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

RESPONSE TO EMERGENCY MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

Apparently terrified that voter turnout will increase, as it did during the 2020 Presidential Preference Primary ("PPP") when the State of Rhode Island, without legal challenge, suspended the requirement that voters who want to vote by mail have their signatures witnessed by two people or notarized, Republicans have brought this frantic request for a stay of a consent judgment pending their appeal of an order denying their last-minute attempt to intervene and scuttle the agreed-upon resolution of the parties' dispute. This is not a surprise given reports that "[t]he RNC has committed $20 million this year to fight the Democrats' legal challenges to the signature and other mail-in voting laws". https://www.npr.org/2020/06/01/ 865043618/need-a-witness-for-your-mail-in-ballot-new-pandemic-lawsuits-challenge-old-rules The Republicans' Emergency Motion to Stay Pending Appeal should be denied for the reasons below.

I. BACKGROUND

Movants-Appellants Republican National Committee and Republican Party of Rhode Island (the "Republicans") have moved for expedited consideration of this appeal, and the Court has granted their request. While the Rhode Island Secretary of State (the "Secretary") has no objection to expedited consideration, it is important to point out that the Affidavit of Suzanne Cienki, the Chair of the Rhode Island Republican Party, does not present the full context for how late is the Republicans' attempt to intervene and appeal.

Ms. Cienki testifies that a printing vendor in Rochester, New York "indicated the

process for printing would take 2 weeks and a rush job could be completed in 8-10 days." Affidavit of Suzanne Cienki, attached to Movant-Appellants Emergency Motion to Expedite Emergency Motion to Stay Pending Appeal as Exhibit A ("Cienki Affidavit"), ¶ 7.[1] Ms. Cienki, however, failed to note that the printing vendor from Rochester she mentions is not the State's vendor.

Robert Rock, the Director of Elections for the Rhode Island Department of State with over 15 years of experience working in elections administration, did testify by affidavit in the District Court that: "In order to provide enough time for voters to receive, vote, and send back their mail ballots by Primary Day (September 8), it is imperative our vendor begin mailing ballots on August 10." Affidavit of Robert Rock (Doc # 23) ("Rock Affidavit") ¶6. The printing vendor informed the Director of Elections that to meet the August 10th deadline, the vendor needed to have the ballot return envelopes information by July 17.[2] As the consideration of the Consent Judgment was continued to July 28, the Director of Elections testified: "I immediately notified our vendor who stressed the importance of knowing that day (July 27), how to proceed." Rock Affidavit ¶10. The printing vendor for the State of Rhode Island has been hard at work printing the ballot return envelopes without the requirements for witnesses or a notary but with the request for optional information, the last four

[1] Ms. Cienki did not testify nor submit an affidavit to the District Court.

[2] July 17 is almost exactly 3 weeks before August 10. Ms. Cienki in her affidavit says that the Rochester printing company said the "printing would take 2 weeks and a rush job could be completed in 8-10 days." Cienki Affidavit ¶ 7. Even assuming that Ms. Cienki's assertions are true, the time has already passed in order to meet the August 10th date and make sure that voters have a chance to receive, complete and return their mail ballot.

numbers of the voter's social security number and/or driver's license number. Stopping the printing now will only wreak havoc on the mail ballot voting process and make it more likely that mail voters will be disenfranchised. For that reason alone, Republicans' Motion to Stay should be denied.

A. Governor Raimondo's Executive Order for 2020 Presidential Preference Primary

As alleged by Plaintiffs-Appellees in their Complaint:

> Governor Raimondo responded to these serious (COVID-19) public health dangers and the need to provide Rhode Island citizens with a safe and accessible means of voting for the June presidential primary election by issuing an executive order that, among other measures, eliminated the two witness/notary requirement challenged here.[3] Defendant Gorbea's 2020 Presidential Primary Election Task Force ("PPE Task Force" or "task force") specifically reflected that "[r]emoving the two witness/notary requirement on ballots made it easier for older Rhode Islanders and those living alone" to vote safely. As a result of these measures, the PPS task force concluded that the executive order was a success and led to a "[d]ecreased number of in-person voters [which] allowed for social distancing best practices."[4]

Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctive Relief, and Declaratory Judgment, ¶33 (Doc. #1). In response to the Governor's Executive Order, the Secretary worked with the Rhode Island Board of Elections ("Board of Elections") to conduct a predominantly mail ballot election for the 2020 Presidential Preference Primary. The Board of Elections passed a resolution to require that in place of two witness/notary requirement, the voter be asked to voluntarily provide his or her driver's license and/or the last four digits of their social security

[3] Executive Order 20-27 at 2 (April 17, 2020), https://governor.ri.gov/documents/orders/Executive-Order-20-27.pdf.
[4] 2020 Presidential Primary Election Task Force Slideshow at 4 (July 9, 2020).

number.[5] Accordingly, the Secretary worked with a printer vendor to prepare certifying envelopes without the two witness/notary requirement but with a request for driver's license and/or the last 4 digits of a voter's social security number. In addition, for the June PPP the Secretary also took an unprecedented step of mailing a mail ballot application to all voters.

The result of the Governor's Executive Order and the work of the Secretary of State and the Board of Elections was a huge increase in mail ballot applications from voters requesting a mail ballot. *See* [Proposed] Intervenor-Defendants' Opposition to the Proposed Consent Decree, ("83% of voters cast their ballots in the June 2020 presidential primary by mail versus only 4% in the same primary four years earlier")[6] (Doc. #21 at 26). Even with this huge increase in requests for mail ballots, the Movants-Appellants cannot point to one case of voter fraud and offered no such evidence in the District Court.

B. September Statewide Primary Election and November General Election

The Secretary and co-defendant/co-appellee Board of Elections both expressed their views, in their official capacities, that the 2020 September statewide primary

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

[6] In the most similar Rhode Island PPPs of the recent past, 38,294 voted in 2004 and 22,670 voted in 2012. *See* https://elections.ri.gov/elections/results/2004/preference/ and https://www.ri.gov/election/results/2012/presidential_preference_primary/. By comparison, 125,991 voted in 2020 with 83% of those voters voting by mail ballots. https://www.ri.gov/election/results/2020/presidential_preference_primary/#

election and November general election should be held similarly to the 2020 Presidential Preference Primary and conducted primarily through mail. Both, the Secretary and the Board of Elections recommended a continued suspension of the two witness/notary requirement on certifying envelopes.

Unlike the 2020 Presidential Preference Primary, the Rhode Island Governor did not issue an executive order and the matter was taken up by the Rhode Island General Assembly, which previously was not in session when the Governor issued Executive Order 20-27 related to the Presidential Preference Primary. The Rhode Island House of Representatives passed a bill that would have eliminated the two witness/notary requirement for the 2020 September statewide primary and November general election. However, the Rhode Island State Senate failed to act on the same bill before adjourning on July 17, 2020. The result of the Rhode Island Senate's failure to act was this lawsuit. Significantly, the Rhode Island Senate has **not** sought to intervene or object to the entry of the Consent Judgment in this case.

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

Less than a week after the Rhode Island Senate failed to act, Plaintiffs-Appellees filed the Complaint in this matter. Despite Movants-Appellants' false assertions, the Secretary did not "[find] another way to suspend the witness requirement" or "turn[] to this lawsuit for relief." Emergency Motion for Stay Pending Appeal, at 3, 19. As indicated in Court, on July 22, 2020 Plaintiffs-Appellees' counsel emailed counsel for

the Secretary, Board of Elections, and the Rhode Island Attorney General's Office telling them that Plaintiffs would file a complaint in federal court and asking whether the soon-to-be defendants would be opposing their request. Approximately 7 hours after the email, the Secretary's counsel responded via email and wrote that the Secretary would not be opposing Plaintiffs' request for injunctive relief.

Movants-Appellants strain to make a big "collusion" issue out of the Secretary's position not to oppose the request for injunctive relief. As the Secretary's counsel pointed out during the fairness hearing in District Court, the Secretary had the benefit of a 14-page decision in *Acosta v. Restrepo*, No. 1:20-CV-00262, 2020 U.S. Dist. LEXIS 115782 (D.R.I. June 25, 2020). In *Acosta*, Judge McElroy, the same judge as the present case, concluded that as applied during the COVID-19 pandemic, the requirements of "in-person solicitation and receipt of signatures, an in-person witness, and use of a common petition form upon which qualified voters sign" for a candidate to qualify to appear on the ballot, were unconstitutional. *Id.* at *4. Given that prior and very recent ruling by the same District Court Judge, it was reasonable to predict that the District Court would grant Plaintiffs relief in the present case and that opposing the request for injunctive relief would be fruitless.

Further evidence that there was no collusion here between the parties is found in the affidavit of the Director of Elections. By July 17, the printing vendor had finalized the form for the certifying envelope to meet the August 10th deadline for mailing mail ballots. Rock Affidavit ¶ 7. Mr. Rock testified: "Due to this ongoing

litigation, I asked the vendor to remove the witness and notary requirements from the envelopes and to add an 'optional information' section asking for voter's driver's license number or last four digits of their social security like we had done in the Presidential Primary." *Id.* ¶ 9. Despite Movants-Appellants' false statements to the contrary, the Secretary was ready to enforce the two witness/notary requirement up until the time of the lawsuit.

On July 24, 2020, Plaintiffs-Appellees and Defendants-Appellees Secretary and Board of Elections, had an in-chambers conference with Judge McElroy. Because the Defendants-Appellees did not object to Plaintiffs-Appellees' requested relief and indeed thought the requested relief would be good public policy, it was suggested that the parties see if they could agree on a Consent Judgment. However, the District Court also set the matter down for a hearing on Monday, July 27.

After the court conference on July 24, the Secretary's counsel received a text from Movants-Appellants' current counsel, Brandon Bell, which read in relevant part: "Anything happen today with Judge McElroy? National GOP may seek to intervene". The Secretary's Counsel responded a minute later, in relevant part: "The parties are working on a Consent Judgment so if you want to intervene you should try soon." Mr. Bell responded in relevant part: "I may reach out to you about Common Cause case but not sure what your (sic) friends at the White House will do, if anything." So, as of 2:32 pm on July 24, Mr. Bell knew that the parties were working on a Consent Judgment. Movants-Appellants are misleading when they write "The Republican party was not

invited to participate in the negotiations." Emergency Motion for Stay Pending Appeal at 3. The Republican National Committee and Republican Party of Rhode Island knew about lawsuit but apparently had not made a decision to intervene.

D. The Republicans' Motion to Intervene

On July 26, 2020, at literally the eleventh hour, 11:52 PM to be exact, the Republicans filed their Motion to Intervene. (Doc. # 10). On July 27, 2020, the District Court held its scheduled hearing in this matter and directed the Republicans to perfect their Motion to Intervene by filing a responsive pleading by 7 pm that evening. The District Court directed the Secretary to file any objection by noon on July 28, 2020 and scheduled a fairness hearing for July 28, 2020 at 3 pm. The Secretary filed her Objection to Movants-Appellants' Emergency Motion to Intervene but intentionally and explicitly did not object to the Republicans being heard at the fairness hearing. In her objection to intervention, the Secretary cited numerous cases where the Republican Party or Republican officials were denied their requests to intervene in election-related cases due to the significant prejudice that can arise in elections from complications and delays resulting from the intervention. Objection at 3-5. (Doc. #22).

E. Consent Judgment and Fairness Hearing

At the fairness hearing, the parties described the process leading to the Consent Judgment. The Secretary's counsel informed the District Court that he had worked with counsel for the Board of Elections as well as the Rhode Island Attorney General's Office to revise the Plaintiffs-Appellants' proposed Consent Judgment. In fact, an

Assistant Attorney General was present at the fairness hearing to answer any questions the District Court might have relating to the Attorney General's Office participation in the settlement process. The Secretary's counsel also pointed out that despite the Republicans' assertions that she "obtained nothing", the Secretary obtained the ability to ask all mail ballot applicants for their driver's license number and/or last 4 digits of the social security number. Furthermore, at the insistence of the Secretary and the Board of Elections, Plaintiffs-Appellees waived their right to attorneys' fees and costs.

Movants-Appellants argue that they have an interest that is not adequately protected by the Secretary or Board of Elections. The Republicans assert that they have an interest in conserving resources, mobilizing voters and promoting electoral prospects. Emergency Motion for Stay Pending Appeal at 10. Movants-Appellants do not explain how these alleged interests are impaired by this litigation and Consent Judgment. The Secretary and Board of Elections have an interest in free, fair, and safe elections. The Republicans' interest should be the same.[7] The fact that the Republicans disagree with the Secretary and Board of Elections' view of the two witness/notary requirement[8] does not mean that the Republicans' interest is not being adequately

[7] In the District Court, the Movants-Appellants argued: "Removing this requirement – particularly for an election with unprecedented levels of absentee voting – poses a serious threat that fraudulent or otherwise ineligible ballots will be cast." [Proposed] Intervenor-Defendants' Opposition to the Proposed Consent Decree at 24. (Doc. #21). Yet, Movants-Appellants offered no evidence of any fraud in the 2020 PPP which had unprecedented levels of mail ballots. Moreover, the Movants-Appellants' alleged interest in protecting against fraudulent or ineligible ballots is the same interest that the Secretary and the Board of Elections have. In fact, the Secretary and the Board of Elections is asking all mail ballot voters for their driver's license number and/or the last 4 digits of their social security number.

[8] The Republicans argue: "As for the witness requirement, Rhode Island will allow voters to teleconference with remote notaries." Emergency Motion for Stay Pending Appeal at 2. If the Republicans had made that argument at the District Court, the Secretary would have pointed out that there are only 118 remote notaries in Rhode Island.

represented. Memorandum and Order at 8, fn. 5. (Doc. #25) ("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.")

In addition, in response to Movants-Appellants' legal argument that the District Court should not change rules close to an election, the Secretary pointed out that in fact, the 2020 Presidential Preference Primary had been conducted primarily through mail ballots without the two witness/notary requirement. Given the vast increase in the use of mail ballots for the PPP, voters were much more likely to be confused by a new two witness/notary requirement than by the entry of the Consent Judgment and the suspension of that requirement.

The District Court agreed with the Secretary and granted the Motion for Entry of Consent Judgment. The District Court also denied Movants-Appellants' Motion to Intervene. Memorandum and Order at 8, fn. 5. (Doc. #25). This Appeal and Emergency Motion for Stay Pending Appeal followed.

F. Overview of Mail Ballot Voting in Rhode Island

Under Rhode Island law, any voter may vote by mail and the voter does not need a specific reason to vote by mail. R.I. Gen. Laws § 17-20-2(4). The voter must fill out a mail ballot application, sign it (without any witnesses or notary), and return it to the local board of canvassers. R.I. Gen. Laws §§ 17-20-2.1; 17-20-13. The local board of

canvassers is then required to review the application for compliance with the requirements of the law and to check the signature on the mail ballot application against the voter's signature from the voter's original registration card. R.I. Gen. Laws § 17-20-10 (a). If the signature on the application and the voter's original registration card match, the local board of canvassers certifies the application to the Secretary of State through the Central Voter Registrations System ("CVRS"). R.I. Gen. Laws § 17-20-10 (c).[9] The local boards of canvassers maintain a separate list of all voters who applied for a mail ballot. R.I. Gen. Laws § 17-20-8. That list is publicly available for inspection.

Once the CVRS has been updated with the board of canvassers' notation that a voter has properly applied for a mail ballot, the Secretary of State mails the voter a mail ballot package which consists of an instruction sheet on how to complete the ballot, the actual ballot, a certifying envelope which the voter uses to place the voted ballot, and a return envelope that the voter uses to place the certifying envelope and mail the voted ballot to the Rhode Island Board of Elections. Rock Affidavit ¶ 14; R.I. Gen. Laws §§ 17-20-10 (d)(1); 17-20-12. More specifically, Rhode Island law explicitly provides: "The secretary of state shall cause to be prepared and printed and shall furnish

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

> Prior to each election, the secretary of state shall also furnish to the chairperson of the state committee of each political party a list of the names and residence addresses of all persons to whom mail ballots have been issued. The secretary of state shall also furnish to a candidate for political office, upon request, a list of the names and residence addresses of all persons to whom mail ballots have been issued within his or her district.

R.I. Gen. Laws §17-20-10(e).

with each mail ballot an envelope for sealing up and certifying the ballot when returned." R.I. Gen. Laws § 17-20-21[10]. The statute also provides that the certifying envelopes "shall be printed in substantially the following form" and includes a notary signature block as well as spaces for 2 witness signatures. R.I. Gen. Laws § 17-20-21.

With some statutory exceptions, "[i]n order to be valid, the signature of the elector on the certifying envelope containing a voted ballot must be made before a notary public, or other person authorized by law to administer oaths where signed, or where the elector voted, or before two (2) witnesses who shall set forth their addresses on the form." R.I. Gen. Laws § 17-20-2.1 (d)(4).

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

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

R.I. Gen. Laws §17-20-26 (a)(2).

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

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

The Board of Elections is required to "(1) Determine the city or town in which the voter cast his or her ballot and classify accordingly; and (2) Compare the name, residence, and signature of the voter with the name, residence, and signature on the ballot application for mail ballots and satisfy itself that both signatures are identical." R.I. Gen. Laws §17-20-26 (c)(1)-(2). There is no explicit requirement that the Board of Elections examine the witnesses or notary on the certifying envelope.

The candidates have a right to object to mail ballots during this certification process. The law explicitly provides:

> The board shall establish guidelines setting forth the grounds for challenging the certification of mail ballots. These guidelines shall recognize that if a ballot can be reasonably identified to be that of the voter it purports to be, and if it can reasonably be determined that the voter was eligible to vote by mail ballot and if the requirements of § 17-20-2.1 were complied with, it should not be subject to frivolous or technical challenge. The burden of proof in challenging a mail ballot as not obtained and/or cast in conformance with this chapter is on the person challenging the ballot. Once the irregularity is shown, the burden of proof shall shift to the person defending the ballot to demonstrate that it is the ballot of the voter it purports to be, that the voter was eligible to vote by mail ballot, and that all of the applicable requirements of § 17-20-2.1 were complied with. The guidelines shall be adopted at a public meeting of the board and shall be made available prior to the start of the certification process for mail ballots.

R.I. Gen. Laws §17-20-26 (e).

II. STANDARD OF REVIEW

Orders denying a motion to intervene are reviewed under an abuse of discretion standard. *Public Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998). Denials of intervention *as of right* may be reversed only "if the court fails to apply the general standard provided by the text of Rule 24(a)(2), or if the court reaches a decision that so

fails to comport with that standard as to indicate an abuse of discretion." *Id.* The First Circuit has recognized that "despite its nomenclature, intervention 'as of right' usually turns on judgment calls and fact assessments that a reviewing court is unlikely to disturb except for clear mistakes. . . . In practice, the district court enjoys a reasonable measure of latitude . . . ." *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 172 F.3d 104, 113 (1st Cir. 1999). As to the denial of *permissive* intervention, appellate review is even more restrictive. *Maine v. Director, United States Fish & Wildlife Serv.*, 262 F.3d 13, 21 (1st Cir. 2001) (it is entirely with the District Court's discretion to deny permissive intervention because it would unduly delay the case).

Motions to stay pending appeal of a district court order are evaluated under the four-part standard applied to preliminary injunctions. *Acevedo-Garcia v. Vera-Monroig*, 296 F.3d 13, 16 (1st Cir. 2002). The considerations are: (1) whether the applicant has made a strong showing of success on the merits; (2) whether the applicant will be irreparably harmed absent injunctive relief; (3) whether issuance of the stay will injure other parties; and (4) where the public interest lies. *Id.* at 16 n.3; *accord Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (holding that traditional four-part standard applies to motions for a stay pending appeal). The First Circuit has clarified that the *sine qua non* of the stay pending appeal standard is whether the movant is likely to succeed on the merits. *Acevedo-Garcia*, 296 F.3d at 16; *Latino Political Action Comm., Inc. v. City of Boston*, 716 F.2d 68, 69 (1st Cir. 1983) (denying a motion to stay pending appeal of a court order invalidating Boston election rules because movant's likelihood of success was too low to justify granting of

the stay). In essence, the granting of a stay depends on "whether the harm caused movant without the stay, *in light of the movant's likelihood of eventual success on the merits*, outweighs the harm the stay will cause the non-moving party." *Id.* (emphasis added).

III. ARGUMENT

A. The Court Should Deny The Motion to Stay Because Movants-Appellants Cannot Succeed On Their Intervention Claim.

The Movants-Appellants cannot come close to showing that the District Court abused its discretion when it denied their motion to intervene. As pointed out above, the First Circuit has recognized that "despite its nomenclature, intervention 'as of right' usually turns on judgment calls and fact assessments that a reviewing court is unlikely to disturb except for clear mistakes…" *Daggett*, 172 F.3d at 113. The District Court here correctly and fairly denied the Movants-Appellants' motion to intervene.

Because the District Court acted appropriately denying the Movants-Appellants' motion to intervene, the Emergency Motion for Stay Pending Appeal should be denied. Movants-Appellants cannot show the most important factor for a stay – a likelihood of success on the merits. *Acevedo-Garcia*, 296 F.3d at 16; *Georgia Muslim Voter Project v. Kemp*, 918 F.3d 1262 (11th Cir. 2019) (Pryor, C.J. concurring)(denying stay pending appeal and concluding that the district court had not abused its discretion in issuing an injunction ordering the Secretary of State of Georgia to instruct county elections officials to provide prerejection notice and an opportunity to be heard in the event of a perceived signature mismatch for mail ballots); *Michigan State A. Philip Randolph Inst. v.*

Johnson, 833 F.3d 656 (6th Cir. 2016) (denying stay pending appeal of a preliminary injunction barring enforcement of Michigan's law prohibiting straight-party voting as movant had failed to meet its burden to show a likelihood of success on the merits).

i. The District Court correctly denied Movants-Appellants' motion to intervene because it would unduly delay the case and prejudice the parties.

In ruling on a motion to intervene under FED. R. CIV. PROC. 24, the court must weigh whether the proposed intervention will unduly delay the case or prejudice the existing parties. *Culbreath v. Dukakis*, 630 F.2d 15, 21 (1st Cir. 1980) (courts should consider the prejudice to existing parties for motions to intervene filed under Rule 24(a) or (b)). Several courts have denied the intervention of unnecessary parties in election-related cases due to the significant prejudice that can arise from complications and delays resulting from the intervention.

In *One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394 (W.D. Wis. 2015), plaintiffs filed suit challenging several state voting laws. A group of Republican officials and registered voters sought to intervene as defendants. *Id.* at 396. The proposed intervenors asserted a protected interest in ensuring that they are not defeated by fraudulent votes and avoiding the appearance of corruption in the electoral process. *Id.* at 396. The court denied the motion to intervene, paying particular attention to the fact that "adding the proposed intervenors could unnecessarily complicate and delay all stages of this case." *Id.* at 399. For the court, the electoral nature of the case "require[d] a higher-than-usual commitment to a swift resolution." *Id.* Because

plaintiffs challenged the State's election procedures, the court recognized, in an order issued on October 28, 2015, that it needed to resolve these challenges "well ahead of the November 2016 election to avoid any voter confusion" and that "even minor delays . . . could jeopardize the parties' ability to obtain a final judgment . . . in time for the election." *Id.*

Likewise, in *N. Carolina State Conf. of NAACP v. Cooper*, 332 F.R.D. 161 (M.D.N.C. 2019), plaintiffs sought to strike down state laws requiring voters to provide photographic identification before voting in person and expanding the number of poll observers and the number of people who can challenge ballots. Less than one month after the plaintiff filed suit, a group of Republican officials filed a motion to intervene as defendants. *Id.* at 164. In denying the motion to intervene, the court focused on the fact that the outcome of the case "could have direct impact on the upcoming election cycle, beginning with primary elections scheduled in early 2020." *Id.* at 172. In an order issued in June 2019, the court held that the electoral nature of the claims at issue and the imminence of the 2020 election "require[d] a swift resolution on the merits to bring certainty and confidence to the voting process." *Id.* Given the proximity of the electoral cycle, the court concluded that the intervention would "unnecessarily complicate and delay" the case and, therefore, jeopardize the Court's ability to reach final judgment in advance of the impending election cycle. *Id.* (quoting *One Wis. Inst.*, 310 F.R.D. at 399).

In *Am. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236 (D.N.M 2008), plaintiffs challenged state laws requiring the registration of non-government voter registration agents and providing for various procedures and penalties regarding the activities of such agents. A group of voters, state officials, and the Republican Party of New Mexico filed motions to intervene as co-defendants. *Id.* at 241. In an order issued one month before the state deadline to register voters for the November 2008 election, the court denied the proposed intervention to avoid any unnecessary delays as the case was "very time-sensitive." *Id.* at 259.

Lastly, in *SEIU, Local 1 v. Husted*, 887 F. Supp. 2d 761 (S.D. Ohio 2012) *aff'd* 515 F. App'x 539 (6th Cir. 2013), the court denied the intervention by a group of voters in consolidated cases challenging the constitutionality of Ohio's provisional ballot system. The court noted that the delay caused by the intervention and resulting prejudice to the parties was "of particular concern in this election case." *Id.* at 772. The Sixth Circuit affirmed, holding that the delay posed a significant risk of upsetting the expedited schedule necessitated by the upcoming election. *SEIU Local 1 v. Husted*, 515 F. App'x 539, 542 (6th Cir. 2013).

In all these cases[11], the court denied intervention due, in part, to concerns about unduly delay and prejudice to the parties even though the relevant electoral deadlines in each case were months, or even a full year, away. *See One Wis. Inst.*, 310 F.R.D. at

[11] Perhaps not by coincidence, in three of the four cases cited, it is Republicans who are trying to intervene.

399 (one year); *N. Carolina State Conf. of NAACP*, 332 F.R.D. at 172 (more than six months); *Am. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. at 259 (one month); *SEIU, Local 1 v. Husted*, 887 F. Supp. 2d at 771-72 (three months). Here, Rhode Island's primary and general 2020 elections are only mere *weeks* away. As a result, concerns about unduly delays and prejudice to the parties caused by the proposed intervention are even more pressing. Any minor delays caused by the Republicans' proposed intervention will most likely impact the state's ability to conduct well-ordered elections, especially amidst a global pandemic.

To explain the prejudice to the Secretary and the negative impact on the upcoming elections, the Secretary submitted the Affidavit of the Secretary of State's Director of Elections, Robert Rock, which explained the printing process for the mail ballots and more specifically, the mail ballot certifying envelopes. As Mr. Rock explained, the printing vendor needed a response by July 27, 2020 to have the mail ballots including the mail ballot certifying envelopes ready to be mailed out by August 10, 2020. Rock Affidavit ¶ 6.

ii. The District Court Correctly Found that Movants-Appellants' Interest was adequately Represented by the Existing Parties

In the District Court, the Movants-Appellants argued: "Removing this requirement – particularly for an election with unprecedented levels of absentee voting – poses a serious threat that fraudulent or otherwise ineligible ballots will be cast." [Proposed] Intervenor-Defendants' Opposition to the Proposed Consent Decree at

24. (Doc. #21). Yet, Movants-Appellants offered no evidence of any fraud in the 2020 PPP which had unprecedented levels of mail ballots. Moreover, the Movants-Appellants' alleged interest in protecting against fraudulent or ineligible ballots is the same interest that the Secretary and the Board of Elections have. In fact, the Secretary and the Board of Elections are asking all mail ballot applicants for their driver's license number or the last four digits of their social security number.

In considering the Movants-Appellants' motion for intervention, "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." Memorandum and Order at 8, fn. 5. (Doc. #25). Accordingly, the District Court correctly denied Movants-Appellants' motion to intervene.

B. Movants-Appellants Have Not Shown Any Irreparable Harm from the District Court's Denial of their Motion to Intervene.

The Movants-Appellants have not shown any irreparable harm in this case. In the District Court, the Movants-Appellants offered no evidence of mail ballot fraud. Even with a 2020 Presidential Preference Primary that saw over 100,000 Rhode Islanders vote by mail, the Republicans were not able to offer one case of fraud.

Furthermore, Rhode Island law requires that signatures on applications and mail ballot certifying envelopes be matched to the voter's signature. R.I. Gen. Laws §§ 17-

20-10 (a), 17-20-26 (c)(1)-(2). In addition, Rhode Island law:

- Requires that a public list be compiled of all voters who have applied and obtained a mail ballot;
- Requires that the Republican Party be given a copy of the mail ballot list;
- Requires that a candidate, upon request, be given a copy of the mail ballot list for his or her race;
- Requires that the Republican Party and its candidates be given oral notice at least 24 hours before mail ballot certification begins;
- Allows the Republican Party and its candidates an opportunity to be present during certification and to object to any mail ballot; and
- Prohibits anyone who has obtained a mail ballot from voting at the polls on election day.

R.I. Gen. Laws §§ 17-20-8, 17-20-10(e), 17-20-26(a)(2), 17-20-29. The Republicans have more than a fair opportunity to contest mail ballots.

The Republicans do not point to any evidence of mail ballot voter fraud because they have no evidence. Moreover, the State of Rhode Island has numerous safeguards in place to protect against any interest that the Republicans may have. Most importantly, the Republicans have the right to be present at the certification of mail ballots and to object to any mail ballot.

C. The Public Interest Favors Denying of the Motion to Intervene as it Would Risk an Orderly Election Like the 2020 Presidential Preference Primary.

The September statewide primary is approximately 35 days away. The Secretary of State's Director of Elections has testified: "In order to provide enough time for voters to receive, vote, and send back their mail ballots by Primary Day (September 8), it is imperative our (printing) vendor begin mailing ballots on August 10." Rock Affidavit ¶ 6. Furthermore, Mr. Rock testified: "Approximately three weeks ago, K&H

(our printing vendor) began their internal process of preparing to meet our August 10th deadline. For them to meet the deadline they indicated that envelopes had to be finalized by July 17, a deadline we met." Rock Affidavit ¶ 7. At this point, allowing the Republicans to intervene threatens the right of thousands of Rhode Islanders to vote by mail as they did during the 2020 Presidential Preference Primary. The Republicans' motion for a stay should be denied.

Given that Movants-Appellants fail on their motion to intervene, that should end this appeal. As Movants-Appellants concede: "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.'" Emergency Motion for Stay Pending Appeal at 5. There is no need to consider the Consent Judgment because the intervention was properly denied in this case.

D. Movants-Appellants Have Not Shown a Likelihood of Success on Their Challenge to the Consent Judgment.

In their Emergency Motion for Stay Pending Appeal, the Movants-Appellants make three arguments for why the Consent Judgment is invalid. According to the Movants-Appellants the consent judgment: (1) violates the *Purcell* principle; (2) suspends a constitutional state law; and (3) is fatally overbroad. Emergency Motion for Stay Pending Appeal at 12-18.

i. The Consent Judgment does not violate the Purcell principle.

The Movants-Appellants argue that under *Purcell v. Gonzalez*, 549 U.S. 1 (2006), "federal courts are not supposed to change state election rules as elections approach." Emergency Motion for Stay Pending Appeal at 12. However, in the present case, the District Court is approving a Consent Decree entered into by the parties including representatives of the State, namely the Secretary and the Board of Elections. The cases cited by Movants-Appellants all involve government entities requesting stays from injunctions. In *Purcell,* the State of Arizona and county officials applied for a stay from an injunction. 549 U.S. at 2. Likewise, in the Wisconsin case that Movants-Appellants cite, the Wisconsin Legislature applied for a stay from an injunction. *Republican National Committee v. Democratic National Committee*, 589 U.S. ___ (2020). In the Alabama case, the Alabama Secretary of State and the State of Alabama applied for a stay. *Merrill v. People First of Alabama*, 591 U.S. ___, 2020 WL 3604049 (July 2, 2020).

The present case is unique as it is a Consent Judgment and the Secretary and Board of Elections do not seek to lift a stay. Instead, the Secretary and Board of Elections seek to prevent the Court from entering a last-minute stay so that the 2020 September primary and November general election may be conducted in a fashion that they deem safe. Chief Justice Roberts recently admonished a district court and pointed out: "The District Court did not accord sufficient weight to the State's discretionary judgments about how to prioritize limited state resources across the election system as a whole." *Little v. Reclaim Idaho*, 591 U.S. ___ (July 31, 2020). The Consent Judgment in

this case is totally appropriate and reflects the judgment of the Secretary and Board of Elections on how to prioritize limited state resources. Contrary to the Republicans' contention, the *Purcell* principle mandates that this Court **not** intervene to grant a last-minute stay and thereby interfere with the decisions of the Rhode Island state officials as to how to conduct their elections.

Movants-Appellants wrongly contend that the Secretary and Board of Elections are changing the rules on the eve of the election. As pointed out by the District Court: "the Court rejected the proposed intervenors' main argument that 'changing the rules' on the eve of the election would cause voter confusion. In fact, the opposite is true. The last rules explained to voters eliminated the signature and notary requirement for the June 2, 2020, presidential preference primary. Approving the Consent Decree maintained that status quo. *Enforcing* the signature and notary requirement would have 'changed the rules.'" Memorandum and Order at 8-9, fn. 5. (Doc. #25).

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

The District Court expressly found: "While the Consent Decree seeks to transgress existing Rhode Island statutory election law, had there been a hearing on the merits of the plaintiffs' prayer for injunctive relief, the Court would have found that the mail-ballot witness or notary requirement, as applied during the COVID-19 pandemic, is violative of the First and Fourteenth Amendments to the United States Constitution because it places an unconstitutional burden on the right to vote." Memorandum and

Order at 10. (Doc. #25). The District Court's ruling is consistent with a case it had decided merely a month earlier. *Acosta*, 2020 U.S. Dist. LEXIS 115782. In *Acosta* the District Court found that the Rhode Island ballot qualification laws for candidates, which required "in-person solicitation and receipt of signatures, an in-person witness, and use of a common petition form upon which qualified voters sign" was unconstitutional as applied during the COVID-19 pandemic. *Id.* at *4.

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

Movants-Appellants claim that the consent decree is overbroad. Emergency Motion for Stay Pending Appeal at 17. Apparently, Movants-Appellants suggest that the exception to the witness/notary requirement should simply apply to the three plaintiffs, and the subset of voters who cannot find witnesses or vote in person. Emergency Motion for Stay Pending Appeal at 17-18. The Movants-Appellants do not address the administrative challenges of having such narrow proposed relief. Furthermore, the fact that Movants-Appellants do not like the alternative of asking for the voter's driver's license number and last four digits of their social security number does not mean that the Consent Judgment is overbroad.

The Movants-Appellants cite to a District of Minnesota case in support of their claim that the Consent Judgment is overbroad. Emergency Motion for Stay Pending Appeal at 18. However, on August 3, 2020, a state court in Minnesota, over the objection of the Republican National Committee, granted a motion to enter a consent

decree which suspended the witness requirement for mail ballots in Minnesota. While the court allowed the Republican National Committee to permissively intervene, the court concluded:

> The benefits of the relief sought will accrue equivalently to all voters, whether they cast their votes for Democrats, Republicans, Independents, or the Green Party – no voters would be obligated to endanger themselves and their community to exercise their right to vote, and those who cast their ballots on Election Day would be counted. The Committees present no evidence that the outcome of this litigation will specifically disadvantage their candidates or the voters they represent.

LaRose v. Minnesota Secretary of State, 62-CV-20-3149 (Second Judicial District Minn., August 3, 2020). The Consent Judgment in the present case is also very similar to a consent decree which enjoined Virginia officials from enforcing their witness requirement for absentee ballots. *League of Women Voters v. Virginia State Board of Elections*, No. 6:20-cv-00024, 2020 WL 2158249 (W.D. Va. May 5, 2020).

E. Movants-Appellants Will Not Suffer Irreparable Harm Without a Stay.

Movants-Appellants have not shown how they will be irreparably harmed by the Consent Judgment. Looking at Rhode Island's 2020 Presidential Preference Primary which was conducted without the two witness/notary requirement, the data suggests that Movants-Appellants can expect an increase in turnout of Republican voters.

Despite Republicans' alleged fear of "fraud," there has been absolutely no evidence introduced of any mail ballot fraud in the 2020 Presidential Preference Primary. As outlined above, Rhode Island law provides numerous safeguards to ensure that a mail ballot applicant is indeed registered to vote. Moreover, the Secretary and

Board of Elections required that the Consent Judgment include the ability to ask mail ballot applicants for their driver's license and/or last four digits of their social security number as yet another way to confirm identity in the absence of the two witness/notary requirement. The Republicans can receive the list of mail ballot applicants and those who were actually approved for a mail ballot. They also have the right to be present at the certification of mail ballots and can object to any mail ballot.

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

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

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CONCLUSION

For all the foregoing reasons, Defendant-Appellee Nellie M. Gorbea, in her official capacity as Secretary of State of Rhode Island, respectfully requests that this Court deny Movants-Appellants' Emergency Motion for Stay Pending Appeal and order such other relief as the Court shall deem just and proper.

Respectfully submitted,

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Dated: August 4, 2020

CERTIFICATE OF COMPLIANCE

This opposition complies with Rule 27(d)(2) because it contains 7,614 words, excluding the parts that can be excluded. This opposition also complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in a 14-point Garamond font.

Dated: August 4, 2020 */s/ Angel Taveras*

CERTIFICATE OF SERVICE

I filed this opposition with the Court via ECF, which will electronically notify all parties.

Dated: August 4, 2020 */s/ Angel Taveras*