Code R. 20-00-9.3(E). Movants, their members, and their voters thus face "[s]erious and irreparable harm" if the State "cannot conduct its election in accordance with its lawfully enacted ballot-access regulations." *Thompson*, 959 F.3d at 812 ; *accord Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018).

C. The balance of harms and public interest favor a stay.

Because the witness requirement is likely constitutional, a stay pending appeal will not substantially injure the parties. *Pavek v. Simon*, No. 20-2410, ___ F.3d ___ (8th Cir. July 31, 2020). It is worth noting that the rushed nature of this appeal is "largely one of [the parties'] own making." *Respect Maine PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010). Indeed, the Secretary turned to this lawsuit for relief only after unsuccessfully lobbying the legislature and governor to provide the same relief. "[W]ell aware of the requirements of the election laws, [plaintiffs] chose not to bring this suit until [8 days

ago], shortly before the [September primary and November general] elections." *Id.* at 16. This undercuts their claims of harm.

Because Rhode Island's witness requirement is likely constitutional, "staying the [consent decree] is 'where the public interest lies'" too. *Tex. Democratic Party*, 961 F.3d at 412 ; *accord Respect Maine*, 622 F.3d at 15; *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008). Federal courts should not "lightly tamper with election regulations," *Thompson*, 959 F.3d at 813, so the public interest lies in "giving effect to the will of the people by enforcing the [election] laws they and their representatives enact." *Tex. Democratic Party*, 961 F.3d at 812; *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006); *Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 904 (5th Cir. 2012). This is especially true in the context of an approaching election. *Thompson*, 959 F.3d at 813; *Respect Maine*, 622 F.3d at 16. And it remains true even though the State has chosen to lay down instead of defending its witness-requirement statute. *See Pavek*, *supra*.

CONCLUSION

This Court should grant intervention and stay the consent decree by August 10, 2020.

Respectfully submitted,

s/ Thomas R. McCarthy

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CERTIFICATE OF COMPLIANCE

This motion complies with Rule 27(d)(2) because it contains 5,101 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: July 31, 2020 *s/ Thomas R. McCarthy*

CERTIFICATE OF SERVICE

I filed this brief via the Court's ECF system, which will electronically notify the following:

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ADDENDUM

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

COMMON CAUSE RHODE ISLAND, LEAGUE OF WOMEN VOTERS OF RHODE ISLAND, MIRANDA OAKLEY, BARBARA MONAHAN, and MARY BAKER, Plaintiffs, v. NELLIE M GORBEA, in her official capacity as Secretary of State of Rhode Island; DIANE C. MEDEROS, LOUIS A. DESIMONE JR., JENNIFER L. JOHNSON, RICHARD H. PIERCE, ISADORE S. RAMOS, DAVID H. SHOLES, and WILLIAM WEST, in their official capacities as members of the Rhode Island Board of Elections, Defendants.	C.A. No. 1:20-CV-00318-MSM-LDA

MEMORANDUM AND ORDER

Mary S. McElroy, United States District Judge.

The plaintiffs, Common Cause Rhode Island, League of Women Voters of Rhode Island, Miranda Oakley, Barbara Monahan, and Mary Baker, filed this action seeking to enjoin the State's enforcement of the witness or notary requirement for the two upcoming statewide elections in 2020: the primary election on September 8 and the general election on November 3. The plaintiffs have named as defendants the Rhode Island Secretary of State and the members of the Rhode Island Board of Elections.

The parties have submitted to the Court a proposed Consent Judgment and Decree ("Consent Decree") which would resolve the plaintiffs' claims. On July 28, 2020, the Court conducted a Fairness Hearing to review the proposed Consent Decree. For the following reasons, the Court approves the Consent Decree and thereby GRANTS the parties' Joint Motion to Approve Consent Judgment (ECF No. 18.)

I. BACKGROUND

With exceptions related to voters in medical facilities, abroad, or out of state for military service, Rhode Island law requires that any voters seeking to vote by mail must have their ballot envelope signed by either two witnesses or a notary public. R.I.G.L. §§ 17-20-2.1(d)(1), (d)(4) ("[T]he signature on the certifying envelopes containing a voted ballot must be made before a notary public or two (2) witnesses who shall set forth their addresses on the form."). The two witnesses or the notary for each ballot must actually witness the voter marking the ballot. R.I.G.L. §§ 17-20-21 and 17-20-23. Rhode Island is one of three states with such a requirement.[1]

All the parties share a concern with the integrity of the election process. The Secretary of State and Rhode Island Board of Elections share a statutory obligation to ensure full and fair elections, and the Court examines this Consent Decree with a specific eye on that public interest. To the extent that some have suggested the signature and notary requirements are necessary to prevent voter fraud, Rhode

[1] The other states with such requirements are Alabama and North Carolina. *See* Ala. Code §§ 17-11-7, 17-11-10; N.C. Gen. Stat. Ann. § 163-231(a).

Island law includes other measures to safeguard against fraud in mail-ballot procedures. The Board of Elections is statutorily required to assess mail-in ballots to ensure that the name, residence, and signature on the ballot itself all match that same information on the ballot application, including ensuring "that both signatures are identical." R.I.G.L. § 17-20-26(c)(2). Additionally, voter fraud in Rhode Island is a felony, punishable by up to ten years of imprisonment and/or a fine of between $1,000 and $5,000. R.I.G.L. §§ 17-23-4, 17-26-1.

Due to the COVID-19 pandemic, Rhode Island's Governor, by executive order, suspended the two-witness or notary requirement for mail ballots in the June 2, 2020, presidential preference primary. R.I. Exec. Order No. 20-27 at 2 (Apr. 17, 2020). In that election, 83% of those voting did so by mail-in ballot, compared to less than 4% in the previous presidential preference primary of May 2016. The Governor has not issued any similar orders for the upcoming elections, despite the Secretary of State's proposal to do so. Further, the Secretary of State promoted legislation to implement mail-in voting for the remaining 2020 elections, including a provision to eliminate the witness or notary requirement. The Rhode Island House of Representatives passed this legislation, but it was not taken up by the Rhode Island Senate. At this time, the Rhode Island General Assembly has adjourned.

During this period of inaction, the COVID-19 pandemic, while it has improved in Rhode Island since the presidential preference primary, continues to threaten and permeate society in this state. Because COVID-19 spreads mainly from person-to-person through close contact with one another and through respiratory droplets when

an infected person coughs or sneezes, mask wearing, social distancing practices, and limitations on the size of group gatherings continue to be public health mandates. Persons in particularly vulnerable demographics—those over age 65 or with preexisting health conditions—remain advised to stay home unless they must venture out for work, medical visits, or to gather necessities.

Although Rhode Island had made much progress in slowing the spread of the virus, recent warnings indicate an uptick in infections and just days before this filing the Rhode Island Governor rescinded a planned move to Stage 4 of the state's reopening plan which would have relaxed restrictions on gatherings and public excursions. In fact, the governor reduced the maximum size of in person gatherings at a coronavirus briefing held on July 29, 2020.[2] Rhode Island's rate of transmission has risen to 1.7 – nowhere near the 1.0 goal. With the elections months away, there is no telling whether the health crisis will improve or become dramatically worse. The most reasonable inference, since Rhode Island is in a worsening trend, is that it will become more grave.

The plaintiffs maintain that the two signature or notary requirement will drive them out of their houses into the general population, with the risk to health that entails. The plaintiffs have presented data from the U.S. Census Bureau which demonstrates that a large portion of the Rhode Island electorate lives alone. As of 2018, 197,000 Rhode Islanders over the age of 18, 23.45% of the State's voting-age

[2] https://www.providencejournal.com/news/20200729/ri-reports-2-coronavirus-deaths-61-new-cases-raimondo-reduces-limit-on-social-gatherings.

population, live alone. Another 289,000 Rhode Islanders of voting age live with only one other person. Of the 197,000 Rhode Islanders of voting age who live alone, an estimated 59,000 are aged 65 and older, accounting for 37.82% of all those aged 65 and over in Rhode Island. For Rhode Islanders of voting age with a disability, an estimated 42,000, or 42%, live alone.

The individual plaintiffs, Miranda Oakley, Barbara Monahan, and Mary Baker, all have provided the Court with affidavits stating that they either live alone or are in high risk groups for COVID-19 because they are of advanced age or are regularly in close contact with those that are, or have preexisting medical conditions. The organizational plaintiffs, Common Cause and the League of Women Voters, have provided affidavits attesting that the majority of their members, who are voters, are of advanced age while others live alone or have preexisting health conditions. It is their concern that the witness or notary requirements would force them to make "an impossible choice between two irreparable harms—violating social distancing guidelines designed to protect them and their loved ones and foregoing their fundamental right to vote." (ECF No. 5-1 at 1.)

The plaintiffs therefore have filed the instant suit, putting forth (1) a 42 U.S.C. § 1983 claim that the mail-ballot witness or notary requirement, as applied to the September 2020 primary and November 2020 general elections, imposes an undue burden on their right to vote in violation of the First and Fourteenth Amendments to the United States Constitution; and (2) a claim for violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* because the challenged

provisions disadvantage individuals with disabilities from participating safely in the upcoming elections and do not provide them with reasonable accommodations.

Regarding their constitutional claim, the plaintiffs assert that the witness requirement for mail voting constitutes "a severe burden on the right to vote because it forces voters to choose between exercising the franchise safely or violating social distancing guidelines and exposing themselves, their families, and their communities to a heightened risk of COVID-19." (ECF No. 1 ¶ 60.) Moreover, they argue, the State has no interest sufficient to justify maintaining the witness requirement during the COVID-19 pandemic. In response to the argument that the witnessing requirement ensures the integrity of the election, the plaintiffs counter that, while the prevention of fraud is a legitimate state interest, the state has other safeguards, including signing under oath and signature matching which protect the integrity of the voting process. There is no information in the record, nor was any brought forth, that recent Rhode Island elections are susceptible to fraud.

On July 23, 2020, shortly after filing their Complaint, the plaintiffs moved for a preliminary injunction to enjoin the defendants from enforcing the witness or notary requirements. The Court held a conference with all parties on Friday, July 24, 2020, at which time the parties informed the Court that they would seek to craft a consent decree, due to the defendants' sharing of the plaintiffs' concerns and general agreement with the plaintiffs' request, thus possibly obviating the need to proceed with the plaintiffs' motion for a preliminary injunction. The parties agreed to discuss a consent decree over the weekend and the Court scheduled a hearing on the

plaintiffs' motion for Monday, July 27, in the event the negotiations failed.

Also discussed at the Friday, July 24, conference was the Rhode Island Republican Party's publicly stated intention to seek to intervene in the matter and oppose the plaintiffs' Complaint.[3] On that same Friday, counsel for the Secretary of State informed counsel for the Rhode Island Republican Party that the parties were going to negotiate a consent decree and that if the Republican Party was going to attempt to intervene, it should do so quickly. Yet, it was not until more than 48 hours later, at approximately midnight on Sunday, July 26, that the Republican National Committee ("RNC") and the Rhode Island Republican Party filed a Motion to Intervene.[4]

By Monday, July 27, the parties had reached an accord and presented the Court with a proposed Consent Decree for review. That same day, the Court held another conference with the parties and with representatives of the proposed intervenors, the RNC and Rhode Island Republican Party. The proposed intervenors, in addition to seeking to intervene, filed an emergency "Protective Motion For Fairness Hearing" to present arguments opposing the proposed Consent Decree. The Court granted the request for the Fairness Hearing. Although the Court deferred ruling on the Motion to Intervene, it allowed the proposed intervenors to participate

[3] In fact, the local Republican Party had announced that intention the day before, on the same day that this suit was filed. http://www.ri.gop/aclu_puts_the_integrity_of_our_elections_at_risk (July 23, 2020).

[4] Notably that motion was not perfected until approximately 6:30 p.m. on Monday July 27 by the filing of a proposed answer. See FRCP 24 (c).

in the fairness hearing and to provide the Court with written briefing in advance of that hearing. The proposed intervenors did file an Objection to the proposed Consent Decree and were heard, in equal measure to the parties, at the Fairness Hearing.

The Court conducted the Fairness Hearing on July 28, 2020, during which counsel for all parties, as well as the proposed intervenors, presented argument for and against approval of the proposed Consent Decree and on the Motion to Intervene.[5]

[5] At the Fairness Hearing, the Court heard argument on the RNC and Rhode Island Republican Party's Motion to Intervene. The Court denied that Motion, finding that the proposed intervenors had not timely sought to intervene and that their interest, for a fair and lawful election, was adequately represented by the existing parties. *See* Fed. R. Civ. P. 24. Specifically, even though the time between the filing of the lawsuit and the Motion to Intervene was short in terms of actual days, it was well within the capability of the RNC and local party to meet. Although the RNC protests it did not hire its counsel until Saturday night, delay is counted toward litigants, not lawyers, and the local Party was already represented. Nothing, certainly, prohibited the RNC even on Saturday night from filing a motion to intervene, announcing its intention, and seeking more time if necessary, to file a memorandum. That, at least, would have put the parties on formal notice that the RNC was prepared to actively participate. Instead, the parties worked extensively over the weekend toward crafting a settlement. In addition, the Court found that the RNC did not assert an interest any different from that asserted by the named defendants. They simply claimed a desire to "protect" their voters from possible election fraud and to see that existing laws remained enforced. That is the same interest the defendant agencies are statutorily required to protect. The point of the would-be intervenors was their naked assertion that the defendant-parties were not adequately protecting those interests because there had been "collusion" between them and the plaintiffs. This Court found no evidence of collusion. The fact that two agencies with expertise independently reached the conclusion that the health risk was real, that the signature and notary requirements unduly burdened the right to vote, and that the parties could reach a workable solution that protected the integrity of the election, does not show collusion. If anything, it points to the reasonableness and fairness of the Consent Decree. Finally, the Court rejected the proposed intervenors' main argument that "changing the rules" on the eve of an 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

II. LEGAL STANDARD

A consent decree "embodies an agreement of the parties," that they "desire and expect will be reflected in, and be enforceable as, a judicial decree." *Aronov v. Napolitano*, 562 F.3d 84, 90–91 (1st Cir. 2009) (quoting *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004)). Because it is entered as an order of the court, a consent decree is distinguished from a private settlement in that the latter do not "entail judicial approval and oversight." *Id.*

For that reason, a "court entering a consent decree must examine its terms to be sure they are fair and not unlawful." *Id.* at 91. Approval of a consent decree is "committed to the trial court's informed discretion." *Puerto Rico Dairy Farmers Ass'n v. Pagan*, 748 F.3d 13, 20 (1st Cir. 2014). "Woven into the abuse of discretion standard here is a 'strong public policy in favor of settlements ….'" *Id.* (quoting *U.S. v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 280 (1st Cir. 2000)).

Should a third-party object to a consent decree, that party is entitled "to present evidence" and "have its objections heard." *Id.* (quoting *Local No. 93, Int'l Ass'n of Firefighters, AFL–CIO v. City of Cleveland*, 478 U.S. 501, 529 (1986)). The key consideration in this type of 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.* The objecting party's "right to be heard, however, does not translate into a right to block a settlement." *Id.* (citing *Local No. 93*, 478 U.S. at 529).

When reviewing a consent decree,

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primary. Approving the Consent Decree maintained that status quo. *Enforcing* the signature and notary requirement would have "changed the rules."

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

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

III. DISCUSSION

The Court is satisfied that the parties to the Consent Decree—the plaintiffs, the Secretary of State, and the members of the Board of Elections—all have validly consented to its terms. The Consent Decree was drafted by those parties over a weekend of negotiations. Additionally, reasonable notice has been given to possible objectors: the RNC and local Republican Party were given an opportunity to provide the Court with extensive briefing and to argue their position at the Fairness Hearing.

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. As the supreme law of the land, the United States Constitution supersedes any conflicting state statute. *See* U.S. Const. Art. IV. The Court therefore finds that the Consent Decree is lawful.

The Court also finds that the Consent Decree is fair, adequate, and reasonable. The RNC argued that the because the defendants generally were in agreement with

the plaintiffs' position on the witness or notary requirement, the litigation lacked adversarial vigor which made it collusive and, therefore, unfair. (ECF No. 21 at 19-20.) But no evidence of collusion among the parties has been presented to this Court; in fact, the parties have represented that they engaged in good-faith negotiations in the crafting of the Consent Decree's terms. It is clear that the Consent Decree was a compromise reached after sincere, arm's length negotiations. Indeed, the plaintiffs sought to do away with all extra identity requirements such as providing, in appropriate circumstances, the last four digits of a voter's Social Security Number or a photographic ID. But the parties agreed to suspend the witness and notary requirement and retain these extra identity requirements. This compromise and the fact that the plaintiffs did not get everything that they sought in the Consent Decree, as well the fact that the defendants notified the proposed intervenors of the status of the case immediately after Friday's conference suggest that the proposed intervenors' argument that this agreement was not at arm's length and was otherwise collusive is wholly without merit or evidence.

The adequacy and reasonableness of the Consent Decree also is evident by the fact that it sets forth the exact mail-ballot protocols successfully used during the June 2, 2020, presidential preference primary.

Finally, the Consent Decree is not legally impermissible as to the RNC or the Rhode Island Republican Party. Had the parties not reached a Consent Decree to suspend the witness or notary requirements for the remaining 2020 elections, this Court is empowered to find that the requirement, as applied in the current pandemic,

unconstitutionally limits voting access, and therefore order precisely what the Consent Decree achieves. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (holding that the constitutionality of election laws depends upon a court's balancing of the character and magnitude of any law burdening the right to vote against the relevant government interest served by the law); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Barr v. Galvin*, 626 F.3d 99, 109 (1st Cir. 2010).

The proposed intevenors argued at the Fairness Hearing that, even if this Court were to find that the statutory requirement, as applied during the current pandemic was violative of the constitution, the Court would be powerless to intervene as the legislature had not acted. This rather improbable argument, when taken to its extreme would mean that no court could invalidate unconstitutional restrictions on voting as long as state legislatures had declined to do so. A long history of federal court review of voting laws says the contrary. "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote." *Reynolds v. Sims*, 377 U.S. 533, 554-56 (1964).

IV. CONCLUSION

For the foregoing reasons, the parties' Joint Motion to Approve Consent Judgment (ECF No. 18) was GRANTED on July 28, 2020. The Court therefore enters the Consent Judgment and Decree (ECF No. 18-1).

IT IS SO ORDERED.

Mary S. McElroy
United States District Judge
July 30, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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

Plaintiffs,

- against -

NELLIE M. GORBEA, in her official capacity as Secretary of State of Rhode Island; DIANE C. MEDEROS, LOUIS A. DESIMONE JR., JENNIFER L. JOHNSON, RICHARD H. PIERCE, ISADORE S. RAMOS, DAVID H. SHOLES, and WILLIAM E. WEST, in their official capacity as members of the Rhode Island Board of Elections,

Defendants.

Case No. 1:20-cv-00318-MSM-LDA

CONSENT JUDGMENT AND DECREE

1. Whereas Rhode Island law requires voters eligible to vote by mail, subject to very limited exclusions, to sign the certifying envelopes which contain their ballots before a notary public or two witnesses, in order for their votes to be counted (the "two witness requirement"). 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). The two witnesses or the notary for each ballot must actually witness the voter marking the ballot. R.I. Gen. Laws §§ 17-20-21 and 17-20-23(c). Rhode Island is in the minority of states with such a requirement.

2. Whereas Rhode Island and America are currently suffering from the effects of a global pandemic. The novel coronavirus, SARS-CoV-2, causes individuals to contract COVID-19, and spreads mainly from person-to-person through close contact with one another and through respiratory droplets when an infected person coughs or sneezes. COVID-19 threatens the

health of any individual no matter their age, although older persons are particularly vulnerable. As of July 24, 2020, Rhode Island has experienced over 18,000 confirmed cases and over 1,000 deaths from COVID-19.

3. Whereas Rhode Island Governor Raimondo issued an Executive Order on March 9, 2020 declaring a state of emergency which has been extended at least through August 2, 2020. R.I. Exec. Order No. 20-52 (July 3, 2020). Shortly after declaring a state of emergency, Governor Raimondo issued an executive order announcing that the Rhode Island Department of Health "determined that it is necessary to further reduce the size of mass gatherings." R. I. Exec Order No. 20-09 (March 22, 2020). While Governor Raimondo has since eased restrictions on the maximum permissible size for public gatherings, she has cautioned that citizens should continue to avoid mass gatherings. R.I. Exec. Order No. 20-50 (June 29, 2020). The Governor explained that "the lower the attendance and gathering size, the lower the risk." *Id.* She emphasized that a key message for the public is to "[k]eep groups consistent and small." *Id.*

4. Whereas the two witness requirement necessitates that some individuals will invite one or two persons into their home, or travel outside their home to meet these witnesses. Either of these situations may violate social distancing guidelines and increase the likelihood that those involved will contract COVID-19 and transmit it to others. For this reason, the two witness requirement may carry a high risk to the general public's health. Rhode Island voters' other option, in-person voting, also may contain a risk to the general public's health. Voting in person involves waiting in line with other voters, interacting with poll workers, and touching voting equipment, which also violates social distancing guidelines.

5. Whereas Rhode Island has other laws to maintain the integrity of the electoral process. Mail-in ballots are assessed to ensure that the name, residence, and signature on the

ballot itself all match that same information on the ballot application. R.I. Gen. Laws 17-20-26(c)(2). Further, voting fraudulently is a felony in Rhode Island, punishable by up to ten years of imprisonment with a fine between $1,000 and $5,000. R.I. Gen. Laws §§ 17-23-4 & 17-26-1.

6. Whereas on March 26, 2020 the State Board of Elections voted to suspend the two witness requirement for mail ballots for the June 2, 2020 presidential primary, acknowledging that the requirements may result in close contact between the voter and other people, which is a known cause of transmitting COVID-19. On April 17, 2020 Governor Raimondo issued Executive Order 20-27, which suspended the two witness requirement challenged here for the June 2, 2020 presidential primary election. R.I. Exec. Order No. 20-27 (Apr. 17, 2020).

7. Whereas the suspension of the two witness requirement for the June presidential primary was successful. 83% of Rhode Island voters exercised their fundamental right to vote via mail-in ballot. *2020 Presidential Preference Primary Statewide Summary*, ST. OF R.I. BD. OF ELECTIONS (updated July 3, 2020), https://www.ri.gov/election/results/2020/presidential_preference_primary/#. Voting by mail was used most extensively by older voters. In comparison, less than 4% of the votes in the May 2016 presidential preference primary were cast by mail. A presentation published by the Election Task Force ("ETF"), established by Defendant Secretary Gorbea's office, reflected that "[r]emoving the two witness/notary signature requirement on ballots made it easier for older Rhode Islanders and those living alone" to vote safely. *2020 Presidential Primary Election Task Force Presentation* 4, R.I. DEP'T OF ST. (July 9, 2020), https://vote.sos.ri.gov/Content/Pdfs/PPP%20Task%20Force%20July%209%202020%20Final.pdf. As a result of these measures, the ETF concluded that the Governor's executive order was a

success and led to a "[d]ecreased number of in-person voters [which] allowed for social distancing best practices." *Id.* The Election Task Force proposed that Rhode Island follow the same course for the September and November 2020 elections.

8. Whereas Rhode Island will hold two statewide election days in the remaining part of 2020. Primary elections for offices including U.S. Congress, Rhode Island Senate, and Rhode Island House of Representatives will be held on September 8, 2020. On July 13, 2020 Defendants constituting the State Board of Elections voted unanimously to suspend the witness and notary public requirements for the mail ballot certification envelope, under the requirements set forth under Chapter 20 of Title 17 of the General Laws in order to mitigate exposure to COVID 19. Defendant Secretary Gorbea also believes the two witness requirement should be suspended for the State's September and November, 2020 elections.

9. Whereas on July 23, 2020, the League of Women Voters of Rhode Island, Common Cause Rhode Island, Ms. Miranda Oakley, Ms. Barbara Monahan, and Ms. Mary Baker ("Plaintiffs") filed a complaint against the above-named Defendants challenging enforcement during the ongoing public health crisis caused by the spread of COVID-19 of Rhode Island's two witness requirement. Plaintiffs moved for a temporary restraining order and injunctive relief enjoining Defendants from enforcing the two witness requirement, 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), for the State's pending September 8, 2020 primary and November 3, 2020 general elections.

10. Whereas for qualified electors who wish to vote by mail, their mail ballot applications must be received by the voter's local board by August 18, 2020 and October 13,

2020 for the State primary and general election, respectively. The State must print ballots for these elections imminently.

11. Whereas in light of the data that supports the Plaintiffs' concerns for their safety if they are required to interact with others in order to cast their ballot in the pending September 8, 2020 primary and November 3, 2020 general elections, Plaintiffs and Defendants (collectively, the "Consent Parties") agree that an expeditious resolution of this matter in the manner encompassed by the terms of this Consent Order, is in the best interests of the health, safety, and constitutional rights of the citizens of Rhode Island, and therefore in the public interest.

12. Whereas the Consent Parties further agree that no eligible voter should have to choose between casting a ballot that will count and placing their own health at risk.

13. Whereas Defendants agree not to enforce the two witness requirement for the September 8, 2020 primary and November 3, 2020 general elections. The Consent Parties further agree that nothing in this Consent Order shall restrict the Defendants from requesting that that mail voters provide their Rhode Island Driver's License or State ID number, the last four digits of their Social Security number, or their phone number, as further identification verification, so long as the request makes clear that the provision of such information is optional.

14. Whereas Plaintiffs agree to a waiver of any entitlement to damages, fees, including attorneys' fees, expenses, and costs, that may have accrued as of the date of the entry of this Consent Order, with respect to the claims raised by Plaintiffs in this action.

15. Whereas the Court finds that it has subject matter jurisdiction over the Consent Parties and that this Consent Order is fair, adequate, and reasonable and that it is not illegal, a product of collusion, or against the public interest, because such agreement preserves the constitutional right to vote of Plaintiffs and other Rhode Island voters while promoting public

health during a pandemic and does so without harming the integrity of Rhode Island's elections. It gives appropriate weight to Defendants' expertise and public interest responsibility in the area of election administration.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED FOR THE REASONS STATED ABOVE IN PARAGRAPHS 1-15 THAT:

1. The two witness requirement set forth in 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) shall be suspended for the September 8, 2020 primary or November 3, 2020 general elections. Defendants members of the Rhode Island Board of Elections shall not enforce the requirements set forth in 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 qualified electors who vote by mail sign the certifying envelope which contains their ballot before a notary public or two witnesses for the September 8, 2020 primary or November 3, 2020 general elections.

2. As of the date of this Consent Order, Defendant Secretary Gorbea shall not print or distribute to qualified electors any ballots, envelopes, instructions, or other materials directing qualified electors who vote by mail to sign the certifying envelope which contains their ballot before a notary public or two witnesses or requiring a notary public's or two witnesses' signatures on the certifying envelopes.

3. Defendants Secretary Gorbea and members of the Rhode Island Board of Elections shall issue guidance instructing all relevant local election officials and boards of canvassers that, for the September 8, 2020 primary and November 3, 2020 general elections, no mail ballot cast by a registered voter may be rejected for failure to include the signature of either two witnesses or a notary.

4. Defendant Secretary Gorbea shall take all actions necessary to modify or amend the printed instructions accompanying each mail ballot provided to voters for the September 8, 2020 primary and November 3, 2020 general elections, to inform voters that any mail ballot cast in these elections without witness signatures will not be rejected on that basis.

5. Defendants Secretary Gorbea and members of the Rhode Island Board of Elections shall inform the public that the two witness requirement will be suspended for the September 8, 2020 primary and November 3, 2020 general elections on their existing web sites and social media, including frequently asked questions, and any recorded phone lines.

6. Plaintiffs will withdraw their motion for a temporary restraining order and preliminary injunction.

7. The within Consent Order, upon entry by the Court, shall be the final judgment of the Court. Each party shall bear their own fees, expenses, and costs.

Entered as the Judgment of this Court this 28 day of July, 2020.

Mary S. McElroy
UNITED STATES DISTRICT JUDGE

July 28, 2020
Providence, Rhode Island

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UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

COMMON CAUSE RHODE ISLAND, LEAGUE OF WOMEN VOTERS OF RHODE ISLAND, MIRANDA OAKLEY, BARBARA MONAHAN, and MARY BAKER, *Plaintiffs*, v. NELLIE M. GORBEA, in her official capacity as Secretary of State of Rhode Island; DIANE C. MEDEROS, LOUIS A. DESIMONE JR., JENNIFER L. JOHNSON, RICHARD H. PIERCE, ISADORE S. RAMOS, DAVID H. SHOLES, and WILLIAM E. WEST, in their official capacities as members of the Rhode Island Board of Elections, *Defendants*, REPUBLICAN NATIONAL COMMITTEE, and RHODE ISLAND REPUBLICAN PARTY [*Proposed*] *Intervenor-Defendants*.	Case No. 1:20-cv-00318-MSM-LDA

CORRECTED <u>EMERGENCY</u> NOTICE OF APPEAL
AND [PROTECTIVE] NOTICE OF APPEAL

Proposed Intervenor-Defendants, the Republican National Committee and the Rhode Island Republican Party, now appeal to the U.S. Court of Appeals for the First Circuit this Court's order denying their motion to intervene, Amended Text Order (July 30, 2020); Minute Entry (July 28, 2020). Proposed Intervenor-Defendants also protectively appeal the consent judgment and decree and this Court's grant of the

parties' motion to approve that decree, Docs. 25, 26; Minute Entry (July 28, 2020); *see Mausolf v. Babbitt*, 125 F.3d 661, 666 (8th Cir. 1997) ("If final judgment is entered with or after the denial of intervention, the applicant should be permitted to file a protective notice of appeal as to the judgment, to become effective if the denial of intervention is reversed." (cleaned up; quoting 15A Wright & Miller, *Fed. Practice & Procedure* §3902.1, at 113 (2d ed. 1991)).*

Dated: July 30, 2020

Respectfully submitted,

/s/ Thomas R. McCarthy

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* The Court denied intervention and approved the consent decree at the hearing on July 28. The Court did not enter an order, however. It told the parties that an order would issue, *see* Minute Entry (July 28, 2020), and then issued an order on a separate, unrelated motion, *see* Order (July 28, 2020).

On July 30, the Court issued an order granting the motion to approve the consent decree, entered the consent judgment, and issued an order denying the motion to intervene. Proposed Intervenor-Defendants immediately filed their notice of appeal. *See* Doc. 28.

Shortly after Proposed Intervenor-Defendants filed their notice of appeal, the Court amended the appealed orders to backdate them to the date of the hearing (July 28). Out of an abundance of caution, Proposed Intervenor-Defendants are filing this corrected notice of appeal to reflect those changes.

U.S. District Court
District of Rhode Island (Providence)
CIVIL DOCKET FOR CASE #: 1:20-cv-00318-MSM-LDA

Common Cause Rhode Island et al v. Gorbea et al
Assigned to: District Judge Mary S. McElroy
Referred to: Magistrate Judge Lincoln D. Almond
Case in other court: U.S. Court of Appeals for the First Circuit, 20-01753 (requires PACER login)
Cause: 42:1983 Civil Rights Act

Date Filed: 07/23/2020
Jury Demand: None
Nature of Suit: 441 Civil Rights: Voting
Jurisdiction: Federal Question

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Defendant

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Defendant

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Date Filed	#	Docket Text
07/23/2020	1	COMPLAINT (filing fee paid $ 400.00, receipt number 0103-1532635), filed by Miranda Oakley, League of Women Voters of Rhode Island, Common Cause Rhode Island, Barbara Monahan, Mary Baker. (Attachments: # 1 Civil Cover Sheet)(Labinger, Lynette) (Entered: 07/23/2020)
07/23/2020		CASE CONDITIONALLY ASSIGNED to District Judge Mary S. McElroy and Magistrate Judge Lincoln D. Almond. Related Case Number CV20-262-MSM-LDA based upon the indication on the cover sheet that a related case previously was assigned to the presiding judge. The assignment is subject to the presiding judge's determination that the cases, in fact, are related. (Potter, Carrie) (Entered: 07/23/2020)
07/23/2020	2	CASE OPENING NOTICE ISSUED (Potter, Carrie) (Entered: 07/23/2020)
07/23/2020	3	MOTION for Michael C. Keats to Appear Pro Hac Vice *for all Plaintiffs* (filing fee paid $ 100.00, receipt number 0103-1532672) filed by All Plaintiffs. (Labinger, Lynette) (Entered: 07/23/2020)
07/23/2020	4	MOTION for Christopher H. Bell to Appear Pro Hac Vice *for all Plaintiffs* (filing fee paid $ 100.00, receipt number 0103-1532680) filed by All Plaintiffs. (Labinger, Lynette) (Entered: 07/23/2020)
07/23/2020		TEXT ORDER granting 3 Motion to Appear Pro Hac Vice of Michael C. Keats; granting 4 Motion to Appear Pro Hac Vice of Christopher H Bell. So Ordered by District Judge Mary S. McElroy on 7/23/2020. (Potter, Carrie) (Entered: 07/23/2020)
07/23/2020	5	MOTION for Temporary Restraining Order , MOTION for Preliminary Injunction (**Responses due by 8/6/2020.**) filed by All Plaintiffs. (Attachments: # 1 Supporting Memorandum, # 2 Affidavit A. Dr.Reingold Declaration, # 3 Affidavit B. Dr.Fine Declaration, # 4 Affidavit C. Oakley Declaration, # 5 Affidavit D. Monahan Declaration, # 6 Affidavit E. Baker Declaration, # 7 Affidavit F. Koster/LWVRI Declaration, # 8 Affidavit G. Marion/CC-RI Declaration, # 9 Exhibit H. 2018 Census Data)(Labinger, Lynette) (Entered: 07/23/2020)
07/23/2020		NOTICE of Remote Hearing: Chambers Conference set for Friday, 7/24/2020 at 10:00 AM via Zoom before District Judge Mary S. McElroy. The Court will send Zoom access

		information to counsel by email. (Urizandi, Nisshy) (Entered: 07/23/2020)
07/23/2020	6	NOTICE of Appearance by Angel Taveras on behalf of Nellie M. Gorbea (Taveras, Angel) (Entered: 07/23/2020)
07/23/2020	7	MOTION for Julie A. Ebenstein to Appear Pro Hac Vice *for all Plaintiffs* (filing fee paid $ 100.00, receipt number 0103-1532830) filed by All Plaintiffs. (Labinger, Lynette) (Entered: 07/23/2020)
07/23/2020	8	MOTION for Jonathan Diaz to Appear Pro Hac Vice *for all Plaintiffs* (filing fee paid $ 100.00, receipt number 0103-1532837) filed by All Plaintiffs. (Labinger, Lynette) (Entered: 07/23/2020)
07/23/2020	9	MOTION for Danielle Lang to Appear Pro Hac Vice *for all Plaintiffs* (filing fee paid $ 100.00, receipt number 0103-1532849) filed by All Plaintiffs. (Labinger, Lynette) (Entered: 07/23/2020)
07/23/2020		TEXT ORDER granting 7 Motion to Appear Pro Hac Vice of Julie A Ebenstein, ; granting 8 Motion to Appear Pro Hac Vice of Jonathan Diaz; granting 9 Motion to Appear Pro Hac Vice of Danielle Lang. So Ordered by District Judge Mary S. McElroy on 7/23/2020. (Potter, Carrie) (Entered: 07/23/2020)
07/24/2020		Minute Entry for proceedings held before District Judge Mary S. McElroy: Chambers Conference held via Zoom on 7/24/2020. Lynette Labinger and Michael Keats for the plaintiffs and Angel Tavares and Ray Marcaccio for the defendants participated. (Urizandi, Nisshy) (Entered: 07/24/2020)
07/24/2020		NOTICE of Remote Hearing on Motion 5 MOTION for Temporary Restraining Order MOTION for Preliminary Injunction: Motion Hearing set for Monday, 7/27/2020 at 3:00 PM via Zoom before District Judge Mary S. McElroy. The Court will send out Zoom access information to counsel by email. (Urizandi, Nisshy) (Entered: 07/24/2020)
07/26/2020	10	EMERGENCY MOTION to Intervene *as Defendants* filed by Republican National Committee, Rhode Island Republican Party. **Responses due by 8/10/2020.** (Attachments: # 1 Exhibit Board of Elections Emergency Meeting Agenda)(Bell, Brandon) Modified on 7/27/2020 to reflect that this is an emergency motions and not an amended motion. (Urizandi, Nisshy) (Entered: 07/26/2020)
07/26/2020	11	MEMORANDUM IN SUPPORT by Republican National Committee, Rhode Island Republican Party in support of 10 Amended MOTION to Intervene *as Defendants Emergency Motion to Intervene*. (Bell, Brandon) (Entered: 07/26/2020)
07/27/2020	12	Emergency MOTION for Hearing *Protective Motion for Fairness Hearing* filed by Republican National Committee, Rhode Island Republican Party. **Responses due by 8/10/2020.** (Attachments: # 1 Exhibit Board of Elections Emergency Meeting Agenda) (Bell, Brandon) (Entered: 07/27/2020)
07/27/2020	13	NOTICE of Appearance by Brandon S. Bell on behalf of Republican National Committee, Rhode Island Republican Party (Bell, Brandon) (Entered: 07/27/2020)
07/27/2020	14	MOTION for Thomas R. McCarthy to Appear Pro Hac Vice *for Defendants* (filing fee paid $ 100.00, receipt number 0103-1533367) filed by Republican National Committee, Rhode Island Republican Party. (Bell, Brandon) (Entered: 07/27/2020)
07/27/2020	15	MOTION for Patrick Strawbridge to Appear Pro Hac Vice *for Defendants* (filing fee paid $ 100.00, receipt number 0103-1533368) filed by Republican National Committee, Rhode Island Republican Party. (Bell, Brandon) (Entered: 07/27/2020)
07/27/2020	16	MOTION for Cameron T. Norris to Appear Pro Hac Vice *for Defendants* (filing fee paid $

		100.00, receipt number 0103-1533369) filed by Republican National Committee, Rhode Island Republican Party. (Bell, Brandon) (Entered: 07/27/2020)
07/27/2020		TEXT ORDER granting 14 Motion to Appear Pro Hac Vice for Thomas McCarthy filed by Brandon S. Bell. - So Ordered by District Judge Mary S. McElroy on 7/27/2020. (McGuire, Vickie) (Entered: 07/27/2020)
07/27/2020		TEXT ORDER granting 15 Motion to Appear Pro Hac Vice for Patrick Strawbridge filed by of Brandon S. Bell. - So Ordered by District Judge Mary S. McElroy on 7/27/2020. (McGuire, Vickie) (Entered: 07/27/2020)
07/27/2020		TEXT ORDER granting 16 Motion to Appear Pro Hac Vice for Cameron T. Norris filed by Brandon S. Bell. - So Ordered by District Judge Mary S. McElroy on 7/27/2020. (McGuire, Vickie) (Entered: 07/27/2020)
07/27/2020	17	NOTICE of Appearance by Joseph S. Larisa, Jr. on behalf of Republican National Committee, Rhode Island Republican Party (Larisa, Joseph) (Entered: 07/27/2020)
07/27/2020	18	Joint MOTION to Approve Consent Judgment *presented by all parties* filed by All Plaintiffs. **Responses due by 8/10/2020.** (Attachments: # 1 Exhibit Consent Judgment and Decree)(Labinger, Lynette) (Entered: 07/27/2020)
07/27/2020		Minute Entry for proceedings held before District Judge Mary S. McElroy: Motion Hearing held on 7/27/2020 re 5 MOTION for Temporary Restraining Order: B. Bell, D. Lang, J. Diaz, J. Ebenstein, M. Keats, L. Labinger (Plaintiffs), R. Marcaccio (Board), A. Tavaras (Gorbea), B. Bell, T. McCarthy, J. Larissa (Intervenors). Arguments heard. If potential interveners wish to file Rule 24 documents, they must do so by 7:00 p.m. on 7/27/2020. Responses to the Rule 24 documents due by 12:00 p.m. on 7/28/2020. Fairness hearing to be held on 7/28/2020 at 3:00 p.m. Recess. (Court Reporter L. Schwam via Video Hearing at 3:00 p.m..) (Potter, Carrie) (Entered: 07/27/2020)
07/27/2020		NOTICE of Hearing on Motion 12 Emergency MOTION for Hearing *Protective Motion for Fairness Hearing* : Motion Hearing set for 7/28/2020 at 03:00 PM in Remote Hearing before District Judge Mary S. McElroy. The Court will send out Zoom access information to counsel by email. (Potter, Carrie) (Entered: 07/27/2020)
07/27/2020	19	MOTION for Dale E. Ho to Appear Pro Hac Vice *for all Plaintiffs* (filing fee paid $ 100.00, receipt number 0103-1533746) filed by All Plaintiffs. (Labinger, Lynette) (Entered: 07/27/2020)
07/27/2020	20	*Proposed* ANSWER to Complaint by Republican National Committee, Rhode Island Republican Party.(McCarthy, Thomas) (Entered: 07/27/2020)
07/28/2020	21	RESPONSE In Opposition to 18 Joint MOTION to Approve Consent Judgment *presented by all parties* filed by Republican National Committee, Rhode Island Republican Party. **Replies due by 8/4/2020.** (Attachments: # 1 Exhibit District of Minnesota Decision) (McCarthy, Thomas) (Entered: 07/28/2020)
07/28/2020	22	RESPONSE In Opposition to 10 Amended MOTION to Intervene *as Defendants* filed by Nellie M. Gorbea. **Replies due by 8/4/2020.** (Taveras, Angel) (Entered: 07/28/2020)
07/28/2020	23	AFFIDAVIT re 22 Response to Motion by Nellie M. Gorbea. (Taveras, Angel) (Entered: 07/28/2020)
07/28/2020		TEXT ORDER granting 19 Motion to Appear Pro Hac Vice of Dale E. Ho. So Ordered by District Judge Mary S. McElroy on 7/28/2020. (Potter, Carrie) (Entered: 07/28/2020)
07/28/2020	24	RESPONSE In Opposition to 10 Amended MOTION to Intervene *as Defendants* filed by All Plaintiffs. **Replies due by 8/4/2020.** (Labinger, Lynette) (Entered: 07/28/2020)

07/28/2020		Minute Entry for proceedings held before District Judge Mary S. McElroy: Fairness Hearing held on 7/28/2020 re 10 MOTION to Intervene , *12 Emergency MOTION for Hearing 18 Joint MOTION to Approve Consent Judgment: B. Bell, D. Lang, J. Diaz, J. Ebenstein, M. Keats, L. Labinger (Plaintiffs), R. Marcaccio (Board), A. Tavaras (Gorbea), M. Field (State of RI), B. Bell, T. McCarthy, J. Larissa, C. Norris (Intervenors). Court questions; arguments heard. For reasons states on the record, Court grants MOTION to Approve Consent Judgment; denies MOTION to Intervene as Defendants. Interveners Oral Motion to Stay pending Appeal. Motion to Stay denied. Order to issue. Recess. (Court Reporter D. Veitch via Video Hearing at 3:00 p.m..) (Potter, Carrie) (Entered: 07/28/2020)*
07/28/2020		Oral MOTION to Stay *pending Appeal* filed by Republican National Committee, Rhode Island Republican Party. **Responses due by 8/11/2020.** (Potter, Carrie) (Entered: 07/28/2020)
07/28/2020		Order ORDER: For reasons stated on the record, Court denies Motion to Stay pending Appeal.. So Ordered by District Judge Mary S. McElroy on 7/28/2020. (Potter, Carrie) (Entered: 07/28/2020)
07/30/2020		AMENDED TEXT ORDER denying 10 Motion to Intervene - So Ordered by District Judge Mary S. McElroy on 7/28/2020. (Urizandi, Nisshy) Modified on 7/30/2020 to reflect that motion was denied on the record on July 28, 2020 (Urizandi, Nisshy). (Entered: 07/30/2020)
07/30/2020	25	AMENDED MEMORANDUM relative to approval of Consent Judgment - So Ordered by District Judge Mary S. McElroy on 7/28/2020. (Urizandi, Nisshy) (Main Document 25 replaced on 7/30/2020) (Urizandi, Nisshy). Modified on 7/30/2020 to reflect the correct date of the order(Urizandi, Nisshy). (Entered: 07/30/2020)
07/30/2020		AMENDED TEXT ORDER granting 12 Emergency MOTION for Hearing *Protective Motion for Fairness Hearing* filed by Rhode Island Republican Party, Republican National Committee. A Fairness Hearing was held on 7/28/2020 via Zoom before Judge Mary S. McElroy. The 5 MOTION for Temporary Restraining Order MOTION for Preliminary Injunction filed by Miranda Oakley, Mary Baker, Barbara Monahan, League of Women Voters of Rhode Island, Common Cause Rhode Island is denied as moot - So Ordered by District Judge Mary S. McElroy on 7/30/2020. (Urizandi, Nisshy) Modified on 7/30/2020 to reflect the correct date of the Fairness Hearing (Urizandi, Nisshy). (Entered: 07/30/2020)
07/30/2020	26	AMENDED CONSENT JUDGMENT AND DECREE - So Ordered by District Judge Mary S. McElroy on 7/28/2020. (Urizandi, Nisshy) Modified on 7/30/2020 to reflect the correct date of the ruling (Urizandi, Nisshy). (Main Document 26 replaced on 7/30/2020) (Urizandi, Nisshy). (Entered: 07/30/2020)
07/30/2020	27	Corporate Disclosure Statement by Common Cause Rhode Island, League of Women Voters of Rhode Island identifying Corporate Parent League of Women Voters of United States for League of Women Voters of Rhode Island; Corporate Parent Common Cause for Common Cause Rhode Island.. (Labinger, Lynette) (Entered: 07/30/2020)
07/30/2020	28	NOTICE OF APPEAL by Republican National Committee, Rhode Island Republican Party as to 25 Order on Motion to Approve Consent Judgment, Order on Motion for TRO, Order on Motion for Preliminary Injunction, Order on Motion for Hearing, 26 Consent Decree, Order on Motion to Intervene (filing fee paid $ 505.00, receipt number 0103-1534853) **NOTICE TO COUNSEL: Counsel should register for a First Circuit CM/ECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf/. Counsel should also review the First Circuit requirements for electronic filing by visiting the CM/ECF**

		Information section at http://www.ca1.uscourts.gov/cmecf Appeal Record due by 8/6/2020. (McCarthy, Thomas) (Entered: 07/30/2020)
07/30/2020	29	CLERK'S CERTIFICATE AND APPELLATE COVER SHEET: Abbreviated record on appeal consisting of notice of appeal, order(s) being appealed, and a certified copy of the district court docket report transmitted to the U.S. Court of Appeals for the First Circuit in accordance with 1st Cir. R. 11.0(b). Documents Sent: Amended Text Order of 7/30/20, 25, 26, and 28. (Attachments: # 1 Record on Appeal)(Simoncelli, Michael) (Entered: 07/30/2020)
07/30/2020	30	NOTICE OF APPEAL by Republican National Committee, Rhode Island Republican Party as to 25 Order on Motion to Approve Consent Judgment,, Order on Motion for TRO,, Order on Motion for Preliminary Injunction,, Order on Motion for Hearing, 26 Consent Decree, Order on Motion to Intervene (filing fee paid $ 505.00, receipt number 0103-1534942) **NOTICE TO COUNSEL: Counsel should register for a First Circuit CM/ECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf/. Counsel should also review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at http://www.ca1.uscourts.gov/cmecf** Appeal Record due by 8/6/2020. (McCarthy, Thomas) (Entered: 07/30/2020)
07/31/2020		USCA Case Number 20-1753 for 28 Notice of Appeal filed by Rhode Island Republican Party, Republican National Committee. (Potter, Carrie) (Entered: 07/31/2020)
07/31/2020	31	Supplemental Record on Appeal transmitted to U.S. Court of Appeals for the First Circuit. 28 Notice of Appeal. Unrestricted Documents Sent: 30. (Attachments: # 1 Record on Appeal)(Simoncelli, Michael) (Entered: 07/31/2020)
07/31/2020	33	TRANSCRIPT ORDER for proceedings held on July 28, 2020 before Judge Mary S. McElroy. Expedited Transcript selected. Transcript to be delivered within 7 calendar days.. (Keats, Michael) (Entered: 07/31/2020)
07/31/2020	34	TRANSCRIPT ORDER ACKNOWLEDGMENT Entered re: 33 Transcript Order. Court Reporter/Transcriber: Denise Veitch. (Dias, Jennifer) (Entered: 07/31/2020)

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

LEAGUE OF WOMEN VOTERS OF MINNESOTA EDUCATION FUND and VIVIAN LATIMER TANNIEHILL, Plaintiffs, vs. STEVE SIMON, *in his official capacity as Secretary of State of Minnesota*, Defendant, THE REPUBLICAN NATIONAL COMMITTEE and DONALD J. TRUMP FOR PRESIDENT, INC., Intervenor Defendants, REPUBLICAN PARTY OF MINNESOTA, Movant.	CIVIL FILE NO. 20-1205 (ECT/TNL) **VIA ZoomGov VIDEO CONFERENCE** Courtroom 3B Tuesday, June 23, 2020 St. Paul, Minnesota 11:00 A.M.

EXCERPT TRANSCRIPT FROM

FAIRNESS HEARING ON
STIPULATION AND PARTIAL CONSENT JUDGMENT AND DECREE

[COURT'S RULING FROM THE BENCH]

BEFORE THE HONORABLE ERIC C. TOSTRUD
UNITED STATES DISTRICT JUDGE

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(1:20 p.m.)

P R O C E E D I N G S I N P R O G R E S S

IN OPEN COURT

(VIA ZoomGov VIDEO CONFERENCE)

THE COURT: All right. Thank you.

All right. As I indicated earlier, I think that given the nature of the claims in this case and the background circumstances against which it is litigated, speedy decisions are important, and so I am prepared to rule from the bench today and I'll do that. Let me make a couple of prefatory points for those who are on the phone.

Because I'm going to be ruling from the bench today, it may sound a little awkward to those who are uninitiated in this sort of thing, because I'm going to be citing cases as I describe my ruling here today and that will interrupt the flow of the reasoning some, but it's necessary to substantiate the legal basis in the law that I think drives this decision.

As I did before with the motions to intervene, I'll explain my ruling on the record and this will be the only record of this ruling apart from short text-only orders that will be entered memorializing it on the docket. I'll not issue a written opinion later.

Let me deal with two threshold issues first. There's an argument that the ***Colorado River*** abstention

doctrine, under that doctrine I should abstain from deciding this question at this time. I do not believe that ***Colorado River*** applies here for several reasons. I'll name four or five of them.

First, ***Colorado River*** by its nature requires abstention or permits abstention from the whole of a case, not from particular issues in the case.

Second, there are different parties and somewhat different claims at issue in the state case. As I understand it, the state case also involves claims under the Minnesota state constitution, but more to the point, the six factors I am to determine whether there are exceptional -- or I am to apply, I should say, to determine whether there are exceptional circumstances justifying abstention are not met here.

There is no property over which the courts established jurisdiction.

There is no inconvenience to the federal forum.

I am concerned that separate actions may result in piecemeal litigation, but that is not uncommon when different parties file different lawsuits seeking essentially similar relief.

No one's made an argument about priority here, though this is the second filed case. I think the speed with which these cases have proceeded obviates any need to

consider that factor or any practical reason to base a decision to abstain here on that factor.

So, for those reasons, I just don't think the ***Colorado River*** abstention doctrine is a good fit.

I also do not think that the state case moots this case. There's a practical reason for that, which is the procedural posture of the state case. It is still pending. I'm not going to guess the likelihood of the consent decree in state court getting affirmed or reversed. That's not my point. My point is simply that there are proceedings ongoing there, and as long as those are ongoing, that state case cannot under the law serve to moot this case or render it moot. And here I would cite a case that the plaintiffs alluded to in their brief. The rule of law from that case is that a case or controversy is not rendered moot by a parallel state court decision that is either pending or likely to be appealed. That's ***Myer vs. Americo Life, Inc.***, 469 F.3d 731 (8th Cir. 2006).

So, I think the law requires me to move forward here and issue a decision, and I'll not approve the consent decree and I'll explain my reasons why here.

First, just so everybody knows, I understand the law that I'm obligated to apply here. The law requires me to exercise discretion to accept or reject a proposed consent decree. That's the ***BP Amoco Oil*** case, 277 F.3d

1012, an Eighth Circuit case from 2002.

I abuse my discretion "when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but [], in weighing those factors, [I] commit[] a clear error of judgment. That's ***Kern vs. Txo Production***, 738 F.2d 968, an Eighth Circuit case from 1984.

The Supreme Court has made clear that consent decrees should "spring from and serve to resolve a dispute within the court's subject-matter jurisdiction," "com[e] within the general scope of the case [from] the pleadings," and "further the objectives of the law upon which the complaint was based." That's the ***Firefighters vs. City of Cleveland*** case, 478 U.S. 501 (1986).

The Eighth Circuit instructs that relevant considerations to evaluate a consent decree: "include, but are not limited to, the interest of the public, federalism, the relative strength of Plaintiff's claim, and whether the consent decree resolves the actual controversy in the complaint." Here I would cite ***Dalton vs. Barrett***, 2020 WL 420833. That is a Western District of Missouri case applying Eighth Circuit law from 2020.

When reviewing a proposed consent decree, the law

requires me to review it for fairness, reasonableness, and adequacy. I am not to rely on the standards for post-trial relief. ***EEOC vs. Siouxland Oral Maxillofacial Associates***, 578 F.3d 921 (8th Cir. 2009). It is true that the law prefers settlement agreements, and although that is true, the law is also clear that courts must not abdicate their duty to adjudicate controversies before them in accordance with the law merely because the parties have proposed a consent decree. ***Angela R. by Hesselbein vs. Clinton***, 999 F.2d 320 (8th Cir. 1993). Accordingly, a federal district court cannot merely "rubber stamp" a consent decree, but must instead "carefully consider[] the underlying facts and legal arguments ...."

In some cases, federal courts "give due deference to [a federal agency's] inherent expertise [] in determining whether to approve the consent decree," and I will assume for the time being that it is proper here to give the Secretary that kind of deference. Here I'm looking at ***United States vs. City of Waterloo*** as an example of that, 2016 WL 254725 (Northern District of Iowa 2016).

Courts considering whether a consent decree is fair must consider both procedural fairness and substantive fairness. Procedural fairness turns on whether the parties "were ... negotiating in good faith and at arm's length." "To measure procedural fairness, a court should ordinarily

look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance." That's the ***Union Electric Company*** case, 943 F.Supp. at 327.

Here, I have no basis to find that the consent decree is not procedurally fair. We've got multiple individuals involved on both sides of this case between Plaintiffs and Defendants, several lawyers and their parties, their clients. There were no pre-suit negotiations. The settlement agreement -- well, the consent decree, I should say -- went through multiple drafts and several rounds of communication over a relatively extended period of time given the speed with which this case has proceeded. The negotiations ramped up after the motion for a preliminary injunction was filed. Material terms -- I should say terms that both parties considered material -- were deleted. And I think most importantly, counsel here have represented that the negotiations were at arm's length and I have no difficulty whatsoever accepting that representation. Against that backdrop, I cannot say that the terms of the settlement agreement -- or of the consent decree, rather -- themselves show procedural unfairness.

I'll confess that I've read numerous cases in preparation for this hearing, and I'm not sure of the difference between substantive fairness, reasonableness, and adequacy. My take on these cases is that these elements

call for consideration of overlapping factors. So I'll quote a couple of cases here that I think fairly describe the standard that I am to apply.

"When determining whether a consent decree is reasonable, the court must consider the technical adequacy of the remedies, the adequacy of the settling defendants' obligations, and the savings represented by settlement over litigation." That's from ***United States vs. Mallinckrodt, Inc.***, 2007 WL 1231665 (Eastern District of Missouri 2007).

In evaluating reasonableness, I am not to examine whether the settlement is one which I myself might have fashioned or consider to be ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing law. At the same time, however, as we've talked about today a number of times, "A consent decree is a judicial act. Thus, before entering such a decree, the Court must ensure that it does not 'put the court's sanction on and power behind a decree that violates [either the] Constitution, statute, or jurisprudence.'" Here I'm citing ***Missouri vs. Westinghouse Electric, LLC***, 487 F.Supp. 2d 1076 (Eastern District of Missouri 2007). In other words, I must be satisfied that the decree represents a reasonable, factual and legal determination, and relevant considerations here include the interest of the public, federalism, the relative strength of Plaintiff's claim, and whether the

consent decree resolves the actual controversy in the complaint.

I find that the consent decree is not substantively fair or reasonable because it would, if approved, impose relief that goes well beyond remedying the harm Plaintiffs allege to suffer in support of their as-applied challenge to Minnesota's witness requirement for the August primary. It would impose injunctive relief that is not necessary or justified by Plaintiffs' factual showing.

I want to be clear about something here. I have no doubt that Ms. Latimer Tanniehill has established that she suffers from serious health conditions, that she reasonably has gone to great lengths to protect herself from exposure to COVID-19, that if she contracted COVID-19, she would be at grave risk. I am concerned that Minnesota's witness requirement would, if enforced against her in connection with the August primary, jeopardize both the efforts that she has taken not to expose herself to the virus and her health. But I also want to be clear that I'm not deciding whether Plaintiffs have or have not shown that the issuance of a consent agree or injunctive relief excusing Ms. Latimer Tanniehill -- and others like her who reasonably fear that complying with the witness requirement will risk their health and safety -- from complying with the

witness requirement for the August primary would be justified. I am not deciding that issue. I do think it's important nonetheless to acknowledge these concerns. The problem as I see it under the law is that the consent decree goes well beyond that and, in doing so, violates settled legal principles that I understand I am required here by the Eighth Circuit to apply in adjudicating the reasonableness of the decree.

Foremost among them, injunctive relief must be narrowly tailored to remedy only the specific harms established by the plaintiff, and I'll cite as one example of a case espousing -- or articulating that rule, I should say, ***Lytle***, L-Y-T-L-E, ***vs. United States Department of Health & Human Services***, 612 Fed. App'x 861. That's an Eighth Circuit case from 2015.

The harms established by Plaintiffs here are risk of exposure to COVID-19 owing to health conditions and personal circumstances that give one a reasonable fear that complying with the witness requirement will risk one's health and safety. That's not everyone. Some individuals, for example, may have compromised health but may reside with others who may fulfill the witness requirement. Many others do not face the health challenges faced by Ms. Latimer Tanniehill. Plaintiffs have not with their as-applied challenge shown a justification for the Secretary's blanket

refusal to enforce the witness requirement. In other words, that blanket refusal -- and the injunctive force that would go with it if the consent decree were approved -- go well beyond Plaintiffs' injuries, and Plaintiffs have not established a need for wholesale non-enforcement of the witness requirement.

The Secretary, as I understand the consent decree, agrees with this. The consent decree describes his position at paragraph 15, and it makes clear that he agrees, quote, "not to enforce the witness requirement for the August primary for absentee voters who fear that complying with the requirement will risk their health and safety and possibly expose them to COVID-19, close quote. It seems unreasonable to read that sentence, or clause, and conclude it is intended to describe every Minnesota absentee voter. I think it is more reasonable to conclude that describes a subset of Minnesotans, yet the remedy the consent decree would impose goes beyond that. No explanation has been provided how such an expansive remedy is needed to address the rights of these plaintiffs in this case.

And for those reasons, I will not approve the proposed consent decree.

I would ask where the case goes from here, but I appreciate that there are many possibilities, and I don't think it's fair to put you all on the spot and predict an

answer. Rather than do that or try to engage in that discussion, I'll simply ask at this time whether there's anything further anyone thinks we need to cover here today.

And I'll start with you, Ms. Taylor, for the Secretary. Anything further you think we need to cover here today?

MS. TAYLOR: Nothing further, Your Honor.

THE COURT: Okay. Mr. Diaz for the plaintiffs?

MR. DIAZ: Not for today, Your Honor.

THE COURT: All right. And then finally Mr. Norris for the intervenors.

MR. NORRIS: Nothing, Your Honor. Thank you.

THE COURT: Okay. Thank you, everyone. I appreciate the advocacy in this case. I don't say this very often, but I'm going to say it here. It was just excellent on all sides and I appreciate that. It serves the public interest and it makes our job a lot easier and I am very appreciative of that, so I thank everyone for their excellent advocacy here.

All right. We will stand adjourned. Thank you.

(Proceedings concluded at 1:38 p.m.)

* * * *

C E R T I F I C A T E

I, **TIMOTHY J. WILLETTE,** Official Court Reporter for the United States District Court, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes, taken in the aforementioned matter, to the best of my skill and ability.

/s/ Timothy J. Willette

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