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

<u>EMERGENCY</u> MOTION FOR STAY PENDING APPEAL

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RULE 26.1 DISCLOSURE STATEMENT

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

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INTRODUCTION

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

I. Movants are entitled to intervene as defendants.

A district court "must permit" intervention when

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

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

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

A. Movants' rapidly filed motion is timely.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The Court should grant a stay pending appeal.

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

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

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

A. Movants will likely succeed on the merits.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

iii. The consent decree is overbroad.

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

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

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

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

B. Movants will suffer irreparable harm without a stay.

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

s/ Thomas R. McCarthy

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CERTIFICATE OF COMPLIANCE

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

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

CERTIFICATE OF SERVICE

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ADDENDUM