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; MARY BAKER,
Plaintiffs-Appellees,

vs.

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

On Appeal from the United States District Court
for the District of Rhode Island

PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL

Dale E. Ho, Bar #1175431
On the Papers (not admitted to this Court):
Julie A. Ebenstein
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
125 Broad Street, 18th Floor
New York, NY 10004
(212) 284-7332 (phone)
jebenstien@aclu.org
dho@aclu.org

Lynette Labinger, Bar #23027
Cooperating counsel,
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF RHODE ISLAND
128 Dorrance St., Box 710
Providence, RI 02903
(401) 465-9565 (phone)
ll@labingerlaw.com

Paul Smith, Bar #48006
On the Papers (not admitted to this Court):
Jonathan Diaz
Danielle Lang
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Suite 400
Washington, DC 20005
(202) 736-2200 (phone)
psmith@campaignlegal.org

Michael C. Keats, Bar #38813
On the Papers (not admitted to this Court):
Christopher H. Bell
Nicholas Carre
Avani Uppalapati
Nicholas Narbutas (law clerk, not admitted to practice)
Agatha Erickson (law clerk, not admitted to practice)
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
One New York Plaza
New York, NY 10004
(212) 859-8914 (phone)
(212) 859-4000 (fax)
Michael.Keats@friedfrank.com

Attorneys for Plaintiffs

TABLE OF CONTENTS

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

In accordance with Local Rule 34.0, Plaintiffs-Appellees request that the Court hold an expedited oral argument on Thursday, August 6 at 2:00 P.M. (or at another suitable time for the Court on or before Friday, August 7) on Movants' Emergency Motion for Stay to ensure that in this expedited and important proceeding there is no mischaracterization of the record before it. The case concerns the Constitutional rights of all Rhode Island voters, as well as their health and safety, and raises questions essential to the functioning of the electoral process. Moreover, oral argument will allow Plaintiffs-Appellees to explain why it is critical that the State continue to print mail-in voter ballots and envelopes as provided for in the Consent Decree ahead of the September 8, 2020 primary election. Oral argument will further allow the Court to seek clarification and context as to the record and proceedings below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Plaintiffs-Appellees Common Cause Rhode Island ("CC-RI") (a nonprofit association), and the League of Women Voters of Rhode Island ("LWV-RI") (a nonprofit association), certify as follows:

CC-RI is a state office of Common Cause, a nonprofit association with no corporate parent. No publicly-held corporation owns 10% or more of CC-RI.

LWV-RI is a nonprofit association with no corporate parent. No publicly-held corporation owns 10% or more of LWV-RI.

INTRODUCTION

Following briefing and argument on an undisputed evidentiary record regarding the ongoing COVID-19 pandemic and the substantial health risks to voters, the District Court approved a consent judgment and decree (the "Consent Decree") suspending Rhode Island's requirement that an eligible voter cast their mail-in ballot before two witnesses or a notary, each of whom must then sign the mailing envelope certifying they witnessed the event (the "two-witness requirement"), solely for purposes of the September 8, 2020 primary and November 3, 2020 general elections. The Republican National Committee and Rhode Island Republican Party (collectively "Movants") belatedly sought to intervene to oppose entry of the Consent Decree, and, despite their delay, were permitted to submit briefing and present their objections. Movants then waited nearly two full days to file an Emergency Motion for Stay Pending Appeal, filed July 31, 2020 (the "Motion to Stay" or "MTS"), in a transparent effort to force tens of thousands of Rhode Islanders to choose between risking their health and surrendering their right to vote in the upcoming elections. Movants' Motion to Stay—coming in the midst of a raging pandemic that has claimed the lives of more than 150,000 Americans—should be summarily rejected for the irresponsible abdication of public responsibility that it represents.

Movants have utterly failed to demonstrate that their appeal is likely to succeed on the merits. As an initial matter, the District Court did not abuse its discretion in denying Movants' tardy motion to intervene, even though the Court did allow them to submit briefing and present argument, and Movants therefore have no standing to appeal to this Court. More fundamentally, Movants' primary argument that the Consent Order was both entered too late on the eve of the September 8, 2020 primary, and too early before the November 3, 2020 general election in violation of the *Purcell* voter confusion principle, is wrong as a matter of law and ignores that Rhode Island suspended the two-witness requirement in the State's June 2, 2020 presidential primaries without any evidence of voter confusion. Indeed, 83% of the ballots cast in the June primaries were cast by mail-in ballot.

Movants also cannot demonstrate that suspending the two-witness requirement exposes Movants to voter fraud. Movants fully conceded below that there was no evidence of any voter fraud in the June primaries; were unable to identify any harm to them whatsoever due to the suspension of the two-witness requirement in the June primaries; and indeed, never even bothered to challenge Rhode Island's suspension of the two-witness requirement before the June primaries. Movants also neglect to mention that two other federal courts and one state court have granted similar relief with respect to mail-in ballot witness requirements. *See Thomas v. Andino,* No. 3:20-cv-01552-JMC, 2020 U.S. Dist. LEXIS 90812 (D.S.C.

May 25, 2020); *League of Women Voters of Virginia. v. Va. State Bd. of Elections,* No. 6:20-CV-00024, 2020 U.S. Dist. LEXIS 79439 (W.D. Va. May 5, 2020); Ex. G (Order, *LaRose v. Simon*, No. 62-CV-3149 (Minn. D. Ct. August 3, 2020)).

The Consent Decree recognizes the need for Rhode Island officials charged with election administration to have certainty in light of looming deadlines for printing mail-in ballots, envelopes, and instructions and mailing them to voters. Movants' Emergency Motion to Expedite Emergency Motion for Stay Pending Appeal (the "Motion to Expedite" or "MTE") wrongly asserts that a decision by August 10 will provide enough time to complete printing. It is based on a pure hearsay statement of the Chair of the Rhode Island Republican Party about a conversation she had with a New York printer that Rhode Island does not use, and who would have no way of knowing the actual logistics of providing hundreds of thousands of voters with mail-in ballots. *See* MTE at 2 and MTE Ex. A, Affidavit of Suzane Cienki. In fact, it is already too late to stay the Consent Order without irreparable harm to Plaintiffs-Appellees' ability to receive their mail-in ballots with sufficient time to vote. *See* Doc. 23, Ex. F,[1] Affidavit of Robert Rock.

Rhode Island today reports over 19,000 confirmed cases of COVID-19, and over 1,000 deaths. In light of the severe burdens imposed by the two-witness

[1] For the Court's convenience, Plaintiffs-Appellees have included entries from the record below as exhibits to their Response. A table listing these exhibits is located at page 27.

requirement on Rhode Islanders' right to vote in the midst of the COVID-19 pandemic, all parties to this matter and the District Court endorsed necessary and limited measures to ensure that qualified Rhode Island voters are able to safely and securely exercise their fundamental right ahead of the State's September 8 and November 3, 2020 elections. This Court should deny Movants' Motion to Stay the Consent Decree, and help ensure that the pandemic does not cost Rhode Island citizens more dearly than it already has.

ARGUMENT

I. Appellants Are Not Entitled to a Stay of the District Court's Order Entering the Consent Decree Because They Cannot Satisfy Any of the Four Factors.

Movants are not entitled to a stay of the District Court's order. A party (which Movants are not, *see* Sec. II, *infra*) requesting a stay of a court injunction pending appeal bears the burden of showing that the circumstances of the case justify the exercise of the court's discretion. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). In cases involving stays of actions pending appeal, the Court considers four factors: (1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent relief; (3) whether issuance of relief will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Id*. at 434 (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "Once a right and a violation have been

shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Morgan v. Kerrigan*, 523 F.2d 917, 921 (1st Cir. 1975) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)). The appellate court reviews the district court's exercise of these powers for abuse of discretion. *Id.*

A. Movants are Highly Unlikely to Succeed on the Merits.

A party moving for a stay of a district court order must demonstrate more than a mere possibility of success; it must demonstrate strong likelihood of success. *See Nken*, 556 U.S. at 434-435; *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010). The Equal Protection Clause of the Fourteenth Amendment prohibits any encumbrance on the right to vote that is not adequately justified by a valid state interest. *See Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983).

Here, as the District Court found, it is the *Plaintiffs-Appellees* who have demonstrated a strong likelihood of success on their claims under the First and Fourteenth Amendments, and indeed would have entered a TRO and preliminary injunction if the parties had not agreed to the Consent Decree. MTS at ADD10. Movants simply cannot overcome their immense burden to demonstrate that both the District Court and State officials charged with administering elections got it wrong. Plaintiffs-Appellees are highly likely to succeed on their claims because the First and Fourteenth Amendments do not permit a state to deprive tens of thousands

of qualified citizens of the right to vote by maintaining a requirement that runs counter to public health guidance and does little, if anything, to promote election integrity.

i. The Two-Witness Requirement Indisputably Burdens Plaintiffs-Appellees' Constitutional Rights.

As the Supreme Court set forth in *Anderson v. Celebrezze* and *Burdick v. Takushi,* courts must balance the character and magnitude of any law burdening the right to vote against the relevant government interest served by the law.[2] *Burdick v. Takushi,* 504 U.S. 428, 434 (1992) (citing *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983)). Courts consider both the reach and severity of the burden on those impacted in determining the applicable level of scrutiny under *Anderson-Burdick*. *See Barr v. Galvin,* 626 F.3d 99, 109 (1st Cir. 2010).

It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote. *Griffin v. Burns*, 570 F.2d 1065, 1074 (1st Cir. 1978). (holding that the State's refusal to count valid absentee and shut-in ballots was constitutionally wrong, thereby ordering a new election). While there is no absolute right to vote by absentee ballot, the privilege of absentee voting is certainly "deserving of due process[.]" *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990). Having induced voters to vote by

[2] *See* Doc. 5-1, Ex. C at 23-25 (Motion for TRO).

absentee ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted. *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018).

Movants argue that because in-person voting remains available, unburdened by the witness requirement, "the right to vote is not at stake here." MTS at 14 (internal citations omitted). This statement brazenly ignores the context of Plaintiffs-Appellees' *as applied* challenge to the two-witness requirement in the midst of the COVID-19 pandemic.[3] Plaintiffs-Appellees have offered sworn statements from medical professionals as to the critical necessity of social distancing generally, Doc. 5-1, Ex. C ¶ 11 (Declaration of Dr. Arthur L. Reingold), and the risks posed by the two-witness requirement in particular. Doc. 5-3, Ex. C at 3, ¶¶ 9, 10 (attached to Brief as Exhibit B) (Declaration of Dr. Michael Fine). In addition, the State's online notarization process (not to mention finding a qualified notary) is so impractical as to be effectively unavailable to the large majority of Rhode Island voters. See Doc. 5-1, Ex. C at 32-33. Movants' attempt to analogize the burden to an administrative

[3] Movants' assertions notwithstanding, the Rhode Island legislature has taken no action regarding the two-witness requirement in the context of the COVID-19 pandemic. The State Senate did not pass legislation which would have provided for mail-in voting for the remaining 2020 elections, including a provision to eliminate the two-witness requirement. Opponents cited a provision of the legislation which would have required applications for mail-in ballots to be sent to every registered voter. *See A Battle Over Mail Ballots*, WJAR (July 17, 2020), https://turnto10.com/i-team/battle-over-mail-ballots.

nuisance akin to Indiana's photo ID requirement is absurd on its face and refuted by the Declarations submitted in support of the Motion for Temporary Restraining Order and Preliminary Injunction. *See* MTS at 15 (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008)). Movants submitted no counter-evidence.

In addition, Movants' suggestion that the two-witness requirement will affect only a "small, idiosyncratic subset of voters" is obnoxious. MTS at 17. The District Court found that, based on U.S. Census estimates from 2018, 197,000 Rhode Islanders aged 18 and over live alone. MTS at ADD4-ADD5. Another 289,000 Rhode Islanders of voting age live with only one other person. *Id.* at ADD5. These 486,000 Rhode Island citizens of voting age will normally not be able to comply with the two-witness requirement without violating the State's social distancing guidelines which exist to protect their safety.[4] And yet this number is still under-inclusive. For example, in a four-person household consisting of two parents and two children, the parents will not be able to comply with the two-witness requirement without violating social distancing guidelines. In addition, not all adults will be capable of serving as witnesses.

[4] These census figures, relied upon by the District Court, completely refute Movants' insinuation that the parties relied solely "on affidavits from three voters to craft statewide relief." MTS at 18.

Even assuming that only the elderly and disabled have a legitimate fear of the COVID-19 virus,[5] the two-witness requirement will require tens of thousands of voters to risk their health in order to exercise their right to vote. Of the estimated 486,000 Rhode Islanders of voting age living alone or with one other person, an estimated 37,000 are disabled and an estimated 138,000 are aged 65 and over (these categories can and do overlap). Doc. 5-9, Ex. C (attached to Brief as Exhibit H) (CPS Data for 2018). If even a fraction of the 83% of Rhode Island voters who chose to vote by mail in the State's June 2, 2020 presidential primary choose to vote by mail, tens of thousands of voters, not to mention individual Plaintiffs-Appellees, must put their health at risk in order to exercise their constitutional rights. Doc. 5-1, Ex. C at 19-22. Courts have found that laws burdening far fewer (and a lower percentage of) voters violate *Anderson-Burdick*. *See id.* at 22-25.

Movants cite Rhode Island's Phase III reopening plan in a futile attempt to demonstrate that voters can vote safely. MTS at 15. However, the State's own Phase III guidance provides that "[a]ll vulnerable populations identified by the Centers for Disease Control and Prevention (CDC), including anyone age 65 and older, are still strongly advised to stay at home unless they must go to work; travel for medical

[5] Movants' assumption fails to account for the countless citizens who may fear infecting a member of their household, even if they do not consider themselves to be at risk.

treatment; or get other necessities such as groceries, gas, or medication."[6] Movants make no attempt to engage with Plaintiffs-Appellees' sworn statements of medical professionals, or the considered judgment of Defendants-Appellees who entered into the Consent Decree. Movants also completely ignore Rhode Island's worsening COVID-19 trend. *See* Doc. 5-1, Ex. C at 6-8. In fact, a mere *six days ago* (July 29), Gov. Raimondo announced the State would remain in Phase III until August 28 with a *lowered* social gathering limit of 15 people as "social gatherings have been the source of many positive cases."[7] Neighboring Connecticut has issued a travel advisory against Rhode Island, requiring a 14-day quarantine for those coming from the state.[8] New York has done the same.[9]

ii. The District Court's Judgment Stands Firmly on Established Precedent.

Recognizing that the COVID-19 pandemic has "dramatically changed" life in America, courts across the country have authorized changes to election regulations to protect voters' health and safety. *Libertarian Party v. Sununu*, No. 20-cv-688-JL,

---

[6] R.I. Exec. Order No. 20-50 (June 29, 2020), https://governor.ri.gov/documents/orders/Executive-Order-20-50.pdf.
[7] *Rhode Island Covid-19 Information*, STATE OF R.I. DEPT. OF HEALTH, https://health.ri.gov/covid/ (last updated Aug. 3, 2020).
[8] *RI Added to CT COVID-19 Travel Advisory Requiring Possible Quarantine*, NBC CONNECTICUT (Aug. 4, 2020), https://www.nbcconnecticut.com/news/coronavirus/ri-added-to-list-of-covid-19-hot-spots-requiring-14-day-quarantine/2313200/.
[9] N.Y. GOV. (Aug. 4, 2020), https://www.governor.ny.gov/news/governor-cuomo-announces-individuals-traveling-new-york-additional-state-will-be-required.

2020 U.S. Dist. LEXIS 133437 at *34-45 (D.N.H. July 28, 2020) (listing cases). Critically for this litigation, other courts have determined that state laws requiring that only a *single* witness observe the voter's signature on a mail-in ballot envelope pose an unconstitutional burden on the right to vote. *See Thomas,* 2020 U.S. Dist. LEXIS 90812; *League of Women Voters of Virginia.,* 2020 U.S. Dist. LEXIS 79439. This distinction is important because far more voters will have access to one adult in their household capable of serving as a witness.

In *League of Women Voters of Virginia* the court entered a consent decree over the objections of the state Republican Party which suspended the state's *single*-witness requirement for the upcoming presidential primary in light of the COVID-19 pandemic. 2020 U.S. Dist. LEXIS 79439 at *24-25. Like the consent decree in that case, this Consent Decree relates only to specific imminent elections, affects only "one of several verification requirements" and does not affect any political party in particular. *Id.* at *45. The Court found the requirement posed an unconstitutional burden on the electorate's right to vote, declaring "[t]he Constitution does not permit a state to force such a choice on its electorate" and that the witness requirement poses a "substantial burden" on the right to vote. *Id.* at *25, 27.

In *Thomas* the court found that, despite the opposition of state election officials, the plaintiffs were likely to prevail on their claim that the state's

requirement that a *single* witness be present when a voter signs their mail-in ballot posed an undue burden on South Carolina voters. 2020 U.S. Dist. LEXIS 90812 at *54-55. The court observed that, while the state's witness requirement had not "absolutely prohibited voting," in-person voting presented voters with an "illusory choice between exercising their right to vote and placing themselves at risk of contracting a potentially terminal disease." *Id.* at *46 n.20.

Movants' references to stays of injunctions in Alabama and Wisconsin withhold critical contextual information from the Court. In *People First of Ala. v. Merrill*, the Supreme Court's stay of the injunction pending appeal runs a mere 117 words, and provides no guidance to this Court as to which of the several election laws enjoined by the district court the Supreme Court may have found objectionable, or why. No. 19A1063, 2020 U.S. LEXIS 3541 (July 2, 2020). In *Democratic Nat'l Comm. v. Bostelmann,* Doc. 30, No. 20-1538 (7th Cir. 2020), the Seventh Circuit's stay of the district court order suspending the state's witness requirement for mail-in ballots relied almost entirely on the Wisconsin Election Commission's insistence (early in the pandemic before 150,000 Americans died) that voters could safely comply, and the Commission's guidance to voters in doing so. The Seventh Circuit's admonition that courts should be guided by the wisdom of state actors charged with administering elections is exactly the position taken by Plaintiffs-Appellees in this case.

Finally, Movants' reference to *League of Women Voters of Minn. v. Simon*, No. 20-1205, Doc. 54 (D. Minn 2020) omits the critical fact that, less than a week before the district court declined to enter a consent order in that case, a Minnesota state court entered a substantially similar order for the August 11 primary election and, subsequently, the November 3 general election that provided the district court plaintiffs their desired relief and essentially mooted the issue. Ex. G (Order, *LaRose v. Simon*, No. 62-CV-3149 (Minn. D. Ct. Aug. 3, 2020)). The case is also clearly distinguishable because the court considered only a single witness requirement (imposing a smaller burden on voters), in a state that did not have Rhode Island's experience of successfully suspending the requirement in an election held only two months prior.

iii. *Purcell* is Not Applicable.

Movants couch *Purcell v. Gonzalez*, 549 U.S. 1 (2006), as a "general equitable principle," arguing that it therefore applies to consent decrees and injunctions with equal force. MTS at 12. This argument cannot withstand the slightest scrutiny. *Movants cite no case* (and Plaintiffs-Appellees are aware of none) in which *Purcell* was invoked to overturn a consent decree. This is only logical, as state actors are entitled to deference, and their endorsement of a remedy greatly reduces the risks of voter confusion and unwarranted administrative burdens.

Here, the District Court "rejected [Movants'] main argument that 'changing the rules' on the eve of an election would cause voter confusion," noting that "[i]n fact, the opposite is true." MTS at ADD8 n.5. 83% of Rhode Island voters voted by mail in the State's June 2, 2020 presidential primaries, which were conducted without the two-witness requirement. *See* Doc. 5-1, Ex. C at 9-13. Considering the vast increase in mail-in ballots compared to prior elections, many, if not most of these voters surely voted by mail for the first time in June, 2020. Enforcing the two-witness requirement for the State's pending September and November elections would confront voters with a requirement that was not applied only two months ago, with which voters may be entirely unfamiliar.

B. Movants will Not be Irreparably Injured Absent a Stay.

Once a constitutional violation is established, "the district court must adopt a plan that provides immediate and effective relief." *Morgan v. Kerrigan*, 523 F.2d 917, 921 (1st Cir. 1975). To stay such an order, Movants must demonstrate not just the possibility of irreparable harm, but that such harm is "likely[.]" *Respect Me. PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008)).

Movants argue that the consent decree suspends measures necessary to assure the integrity of the State's upcoming elections. MTS at 19. However, as the District Court found, "[t]here is no information in the record, nor was any brought forth, that

recent Rhode Island elections are susceptible to fraud." MTS at ADD6. Indeed, this is the rare case in which the Court need not speculate, but can look to the State's recent experience holding an election without the challenged election requirement—an election for which there were no allegations of fraud from Movants or anyone else. *See* Doc. 5-1, Ex. C at 9-13. Even nationwide electoral fraud is rare, and in any case Rhode Island has other measures sufficient to protect its elections. *Id.* at 28-29. For the same reasons Movants lack any interest in this matter sufficient to intervene, they cannot demonstrate even a suggestion (much less a likelihood) of irreparable harm in the absence of a stay. *See* Sec. II.B, *infra*.

C. A Stay Would Harm Plaintiffs-Appellees and Defendants-Appellees, and is Not in the Public Interest.

The burden a stay would impose on Plaintiffs-Appellees and Defendants-Appellees is so clear and obvious that, in their Motion for Stay, Movants make no attempt to argue otherwise. As Defendant-Appellee Secretary Gorbea argues, time is of the essence "to make sure all Rhode Islanders who request a mail ballot obtain one and are able to safely vote by mail." Doc. 22, Ex. E at 3. If voters receive their mail-in ballots late, they may well find themselves without sufficient time to complete and mail their ballots so that they are received by the Board of Elections on or before election day. R.I. Gen. L. § 17-20-23(c). Should the State fall critically

behind in the ballot-printing process, it may be left with no choice but to rely on its stock of ballots that include the two-witness requirement. Doc. 23, Ex. F ¶ 13.

These critical deadlines in the ballot printing process mean that, at bottom, a stay of the Consent Decree at this late date makes it far more likely that Rhode Island voters will be forced to comply with the two-witness requirement for the State's upcoming September 8 primary and November 3 general elections. As explained *supra*, this will leave tens of thousands of Rhode Island voters with no choice but to risk their health in order to vote (whether by complying with the two-witness requirement or voting in-person). Against this clear and present danger to voters' health and constitutional rights the Court must weigh the harm of fraud for which Movants can produce no evidence.

Movants' public interest arguments rest almost entirely on their conclusory assertion that the two-witness requirement is likely constitutional. MTS at 19–20. However, the District Court and all parties to this litigation concur that it is not constitutional as applied during the COVID-19 pandemic. A "state [much less a political party] is in no way harmed by the issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002). Upholding the Consent

Decree will allow Rhode Islanders to continue to observe health guidelines while exercising their fundamental right to vote. *See* MTS at ADD5. This is an "easy call."

II. Movants Were Heard by the District Court, and Their Motion to Intervene was Properly Denied.

A. Movants Were Heard by the District Court, and Offered No Evidence in Support of Their Objections.

With regards to Movants' Motion to Intervene, the salient fact is that, even if the District Court *had* permitted Movants to intervene in the matter below, it would have made *no difference* to the outcome of this case. Movants first sought to intervene late on Sunday, July 26, insisting that intervention was necessary to allow them to "air their views." Doc. 11, Memorandum in Support for Motion to Intervene at 9. Despite their tardy appearance, the District Court permitted Movants to brief the court on their objections to the Consent Decree. *See* Doc. 21, Response In Opposition to Joint Motion to Approve Consent Judgment. As Movants themselves admit, at the Tuesday, July 28 fairness hearing the District Court allowed the Movants to participate "in equal measure to the parties[.]" MTS at 4 (citing MTS at ADD8).

And yet, despite their active participation, the record is devoid of even the slightest evidence for Movants' objections. The District Court's Memorandum and Order in support of its entry of the Consent Decree notes that "[t]here is no information in the record, nor was any brought forth, that recent Rhode Island

elections are susceptible to fraud." MTS at ADD6. In addition, the District Court "found no evidence of collusion." *Id.* at ADD8 n.5. To their assertion that the Consent Decree would lead to voter confusion, the District Court found that "[i]n fact, the opposite is true." *Id.* Movants were unable to offer even the most threadbare factual support for their conclusory allegations.

Ultimately the District Court determined that, had it been obliged to rule on Plaintiffs-Appellees' Motion 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." *Id.* at 10. There is absolutely no reason to believe that, had Movants been granted intervenor status, the District Court would have reached a different conclusion.

B. Appellants are Not Entitled to Intervene.

To succeed on a motion to intervene as of right, a putative intervenor must demonstrate: (i) the timeliness of [the] motion to intervene; (ii) the existence of an interest relating to the property or transaction that forms the basis of the pending action; (iii) a realistic threat that the disposition of the action will impede [the] ability to protect that interest; and (iv) the lack of adequate representation of [the intervenor's] position by any existing party. *See R & G Mortg. v. Fed Home Loan Mortg. Corp.*, 584 F.3d 1, 7 (1st Cir. 2009). The putative intervenor "must run the

table and fulfill all four of these preconditions." *Public Serv. Co. v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998).

Permissive intervention is "wholly discretionary," and the court may consider "almost any factor rationally relevant . . . ." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 113 (1st Cir. 1999); *see* Fed. R. Civ. P. 24(b). *Inter alia*, courts consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *See Students for Fair Admissions*, 308 F.R.D. 39, 51 (D. Mass. 2015) (aff'd 807 F .3d 472 (1st Cir. 2015)). This Court reviews the denial of a motion to intervene for abuse of discretion. *See Int'l Paper Co. v. Inhabs. of Jay, Me.*, 887 F.2d 338, 344 (1st Cir. 1989).

Here, Rhode Island's upcoming elections are only weeks away, MTS at ADD1, and the envelopes should have already been finalized by July 17. Doc. 23, Ex. F ¶ 7. As the Secretary of State's Director of Elections makes clear, August 10 is the date on which the Secretary's office must begin to *mail ballots to voters*. *Id.* at ¶¶ 6, 7. It is *not* the date by which instructions must be *sent to the printer*. MTE at 2. In this context, every day was and is critical to avoid delaying printing ballots for the September 8, 2020 primary. Doc. 23, Ex. F ¶ 11. Movants' unwarranted substitution of their judgment as to the urgency of the ballot-printing process is of a piece with their failure to appreciate the prejudice their intervention would cause, and is reason alone for rejecting Movants' Motion to Intervene.

Movants have failed to establish a "significantly protectable interest" sufficient to intervene. *Patch*, 136 F.3d at 205. Here, Movants "simply claimed a desire to 'protect' their voters from possible election fraud and to see that existing laws remained enforced." MTS at ADD8 n.5. This, of course, "is the same interest the Defendants-Appellees agencies are statutorily required to protect." *Id.* Such a generalized interest cannot support intervention. *See, e.g., Common Cause Ind. v. Lawson*, 2018 U.S. Dist. LEXIS 30917 at *13 (S.D. Ind. Feb. 27, 2018). This is doubly so where, as here, Movants failed to object to the challenged requirements when they were suspended for the June 2, 2020 presidential primary. While Movants intimate that that they did not intervene because the national primaries were largely decided by the time of the June primaries, Movants cannot claim they had no interest in the two-witness requirement when they faced certain victory, but suddenly have an interest when they face potential defeat.

In addition, Defendants-Appellees are members of representative government bodies, and are therefore presumed to adequately represent the interests of Rhode Island citizens. *Patch*, 136 F.3d at 207–08; *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979). As Movants admit, this presumption can be rebutted only if the movant shows "adversity of interest," "collusion," "nonfeasance," or other relevant circumstances. MTS at 9. Here, far from abrogating their duties, Defendants-Appellees insisted that the Consent Decree provide that the

Secretary and Board of Elections could request that voters provide drivers' license numbers, phone numbers, and the last four digits of their social security numbers, to facilitate their ability to confirm voter identity. MTS at ADD18.

Failing to point to a single viable interest in the case distinct from the general public and Appellees-Defendants, Movants rely upon "their naked assertion that the [Defendants-Appellees] were not adequately protecting [their] interests because there had been 'collusion' between them and the plaintiffs." MTS at ADD8 n.5. However, after querying the lawyers and reviewing the terms and conditions of the Consent Decree, the District Court "found no evidence of collusion." *Id.*

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees respectfully request that this Court deny Movants' Motion to Stay.

Dated: August 4, 2020

Respectfully Submitted,

/s/ Dale E. Ho
Dale E. Ho
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
125 Broad Street, 18th Floor
New York, NY 10004
(212) 284-7332 (phone)
dho@aclu.org

/s/ Lynette Labinger
Lynette Labinger
Cooperating counsel,
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF RHODE ISLAND
128 Dorrance St., Box 710
Providence, RI 02903
(401) 465-9565 (phone)
ll@labingerlaw.com

/s/ Paul Smith
Paul M. Smith
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Suite 400
Washington, DC 20005
(202) 736-2200 (phone)
psmith@campaignlegal.org

/s/ Michael C. Keats
Michael C. Keats
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
One New York Plaza
New York, NY 10004
(212) 859-8914 (phone)
(212) 859-4000 (fax)
Michael.Keats@friedfrank.com

CERTIFICATE OF COMPLIANCE

1. This undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(a) and 32(a)(7)(B). Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 5,000 words. As permitted the by Fed. R. App. P. 32(g), the undersigned has relied upon the word-count feature of this word processing system in preparing this certificate.

2. This brief complies with the typeface and type style requirements of F. R. App. P. 32(a)(5)-(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Date: August 4, 2020

/s/ *Michael C. Keats*
Michael C. Keats
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
One New York Plaza
New York, NY 10004
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2020, a copy of the above and foregoing response was filed electronically with the Clerk of the Court of the United States Court of Appeals for the First Circuit using the CM/ECF system.

I certify that notice of this filing will be sent to all parties to this case by the appellate CM/ECF system.

Date: August 4, 2020

/s/ *Michael C. Keats*
Michael C. Keats
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
One New York Plaza
New York, NY 10004
Counsel for Plaintiffs

TABLE OF PLAINTIFFS-APPELLEES' EXHIBITS

Plaintiffs-Appellees submit the following exhibits in support of their Response to Proposed Intervenors' Emergency Motion for Stay Pending Appeal:

Document	**Exhibit No.**
Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctive Relief, and Declaratory judgment (Doc. 1).	A
Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 5)	B
Plaintiffs Memorandum of Law in Support of Their Emergency motion for a Temporary Restraining Order and Declaratory and Injunctive Relief and accompanying exhibits (Docs. 5-1–5-9).	C
Plaintiffs' Memorandum in Opposition to Motion to Intervene (Doc. 24).	D
Defendant Secretary of State Nellie M. Gorbea's Objection to Emergency Motion to Intervene as Defendants by the Republican National Committee and the Rhode island Republican Party (Doc. 22).	E
Affidavit of Robert Rock, Director of Elections for the Rhode Island Department of State (Doc. 23).	F
Order, *LaRose v. Simon*, No. 62-CV-20-3149 (Minn. D. Ct. Aug. 3, 2020).	G