No. _____

In the Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY OF RHODE ISLAND,

Applicants,

v.

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

Respondents.

EMERGENCY APPLICATION FOR STAY

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

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicants are the Republican National Committee and the Republican Party of Rhode Island. They were proposed intervenor–defendants in the district court and movants-appellants in the court of appeals.

Respondents are Common Cause Rhode Island, League of Women Voters of Rhode Island, Miranda Oakley, Barbara Monahan, and Mary Baker; Nellie M. Gorbea, in her official capacity as Secretary of State of Rhode Island; and Diane C. Mederos, Louis A. Desimone Jr., Jennifer L. Johnson, Richard H. Pierce, Isadore S. Ramos, David H. Sholes, and William E. West, in their official capacities as members of the Rhode Island Board of Elections. Common Cause, League of Women Voters, Oakley, Monahan, and Baker were plaintiffs in the district court and appellees in the court of appeals. Gorbea, Mederos, Desimone, Johnson, Pierce, Ramos, Sholes, and West were defendants in the district court and appellees in the court of appeals.

The related proceedings below are

1. *Common Cause R.I., et al. v. Gorbea, et al.*, No. 20-1753 (1st Cir.) – Judgment entered August 7, 2020; and

2. *Common Cause R.I., et al. v. Gorbea, et al.*, No. 20-cv-318 (MSM) (D.R.I.) – Judgment entered July 30, 2020 (and then backdated to July 28, 2020).

CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29, Applicants, 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

TO THE HONORABLE STEPHEN BREYER, CIRCUIT JUSTICE FOR THE FIRST CIRCUIT:

Last month, this Court stayed an injunction against Alabama's witness requirement—a law requiring absentee ballots to be verified by two witnesses or one notary. *Merrill v. People First of Ala.*, 2020 WL 3604049 (U.S. July 2, 2020); *see* Ala. Code §17-11-10. Rhode Island has the same law. *See* R.I. Gen. Laws §17-20-2.1(d). Yet, with full knowledge of this Court's decision in *Merrill* and with voting set to begin in two weeks, the district court enjoined Rhode Island's witness requirement. Late Friday night, the First Circuit denied a stay.

The First Circuit's two points of distinction—that no state party objects to the injunction, and that Rhode Island's governor suspended the witness requirement once before—are untenable. This Court's rule against injunctions on the eve of elections mainly protects "voter[s]," not state election officials. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); *e.g.*, *Frank v. Walker*, 574 U.S. 929 (2014) (applying *Purcell* over the objection of all state parties). And while the witness requirement was suspended for the primary in June, the governor and the legislature decided *not* to suspend it again for the elections in September and November. Because the First Circuit's distinctions fail, this Court's stay in *Merrill* compels a stay here. *See Davila v. Davis*, 137 S. Ct. 2058, 2075 (2017) (Breyer, J., dissenting) (stressing the "basic legal principle … that requires courts to treat like cases alike"). That is, the Court should stay the consent judgment pending disposition of Applicants' appeal in the First Circuit and disposition of Applicants' petition for a writ of certiorari.

Applicants respectfully ask the Court to grant a stay by this Wednesday, August 12. Respondent Gorbea has agreed not to mail absentee ballots for the upcoming September primary until Thursday, August 13, so a ruling any time on Wednesday will ensure that no incorrect ballots are distributed. Applicants propose that all responses to this application be due by 5 p.m. tomorrow (August 11), and that Applicants' reply be due by 12 p.m. the next day (August 12). Because the Secretary will not mail ballots until Thursday, Applicants are not seeking an immediate administrative stay. But if the Court determines that it cannot resolve this application before Thursday, it should enter a brief administrative stay to ensure it has enough time to resolve the application.

OPINIONS BELOW

The First Circuit's opinion granting intervention and denying a stay pending appeal is not yet reported, but is reproduced at Appendix ("App.") 1-12. The district court's opinion denying intervention and approving the consent judgment is reported at *Common Cause R.I. v. Gorbea*, 2020 WL 4365608, at *1 (D.R.I. July 30, 2020), and is reproduced at Appendix 13-25. The consent judgment approved by the district court is reported at *Common Cause R.I. v. Gorbea*, 2020 WL 4460914 (D.R.I. July 30, 2020), and is reproduced at Appendix 26-34. The district court's oral order denying Applicant's motion for a stay pending appeal is reflected in the transcript excerpt reproduced at Appendix 35-43.

JURISDICTION

The district court orally denied Applicants' motion for a stay pending appeal on July 28, 2020, and indicated that it would deny intervention and approve the

consent decree with orders to follow. App. 41. The district court issued an opinion denying intervention and entering the consent judgment on July 30, which it later amended to backdate the opinion and judgment to July 28. App. 24, 32. Applicants filed a notice of appeal from the denial of intervention and a protective notice of appeal from the consent judgment on July 30. On July 31, Applicants filed an emergency motion for stay pending appeal in the First Circuit, where they asked the First Circuit to first grant intervention (without remanding to the district court) and then consider its motion for a stay. *See* Emerg. Mot. for Stay Pending Appeal 5-6, *Common Cause R.I. v. Gorbea*, No. 20-1753 (1st Cir. 2020). The First Circuit followed that procedure and, on August 7, it issued an opinion allowing Applicants to intervene and denying their motion for a stay. App. 12. This Court has jurisdiction to stay the consent judgment pending appeal and certiorari. *See* 28 U.S.C. §2101(f).

STATEMENT OF THE CASE

Rhode Island has two upcoming elections. On September 8, 2020, the State will hold a statewide primary election for offices in both houses of the General Assembly, as well as for Rhode Island's two congressional seats and one Senate seat. *See Candidates in Upcoming Elections*, R.I. Dep't of State, bit.ly/2DumM0Y. August 18 is the last day to submit a mail-ballot application for the primary. *See 2020 Election Dates and Deadlines!*, R.I. Dep't of State, bit.ly/3gLHiIy (*Voter Calendar*). Mail ballots for the primary must be received by 8:00 pm on September 8. *Id.*[1] The

[1] In-person voting for the primary runs parallel to voting by mail. Early in-person voting for the primary begins August 19, 2020 and ends at 4:00 pm on September 8. *Voter Calendar*, *supra*.

State previously indicated that it wanted to start mailing out ballots on August 10. D.Ct. Dkt. 23 ¶6. It currently "has approximately 60,000 mail ballot certificate envelopes (with the witness requirement) in stock." *Id*. ¶12. In the 2012 statewide primary (the last primary where there was a U.S. Senate race but no gubernatorial race), approximately 61,000 total votes were cast in the primary election with the highest vote total. *R.I. Elections Results, 2012 Statewide Primary*, R.I. Bd. of Elections, bit.ly/3fLpj3Q.[2]

On November 3, 2020, Rhode Island will hold a statewide general election for offices in both houses of the General Assembly and for Rhode Island's two congressional seats and one Senate seat, as well as for President. October 13 is the deadline to submit mail-ballot applications for the general election. *See Voter Calendar*, *supra*. Mail-ballots for the general must be received "by 8:00 pm on Election Day." *Vote from Home with a Mail Ballot*, R.I. Dep't of State, bit.ly/33FNoGS. The State has not indicated when it wants to start mailing out ballots for the general.[3]

Rhode Island already makes it easy to vote, and it's making voting even easier in light of COVID-19. Per usual, Rhode Island will have in-person voting on primary day and election day. To make voting safer during the pandemic, Rhode Island has

[2] Turnout in the primaries is much higher when the Governor's seat is on the ballot. *See 2018 Statewide Primary*, bit.ly/2DPmMIE; *2014 Statewide Primary*, bit.ly/2PFEQYi. And it is much lower when there is no gubernatorial or U.S. Senate race. *See 2016 Statewide Primary*, bit.ly/2PEzOLD.

[3] Similar to the primary, in-person voting for the general runs parallel to voting by mail. Early in-person voting begins October 14, 2020 and ends at 4:00 pm on November 2. *See Voter Calendar*, *supra*.

"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. Rhode Island is also, for the first time, allowing 20 days of early voting before the primary and the general elections. "Early voting will reduce the number of people who go to the polls on Election Day," according to the Secretary of State, and will prevent "crowding at city or town halls on any particular day or time." *How to Vote In-Person Before Election Day*, bit.ly/2DUdtqA. Rhode Island also offers no-excuse absentee voting, 17 R.I. Gen. Laws §17-20-2(4)—an extremely popular option during the pandemic.

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 absentee ballots in the presence of two witnesses or one notary. R.I. Gen. Laws §§17-20-2.1(d)(1), (4); 17-20-2.2(d)(1), (4); 17-20-21; 17-20-23(c); *see also* §17-20-2.1(d)(2)-(3) (creating exceptions for voters who are out of state, overseas, hospitalized, or in a nursing home). Like poll workers for in-person voting, these third-parties are the only external verification that the person casting the absentee ballot is who she says she is. Rhode Island's witness requirement has been in place since at least 1978, R.I. Public Law 1978, c. 258—though the notary aspect is nearly a century old, R.I. Public Law 1932, c. 1863. A dozen States have similar laws. *See How States Verify Voted Absentee Ballots*, NCSL (Apr. 17, 2020), bit.ly/33LAqay. For

the 2020 elections, Rhode Islanders can satisfy the witness requirement by teleconferencing with a remote notary. *Remote Online Notarization*, bit.ly/39JG4Lu.

In April 2020, Rhode Island's governor moved the State's presidential primary from April to June and suspended the witness requirement. E.O. 20-27 (Apr. 17, 2020), bit.ly/33dwoYq. (By April, it was already clear that the primary would be noncompetitive because both parties already had a de facto nominee.) The then-Vice Chair of the Board of Elections made clear that the suspension of the witness requirement for the June primary was "a one time emergency response to an emergency of unprecedented proportions" and cautioned that "[n]o precedent is being set for the fall primaries or November election in any way." @sericksonri, Twitter (April 14, 2020, 11:52 AM), bit.ly/2PHEPTQ (posting copy of statement); Gregg, *R.I. GOP Warns of Potential Mail Ballot Fraud in Presidential Primary*, Providence J. (April 14, 2020), bit.ly/30GSPU4.

When the governor waived the witness requirement for the June presidential primary, the State had not yet entered Phase I of the governor's plan for reopening after COVID-19. *See* Folger-Hartwell & Strauss, *Reopening Rhode Island Phase 1: A Practical Guide for Employers*, bit.ly/30TRjNd. Since June 30, however, Rhode Island has been in Phase III. *Rhode Island to Move to Phase 3 Tuesday, Governor Extends Executive Orders*, ri.gov/press/view/38720. Under Phase III, Rhode Islanders can (with social-distancing precautions) go to "[r]etail, restaurants, gyms, museums, close-contact business, office-based businesses, parks, beaches" and attend "[w]eddings, parties, networking events," indoor "[s]ocial gatherings" of up to 15

people (or 50 people "with a licensed caterer), and indoor public events of up to "125 people." See *Phase III Revised: Picking Up Speed*, bit.ly/3ipa16v.

Both the governor and the legislature have declined to suspend the witness requirement for the September or November elections. The Secretary of State championed legislation to that effect, but her bill failed in the senate. D.Ct. Dkt. 1 ¶35. The Secretary criticized the senate for "fail[ing] the people of our state." *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*.

Not long after her legislation failed, the Secretary found another way to suspend the witness requirement. Plaintiffs filed this lawsuit against the Secretary and the 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]." D.Ct. Dkt. 1 at 21-22. Plaintiffs simultaneously sought a TRO and preliminary injunction. In their motion, Plaintiffs stated that they had contacted the Secretary's office the day before they filed their complaint. D.Ct. Dkt. 5 at 2. Notwithstanding the fact that the Secretary had finalized the State's order for mail-ballot envelopes (with the witness requirement) by the original deadline of July 17, *see* D.Ct. Dkt. 23 ¶7, the Secretary advised Plaintiffs before they even filed their complaint that she "will not oppose Plaintiffs' motion for injunctive relief." D.Ct. Dkt. 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). App. 18. Knowing the state Republican party planned to intervene, the Secretary's counsel informed the party on Friday about the potential consent decree. App. 19. (The Republican party was not invited to participate in the negotiations.) Applicants then joined forces and worked all weekend to find counsel and draft emergency motions. They moved to intervene late on Sunday, July 26—less than one business day after they learned of the consent-decree negotiations, and only three days after the complaint was filed.

On Monday, July 27, the parties submitted a proposed consent decree that suspended the witness requirement for all Rhode Islanders during the September and November elections. D.Ct. Dkt. 18-1. 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. *Id.* ¶13. That same day, without waiting for court approval of the proposed consent decree, the Secretary asked the state's vendor to print mail-ballot envelopes for the primary "without the witness requirement." D.Ct. Dkt. 23 ¶11.

The district court held a fairness hearing on Tuesday, July 28. At the hearing, the district court let Applicants participate "in equal measure to the parties," App. 20, but denied their motion to intervene. The court found that Applicants "had not timely sought to intervene" and that their interests were "adequately represented by the existing [defendants]." App. 20 n.5.

The district court approved the consent decree. Recognizing that these decrees cannot "'violate the Constitution, a statute, or other authority,'" App. 22, 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." App. 22. Despite the rapidly approaching elections, the court's opinion never mentioned or addressed the *Purcell* principle, or this Court's stay of a similar injunction in *Merrill*. The court denied Applicants' request for a stay pending appeal. App. 41. The court ended the fairness hearing by noting that it would issue written orders as soon as possible. App. 41.

After the district court issued written orders on July 30, Applicants immediately appealed. Applicants filed a motion for a stay pending appeal with the First Circuit on July 31. On August 1, the First Circuit ordered expedited briefing to be completed by August 5. On August 6, a panel of the First Circuit held oral argument on the motion.

On August 7, the panel issued a *per curiam* decision. It granted Applicants intervention "for the purposes of appeal only," reserving judgment on "the full scope of intervention until we review this case on its merits." App. 4. And it denied a stay pending appeal.

As to the merits of the stay motion, the panel agreed with the parties that it must address whether COVID-19 makes Rhode Island's witness requirement unconstitutional. App. 4-5. Applying *Anderson-Burdick* balancing, the panel concluded that enforcing the witness requirement would impose a "significant"

burden on the right to vote, while the state's interest in enforcing the law "is not of great import." App. 5, 7. Addressing the *Purcell* principle, the panel recognized that this Court has repeatedly emphasized "the perils of federal courts changing the rules on the eve of an election." App. 8. In fact, the panel explained that it "would be inclined to grant the stay" in light of *Purcell*, but it declined for two reasons. App. 9. First, the Secretary and the Board opposed the stay; second, the panel surmised that Rhode Island voters might expect that the witness requirement would not be enforced for the upcoming elections given that the Governor had waived it for the uncontested June presidential primary. App. 9-10.

REASONS FOR GRANTING THE STAY

The standard for a stay pending appeal is "well-settled." *Little v. Reclaim Idaho*, 2020 WL 4360897, at *1 (U.S. July 30, 2020) (Roberts, C.J., concurring in the grant of stay). This Court will enter a stay when three factors are present:

1. a "reasonable probability" that it will grant certiorari;
2. a "fair prospect" that it will reverse the judgment below; and
3. a "likelihood that irreparable harm will result from the denial of a stay."

Id. (quoting *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010)). Sometimes this Court will also "balance the equities and weigh the relative harms to the applicant[s] and to the respondent[s]." *Hollingsworth*, 558 U.S. at 190. These factors, as they did in *Merrill*, all favor a stay here.

I. There is a reasonable probability that four Justices will vote to grant certiorari and a fair prospect that five Justices will vote to reverse.

This Court has already determined that it would likely review, and likely reverse, an injunction against Alabama's witness requirement. *Merrill*, 2020 WL

3604049, at *1. Rhode Island's witness requirement mirrors Alabama's. And Applicants are raising the same two questions that Alabama raised in *Merrill* concerning its witness requirement: whether these laws are unconstitutional during COVID-19, and whether the district court's late-breaking injunction violates the *Purcell* principle. *See* Emerg. Stay App. 16-20, *Merrill*.

While *Merrill* involved a preliminary injunction rather than a consent judgment, that fact makes no difference to the two questions Applicants raise here. As all parties conceded below, App. 4-5, the consent judgment cannot stand unless Rhode Island's witness requirement is likely unconstitutional. Consent judgments cannot be "unlawful"; parties cannot "agree to take action that conflicts with or violates" a statute or the Constitution. *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 526 (1986). As Judge Easterbrook put it, "a consent judgment in which the executive branch of a state consents not to enforce a law is 'void on its face'" unless the state law "probabl[y] violat[es]" federal law. *Kasper v. Bd. of Election Comm'rs of the City of Chicago*, 814 F.2d 332, 342 (7th Cir. 1987) (quoting *Nat'l Revenue Corp. v. Violet*, 807 F.2d 285, 288 (1st Cir. 1986)).

Relatedly, a consent judgment that contains injunctive relief *is* an injunction. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 89-90 (1981); *see Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996) ("The consent decree is an injunction … when [it] commands or prohibits conduct"). It is a "judicial" judgment—approved by the district court and enforceable by contempt—and thus is "subject to the rules generally applicable to other judgments." *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 378 (1992). Those

rules include the *Purcell* principle, a "general equitable principle" that is "specific to election cases." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964); *Purcell*, 549 U.S. at 4; *see Brennan v. Nassau Cty.*, 352 F.3d 60, 64 (2d Cir. 2003) ("consent decrees are … equitable decrees … 'and therefore subject to the usual equitable defenses'").

Thus, no matter why this Court entered a stay in *Merrill*, its reasoning compels a stay here. If Alabama's witness requirement did not violate the Constitution during COVID-19, then neither does Rhode Island's. And if the *Merrill* injunction violated *Purcell* because it was entered a month before the election, then the injunction here plainly violates *Purcell* as well.

A. Reasonable, nondiscriminatory regulations of absentee voting, like Rhode Island's witness requirement, remain constitutional during COVID-19.

As Alabama explained in *Merrill*, "courts across the nation are facing a flood" of challenges to "States' election laws in light of COVID-19." *Merrill* Stay App. 18. By one count, nearly 200 COVID-19/election cases have been filed in more than 40 States. *See* Levitt, *The List of COVID-19 Election Cases*, bit.ly/33D1xoe (last updated Aug. 8, 2020). The Democratic Party alone has filed more cases in 2020 than it did in "2015, 2016, 2017, and 2018 combined." Debenedetti, *Vision 2020*, N.Y. Mag. (June 22, 2020), nym.ag/3gVdrOd. This Court has already seen several of these cases. *E.g.*, *Merrill*, 2020 WL 3604049 (granting stay); *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020) (declining to vacate stay); *Thompson v. DeWine*, 2020 WL 3456705, at *1 (U.S. June 25, 2020) (declining to vacate stay); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (*RNC*) (granting stay). And until this Court addresses the merits in a written opinion, it will see many more.

The basic theory of these cases is that COVID-19 has made otherwise constitutional election laws unconstitutional; the burdens of complying with these laws are now too high, the argument goes, because people are staying home and socially distancing to avoid contracting the virus. *E.g.*, D.Ct. Dkt. 1 at 3. In States that restrict absentee voting to certain classes of voters, plaintiffs have used this theory to press for no-excuse absentee voting.[4] In States that already have no-excuse absentee voting, plaintiffs have used this theory to challenge many routine regulations of absentee voting. Plaintiffs have challenged election-integrity measures that require absentee voters to, for example, provide copies of a photo ID,[5] have someone witness their signature,[6] return their own ballot,[7] match their signature to

[4] *E.g.*, *Tully v. Okeson*, No. 1:20-cv-01271 (S.D. Ind.); *Collins v. Adams*, No. 3:20-cv-00375 (W.D. Ky.); *Clark v. Edwards*, No. 20-cv-00308 (E.D. La.); *Conn. NAACP v. Merrill*, No. 20-cv-00909 (D. Conn.); *Tex. Democratic Party v. Abbott*, No. 20-cv-438 (W.D. Tex.).

[5] *E.g.*, *Collins*, No. 3:20-cv-00375; *DCCC v. Ziriax*, No. 4:20-cv-00211 (N.D. Okla); *Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249 (W.D. Wis.).

[6] *E.g.*, *Ziriax*, No. 4:20-cv-00211; *Clark*, No. 20-cv-00308; *Common Cause R.I. v. Gorbea*, No. 20-cv-00318 (D.R.I.); *People First of Ala. v. Merrill*, No. 20-cv-00619 (N.D. Ala.); *Bostelmann*, No. 20-cv-249.

[7] *E.g.*, *New Ga. Project v. Raffensperger*, No. 1:20-cv-01986 (N.D. Ga.); *Democracy N.C. v. N.C. State Board of Elections*, No. 20-cv-457 (M.D.N.C.).

one already on file,[8] make sure their ballot arrives by election day,[9] pay for their own stamps,[10] and more.

These claims have divided the lower courts. *See Merrill* Stay App. 19-20 (highlighting the disagreements). Consider witness requirements for absentee ballots. The Seventh Circuit found these requirements likely constitutional despite COVID-19, while the Eleventh Circuit and now the First Circuit found the opposite. *Compare Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 3619499 (7th Cir. Apr. 3, 2020) (*DNC*) (granting stay), *with* App. 12 (denying stay), *and People First of Ala. v. Ala. Sec'y of State*, 2020 WL 3478093 (11th Cir. June 25, 2020) (denying stay). District courts, too, have split on these requirements. *Compare League of Women Voters of Va. v. Va. State Bd. of Elections*, 2020 WL 2158249 (W.D. Va. May 5, 2020) (approving consent judgment), *with League of Women Voters of Minn. Educ. Fund v. Simon*, No. 20-cv-1205 (D. Minn. June 23, 2020) (available at CA1 Doc. 00117623123 at 63-76) (rejecting similar consent judgment), *and compare Thomas v. Andino*, 2020 WL 2617329 (D.S.C. May 25, 2020) (entering preliminary injunction), *with Clark v.*

[8] *E.g.*, *Fugazi v. Padilla*, No. 20-cv-00970 (E.D. Cal.); *League of Women Voters Ohio v. LaRose*, No. 20-cv-03843 (S.D. Ohio); *Ariz. Democratic Party v. Hobbs*, 20-cv-01143 (D. Ariz.); *League of Women Voters v. Kosinski*, No. 20-cv-05238 (S.D.N.Y.); *League of Women Voters N.J. v. Way*, No. 20-cv-05990 (D.N.J.); *Self Advocacy Solutions N.D. v. Jaeger*, No. 20-cv-00071 (D.N.D.); *Memphis A. Phillip Randolph Inst. v. Hargett*, No. 20-cv-00374 (M.D. Tenn.).

[9] *E.g.*, *Common Cause Ind. v. Lawson*, No. 20-cv-02007 (S.D. Ind.); *Mays v. Thurston*, No. 20-cv-00341 (E.D. Ark); *New Ga. Project*, No. 20-cv-01986; *Bostelmann*, No. 20-cv-249.

[10] *E.g.*, *Black Voters Matter Fund v. Raffensperger*, No. 20-cv-01489 (N.D. Ga.); *New Ga. Project*, No. 20-cv-01986; *Ziriax*, No. 20-cv-00211.

Edwards, 2020 WL 3415376, at *1 (M.D. La. June 22, 2020) (denying similar preliminary injunction). Virus-based challenges to other in-person signature and notary requirements have likewise divided the lower courts. *See Reclaim Idaho*, 2020 WL 4360897, at *1 (Roberts, C.J., concurring) (highlighting the split that has arisen "[s]ince the onset of the pandemic" on "whether and to what extent States must adapt the initiative process to account for new obstacles to collecting signatures").[11]

Most courts have rejected these virus-specific challenges to States' regulations of absentee voting. Those courts are correct. Even setting aside the *Purcell* principle, these cases have at least three independent flaws.

First, these cases ignore this Court's decision in *McDonald*, which held that limitations on absentee voting typically do not "impact … the fundamental right to vote." *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969). In *McDonald*, Illinois law allowed some classes of voters to cast absentee ballots, but not people in jail. *Id.* at 803-04. When inmates who couldn't post bail challenged the law, this Court held that "the right to vote" was not "at stake." *Id.* at 807. There is no "right to receive absentee ballots." *Id.* Illinois' rules on absentee voting "d[id] not themselves deny … the exercise of the franchise" since they only "ma[d]e voting more available to some groups." *Id.* at 807-08. And Illinois' election code "as a whole" did not "deny … the exercise of the franchise" either. *Id.* at 808. Illinois had not "precluded [the inmates] from voting," since the inmates had potential options to vote

[11] While these decisions are all interlocutory, that posture is inevitable in election-year litigation, where plaintiffs seek relief rapidly and cases quickly become moot on appeal. *See Purcell*, 549 U.S. at 5-6.

in person. *Id.* at 808 & n.6. In other words, the inmates' constitutional claims failed because they were not "absolutely prohibited from voting by the State." *Id.* at 808 n.7.

The decisions below conflict with *McDonald*, as well as the Fifth Circuit's recent decision in *Texas Democratic Party v. Abbott*. *See* 961 F.3d 389 (5th Cir. 2020) (rejecting a virus-based challenge to Texas's law limiting absentee voting to senior citizens). Rhode Island's witness requirement affects only absentee voting. Even if it made that method of voting more difficult, Rhode Islanders are not "absolutely prohibited from exercising the franchise," *McDonald*, 394 U.S. at 809, because they can still vote in person on election day or during the 20 days of early voting. "[P]ermit[ting] the plaintiffs to vote in person … is the exact opposite of 'absolutely prohibit[ing]' them from doing so." *Tex. Democratic Party*, 961 F.3d at 404.

While the First Circuit noted that "many more voters are likely to want to vote without going to the polls" during COVID-19, App. 5, "we cannot hold private citizens' decisions to stay home for their own safety against the State," *Thompson v. Dewine*, 959 F.3d 804, 810 (6th Cir. 2020); *accord Tex. Democratic Party*, 961 F.3d at 405 (explaining that "the Virus" is "beyond the state's control"). In-person voting can be done safely, especially with the extra precautions that Rhode Island is taking. *See Public Health Efforts to Mitigate COVID-19 Transmission During the April 7, 2020 Election*, CDC (July 31, 2020), bit.ly/2DsLmzf (finding no increase in COVID-19 after Wisconsin's in-person election in April due to common mitigation strategies). Rhode Island's election officials must believe in-person voting is safe, since they are opening and staffing polling places in September and November. And Rhode Island's health

officials must agree, since they have deemed it safe to engage in far more social activities. These judgments cannot be "second-guess[ed] by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess" the relevant risks. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief).

Second, even if regulations of absentee voting implicated the constitutional right to vote, cases like this one wrongly assume that COVID-19 can make otherwise constitutional laws unconstitutional. Courts usually analyze laws that implicate voting rights under the *Anderson-Burdick* test—the balancing test from this Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). The *Anderson-Burdick* test asks courts to "weigh" the law's burden on voting rights against the state interests behind the law. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). "Reasonable, nondiscriminatory restrictions" on voting rights are almost always justified by the "State's important regulatory interests." *Id.* (cleaned up). After all, there is no right to be free from "the usual burdens of voting." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (op. of Stevens, J.).

Laws like Rhode Island's witness requirement are "only the most typical sort of neutral regulations" that, in normal times, would easily satisfy the *Anderson-Burdick* balancing test. *Reclaim Idaho*, 2020 WL 4360897, at *2 (Roberts, C.J., concurring). Respondents agree; they argue only that the witness requirement is unconstitutional during the pandemic. *E.g.*, D.Ct. Dkt. 1 ¶¶60, 63. But even assuming

the witness requirement implicates the right to vote, the pandemic does not meaningfully alter the *Anderson-Burdick* balance.

On the burden side, witness requirements continue to impose only reasonable, nondiscriminatory burdens on absentee voting. Rhode Island gives voters nearly a month to find two witnesses or one notary. That task is not unusually difficult—certainly no more difficult than getting a photo ID by "making a trip to the [D]MV, gathering the required documents, and posing for a photograph." *Crawford*, 553 U.S. at 198. Witnesses can be family, friends, coworkers, congregants, teachers, waiters, bartenders, gymgoers, neighbors, grocers, and more. And every bank, credit union, UPS, and FedEx has a notary.

Again, courts cannot second guess the health and safety determinations of Rhode Island's elected officials. Both the governor and the legislature considered, and declined to, suspend the witness requirement in light of COVID-19. Even the Secretary concedes that "in person notary services" can be done safely during COVID-19, *Notarizing While Social Distancing*, bit.ly/33Jju4m, and she has made it even safer by allowing remote notarization that requires no physical interaction whatsoever, *Remote Online Notarization*, *supra*. The witnessing process can also be done safely, as several courts have found, by wearing masks, staying outside, standing six feet apart, looking through glass, sterilizing documents and pens, and other commonsense measures. *See Thompson*, 959 F.3d at 810; *Miller v. Thurston*, 2020 WL 4218245, at *7 (8th Cir. July 23, 2020). Witnessing involves less contact

than many other activities Rhode Island deems safe, including indoor social gatherings in groups of 15, going to the gym, eating out, working, and seeing a movie.

On the state-interest side of the balance, witness requirements continue to serve the State's interests in deterring "voter fraud" and increasing "'[c]onfidence in the integrity of our electoral processes,'" as the Seventh Circuit explained when it stayed an injunction of Wisconsin's witness requirement, *DNC*, 2020 WL 3619499, at *2; *accord Thompson*, 959 F.3d at 811 ("witness … requirements help prevent fraud"); *Miller*, 2020 WL 4218245, at *8 (similar). These interests, as well as the related interest in "promoting transparency and accountability in the electoral process," are "particularly strong"—indeed, "'essential to the proper functioning of a democracy.'" *John Doe No. 1 v. Reed*, 561 U.S. 186, 197-98 (2010). And these interests are even *stronger* during COVID-19, where Rhode Island expects "a record number of absentee ballot requests" at the same time its "primary and general election system [is] facing a wide variety of challenges in the face of the pandemic." *Reclaim Idaho*, 2020 WL 4360897, at *2 (Roberts, C.J., concurring).

The First Circuit's attempt to nitpick at these state interests is unpersuasive. Even if the state respondents believe the witness requirement serves no purpose, App. 7, they lost that debate when they failed to get it repealed. The legislatures that enacted and reenacted the law over the course of many years certainly thought it enhanced the integrity of Rhode Island elections. Further, *Anderson-Burdick* review is not strict scrutiny, so the First Circuit's demand for "evidence of fraud" and its suggestion that other anti-fraud protections are sufficient, App. 7-8, miss the mark.

See Crawford, 553 U.S. at 194-95 (rejecting similar arguments); *Timmons*, 520 U.S. at 364 (same). Regardless whether any fraud occurred in Rhode Island's presidential primary in June—a race where fraud would make little sense because the parties had already selected their de facto nominees—"the risk of voter fraud [is] real" and "could affect the outcome of a close election" in September or November. *Crawford*, 553 U.S. at 196.

Even during COVID-19, then, laws that require in-person signatures remain "reasonable, nondiscretionary restrictions [that] are almost certainly justified by the [state's] important regulatory interest[] in combating fraud." *Reclaim Idaho*, 2020 WL 4360897, at *2 (Roberts, C.J., concurring). Like the Seventh Circuit and unlike the First Circuit, this Court would likely so hold.

Third, these COVID-19 cases ask courts to enjoin *entire* state laws based on burdens to *some* specific voters. The only people who cannot vote as a result of Rhode Island's witness requirement are individuals who do not live with two eligible witnesses, will not interact with eligible witnesses outside of their home, will not have eligible witnesses visit their home, cannot access a remote notary for three weeks, and cannot vote in person on any of the 21 available days. None of the named plaintiffs satisfy these criteria, and Respondents have not quantified how many Rhode Islanders do. This Court's "precedents refute the view that individual impacts" on only some voters "are relevant" under the *Anderson-Burdick* test. *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment). The "proper remedy" for "an unjustified burden on some voters" is not "to invalidate the entire statute" for "all …

voters." *Id.* at 202-03 (opinion of Stevens, J.). But that is precisely what the district court did here, contrary to this Court's precedent and a recent decision by the District of Minnesota. *See League of Women Voters of Minn.*, *supra*.

B. Federal injunctions on the eve of elections violate the *Purcell* principle, even when the state parties do not oppose them.

Relying on its decision in *Purcell*, "[t]his Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *RNC*, 140 S. Ct. at 1207. The *Purcell* principle guards against judicial interference in approaching elections, ensuring that voters know and adhere to the same neutral rules. *See, e.g.*, *Thompson*, 959 F.3d at 813 ("[F]ederal courts are not supposed to change state election rules as elections approach."). This principle of noninterference promotes "[c]onfidence in the integrity of our electoral processes," which "is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4; *see Benisek v. Lamone*, 138 S. Ct. 1942, 1944-45 (2018) (*Purcell* gives "due regard for the public interest in orderly elections."). And it protects against "voter confusion and [the] consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5.

Importantly, *Purcell*'s non-interference principle is a *sufficient* basis to deny injunctive relief—one that warrants a stay even when the existing law is likely unconstitutional. *See id.* at 5 (vacating a lower court's injunction "[g]iven the imminence of the election" while "express[ing] no opinion here on the correct disposition" of the case). *Purcell* thus "allow[s] elections to proceed despite pending legal challenges." *Riley v. Kennedy*, 553 U.S. 406, 426 (2008). Both this Court and the

circuit courts routinely rely on *Purcell* to stay lower-court orders requiring States to change election laws shortly before elections. *See, e.g.*, *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014); *Husted v. Ohio State Conference of NAACP*, 573 U.S. 988 (2014); *Perry v. Perez*, 565 U.S. 1090 (2011).

The First Circuit recognized *Purcell*'s "special caution about the perils of federal courts changing the rules on the eve of an election" and acknowledged this Court's repeated applications of it. App. 8-9. Indeed, it stated that it "would be inclined to grant the stay requested" under *Purcell* "but for two unique factors in this case." App. 9. Those factors were the state respondents' opposition to a stay, and the court's speculation that Rhode Island voters might wrongly think that the witness requirement is suspended for September and November, like it was in June. Neither factor is a legitimate basis to distinguish *Purcell*.

First, the Secretary's and the Board's opposition to a stay is irrelevant. Because the *Purcell* principle protects *voters* and their "[c]onfidence in the integrity of our electoral processes," 549 U.S. at 4, it makes little difference whether state officials support judicial interference. To the extent the State has spoken in this case, it *supports* the witness requirement, as the governor and legislature both deliberately declined to suspend it for the upcoming elections. The First Circuit's speculation that these actors support the consent judgment because they have not filed an amicus brief in this highly expedited litigation, App. 7, 11-12, is pure speculation. And even if the entire state government wanted rid of the requirement, courts cannot honor that subjective desire until it is manifested in the proper lawmaking channels. In any

event, this Court's decision in *Frank v. Walker*, 574 U.S. 929 (2014), makes clear that *Purcell*'s non-interference principle also applies when the private parties want stability and the state parties want change.

Frank concerned Wisconsin's voter-ID law, which required voters to show specified photo identifications to cast a ballot. When a group of voters and various organizations challenged the law preenforcement, the district court enjoined it almost as soon as it went into effect. Two years passed, and the district court permanently enjoined the law. *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wisc. April 29, 2014). Yet the Seventh Circuit stayed the injunction pending appeal, stating that Wisconsin could "enforce the photo ID requirement in this November's election." *Frank v. Walker*, 766 F.3d 755 (7th Cir. Sept. 12, 2014).

Nearly three weeks later, the plaintiffs sought emergency relief with this Court, arguing that *Purcell* required vacatur of the Seventh Circuit's stay. As they put it (in a brief by one of the same lawyers who represents the private respondents here), the voter-ID law "ha[d] never been enforced in any federal election" and had been "enjoined for 30 months when the Seventh Circuit entered the stay order," so the status quo was no voter-ID law. Emerg. App. to Vacate 1, 22-23, *Frank v. Walker*, No. 14A352 (filed Oct. 2, 2014). *Purcell* required vacatur of the Seventh Circuit's stay, the plaintiffs argued, because it "radically altered the status quo and fundamentally changed voting procedures weeks prior to Election Day." *Id.* at 22-23; *see also id.* at 20 ("[L]ower courts considering last-minute changes to long-established election rules

should delay implementation of proposed changes, even where the party seeking those changes is likely to prevail.").

The Wisconsin state officials opposed vacatur of the Seventh Circuit's stay, arguing that *Purcell* ran in the opposite direction. In their view, *Purcell* supported leaving the stay in place because the State had been "diligently implementing the voter-ID law" for the more than three weeks that had passed since the stay was entered. Opp. to Emerg. Appl. 3, 4, *Frank v. Walker*, No. 14A352 (filed Oct. 7, 2014) (*Frank* Opp.).

This Court sided with the plaintiffs' view of *Purcell*. Over the state officials' objection, it vacated the Seventh Circuit's stay. 574 U.S. 929. *Frank* thus makes clear that *Purcell* applies to protect voters, even when all state parties support the order in question. *Accord Pavek v. Donald J. Trump for President, Inc.*, 2020 WL 4381845, at *3 (8th Cir. July 31, 2020) ("[W]hile the state no longer challenges the preliminary injunction, it is in the public interest to uphold the will of the people, as expressed by acts of the state legislature"). *Purcell*'s principle of non-interference thus applies regardless of the Secretary's and the Board's position.

Second, the First Circuit's speculation that voters might expect the witness requirement to be waived for the September and November elections is neither true nor relevant. It's not true because Rhode Island's witness requirement has been in place for decades. Because it applied in every election in recent memory—with the sole exception of the June presidential primary—it is demonstrably wrong to say that "no witnesses" is the "only experience" for most voters. App. 10. Notably, when the

witness requirement was waived for the June primary, the then-Vice Chair of the Board of Elections assured voters that "[t]his is a one time emergency response to an emergency of unprecedented proportions" and cautioned that "[n]o precedent is being set for the fall primaries or November election in any way." *Supra* 6.

In any event, *Frank* makes clear that *changes* in governing law trigger *Purcell*, not courts' guesses at what voters' expectations might be. In *Frank*, the state officials seeking to enforce the voter-ID rule cited public polling suggesting "that 75 percent of likely voters believe that photo ID will be required to vote this November." *Frank* Opp. 3-4. But this Court still vacated the stay. Here, there is no dispute that Rhode Island's witness requirement is "current Rhode Island law." App. 7. And there is no real dispute that the consent judgment was imposed too close to the September and November elections. App. 9. *Purcell* thus warrants a stay.

II. Applicants will suffer irreparable harm without a stay.

Applicants face irreparable harm because, without a stay, this appeal will become moot and Applicants will forever lose their ability to appeal the consent judgment. *See Chafin v. Chafin*, 568 U.S. 165, 178 (2013) ("When ... the normal course of appellate review might otherwise cause the case to become moot, issuance of a stay is warranted."). Voting will begin and end before Applicants can litigate their appeal and file a certiorari petition, 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 "'[p]erhaps the most

compelling justification'" for a stay. *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers).

Other circuits have credited this exact harm, *Pavek*, 2020 WL 4381845, at *2, and the First Circuit was wrong to dismiss it. While Respondents "would face precisely the same harm if [the court] were to grant a stay," App. 8 n.2, "that consequence is attributable at least in part to [Respondents], wh[o] 'delayed unnecessarily' [their] pursuit of relief" until the eleventh hour. *Reclaim Idaho*, 2020 WL 4360897, at *4 (C.J., Roberts, concurring). Further, when both sides face mootness concerns due to "the imminence of the election," any tie goes to "allow[ing] the election to proceed *without* [the] injunction." *Purcell*, 549 U.S. at 5-6 (emphasis added).

Mootness aside, Applicants' members and voters will suffer other irreparable harms without a stay. Rhode Islanders rely on the legislature to enact and amend election laws. *See* R.I. Const. art. II, §2 (vesting the General Assembly with authority to over primaries, elections, absentee voting, and "the prevention of abuse, corruption and fraud in voting"). Yet the consent decree circumvents the legislature and suspends the witness requirement that Rhode Islanders have used for decades, and that the Board of Elections once deemed necessary "to assure the integrity of the electoral system." 410 R.I. Code R. 20-00-9.3(E). Applicants, their members, and their voters will face "[s]erious and irreparable harm" if the State "cannot conduct its election in accordance with its lawfully enacted ballot-access regulations." *Thompson*, 959 F.3d at 812.

III. 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 any parties. *See Pavek*, 2020 WL 4381845, at *3. Again, any urgency here is Respondents' fault. Indeed, the Secretary turned to this lawsuit only after unsuccessfully lobbying the legislature and governor to provide the same relief. And well aware of the witness requirement and COVID-19, the private respondents chose not to file this suit until the next elections were rapidly approaching. This delay undercuts their claims of harm. *Benisek*, 138 S. Ct. at 1944. After all, "a party requesting a preliminary injunction must generally show reasonable diligence—"in election law cases as elsewhere." *Id.*

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 Me. PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010); *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008). Federal courts should not "lightly tamper with election regulations," so the public interest lies in "giving effect to the will of the people by enforcing the [election] laws they and their representatives enact." *Thompson*, 959 F.3d at 812-13. This is especially true in the context of an approaching election. *See id.* at 813; *Respect Maine PAC*, 622 F.3d at 16. And it remains true where the State has chosen to lie down instead of defending its duly enacted election laws. *Pavek*, 2020 WL 4381845, at *3.

CONCLUSION

For all these reasons, Applicants respectfully ask this Court—by Wednesday, August 12—to stay the consent judgment pending disposition of Applicants' appeal in the First Circuit and petition for a writ of certiorari in this Court.

Respectfully submitted,

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