No. _____

In the Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE,
Petitioner,

v.

DEMOCRATIC NATIONAL COMMITTEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

BOBBY B. BURCHFIELD
Counsel of Record
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000
bburchfield@mwe.com

Attorney for Petitioner Republican National Committee

September 21, 2012

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Third Circuit misinterpret *United States v. Munsingwear, Inc.,* 340 U.S. 36 (1950), and thus improperly rely on the district court's factual findings and legal rulings in an earlier case that was vacated as moot while on appeal, even though other courts of appeals have interpreted *Munsingwear* as rendering a vacated decision a nullity, as if it the case had never been filed, and draining its factual findings of all vitality?

2. Did the United States Court of Appeals for the Third Circuit misconstrue Rule 60(b)(5), Fed. R. Civ. P., as this Court has interpreted that rule in *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991), and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), by deeming substantial compliance with a consent decree over more than two decades insufficient to justify termination, even though other courts of appeals have held that the defendant's good faith and substantial compliance with a decree over a long period of time is a ground, standing alone, for terminating the decree?

3. Did the United States Court of Appeals for the Third Circuit misconstrue Rule 60(b)(5), Fed. R. Civ. P., by affirming the district court's unilateral expansion of the decree, even though other courts of appeals have held that the rule does not authorize a court to increase the obligations imposed by a decree?

PARTIES TO THE PROCEEDING

The parties to this proceeding are the same as the parties to the proceeding in the United States Court of Appeals for the Third Circuit: petitioner Republican National Committee and respondent Democratic National Committee. Before the court of appeals, there were also several nonparticipating plaintiffs and nonparticipating defendants: Virginia L. Feggins, Lynette Monroe, New Jersey Democratic State Committee, Alex Hurtado, Ronald Kaufman, John Kelly, and New Jersey Republican State Committee.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the petitioner is not a subsidiary of a publicly-owned corporation, and no publicly-owned corporation has a financial interest in the outcome of these proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

PETITION FOR A WRIT OF CERTIORARI

The Republican National Committee respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Third Circuit's decision below, *Democratic National Committee v. Republican National Committee*, 673 F.3d 192 (2012), is reprinted at Pet. App. A. The Third Circuit's order denying rehearing is reprinted at Pet. App. C.

The district court's judgment, 671 F. Supp. 2d 575 (D.N.J. 2009), is reprinted at Pet. App. B.

JURISDICTIONAL STATEMENT

The Third Circuit issued its opinion in this case on March 8, 2012. The Third Circuit denied petitioner's timely petition for rehearing and rehearing *en banc* on April 27, 2012. On July 17, 2012, Justice Alito granted petitioner's application to extend the time to file a petition for writ of certiorari until September 24, 2012. Supreme Court Dkt. No. 12A53. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

Federal Rule of Civil Procedure 60 provides, in pertinent part:

FRCP 60. RELIEF FROM A JUDGMENT OR ORDER

> **(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> > (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable;

INTRODUCTION

For thirty years, through seven presidential and fifteen congressional election cycles, petitioner Republican National Committee ("RNC") has labored under a nationwide consent decree. The decree, originally entered in 1982 and modified by agreement in 1987, imposes restrictions and preclearance requirements on the RNC's ability to engage in ballot integrity programs. The central purpose of the decree is to prevent intimidation and suppression of minority voters. In 2008, the RNC sought termination or modification of the decree based on extensive changes in federal and state election laws and its good faith compliance with the terms and purpose of the decree over the course of more than two decades. Although

the district court modified the decree in certain respects, it refused to terminate the decree and reconfirmed it through at least November 2017. The Third Circuit affirmed.

In refusing to terminate the decree, the district court and Third Circuit both relied heavily on the district court's decision from 2004 granting a preliminary injunction against the RNC based on an alleged violation of the decree, even though that 2004 decision had been stayed pending appeal and subsequently vacated as moot pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Moreover, both lower courts deemed the RNC's compliance with the decree to be "not necessarily sufficient to justify vacating the Decree because compliance is the purpose of the Decree," Pet. App. 57a, and (citing no evidence) asserted that the RNC continues to have an "incentive" to intimidate and suppress minority voters because Republican candidates receive a lower share of minority voter support than Democratic candidates, Pet. App. 58a, 111a. Finally, the Third Circuit affirmed the district court's unilateral expansion of the decree to require preclearance of every RNC program that has "as at least one of its purposes the prevention of either fraudulent voting or fraudulent voter registrations." Pet. App. 162a.

This case merits review by the Court. The ability of the Republican Party, as one of two national political parties, to conduct effective election observation programs is of national importance. Moreover, the Third Circuit departed from its sister circuits in its interpretation and application of *Munsingwear*. The

Third Circuit relied heavily on the vacated 2004 ruling, whereas other circuits have uniformly interpreted *Munsingwear* as divesting a vacated decision of any factual or legal weight. Further, the Third Circuit, like the D.C. and Ninth Circuits, deemed decades of compliance with the decree insufficient to justify vacating the decree "because compliance is the purpose of the Decree," Pet. App. 58a.[1] In contrast, this Court in *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 249–50 (1991), as well as the Second and Eleventh Circuits, have held that good faith compliance with a consent decree over a period of years, coupled with elimination of the violation "to the extent practicable," is sufficient to warrant termination.[2] Finally, the Third Circuit deviated from Rule 60(b) and decisions of other circuits by affirming the district court's unilateral expansion of the decree beyond its explicit terms. A decision by this Court is necessary to resolve these important issues.

---

[1] *See NLRB v. Harris Teeter Supermarkets*, 215 F.3d 32, 36 (D.C. Cir. 2000); *SEC v. Coldicutt*, 258 F.3d 939, 943 (9th Cir. 2001).

[2] *See Patterson v. Newspaper and Mail Deliverers' Union of New York*, 13 F.3d 33, 39 (2d Cir. 1993); *United States v. City of Miami*, 2 F.3d 1497, 1508 (11th Cir. 1993). The First, Fourth, and Seventh Circuits appear to agree with the Second and Eleventh Circuits. *See also Consumer Advisory Bd. v. Glover*, 989 F.2d 65, 68 (1st Cir. 1993); *Alexander v. Britt*, 89 F.3d 194, 198 (4th Cir. 1996); *Alliance to End Repression v. City of Chicago,* 237 F.3d 799, 801 (7th Cir. 2001).

STATEMENT OF THE CASE

Background of the Consent Decree. Thirty years ago, in 1982, following allegations by the Democratic National Committee ("DNC") and New Jersey Democratic State Committee ("DSC") of minority voter suppression during the 1981 New Jersey gubernatorial election, the RNC and New Jersey Republican State Committee ("RSC") entered a consent decree with the DNC and DSC. Without admitting wrongdoing,[3] the RNC and RSC agreed to certain provisions intended to prevent purposeful suppression of minority votes. Insofar as relevant here, the decree required the RNC and RSC to "comply with all applicable state and federal laws protecting the rights of duly qualified citizens to vote for the candidate(s) of their choice," and to refrain from:

> undertaking any *ballot security activities* in polling places or election districts [1] where the racial or ethnic composition of such districts is a factor in the decision to conduct, or the actual conduct of, such activities there ***and*** [2] *where a purpose or significant effect of such activities is to deter qualified voters from voting*; ***and*** [3] the conduct of such activities disproportionately in or directed toward districts that have a substantial proportion of racial or ethnic

[3] "It is expressly understood and agreed that this Settlement Agreement, and the Consent Order incorporating the terms hereof, do not constitute any finding or admission of liability or wrongdoing by any defendant and do not constitute any finding or admission of merits or lack of merits to the allegations raised by the plaintiffs." Pet. App. 178a.

> populations shall be considered *relevant evidence* of the existence of such a factor or purpose.

Pet. App. 175a (emphasis added). The 1982 decree also made clear that "the RNC and RSC have no present right or control over other state party committees, county committees, or other national, state and local political organization of the same party, and their agents, servants and employees." Pet. App. 176a. On November 1, 1981, Judge Dickinson R. Debevoise entered the agreed decree without modification. Pet. App. 178a.

In 1987, based on allegations arising out of the 1986 election for United States Senate in Louisiana, the RNC and DNC (but not the RSC and DSC) amended the consent decree, again with no admission of wrongdoing. The 1987 modification expressly recited that "the RNC and DNC recognize the importance of preventing and remedying vote fraud where it exists." Pet. App. 181a. In addition, the 1987 modification stated that "the RNC may deploy persons on election day to perform normal poll watch functions," but for all other "ballot security efforts" required the RNC to seek preclearance from the court "following 20 days notice to the DNC." Pet. App. 181a–82a. On July 27, 1987, Judge Debevoise again entered the stipulated order with no modification. Pet. App. 184a.

Efforts to enforce the Consent Decree. The DNC or its allies have alleged voter suppression in violation of the decree four times, never successfully. Just prior to the 1990 midterm election, the DNC alleged violations of the decree in connection with the United States Senate race in North Carolina. After a hearing on

November 5, 1990, Judge Debevoise found the DNC "has failed to establish that the [RNC] conducted, participated in, or assisted ballot security activities in North Carolina." Pet. App. 186a. Notwithstanding this finding of no involvement by the RNC in prohibited activities, Judge Debevoise *sua sponte* ordered the RNC to include a copy of the decree with guidance on compliance with the decree in all ballot security materials it provides to state parties. Pet. App. 186a.[4]

On the eve of the 2002 election, the DSC challenged the RSC's Ballot Fairness plan in connection with the New Jersey election for United States Senate. On October 31, 2002, however, the court rejected the allegations and denied all relief. Pet. App. 189a.

Less than a week before the 2004 election, Ohio resident Ebony Malone alleged violation of the decree by the RNC in Ohio. On election eve, after expedited discovery including depositions of senior personnel of the RNC, Judge Debevoise heard argument but no live witnesses. Later that day, although recognizing that the challenged activity "was not in and of itself illegal under Ohio or federal law," Judge Debevoise concluded that "it was a clear violation of the 1987 consent decree in that advance Court approval was not obtained." Pet. App. 259a–60a. Accordingly, the afternoon before Election Day, he issued a preliminary injunction against the RNC prohibiting the RNC from using a vote challenge list compiled from returned postcards sent to

[4] Judge Debevoise ruled that the RNC violated the decree by failing to inform the North Carolina state party about the consent decree. The decree contained no provision, however, requiring the RNC to notify others of the decree.

newly-registered voters. Pet. App. 191a. That evening, a panel of the Third Circuit denied the RNC's request for a stay. Pet. App. 284a. On the morning of Election Day, however, the Third Circuit granted the RNC's petition for *en banc* rehearing, vacated the panel decision, and granted the stay.[5] That same day Ms. Malone sought a stay of the *en banc* order from Circuit Justice Souter, but because "she has already voted without challenge" he denied her petition. Pet. App. 290a.

On December 20, 2004, the Third Circuit acting *en banc* noted that Ms. Malone "voted in the November 2, 2004 election without challenge," dismissed the RNC's appeal as moot, and ruled "*the November 1, 2004 Order of the District Court is vacated*. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)." Pet. App. 292a (emphasis added).[6] Subsequently, on remand to the district court, Ms. Malone, the DNC, and the RNC executed a Joint Stipulation of Dismissal "[i]n accordance with . . . (3) the decision of the United States Supreme Court in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)." Pet. App.

[5] The *en banc* court "ORDERED that . . . *the opinion and order of this Court dated November 1, 2004, is vacated* and the November 1, 2004 order of Judge Debevoise is hereby stayed." Pet. App. 288a (emphasis added).

[6] Before the case became moot on appeal, the RNC was arguing, *inter alia*: (a) the case was nonjusticiable because, regardless of the court's ruling on the consent decree, Ms. Malone had been flagged for challenge by state authorities for registering multiple times at different addresses; (b) Ms. Malone lacked standing to enforce the decree; and (c) the challenged actions were neither attributable to the RNC nor a violation of the decree.

293a. Judge Debevoise entered that stipulation on February 3, 2005. Pet. App. 295a.

Shortly before the 2008 election, the DNC again sought relief under the Consent Decree, this time alleging wrongdoing in New Mexico. After a telephonic hearing, Judge Debevoise denied all relief. Pet. App. 296a–97a.

The current controversy. After the 2008 proceeding, the RNC concluded that the then-26 year old decree had become antiquated and was being used increasingly as a political weapon to distract the RNC's senior management at the most critical time before elections. Accordingly, on November 3, 2008, the RNC moved to terminate or modify the decree.

Proceedings before the district court. The district court held a two-day evidentiary hearing on May 5–6, 2009. At the hearing, the RNC called as its only witness the Hon. Thomas J. Josefiak, a practicing attorney who previously served as Commissioner and Chairman of the Federal Election Commission by appointment of President Reagan, as Chief Counsel to the RNC, and as General Counsel to President George W. Bush's reelection campaign. Testifying as a percipient and expert witness, Mr. Josefiak explained the RNC's extensive efforts at good faith and successful compliance with the decree. He testified that the RNC now has a "zero tolerance" policy for minority voter intimidation and suppression, and recognizes that, with the increasing proportion of minorities in the electorate, it would be "political suicide" for the RNC to

engage in or condone such tactics. J.A. 113, 174.[7] Mr. Josefiak also explained how numerous changes in law since entry of the decree in 1982 have reduced the justification for the decree by enhancing participation of minorities in elections, made the decree less workable, and made it more onerous for the RNC.[8]

The DNC called three expert witnesses. Dr. Chandler Davidson identified himself as the "leading expert in the country on voter suppression." J.A. 229. Although recounting numerous allegations of voter suppression going back almost sixty years, Dr. Davidson could name only two incidents of alleged voter suppression involving the RNC: the very ones in 1981 and 1986 on which the consent decree is based. As the district court recounted:

---

[7] Citations to "J.A." are to the Joint Appendix filed in the United States Court of Appeals for the Third Circuit.

[8] Mr. Josefiak discussed the National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg *et seq*. (also known as the "Motor Voter Law") which facilitates voter registration and the Help America Vote Act of 2002, 42 U.S.C. §§ 15301 *et seq*. ("HAVA"), which allows any putative voter to cast a "provisional ballot" even if subjected to challenge at the polls. Mr. Josefiak also testified that the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), has led the DNC to rely much more heavily on groups such as the Association of Community Organizations for Reform Now ("ACORN") for voter registration and get-out-the-vote efforts, leading to highly-publicized irregularities and numerous convictions for voter registration and ballot fraud. Mr. Josefiak also discussed state laws expanding no-excuse absentee voting by mail (allowed as of 2008 in 28 states), and early voting (allowed as of 2008 in 31 states). Pet. App. 87a.

> of the 14 incidents of voter intimidation discussed in [Dr. Davidson's] book, *the RNC was involved in only two*: the program in Newark, New Jersey that led to the enactment of the Consent Decree in 1982 and the initiative in Louisiana that resulted in its 1987 modification . . . In fact, the entirety of his book was based on press accounts.

Pet. App. 91a–92a (emphasis added). The DNC offered no other evidence of voter suppression.

The DNC's other expert witnesses were Dr. Lorraine Minnite, Assistant Professor of Political Science at Bernard College, and Justin Levitt, counsel to the Brennan Center for Justice and Associate Professor of Clinical Law at New York University School of Law. They testified that concerns about in-person voter fraud are "generally exaggerated," Pet. App. 93a, and "very rare," Pet. App. 100a.

On December 1, 2009, the district court refused to terminate the consent decree, but modified it in certain respects. The court devoted nearly two pages to reciting its findings in *Malone*. Pet. App. 75a–76a. It stated that "the substantive merits of the Court's [*Malone*] ruling have never been refuted, and its factual determination that the RNC engaged in conduct prohibited by the Consent Order remains undisturbed." Pet. App. 76a. The court observed that "the RNC was found as recently as five years ago in the *Malone* matter to have violated the consent decree." Pet. App. 101a. Although its earlier decision had been vacated while on appeal, the district court wrote: "Thus, this Court's factual determination that the RNC violated

the Consent Decree was never refuted and remains significant insofar as it rebuts the RNC's claims in connection with the pending Motion that it has not engaged in such activity since 1987." Pet. App. 114a n.10. Moreover, the court stated "it does not appear that the RNC's incentive to suppress minority votes has changed since 1982," Pet. App. 110a, because "it appears that the RNC has been largely unsuccessful in its efforts to attract minority voters. Until it is able to do so [*i.e.*, persuade minority voters to vote for Republican candidates], it will have an *incentive* to engage in the type of voter suppression that it allegedly committed in the actions that led to the enactment and modification of the Consent Decree." Pet. App. 110a (emphasis added); *see also* Pet. App. 111a (stating that RNC "*may be tempted* to keep qualified minority voters from casting their ballots") (emphasis added). The court concluded: "[I]n light of the continued incentive for the RNC to engage in voter suppression and *the fact that it violated the Consent Decree as recently as five years ago* [in the vacated *Malone* case], the Court finds that changed factual circumstances do not justify vacating that agreement." Pet. App. 115a (emphasis added).

The district court also stated that the risk of in-person vote fraud did not support terminating the decree. Relying on *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), which upheld an Indiana statute requiring voters to show photographic identification in order to vote, the district court stated that "a binding majority of the Court" joined opinions "refut[ing] the RNC's argument that in-person vote fraud poses a danger to the integrity of modern elections." Pet. App. 133a. It speculated that "the

effects of such fraud pales in comparison to the damage that would likely result from allowing the types of ballot security initiatives that are currently prohibited by the Consent Decree." Pet. App. 135a.[9] Citing no record evidence, the court asserted "*it is all but certain* that anti-fraud initiatives in which challengers are deployed at polling places will result in the disenfranchisement of many individuals whose eligibility is not in question." Pet. App. 140a (emphasis added).

Next, the district court found that changes to federal election laws in the Motor Voter Law, HAVA, and BCRA, and state adoption of no-excuse absentee balloting, vote-by-mail, and early-voting laws were not sufficient to warrant terminating the decree. The district court found that increases in minority voter registration are merely proportional to increases in the general population of African-Americans and Hispanics, and in any event do not assure registered voters will be allowed to vote. Pet. App. 142a. With regard to provisional ballots mandated by HAVA, the district court expressed concern that large numbers of provisional ballots (which are cast when the voter is

[9] To support this point, the court again invoked *Malone* as well as *Montana Democratic Party v. Eaton*, 581 F. Supp. 2d 1077 (D. Mont. 2008). *Eaton*, to which the RNC was not a party, was an *ex parte* decision denying a temporary restraining order against the Executive Director of the Montana Republican Party. The docket indicates that the case was dismissed without prejudice on October 10, 2008, with no substantive findings. *Eaton*, No. 08-141, Dkt. No. 16 (Oct. 10, 2008). Relying on *Malone* and *Eaton*, Judge Debevoise asserted that if "even one-tenth of the voters" that might have been (but never were) challenged in these cases were improperly disenfranchised, "4,100 citizens" would have been "robbed . . . of their right to vote." Pet. App. 139a.

challenged by a local official or a private poll watcher and cannot establish that he or she is entitled to vote in that precinct) were disallowed after review. In 2006, the court noted, 170,000 provisional ballots were not counted, including 17,325 "after it was verified that the voter was *not qualified*; 9,269 on the basis of *unspecified* '*ineligibility*,' 4,879 due to the fact that the voter had cast his or her ballot in the wrong jurisdiction, 3,147 after the voter was found to have *already voted*, and 30 on the grounds that the registrant was classified as '*deceased.*'" Pet. App. 149a–50a (emphasis added).

Although declining to vacate the decree, the district court modified it in several respects. The court added a termination provision eight years from the date of the court's order (December 1, 2017), with the prospect of further extensions if the DNC could prove to the district court judge's satisfaction a violation of the decree in the interim; clarified that only the DNC and DSC—and not nonparties such as Ms. Malone—may enforce the decree; and reduced the preclearance notice period for ballot security programs to ten days notice simultaneously to the DNC and the court. Pet. App. 161a–63a. Finally, in an effort to define the term "ballot security program," the court modified the decree to prohibit RNC poll watchers from reporting "irregularities []related to voter fraud," and to require preclearance of "any initiative undertaken by the RNC" that has "as at least one of its purposes the prevention of either fraudulent voting or fraudulent voter registration." Pet. App. 162a.

Proceedings before the Third Circuit. On appeal to the Third Circuit, the panel (Greenway, J., joined by

Sloviter, J. and Stapleton, S.J.) affirmed. The Third Circuit also relied expressly on the vacated 2004 *Malone* rulings. Rejecting the RNC's argument that its decades-long history of compliance supports termination of the decrees, the panel stated: "The District Court did not abuse its discretion or err by considering the *Malone* finding that, in 2004, the RNC engaged in substantive and procedural violations of the decree." Pet. App. 56a. Further, "the Court did not err in referring to and *relying upon its factual finding* of a 2004 violation in the *Malone* proceeding." Pet. App. 57a n.27 (emphasis added). And "the District Court . . . merely *considered its finding of fact* [in *Malone*] regarding the Decree violation as instructive regarding the RNC's level of compliance with the Decree." Pet. App. 56a (emphasis added).

Rejecting the RNC's argument based on substantial compliance with the decree, the Third Circuit ruled that "[e]ven if the RNC had not violated the Decree since 1987, that fact alone is not necessarily sufficient to justify vacating the Decree because compliance is the purpose of the Decree." Pet. App. 57a (citation omitted). It further noted that "the District Court did not abuse its discretion by finding that the RNC had not produced evidence demonstrating a lack of incentive for the RNC to engage in voter suppression and intimidation." Pet. App. 58a. The court found it "puzzling that the RNC is pursuing vacatur so vigorously" "[i]f the RNC does not hope to engage in conduct that would violate the Decree." Pet. App. 58a.

Finally, the court rejected the RNC's arguments that the district court had improperly expanded the decree. It ruled that the modifications were "suitably

tailored to resolve the prior ambiguity and [do] not strive to conform to the constitutional floor by allowing the RNC to engage in all activities without preclearance." Pet. App. 51a. It confirmed that the revised decree would prevent RNC poll watchers who observed clear instances of vote fraud from reporting the fraud, stating "perhaps the RNC *could obtain preclearance* for a voter fraud security program that instructs its normal poll watchers that, if they see a person who they believe is voting more than once, they can report that potential fraud to poll workers." Pet. App. 48a (emphasis added).

The RNC timely petitioned for *en banc* review, and the Third Circuit denied that petition on April 27, 2012. Pet. App. 169a. On July 17, 2012, this Court (Alito, Circuit Justice) granted a sixty-day extension of time to file this petition. Pet. App. 298a.

REASONS FOR GRANTING THIS PETITION

This case involves issues of profound national importance concerning the ability of and terms under which the RNC may exercise its right, guaranteed by statute in at least 21 states, to conduct poll watching activities for the purpose of detecting and reporting fraud.[10] Participation by both parties in the process of

[10] *See* Ariz. Rev. Stat. § 16-590(B); Ark. Code Ann. § 7-5-312(b)(1); Colo. Rev. Stat. § 1-7-106; Del. Code Ann. Tit. 15, § 4934(a); Fla. Stat. § 101.131; Ga. Code Ann. § 21-2-408(b); Iowa Code § 49.104(2); Ky. Rev. Stat. Ann. § 117.315(1); La. Rev. Stat. Ann. § 18:435(A)(1); Mich. Comp. Laws § 168.730(1); Minn. Stat. § 204C.07; Mo. Rev. Stat. § 115.105(1); N.H. Rev. Stat. Ann. § 666:4; N.J. Stat. Ann. § 19:7-5; N.M. Stat. Ann. § 1-2-21; N.C. Gen. Stat. § 163.45; Ohio Rev. Code Ann. § 3505.21; 25 Pa. Cons.

legally observing all phases of the electoral process serves the vital public purpose of ensuring the integrity of and enhancing confidence in federal, state, and local elections.

Moreover, this case would provide the Court an opportunity to clarify its precedents and resolve conflicts among the courts of appeals on three very important issues: the effect of *Munsingwear* on vacated findings of fact, the proper standard for terminating a longstanding consent decree entered between non-governmental parties, and the authority of a district court acting unilaterally to expand the scope of a consent decree.

I. BY PLACING DETERMINATIVE RELIANCE ON THE VACATED *MALONE* DECISION, THE LOWER COURT DECISIONS CONFLICT WITH *MUNSINGWEAR* AND DECISIONS OF OTHER CIRCUITS.

When the Third Circuit, sitting *en banc*, dismissed the RNC's 2004 appeal in *Malone* as "*moot*," and ruled that "the November 1, 2004, Order of the District Court is *vacated*," the court expressly cited *Munsingwear* in its order. Pet. App. 292a. Subsequently, Ms. Malone, the DNC, and the RNC stipulated to dismissal of the district court case, and Judge Debevoise entered the dismissal, again "[i]n accordance with" *Munsingwear*. Pet. App. 293a. Notwithstanding these clear rulings, both Judge Debevoise and the Third Circuit relied

---

Stat. § 2689(a); Tenn. Code Ann. § 2-7-104(a); Vt. Stat. Ann. Tit. 17, § 2564; Va. Code Ann. § 24.2-604(C).

heavily on the legal conclusions and factual findings in the *Malone* case.

A. The Lower Courts Placed Material Reliance on *Malone*.

As shown (pp. 11-12, 15 above), the District Court relied on the vacated *Malone* ruling stating: "the substantive merits of the Court's ruling [in *Malone*] have never been refuted, and its factual determination that the RNC engaged in conduct prohibited by the Consent Order remains undisturbed." Pet. App. 76a. Affirming, the Third Circuit endorsed the District Court's reliance on the *Malone* decision: "The District Court did not abuse its discretion or err by considering the *Malone* finding that, in 2004, the RNC engaged in substantive and procedural violations of the decree." Pet. App. 56a.

This was error, and it was not harmless. Reliance by the district court and the Third Circuit on the vacated *Malone* decision was fundamental to each court's holding. The Third Circuit recognized that the "central purpose" of the consent decree is "preventing the intimidation and suppression of minority voters," Pet. App. 19a, but was able to cite no instance, other than *Malone*, to implicate the RNC in any intimidation or suppression of minority voters during the 25-year life of the decree. As the district court acknowledged, the DNC's voter suppression expert Dr. Chandler Davidson could name only two incidents of alleged voter suppression involving the RNC: the ones in 1981 and 1986 on which the consent decree is based. Thus, without the *Malone* accusations, the undisputed

evidence shows consistent compliance by the RNC with the consent decree for well over 20 years.

B. The Third Circuit Misinterpreted *Munsingwear* and Is in Conflict with Other Circuits.

Munsingwear states that "[t]he established practice of the Court in dealing with a civil case . . . which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." 340 U.S. at 39. "That procedure *clears the path for future relitigation* of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *Id.* at 40 (emphasis added).

More recently, this Court applied *Munsingwear* when it vacated a qualified immunity decision:

> "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance . . . ought not in fairness be forced to acquiesce in" that ruling . . . . The equitable remedy of vacatur ensures that "those who have been prevented from obtaining the review to which they are entitled [are] not . . . treated as if there had been a review."

Camreta v. Green, 131 S. Ct. 2020, 2035 (2011) (citations omitted). "Vacatur then rightly '*strips the*

decision below of its binding effect,' . . . and 'clears the path for future relitigation.'" *Id*. (citations omitted) (emphasis added).

The Third Circuit attempted to distinguish *Munsingwear* on the ground that the lower court considered only "its *factual finding* of a 2004 violation in the *Malone* proceeding." Pet. App. 57a n.27 (emphasis added). To begin with, a judicial conclusion that a "violation" occurred is not a pure finding of historical fact; it is a mixed ruling of law and fact. Further, findings made during a preliminary injunction proceeding are not binding even at a later trial on the merits of the very same dispute.[11]

But most important, the mootness of *Malone* on appeal deprived the RNC an opportunity to challenge the district court's conclusions and findings. *See* n.6 above. Other circuits have been quite clear that vacatur for mootness eliminates any future effect or authority of the vacated ruling. The Ninth Circuit has recently gone out of its way to make clear that vacatur for mootness encompasses all past rulings, including the court's "judgment, injunction, opinions, orders, *and factual findings*." *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1168 (9th Cir. 2011) (emphasis added). The D.C. Circuit has been equally plain: vacatur under *Munsingwear* "drains the court's underlying findings of fact of whatever vitality they might otherwise have had for *res judicata* purposes."

---

[11] *See, e.g., University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.").

Aviation Enters, Inc. v. Orr, 716 F.2d 1403, 1407-08 (D.C. Cir. 1983). *See also United States v. Hernandez*, 216 F.3d 1088, 2000 WL 797332, at *4 (10th Cir. 2000) (unpublished decision) (vacatur transforms a decision into a "nullity with no precedential value," as though the case "was never filed.").

Not only does the Third Circuit's misinterpretation of *Munsingwear* undermine its decision in this case, it also confuses the settled law. Granting this Petition would enable the Court to clarify the meaning of *Munsingwear* and ensure its consistent application nationwide.

II. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH OTHER CIRCUITS OVER THE PROPER LEGAL STANDARD TO USE FOR TERMINATING A CONSENT DECREE.

A. This Court Has Construed Rule 60(b)(5) To Allow Termination of a Consent Decree upon a Showing of Substantial Compliance over a Course of Time.

This Court's modern jurisprudence on modification and termination of consent decrees derives from *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991), and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). In *Dowell*, the Tenth Circuit had set aside a district court order vacating a 1972 injunction on the ground that the school board had substantially complied with the injunction over a period of years. This Court reversed the Tenth Circuit. Of particular note, the Court firmly

rejected the Tenth Circuit's view that "'compliance alone cannot become the basis for modifying or dissolving an injunction,' 890 F.2d, at 1491," holding that the lower court's reliance on *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953), for this proposition "was mistaken." *Id.* at 246. The Court remanded with instructions for the district court to "address itself to whether the Board had *complied in good faith* with the desegregation decrees since it was entered, and whether the vestiges of past discrimination *had been eliminated to the extent practicable*." *Id.* at 249-50 (emphasis added).

Exactly a year later in *Rufo*, the Court addressed a consent decree governing the operation of the Charles Street Jail in Boston. In *Rufo*, the County did not assert substantial compliance with the decree, but rather challenged the decree as unduly burdensome. The district court, affirmed by the First Circuit, held that the County had not made "a clear showing of grievous wrong evoked by new and unforeseen conditions" as required for modification by *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932). Vacating, this Court repeatedly emphasized that Rule 60(b) sets forth a "flexible" standard for modification of consent decrees. *See, e.g.,* 502 U.S. at 379–382. "Accordingly," it ruled, "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Id.* at 383. This burden may be met "by showing a significant change either in factual conditions or in law." *Id.* at 384; *see also id.* at

393. The Court remanded for reconsideration of the County's motion to modify the consent decree.

More recently, in *Horne v. Flores*, 129 S. Ct. 2579 (2009), the Court vacated a decision of the Ninth Circuit and remanded to reconsider a motion to terminate a 2000 consent decree requiring funding for English language instruction. The Court emphasized that "passage of time frequently brings about changed circumstances—changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights—that warrant reexamination of the original judgment," *id*. at 2593, and "a critical question in this Rule 60(b)(5) inquiry is whether the objective of the District Court's 2000 declaratory order . . . has been achieved," *id.* at 2595. By failing to give sufficient weight to such changes as "structural and management reforms" in the school system, *id.* at 2604, the district court, as affirmed by the appellate court, abused its discretion.

Thus, this Court's precedents appear to distinguish the standard for termination of a decree based on substantial compliance from the standard for modification of a decree based on changed circumstances. Courts are empowered to terminate consent decrees upon a showing of substantial, good faith compliance over a period of time. Courts may modify consent decrees, even in the absence of substantial compliance, upon a showing that circumstances have changed so as to make further compliance without modification inequitable.

B. The Lower Courts Deemed Substantial Compliance Irrelevant, and Instead Demanded Proof that the RNC Lacked Any Incentive To Engage in Suppression.

In this case, the Third Circuit held that compliance with the decree, standing alone, is insufficient to warrant termination "because compliance is the purpose of the Decree." Pet. App. 57a. In addition, although recognizing that the "central purpose" of the decree is "preventing the intimidation and suppression of minority voters," Pet. App. 19a, it held that increased minority "[v]oter registration and turnout data is not statistically relevant" because those data "could be evidence that the decree is necessary and effective," Pet. App. 32a. Further, the court agreed with the district court that "the RNC had not produced evidence demonstrating a lack of incentive for the RNC to engage in voter suppression and intimidation," Pet. App. 58a.[12] Indeed, the Third Circuit deemed it "puzzling" that the RNC would seek termination of the decree unless the RNC hoped "to engage in conduct that would violate the Decree." Pet. App. 58a. Thus,

[12] According to the district court: "[T]he RNC has been largely unsuccessful in its efforts to attract minority voters. Until it is able to do so, it will have an incentive to engage in the type of voter suppression that it allegedly committed in the actions that led to the enactment and modification of the Consent Decree." Pet. App. 110a. The lower court concluded that "in light of the continued incentive for the RNC to engage in voter suppression and the fact that it violated the Consent Decree as recently as five years ago [in the vacated *Malone* case], the Court finds that changed factual circumstances do not justify vacating that agreement." Pet. App. 115a.

although asserting that "the purpose of the Decree had not yet been fulfilled," Pet. App. 54a, the Third Circuit viewed evidence that the central purpose of the Decree *was* being achieved *not* as evidence that the mission of the decree had been *fulfilled*, but as evidence that continuation of the decree was *necessary*.

C. The Circuits Are in Conflict about Whether a Long Period of Substantial Compliance, Without More, Supports Termination of a Consent Decree.

The courts of appeals are in conflict about whether a long period of substantial compliance is sufficient to terminate a consent decree. The Third Circuit, joined by the Ninth and D.C. Circuits, holds that compliance over a term of years, standing alone, is insufficient to justify termination unless the changed circumstances test of *Rufo* is met. In contrast, the Second and Eleventh Circuits have held that substantial compliance over a term of years may justify termination of a consent decree if the purpose of the decree has been achieved to the extent practicable. The First, Fourth, and Seventh Circuits have suggested their agreement with this latter view.

As shown (pp. 15-16), the Third Circuit holds that good faith compliance over a period of time was "not necessarily sufficient to justify vacating the Decree because compliance is the purpose of the decree." Pet. App. 57a. Likewise, the D.C. Circuit declined to terminate a consent decree, opining "good faith compliance certainly matters," but concluded that "extended compliance alone does not compel the modification of a consent decree." *NLRB v. Harris*

Teeter Supermarkets, 215 F.3d 32, 36 (D.C. Cir. 2000). Indeed, "*Dowell* and *Rufo* must be read together and the precedent leads us to conclude that compliance over an extended period of time is *not* in and of itself sufficient to warrant relief." *Id.* (emphasis added).[13] Similarly, in *SEC v. Coldicutt*, 258 F.3d 939 (9th Cir. 2001), the Ninth Circuit declined to terminate a decree. It reasoned: "obedience to a mandate 'provides no justification for dissolving the injunction. Compliance is just what the law expects.'" *Id.* at 943 (citation omitted). *But see NLRB v. Carpenters 46 N. Cal. Cntys. Conf. Bd.*, 191 F.3d 460, 1999 WL 680341, at *2 (9th Cir. 1999) (unpublished) (*per curiam*) (terminating a consent decree on the grounds that the decree contemplated a motion for modification or dissolution after 1989, that "all of the unions now before us have complied with the decree for at least ten years, a substantial length of time, and the NLRB has presented no evidence suggesting that violations are likely to recur in the absence of the decree.").

In contrast, other circuits have held that substantial compliance over a period of time may, standing alone, be sufficient to justify vacating a decree. The Second Circuit, also relying upon *Dowell* and *Rufo*, affirmed the termination of a consent decree on the basis of substantial compliance. In *Patterson v. Newspaper and Mail Deliverers' Union of New York and Vicinity*, 13 F.3d 33 (2d Cir. 1993), the court affirmed a district court decision terminating a nineteen-year-old consent

[13] Although Harris Teeter had never been held in contempt of the decree, the D.C. Circuit noted that during the time the decree was in effect, the NLRB had found Harris Teeter in violation of the labor laws, and Harris Teeter had settled other charges of unfair labor practices. 215 F.3d at 34.

decree that required newspapers in New York to use a comprehensive affirmative action program for the hiring of newspaper delivery personnel. The court ruled that "it is appropriate to apply a flexible standard in determining when modification or termination should be ordered in light of *either* changed circumstances *or* substantial attainment of the decree's objective." *Id.* at 38 (emphasis added). Even though the decree had not succeeded in achieving the desired parity between the percentage of minorities in the general population and the percentage of minorities in the workforce, the court concluded:

> Application of the flexible standard for modifying decrees in the context of this lawsuit seeking broad remedies to change hiring practices entitles a court of equity to focus on the dominant objective of the decree and *to terminate the entire decree once that objective has been reached*.

Id. at 39 (emphasis added). *See also United States v. Eastman Kodak Co.*, 63 F.3d 95, 101 (2d Cir. 1995) (explaining *Patterson* as upholding "an order of a district court vacating a consent decree where, although not every provision of the decree had been satisfied, we were satisfied that the decree had served its primary purpose.").

Likewise, in *United States v. City of Miami*, 2 F.3d 1497 (11th Cir. 1993), the Eleventh Circuit remanded to the district court to consider anew whether a consent decree that imposed on the City of Miami hiring targets for firefighters should be terminated in light of the City's substantial compliance. The district court had

refused to terminate the decree because "the basic objectives of the consent decree *had not been achieved*." Although not questioning the district court's conclusion regarding achievement of the decree's "basic objectives," the Eleventh Circuit instructed that "on remand, the district court must reach the substantial compliance question to determine whether the City has acted in good faith." *Id.* at 1498 n.38. The court ruled that, under *Dowell*, a motion to terminate as opposed to a motion to modify requires a determination of the basic purpose of the decree—as the district court had done—but also requires a determination of whether good faith compliance will support termination. The First, Fourth, and Seventh Circuits have suggested their agreement that substantial good faith compliance over a period of years may, without more, justify termination of a consent decree.[14]

---

[14] *See Consumer Advisory Board v. Glover,* 989 F.2d 65, 68 (1st Cir. 1993) (remanding for clarification of whether consent decree was properly terminated; "the district court has considerable discretion, especially after years of apparent compliance have passed, to conclude that the decree should be dissolved because it has achieved its purpose or no longer serves the public interest."); *Alexander v. Britt*, 89 F.3d 194, 198, 200 (4th Cir. 1996) (affirming refusal to terminate a 1992 consent decree because "the record unequivocally demonstrates that the administrators have not complied with the consent decree for a reasonable period of time," but recognizing that *Dowell* "directed that Rule 60(b) relief should be granted if the local authority could establish that (1) it had 'complied in good faith with the desegregation decree' (2) its compliance had lasted for 'a reasonable period of time' and (3) 'the vestiges of past discrimination had been eliminated to the extent practicable.'") (citation omitted); *Alliance to End Repression v. City of Chicago*, 237 F.3d 799, 801 (7th Cir. 2001) ("Mere compliance with a decree over a period of years, the plaintiffs argue, does not in itself justify the lifting of the decree. *We have our doubts whether this position is correct*, when the period of substantial

In each of those cases, the period of substantial compliance was substantially less than the twenty-five years of compliance by the RNC in this case. *See Alexander*, 89 F.3d at 200, 201 (noting that the Supreme Court in *Dowell* allowed termination after twelve years of compliance, the Second Circuit in *Patterson* after eighteen years, the Eleventh Circuit in *City of Miami* after fifteen years, and the First Circuit in *Consumer Advisory Board v. Glover* suggested without deciding that fifteen years would be sufficient); *Horne*, 129 S. Ct. at 2589, 2607 (nine years).

A decision by this Court would clarify whether compliance over the course of decades with a consent decree with no evidence of intent to return to the enjoined practices is sufficient to justify vacatur.

III. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH RULE 60(b)(5) AND OTHER CIRCUITS BY ALLOWING ENHANCED RESTRICTIONS ON THE RNC.

A. The District Court's Modification of the Decree, Affirmed by the Third Circuit, Resulted in a Significant Expansion of the Decree.

At its own instigation and over the objections of the RNC, the district court unilaterally expanded the

---

compliance is as long as it has been in this case [*i.e.*, ten years with only one incident of violation] and the decree is one that constrains a core function of state (or, what for these purposes is the same thing, local) government as tightly as this one does.") (emphasis added).

consent decree in two ways. First, it required preclearance of any effort by the RNC that has "as at least one of its purposes the prevention of either fraudulent voting or fraudulent voter registration." Pet. App. 162a. Unlike the actual decree, this modification prohibits the RNC from engaging in such efforts as assisting state and local election authorities in efforts to clean up outdated voter registration rolls, as well as any efforts to prevent registration fraud, absentee ballot fraud, vote tabulation fraud, or even vote buying. Second, the district court redefined "normal poll-watch function" in a way that prohibits poll watchers from reporting irregularities related to vote fraud, even if the observed fraud does *not* involve a minority voter, involves *no contact* by the poll watcher with a minority voter, and requires no more than an oral report of the irregularity to a poll worker. Pet. App. 162a.[15]

The Third Circuit affirmed, deeming the district court's modifications "suitably tailored to resolve the prior ambiguity." Pet. App. 51a. It also confirmed that the revised decree requires the RNC to seek preclearance from the district court to allow its poll watchers even to report clear instances of multiple voting. *See* Pet. App. 48a n.23 ("*perhaps* the RNC could obtain *preclearance* for a voter fraud security program that instructs its normal poll watchers that, if they see a person who they believe is voting more than once, they can report that potential fraud to poll workers")

[15] The district court wrote: "'Normal poll-watch function' shall include stationing individuals at polling stations to observe the voting process and report *irregularities unrelated to voter fraud* to duly-appointed state officials." Pet. App. 162a (emphasis added).

(emphasis added). Needless to say, the decree does not restrict the RNC's ability to report such blatantly illegal activity, and such a restriction is not what the RNC bargained for or agreed to in 1982 and 1987. Indeed, these unilateral changes stand in contrast to the express terms in the 1987 modification "recogniz[ing] the importance of preventing and remedying vote fraud where it exists." Pet. App. 181a.

Even though the Third Circuit recognized that the "central purpose" of the decree is "preventing the intimidation and suppression of minority voters," Pet. App. 19a, it, like the district court, conflated all efforts to prevent vote fraud with minority voter suppression. According to the district court, "it is all but certain that anti-fraud initiatives in which challengers are deployed at polling places will result in the disenfranchisement of many individuals whose eligibility is not in question." Pet. App. 140a. Such an assumption is both illogical and unsupported by the facts. Persons engaged in vote fraud may be of any ethnic or demographic background, but every fraudulent vote dilutes a properly cast vote. Further, efforts to prevent vote fraud need not, and indeed should not, suppress any legitimate votes. Efforts to remove the names of deceased persons or former residents from voting rolls, combat vote-buying, or prevent multiple voting are neither in concept nor effect targeted at minority voters.[16] Caucasians, as well as Hispanics and African-Americans, die, move, and engage in fraud.

[16] Indeed, Congress recognized in HAVA, which instructs state authorities to make efforts to clean up voter registration rolls by deleting the names of deceased persons and other improper registrants, that poorly-maintained voter rolls are an invitation to mischief. *See* 42 U.S.C. § 15483(a)(2).

B. The Unilateral Expansion of the Decree Conflicts with Rule 60(b) and Decisions of Other Circuits.

The unilateral expansion of this decree is at odds with both Rule 60(b) and the law of other circuits. Rule 60(b) states that "on motion and just terms, the court may *relieve* a party or its legal representative from a final judgment, order, or proceeding . . . ." By allowing the court to "relieve" a movant from obligations imposed by the order, Rule 60(b) plainly does *not* authorize a court to *increase* the party's obligation.

The Sixth Circuit drove this point home in *Lorain NAACP v. Lorain Board of Education*, 979 F.2d 1141 (6th Cir. 1992), in which it reversed a district court order that had increased the financial obligation on the state of Ohio, over the State's objection, from $1 million under the original consent decree to $9 million. The Sixth Circuit observed that Rule 60(b) "allows for *relief* from the terms of a consent decree where the terms are no longer equitable. . . . There appears no comparable provision addressing a party's request for an increase in the burdens of a consent judgment." *Id.* at 1152–53. *See also Harris v. City of Philadelphia*, 137 F.3d 209, 212 (3d Cir. 1998)(Cowen, J., joined by Mansmann and Alito, JJ.)(vacating amended consent decree on the ground that "the additional requirements imposed in the Amended Order cannot be found anywhere within the four corners of the 1991 Consent Decree.").

Even if the Third Circuit and district court were correct in their assumption that expanding the decree to prohibit any efforts by the RNC to detect and report vote fraud was consistent with the "central purpose" of

the decree, the district court exceeded its authority by unilaterally expanding the decree. The consent decree restricts the RNC's ability to engage in election day observation, but allows it to participate in state and local government efforts to combat voter registration and ballot fraud. Such efforts are in no way inconsistent with the RNC's "zero tolerance" policy against minority voter harassment or suppression, and indeed are consistent with state and federal law as well as the public policy of encouraging bipartisan election observation to build confidence in the electoral process. By allowing this dramatic expansion, the Third Circuit misconstrued Rule 60(b) and came into conflict with other circuits. This Court can correct this error and resolve the conflict by granting the Petition.

CONCLUSION

For the reasons set forth above, petitioner Republican National Committee urges this Court to grant the petition, and to schedule this matter for briefing and argument during the October 2012 Term.

Respectfully submitted,

BOBBY R. BURCHFIELD
Counsel of Record
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000
bburchfield@mwe.com

Attorney for Petitioner

September 21, 2012

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-4615

[Filed March 8, 2012]

DEMOCRATIC NATIONAL COMMITTEE; NEW JERSEY DEMOCRATIC STATE COMMITTEE; VIRGINIA L. FEGGINS; LYNETTE MONROE

v.

REPUBLICAN NATIONAL COMMITTEE; NEW JERSEY REPUBLICAN STATE COMMITTEE; ALEX HURTADO; RONALD C. KAUFMAN; JOHN KELLY

Republican National Committee,
Appellant

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civ. Action No. 2-81-cv-03876)

District Judge: Honorable Dickinson R. Debevoise

Argued on December 13, 2010

Before: SLOVITER, GREENAWAY, JR., and STAPLETON, *Circuit Judges*.

(Opinion Filed: March 8, 2012)

John W. Bartlett
Angelo J. Genova (argued)
Rajiv D. Parikh
Genova Burns
494 Broad Street
6th Floor
Newark, NJ 07102
Counsel for Appellee, Democratic National Committee

Bobby R. Burchfield (argued)
Mcdermott, Will & Emery
600 13th Street, N.W.
Washington DC 20005

Jason A. Levine
Vinson & Elkins
2200 Pennsylvania Avenue, N.W.
Suite 500 West
Washington, DC 20037
Counsel for Appellant, Republican National Committee

James R. Troupis
7609 Elmwood Avenue
Middleton, WI 53562
Counsel for Amicus Appellant, Republican Party of Wisconsin

Karl S. Bowers, Jr.
Hall & Bowers
1329 Blanding Street
Columbia, SC 29201
Counsel for Amici Appellants, Karl S. Bowers, Jr., Asheegh Agarwal, Esq., Roger Clegg, Esq., Robert N. Driscoll, Eric Eversole and Hans A. Von Spakovsky

---

OPINION

GREENAWAY, JR., *Circuit Judge*.

In 1982, the Republican National Committee ("RNC") and the Democratic National Committee ("DNC") entered into a consent decree (the "Decree" or "Consent Decree"), which is national in scope, limiting the RNC's ability to engage or assist in voter fraud prevention unless the RNC obtains the court's approval in advance. The RNC appeals from a judgment of the United States District Court for the District of New Jersey denying, in part, the RNC's Motion to Vacate or Modify the Consent Decree.[1] Although the District

[1] Judge Dickinson R. Debevoise, a United States District Judge, has presided over all district court proceedings regarding the

Court declined to vacate the Decree, it did make modifications to the Decree. The RNC argues that the District Court abused its discretion by modifying the Decree as it did and by declining to vacate the Decree. For the following reasons, we will affirm the District Court's judgment.

I. BACKGROUND

A. 1981 Lawsuit and Consent Decree

During the 1981 New Jersey gubernatorial election, the DNC, the New Jersey Democratic State Committee ("DSC"), Virginia L. Peggins, and Lynette Monroe brought an action against the RNC, the New Jersey Republican State Committee ("RSC"), John A. Kelly, Ronald Kaufman, and Alex Hurtado, alleging that the RNC and RSC targeted minority voters in an effort to intimidate them in violation of the Voting Rights Act of 1965 ("VRA"), 42 U.S.C. §§ 1971, 1973, and the Fourteenth and Fifteenth Amendments to the Constitution of the United States. The RNC allegedly created a voter challenge list by mailing sample ballots to individuals in precincts with a high percentage of racial or ethnic minority registered voters and, then, including individuals whose postcards were returned as undeliverable on a list of voters to challenge at the polls. The RNC also allegedly enlisted the help of off-duty sheriffs and police officers to intimidate voters by standing at polling places in minority precincts during voting with "National Ballot Security Task Force"

Consent Decree at issue in this case, beginning with the 1981 lawsuit through the Motion to Vacate in 2009.

armbands. Some of the officers allegedly wore firearms in a visible manner.

To settle the lawsuit, the RNC and RSC entered into the Consent Decree at issue here. The RNC and RSC agreed that they would:

> [I]n the future, in all states and territories of the United States:
>
> (a) comply with all applicable state and federal laws protecting the rights of duly qualified citizens to vote for the candidate(s) of their choice;
>
> (b) in the event that they produce or place any signs which are part of ballot security activities, cause said signs to disclose that they are authorized or sponsored by the party committees and any other committees participating with the party committees;
>
> (c) refrain from giving any directions to or permitting their agents or employees to remove or deface any lawfully printed and placed campaign materials or signs;
>
> (d) refrain from giving any directions to or permitting their employees to campaign within restricted polling areas or to interrogate prospective voters as to their qualifications to vote prior to their entry to a polling place;
>
> (e) refrain from undertaking any ballot security activities in polling places or election districts

> where the racial or ethnic composition of such districts is a factor in the decision to conduct, or the actual conduct of, such activities there and where a purpose or significant effect of such activities is to deter qualified voters from voting; and the conduct of such activities disproportionately in or directed toward districts that have a substantial proportion of racial or ethnic populations shall be considered relevant evidence of the existence of such a factor and purpose;
>
> (f) refrain from having private personnel deputized as law enforcement personnel in connection with ballot security activities.

(App. at 401–02.)[2] The RNC also agreed to, "as a first resort, use established statutory procedures for challenging unqualified voters." (Id.)

B. 1987 Enforcement Action and Consent Decree Modifications

In Louisiana during the 1986 Congressional elections, the RNC allegedly created a voter challenge list by mailing letters to African-American voters and, then, including individuals whose letters were returned as undeliverable on a list of voters to challenge. A number of voters on the challenge list brought a suit against the RNC in Louisiana state court. In response

---

[2] The RNC agreed that the RNC, its agents, servants, and employees would be bound by the Decree, "whether acting directly or indirectly through other party committees." (Id. at 402.)

to a discovery request made in that suit, the RNC produced a memorandum in which its Midwest Political Director stated to its Southern Political Director that "this program will eliminate at least 60,000–80,000 folks from the rolls . . . If it's a close race . . . which I'm assuming it is, this could keep the black vote down considerably." Democratic Nat'l Comm. v. Republican Nat'l Comm., 671 F. Supp. 2d 575, 580 (D.N.J. 2009) (citing Thomas Edsall, Ballot Security Effects Calculated: GOP Aide Said Louisiana Effort "Could Keep the Black Vote down," WASH. POST, OCT. 24, 1986 at A1. Although the DNC was not a party to the action in Louisiana state court, it brought an action against the RNC for alleged violations of the Consent Decree after this memorandum was produced.

The RNC and the DNC settled the lawsuit, this time by modifying the Consent Decree, which remained "in full force and effect." (App. at 404.) In the 1982 Decree, the RNC had agreed to specific restrictions regarding its ability to engage in "ballot security activities," but that Decree did not define the term "ballot security activities." (App. at 401.) As modified in 1987, the Decree defined "ballot security activities" to mean "ballot integrity, ballot security or other efforts to prevent or remedy vote fraud." Democratic Nat'l Comm., 671 F. Supp. 2d at 581. The modifications clarified that the RNC "may deploy persons on election day to perform normal poll watch[ing] functions so long as such persons do not use or implement the results of any other ballot security effort, unless the other ballot security effort complies with the provisions of the Consent Order and applicable law and has been so determined by this Court." (App. at 405.) The modifications also added a preclearance provision that

prohibits the RNC from assisting or engaging in ballot security activities unless the RNC submits the program to the Court and to the DNC with 20 days' notice and the Court determines that the program complies with the Consent Decree and applicable law.[3]

C. 1990 Enforcement Action

In 1990, the DNC brought a lawsuit alleging that the RNC violated the Consent Decree by participating in a North Carolina Republican Party ("NCRP") program. The DNC alleged that the RNC had violated the Decree in North Carolina by engaging in a program of the North Carolina Republican Party ("NCRP") in which 150,000 postcards were sent to residents of predominantly African-American precincts. This program allegedly attempted to intimidate voters by warning that it is a "federal crime . . . to knowingly give false information about your name, residence or period of residence to an election official." Democratic Nat'l Comm., 671 F. Supp. 2d at 581. The postcards falsely stated that there was a 30-day minimum

---

[3] The modifications state that

> the RNC shall not engage in, and shall not assist or participate in, any ballot security program unless the program (including the method and timing of any challenges resulting from the program) has been determined by this Court to comply with the provisions of the Consent Order and applicable law. Applications by the RNC for determination of ballot security programs by the Court shall be made following 20 days[sic] notice to the DNC . . .

(App. at 405.)

residency requirement prior to the election during which voters must have lived in the precinct in which they cast their ballot.

The District Court found that the DNC failed to establish that the RNC conducted, participated in, or assisted in the postcard program. However, the Court also found that the RNC violated the Consent Decree by failing to give the state parties guidance on unlawful practices under the Consent Decree or copies of the Decree when the RNC gave them ballot security instructional and informational materials. The Court held that the RNC must provide a copy of the Consent Decree, or information regarding unlawful practices under the Consent Decree, along with any such instructional or informational materials that the RNC distributes in the future to any state party.

D. 2004 Enforcement Action (the "Malone enforcement action")

In 2004, the week before the general election for President, Ebony Malone ("Malone"), an African-American resident of Ohio, brought an enforcement action against the RNC, alleging that the RNC had violated the Consent Decree by participating in the compilation of a predominantly-minority voter challenge list of 35,000 individuals from Ohio. Malone's name was on the list. To compile the list, the RNC had sent a letter to registered voters in high minority concentration areas of Cleveland and the Ohio Republican Party sent a second mailing approximately a month later. Registered voters whose letters were returned as undeliverable were added to the challenge list.

Seeking solace pursuant to the Decree, Malone sought before the District Court a preliminary injunction barring the RNC and any state organizations with which it was cooperating from using the list in ballot security efforts.

On November 1, 2004, the DNC appeared before the District Court at an evidentiary hearing in support of Malone. The RNC argued that Malone's suit was non-justiciable due to irregularities in her registration which would result in her being challenged by the Ohio Board of Election regardless of any separate challenge brought by the RNC. The RNC also claimed that it had complied with the Decree and that the potential challenge to Malone voting was a "normal poll watch function[]" allowed by the Decree. (App. at 405.) Finally, the RNC asserted that the Ohio Republican Party, which was not subject to the Decree, would carry out any challenge to Malone's eligibility to vote.

Following an evidentiary hearing, the District Court issued an Order barring the RNC from using the list to challenge voters and directing the RNC to instruct its agents in Ohio not to use the list for ballot security efforts. The District Court rejected the RNC's argument that Malone's claims were non-justiciable because she would suffer irreparable harm if she had to endure multiple challenges to her eligibility to vote. The District Court found that the RNC had violated the procedural and substantive provisions of the Consent Decree by participating with the Ohio Republican Party in devising and implementing the ballot security program and failing to obtain preclearance for the program.

The RNC requested that our Court stay the Order. The panel denied the request for a stay and affirmed the District Court's Order, noting that emails between the RNC and the Ohio Republican Party showed collaboration between the two organizations sufficient to support the District Court's factual findings.

The RNC petitioned for rehearing en banc. We granted the petition for rehearing en banc the next day, Election Day, November 2, 2004. This Court vacated the panel's ruling and stayed the District Court's Order. Before the entire Court could hear the matter en banc, Malone cast her ballot without being challenged. After Malone voted without challenge, Justice Souter, in his capacity as Circuit Justice for the Third Circuit, denied Malone's application to the Supreme Court seeking reinstatement of the injunction. We dismissed the appeal as moot, without addressing the merits.

E. 2008 Enforcement Action

On November 3, 2008, the DNC alleged in a lawsuit that the RNC violated the Consent Decree by hiring private investigators to examine the backgrounds of some New Mexico voters in preparation for challenging those individuals' voting eligibility. The DNC requested a preliminary injunction to prevent the RNC from using the information gathered by private investigators in any ballot security efforts. The District Court denied the DNC's Motion for a Preliminary Injunction, concluding that the RNC did not direct or participate in any ballot security measures, and held that the RNC had not violated the Consent Decree.

F. Motion to Vacate or Modify the Consent Decree

On November 3, 2008, shortly after the District Court denied the DNC's Motion for a Preliminary Injunction, the RNC submitted the Motion to Vacate or Modify the Consent Decree that is currently at issue. The RNC submitted several arguments in support of its motion: (1) since the 1987 modification, the enactment of (a) the National Voter Registration Act of 1993 (the "NVRA" or "Motor Voter Law"), 42 U.S.C. §§ 1973gg et seq., (b) the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 2 U.S.C. §§ 431 et seq., and (c) the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. §§ 15301 et seq. increased the risk of voter fraud and decreased the risk of voter intimidation; (2) the Consent Decree extends to types of conduct that were not included in the initial 1981 Complaint; (3) the Decree was interpreted too broadly and inconsistently with the parties' expectations at the time they entered the 1982 and 1987 settlements; and (4) the Decree violates the First Amendment by restricting communications between the RNC and state parties.

The District Court held an evidentiary hearing on the motion during May 5 and 6, 2009 and also received post-hearing submissions from the parties. On December 1, 2009, the District Court issued an opinion, denying the motion to vacate the Decree. First, the District Court rejected the RNC's argument that the Consent Decree was void because it "'improperly extend[s] to ... private conduct' and grants prospective relief beyond what the DNC could have achieved if the original 1981 action had been litigated." Democratic Nat'l Comm, 671 F. Supp 2d at 595. The Court, instead, held the Decree was not void because parties can settle

lawsuits by agreeing to broader relief than a court could have awarded otherwise. Furthermore, the Court held that the RNC was barred from asserting this argument because the RNC willingly entered the Decree as a means of settling the initial 1981 lawsuit and the RNC again consented to the Decree, as modified, in 1987. The District Court also held that the Decree did not violate the First Amendment because, under the Decree, the RNC is free to communicate with state parties about subjects other than ballot security. Additionally, the Court noted that the First Amendment applies only to state actions and does not prevent private parties from agreeing to refrain from certain types of speech.

Next, the District Court considered the RNC's arguments that the Decree should be vacated or modified due to changes in law, changes in fact, and the public interest in the RNC combating voter fraud. The Court found that neither the purported changes nor the public interest justified vacating or modifying the Decree. While the Court found that the Decree was not sufficiently unworkable to warrant vacating the Decree, the Court did find that four workability considerations justified modifying the Decree. Those considerations are that: (1) the potential inequity of the RNC being subject to suits brought by entities who were not party to the Decree when, under the BCRA, the RNC has to defend lawsuits using "hard money,"[4]

---

[4] "'[C]ontributions subject to [the Federal Election Campaign Act's (FECA), 2 U.S.C. §§ 431–55] source, amount, and disclosure requirements' came to be known as 'hard money,' while '[p]olitical donations made in such a way as to avoid federal regulations or limits' came to be known as 'soft money.'" Shays v. FEC, 528 F.3d

while the DNC would not have to spend any money on such suits because it would not be a party[5]; (2) the twenty-day notice requirement for preclearance prevents the RNC from combating mail-in voter registration fraud in a number of states with later mail-in voter registration deadlines; (3) the Decree lacked a clear definition of normal poll watching activities and the parties have not provided a definition, which has led the RNC to refrain from normal poll watching activities that the Decree was never intended to prohibit; and (4) the Decree lacked a termination date.

Thus, although the District Court denied the request to vacate the Decree, the Court granted the motion to modify the Decree. The District Court's modifications can be summarized as follows:

1. Only parties to the Consent Decree, RNC and DNC, may bring an enforcement suit regarding a violation of the Decree.

2. The preclearance period is shortened from 20 days to 10 days.

914, 917 (D.C. Cir. 2008) (quoting Shays v. FEC, 414 F.3d 76, 80 (D.C. Cir. 2005) ("Shays II"); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1652 (4th Ed. 2006)).

[5] The RNC would have to spend "hard money" on any lawsuits because the "BCRA made a number of dramatic changes to campaign finance law . . . , including barring national political parties from soliciting soft money." Shays, 528 F.3d at 918 (citing 2 U.S.C. § 441i(a)).

3. "Ballot security" is defined to include "any program aimed at combating voter fraud by preventing potential voters from registering to vote or casting a ballot." Democratic Nat'l Comm., 671 F. Supp. 2d at 622. The modification also includes a non-exhaustive list of ballot security programs.

4. "Normal poll-watch function" is defined as "stationing individuals at polling stations to observe the voting process and report irregularities unrelated to voter fraud to duly-appointed state officials." Id. The modification includes a non-exhaustive list of activities that do and do not fit into the Decree definition of normal poll-watch function.

5. The Decree does not apply to any RNC program that does not have as at least one of its purposes the prevention of fraudulent voting or fraudulent voter registration.

6. The Consent Decree expires on December 1, 2017 (eight years after the date of the modification). If, before that date, the DNC proves by a preponderance of the evidence that the RNC violated the Decree, the Decree will extend for eight years from the date of the violation.

The RNC filed a timely appeal.

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had subject matter jurisdiction over the litigation pursuant to 28 U.S.C. § 1331. We have jurisdiction over the appeal from the Consent Order, which contained an explicit reservation of appellate jurisdiction over the enforcement of the settlement terms, pursuant to 28 U.S.C. § 1291. See Keefe v. Prudential Prop. & Cas. Co., 203 F.3d 218, 223 (3d Cir. 2000); see also Halderman v. Pennhurst State Sch. & Hosp., 901 F.2d 311, 317 (3d Cir. 1990) (holding that courts have jurisdiction to enforce settlement agreements incorporated into orders).

We review the District Court's decision modifying and refusing to vacate the Consent Order for abuse of discretion. Delaware Valley Citizens' Counsel for Clean Air v. Pennsylvania, 755 F.2d 38, 41 (3d Cir. 1985). To demonstrate that a district court abused its discretion, an appellant must show that the court's decision was "arbitrary, fanciful or clearly unreasonable." Moyer v. United Dominion Indus., Inc., 473 F.3d 532, 542 (3d Cir. 2007) (quoting Stecyk v. Bell Helicopter Textron, Inc., 295 F.3d 408, 412 (3d Cir. 2002).

III. ANALYSIS

A. Legal Standard

This Court has emphasized that, by signing a consent decree, signatories make a "free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment." United States Steel Corp. v. Fraternal Assoc. of Steel

Haulers, 601 F.2d 1269, 1274 (3d Cir. 1979). Federal Rule of Civil Procedure 60(b) provides that a court may relieve a party from an order when "the judgment is void," "applying it prospectively is no longer equitable," or for "any other reason that justifies relief." FED. R. CIV. P. 60(b) (4), (5), (6). Rule 60(b) does not provide, however, that an order may be rescinded or modified merely because it is no longer convenient for a party to comply with the consent order. Rufo v. Inmates of the Suffolk County Jail, et al., 502 U.S. 367, 383 (1992); see Bldg. & Constr. Trades Council of Phila. & Vicinity, AFL-CIO v. NLRB ("BCTC"), 64 F.3d 880, 887 (3d Cir. 1995) (holding that Rufo's interpretation of Rule 60(b)(5) is a rule of general applicability and not limited to institutional reform litigation).

The Supreme Court interpreted Rule 60(b)(5) in Rufo, clarifying that "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." Rufo, 502 U.S. at 383. Such a party must establish at least one of the following four factors by a preponderance of the evidence to obtain modification or vacatur: (1) a significant change in factual conditions; (2) a significant change in law; (3) that "a decree proves to be unworkable because of unforeseen obstacles"; or (4) that "enforcement of the decree without modification would be detrimental to the public interest." Id. at 384.

The Court elaborated on the change in law factor, holding that a decree must be modified if "one or more of the obligations placed upon the parties has become impermissible" and that a decree may be modified if "law has changed to make legal what the decree was

designed to prevent." Id. at 388. Typically, courts should not grant modification or vacatur "where a party relies upon events that actually were anticipated at the time it entered into a decree." Id. at 385. If a party agreed to the decree notwithstanding the anticipated change in conditions, "that party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b)." Id.

Although Rufo provides a general interpretation of Rule 60(b)(5), it does not provide a "universal formula" for deciding when applying a decree prospectively is no longer equitable. BCTC, 64 F.3d at 888. In addition to the Rufo standard, a court determining whether to vacate or modify a decree should respond to the specific set of circumstances before it by considering factors unique to the conditions of the case. Id. (noting that "equity demands a flexible response to the unique conditions of each case"); The additional factors a court should typically consider before modifying or vacating a decree under Rule 60(b)(5) include:

> the circumstances leading to entry of the injunction and the nature of the conduct sought to be prevented; the length of time since entry of the injunction; whether the party subject to its terms has complied or attempted to comply in good faith with the injunction; and the likelihood that the conduct or conditions sought to be prevented will recur absent the injunction.

Id.

In weighing these factors, "the court must balance the hardship to the party subject to the injunction against the benefits to be obtained from maintaining the injunction" and the court should also "determine whether the objective of the decree has been achieved." BCTC, 64 F.3d at 888. While the decree and changed fact or law need not be completely inconsistent with each other, for such a change to justify vacatur, it must be significant, meaning that it renders the prospective application of the decree inequitable. See BCTC, 64 F.3d at 888.

After a moving party has established a change warranting modification of a consent order, "the district court should determine whether the proposed modification is suitably tailored to the changed circumstance." Rufo, 502 U.S. at 391. The modification "must not create or perpetuate a constitutional violation"; it "should not strive to rewrite a consent order so that it conforms to the constitutional floor"; and a court should not try to modify a consent order except to make those revisions that equity requires, given the change in circumstances. Id.

B. Discussion

The RNC asks that our Court vacate a decree that has as its central purpose preventing the intimidation and suppression of minority voters. When, as here, a party voluntarily enters into a consent decree not once, but twice, and then waits over a quarter of a century

before filing a motion to vacate or modify[6] the decree, such action gives us pause. Further, the RNC, with the advice of counsel, twice chose to limit indefinitely its ability to engage in certain activities enumerated in the Decree by entering into a decree with no expiration date.

At present, Appellant seeks review of the District Court's order denying vacatur because it prefers not to comply with the Consent Decree at a critical political juncture — the upcoming election cycle. See Rufo, 502 U.S. at 383. However, we cannot disturb the District Court's opinion unless it abused its discretion, meaning that its decision was "arbitrary, fanciful, or clearly unreasonable," Moyer, 473 F.3d at 542, when it found that the RNC failed to demonstrate that prospective application of the Decree, with the Court's modifications, would not be equitable.

In reviewing the District Court's opinion and its modifications to the Decree, we do not take lightly Judge Debevoise's nearly three decades of experience presiding over all matters related to this Decree. See Reconstruction Fin. Corp. v. Denver & R. G. W. R. Co., 328 U.S. 495, 533 (1946) (according special weight to a district judge's finding that a reorganization plan provided adequately for the equitable treatment of dissenters "[i]n view of the District Judge's familiarity with the reorganization"); Jenkins by Jenkins v.

---

[6] Although the RNC's motion requested that the Court vacate or modify the Decree, the RNC has not referenced any modifications, short of vacatur, that would make applying the Decree equitable in the RNC's view.

Missouri, 122 F.3d 588, 604 (8th Cir. 1997) (noting that a district judge had gained extensive knowledge of the conditions relevant to a specific lawsuit because the judge had presided over the litigation for twenty years, from the time of its inception).

We shall review whether the District Court abused its discretion by first holding that the Decree need not be vacated due to any First Amendment violation.[7]

Next, we shall review whether the District Court abused its discretion regarding Rule 60(b)(5). First, we shall analyze whether the District Court abused its discretion regarding the broad changed circumstances factors outlined in Rufo. Second, we shall analyze whether the District Court abused its discretion regarding the BCTC factors specific to the parties and Consent Decree at issue.[8] Third, we will inquire into whether the Court abused its discretion by holding that its prescribed modifications to the Decree were

---

[7] It is not clear from Appellant's brief whether the RNC raises this First Amendment argument under Rule 60(b)(5) or Rule 60(b)(6); however, we would reach the same conclusion under either rule because we do not find a First Amendment violation.

We need not determine whether the District Court abused its discretion by holding that the Decree was not void due to its extension to private conduct and granting relief beyond that which the Court could order absent the Consent Decree because the RNC has not raised that issue on this appeal.

[8] Although the District Court opinion did not specifically reference any BCTC factors as such, the opinion did consider factors relevant to the specific circumstances of this Consent Decree, including the BCTC considerations that the parties raised.

"suitably tailored to the changed circumstance[s]."[9] Rufo, 502 U.S. at 393.

The RNC has not demonstrated, by a preponderance of the evidence, the circumstances necessary for vacatur or for modifications, other than those ordered by the District Court. For the reasons set forth herein, we find that the District Court did not abuse its discretion in declining to vacate the Decree or in making the modifications to the Decree that it ordered.

1. First Amendment

The RNC argues that the Consent Decree should be vacated because the Decree violates the First Amendment in two ways. The RNC claims that the 2004 modifications to the Decree, which bar the RNC from engaging in ballot security activities absent District Court preclearance, serve as a prior restraint on the RNC's right to engage in political speech. Additionally, the RNC alleges that the District Court's 1990 Order unconstitutionally forces speech by requiring the RNC to provide a copy of the Decree, or information regarding unlawful practices under the Decree, along with any ballot security instructional or informational materials that the RNC distributes to any state party.

---

[9] The District Court did not expressly state that the modifications it ordered were suitably tailored to the changes in circumstances, but the Court discussed in some detail how the modifications would address the specific workability concerns.

As the District Court correctly noted, in this context, the First Amendment applies only to state action. Cent. Hardware Co. v. NLRB, 407 U.S. 539, 547 (1972). Under Shelley v. Kramer, 334 U.S. 1 (1948), court enforcement of certain private agreements constitutes state action. Id. at 19–20 (holding that a state court injunction to enforce a racially restrictive covenant against parties who did not wish to discriminate is state action); Switlik v. Hardwicke Co., Inc., 651 F.2d 852, 860 (3d Cir. 1981) ("the state court's enforcement of an agreement between two private individuals can, in certain instances, constitute state action" (citing Shelley, 334 U.S. 1)).

Although a court's enforcement of a consent decree can constitute state action under Shelley, Shelley's holding may not have sufficient reach to encompass the enforcement of this Decree. The Supreme Court has declined to find state action where the court action in question is a far cry from the court enforcement in Shelley. See Blum v. Yaretsky, 457 U.S. 991, 1004–05 (1982) (recognizing that state approval of or acquiescence to a private choice does not convert that choice into state action); Lavoie v. Bigwood, 457 F.2d 7, 11 (1st Cir. 1972) (noting the theory that, under Shelley, court enforcement of a private agreement may only be state action if, "in resorting to a state sanction, a private party must necessarily make the state privy to his discriminatory purpose").

Even if court enforcement of this Consent Decree constitutes state action, "speech rights are not absolute." Tennessee Secondary Sch. Athletic Ass'n v. Brentwood Acad., 551 U.S. 291, 295 (2007). "[C]onstitutional rights . . . may be contractually

waived where the facts and circumstances surrounding the waiver make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver." Erie Telecomm., Inc. v. City of Erie, Pa., 853 F.2d 1084, 1096 (3d Cir. 1988). Court enforcement of a private agreement to limit a party's ability to speak or associate does not necessarily violate the First Amendment. Ry. Emps. Dep't. v. Hanson, 351 U.S. 225 (1956) (holding that court enforcement of a union shop agreement, which would require all railroad employees to become union members does not violate the First Amendment right to association).[10]

The Supreme Court has long recognized that a party may waive constitutional rights if there is "clear" and "compelling" evidence of waiver and that waiver is voluntary, knowing, and intelligent.[11] "Such volition and understanding are deemed to be, and indeed have

---

[10] Furthermore, court orders can include limits on the ability of a party to speak, as occurs in confidentiality provisions regarding settlement agreements, and a party could bring an action for a court to enforce a private confidentiality agreement. See Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787-89 (3d Cir. 1994).

[11] See Edwards v. Arizona, 451 U.S. 477, 482 (1981) (waiver of right to counsel must be voluntary, knowing, and intelligent); Faretta v. California, 422 U.S. 806, 835 (1975) (same); D.H. Overmyer Co. of Ohio v. Frick Co., 405 U.S. 174, 185–86, (1972) (waiver of due process rights must be voluntary, knowing, and intelligent); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 145 (1967) (waiver of First Amendment rights must be shown by clear and compelling evidence); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (waiver requires "an intentional relinquishment or abandonment of a known right or privilege").

been held to be, present, where the parties to the contract have bargaining equality and have negotiated the terms of the contract, and where the waiving party is advised by competent counsel and has engaged in other contract negotiations." Erie Telecomm., 853 F.2d at 1096.

"The question of waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law." Brookhart v. Janis, 384 U.S. 1, 4 (1966). The Supreme Court has held that courts must "'indulge every reasonable presumption against waiver' of fundamental constitutional rights." Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1931)). Determining whether waiver was voluntary, knowing, and intelligent in any particular case rests "upon the particular facts and circumstances surrounding that case, including the background, experience and conduct" of the waiving party. Id.

Here, in 1982, the RNC, with the assistance of counsel, voluntarily entered into the Decree. In consideration of the DNC and other plaintiffs amicably resolving all matters that were or could have been raised in the 1982 lawsuit, the RNC signed a settlement agreement in which they committed, among other provisions,

> to refrain from undertaking any ballot security activities in polling places or election districts where the racial or ethnic composition of such districts is a factor in the decision to conduct, or the actual conduct of, such activities there and where a purpose or significant effect of such

> activities is to deter qualified voters from voting . . .

(App. at 401–02.) The RNC agreed that the terms of the Decree would bind the RNC, its agents, servants, and employees, "whether acting directly or indirectly through other party committees." (Id. at 402.)

In 1987, the RNC once again entered into a settlement stipulation, with the assistance of counsel, agreeing to modify the 1982 Decree. The Decree, as modified, clarified that "ballot security" efforts meant "ballot integrity, ballot security or other efforts to prevent or remedy voter fraud." Democratic Nat'l Comm., 671 F. Supp. 2d at 581. The modifications allow the RNC to engage in normal poll watch functions on Election Day so long as the people it deploys do not use or implement the results of any ballot security effort without a determination by the District Court that the ballot security effort complies with the provisions of the Decree and applicable law. In order to secure such a determination, the RNC must submit a description of the program to the District Court following twenty days' notice to the DNC. Only with the District Court's approval secured in this fashion can the RNC engage, assist, or participate in any ballot security program.

A court can enforce an agreement preventing disclosure of specific information without violating the restricted party's First Amendment rights if the party received consideration in exchange for the restriction. See Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1370 (4th Cir. 1975) (noting that executing a secrecy

agreement can "effectively relinquish[] . . . First Amendment rights").

That the Decree and its 1987 modification resolved all issues that could have been raised by the DNC and other plaintiffs in that litigation was sufficient consideration to evidence a waiver. See D.H. Overmyer Co. of Ohio v. Frick Co., 405 U.S. 174, 186-87 (1971) (holding that the presence of consideration constitutes some evidence of a waiver).

The Supreme Court has held that there is a valid waiver of constitutional rights where the party that waived "was a corporation with widespread activities and a complicated corporate structure; [the parties] had equal bargaining power; and [where the waiving party] did not contend that it or its counsel was unaware of the significance of the [instrument in which it waived notice]." Erie Telecomm., 853 F.2d at 1095 (citing D.H. Overmyer, 405 U.S. at 186). Here, the RNC has widespread activities, had equal bargaining power with the plaintiffs, and has not contended that it was unaware of the significance of the Decree, which it was free to decide not to enter into. The RNC also received consideration— the plaintiffs in the 1982 and 1987 lawsuits relinquished all claims that could have arisen from those actions. The RNC "may not now seek to withdraw from performing its obligations and from discharging its burdens, while it still continues to retain all of the benefits it received . . . as a result of the agreement[]." Erie Telecomm., 853 F.2d at 1097. The 1982 and 1987 settlement agreements, signed by counsel for the RNC, are clear and compelling evidence that the RNC voluntarily, knowingly, and intelligently waived certain First Amendment rights.

The RNC alleges that the District Court Orders from 1990 and 2004 violate its First Amendment rights. However, neither order imposes limitations on the RNC's First Amendment rights beyond those that the RNC voluntarily waived in 1982 and 1987. In 1990, the Court held that the RNC must provide a copy of the Consent Decree, or information regarding unlawful practices under the Consent Decree, along with any ballot security materials that the RNC distributes to any state party. Despite the RNC's arguments before our Court, any restrictions on the RNC's ability to communicate and associate with state and local parties are self-imposed and waived by the RNC entering into the Decree in 1982 and 1987.

In 2004, the District Court issued an Order barring the RNC from using a voter challenge list targeting precincts with large African-American populations that the RNC had compiled in coordination with the Ohio Republican Party. The District Court found that the RNC had violated the Decree both procedurally and substantively by participating with the Ohio Republican Party in devising and implementing the ballot security program and failing to obtain preclearance for the program. The 2004 Order does not impose any additional limitation on the speech rights of the RNC beyond those present in the 1982 and 1987 Decree and modifications, in which the RNC consented and agreed to certain restrictions of its rights. Hence, neither the 1990 nor 2004 Orders present a basis for a First Amendment challenge.

In 1982 and 1987, the RNC voluntarily agreed to create and abide by the very provisions that it now challenges as unconstitutional. The District Court's

enforcement of the Decree against the RNC does not result in a First Amendment violation. The District Court did not abuse its discretion in denying the request to vacate the Decree on this basis.

2. Rufo Factors

We now address the three Rufo factors in turn.

a. *Changed Factual Circumstances*

The Decree and its 1987 modification aim primarily to prevent the RNC from "using, [or] appearing to use, racial or ethnic criteria in connection with ballot integrity, ballot security or other efforts to prevent or remedy suspected vote fraud" and to neither "hinder[] [nor] discourag[e] qualified voters from exercising the right to vote." (App. at 404–05.) Given these purposes of the Decree, only a change that decreases minority voter intimidation and vote suppression ex ante can be a "significant change [that] warrants revision of the decree." Rufo, 502 U.S. at 383.

The RNC argues that the following factual changes warranted vacatur or modification of the Decree: first, the President and Attorney General of the United States and the President of the RNC (former) are African American;[12] second, that minority voter

[12] The only witness called by the RNC at the evidentiary hearing before the District Court was Thomas Josefiak, an election law expert who was appointed by President Ronald Reagan to serve as the Commissioner of the Federal Election Commission from 1985 until 1992. Josefiak testified that, since 1982, there has been a 41.6 percent increase in the number of registered voters classified

registration and turnout have increased; and third, that increased availability of alternative voting mechanisms such as early voting or permanent absentee voting are more widely available. The RNC also presented testimony at the evidentiary hearing before the District Court that the appointment of African-Americans as the RNC Chairman and Chief Administrative Officer decreased the likelihood that the RNC would engage in ballot security programs resulting in minority vote suppression. Testimony presented by the RNC further claimed that "with an African–American President, and an African–American Attorney General, [] the laws that are already on the books regarding voter fraud, voter intimidation, and voter suppression are going to be actively pursued by this Justice Department." (Hr'g Tr. 65:22–66:2.)

The RNC argues that increases in minority voter registration and voter turnout are changes in factual circumstances rendering the Decree unnecessary because this data "demonstrat[es] that minority voters are not being suppressed." (Appellant's Br. 33.) Furthermore, the RNC asserts that the availability of alternative voting methods, such as early voting or permanent absentee voting, allows voters who are worried about intimidation at precincts on Election Day to avoid such intimidation by voting from home or voting early. It contends that records of voters using these alternative voting mechanisms undermine

---

as black and a 201 percent increase in the number of registered voters classified as Hispanic. The District Court discounted this increase based on the concomitant increase in the overall population of blacks and Hispanics. Democratic Nat'l Comm., 671 F.Supp. 2d at 598-99.

allegations of disenfranchisement and that "the availability of provisional ballots squelches any effort to disenfranchise a voter who appears at the polls." (Id. at 38.)

The RNC's argument that the fact that President Obama, Attorney General Eric Holder, RNC Chairman Michael Steele,[13] and another RNC leader are minorities justifies vacatur or modification of the Decree hardly requires a serious response. The RNC posits that a minority President and Attorney General of the United States increase the likelihood of prosecution for violations of the Voting Rights Act ("VRA"), such as intimidation of minority voters. Are we to conclude that all issues that affect African-Americans will now get greater funding, greater attention, and more focus because of President Obama? Our jurisprudence cannot depend on such assumptions.

Even assuming that VRA violations will be more vigorously litigated by the current administration, that litigation would likely be brought after the VRA has been violated, so it will not prevent minority voter intimidation or vote suppression ex ante. Similarly, a handful of minorities temporarily[14] occupying leadership positions in the RNC does not mean that

---

[13] Michael Steele served as the first African-American chairman of the RNC from January 2009 until January 2011.

[14] Even if the racial background of the nation's or RNC's leaders makes voter intimidation and suppression less likely, it is illogical to vacate the Decree due to the racial makeup of the administration of the United States or the RNC.

minority voter intimidation or suppression will decrease.

Contrary to the RNC's assertions, the increase in minority voter registration and voter turnout since 1982 does not demonstrate that "minority voters are not being suppressed." (Appellant's Br. 33.) The RNC has submitted no evidence to support its supposition. Voter registration and turnout data is not statistically relevant regarding the argument that revision of the Decree is warranted. Moreover, the increase in minority voter registration and voter turnout could be evidence that the Decree is necessary and effective. The RNC's data on minority voter registration and turnout demonstrates that, since the RNC consented to the Decree in 1982, minority voter registration and turnout have increased significantly. The Decree's purpose is to help ensure that potential minority voters are not dissuaded from going to the polling station to vote, as they might be if the RNC were unfettered by the Decree.

Despite the RNC's bald assertion to the contrary, the availability of alternative voting mechanisms is not a factual change that prevents polling place voter suppression and intimidation. The RNC has presented no evidence demonstrating how alternative voting mechanisms, such as allowing voters to vote prior to Election Day or to mail in their votes, would prevent the RNC from "using, [or] appearing to use, racial or ethnic criteria in connection with ballot integrity, ballot security or other efforts to prevent or remedy suspected vote fraud" at polling stations. (App. at 404–05.) Furthermore, as the District Court notes, voters should

not have to avoid voting at polling stations on Election Day in order to avoid voter intimidation.

None of these alleged factual changes renders the continuation of the Decree inequitable. The District Court did not abuse its discretion by declining to vacate or modify the Decree based on the RNC's asserted factual changes.

b. Changes in Law[15]

The RNC's arguments regarding changes in law brought about by the enactments of the Motor Voter Law or NVRA, BCRA,[16] and HAVA are only relevant to our review if they render prospective application of the Decree inequitable. To do that, they must have some bearing on the purpose of the Decree — decreasing the RNC's engagement in minority voter intimidation and suppression. The RNC asserts that the Motor Voter Law, BCRA, and HAVA increase the risk of voter fraud and increase the ease with which eligible voters can register to vote, vote, and file a provisional ballot if they are challenged at polling stations. Even if the RNC's assertions are true, which has not been

---

[15] We need not determine whether the alleged changes in First Amendment law raised by the RNC render prospective application of the Decree inequitable because we find that the RNC waived any relevant First Amendment rights by consenting to the 1982 and 1987 Decrees.

[16] Because the RNC's arguments regarding the BCRA center on the Decree's workability, the majority of our review of the District Court's opinion regarding the BCRA is included in the workability discussion infra.

established, the RNC has failed to carry its burden of establishing that a significant change in circumstances warrants revision of the Decree. Additionally, none of the changes in law that the RNC puts forth make "one or more of the obligations placed upon the parties [] impermissible under federal law" or "make legal what the decree was designed to prevent." Rufo, 502 U.S. at 388.

"One of the NVRA's central purposes was to dramatically expand opportunities for voter registration and to ensure that, once registered, voters could not be removed from the registration rolls by a failure to vote or because they had changed addresses." Welker v. Clarke, 239 F.3d 596, 598–99 (3d Cir. 2001) (citing 42 U.S.C. § 1973gg(b)).[17] The NVRA authorizes election officials to use mailings to update voter registration rolls. Additionally, the NVRA imposes criminal penalties on individuals who submit false voter registration forms, knowingly cast a forged ballot, or manipulate the tabulation of votes, and it specifies

---

[17] In Welker v. Clarke, 239 F.3d 596 (3d Cir. 2001), we noted that

> To achieve this purpose, the NVRA strictly limited removal of voters based on change of address and instead required that, for federal elections, states maintain accurate registration rolls by using reliable information from government agencies such as the Postal Service's change of address records. The NVRA went even further by also requiring the implementation of "fail-safe" voting procedures to ensure voters would not be removed from registration rolls due to clerical errors or the voter's own failure to re-register at a new address.

Id. at 599 (citing 42 U.S.C. § 1973gg-6(b)(1)).

criminal penalties for intimidating, threatening, or coercing any person who is registering to vote or voting. 42 U.S.C. §1973gg-10(1)(A), 10(2).

The RNC argues that the NVRA renders the Decree antiquated because it has led to significant increases in minority voter registration and turnout. The RNC also asserts that the NVRA creates an increased risk of voter fraud. This argument, that the enactment of a law that expands voter registration opportunities renders inequitable a Decree that aims to prevent voter intimidation and suppression, is unpersuasive. The District Court correctly notes that any increase in minority voter registration or voter turnout caused by the Motor Voter Law is irrelevant to the Decree because "the Consent Decree was not designed to encourage minority voter registration, but rather to prevent voter suppression." Democratic Nat'l Comm., 671 F. Supp. 2d at 614. Additionally, the District Court cites evidence that the Motor Voter Law reduces the threat of voter registration fraud, but does not attempt to prevent voter suppression. Id.

Nor does the NVRA "make legal what the decree was designed to prevent." Rufo, 502 U.S. at 388. The NVRA authorizes election officials, not the RNC, to use mailings to update voter registration lists. 42 U.S.C. § 1973gg-6(c)-(d). The NVRA does not authorize targeting such mailings at predominantly minority precincts nor does the NVRA authorize the presence of voter fraud security teams targeted at predominantly minority precincts on Election Day, both actions that the Decree is designed to prevent.

The NVRA provision that makes voter intimidation subject to a criminal penalty is not relevant to the purpose of the Decree because it would not prevent minority voter intimidation or suppression. The provision allows for criminal penalties to be imposed ex post, only after voters had been intimidated and had lost their opportunity to cast their ballots. This provision does not render inequitable the application of the Decree, in which the RNC agreed not to "us[e], [or] appear[] to use, racial or ethnic criteria in connection with ballot integrity, ballot security or other efforts to prevent or remedy suspected vote fraud." (App. at 404–05.)

The "central provisions" of the BCRA were "designed to address Congress' concerns about the increasing use of soft money and issue advertising to influence federal elections." McConnell v. FEC, 540 U.S. 93, 132 (2003). The "BCRA made a number of dramatic changes to campaign finance law to achieve these goals, including barring national political parties from soliciting soft money." Shays v. Federal Election Comm'n, 528 F.3d 914, 918 (D.C. Cir. 2008) (citing 2 U.S.C. § 441i(a)). The BCRA also "barred state parties from spending soft money on 'federal election activity,' including 'get-out-the-vote activity' and 'voter registration activity.'" Id. (quoting 2 U.S.C. § 441i(b)(1)).

The RNC argues that the BCRA's prohibition on the spending of soft money by state parties for voter registration and get-out-the-vote activity has heightened the risk of voter fraud because it is difficult to track the voter registration efforts of the increased number of groups registering voters. As the District

Court mentions, the Decree does not prevent the RNC from collaborating with non-party organizations to register voters and the RNC has not demonstrated that any ineligible voter registered by a non-party organization has ever actually cast a vote. The RNC has not demonstrated that this provision of the BCRA is a significant change in the law that warrants revision of the Decree.

"HAVA is concerned with updating election technologies and other election-day issues at polling places." Gonzalez v. Arizona, 624 F.3d 1162, 1184 (9th Cir. 2010). One purpose of HAVA was "to prevent on-the-spot denials of provisional ballots to voters deemed ineligible to vote by poll workers." Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 574 (6th Cir. 2004).[18] HAVA also established complaint procedures to challenge alleged voting violations. 42 U.S.C. § 15512. The RNC argues that HAVA increases the risk of voter fraud and reduces the risk of vote suppression by allowing voters to cast provisional ballots.

The provisional ballot portion of HAVA is not aimed at preventing voter suppression or intimidation and does not render the prospective application of the Decree inequitable. Despite the RNC's assertions, the

---

[18] "HAVA requires that any individual affirming that he or she 'is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office . . . shall be permitted to cast a provisional ballot.'" Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 574 (6th Cir. 2004) (citing 42 U.S.C. § 15482(a)).

fact that HAVA affords every voter the opportunity to cast a provisional ballot is only effective if those voters are not intimidated by voter fraud efforts, such as those targeted by the Decree. As the District Court notes, voter intimidation could prevent voters from entering the polls to obtain a provisional ballot. Democratic Nat'l Comm., 671 F. Supp. 2d at 612–13, 616 ("Some voters . . . may choose to refrain from voting rather than wait for the qualifications of those ahead of them to be verified . . . Others may be prevented from waiting by responsibilities . . ." (citing DNC Hr'g Ex. 18 at 6; RNC Hr'g Ex. 26 at 56; League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 478 (6th Cir. 2008)). The opportunity to cast a provisional ballot is not relevant to the purpose of the Decree because it does not decrease minority voter intimidation or suppression.

The availability of complaint procedures for alleged voting violations under HAVA does not "make legal what the decree was designed to prevent." Rufo, 502 U.S. at 388. Moreover, the HAVA complaint procedures, unlike the Decree, do not aim to prevent the RNC from targeting its voter fraud efforts at precincts with higher populations of minorities.

The District Court did not abuse its discretion when it found that the Motor Voter Law, BCRA, and HAVA have "not altered [the] calculus" of in-person voter fraud or voter intimidation to an extent that justifies vacating or modifying the Decree due to a change in law. Democratic Nat'l Comm., 671 F. Supp. 2d at 613.

c. Public Interest

The RNC argues that vacating the Decree would benefit the public interest by allowing the RNC to engage in programs attempting to prevent voter fraud, which the RNC alleges are hampered by the Decree. Additionally, the RNC contends that there is little need to prevent the intimidation and suppression of minority voters. Specifically, the RNC asserts that voter fraud is a danger and that "political parties, candidates, the Government, and the public all have an undisputed interest in protecting the integrity of the election process." (Appellant's Br. at 50.) Thus, the RNC argues that it should be permitted to address voter fraud free from the constraints of the Decree.

If the RNC establishes that "a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper." Horne v. Flores, --- U.S. ----, ----, 129 S. Ct. 2579, 2595 (2009) (holding that the United States Court of Appeals for the Ninth Circuit employed a heightened standard for its Rule 60(b)(5) inquiry instead of the required flexible approach). However, the RNC has pointed to no remedy other than the Decree that prevents the RNC from "using, [or] appearing to use, racial or ethnic criteria in connection with ballot integrity, ballot security or other efforts to prevent or remedy suspected vote fraud." (App. at 404–05.)

The District Court declined to determine whether laws passed by Congress sufficiently address the dangers of voter fraud, recognizing that such is not the task of the federal court. Bartlett v. Strickland, 556 U.S. 1, ----, 129 S. Ct. 1231, 1245 (2009) ("Though

courts are capable of making refined and exacting factual inquiries, they 'are inherently ill-equipped' to 'make decisions based on highly political judgments' . . .") (quoting Holder v. Hall, 512 U.S. 874, 894 (1994) (Thomas, J., concurring in judgment)). Instead, the Court noted that Congress is better equipped to make this determination by weighing the dangers of voter fraud against the dangers of voter intimidation.

The District Court rejected the RNC's argument that the Decree must be vacated or modified because the risk of voter fraud outweighs the risk of voter suppression and intimidation. As the District Court correctly points out, the Decree only requires preclearance for programs involving the prevention of in-person voter fraud. Furthermore, the District Court has never prevented the RNC from implementing a voter fraud prevention program that the RNC has submitted for preclearance, at least in part, because the RNC has never submitted any voter fraud prevention program for preclearance.

Although the RNC pointed to charges that were noted in the Carter-Baker Commission Report against eighty-nine individuals and fifty-two convicted individuals to demonstrate the pervasiveness of voter fraud, those purported instances of voter fraud ranged "from vote-buying to submitting false voter registration information and voting-related offenses by non-citizens." (RNC Hr'g Ex. 26 at 45.) Thus, only a fraction of that alleged fraudulent activity was related to in-person voter fraud, which is the type of fraud addressed in the Decree.

The FBI report that the RNC submitted regarding irregularities in Wisconsin during the 2004 election did not specify whether the voting irregularities under investigation involved votes cast in person or votes cast through absentee voting or some other alternative process. In support of the notion that most alleged incidents of voter fraud are not related to in-person voting and are, thus, irrelevant to the Decree, the DNC submitted evidence of voting irregularities in Florida during the 2004 election, which was also cited by the RNC, that showed that "the majority of those accused of wrongdoing were elected officials and political operatives." Democratic Nat'l Comm., 671 F. Supp. 2d at 607.

The Supreme Court has also noted the rarity of in-person voter fraud. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 194 (2008) (noting that there was "no evidence of any [in-person voter] fraud actually occurring in Indiana at any time in its history); see also id. at 226 (Souter, J., dissenting) ("[T]he State has not come across a single instance of in-person voter impersonation fraud in all of Indiana's history."); Democratic Nat'l Comm., 671 F. Supp. 2d at 609 ("Justice Stevens acknowledged that, of the 'occasional examples' of in-person fraud on which his ruling was based, all but one had been shown to have been 'overstated because much of the fraud was actually absentee ballot fraud or voter registration fraud.'" (quoting Crawford, 553 U.S. at 196 n.12)). Thus, the RNC has not established that in-person voter fraud is sufficiently prevalent such that applying the Decree prospectively is no longer equitable. Even if the public has an unmet need for the prevention of in-person fraud, the Decree does not prevent the RNC from

combating in-person voter fraud if it obtains preclearance. If the risk of voter fraud is as great and consequential as the RNC alleges and an RNC voter security program is a significant part of efforts needed to prevent that voter fraud, it would seem that the RNC would have attempted to obtain preclearance for a voter security program at least once since 1987.

The RNC argues that "minority voters are not being suppressed," and, thus, the Decree does not serve public interest. (Appellant's Br. 33.) The District Court noted as an example, however, that the voter-challenge list in Malone included 35,000 registered voters who were predominantly minorities. Without the enforcement of the Decree provisions, these voter-challenge lists that are racially-targeted, in intent or in effect, could result in the intimidation and deterrence of a number of voters.

When confronted with such targeted voter-challenge lists, some eligible voters may choose to refrain from voting instead of waiting for the verification of their own eligibility or that of others ahead of them in line. (See, e.g., DNC Hr'g Ex. 18 at 6 (quoting a former Political Director of the Republican Party of Texas, who stated that photo identification requirements "could cause enough of a dropoff in legitimate Democratic voting to add three percent to the Republican vote."); RNC Hr'g Ex. 26 at 56 (portion of the Carter-Baker Commission Report on "Polling Station Operations," in which the Report noted voter fraud security in some minority communities may be "intimidating" and that, during the 2004 election, "[p]roblems with polling station operations, such as long lines, were more pronounced in some places than others. This gave rise

to suspicions that the problems were due to discrimination . . .").)

The District Court did not abuse its discretion by finding that public interest concerns, including the prevention of voter fraud and the prevention of voter suppression and intimidation, do not justify vacatur or modification of the Decree.

d. Workability

The RNC argued before the District Court that there were workability issues that required modification of the Decree, as a practical matter. The District Court held that there were four workability issues that weighed in favor of modification: (1) the potential inequity of the RNC being subject to suits brought by entities who were not party to the Decree when, under the BCRA, the RNC has to defend lawsuits using "hard money," while the DNC does not have to spend any money on such suits because it would not be party to them[19]; (2) the twenty-day notice requirement for preclearance prevents the RNC from combating mail-in voter registration fraud in a number of states with later mail-in voter registration deadlines; (3) the Decree lacks a clear definition of normal poll watching activities and the parties have not provided a definition, leading the RNC to refrain from normal poll watching activities, which the Decree was never

---

[19] The RNC would have to spend "hard money" on any lawsuits because the "BCRA made a number of dramatic changes to campaign finance law . . . , including barring national political parties from soliciting soft money." Shays, 528 F.3d at 918 (citing 2 U.S.C. § 441i(a)).

intended to prohibit; and (4) the Decree lacked a termination date.

The District Court, accordingly, modified the Decree in the following ways: (1) allowed only parties to the Decree, the DNC and NJDSC, to bring an enforcement action under the Decree; (2) decreased the preclearance notice requirement from twenty days to ten days; (3) provided clearer definitions and examples of "ballot security"[20] and "normal poll watching"[21] activities; and (4) added an eight-year expiration date, December 1, 2017, to the Decree, allowing for an extension of the Decree for another eight years if the DNC proves by a preponderance of the evidence that the RNC has violated the Decree.

In addition to determining whether the District Court abused its discretion by declining to make more extensive modifications to the Decree than it did based on workability concerns, we analyze, also under the abuse of discretion standard, whether the District Court's "proposed modification is suitably tailored to

---

[20] "Ballot security" is defined to include "any program aimed at combating voter fraud by preventing potential voters from registering to vote or casting a ballot." Democratic Nat'l Comm., 671 F. Supp. 2d at 622. The modification also includes a non-exhaustive list of ballot security programs.

[21] "Normal poll-watch function" is defined as "stationing individuals at polling stations to observe the voting process and report irregularities unrelated to voter fraud to duly-appointed state officials." Democratic Nat'l Comm., 671 F. Supp. 2d at 622. The modification includes a non-exhaustive list of activities that do and do not fit into the Decree definition of normal poll-watch function.

the changed circumstance." Rufo, 502 U.S. at 391. As noted above, the modification "must not create or perpetuate a constitutional violation"; it "should not strive to rewrite a consent order so that it conforms to the constitutional floor"; and a court should not try to modify a consent order other than making those revisions that equity requires because of the change in circumstances. Id.

The District Court held that the Decree should be modified because the BCRA creates a potential inequity between the RNC and the DNC if third parties are allowed to bring suits to enforce the Decree against the RNC. Without modification, the RNC would have to defend such third-party suits with limited "hard money" because it cannot solicit "soft money" under the BCRA while the DNC, not a party to such suits, would not have to expend resources on these third-party suits. Accordingly, the District Court modified the Decree so that only the DNC and NJDSC can bring an enforcement action under the Decree so that both parties would have to spend "hard money" on the enforcement action. This modification eliminates any potential BCRA-caused inequity in the prospective application of the Decree.

In this respect, the Court revised the Decree only to the extent required because of the change in circumstances brought about by the BCRA. Limiting the ability to bring Decree enforcement actions to parties to the Decree is a modification suitably tailored to the equitable concerns brought about by the "hard money" restrictions in the BCRA.

The RNC argues that this modification does not address the workability issues caused by the costly and distracting enforcement actions filed shortly before Election Days because the money the RNC would have to spend defending those suits takes money away from the RNC's political efforts, regardless of whether the DNC also has to spend money to bring those suits. The nature and timing of election cycles may cause the need to defend against Decree enforcement suits to arise at inconvenient times, but resolving those issues before Election Day is crucial to enforcing the Decree by ensuring access to the polls and preventing suppression of minority votes.

In effect, the RNC contends that the Decree should be vacated because it is unworkable for the RNC to spend any money defending itself in enforcement actions. This argument is not persuasive. When the RNC twice consented to the Decree and gained its benefits, it should have anticipated that it would likely need to spend money defending itself in future enforcement actions. Neither modification nor vacatur are justified "where a party relies upon events that actually were anticipated at the time it entered into a decree." Rufo, 502 U.S. at 385.

The District Court noted that a number of states now have voter registration deadlines less than twenty days before the election and that the RNC has a valid interest in preventing fraudulent voter registration. The District Court modified the Decree by decreasing the notice requirement for preclearance from twenty days to ten days.

The RNC argues that the ten-day preclearance period should be eliminated because it forces the party to reveal its Election Day strategy to the DNC in order to combat voter fraud and is, therefore, unworkable. The RNC has requested zero days for preclearance or, at least, some decrease in the time period for the preclearance notice requirement.[22] The RNC asserts that "any preclearance requirement is tantamount to a prohibition on Election Day activities by the RNC" because it means that the RNC must foresee Election Day issues twenty to thirty-five days in advance of an election; "forc[es] the RNC to disclose its tactical thinking and Election Day strategy far enough in advance for the DNC and others to craft counter-strategies"; and it "requires the RNC to place equivalent numbers of poll watchers in all precincts, regardless of political or practical considerations." (Appellant's Br. at 52–54.)

The RNC's argument is wholly speculative. The RNC's supposed knowledge and experience of unworkability is mere conjecture because, since the preclearance provision was added to the Decree in 1987, the RNC has never attempted to obtain preclearance. Contrary to the RNC's argument, the preclearance provision does not require the RNC to disclose its tactical thinking and Election Day strategy except with regard to ballot security activities. The RNC points to no statement of the District Court and no provision of the Decree that requires the RNC "to

---

[22] The RNC suggested two to three days for preclearance at oral argument, but could not articulate a basis for such a modification other than it would be better than ten days.

place equivalent numbers of poll watchers in all precincts." (Appellant's Br. at 52–54.)

On the contrary, the Decree does not require any preclearance for normal poll watching functions, so the Decree would in no way prohibit the RNC from placing different numbers of poll watchers in precincts. Further, there is no basis for any RNC argument that the preclearance provision requires the RNC to place the same number of voter fraud security team members at each precinct. The RNC does not know what level of program detail the District Court would require before granting preclearance.[23] The preclearance provision does not prevent the RNC from achieving its objective of normal poll-watching, carrying out approved ballot security programs, or implementing any other Election Day strategies that do not "us[e], [or] appear[] to use, racial or ethnic criteria in connection with ballot integrity, ballot security or other efforts to prevent or remedy suspected vote fraud." (App. at 404–05.)

With no preclearance provision, the RNC could implement any ballot security program and would only be subject to enforcement of the Decree after potential minority voter intimidation and suppression had already occurred. Thus, the elimination of the provision would thwart the Decree's purpose of preventing minority voter intimidation and suppression ex ante. The District Court shortened the preclearance time to

---

[23] For example, perhaps the RNC could obtain preclearance for a voter fraud security program that instructs its normal poll watchers that, if they see a person who they believe is voting more than once, they can report that potential fraud to poll workers.

allow the RNC to combat more of the potential voter registration fraud that might occur closer to Election Day, a modification suitably tailored to address the inequity the District Court identified.

Although the Decree was never intended to prohibit normal poll watching activities, the RNC claims that is has refrained from engaging in normal poll watching activities because the Decree's definitions of such activities are unclear and it fears it would unintentionally violate the Decree. To address this workability concern, the District Court modified the Decree to provide clearer definitions and examples of "ballot security" and "normal poll watching" activities. With the District Court's modifications, "[b]allot security" is defined to include "any program aimed at combating voter fraud by preventing potential voters from registering to vote or casting a ballot,"[24] and

---

[24] The modification includes a non-exhaustive list of ballot security programs:

> the compilation of voter challenge lists by use of mailings or reviewing databases maintained by state agencies such as motor vehicle records, social security records, change of address forms, and voter lists assembled pursuant to the HAVA; the use of challengers to confront potential voters and verify their eligibility at the polls on either Election Day or a day on which they may take advantage of state early voting procedures; the recording by photographic or other means of voter likenesses or vehicles at any poling place; and the distribution of literature informing individuals at or near a polling place that voter fraud is a

"[n]ormal poll-watch function" is defined as "stationing individuals at polling stations to observe the voting process and report irregularities unrelated to voter fraud to duly-appointed state officials." Democratic Nat'l Comm., 671 F. Supp. 2d at 622.

The District Court's modifications more clearly define ballot security and normal poll-watch function under the Decree and provide lists of examples of both. [25] The RNC contends that it cannot engage in normal poll-watch functions because the definitions of the terms remain unclear. Contrary to the RNC's argument that the District Court's definitions and non-exhaustive lists of examples "worsen the problem," (Appellant's Br.

> crime or detailing the penalties under any state or federal statute for impermissibly casting a ballot.

Democratic Nat'l Comm., 671 F. Supp. 2d at 622.

[25] The modification also includes a non-exhaustive list of activities that do and do not fit into the Decree definition of normal poll-watch function:

> [O]bservers may report any disturbance that they reasonably believe might deter eligible voters from casting their ballots, including malfunctioning voting machines, long lines, or understaffing at polling places. Such observers may not question voters about their credentials; impede or delay voters by asking for identification, videotape, photograph, or otherwise make visual records of voters or their vehicles; or issue literature outlining the fact that voter fraud is a crime or detailing the penalties under any state or federal statute for impermissibly casting a ballot.

Democratic Nat'l Comm., 671 F. Supp. 2d at 622–23.

at 55), the modifications of adding specific definitions and examples of ballot security and normal poll-watch functions give both the RNC and the DNC more clarity regarding what types of activities require preclearance, which do not require preclearance, and which are prohibited by the Decree.

Given these modifications, any hardship to the RNC is not a product of the terms of the Decree. Clarity allows the RNC to engage in normal poll watching activities while still maintaining adherence to fulfillment of the Decree's purpose. The District Court's modification is suitably tailored to resolve the prior ambiguity and does not strive to conform to the constitutional floor by allowing the RNC to engage in all activities without preclearance. See Rufo, 502 U.S. at 391. The modification clarifies the previous ambiguity.

The District Court agreed with the RNC that the lack of an expiration date in the Decree was "inherently inequitable." Democratic Nat'l Comm., 671 F. Supp. 2d at 621. The District Court modified the Decree by adding an eight-year expiration date, December 1, 2017, and allowing for an extension of the Decree for another eight years if the DNC proves by a preponderance of the evidence that the RNC has violated the Decree. The RNC argues that the District Court's December 1, 2017 expiration date is an abuse of discretion and that the appropriate Decree termination date is either eight years after the parties entered into the Decree in 1982, eight years after the Decree's modification in 1987, or, at worst, eight years after the Malone litigation.

Although a considerable number of years have passed since the RNC and DNC agreed to the Decree in 1982 and 1987, the parties entered the Decree voluntarily and for over a quarter of a century neither party objected to the duration of the Decree. The District Court did not abuse its discretion by declining to vacate the Decree due to the length of time since its entry. See BCTC, 64 F.3d at 889 (declining to hold that "the mere passage of time" is itself "sufficient to constitute the type of changed circumstances that warrant lifting of an injunction"). Thus, it does not follow that the original decision not to include an expiration date requires vacatur now that the Decree has an expiration date.

The District Court noted that it was imposing a termination date of eight years from its ruling because the Civil Rights Division of the Department of Justice, which is charged with enforcing the Voting Rights Act, also imposes consent decrees with time limits of eight years, which can be extended for good cause. The RNC has not shown that the District Court's decision to set a termination date of eight years from the date of its order modifying the Decree with provisions allowing for an extension of that termination date for good cause is "arbitrary, fanciful or clearly unreasonable." Moyer, 473 F.3d at 542.

By adding an eight-year expiration date, December 1, 2017, to the Decree, the District Court modified the Decree to remedy the inequity that it perceived to be

caused by the lack of expiration date.[26] Accepting

---

[26] Neither party argued before this Court that the District Court abused its discretion by imposing a formerly non-existent time limitation on the RNC's obligations under the Decree, thereby relieving the RNC of its burden to show a significant change of fact or law to secure release from those obligations. Thus, this issue is not before this Court and we, accordingly, do not decide it. The District Court decided to impose that time limitation based on a hypothetical situation that it speculated might well occur in the future. The District Court held as follows with respect to this matter:

> The final consideration weighing in favor of modification involves the fact that the Consent Decree does not include a date on which the obligations it imposes on the RNC will terminate. In failing to include such an expiration date, the parties have created a situation in which the RNC is, at least nominally, bound by those obligations in perpetuity, regardless of whether it continues to engage in voter suppression efforts or has any incentive to do so. That situation is inherently inequitable. For example, if at any point in the future the RNC succeeds in attracting minority voters in such numbers that its candidates receive the majority of votes cast by those populations, it will have no incentive to engage in anti-fraud measures that have the effect of deterring those voters from casting their ballots. Under the Consent Decree as currently written, though, the RNC would be required to pre-clear any such measures with this Court, while the DNC would be free to implement ballot security programs without doing so. In an effort to avoid similar situations, the Civil Rights Division of the DOJ—the government entity charged with enforcing the VRA—imposes a time limit of eight years on its consent decrees, which may be extended for good cause. . . . The Court believes that such a provision is justified in this case.

Democratic Nat'l Comm., 671 F. Supp. 2d at 621-22.

arguendo that the Decree without a time limit is "inherently inequitable," the provision allowing for an extension of the Decree for another eight years if the DNC proves by a preponderance of the evidence the RNC has violated the Decree preserves the purpose of the Decree so that the modification does not rewrite the consent order more than equity requires. Moreover, we do not adopt the RNC's argument that the District Court abused its discretion by not starting the eight year period from the date of the entry of the Decree or from its 1987 modification, "thus requiring . . . immediate vacatur." (Appellant's Br. 42.) The District Court concluded, with ample record support, that the purpose of the Decree had not yet been fulfilled and vacatur would not have been suitably tailored to its findings.

This Court draws attention to this issue only to make clear that we have not resolved it by implication or otherwise. It is at least doubtful that a district court could decide to impose a time limitation within the bounds of its appropriate discretion while simultaneously concluding that the RNC retained an incentive to violate the Consent Decree and had shown no other existing and relevant change of circumstance. Passage of time alone is not normally regarded as a significant change of fact. *Building and Const. Trades v. NLRB*, 64 F.3d 880, 889 (3d Cir. 1995) ("[W]e are unwilling to hold, and BCTC cites no persuasive authority to the contrary, that the mere passage of time and temporary compliance are themselves sufficient to constitute the type of changed circumstances that warrant lifting an injunction."). Moreover, given that the obligations of a consent decree are necessarily subject to the limitations of Rule 60(b)(5) and terminable whenever prospective application would no longer be equitable, the District Court's characterization of the RNC's situation as "inherently inequitable" also seems questionable.

The RNC has not established by a preponderance of the evidence that any workability issues remaining after the District Court's modification are so acute that prospective application of the Decree is inequitable. The District Court did not abuse its discretion by declining to vacate due to workability. The RNC has not established that any of the District Court's decisions were "arbitrary, fanciful or clearly unreasonable." Moyer, 473 F.3d at 542. Thus, the District Court did not abuse its discretion by holding that the RNC did not establish by a preponderance of the evidence that any of the following four Rufo factors necessitated vacatur or modifications beyond those ordered by the District Court: (1) a significant change in factual conditions; (2) a significant change in law; (3) that "a decree proves to be unworkable because of unforeseen obstacles"; or (4) that "enforcement of the decree without modification would be detrimental to the public interest." Rufo, 502 U.S. at 384. Furthermore, the District Court's modifications were suitably tailored to the changed workability circumstances.

3. BCTC Factors

We noted in BCTC that a court determining whether to vacate or modify a decree should respond to the specific set of circumstances before it by considering factors unique to the conditions of the case. BCTC, 64 F.3d at 888. The factors raised in the District Court that are unique to the circumstances of this case are whether the RNC has complied or attempted to comply in good faith with the terms of the Decree and the likelihood that the conduct sought to be prevented will recur absent the Decree. For any change to justify

vacatur, it must be a significant change, rendering the prospective application of the Decree inequitable. See BCTC, 64 F.3d at 886.

The RNC claims that it has complied with the Decree since 1987 and that it is highly unlikely that the RNC will attempt to intimidate or suppress minority voters in the future if the Decree is vacated. The District Court did not abuse its discretion or err by considering the Malone finding that, in 2004, the RNC engaged in substantive and procedural violations of the Decree. Although the panel's decision was vacated as moot by this Court sitting en banc, that vacatur did not disturb the panel's factual determination that the RNC had violated the Decree. Furthermore, the District Court did not rely on Malone's preliminary injunction as precedent, but, instead, merely considered its finding of fact regarding the Decree violation as instructive regarding the RNC's level of compliance with the Decree.[27]

---

[27] Because the District Court is not using the Malone judgment to "spawn[] any legal consequences" and the Court's consideration of the findings of fact has no impact on "relitigation of the issues between the parties," United States v. Munsingwear, Inc., 340 U.S. 36 (1950), is inapposite. Id. at 39–41 (holding that the practice for dealing with a judgment that "has become moot while on its way [to the Supreme Court] or pending [the Supreme Court's] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss").

The RNC insists that the District Court's 2004 decision in the Malone proceeding has no "precedential effect." Here, however, the District Court did not give "precedential effect" to the judgment in another case. The issue of whether the RNC had violated the consent decree in Malone's situation was litigated before the

Furthermore, the RNC's position regarding Malone is contradictory. For purposes of determining RNC's compliance with the Decree, the RNC argues that the Court should not consider Malone in any way. However, for purposes of determining from which point the eight-year Decree expiration date should begin to run, the RNC has mentioned that the 2004 Malone decision could be an appropriate starting point. Even if the RNC had not violated the Decree since 1987, that fact alone is not necessarily sufficient to justify vacating the Decree because compliance is the purpose of the Decree. See BCTC, 64 F.3d at 889 (declining to hold that "temporary compliance" is itself "sufficient to constitute the type of changed circumstances that warrant lifting of an injunction"). As the District Court noted, any past compliance might have been "because the Decree itself has deterred such behavior." Democratic Nat'l Comm., 671 F. Supp. 2d at 601.

District Court in this case and all of the evidence submitted by the parties with respect to that issue remains part of the record in this case. The Court referred to its factual finding of a consent decree violation in the Malone proceeding in response to the RNC's attempt to carry its burden by relying on the results in the enforcement litigation that had occurred since 1982. According to the RNC, the "slim record of enforcement success against the RNC demonstrates that it has strictly complied with the Consent Decree since 1987, and there is no evidence to suggest that its behavior will change if the Decree is vacated." RNC Proposed Conclusions of Law, App. at 1264. In this context, the Court did not err in referring to and relying upon its factual finding of a 2004 violation in the Malone proceeding. Contrary to the RNC's suggestion, it was clearly not surprised by the District Court's response to its argument. Evidence from the Malone proceeding was discussed by the witnesses at the evidentiary hearing and in the ensuing briefing of the parties. See, e.g., App. at 1081-82, 1234-35.

Additionally, the District Court did not abuse its discretion by finding that the RNC had not produced evidence demonstrating a lack of incentive for the RNC to engage in voter suppression and intimidation. The racial and ethnic background of this nation's political leadership, the RNC's leadership, and the electorate do not decrease the likelihood that the RNC will suppress minority voters such that prospective application of the Decree is inequitable. If the RNC does not hope to engage in conduct that would violate the Decree, it is puzzling that the RNC is pursuing vacatur so vigorously notwithstanding the District Court's significant modifications to the Decree.

The RNC's decision not to engage in normal poll-watch functions or obtain preclearance for voter fraud security programs does not allow us to assume past or future compliance. On the contrary, the RNC's refusal to engage in normal poll-watch functions or to obtain preclearance may be because the RNC, as it has argued, is not sure of the difference between normal poll-watch functions and voter fraud security programs. That the RNC has not engaged in a normal poll-watch function and has not presented a request for preclearance of a voter fraud security program that does not disproportionately target minority voters leaves open the possibility that the RNC, absent enforcement of the Decree, would not comply with the Decree terms in the future. See BCTC, 64 F.3d at 890 (noting that a party deciding "not to picket at all" does not "show that [the party] has in fact learned how to picket without treading on the prohibitions against secondary boycott contained both in the law and the various negotiated consent decrees").

In light of the District Court's modifications, the RNC does not point to any significant change that renders prospective application of the Decree inequitable. The District Court did not abuse its discretion by declining to vacate or modify the Decree because of BCTC factors.

IV. CONCLUSION

For the reasons set forth above, we will affirm the judgment of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-4615

[Filed March 8, 2012]

DEMOCRATIC NATIONAL COMMITTEE; NEW JERSEY DEMOCRATIC STATE COMMITTEE; VIRGINIA L. FEGGINS; LYNETTE MONROE	)
v.	)
REPUBLICAN NATIONAL COMMITTEE; NEW JERSEY REPUBLICAN STATE COMMITTEE; ALEX HURTADO; RONALD C. KAUFMAN; JOHN KELLY	)
Republican National Committee, Appellant	)

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civ. Action No. 2-81-cv-03876)
District Judge: Honorable Dickinson R. Debevoise

Argued on December 13, 2010

Before: SLOVITER, GREENAWAY, JR., and STAPLETON, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued on December 13, 2010.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the order of the District Court entered December 1, 2009 be, and the same is hereby, AFFIRMED. Parties to bear their own costs. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: 8 March 2012

APPENDIX B

FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 81-3876 (DRD)

[Filed December 1, 2009]

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,	)
Plaintiffs,	)
v.	)
REPUBLICAN NATIONAL COMMITTEE, ET AL.,	)
Defendants.	)

O P I N I O N

Appearances by:

GENOVA, BURNS & VERNOIA
by: Angelo J. Genova, Esq., Peter J. Cammarano, Esq., and Rajiv D. Parikh, Esq.

494 Broad Street
Newark, NJ 07102

SANDLER, REIFF & YOUNG
by: Joseph Sandler, Esq.
300 M Street, SE Suite 1102
Washington, DC 20003

Attorneys for Plaintiff

DRINKER, BIDDLE & REATH
by: Mark D. Sheridan, Esq.
500 Campus Drive
Florham Park, NJ 07932

McDERMOTT, WILL & EMERY, LLP
by: Bobby R. Burchfield, Esq. and Jason A. Levine, Esq.
600 Thirteenth Street, NW
Washington, DC 20005

Attorneys for Defendant

DEBEVOISE, Senior District Judge

This matter comes before the Court on a motion by Defendant, the Republican National Committee ("RNC") to vacate or modify a Consent Decree entered into by the parties as part of a settlement for voter intimidation claims brought by the Plaintiff, the Democratic National Committee ("DNC"). The Decree, which was entered on November 1, 1982 and modified on July 27, 1987, imposes various requirements on any "ballot security" initiatives undertaken by either the RNC or the New Jersey Republican State Committee

("RSC"). Such initiatives are defined in the Decree as any efforts to prevent or remedy voter fraud.

In its pending request to modify or vacate the Consent Decree, the RNC argues that intervening changes in state and federal election laws have significantly increased the danger of voter fraud, thus making it essential that it be allowed to carry out ballot security initiatives without complying with the requirements of the Decree. Additionally, the RNC claims that the Consent Decree (1) has been interpreted in a manner that impermissibly broadens its scope, (2) is no longer necessary to prevent voter intimidation, and (3) is contrary to the public interest because it imposes requirements only on the RNC, thereby creating an imbalance that adversely affects the competition between political parties necessary to ensure fair elections. In response to those arguments, the DNC contends that the RNC exaggerates the danger of voter fraud, which it claims is outweighed by the ongoing threat that Republican political groups will engage in voter intimidation. As proof that the protections contained in the Consent Decree remain necessary, the DNC points to decisions made pursuant to that agreement by this Court, which found that the RNC had engaged in impermissible voter challenges as recently as the 2004 election.

Both parties submitted mountains of documentary evidence in support of their arguments. The RNC produced thousands of pages of newspaper articles and other sources documenting alleged incidents of voter fraud over the past 27 years, while the DNC did the same with respect to voter intimidation. The Court held an evidentiary hearing on May 5 and 6, 2009, at

which the parties were permitted to make oral arguments and call witnesses in support of their claims. Following that hearing, the parties were each permitted to file an additional brief.

For the reasons set forth below, the Court finds that neither changed factual circumstances nor developments in state and federal election laws justify vacating the Consent Decree, but modification is required. Voter intimidation presents an ongoing threat to the participation of minority individuals in the political process, and continues to pose a far greater danger to the integrity of that process than the type of voter fraud the RNC is prevented from addressing by the Decree. However, while the Court finds that there is an ongoing need for the Consent Decree, the manner in which the RNC has interpreted its terms has rendered the Decree "unworkable" by precluding the RNC from engaging in several activities that are unrelated to voter fraud and do not have a disparate impact on minority voters. Additionally, the fact that the parties did not include a date on which the Consent Decree will terminate has created an inequitable situation in which the RNC may be subject to the requirements of that agreement in perpetuity. Therefore, the Decree will be modified in five ways: (1) as consented to by the DNC, the Consent Decree will be clarified to allow enforcement only by the parties to that agreement, (2) the time period by which the RNC must inform this Court of any proposed ballot security measures ("preclearance provision") will be shortened from 20 to 10 days, (3) the term "ballot security" will be clarified to include only efforts that are aimed at preventing potential voters from casting a ballot, as opposed to programs meant to ensure the

smooth functioning of the electoral process or increase the number of people participating therein, (4) the term "normal poll watch functions" will be defined in order to provide notice of the types of activities that do not fall under the Consent Decree, and (5) a termination date will be added so that the Consent Decree will expire eight years after the date of this ruling unless, at any point before that date, the DNC is able to prove by a preponderance of the evidence that the RNC has violated the Decree, in which case the termination date will be extended to eight years from the date of that violation.

I. BACKGROUND

The 27-year history of the Consent Decree that is the subject of this ruling began when, during the 1981 New Jersey gubernatorial election, the RNC and RSC engaged in a ballot security program that the DNC claimed targeted minority voters in an effort to intimidate them in violation of the Voting Rights Act ("VRA") of 1965, 42 U.S.C. §§ 1971, et seq., and the 14th and 15th Amendments to the Constitution. As part of that program, the RNC allegedly created a list of persons to be challenged at the polls by mailing sample ballots to individuals living in precincts where the majority of the registered voters were members of ethnic minorities. The names of voters registered at an address from which a sample ballot was returned as undeliverable were then added to a list that the RNC asked to have removed from New Jersey's voter rolls. In addition to the challenge list, the RNC allegedly intimidated voters on Election Day by posting off-duty sheriffs and policemen – some of whom were wearing equipment normally associated with law enforcement

personnel such as two-way radios and firearms – at polling places in minority precincts. The officers involved in the program wore armbands emblazoned with a seemingly-official title: "National Ballot Security Task Force."

A. The Consent Decree

Faced with intense political pressure and scrutiny from local media, the RNC chose to settle the 1981 suit by entering into the Consent Decree. Pursuant to that settlement, the RNC agreed that "in the future, in all states and territories of the United States," it would:

> (a) comply with all applicable state and federal laws protecting the rights of duly qualified citizens to vote for the candidate(s) of their choice;
>
> (b) in the event that [it] produce[s] or place[s] any signs which are part of ballot security activities, cause said signs to disclose that they are authorized or sponsored by the [RNC];
>
> (c) refrain from giving any directions to or permitting their agents or employees to remove or deface any lawfully printed and placed campaign materials or signs;
>
> (d) refrain from giving any directions to or permitting their employees to campaign within restricted polling areas or to interrogate prospective voters as to their

qualifications to vote prior to their entry to a polling place;

(e) refrain from undertaking any ballot security activities in polling places or election districts where the racial or ethnic composition of such districts is a factor in the decision to conduct, or the actual conduct of, such activities there and where a purpose or significant effect of such activities is to deter qualified voters from voting; and the conduct of such activities disproportionately in or directed toward such districts that have a substantial proportion of racial or ethnic [minority] populations shall be considered relevant evidence of such a factor and purpose;

(f) refrain from attiring or equipping agents, employees or other persons or permitting their agents or employees to be attired or equipped in a manner which creates the appearance that the individuals are performing official or governmental functions, including, but not limited to, refraining from wearing public or private law enforcement or security guard uniforms, using armbands, or carrying or displaying guns or badges except as required by law or regulation, in connection with any ballot security activities; and

(g) refrain from having private personnel deputized as law enforcement personnel in connection with ballot security activities.

In 1987, the DNC sued the RNC for alleged violations of the Consent Decree during the previous year's Congressional elections in Louisiana. Those purported violations, like the ones in the 1981 New Jersey gubernatorial election, involved the compilation of a voter challenge list by sending letters to African-American voters and recording the names of individuals for whom the mailing was undeliverable at the address where they were registered to vote. While defending a suit brought in Louisiana state court by several of the voters on the list, the RNC responded to a discovery request by producing a memo from its Midwest Political Director to its Southern Political Director, in which the former stated that "I would guess that this program will eliminate at least 60,000-80,000 folks from the rolls … If it's a close race … which I'm assuming it is, this could keep the black vote down considerably." See Thomas Edsall, Ballot Security Effects Calculated: GOP Aide Said Lousiana Effort "Could Keep the Black Vote Down," Wash. Post, Oct. 24, 1986 at A1. After those statements came to light, the DNC – which was not a party to the Louisiana state action – instituted an action in this Court alleging that the RNC's ballot security activities were racially motivated, and thus violated the Consent Decree.

As in the prior suit, the RNC chose to settle the claims against it. In exchange for the DNC dismissing its claims, the RNC agreed to a modification of the

1982 Consent Decree. That modification defined "[b]allot security" efforts to mean "ballot integrity, ballot security or other efforts to prevent or remedy vote fraud," and added the preclearance provision, which prohibits the RNC from engaging in such efforts unless they are approved ahead of time by this Court by stating:

> [T]he RNC shall not engage in, and shall not assist or participate in, any ballot security program unless the program (including the method and timing of any challenges resulting from the program) has been determined by this Court to comply with the provisions of the Consent Order and applicable law. Applications by the RNC for determination of ballot security programs by the Court shall be made following 20 days notice to the DNC, which notice shall include a description of the program to be undertaken, the purpose(s) to be served, and the reasons why the program complies with the Consent Order and applicable law.

As an exception to the preclearance requirement, the modification agreed to by the parties stated that:

> [T]he RNC may deploy persons on [E]lection [D]ay to perform normal poll watch functions so long as such persons do not use or implement the results of any other ballot security effort, unless the other ballot security effort complies with the provisions of the Consent Order and applicable law and has been so determined by this Court.

B. Subsequent Enforcement Actions

Since the modification of the Consent Decree in 1987, the DNC has brought two suits alleging violations of that agreement on the part of the RNC. In 1990 it instituted an action alleging that the RNC had violated the Consent Decree by participating in a program in which the North Carolina Republican Party ("NCRP") sent 150,000 postcards to residents of predominantly African-American precincts in that state. The postcards allegedly attempted to intimidate voters by warning that it is a "federal crime … to knowingly give false information about your name, residence or period of residence to an election official," and falsely stated that voters must have lived in the precinct in which they cast their ballot for at least 30 days prior to the election. In its decision, the Court found that the DNC had "failed to establish that the [RNC] conducted, participated in, or assisted in" the program.[1] It ruled, however, that the RNC, "by failing to include in ballot security instructions and informational guidance to state parties on unlawful practices under the consent decree or copies of such decree for their review, ha[d] violated said decree and shall in all such materials include such guidance or copy of the decree" in the future.

---

[1] The Court's ruling was based solely on the fact that the Consent Decree applies only to the actions of the RNC and RSC, and advanced no opinion as to the legality of the activities undertaken by the NCRP. Those activities were the subject of a separate action brought by the United States Department of Justice ("DOJ") against the NCRP and the campaign committee of Senator Jesse Helms, which resulted in a separate consent decree between those entities and the federal government.

On November 3, 2008, the DNC brought a second action, in which it alleged that the RNC had violated the Consent Decree by hiring private investigators to examine the backgrounds of various New Mexico voters in preparation for challenging those individuals' right to cast a ballot in that year's election. As redress for that purported violation, the DNC requested a preliminary injunction ordering the RNC to refrain from using any information gathered by the investigators or carry out any ballot security initiatives in New Mexico during the election, which was scheduled to take place the following day. The Court held oral arguments on the petition, at which the RNC produced a sworn affidavit from the vendor accused of hiring the private investigators testifying that they had not been used for the purposes of gathering information or preparing for ballot security efforts. That testimony led the Court to conclude that, while there may have been misconduct on the part of the New Mexico Republican Party or other political operatives, the RNC did not direct or participate in the ballot security measures at issue, and therefore had not violated the Consent Decree.[2]

---

[2] The RNC attempts to portray the Consent Decree as having led to multiple vexatious litigations. In doing so, it notes two actions that were not brought by the DNC, and did not name the RNC as a defendant: (1) a 2002 suit in which the New Jersey State Democratic Committee ("NJSDC") alleged that the RSC and a Republican Senate candidate had violated the Decree, and (2) a 2004 suit brought in South Dakota by the campaign of that state's then-Senator, Tom Daschle, alleging that his opponent, John Thune, and various other individuals had carried out ballot security initiatives which violated applicable laws. In the former action, this Court denied the NJSDC's claim. The United States District Court for the District of South Dakota granted Senator

C. The Malone Suit

A third enforcement action – brought by an intervenor during the week before the 2004 general election – is also relevant to the question of whether the Consent Decree should be modified or vacated. On October 28, 2004, an African-American resident of Cleveland, Ohio named Ebony Malone filed a Complaint alleging that the RNC had violated the Consent Decree by participating in the compilation of a voter challenge list that included 35,000 predominantly-minority individuals from that state. As was the case in the actions that led to the initial Consent Decree and the 1987 modification, the list was assembled by sending letters to registered voters in precincts with a high concentration of minorities, in this case inner-city areas in Cleveland, and recording the names of those voters for whom the letter was returned as undeliverable. An initial letter was sent by the RNC on August 10, 2004, while a second mailing was issued by the Ohio Republican Party ("ORP") on September 9th of that year. Ms. Malone was a recently-registered voter and was included on the challenge list.

Ms. Malone contended that the challenge list posed a threat to her right to vote. Moreover, she asserted that any program involving challenges to the individuals on the list on Election Day would result in the disenfranchisement of other minority voters by

---

Daschle's request for a temporary restraining order in the latter action. Although Senator Daschle invoked the Consent Decree in that case, the District of South Dakota did not address that agreement in its ruling.

overwhelming Ohio election officials and clogging the polls. On the basis of those claims, she requested that the Court issue a preliminary injunction barring the RNC and any state organizations with which it was cooperating from carrying out poll challenges using the list.

The Court held an evidentiary hearing on the morning of November 1, 2004, at which it heard arguments relating to whether a preliminary injunction should be issued. At that hearing, the DNC appeared in support of Ms. Malone. The RNC opposed Ms. Malone's request for a preliminary injunction on several grounds. As a threshold issue, it argued that Ms. Malone's suit was non-justiciable because irregularities in her registration would render her subject to challenge by the Ohio Board of Elections regardless of whether the RNC or ORP engaged in a separate challenge. The RNC also claimed that it had complied fully with the Consent Decree, asserting that the potential challenge to Ms. Malone fell within the "normal poll watch functions" allowed by that agreement. Finally, it contended that any challenge would be carried out by the ORP – which was not subject to the Decree – and an injunction issued by this Court would therefore be ineffective in redressing Ms. Malone's claims.

At the conclusion of the hearing, the Court rejected the RNC's arguments and issued an Order in which it (1) barred the RNC from using the list to carry out voter challenges and (2) directed the RNC to instruct its agents in Ohio not to use the list for such purposes. In doing so, the Court found that the RNC had violated both the procedural and substantive provisions of the

Consent Decree. In its Opinion, which was read into the record at the conclusion of the hearing, the Court first rejected the RNC's argument that Ms. Malone's claims were non-justiciable by ruling that she would suffer irreparable harm if forced to endure multiple challenges to her eligibility, as such challenges may delay her efforts to cast a ballot or result in congestion at the polling place that would prevent other voters from doing so. It then held that:

> [T]he RNC violated the Consent Decree. It engaged in a ballot security effort. … [F]rom at least the time of the RNC's August 10, 2004 letter until recent days the RNC participated with the Ohio Republican Committee in the devising and implementation of the program.
>
> Procedurally, the RNC is in clear violation inasmuch as it failed to obtain [a] determination that the ballot security program complies with the provisions of the Consent Decree. Further, the program violates the substantive provisions of the Decree. It undertook ballot security activities in polling places or election districts where the racial composition in such districts [factored] in the decision to conduct … such activities there, and where the purpose or significant effect of such activities is to deter qualified voters from voting. The RNC's original mailing and the Ohio State Committee's September 9th mailing were directed to the counties having the State's major cities and largest concentration of minority voters.

Immediately after this Court issued its ruling, the RNC filed an emergent application to the Court of Appeals for the Third Circuit requesting a stay of the Order. A panel of the Court of Appeals met that afternoon and worked into the evening to address the application. With fewer than eight hours remaining before the polls opened in Ohio, the panel issued an Opinion and Order denying the RNC's application for a stay and affirming this Court's decision. In doing so, it stated that "we believe there is ample support for the factual findings of the District Court," and noted that "emails between the RNC and … Ohio Republican Party show collaboration and cooperation between the RNC and ORP."

Following that ruling, the RNC petitioned for rehearing en banc. On the morning of Election Day, November 2, 2004, the Court of Appeals granted that petition, vacated its earlier ruling, and stayed this Court's judgment pending a decision on rehearing. Before the case could be reheard, though, Ms. Malone cast her ballot without being challenged. Based on that development, the Court of Appeals dismissed the appeal as moot. In doing so, it did not address the merits of this Court's determination that the RNC had violated the Consent Order. Thus, the substantive merits of the Court's ruling have never been refuted, and its factual determination that the RNC engaged in conduct prohibited by the Consent Order remains undisturbed.

D. Motion to Vacate or Modify the Consent Decree

On November 3, 2008, shortly after the Court denied the DNC's Motion for a Preliminary Injunction based on the alleged violations in New Mexico, the RNC submitted the pending Motion to Vacate the Consent Decree. In its opening and reply briefs, the RNC argued that it should be allowed to conduct ballot security initiatives without complying with the Decree because the enactment of various statutes since the Decree was last modified in 1987 – including (1) the National Voter Registration Act of 1993 (the "Motor Voter Law"), 42 U.S.C. §§ 1973gg, et seq., (2) the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 2 U.S.C. §§ 431, et seq., and (3) the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. §§ 15301, et seq. – has increased the danger of voter fraud and decreased the risk of voter intimidation. Additionally, it contended that the Consent Decree (1) improperly extends to conduct that was outside the scope of the Complaints in the actions which led to its enactment, (2) has been interpreted in a broad manner that undermined the expectations of the parties at the time the 1982 and 1987 settlements were entered, and (3) violates the First Amendment by restricting communications between the RNC and state parties relating to ballot security initiatives.

In its brief in opposition to the Motion to Vacate, the DNC argued that, despite the statutes pointed out by the RNC, the danger of voter intimidation remains greater than that of voter fraud. In doing so, it noted several recent incidents in which minority voters were reportedly subjected to illegal and abusive ballot

security initiatives by Republican operatives, and pointed to several occasions during the past 15 years in which Republicans made allegations of voter fraud that were later revealed to be false. Additionally, the DNC argued that the conduct prohibited by the Consent Decree – the implementation of ballot security initiatives in minority precincts as a means of deterring qualified voters from casting their ballots – remains illegal, and any action modifying or vacating the Consent Decree would give the RNC an opportunity to return to the very practices that agreement is meant to prevent. With respect to the RNC's argument that the Consent Decree extends to conduct that was not at issue in the suits that led to its adoption and modification, the DNC set forth several precedents – including a case from the Supreme Court – holding that a party may enter into a settlement in which it consents to broader relief than the court may have granted if the case had been tried.

E. Evidentiary Hearing

In keeping with the requirement that a district court hold an evidentiary hearing before modifying a consent decree in such a manner as to remove requirements previously imposed, Mayberry v. Maroney, 529 F.2d 332, 336 (3d Cir. 1976), the Court heard two days of oral arguments on May 5 and 6, 2009. During that hearing, both parties were allotted time for opening and closing statements and were allowed to call witnesses in support of their respective arguments. The arguments articulated by the parties largely restated those in their briefs, and will not be repeated here. The relevant testimony of the witnesses is summarized below. For the sake of brevity, the Court

will not revisit the portions of that testimony in which witnesses simply restated arguments laid out in the parties' briefs or opined on matters not directly pertinent to today's decision.

i. Thomas Josefiak

The only witness called by the RNC in support of its Motion was Thomas Josefiak, an expert in election law who served from 1985 until 1992 as a Commissioner of the Federal Election Commission ("FEC") after being appointed to that post by President Ronald Reagan. On leaving the FEC, Mr. Josefiak worked as Special Counsel to the RNC until 1995, at which time he assumed the duties of General Counsel to the Committee. He served in that capacity from 1995 until 2004 and again from 2005 until 2008, taking a brief interlude to work as General Counsel to the Committee to Re-Elect President George W. Bush from 2004-2005.

Mr. Josefiak's testimony largely echoed the arguments set forth in the RNC's briefs. He first stated as a general matter that he was familiar with the Consent Decree and that the RNC had made efforts throughout his tenure to inform state parties of that agreement's contents and requirements. In outlining the RNC's efforts to comply with the Decree, Mr. Josefiak focused particularly on the preclearance requirement added pursuant to the 1987 modification. He argued that the Consent Decree's requirement that the RNC serve 20 days notice and obtain the approval of this Court before engaging in any ballot security initiatives is inequitable and disadvantages the RNC. First, Mr. Josefiak stated that, due to the preclearance requirement and other provisions in the Consent

Decree, the RNC does not coordinate with state and local party committees on Election Day efforts such as voter turnout drives or poll watching activities. (1 Hr'g Tr. 94:7-95:17, May 5, 2009.) Although he admitted that the Consent Decree allows the RNC to engage in "normal poll watch functions," Mr. Josefiak claimed that, since those functions are not defined by the Decree, it is difficult to determine when poll watching crosses into the realm of ballot security. Therefore, the RNC chooses to refrain entirely from participating in Election Day efforts. (Id.)

Even if the RNC tried to engage in poll watching or ballot security initiatives, Mr. Josefiak contended that it would in all practical terms be unable to do so because the Consent Decree's requirement that it serve this Court with 20 days notice of such initiatives makes it impossible for the Committee to effectively allocate its resources on Election Day. In a Presidential election, for example, the RNC may believe at the time it seeks preclearance that Missouri will be a hotly-contested state, only to find based on polls completed in the days just before the election that the margin separating the two candidates has widened, and the poll watchers that were to have been deployed in that state could be put to better use elsewhere. See (Id. at 96:15-97:14.)

In addition to testifying about the RNC's efforts to comply with the Consent Order, Mr. Josefiak opined as an expert on the danger of voter fraud. He argued that voter fraud remains a serious issue, especially in light of the close margins by which many elections have been decided over the past 15 years. In support of that claim, he noted a report issued in 2005 by the Carter-Baker

Commission on Federal Election Reform, a bipartisan panel headed by former President Jimmy Carter and former Secretary of State James Baker. In that report, which was titled "Building Confidence in U.S. Elections," the Commission stated:

> While fraud is difficult to measure, it occurs. The U.S. Department of Justice has launched more than 180 investigations into election fraud since October 2002. These investigations have resulted in charges for multiple voting, providing false information on their felon status, and other offenses against 89 individuals and in convictions of 52 individuals. The convictions related to a variety of election fraud offenses, from vote buying to submitting false voter registration information and voting-related offenses by non-citizens.

(RNC Hr'g Ex. 26 at 45.)

Additionally, Mr. Josefiak cited the report of a Federal Bureau of Investigation ("FBI") task force investigating allegations of voter fraud in Wisconsin during the 2004 election. In its preliminary findings, the task force found over 100 individuals had voted more than once in the election, and more than 200 ineligible felons had voted. (RNC Hr'g Ex. 29 at 2.) Additionally, the report stated that approximately 65 non-existent voters were registered by individuals participating in registration drives that were paid based on the number of voters they signed up, but specifically stated that those fictitious identities were not used to cast a ballot. (Id. at 3.) Mr. Josefiak noted in his testimony that the number of individuals convicted of such offenses is

often a poor measure of the extent of voter fraud because prosecutors must prove that each defendant knew that his or her activities were illegal and, despite that knowledge, willfully violated the law. (1 Hr'g Tr. 91:21-92:6.) He then went on to discuss other incidents in which voter fraud allegedly took place, most notably in Florida and Missouri during the 2004 Presidential election. (Id. at 92:8-93:19.) After doing so, he again stated that the practical effect of the Consent Decree has been to preclude the RNC from engaging in initiatives aimed at combating voter fraud. (Id. at 93:20-22.)

In his capacity as an expert witness, Mr. Josefiak also gave testimony on voter registration trends and changes to voting laws since the Consent Decree was enacted in 1982. In doing so, he noted two charts created using data compiled by the United States Census Bureau. The first showed that, while there was a 28.1 percent increase in the total number of registered voters between 1982 and 2006, there was an increase of only 13.2 percent in the number of new voters that were classified as "white." In contrast, there was a 41.6 percent increase in "black" voters, and a 201 percent increase in those categorized as "hispanic."[3]

---

[3] The Court is aware that, given the fluid nature of ethnicity, the categories used by the Census Bureau are outdated and may at times result in confusion. For instance, an individual's family tree may include persons of several different ethnicities, thus resulting in a unique heritage that does not lend itself well to classification in any one category. Moreover, the very separation of individuals into ethnic categories is unhelpful; it serves only to foster the mistaken assumption that a person's ethnic heritage, rather than individual experience, can be used as a proxy for determining his

(RNC Hr'g Ex. 6.) The second chart, which included information on the number of individuals from each ethnic category that actually voted in the 1982 and 2006 elections, showed a similar trend: the number of "white" voters increased by 7.8 percent, while the number of "black" and "hispanic" voters went up 31.1 and 152 percent, respectively. (RNC Hr'g Ex. 7.)

According to Mr. Josefiak, the relatively-greater increases in "black" and "hispanic" registration between 1982 and 2006 were significant insofar as the RNC was aware of the trend, and sought to ingratiate itself with those communities in an effort to garner their votes. Moreover, the increase in minority registration and voter turnout during those periods, according to Mr. Josefiak, gave the RNC a strong incentive to refrain from engaging in any form of voter intimidation aimed at members of those communities. He testified that doing so "would be political suicide," and asked rhetorically, "[w]hy would the RNC make concerted efforts to reach out to the minority communities and then at the same time prevent those minority communities from voting?" (1 Hr'g Tr. 58:14, 58:21-23.)

As further evidence that the RNC has no incentive to violate the Consent Decree by engaging in ballot security initiatives meant to intimidate minority voters, Mr. Josefiak pointed to the changing

---

or her values, beliefs, and political views. Therefore, the Court uses the labels outlined above only in an effort to summarize the evidence presented, and does not endorse the use of such partially outmoded categories.

composition of both that Committee and the Federal Government. In doing so, he pointed out that at least two members of the RNC's leadership – Chairman Michael Steele and Chief Administrative Officer Boyd Rutherford – are African-American, and are the first minority holders of their respective offices. Additionally, he noted that two of the highest officials responsible for enforcing the VRA and other election laws prohibiting discrimination are themselves minorities, stating that "I find it very difficult to believe that with an African American President, and an African American Attorney General, that the laws that are already on the books regarding voter fraud, voter intimidation, and voter suppression are[n't] going to be actively pursued by this Justice Department." (Id. at 65:22-66:2.)

In discussing changes to both federal and state election laws during the period since the Consent Decree was last modified in 1987, Mr. Josefiak noted that the Motor Voter Law has made it easier for individuals to register to vote and has contributed to a major increase in minority voting. The main thrust of his testimony regarding changes to election laws, however, focused on the effects of the BCRA, the HAVA, and state laws relating to early voting. With respect to the first, he noted that the BCRA prohibited the use of so-called "soft money" by both the DNC and RNC. See 2 U.S.C. § 441i(a)(1) ("[N]ational committee[s] of a political party … may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act."). Prior to the enactment of that section, the

party committees were allowed to raise "soft money" – a term used to describe donations that could be made in unlimited amounts – from various sources and then use those donations to fund the campaigns of candidates, voter registration drives, or any other initiatives they saw fit. Since the BCRA, however, the parties have been limited to funding their activities using "hard money" – individual contributions with varying limits depending on whether they are given directly to a candidate or political committee. See 2 U.S.C. § 441a(a)(1) (limiting direct contributions to candidates to $2,000 per person and contributions to national committees to $25,000 per year).

Mr. Josefiak claimed that the BCRA's ban on the use of "soft money" by national committees, when combined with the restrictions in the Consent Decree, led to several developments that heightened the danger of voter fraud and gave the DNC a competitive advantage in both its voter registration and ballot security efforts. First, he contended that the DNC had increasingly relied on various non-profit and community organizations to implement voter registration drives and get-out-the-vote efforts, noting as an example the Association of Community Organizations for Reform Now ("ACORN"). (1 Hr'g Tr. 75:5-12.) Because the BCRA prohibits the national political committees from directly supervising or participating in voter registration drives funded by such entities, Mr. Josefiak contended that the "outsourcing" of those efforts had heightened the danger of voter fraud by creating a situation in which the number of organizations conducting registration drives proliferated to the point that it was impossible for the RNC to track their activities and hold them

accountable for potential instances of voter fraud. Additionally, he contended that the Court's interpretation of the Consent Decree – in allowing private individuals or groups (such as Ms. Malone during the 2004 election) to bring intervenor actions to enforce its restrictions – created an uneven playing field between the DNC and RNC. In the event of such suits, the RNC would be forced to expend its limited "hard money" resources defending against claims brought by groups that are not bound by the fundraising restrictions contained in the BCRA, while the DNC would not be subject to similar litigations because it is not bound by the Decree. (Id. at 75:12-17.) Moreover, Mr. Josefiak claimed that past actions such as the Malone suit had required the RNC to divert high-level officials in the critical days just before an election so that they could be deposed or otherwise involved in the litigation, whereas the DNC – which is not subject to such suits under the Consent Decree – is able to put such officials to better use in focusing on specific races. (Id. at 99:4-25.)

In addition to contending that the restrictions contained in the BCRA might create an uneven playing field between the DNC and RNC by requiring the latter to use campaign funds to defend lawsuits brought by third parties pursuant to the Consent Decree, Mr. Josefiak also argued that changes to state and federal election laws had decreased the danger of voter intimidation. His testimony to that effect focused on two developments: (1) the HAVA's requirement that individuals be allowed to cast a provisional ballot (which is later examined by election officials to determine its validity), see 42 U.S.C. § 15482(a), and (2) the adoption of alternative voting procedures by an

increasing number of states. According to Mr. Josefiak, the ability of individuals to cast a provisional ballot largely eviscerates the danger that voter suppression programs like the ones that led to the enactment and modification of the Consent Decree or the voter challenge list at issue in the Malone matter will result in the disenfranchisement of qualified voters. He claimed that – since anyone can cast a provisional ballot regardless of whether their name appears on the voter rolls – the use of challenge lists and other ballot security provisions will not preclude a qualified individual from voting even in cases of egregious voter suppression such as an individual being wrongfully accused by an RNC poll watcher of possessing some disqualifying characteristic, such as having committed a felony. See (1 Hr'g Tr. 79:16-24.)

Similarly, Mr. Josefiak testified that the adoption of alternative voting procedures by an increasing number of states has largely alleviated the danger of voter suppression that led to the enactment and modification of the Consent Decree. In doing so, he specifically noted the spread of two alternatives to the traditional model in which voters were required to visit the polls on Election Day: early voting and no-excuse absentee voting. Under the former, a voter may visit one of several early voting polling places during a designated time period prior to Election Day. The latter procedure allows voters to submit their ballots by mail without being required to show that they will be out of the state or otherwise unable to vote in person on Election Day. As of 2008, 31 states allowed early voting, while 28 permitted absentee voting. See (RNC Hr'g Ex. 21.) Mr. Josefiak testified that such procedures inject an element of "flexibility" into the voting process that was

not present at the time the Consent Decree was enacted in 1982 or modified in 1987. (1 Hr'g Tr. 82:1-9.) He claimed that taking advantage of early voting would allow minorities who suspected that they might be subject to intimidation on Election Day to avoid harassment or delays by avoiding poll watchers deployed on Election Day or, if subjected to suppression tactics during their first attempt to vote, making repeated trips to the polls. (Id. at 82:7-9.) Moreover, Mr. Josefiak testified that "if it were rumored in the minority community that there was going to be an effort to suppress the minority vote," individuals who wished to avoid potential abuse at the polls could exercise their right to cast a mail-in ballot through absentee voting. (Id. at 82:22-83:14.) He admitted on cross-examination, however, that most states require voters to apply for an absentee ballot in advance of the election, and that requirement might preclude a voter from deciding to avoid the polls based on rumors of intimidation that may not come to light until just prior to Election Day. (Id. at 144:2-10) (discussing requirement in New Jersey that a voter apply for an absentee ballot at least seven days prior to the election). Additionally, Mr. Josefiak noted that, as of 2006, almost 80 percent of people still voted in person by visiting the polls on Election Day, while only 14.3 percent voted by absentee ballot and 5.6 percent took advantage of early voting. See (RNC Hr'g Ex. 24.)

ii. Chandler Davidson

The DNC called three expert witnesses. The first was Dr. Chandler Davidson, a retired Professor from Rice University and expert on the history of race relations, including the VRA and voter suppression.

Much of Dr. Davidson's testimony was drawn from the manuscript of a book he recently authored, titled "Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression – Or Both?" See (DNC Hr'g Ex. 2.) That book, which Dr. Davidson initially began in the late 1980s, was completed in 2004 at the request of Bob Bauer, a prominent Democratic election lawyer who served as General Counsel to the 2008 Presidential Campaign of Barack Obama and was recently named White House Counsel. The book details 14 ballot security programs undertaken by the Republican Party between 1982 and 2003 in which minority voters were allegedly intimidated. In doing so, the book includes chapters on the 1982 program instituted in Newark, New Jersey that resulted in the Consent Decree and the 1986 initiative in Louisiana that led to its modification.[4]

Dr. Davidson testified that voter suppression efforts remain widespread, especially cases of what he referred to as "vote caging" – the process used in the Malone case – in which non-forwardable letters are sent to individuals at the address under which they registered to vote, and those whose letters are returned as undeliverable are added to a list of voters to be challenged at the polls on Election Day. (1 Hr'g Tr. 159:7-161:21.) He then noted that vote caging and

---

[4] Dr. Davidson specifically noted in his testimony that his book is not a comprehensive account of Republican ballot security efforts. To the contrary, he stated that the book only covered "the very worst cases," and that he did not mean to "suggest[] that all or most ballot security programs that are run by the Republican Party go askew in the way that [the programs detailed in the book] did." (1 Hr'g Tr. 157:25-158:1-7.)

other methods of voter suppression – such as disseminating misinformation on the time and place individuals should vote or posting challengers at the polls to harass potential voters – are overwhelmingly directed at minorities, and are usually perpetrated by Republican operatives. (Id. at 164:24-165:5.) Dr. Davidson opined that the reason such programs are usually carried out by Republicans rather than Democrats may simply be a matter of statistics: minority voters – who are far more likely to be added to a challenge list because of irregularities in registration attributable to language barriers, lack of photo identification cards ("ID"), or changes of address – have historically tended to vote for Democratic candidates. (Id. at 165:7-24.)

Additionally, Dr. Davidson testified on the efficacy of the Consent Decree in combating voter intimidation. In doing so, he argued that existing federal statutes prohibiting voter suppression, most notably the VRA, do not sufficiently address the ongoing incentives for Republican operatives to intimidate minority voters. He stated that actions under the VRA and other statutes are generally filed after individuals have already been disenfranchised through suppression efforts that frighten them away from the polls. (2 Hr'g Tr. 9:25-10:22.) In contrast, the Consent Decree creates a prophylactic solution in which individuals who suspect that they may be subjected to suppression efforts can obtain injunctive relief from this Court in order to stop those efforts before they begin. (Id. at 11:1-6.) Dr. Davidson noted, however, that he is not a legal expert, and stated that he is not aware of whether similar injunctive relief would be available under the

section of the VRA prohibiting voter intimidation, 42 U.S.C. § 1973i(d).[5]

On cross-examination, Dr. Davidson admitted that, of the 14 incidents of voter intimidation discussed in

---

[5] It is unclear whether a private individual may bring suit against another private individual to redress violations of the prohibitions on voter suppression contained in 42 U.S.C. § 1973i. Another section of the statute, 42 U.S.C. § 1973j, grants the Attorney General of the United States the power to bring such actions, stating:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section … 1973i … of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order.

However, the Supreme Court has held that private individuals may sue state or municipal entities under the preclearance provisions of § 5, Allen v. State Bd. of Elections, 393 U.S. 544, 554-55 (1969), and the provisions of § 10 prohibiting the use of poll taxes as a prerequisite for voting. Morse v. Republican Party of Va., 517 U.S. 186, 234-35 (1996). In doing so, it noted that another portion of the VRA, added in 1975, allows attorney fees to be granted to "the prevailing party, other than the United States," in any action "to enforce the voting guarantees of the fourteenth or fifteenth amendment." 42 U.S.C. § 1973l(e) (emphasis added).

The motion currently before the Court poses only the narrow question of whether the Consent Decree should be vacated or modified. The DNC has conceded that it should be altered to limit enforcement actions to those brought by the parties to that agreement. Therefore, the Court will refrain from wading into the interpretive briar patch and will advance no opinion on whether such suits can be brought directly pursuant to the VRA.

his book, the RNC was involved in only two: the program in Newark, New Jersey that led to the enactment of the Consent Decree in 1982 and the initiative in Louisiana that resulted in its 1987 modification. (2 Hr'g Tr. 25:1-26:17.) Additionally, he stated that his report was compiled without speaking to any of the individuals who allegedly participated in suppression efforts. (Id. at 19:13-24.) In fact, the entirety of his book was based on press accounts. (Id. at 26:3-13.)

iii. Lorraine Minnite

The second of the DNC's three expert witnesses was Dr. Lorraine Minnite, an Assistant Professor of Political Science at Barnard College who specializes in the study of voter fraud. At the request of Project Vote – a non-partisan organization that works to mobilize low-income and minority voters – Dr. Minnite in 2007 completed a report titled "The Politics of Voter Fraud." See (DNC Hr'g Ex. 22.) Over the next two years, she expanded that report into a book, which at the time of the hearing had been peer-reviewed and accepted for publication by the Cornell University Press.

The central thesis of Dr. Minnite's testimony was that the actual incidence of voter fraud in US elections is quite rare, and the disproportionate amount of attention paid to voter fraud by political parties and the media is generally due to the use of fraud allegations by Republicans in order to place increased scrutiny on minority voters and make it harder for them to cast a ballot. (2 Hr'g Tr. 47:9-17.) In a March 2008 Senate Rules and Administration Committee

hearing titled "In-Person Voter Fraud: Myth and Trigger for Disenfranchisement?" she testified to that effect, stating:

> It is my view based on my record of academic research on the subject that in-person voter fraud is rare in contemporary American elections. As a problem or threat, it cannot compare in seriousness or magnitude to other resource, technology, or personnel problems currently facing state and local election officials.

(DNC Hr'g Ex. 25.)

According to Dr. Minnite, most media reports of voter fraud are attributable not to intentional attempts by individuals to cast illegitimate ballots, but rather minor errors or irregularities in the registration and voting process. As an example, she noted that the misspelling of an individual's name by elections officials at the time he or she registered to vote might be reported as "voter fraud" in media accounts. (2 Hr'g Tr. 52:18-53:10.)

In support of her general assertion that the problem of voter fraud is generally exaggerated, Dr. Minnite noted a portion of her book in which she completed a case study on the alleged fraud that took place in Wisconsin during the 2004 election. By cross-referencing press releases issued by the DOJ with court records and interviewing the majority of the attorneys and individuals accused of wrongdoing in that case, Dr. Minnite ascertained that only 14 of the individuals who were prosecuted as a result of that incident – which Mr. Josefiak referred to in his

testimony and which was specifically cited by the Carter-Baker Commission in its report – were voters, and of those, only 5 were convicted or pled guilty. The others who were indicted were comprised mostly of elected officials engaged in "vote buying" – a practice in which voters are paid to cast their ballot for a particular candidate. A separate incident in Florida during the 2004 elections had similar results: the majority of those indicted were not voters, but elected officials and political operatives, and a relatively low number of the voters who were prosecuted were convicted or pled guilty. (Id. at 59:4-15.)

As a final point, Dr. Minnite testified that she was unaware of any instance of attempted voter fraud discovered by a poll challenger that led to a criminal prosecution. (Id. at 62:23-25.) She noted that the effectiveness of poll watchers is dependent on the information that is given to them – if the challengers use lists that were compiled through dubious methods such as "vote caging," they will be unlikely to discover specific instances of fraud, but may create a disruption that will result in the disenfranchisement of eligible voters. (Id. at 63:2-21.) She acknowledged, however, that ballot security initiatives can play a legitimate role in ensuring the integrity of the voting process as long as they are conducted carefully and do not preclude qualified individuals from voting. (Id. at 64:24-65:1.)

On cross-examination, Dr. Minnite admitted that the definition of "voter fraud" used in her research – which includes only intentional attempts by voters to cast an illegitimate ballot – is narrower than the one used by the DOJ, and may not include some cases that

might be detected by the use of poll watchers. (Id. at 50:25-52:6, 69:4-11.) That definition also does not include incidents in which individuals fill out a voter registration under a fraudulent name, or where workers paid to complete voter registrations by private groups such as ACORN register individuals who do not exist. (Id. at 73:11-21.) Additionally, Dr. Minnite conceded that poll watchers may serve valuable purposes beyond the detection of fraud, such as detecting broken equipment, overcrowding, and irregularities in the tabulation of votes. (Id. at 69:19-70:8.)

iv. Justin Levitt

The DNC's final witness, Justin Levitt, currently serves as counsel to the Brennan Center for Justice[6] and an Associate Professor of Clinical Law at New York University School of Law. His testimony focused on changes to federal election statutes since the Consent Decree was entered in 1982 and modified in 1987 – most notably the enactment of the Motor Voter Law, BCRA, and HAVA. In doing so, he drew material from an article he authored titled "The Truth About Voter Fraud." See (DNC Hr'g Ex. 18.) In addition to that piece, Mr. Levitt's testimony drew on remarks he made

---

[6] The Brennan Center describes itself as a "non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice." See The Brennan Center for Justice, "About Us," http://www.brennancenter.org/pages/about/. Mr. Levitt's research for the Center focuses on the administration of federal elections, Congressional redistricting, and new developments in both state and federal elections law. (2 Hr'g Tr. 80:4-8.)

before the same March 2008 Senate Rules and Administration Committee hearing at which Dr. Minnite spoke, along with other publications he has completed in the course of his work.

The main theme of Mr. Levitt's testimony was that changes to federal election laws since the Consent Decree was enacted and modified have not heightened the danger of voter fraud. To the contrary, he argued that the Motor Voter Law and HAVA have actually decreased the possibility that voters will be able to corrupt the electoral process through fraud. According to Mr. Levitt, the former law includes three measures that significantly reduce the likelihood of voter fraud. First, it allows the various government agencies with whom potential voters come in contact – such as vehicle licensing services and Medicaid administrators – to verify the identity of individuals in a more standardized way than was previously used. In doing so, those agencies must comply with the terms of the REAL I.D. Act of 2005, Pub.L. No. 109-13, which requires individuals to show documentation that they are United States citizens in order to register to vote. (2 Hr'g Tr. 86:14-17.) Thus, Mr. Levitt argued that the requirements for voter registration have actually become more restrictive and more reliable in preventing fraud since the enactment of the Consent Decree.

Mr. Levitt also noted that the Motor Voter Law was the first federal statute to impose uniform regulation on the maintenance and purging of voter rolls by the states. In doing so, the law creates a procedure whereby states may remove voters from the rolls for several reasons, including criminal conviction or

mental incapacity, death, or a change in address to a location outside the state's jurisdiction. 42 U.S.C. § 1973gg-6(a). In order to verify a change in address, the states may send forwardable address verification cards to voters, and may remove from the rolls any individual who returns the card confirming a change of address. 42 U.S.C. § 1973gg-6(d)(2). According to Mr. Levitt, those provisions have been used by states to maintain their rolls to a degree that was not possibly prior to the Motor Voter Law, and have resulted in increasingly accurate voter lists. (2 Hr'g Tr. 88:10-23.)

Finally, Mr. Levitt pointed out that the Motor Voter imposed criminal penalties on three categories of individuals engaged in voter fraud: (1) those who submit false voter registrations, (2) individuals who knowingly cast a forged ballot, and (3) persons who manipulate the tabulation of votes. See 42 U.S.C. § 1973gg-10(2). In doing so, Mr. Levitt argued that the Motor Voter Law "provided prosecutors with a new tool to confront any alleged instances of voter fraud." (2 Hr'g Tr. 89:1-2.)

According to Mr. Levitt, the HAVA also contains provisions that significantly decrease the likelihood of voter fraud. Most significantly, the statute requires each state to aggregate its voter lists – which were previously kept by disparate local agencies – into a single computerized database. See 42 U.S.C. § 15483(a)(1). In connection with its requirement that states compile an electronic list of all eligible voters within their borders, the HAVA imposed an obligation on state officials to maintain such lists by periodically removing the names of individuals who had become ineligible to vote due to criminal conviction, mental

incapacity, or other factors, along with names that appeared to be duplicates of others on the list. 42 U.S.C. § 15483(a)(2)(A). Mr. Levitt testified that the imposition of HAVA's requirements relating to the maintenance of voter rolls was the first time states had been required to remove such individuals, and claimed that those requirements created a safeguard against voter fraud by making the lists "as clean as [they] could possibly be." (2 Hr'g Tr. 91:7-92:5.)

Additionally, Mr. Levitt testified that the HAVA imposes a "check for" provision that safeguards against fraudulent voter registrations. That portion of the statute requires individuals who submit a voter registration to include either their driver's license number or the last four digits of their social security number. 42 U.S.C. § 15483(a)(5)(A)(i). Those without either a driver's license or social security number may still register, but are automatically subject to a process whereby the state is required to verify their eligibility. 42 U.S.C. § 15483(a)(5)(A)(ii),(iii). Based on those provisions, Mr. Levitt argued that the HAVA has significantly reduced the likelihood that ineligible voters will be allowed to cast a ballot.[7] (2 Hr'g Tr.

---

[7] Mr. Levitt alluded briefly to the safeguards imposed on mail-in and absentee voting by the HAVA, but did not testify at length about those measures. As stated by the Supreme Court:

> HAVA [] imposes new identification requirements for individuals registering to vote for the first time who submit their applications by mail. If the voter is casting his ballot in person, he must present local election officials with written identification, which may be either "a current and valid photo identification" or another form of

92:17-93:8).

Turning to the third statute cited by the RNC in support of its argument that changes in federal election law require the Consent Decree to be vacated or modified, Mr. Levitt argued that the BCRA had not, as contended by Mr. Josefiak, created an incentive for political parties to "outsource" voter registration activities to non-profit organizations. In doing so, he noted community outreach organizations such as ACORN and the League of Women Voters were involved in voter registration drives prior to the BCRA, and the statute does not alter the funding sources that can be used by such organizations. Additionally, he noted that both parties funded voter registration activities during the last several elections, either through their national committees or corresponding state and local entities. In fact, the parties and various political candidates have increased their spending on voter registration activities over the life of the Consent Decree. (2 Hr'g Tr. 96:1-13.) On the basis of those facts, Mr. Levitt contended that the increased voter registration activities of groups such as ACORN were due not to "outsourcing" of such functions by the DNC,

---

documentation such as a bank statement or paycheck. § 15483(b)(2)(A). If the voter is voting by mail, he must include a copy of the identification with his ballot. A voter may also include a copy of the documentation with his application or provide his driver's license number or Social Security number for verification. § 15483(b)(3).

Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1617-18 (2008).

but rather to a general increase in such activities. (Id. at 96:21-97:24.)

In addition to his testimony on changes to federal election laws during the period since the Consent Order was enacted and modified, Mr. Levitt spoke briefly regarding the prevalence of voter fraud. Like Dr. Minnite, he claimed that voter fraud in modern elections is very rare, and allegations of fraud tend to be overstated. (Id. at 99:3-8.) In fact, Mr. Levitt argued that allegations of voter fraud are often indicative of an "attitude of intimidation" and are meant to deter individuals from participating in the electoral process. (Id. at 99:14-100:3); see also (DNC Hr'g Ex. 18 at 3) ("[O]n closer examination, many of the claims of voter fraud amount to a great deal of smoke without much fire. … [T]hese claims of voter fraud are frequently used to justify policies that do not solve the alleged wrongs, but that could well disenfranchise legitimate voters."). He also stated that, especially in the case of challenge lists compiled using "vote caging" in which mail is sent to registered voters and those for whom the letter is returned are confronted by poll watchers on Election Day, the very existence of anti-fraud programs may deter eligible voters from going to the polls. (2 Hr'g Tr. 103:9-104:9). Voter who learn of such programs ahead of time may decide that they are unwilling to withstand a barrage of questions from a potentially-hostile challenger before casting their ballot, and may avoid the polls completely. (Id. at 104:1-4.) Others may be prevented from voting due to the delays caused by such challenges. (Id. at 103:23-24.)

F. Post-Hearing Submissions

Following the evidentiary hearing, both parties were permitted to submit supplemental briefs outlining their arguments. They did so on June 27, 2009.

The parties' arguments in their post-hearing briefs largely tracked those outlined in their prior submissions and developed through the testimony of their witnesses. The RNC made no reference to its initial contention that First Amendment jurisprudence protects the conduct prohibited by the Consent Decree, but emphasized Mr. Josefiak's testimony relating to the increase in minority voters since 1982 in order to contend that the Consent Decree is no longer necessary. The RNC also added allegations that the Decree is antiquated and unduly burdensome, especially in its requirement that this Court be notified of any proposed ballot security initiatives at least 20 days prior to the election in which those programs are implemented. Finally, it the claimed that the Decree is onerous and contrary to the public interest because it prevents the RNC from undertaking appropriate and necessary poll watch activities.

For its part, the DNC claimed that the RNC had failed to establish that the Consent Decree should be vacated pursuant to Federal Rule of Civil Procedure 60(b). In doing so, the DNC argued that the RNC has not demonstrated changed factual circumstances which would justify vacatur for two reasons. First, the RNC was found as recently as five years ago in the Malone matter to have violated the Consent Decree. Second, the DNC claims that the VRA does not provide sufficient protection against voter suppression, and the

Consent Decree remains necessary as a means of quickly redressing voter intimidation claims. With regard to the RNC's claim that changes in federal election laws justify vacatur, the DNC pointed out that the new laws cited by the RNC – the Motor Voter Act, HAVA, and BCRA – did not alter the prohibition on voter intimidation contained in the VRA. See 42 U.S.C. § 1973i(d). Finally, the DNC contended that the Consent Decree is not contrary to the public interest, and proposed several modifications which it claimed would remedy the RNC's complaints.

II. DISCUSSION

As a preliminary matter, the RNC's argument that the Consent Decree is void because it "improperly extend[s] to … private conduct" and grants prospective relief beyond what the DNC could have achieved if the original 1981 action had been litigated, (Def.'s Br. Supp. Mot. Vacate 18), must be rejected. It is well-established that, although "a consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction, … a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland, 478 U.S. 501, 525 (1986). To the contrary, parties may "settle the dispute" over an alleged statutory or constitutional violation by "undertaking to do more than … a court would have ordered absent the settlement." Rufo, 502 U.S. at 389.

The DNC's Complaint in the original action alleged violations of the VRA and asserted claims under 42

U.S.C. § 1983, and its 1987 claims were premised on the same provisions. The Court had subject matter jurisdiction over both litigations because they arose out of federal law. 28 U.S.C. § 1331. The RNC agreed to the original version of the Consent Decree in exchange for the DNC dismissing its claims in the first suit, and acceded to the 1987 modification – including the imposition of the preclearance provision – as consideration for dismissal of the second. Having done so, it is barred from asserting in the pending Motion that the Consent Decree should be vacated because it provided a greater measure of relief than could have been achieved in those actions. See Local No. 93, 478 U.S. at 525; Rufo, 502 U.S. at 389. "[E]ven if [the RNC's] decision to settle was improvident in hindsight, the decision has been made and cannot be revisited." Coltec Indus. v. Hobgood, 280 F.3d 262, 275 (3d Cir. 2002). Therefore, the Court rejects the RNC's argument that the Consent Decree is void.

Similarly, any contention that the Consent Decree infringes on activity protected by the First Amendment is meritless. The RNC claims that this Court's interpretation of the Consent Decree is so broad as to restrict virtually all communications with state and local Republican organizations, and therefore constitutes a prior restraint on the RNC's rights to free speech and association under the First Amendment. That contention overlooks the fact that the Consent Decree applies only to "ballot security activities." Thus, the RNC is free to communicate with state and local organizations concerning any other subject, including the prospects of any of the party's candidates, fundraising, voter registration and poll watching activities, etc. Moreover, it is well-established that the

First Amendment applies only to state actions. Cent. Hardware Co. v. NLRB, 407 U.S. 539, 547 (1972) ("The First and Fourteenth Amendments are limitations on state action, not on [private] action for private purposes."); Green v. Am. Online (AOL), 318 F.3d 465, 472 (3d Cir. 2003) (stating that an internet service provider was not subject to the First Amendment's free speech guarantees because it was a private company and not a government entity). Thus, nothing in the First Amendment prohibits private parties from agreeing to refrain from engaging in certain types of speech or association pursuant to a settlement or contract between themselves. Ry. Employees' Dep't v. Hanson, 351 U.S. 225, 232 n.4 (1956) (holding that court enforcement of a settlement entered into in a suit arising out of the National Labor Relations Act was not a "state action."). In fact, parties to a dispute routinely enter settlements, such as the one in this case, that include confidentiality or non-disclosure provisions restricting their speech, and such settlements are routinely enforced. See Pansy v. Borough of Stroudsburg, 23 F.3d 772, 788-89 (3d Cir. 1994) (discussing enforcement of such agreements).

As a final matter before turning to the merits of the RNC's other contentions, the Court notes that the DNC has agreed that the Consent Decree should be modified in order to make clear that its restrictions cannot be enforced by third parties. See, e.g., (Pl.'s Br. Opp'n Mot. Vacate 4, 23, 26); (Hr'g Tr. 26:17-27:1.) Thus, there is no need to address the RNC's contentions or Mr. Josefiak's testimony that allowing third parties a right of action under the Decree leads to an inequitable situation in which it may be forced to expend its resources to defend lawsuits brought by well-funded

organizations that are not subject to the BCRA's restrictions on "soft money" expenditures. The RNC's remaining arguments in support of its Motion to Vacate or Modify the Consent Decree must be viewed in light of the standard of review applicable to such requests.

A. Standard of Review

Under Federal Rule of Civil Procedure 60(b)(5), a court may modify a consent decree when "applying [the judgment] prospectively is no longer equitable." The Supreme Court has noted, however, that such a judgment may not be rescinded or modified simply because "it is no longer convenient to live with the terms of a consent decree." Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383 (1992). "Accordingly, a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." Id.

The standard of proof necessary to meet that burden varies depending on whether the party requesting modification is the plaintiff or defendant. A plaintiff may obtain modification by showing "that conditions have changed so that the basic purpose of the original consent decree has been thwarted, meaning that time and experience have demonstrated that the decree has failed to accomplish the result that it was specifically designed to achieve." Holland v. N.J. Dep't of Corr., 246 F.3d 267, 283-84 (3d Cir. 2001) (internal quotations and citations omitted). However, "[t]he Supreme Court has set a more rigorous standard for defendants seeking modification because defendants usually seek modification 'not to achieve the purposes of the

provisions of the decree, but to escape their impact.'" Id. at 284 n.16 (quoting United States v. United Shoe Mach. Corp., 391 U.S. 244, 249, (1968)). Thus, a defendant seeking modification must demonstrate one of four factors by a preponderance of the evidence: (1) "a significant change in … factual conditions," (2) an intervening change in "statutory or decisional law … to make legal what the decree was designed to prevent" or make impermissible "one of the obligations placed upon the parties," (3) "unforeseen circumstances" that render the decree "unworkable," or (4) that "enforcement of the decree without modification would be detrimental to the public interest."[8] Rufo, 502 U.S. at 384, 388.

As discussed above, the RNC asserts three main arguments in favor of its Motion to Vacate or Modify the Consent Decree. First, it claims that its attempts to comply with the Consent Decree, along with the fact that only two actions have been successfully brought against it for violations of the Decree (in 1987 and in the 2004 Malone case), constitute sufficient factual evidence to compel vacatur. Additionally, the RNC contends that changes to federal elections statutes as

---

[8] The DNC claimed during oral arguments that a defendant must demonstrate one of the four Rufo factors by "clear and convincing" evidence. (1 Hr'g Tr. 31:9-15); (2 Hr'g Tr. 168:6-10.) The Supreme Court does not appear to have used that heightened standard in Rufo, and the DNC has not submitted any caselaw from this circuit to support its claim. See (Pl.'s Post-Hr'g Br. Opp'n Mot. Vacate 18-19) (citing cases from other circuits utilizing the "clear and convincing" standard in dealing with motions for reconsideration under Rule 60(b), none of which involved a request to vacate or modify a consent decree.) Therefore, the Court will follow the "preponderance of the evidence" standard that is normally used in civil proceedings.

a result of the enactment of the Motor Voter Law, BCRA, and HAVA, have increased the danger of voter fraud while simultaneously decreasing the risk of the type of voter suppression that originally justified the Decree. As part of that argument, the RNC notes that a number of states have adopted alternative procedures such as early and absentee voting that may alleviate the need for individuals to visit the polls – where they might be subject to intimidation – on Election Day. Finally, the RNC claims that the Consent Decree is contrary to the public interest because its terms preclude the RNC from engaging in several legitimate enterprises that are not aimed at combating voter fraud, including the deployment of poll watchers on Election Day and the coordination of voter registration and "get out the vote" efforts with state and local party organizations.

For the reasons set forth below, the Court finds that the RNC has failed to demonstrate either a change in factual conditions or law that would justify vacating the Consent Decree. However, the Court agrees that the Decree has become "unworkable" and detrimental to the public interest insofar as (1) the RNC interprets that settlement as prohibiting a variety of legal activities that are unrelated to voter fraud and do not have a disparate impact on minority voters and (2) the 20-day preclearance provision contained in the current version of the Consent Decree does not allow the RNC to address voter registration fraud in states that impose a registration deadline of only 10 days. Moreover, the Court finds that the failure of the parties to include an expiration date in the Consent Decree may impose an inequitable burden on the RNC by forcing it to comply with requirements that exceed

those which Congress, in its good judgment, has seen fit to impose in the form of federal law. Therefore, the Court will modify the Consent Decree in five ways: (1) it will be altered to make it clear that, as agreed to by the DNC, only the parties to the original agreement may bring actions to enforce it, (2) the preclearance deadline by which the RNC must give this Court notice of any proposed ballot security initiatives will be shortened from 20 to 10 days, (3) the term "ballot security program" will be clarified to include only efforts that are aimed at preventing potential voters from casting a ballot, (4) "normal poll watch function" will be defined in order to clearly demarcate the various actions in which the RNC may engage without subjecting itself to the requirements of the Decree, and (5) the Court will add a provision stating that the Decree will expire eight years after the date of this ruling – the amount of time used by the Department of Justice in its settlements arising out of voter suppression actions and cited by the RNC as a reasonable period.

B. Changed Factual Circumstances

The RNC cites three developments as evidence that factual conditions have changed in such a way that the Consent Decree is no longer necessary. First, it contends that increases in minority registration and voter turnout have rendered the Decree unnecessary. That argument is based partially on Mr. Josefiak's testimony, in which he noted that there has been a 41.6 percent increase in the number of registered voters classified as "black" by the United States Census Bureau since 1982, and a 201 percent increase in those categorized as "hispanic." See (RNC Hr'g Ex. 6.) Mr.

Josefiak also pointed out that the actual number of voters in each category has increased by 31.1 percent and 152 percent, respectively. See (RNC Hr'g Ex. 7.) According to the RNC, that data "belies any notion that the RNC or state Republican parties are suppressing or intimidating minority voters," and "statistically demonstrates the absence of an objective need for the Decree, [as] it shows that the RNC's incentive is to attract rather than repel minority voters." (Def.'s Post-Hr'g Br. Supp. Mot. Vacate 16.)

The RNC's argument that the increased participation of minority voters in the electoral process since 1982 alleviates the need for the Consent Decree is inapposite for several reasons. To begin with, the statistical evidence included on the RNC's charts and in Mr. Josefiak's testimony ignores the fact that there was a marked increase in both "black" and "hispanic" population during the period between 1982 and 2006. In fact, a closer examination of the Census Reports submitted by the RNC reveals that the voting-age "black" population increased from approximately 17,624,000 in 1982 to 25,722,000 in 2006 – a gain of 45.9 percent. See (RNC Hr'g Exs. 4 at Table 2, 5 at 5.) During the same period, the total number of "hispanics" eligible to vote grew from 8,765,000 to 28,945,000 – an increase of 229.9 percent. See (RNC Hr'g Exs. 4 at Table 2, 5 at 5.) Thus, it appears that the increases in voter registration and actual voting in both communities were outpaced by their total population growth. Put differently, the increases pointed out by the RNC are attributable not to increased participation in the political process, but simply to the fact that both ethnic groups grew during the period between 1982 and 2006.

Moreover, it does not appear that the RNC's incentive to suppress minority votes has changed since 1982. According to the Pew Research Center, 76 percent of "hispanics" voted for Democratic candidates during the 2006 election.[9] Scott Keeter, Pew Research Center, "Election '06: Big Changes in Some Key Groups," (Nov. 16, 2006), http://pewresearch.org/-pubs/93/election-06-big-changes-in-some-key-groups. During that same election, 76 percent of "black" voters chose Ted Strickland, a "white" candidate running on the Democratic ticket for Governor of Ohio against an African-American Republican, while a similar percentage voted against Michael Steele (an African-American running against a "white" Democrat) in his attempt to become a Maryland senator. Id. In fact, 77 percent of "non-white" voters cast their ballots in favor of Democrats during the 2006 election. Id. Based on those statistics, it appears that the RNC has been largely unsuccessful in its efforts to attract minority voters. Until it is able to do so, it will have an incentive to engage in the type of voter suppression that it allegedly committed in the actions that led to the enactment and modification of the Consent Decree.

In another portion of his testimony, Mr. Josefiak claimed that changes in the Committee's leadership – specifically the appointment of African-Americans as both the Chairman and Chief Administrative Officer of

---

[9] Mr. Josefiak contended that the candidacy of Barack Obama for President during the 2008 election likely led to an African-American voter turnout significantly higher than normal in that contest. In order to avoid using anomalous statistics that may have resulted from that phenomenon, the Court will limit its discussion of minority voter trends to previous elections.

that body – make it less likely that the RNC will engage in ballot security initiatives aimed at suppressing minority votes. (Hr'g Tr. 62:19-64:25); see also (Def.'s Post-Hr'g Br. Supp. Mot. Vacate 17) (citing Mr. Josefiak's testimony.) That argument misinterprets the incentives faced by the RNC and other Republican committees; it is less likely that voter suppression is motivated by racial animus than by a simple calculation of who is voting for whom. As demonstrated by the aforementioned statistics, the appointment of minority officials within the RNC has not coincided with an end to racially polarized voting. Rather, minority voters continue to overwhelmingly support Democratic candidates. As long as that is the case, the RNC and other Republican groups may be tempted to keep qualified minority voters from casting their ballots, especially in light of the razor-thin margin of victory by which many elections have been decided in recent years. As Mr. Josefiak stated, the RNC is "all about … winning elections," (Hr'g Tr. 99:5-6), and given current voting trends, the intimidation of minorities at the polls would advance that goal.

Nor does the fact that the current President and Attorney General of the United States are African-American represent a change in factual circumstances that would alleviate the need for the Consent Decree. In his testimony, Mr. Josefiak claimed that "with an African-American President, and an African-American Attorney General, [] the laws that are already on the books regarding voter fraud, voter intimidation, and voter suppression are going to be actively pursued by this Justice Department." (Id. at 65:22-66:2.) In addressing that argument, the Court as

a preliminary matter notes the obvious: the fact that two of the highest officials charged with enforcing the VRA are members of an ethnic minority does not, in and of itself, necessarily mean that law will be executed more vigorously under this administration than in the past. The RNC presented no evidence that the faithful enforcement of the law by the executive branch is somehow dependent on the race of the individuals that form its upper echelons, and the Court is aware of no support for that proposition beyond an unsubstantiated and offensive assumption that each ethnic group gives special priority to protecting the interests of its own members.

Even if true, the fact that the current administration may enforce the VRA more vigorously than previous ones would not justify releasing the RNC from the requirements it agreed to in negotiating the Consent Decree. "Modification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous." Rufo, 502 U.S. at 384. Although the terms of the Consent Decree partially overlap with the portion of the VRA that prohibits voter intimidation, the RNC cannot argue that more active enforcement of that statute by the government will make the Consent Decree more onerous. The RNC has no legally-cognizable interest in suppressing minority votes, and has repeatedly disavowed any such purpose. Having done so, it may not argue that it would be harmed by the DOJ's actions in enforcing the anti-intimidation provisions of the VRA. Such enforcement would simply be an effort to assure that all eligible individuals are allowed to vote – an objective that is compelled by both moral imperative

and the public interest as determined by Congress in passing the VRA.

The fact that it was eminently foreseeable at the time that the RNC entered into the Consent Decree in 1982 and modified that agreement in 1987 that future administrations might take a more energetic approach in using the VRA to combat voter suppression forms a secondary basis for rejecting the RNC's argument that it should be released from the requirements of the Decree. Although "[l]itigants are not required to anticipate every exigency that could conceivably arise during the life of a consent decree … modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree." Id. Many commentators complained that the Reagan Administration, which was in power at the time the Consent Decree was enacted and modified, was too passive in enforcing the VRA. See, e.g., Lani Guinier, Keeping the Faith: Black Voters in the Post-Reagan Era, 24 Harv. C.R.-C.L. L. Rev. 393, 402-403 (1995) (arguing that political appointees to the DOJ's Civil Rights Division under President Reagan "encouraged conservative policymakers of the Reagan Justice Department to launch a profound assault on Division policies and goals, and upon those whom the Act was intended to protect"); Bernard Goffman, Criteria for Redistricting: A Social Science Perspective, 33 UCLA L. Rev. 77, 172-73 (1985) ("[I]n President Reagan's second term, voting rights enforcement under section 5 of the Voting Rights Act has come to a virtual standstill, with many changes precleared after only cursory review, in some instances over the objections of career staff in the Department of Justice."). Regardless of the veracity of those complaints, the RNC should

have anticipated that some future administration would take a more active approach in pursuing voter intimidation claims.

As a final point in support of its contention that changed factual circumstances justify vacatur, the RNC claims that "it has strictly complied with the Consent Decree since 1987, and there is no evidence to suggest that its behavior will change if the Decree is vacated." (Def's Post-Hr'g Br. Supp. Mot. Vacate 16.); see also (Def's Br. Supp. Mot. Vacate 8) (stating that the RNC has made "extraordinary efforts" to comply with the Decree.) That claim is belied by the fact that this Court found a mere five years ago in the Malone matter that the RNC had engaged in conduct that violated both the substantive and procedural provisions of the Decree.[10] Moreover, there is no way of knowing whether the fact that the RNC has rarely engaged in conduct prohibited by the Consent Decree – the Court has found violations of that agreement only twice since it was enacted, in 1987 and 2004 – because it "does not and will not tolerate voter suppression," (Def.'s Post-Hr'g Br. Supp. Mot. Vacate 17), or because the Decree itself has

[10] As discussed above, that ruling was affirmed by a three-judge panel of the Court of Appeals, but later vacated as moot by the Court of Appeals sitting en banc. The en banc decision did not address the merits of this Court's ruling that the RNC had violated the Consent Decree. Rather, vacatur was based on the fact that the intervenor in that case, Ms. Malone, had been allowed to vote without incident, and therefore no longer had standing. Thus, this Court's factual determination that the RNC violated the Consent Decree was never refuted and remains significant insofar as it rebuts the RNC's claims in connection with the pending Motion that it has not engaged in such activity since 1987.

deterred such behavior. The DNC submitted evidence of widespread voter suppression efforts undertaken by state and local Republican organizations. See (Pl.'s Br. Opp'n Mot. Vacate 10-15.) Although those initiatives are not attributable to the RNC, they are indicative of the fact that minority voters still face the prospect of widespread intimidation due to the incentives discussed above. The Supreme Court has acknowledged that danger, stating that "racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." Bartlett v. Strickland, 129 S. Ct. 1231, 1249 (2009). Therefore, in light of the continued incentive for the RNC to engage in voter suppression and the fact that it violated the Consent Decree as recently as five years ago, the Court finds that changed factual circumstances do not justify vacating that agreement.

C. Changes in Election Laws

As a second argument in support of its Motion, the RNC contends that it should be relieved of its obligations under the Consent Decree due to changes in election laws. Such agreements must be vacated if "one or more of the obligations placed upon the parties has become impermissible under federal law," and may be modified or vacated if "statutory or decisional law has changed to make legal what the decree was designed to prevent." Rufo, 502 U.S. at 388. The RNC does not contend that any change to state or federal election laws since the Consent Decree was enacted in 1982 and modified in 1987 renders its obligations under that agreement illegal. Nor does it argue that there has

been any change in law that would make legal the activities the Decree is meant to prevent – attempts to prevent qualified voters from casting their ballots through intimidation or screening mechanisms based in whole or in part on their ethnicity. To the contrary, Mr. Josefiak admitted in his testimony that the section of the VRA prohibiting such activities, 42 U.S.C. § 1973i(b), has not been amended or modified since the Consent Decree was enacted in 1982. (Hr'g Tr. 111:16-22.)

Rather than any change to the statute on which the Consent Decree is based, the RNC's argument is based on its contention that the enactment of other federal statutes regulating the registration and voting process have increased the danger of fraud while decreasing the likelihood that suppression programs will result in the disenfranchisement of qualified individuals. In doing so, it points to three statutes in particular: the Motor Voter Law, BCRA, and HAVA. Additionally, the RNC asserts that the increased adoption of alternative voting procedures – such as early and absentee voting – by the states has alleviated the need for the Consent Decree.

As a preliminary matter, the RNC's arguments relating to voter fraud must be put in proper context. Under the Supreme Court's holding in Rufo, 502 U.S. at 384, 388, there are four circumstances in which vacating or modifying the Consent Decree would be justified: (1) "a significant change in … factual conditions," (2) an intervening change in "statutory or decisional law … to make legal what the decree was designed to prevent" or make impermissible "o ne of the obligations placed upon the parties," (3) "unforeseen

circumstances" that render the decree "unworkable," or (4) that "enforcement of the decree without modification would be detrimental to the public interest." As set forth above, the first and second factors do not apply to this case. Thus, in order to show that the changes in state and federal election laws that have taken place since the Consent Decree was enacted in 1982 and modified in 1987 justify vacating or modifying that agreement, the RNC must demonstrate either (1) that those changes were "unforeseeable" and render the Decree "unworkable," or (2) that the continued enforcement of the Decree would be detrimental to the public interest. Id. at 384.

i. Public Interest

Any claim that changes to election laws have increased the danger of voter fraud such that continued enforcement of the Consent Decree would be contrary to the public interest must be rejected. To the extent that the RNC asserts such an argument, it asks this Court to perform a function for which it is ill-equipped: weigh the danger that the electoral process will be corrupted through voter fraud against the possibility that individual voters will suffer the irreparable harm of disenfranchisement as the result of efforts to prevent such fraud. Such determinations – which require a broad inquiry into how the law should be structured in order to best serve the public interest – must be left to Congress, which has considered and balanced those concerns through the promulgation of the very statutes on which the RNC premises its claims. See Bartlett, 129 S. Ct. at 1245 ("Though courts are capable of making refined and exacting factual inquiries, they are inherently ill-equipped to make decisions based on

highly political judgments.") (internal quotations omitted). Thus, the RNC's contention that the laws passed by Congress do not sufficiently address the danger of voter fraud asks this Court to review policy choices made by another branch of government, and must be rejected. Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.").

Even if the Court were to consider the RNC's allegations that changes in federal elections laws have increased the danger of voter fraud those contentions would not justify vacating the Consent Decree. The RNC's claimed interest in "deterring and detecting voter fraud" in order to "protect[] the integrity and reliability of the electoral process" is a valid one. Crawford, 128 S. Ct. at 1617. In determining whether complying with the Consent Decree unnecessarily burdens that interest, however, it is important to distinguish between the different types of voter fraud. In the first type, which the Court shall refer to as "voter registration fraud," an individual either registers under a false or fictitious name, thereby adding an unqualified voter to the rolls. A second category of fraud, hereinafter designated "in-person fraud," involves individuals actually casting ballots in cases where they are not legally permitted to do so, including multiple-voting in various jurisdictions by otherwise-qualified individuals and voting by felons disenfranchised under state law, non-citizens, and individuals registered under fictitious identities. A

final grouping, "absentee ballot fraud," involves the submission of absentee or mail-in ballots in the name of qualified voters by individuals other than those voters. See Id. at 1637 (Souter, J., dissenting) (distinguishing between the various categories of voter fraud). Nothing in the Consent Decree prevents the RNC from effectively combating absentee ballot and voter registration fraud. The former would exist in the absence of the Decree, while the latter can be addressed while complying with the terms of that agreement.

Absentee ballot fraud is an intractable problem that is not susceptible to pre-election remedies. Short of personally observing absentee voters in order to assure that their ballots are not filled out by an individual other than themselves – an absurd proposition that would compromise the privacy of voting by requiring voters to allow political operatives into their private residences, vehicles, or any other location where they choose to complete their ballot – there is no way the RNC or any other political party can prevent individuals from submitting fraudulent absentee ballots. Such fraud must, therefore, be redressed after the election in the form of criminal penalties imposed on individuals found guilty of having completed an absentee ballot on behalf of someone else.[11] As

[11] An individual found guilty of absentee voter fraud faces federal penalties of up to five years in prison and a fine of $10,000 for each ballot he or she wrongfully submitted. 42 U.S.C. § 1973i(e). Most states impose additional penalties. See, e.g., Ala. Code § 17-17-24(a) (1975) (categorizing absentee ballot fraud as a "class C felony"); Conn. Gen. Stat. § 9-359(a) (1975) (categorizing absentee ballot fraud as a "class D felony"); Ind. Code § 3-14-2-3(1)

discussed below, the Consent Decree prohibits the RNC from engaging in pre-election ballot security initiatives, but does not prevent the Committee from reporting suspected cases of absentee ballot fraud to state election officials – who may in turn refer those cases to the proper authorities for investigation or prosecution – after an election is complete. Thus, the RNC has the same opportunity to remedy absentee ballot fraud as the DNC or any other political committee, and that opportunity is not infringed by the Consent Decree.

In contrast to the submission of falsified absentee ballots – in which the fraudulent acts at issue occur in a private setting and are not discoverable until after the election, when absentee ballots are reviewed by state officials – voter registration fraud may come to light prior to Election Day. Although the law varies from state to state, there are three primary methods by which an individual may register to vote: (1) by filing a registration card while visiting the Department of Motor Vehicles or some other state office as provided by the Motor Voter Law, 42 U.S.C. § 1973gg-5, (2) by mailing a completed registration card to the proper state agency, usually a subdivision of the office of the

---

(2005) (same). Moreover, an individual who submits absentee ballots via mail – the only method by which such ballots are accepted – may be charged with mail fraud under 18 U.S.C. § 1341, an offense which carries a penalty of up to 20 years imprisonment. United States v. Clapp, 732 F.2d 1148, 1152-53 (3d Cir. 1984). The harsh nature of those penalties is an indication that both Congress and state legislatures have attempted to deter absentee voter fraud in order to assure that it does not compromise the integrity of elections.

Secretary of State, or (3) in-person registration at the polls on Election Day.

From the evidence in the record, it appears that only the second method is conducive to fraud. The RNC submitted evidence of several incidents in which groups such as ACORN engaged in voter registration drives have submitted mail-in registrations that included fictitious names, see (RNC Hr'g Exs. 40, 59 at 64, 70), and the DNC submitted an article authored by one of its witnesses, Mr. Levitt, acknowledging that such fraud occurs. (DNC Hr'g Ex. 18 at 20-22.) There is no indication, however, that such fraud poses a threat to the integrity of modern elections, as the RNC has been unable to point to a single instance in which an individual actually voted using such a fictitious identity. See (DNC Hr'g Ex. 18 at 20) ("[W]e are aware of no recent substantiated case in which registration fraud has resulted in fraudulent votes being cast.") In fact, some of the cases pointed out by the RNC involved the registration of absurd names – such as "Jive Turkey" and "Mickey Mouse" – that no individual would use in an attempt to illegally cast a ballot unless he or she were looking for a speedy and efficient method of going to prison. See (RNC Hr'g Ex. 40 at 2) (noting the conviction of ACORN worker Tyaira L. Williams); Jim Avila and Reynolds Holding, Mickey Mouse is Registered to Vote? Former ACORN Employees Speak Out on Accusations of Fraud, ABC News, Oct. 10, 2008, http://abcnews.go.com/TheLaw/story?id=6074157&page=1 (detailing the case of Ms. Williams, who was convicted for submitting a registration on behalf of "Mickey Mouse.").

The lack of evidence that individuals have actually used the fictitious identities registered by groups such as ACORN using mail-in registration does not vitiate the RNC's interest in assuring that such registration fraud does not occur. See Crawford, 128 S. Ct. at 1619 ("[T]he interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process."). The realization of that interest does not, however, require that the Consent Decree be vacated. Every state that allows registration by mail imposes a deadline after which such registrations will no longer be accepted for an election occurring in that year. The shortest, which is used by Alabama, Iowa, Maine, and New Hampshire, requires that such registrations are received by relevant state authorities at least 10 days prior to an election. See United States Election Assistance Commission, "State Voter Registration Deadlines," http://www.eac.gov/voter/Register%20to%20Vote/deadlines (last visited November 19, 2009) (hereinafter "EAC Voter Registration Deadlines"). Thus, the RNC should be able to effectively address fraudulent registrations submitted by mail while providing some notice of its intent to do so to this Court and the DNC under the Consent Decree's preclearance provision. That provision currently requires 20 days notice. In order to allow for the possibility of fraud in states that allow mail-in registrations to be submitted fewer than 20 days before an election, the Court will modify the Consent Decree's preclearance provision to require that the RNC serve 10 days notice of any ballot security

initiatives.[12] Such a notice period will be sufficient to allow this Court time to make a decision regarding the propriety of the RNC's proposed ballot security measures, even in cases where reports of the allegedly fraudulent mail-in registrations do not come to light until the date after which such registrations will no longer be accepted by any state. In light of that modification, the RNC will also be able to effectively combat fraudulent voter registrations submitted using the first of the three methods outlined above, in-person registration at a state office pursuant to the Motor Voter Law, as long as those registrations occur within 10 days of an election.

On the other hand, in states that allow in-person registration during the 10 days immediately preceding an election or permit voters to register at the polls on Election Day, there is a possibility that news of potentially fraudulent registrations will emerge after the preclearance period has expired, and the RNC will thus be prohibited under the Consent Decree from

---

[12] That modification is not based on a determination that the Consent Decree as it currently stands is contrary to the public interest. As discussed above, such a judgment would involve a review of policy choices made by Congress and the state legislatures in which this Court is powerless to engage. Japan Whaling Ass'n, 478 U.S. at 230. Rather, the Court finds that the 20-day preclearance provision is "unworkable" due to an "unforeseeable" development: the extension of voter registration deadlines in some states to allow mail-in registration as few as 10 days before an election. The "unworkable" nature of a consent decree forms an alternative basis for vacating or modifying a consent decree, and involves an inquiry distinct from the assessment of whether that decree is detrimental to the public interest. See Rufo, 502 U.S. at 384.

taking ballot security measures to address the alleged fraud. The danger to the electoral process posed by such fraud is de minimis, however, due to the fact that only a few states allow such registrations, and those that do impose safeguards that make it highly unlikely that unqualified individuals will be allowed to register. Three states – Connecticut, Maine, and Wisconsin – allow voters to submit in-person registrations fewer than 10 days before an election. Conn. Gen. Stat. § 9-17(a) (allowing in-person registration up to seven days prior to an election); Me. Rev. Stat. Ann. tit. 21-A, § 122(6) (allowing in-person registration at any time before the election); Wis. Stat. § 6.29(2)(a) (same). Maine and Wisconsin, along with six other states – Idaho, Iowa, Minnesota, New Hampshire, North Dakota, and Wyoming – also allow voters to register at the polls on Election Day.[13] Shelley de Alth, ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout, 3 Harv. L. & Pol'y Rev. 185, 193 (2009); Election Reform Information Project, "Election-Day Registration: A Case Study" (Feb. 1, 2007), http://www.pewcenteronthestates.org/topic_category.aspx?category=514. In every state where

[13] North Dakota has eliminated voter registration entirely, and requires all voters to verify their identity at the polls. See N.D. Cent. Code §§ 16.1-01-04 (eligibility requirements), 54-01-26 (enumerating rules for determining "residence" of voters); North Dakota Secretary of State, Elections Division, "I.D. Requirements," (2004), http://www.nd.gov/hava/education/doc/id-requirements.pdf. An additional state, Rhode Island, allows Election Day registration for the limited purpose of voting in national elections for President of the United States. R.I. Gen. Laws § 17-1-3. Montana allows voters to register on Election Day by visiting a county elections office, but does not permit such registration at the polls themselves. Mont. Code Ann. § 13-2-304.

either in-person registration at a state office or Election Day registration at the polls is allowed, individuals wishing to register are required to demonstrate that they are qualified by showing either a state-issued photo ID that includes their address or some form of privately-issued photo identification (such as an employee or university ID) and a document verifying their address within the precinct (such as a residential lease, bank statement, or utility bill). See Conn. Gen. Stat. § 9-20(a); Idaho Code Ann. § 34-408A; Iowa Code § 48A.7A; Me. Rev. Stat. Ann. tit. 21-A, § 122(4) (allowing for Election Day registration), 112-A (outlining ID requirements); Minn. Stat. § 201.061, subd. 3; N.D. Cent. Code § 54-01-26; N.H. Rev. Stat. Ann. §§ 654:7 (stating that voters registering at the polls must provide "proof of qualifications"), 654.12(II) (outlining acceptable "proof of qualifications"); Wis. Stat. §§ 6.55(2)(b) (stating that voters registering at the polls must provide "proof of residence"), 6.34 (outlining acceptable "proof of residence"); Wyo. Stat. Ann. §§ 22-3-104(f)(ii)(A) (allowing Election Day registration at the polls), 22-1-102(xxxix) (defining "acceptable identification" for the purposes of registration). Thus, a voter would have to go to great lengths to register under a fraudulent identity in person either prior to an election by visiting a state agency or on Election Day, including falsifying photographic identification and documents proving he or she resides within the precinct, and making false statements to election officials. Such registrations are best viewed as a form of in-person voter fraud, which, as discussed below,

poses a minimal threat to the integrity of modern elections.[14]

(a) The Prevalence of In-Person Voter Fraud

From the evidence before the Court, it appears that in-person fraud – the type the RNC claims it is prohibited from combating by preclearance requirement of the Consent Decree – is extremely rare. The sources cited by the RNC in support of its claim that developments since 1982 such as the enactment of the Motor Voter Law, BCRA, and HAVA have increased the potential for voter fraud do not appear to distinguish between the various types of election fraud. A close review of those sources reveals that the vast majority of what the RNC classifies as "voter fraud" is more appropriately viewed as absentee ballot or voter registration fraud, and can be addressed while complying with the terms of the Consent Decree. That conclusion is supported both by the testimony of the DNC's witnesses – who claimed that the danger of in-person voter fraud has been exaggerated for political purposes – and recent statements on the subject by the Supreme Court.

In support of his testimony that voter fraud is widespread enough that it may tip the balance in a close election, the RNC's witness, Mr. Josefiak, noted a portion of the Carter-Baker Commmission Report. That section states:

---

[14] The RNC has not pointed to a single case in which an individual fraudulently registered fewer than 10 days prior to an election and proceeded to cast a vote under his or her assumed identity.

> While fraud is difficult to measure, it occurs. The U.S. Department of Justice has launched more than 180 investigations into election fraud since October 2002. These investigations have resulted in charges for multiple voting, providing false information on their felon status, and other offenses against 89 individuals and in convictions of 52 individuals.

(RNC Hr'g Ex. 26 at 45.)

Thus, the RNC contends that the Carter-Baker Commission Report supports its claim that it must be freed from its obligations under the Consent Decree so that it can effectively combat voter fraud.

That contention ignores the next sentence of the Report, which states that the purported instances of voter fraud "related to a variety of election fraud offenses, from vote buying to submitting false voter registration information and voting-related offenses by non-citizens." (Id.) Thus, it appears that only a small fraction of the alleged fraudulent activity involved in-person fraud. In fact, another portion of the Carter-Baker Commission Report acknowledges that all forms of voter fraud are fairly rare, stating "[t]here is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election." (Id. at 18.)

The other examples of purported voter fraud cited by the RNC are similarly deficient in their failure to distinguish between in-person fraud and other forms of illegal activity. In support of its argument that voter fraud is widespread enough to compromise the

integrity of a close election, the RNC submitted an FBI report on irregularities that occurred in Wisconsin during the 2004 election. The report, which was published on May 10, 2005, stated that the FBI was in the process of investigating approximately 100 suspected instances of individuals either voting more than once or casting a ballot under a false name, and more than 200 persons who allegedly voted despite being ineligible due to prior felony convictions. (RNC Hr'g Ex. 29 at 2.) Additionally, the agency stated that "persons who were paid money to obtain registrations allegedly falsified approximately 65 names on registration forms," but noted that there was "no evidence … that votes were cast under those false names." (Id. at 4.)

The FBI report did not specify whether the 200 felons and 100 individuals who allegedly voted more than once or cast ballots under false names did so at the polls or through an alternative process such as absentee or mail-in voting. However, the DNC presented testimony by Dr. Minnite – who completed an extensive study of the incidents referred to in the FBI report, including interviewing the accused individuals – in which she stated that only a few of the persons suspected of wrongdoing in that case were actually voters. (2 Hr'g Tr. 59:4-15.) Dr. Minnite's investigation of a similar incident, which occurred in Florida during the 2004 elections and was cited by Mr. Josefiak in his testimony on behalf of the RNC, yielded the same result: the majority of those accused of wrongdoing were elected officials and political operatives. (Id.) Thus, the evidence submitted by the RNC includes only isolated incidents of in-person fraud. The vast majority of the undifferentiated "voter

fraud" cited by the RNC falls into the other two categories outlined above: voter registration fraud and absentee ballot fraud.

The Court's conclusion that in-person fraud is rare draws further support from the testimony of DNC witnesses. Dr. Minnite stated that she was unaware of any circumstance in which an individual was prosecuted for voter fraud discovered by a poll challenger. (Id. at 62:23-25); see also (DNC Hr'g Ex. 25 at 1) ("[I]n-person or polling place voter fraud is rare in contemporary American elections. … [P]artisans and the media have grossly exaggerated both the incidence of voters committing fraud by intentionally and illegally registering and voting, and the vulnerability of existing election procedures to this kind of fraud.") (internal quotations omitted). Similarly, Mr. Levitt claimed that allegations of voter fraud are usually "hot air," and are motivated not by any evidence of widespread in-person fraud, but rather an "attitude of intimidation" that can result in the disenfranchisement of qualified voters. (2 Hr'g Tr. at 99:14-100:17.)

In fact, the Supreme Court acknowledged the rarity of in-person voter fraud in Crawford. In that case, Justice Stevens, announcing the judgment of the Court in an Opinion joined by Justice Kennedy and Chief Justice Roberts, diverged sharply with Justice Souter, who was joined in his dissent by Justice Ginsburg, as to whether the danger of in-person voter fraud could justify an Indiana statute requiring voters to prove their eligibility by means of government-issued photo identification before voting. Both sides agreed that the statute at issue dealt only with in-person voter fraud, and there was "no evidence of any such fraud actually

occurring in Indiana at any time in its history." Crawford, 128 S. Ct. at 1619; see also 128 S. Ct. at 1637 (Souter, J., Dissenting) ("the State has not come across a single instance of in-person voter impersonation fraud in all of Indiana's history.") (citing Ind. Democratic Party v. Rokita, 458 F. Supp.2d 775, 792-93 (S.D. Ind. 2006)). Justice Stevens found, though, that the danger of in-person voter fraud, however theoretical, could justify the Indiana statute. In doing so, he stated that:

> [T]hat flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor – though perpetrated using absentee ballots and not in-person fraud – demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

Id. at 1619 (footnotes omitted).

Included in that statement were three footnotes. The first cited as an example of fraud "documented by respected historians" voting shenanigans perpetrated by the infamous William "Boss" Tweed during the 1868 New York City election.[15] Id. at 1619 n.11. The third

---

[15] To that example this Court adds another: the 1873 trial of women's suffrage pioneer Susan B. Anthony for voting in the

elaborated on the fact that, as mentioned in the excerpt above, the incident that occurred during the 2003 Democratic primary for East Chicago mayor did not involve in-person fraud, but rather irregularities involving absentee ballots. Id. at 1619 n.13. Accordingly, two of the three factors cited by Justice Stevens provide little support for his ruling that in-person fraud poses a danger to modern elections – the first because it is an inapposite historical example and the third because it did not actually involve in-person fraud.

The second of the three footnotes included in the portion of Crawford quoted above is especially relevant to today's ruling. In it, Justice Stevens acknowledged that, of the "occasional examples" of in-person fraud on which his ruling was based, all but one had been shown to have been "overstated because much of the fraud was actually absentee ballot fraud or voter registration fraud."[16] Id. at 1619 n.12. Justice Stevens stated, however, that:

> [T]here remain scattered instances of in-person voter fraud. For example, after a hotly contested

---

previous year's national elections. Of course, Ms. Anthony's illegal activity was easily detected, as she made no effort to disguise her gender while casting her ballot. See United States v. Anthony, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873) (No. 14,459).

[16] That finding was based on evidence submitted by the Brennan Center, which filed a brief as an amicus curae. Mr. Levitt, who appeared in this matter as a witness for the DNC, was involved in drafting the brief and its factual assertions were based partially on his research.

> gubernatorial election in 2004, Washington conducted an investigation of voter fraud and uncovered 19 "ghost voters." After a partial investigation of the ghost voting, one voter was confirmed to have committed in-person voting fraud.

Id.

In short, Justice Stevens was able to point to only one instance of in-person voter fraud occurring in recent elections, and that example involved only one voter.

Justice Souter, who was joined in his dissent by Justice Ginsburg, also noted that in-person voter fraud is extremely rare. He stated that there is no "evidence whatsoever of in-person voter impersonation fraud in the State" of Indiana, and a "dearth of evidence of in-person voter fraud in any other part of the country." Id. at 1637 (Souter, J., dissenting). Moreover, Justice Souter pointed out that "the lack of evidence of in-person voter impersonation fraud is not for failure to search." Id. at 1637 n.28 (citing Eric Lipton & Ian Urbina, In 5-Year Effort, Scant Evidence of Voter Fraud, N.Y. Times, Apr. 12, 2007, p. A1 ("Five years after the Bush Administration began a crackdown on voter fraud, the Justice Department has turned up virtually no evidence of any organized effort to skew federal elections, according to court records and interviews")). He rejected Indiana's argument that "in-person voter impersonation fraud is hard to detect," characterizing that assertion as being "like saying the „man who wasn't there' is hard to spot," and stating that "there is reason to think that impersonation of

voters is the most likely type of fraud to be discovered." Id. (citations omitted).

Justice Souter went on to hold that, even though in-person voter fraud may theoretically occur, the practical realities of modern elections make it very unlikely:

> It simply is not worth it for individuals acting alone to commit in-person voter impersonation, which is relatively ineffectual for the foolish few who may commit it. If an imposter gets caught, he is subject to severe criminal penalties. And even if he succeeds, the imposter gains nothing more than one additional vote for his candidate.

Id. (citations omitted).

The rulings by Justices Stevens and Souter in Crawford refute the RNC's argument that in-person voter fraud poses a danger to the integrity of modern elections, and therefore requires that the Consent Decree be vacated so that such fraud can be addressed. Five Justices – a binding majority of the Court – joined in those Opinions.[17] Accordingly, it is settled that in-person fraud is extremely rare, and any argument by the RNC to the contrary must be rejected.

---

[17] Justice Stevens was joined by Justice Kennedy and Chief Justice Roberts. Justice Souter was joined in his dissent by Justice Ginsburg.

(b) In-Person Fraud vs. Voter Intimidation

Having established that the type of voter fraud the RNC argues it is prevented from combating by the Consent Decree poses only a minimal threat to the electoral process, the Court must weigh the danger of such fraud against that of voter suppression. As discussed above, the evidence in the record demonstrates that voter intimidation continues to be a problem. See, e.g., Bartlett v. Strickland, 129 S. Ct. 1231, 1249 (2009) ("[R]acial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions."); (Pl.'s Br. Opp'n Mot. Vacate 10-15) (documenting alleged incidents of voter suppression). The effects of ballot security initiatives such as the ones prohibited by the Consent Decree pose a far greater threat to the integrity of modern elections than in-person voter fraud.

In fact, even a cursory investigation of the prevalence of voter intimidation demonstrates that ballot security initiatives have the potential to unfairly skew election results by disenfranchising qualified voters in far greater numbers of than the instances of in-person fraud that may occur during any given race. The only evidence submitted by the RNC in which it actually quantified the incidence of voter fraud in an election is the FBI report detailing irregularities in Wisconsin during the 2004 election. That report stated that the FBI was in the process of investigating roughly 300 suspected instances of voter fraud – 100 in which individuals may have voted more than once, and 200 in which ineligible felons allegedly cast a ballot.

(RNC Hr'g Ex. 29 at 2.) However, as set forth above, the FBI report does not indicate how many of those alleged cases of fraud occurred at the polls rather than through the submission of absentee ballots. Furthermore, Dr. Minnite testified, that of the 300 alleged instances of voter fraud, only a few were perpetrated by voters. (2 Hr'g Tr. 59:4-15.)

Even if the Court were to assume that all 300 of the alleged incidents of fraud involved in-person misconduct at the polls, the effects of such fraud pales in comparison to the damage that would likely result from allowing the types of ballot security initiatives that are currently prohibited by the Consent Decree. The Malone matter involved a voter challenge list that included 35,000 predominantly-minority individuals. If only one tenth of those individuals were deterred from voting by harassment at the polls, the effect would have been the disenfranchisement of 3,500 individuals – a number far greater than the 300 alleged incidents of voter fraud which the RNC points to in support of its claim.[18]

Another case, which occurred in Montana during the 2008 election, demonstrates that the ongoing danger of voter suppression far exceeds the threat posted by in-person voter fraud. In that incident, the Executive Director and Legislative Director of the

---

[18] In another attempt to quantify the prevalence of in-person voter fraud, Justice Stevens in Crawford, 128 S. Ct. 1619 n.12, pointed to an incident during the 2004 Washington gubernatorial election in which 19 so-called "ghost voters" were found to have cast ballots. On further investigation, however, only one individual was confirmed to have committed in-person voter fraud. Id.

Montana Republican Party ("MRP") filed over 6,000 challenges alleging that individuals residing in precincts that had historically supported Democratic candidates were not eligible to participate in the election because their residential addresses did not match those under which they registered to vote.[19] See Montana Democratic Party v. Eaton, 581 F. Supp.2d 1077, 1078 (D. Mont. 2008). The United States District Court for the District of Montana found that those challenges were "frivolous," and had been filed with the "express intent to disenfranchise voters in counties that have historically tipped toward the Democratic party." Id. In doing so, it portrayed the MRP's argument that such challenges were necessary to combat voter fraud as disingenuous, stating:

> Determined to prevent the Hobbesian nightmare sure to ensue if voters' mailing addresses do not match their residential addresses, [MRP Executive Director Jacob] Eaton employed an auditor to pore over the United States Postal Service's change of address registry, and to compare the names in it to the names on voter

---

[19] There is no evidence that the RNC participated in the design or implementation of the ballot security program at issue in Eaton. Therefore, that case does not fall under the purview of the Consent Decree. It is used here not as an example of past violations by the RNC, but rather for the purposes of demonstrating that (1) Republican political operatives at both the state and national level have a continuing incentive to engage in voter suppression efforts aimed at segments of the population that generally support Democratic candidates, and (2) the danger of in-person voter fraud is outweighed by the risk that ballot security measures such as those prohibited by the Consent Decree will result in the disenfranchisement of qualified individuals.

> rolls in some Montana counties. A self-described guardian of the integrity of a political system designed to guarantee the right of the people to govern themselves, Eaton targeted counties with young and likely Democratic voters, who might have changed their mailing addresses without changing their voter registration information. The challenge theory must be that such voters might compromise the democratic process by going off to college or serving in the military overseas, and forwarding their mail to their new location or to a family member – both examples of voters Eaton challenged.

Id. at 1079.

The Court noted that, although the challenges were clearly meritless, they still might result in the disenfranchisement of qualified voters:

> [I]t is the procedural effect of Eaton's challenges that raises the issues here. Montana law provides that when a citizen challenges another citizen's right to vote prior to the close of registration, "the election administrator shall question the challenger and the challenged elector and may question other persons to determine whether the challenge is sufficient or insufficient to cancel the elector's registration." Mont. Code Ann. § 13-13-301(3). When a challenge is made after the close of registration or on election day, "the election administrator or, on election day, the election judge, shall allow the challenged elector to cast a provisional paper ballot." Id. One can imagine the mischief an

> immature political operative could inject into an election cycle were he to use the statutes not for their intended purpose of protecting the integrity of the people's democracy, but rather to execute a tawdry partisan ploy. Voters might be intimidated, confused, or even discouraged from voting upon receiving notice that their right to vote – the most precious right in a government of, by, and for the people – has been challenged. The mess created for those volunteers and elected officials dedicated to preserving the integrity of the system is nearly unimaginable in terms of the time and expense necessary to deal with such blanket challenges.

Id.

The Consent Decree is designed to guard against the implementation of precisely the kind of overbroad and politically-motivated ballot security measures that were used in Malone and Eaton. A quantitative examination of the potential harm caused by such measures demonstrates that the risks created by poorly-designed ballot security initiatives, undertaken with the ostensible purpose of safeguarding against fraud, are a greater threat to the electoral process than the in-person fraud they are meant to prevent.[20] The

---

[20] The two examples of voter suppression included above are far from exhaustive. In fact, as part of the Court's research in preparing this ruling, it had occasion to visit the website maintained by the Alabama Secretary of State, on which the following statement is currently posted:

> The Secretary of State's Office has recently learned that a

RNC has submitted evidence of, at most, 300 instances of such fraud occurring in the United States since the Consent Decree was entered in 1982, while the Supreme Court was able to find only one confirmed case during the past century. See (RNC Hr'g Ex. 29 at 2); Crawford, 128 S. Ct. 1619 n.12. The disenfranchisement of even one tenth of the voters selected for challenges in Malone and Eaton would have robbed 4,100 citizens of their right to vote. Thus, it is clear that the potential harm of anti-fraud measures such as those prohibited by the Consent Decree far outweighs the harm of in-person voter fraud.

> voter registration form has been mailed to some Alabama residents by a state political party. These registration forms have a return address for the Alabama Republican Party, rather than the local Board of Registrars.

Alabama Secretary of State, "Elections," http://www.sos.state.al.us/Elections/Default.aspx (last visited Nov. 20, 2009).

There is no indication that the RNC was involved in the program alluded to by the Alabama Secretary of State, and the Alabama Republican Party has not been found guilty of illegal activity based its actions in mailing the aforementioned form. The use of such deceptive tactics – which may represent an effort to trick voters into submitting their registration forms to an improper recipient, thereby assuring that they will not be eligible to vote in upcoming elections – is typical, however, of past ballot security initiatives (most of which are perpetrated by shadowy state and local groups rather than the RNC itself). The fact that such efforts apparently persist serves as further illustration of the continuing incentive for Republican political committees to engage in voter suppression. See supra at II(B) (discussing minority voter trends and the incentives that lead to voter suppression).

That conclusion draws further support from the fact that, in addition to the qualified voters who may be disenfranchised due to erroneous or illegal objections to their own eligibility, it is all but certain that anti-fraud initiatives in which challengers are deployed at polling places will result in the disenfranchisement of many individuals whose eligibility is not in question. Some voters – especially in minority districts where the legacy of racism and history of clashes between the population and authorities has given rise to a suspicion of police and other officials – may choose to refrain from voting rather than wait for the qualifications of those ahead of them to be verified, especially if the verification process becomes confrontational. See, e.g, (DNC Hr'g Ex. 18 at 6) (quoting a former Political Director of the Republican Party of Texas, who stated that photo ID requirements "could cause enough of a dropoff in legitimate Democratic voting to add three percent to the Republican vote."); (RNC Hr'g Ex. 26 at 56) (portion of the Carter-Baker Commission Report on "Polling Station Operations," in which the Report acknowledged the perception among some minority communities that such measures may be "intimidating," and stated that during the 2004 election, "[p]roblems with polling station operations, such as long lines, were more pronounced in some places than others. This gave rise to suspicions that the problems were due to discrimination or partisan manipulation…") Others may be prevented from waiting by responsibilities such as school or work, or a physical disability. See League of Women Voters v. Ohio, 548 F.3d 463, 478 (6th Cir. 2008) (upholding equal protection claim based on inconsistencies between polling places in Ohio during the 2008 election based partially on the fact that "[l]ong wait times

caused some voters to leave their polling places without voting in order to attend school, work, or to family responsibilities or because a physical disability prevented them from standing in line."). Still others might be kept from voting prior to the broadcast by media outlets of the projected election results – an occurrence which may convince voters that continuing to wait in line at their respective polling places is a futile exercise, as the election has already been decided. See, e.g., Pamela S. Karlan, Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore, 79 N.C. L. Rev. 1345, 1360-61 (2001) (examining cases of two Florida residents who did not vote in the 2000 election because they heard media projections on their way to the polls and "became convinced that their votes would be meaningless"); Susan E. Seager & Laura R. Handman, Congress, The Networks, and Exit Polls, 18 Comm. Law 1, 30-31 (2001) (detailing several cases in which media outlets prematurely projected that a given candidate would win a race, and noting with respect to the 2000 election that, after news sources erroneously declared that Vice President Al Gore had won the state of Florida, "Republicans asserted that . . . the illusion of an easy Gore victory chilled Republican voter desire in the West and in the Florida panhandle, causing GOP congressional candidates to lose to their Democratic challengers.").

(c) The Effect of Recent Changes to Federal Election Laws

Changes to federal election laws since the enactment of the Consent Decree have not altered that calculus. The RNC claims that the Motor Voter Law,

BCRA, and HAVA have increased the danger that the electoral process may be compromised by in-person voter fraud, while simultaneously alleviating the need for the Consent Decree by creating safeguards designed to counteract the types of voter suppression efforts it was intended to prevent. That argument is without factual support, and ignores portions of those statutes that are specifically designed to combat such fraud. In-person voter fraud remains exceedingly rare, while voter suppression efforts continue to pose a threat to the electoral process.

The RNC claims that the Motor Voter Law has alleviated the need for the Consent Decree by "mak[ing] it easier for all voters, including minority voters, to register to vote." (Def.'s Post-Hr'g Br. Supp. Mot. Vacate 18.) While the Court agrees that the Motor Voter Law has simplified the registration process and led to increases in the number of registered voters – doing so was the law's stated purpose, 42 U.S.C. § 1973gg(b)(1) – that development has no bearing on the continued efficacy of the Consent Decree. As discussed above, minority voters remain susceptible to intimidation efforts, and there is a continued incentive for the RNC and other Republican political organizations to engage in such efforts. See supra at II(B). Moreover, while the number of registered minority voters has increased since the enactment of the Motor Voter Law, that increase has been outpaced by the growth of the minority population as a whole. In fact, voter registration as a percentage of total population has decreased among individuals classified as "black" and "hispanic" by the U.S. Census Bureau. Between 1982 and 2006, there was a 41.6 percent increase in "black" registered voters, but the total

number of "black" individuals eligible to vote increased by 45.9 percent. See (RNC Hr'g Exs. 4 at Table 2, 5 at 5, 6.) Similarly, there was an increase of 201 percent in the number of "hispanic" registered voters, but a 229.9 percent increase in the number of "hispanic" individuals eligible to vote. See (RNC Hr'g Exs. 4 at Table 2, 5 at 5, 6.) Thus, it appears that minorities in those categories are actually participating in the political process at lower rates than they were when the Consent Decree was enacted in 1982. That conclusion is supported by the number of votes actually cast by "black" and "hispanic" individuals in 2006 – despite population increases of 45.9 and 229.9 percent, respectively, voter participation for those groups increased by only 31.1 and 152 percent. See (RNC Hr'g Exs. 6, 7.)

The RNC's contention that the Motor Voter Law's simplification of the voter registration process has led to increased minority participation in the political process is not only factually inaccurate, it is also irrelevant. The Consent Decree was not designed to encourage minority voter registration, but rather to prevent voter suppression. Consequently, the relevant inquiry is not whether the Motor Voter Law has increased minority participation, but whether that statute has created a greater danger of in-person voter fraud and/or decreased the risk that voters will be disenfranchised through intimidation. The RNC has presented no evidence that the statute has had either of the latter effects. To the contrary, as testified to by Mr. Levitt, the Motor Voter Law significantly reduces the threat of voter registration fraud by (1) requiring that the government agencies verify the eligibility of individuals attempting to register in-person at state

agencies, including the fact that they are United States citizens, before adding them to the rolls, see Pub.L. No. 109-13 (REAL I.D. Act of 2005); (2 Hr'g Tr. 86:14-17), (2) creating standardized requirements for the maintenance of state voter rolls and allowing for the removal of voters, see 42 U.S.C. § 1973gg(6)(a) (allowing removal on evidence of criminal conviction or mental incapacity, death, or a change in address to a location outside the state's jurisdiction); (2 Hr'g Tr. 88:10-23), and (3) imposing criminal penalties for voter registration fraud. 42 U.S.C. § 1973gg-10(2); (2 Hr'g Tr. 89:1-2.) The statute does not, however, address the threat of voter suppression or the underlying incentives to engage in such efforts. See supra at II(B). Therefore, the Court finds that the Motor Voter law has not alleviated the need for the Consent Decree.

The RNC's arguments relating to the BCRA are similarly unavailing. Its claims relating to that statute are twofold. First, the RNC contends that the combination of that statute's ban on the use of "soft money" by national political committees, see 2 U.S.C. § 441i(a)(1), and the Court's interpretation of the Consent Decree to allow suits by intervenors (who are not bound by the BCRA's "soft money" restrictions) has given the DNC a financial advantage by requiring the RNC to defend such suits using its limited "hard money" resources. That concern is alleviated by the fact that, as discussed above, the DNC concedes that the Consent Decree should be modified to prohibit enforcement of its terms by any party other than the signatories to that agreement. See, e.g., (Pl.'s Br. Opp'n Mot. Vacate 4, 23, 26); (Hr'g Tr. 26:17-27:1.)

In the second of its two arguments relating to BCRA, the RNC claims that statute has increased the danger of voter fraud, stating:

> In recent elections, the DNC responded to the restrictions of BCRA by effectively outsourcing many of its voter registration and get-out-the-vote efforts to non-party organizations, such as ACORN. Transferring these activities from the DNC to groups that lack its transparency and political accountability intrinsically increases the potential for voter fraud, because it removes the institutional and political disincentives to commit fraud. Indeed, members of ACORN and related groups have repeatedly been indicted for, and pleaded guilty to, voter fraud in recent years.

(Def.'s Post-Hr'g Br. Supp. Mot. Vacate 19-20) (citations omitted).

The contention that such "outsourcing" justifies vacating the Consent Decree is inapposite for a number of reasons. First, the RNC is free to engage in similar efforts. Nothing in the Consent Decree prohibits the RNC from using outside organizations that are not subject to the BCRA's "soft money" restrictions to register voters or coordinate activities aimed at increasing voter turnout on Election Day. Moreover, the RNC's argument does not distinguish between the different types of fraud. See Crawford, 128 S. Ct. at 1637 (Souter, J., dissenting) (discussing various categories of voter fraud). The instances of "voter fraud" on the part of ACORN and other groups that the RNC cites in support of its claim were limited to

registering fictitious individuals to vote by means of mailed registration forms. See (RNC Hr'g Exs. 40, 59 at 64, 70). As discussed above, the RNC has not cited a single case in which an individual has actually voted using one of those identities. Furthermore, every state imposes a deadline after which such mail-in registrations cannot be submitted, the shortest being 10 days before an election. See EAC Voter Registration Deadlines. In light of the fact that the Court will modify the Consent Decree in order to shorten the preclearance period to 10 days, the RNC should be able to effectively address such incidents.

The HAVA, the last of the three federal election laws on which the RNC bases its contention that the Consent Decree must be vacated, establishes a procedure in which an individual whose eligibility is challenged on Election Day must be allowed to cast provisional ballot, which is later examined by election officials to determine its validity. See 42 U.S.C. § 15482(a). Initially, the RNC contended without citing any support that the HAVA's provisional ballot mechanism has increased the danger of voter fraud by "eliminat[ing] the traditional safeguards against multiple registrations and multiple voting." (Def.'s Reply Br. Supp. Mot. Vacate 5.) Over the course of the proceedings, that argument evolved. Mr. Josefiak testified that, rather than increasing the risk of voter fraud, the HAVA's provisional ballot mechanism creates a safeguard that decreases the danger that voters will be disenfranchised due to poll challenges by ensuring that individuals whose eligibility is in question are not turned away from the polls. (1 Hr'g Tr. 79:16-24.) The RNC echoed that argument in its

post-hearing brief. (Def.'s Post-Hr'g Br. Supp. Mot. Vacate 9, 18.)

Neither of the RNC's arguments relating to the HAVA is supported by the evidence. The Committee's contention that the HAVA eliminates safeguards against multiple registrations and voting, and thus increases the risk of voter fraud, ignores several provisions of the statute that are designed to address precisely those issues. Prior to the enactment of the HAVA, the various counties and municipalities within states usually maintained their own voter lists. That circumstance created a situation in which individuals might register multiple times and, potentially, attempt to cast a ballot more than once by visiting the different polling stations within a state. See, e.g., Daniel P. Tokaji, Voter Registration and Election Reform, 17 Wm. & Mary Bill Rts. J. 453, 471-72 (2008); (2 Hr'g Tr. 90:4-91:1). The HAVA attempts to solve that problem by requiring that each state aggregate its voter rolls into a single computerized database. 42 U.S.C. § 15483(a)(1). State officials are then required to periodically review that database and remove individuals who are ineligible due to criminal conviction, mental incapacity, or other factors, along with names that appear to be duplicates of others on the list. 42 U.S.C. § 15483(a)(2)(A). In doing so, they must match all voter registrations against state motor vehicle records in order to verify the accuracy of the information in the state voter database. 42 U.S.C. § 15483(a)(5)(B)(i).

In an additional safeguard against multiple registrations and voting, the HAVA imposes identification requirements on individuals attempting

to register to vote. New registrants must include either their driver's license number or, if they do not have a driver's license, the last four digits of their social security number. 42 U.S.C. § 15483(a)(5)(A)(i). Those without either a driver's license or social security number may still register, but are automatically subject to a mandatory verification process. 42 U.S.C. § 15483(a)(5)(A)(ii),(iii). Thus, the HAVA imposes several measures that decrease the danger of voter fraud, including (1) standardizing the voter rolls so that the eligibility of existing voters can be more easily verified, (2) eliminating duplicative registrations and removing individuals who become ineligible, and (3) preventing the registration of new ineligible or fictitious individuals by requiring that each voter's qualifications by verified before they are added to the rolls. In light of those requirements, the RNC's conclusory statement in its initial brief that the HAVA removes traditional safeguards against multiple voting is obviously erroneous, and must be rejected.

The RNC's second argument – that HAVA has mitigated the threat posed by voter suppression efforts by requiring that individuals whose eligibility is challenged on Election Day be allowed to cast a provisional ballot, see 42 U.S.C. § 15482(a) – is unavailing for two reasons. First, that argument does not take into account the problem of voters who are deterred from casting any form of ballot, provisional or otherwise, by the presence of poll challengers or other ballot security initiatives. As discussed above, such anti-fraud efforts may create disruptions to the voting process that have the effect of disenfranchising individuals whose eligibility is not in question. See supra at II(C)(i)(b) ("Some voters … may choose to

refrain from voting rather than wait for the qualifications of those ahead of them to be verified … Others may be prevented from waiting by responsibilities such as school or work, or a physical disability. … Still others might be kept from voting prior to the broadcast by media outlets of the projected election results – an occurrence which may convince voters that continuing to wait in line at their respective polling places is a futile exercise…") (citations omitted).

The RNC's arguments relating to the HAVA also fail to take into account the inconsistent manner in which that statute's provisional ballot mechanism has been implemented by the states and the relatively small number of voters who have been allowed to benefit from that provision. Roughly 1.6 million provisional ballots were cast in the 2004 election, the first in which states were required to offer challenged voters that option, while just over 791,000 voters availed themselves of that option in 2006. (RNC Hr'g Ex. 26 at 15) (2004 election); (RNC Hr'g Ex. 23 at 20) (2006 election). Of the 1.6 million provisional ballots cast in 2004, only about 64.5 percent – slightly under one million – were counted. (RNC Hr'g Ex. 24 at 20.) Thus, a voter who cast a provisional ballot in that election faced a 35.5 percent chance that his or her vote would not be tallied. (Id.) Data from the 2006 election shows a slightly improved picture: of the 791,000 provisional ballots cast, roughly 79.5 percent were counted – thus leaving a 20.5 percent chance that a voter who cast a provisional ballot would not have his or her vote accepted. (Id.) Of the approximately 170,000 provisional ballots that were not counted in 2006, only 17,325 were rejected after it was verified that the voter was not qualified: 9,269 on the basis of unspecified

"ineligibility," 4,879 due to the fact that the voter had cast his or her ballot in the wrong jurisdiction, 3,147 after the voter was found to have already voted, and 30 on the grounds that the registrant was classified as "deceased." (Id. at 21, Table D.) In contrast, 26,631 provisional ballots were rejected because the individual had voted in the wrong precinct, (id.) – a fact that had nothing to do with whether the voters were "eligible under State law to vote," and is therefore not a valid basis under the HAVA for discarding a provisional ballot. 42 U.S.C. § 15482(a)(4). Another 25,464 provisional ballots were rejected for unspecified reasons. (RNC Hr'g Ex. 24 at 21, Table D.) Perhaps most troubling, 2,545 provisional ballots were rejected because the registrations of the voters casting them were wrongfully purged prior to the election. (Id.)

The unreliability of the provisional ballot mechanism is further demonstrated by fact that "[p]ractices for offering and counting provisional ballots … var[y] widely by state and by county." (RNC Hr'g Ex. 26 at 15.) The question of whether a voter who casts a provisional ballot will actually have that ballot counted depends largely on the state in which he or she resides. During the 2006 election, Alaska counted 92.2 percent of such ballots, while Kentucky tallied only 6.7 percent. (RNC Hr'g Ex. 24 at 19, Table C.) The number of provisional ballots that were actually counted was widely divergent even in states such as Maryland and Virginia, which are located in the same geographic area, and in which the number of votes cast were roughly equivalent. In the former, 87.1 percent of provisional ballots were counted, while only 36.3 percent were factored toward the election results in the latter. (Id.)

Similar variations appear in the number of provisional ballots cast. During the 2006 election, 1,168,856 Connecticut residents voted, yet there were no provisional ballots cast in that state. (Id.) In contrast, New Jersey – which, with 1,291,751 people casting ballots, enjoyed a voter turnout similar to that in Connecticut – saw 11,410 individuals cast provisional ballots. (Id.) A total of 2,370 provisional ballots were cast in Alabama, another state in which voter turnout was roughly equal to that in Connecticut, with 1,162,063 individuals voting. (Id.) While the Court does not wish to impugn Connecticut's voter registration and election process, it doubts that process functioned with such perfection that there was not a single case in which an individual attempted to vote in the wrong precinct or found, on appearing at the polls, that the name recorded on his or her voter registration card varied slightly from the correct spelling. The simpler, and much more likely, explanation is that statistical outlier states such as Connecticut (in which the number of provisional ballots cast was lower than the norm for similar-sized states) did not effectively implement the requirement that voters whose qualifications were in question be offered provisional ballots.[21] Thus, while the HAVA's provisional ballot mechanism could, if effectively implemented, provide a means of assuring that ballots cast by voters whose eligibility is wrongly challenged are counted, it currently does so only in certain states. Therefore, the

---

[21] Connecticut is by no means the only state in which an abnormally low number of provisional ballots were cast. In another example, 983,795 votes were cast in Tennessee, none by means of provisional ballot. (Id.) South Carolina, a state in which 1,012,410 people voted, saw 3,013 of its citizens cast provisional ballots. (Id.)

RNC's claim that the HAVA eliminates the need for the Consent Decree must be rejected.

(d) Alternative Voting Mechanisms

The RNC also contends that the adoption of alternative voting procedures by an increasing number of states has eliminated the need for the Consent Decree. In doing so, it focuses on two mechanisms which do not require voters to visit the polls on Election Day: the submission of mail-in absentee ballots and early voting. As a preliminary matter, the Court finds that the use of such procedures, though increasingly prevalent, is not widespread enough to justify vacating the Consent Decree. According to the RNC's own statistics, only 14.3 percent of the votes cast in the 2006 election were submitted by means of absentee ballot, while 5.6 percent were made by means of early voting. (RNC Hr'g Ex. 24.) In contrast, 79.8 percent of voters cast their ballots by visiting the polls on Election Day. (Id.) (stating that 78.8 percent of voters used traditional ballots, while just over one percent cast provisional ballots). In light of those statistics, vacating the Consent Decree due to the rise of alternative voting mechanisms would be akin to "throwing the baby out with the bathwater" – such a decision would remove protections that remain applicable to 79.8 percent of the population due to the behavior of the other 19.9 percent.

Turning to the RNC's substantive arguments relating to alternative voting procedures, the Court notes that, as with its arguments relating to HAVA, the Committee's assertions have evolved over the course of these proceedings. In its initial brief, the RNC

claimed that the adoption of such procedures has increased the danger of voter fraud by "allow[ing] an individual to register to vote, request a ballot, and cast a vote without ever appearing before a county official to establish her existence." (Def.'s Br. Supp. Mot. Vacate 14.) That contention ignores the fact that, as discussed above, the HAVA requires all individuals registering to vote, regardless of whether they intend to do so by absentee ballot or any other means, to verify their eligibility by submitting their driver's license number or the last four digits of their social security number. 42 U.S.C. § 15483(a)(5)(A)(i). Those who have neither form of identification are subject to a mandatory verification process. 42 U.S.C. § 15483(a)(5)(A)(ii),(iii). Moreover, no state accepts mailed voter registrations fewer than 10 days before an election. See EAC Voter Registration Deadlines. In light of today's modification of the Consent Decree to require 10, rather than 20, days notice of any ballot security initiative, the RNC should be able to effectively address any rumors that fictitious or ineligible individuals are registering to vote by mail.

The problem of individuals actually submitting fraudulent absentee ballots, whether by filling out a ballot on behalf of someone other than themselves or by offering some form of remuneration to other voters in exchange for supporting given candidates, is of greater concern. As a practical matter, however, the RNC will not be prevented by the Consent Decree from combating such behavior for two reasons. First, there is no evidence that absentee ballot fraud is perpetrated more often by minority voters than any other population. Since the Consent Decree only prohibits ballot initiatives that disproportionately target

minority voters, the RNC is free to design measures aimed at addressing absentee ballot fraud as long as this Court verifies at least 10 days prior to the implementation of such measures that they do not unfairly target minority populations. More importantly, absentee ballot fraud takes place in settings removed from public scrutiny. The types of ballot security measures contemplated by the Consent Decree – such as compiling challenge lists through vote caging prior to an election and stationing confrontational challengers at the polls to verify individual voters' qualifications – have no efficacy in rooting out such fraud. In fact, there is no practical means by which the RNC (or any other political entity) could discover such fraud prior to the examination of absentee ballots by state officials. At that time, the RNC is free to report suspected instances of fraud to relevant officials, and can do so without disrupting the electoral process or deterring minority voters from casting their ballots.[22]

At the evidentiary hearing and in its later briefs, the RNC claimed that, rather than increasing the danger of voter fraud, absentee and early voting provide a safeguard against voter intimidation. In one articulation of that claim, the RNC stated that "in the

---

[22] In order to assure that such challenges do not disproportionately target minority voters, the RNC should promulgate neutral criteria to determine which ballots will be challenged and submit those guidelines to the Court for approval pursuant to the Consent Decree's preclearance provision. Such a procedure will impose a minimal burden on the RNC, as any set of criteria used in a given race may be applied in subsequent elections without seeking further authorization.

event that a voter is concerned about encountering intimidating behavior on Election Day, that voter may very well be entitled to vote early or even cast an absentee ballot from the comfort of his or her own home." (Def.'s Post-Hr'g Br. Supp. Mot. Vacate 19.) In making that assertion, the RNC makes the unsupportable assumption that voters will know of potential suppression efforts in advance. The evidence compels the opposite conclusion – the very danger of voter suppression efforts lies in their ability to disrupt the electoral process by surprising voters with unexpected confrontation and delay at the polls.

Not only is there no reason to believe that voters will be able to learn of suppression efforts prior to Election Day and avail themselves of alternative procedures, there is no justification for requiring them to do so. The right to vote is "one of the most fundamental rights of our citizens," Bartlett, 129 S. Ct. at 1240, and cannot be conditioned on the completion of any task unrelated to the fulfillment of voting qualifications. See, e.g., Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 653 (1969) (invalidating ordinance that limited franchise in school board elections to owners of taxable property); Harper v. Va. State Election Bd., 383 U.S. 663, 670 (1966) (invalidating poll tax restrictions due to the fact that they had "no relation to voting qualifications"). Although minority voters may escape suppression efforts by utilizing alternative voting procedures, the choice of whether to do so or to exercise their right to vote in the traditional manner by visiting the polls on Election Day must be theirs, and theirs alone. See Bartlett, 129 S. Ct. at 1249 ("[R]acial discrimination and racially polarized voting are not ancient history.

Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions."). Therefore, the Court finds that the adoption by an increasing number of states of mail-in absentee voting cannot serve as the basis for modifying or vacating the Consent Decree.

ii. Workability

Despite the fact that the continued enforcement of the Consent Decree is not detrimental to the public interest, the Court may vacate or modify that agreement if it finds that it has become "unworkable" due to "unforeseen circumstances." Rufo, 502 U.S. at 384. While the Court finds no circumstances that would justify vacating the Consent Decree, four considerations weigh in favor of modification.

The first stems from the combined effect of the Court's interpretation of the Consent Decree, which allows intervenors to bring suit to enforce its terms, and the BCRA, which requires the RNC to defend such suits using only "hard money" resources. Those developments have created the possibility of inequity by potentially subjecting the RNC to suits brought by organizations that are not subject to the BCRA's restrictions, while the DNC is not faced with such suits. As discussed above, the DNC has agreed that the Consent Decree should be modified to allow enforcement only by the parties to that agreement. See, e.g., (Pl.'s Br. Opp'n Mot. Vacate 4, 23, 26); (Hr'g Tr. 26:17-27:1.) Since both the DNC and RNC are bound by BCRA's ban on "soft money," such a modification will effectively level the playing field between the DNC and

RNC by requiring that any future litigation arising out of the Consent Decree be funded solely by using "hard money" donations. See 2 U.S.C. § 441a(a)(1) (enumerating the limits on donations to national political parties). Therefore, the Court will enact such a modification and in the future will entertain suits under the Consent Decree only if those actions are instituted by a party to that agreement.[23]

The second circumstance weighing in favor of modification concerns the RNC's ability to combat mail-in voter registration fraud. Since the Consent Decree was entered in 1982, several states have adopted mail-in voter registration deadlines of that allow individuals to submit their applications after the 20-day time limit contained in the preclearance provision has expired, thus precluding the RNC from effectively combating fraudulent mail-in registrations in those states. See EAC Voter Registration Deadlines (noting that Alabama, Iowa, Maine, and New Hampshire impose a deadline of only 10 days on mail-in registrations). As discussed above, the RNC has a valid interest in assuring the accuracy of voter rolls by preventing fraudulent registrations. See Crawford, 128 S. Ct. at 1619 ("[T]he interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process."). In order to reconcile that interest with the requirements of the

---

[23] The 1987 Modification to the Consent Decree, which imposed the preclearance provision, arose out of an action brought by the DNC in which only the RNC was named as a Defendant. Therefore, only the DNC and RNC were parties to that modification, and only the DNC may enforce the preclearance provision.

Consent Decree, the Court will alter the preclearance provision to require that the RNC serve it with 10 – rather than 20 – days notice of any proposed ballot security measures. See supra at II(C)(i).

The third development favoring modification concerns the vague nature of the terms "normal poll watch functions" and "ballot security" as used in the Consent Decree. The RNC contends that the Consent Decree should be vacated because it prohibits a broad range of otherwise-legal activity. See (Def.'s Post-Hr'g Br. Supp. Mot. Vacate 20) ("[T]he Consent Decree … deters the RNC from working with its state and local parties to engage in legitimate poll watching activities on Election Day."). Mr. Josefiak echoed that claim during his testimony by asserting that the Consent Decree effectively prohibits the RNC from engaging in poll watching or "get out the vote" efforts. In doing so, he noted that the Consent Decree's failure to define "normal poll watch functions," had led the RNC to adopt a cautious approach, stating:

> [W]hen it comes to Election Day activities, [the RNC's cooperation with state and local party committees] stops because of the Consent Decree. And even though there is a provision in the Consent Decree where we can be involved with normal poll watching activities, quite frankly where I sit, what is past security is a very, very difficult line. And so as a result, as a practical matter, the RNC stays out of all Election Day activities. So it causes that break from a team effort up to Election Day, and getting out the vote on Election Day to actually monitoring the polls themselves.

(1 Hr'g Tr. 94:5-14); see also (Def.'s Post-Hr'g Br. Supp. Mot. Vacate 22-23) ("Even though the RNC wants to take part in [voter turnout drives and poll watching] activities and has the ability to make them more professional, effective, and legally compliant, it refrains from doing so because the definition of "normal poll watching" under the Decree is unclear.").

The RNC has a valid interest in the orderly administration of elections, see Crawford, 128 S. Ct. at 1619, and there is no question that it should be allowed to engage in activities that are aimed at ensuring the voting process functions smoothly by stationing observers at the polls or increasing political participation through voter registration and turnout drives in cooperation with state Republican organizations. The fact that the Consent Decree was never meant to prohibit such activities is evidenced by the inclusion of an exception to the preclearance requirement for "normal poll watch functions." Unfortunately, the parties' failure to define that term has led the RNC to refrain from such activities altogether. In order to remedy that situation, the Court will modify the Consent Decree as set forth below in an effort to clearly demarcate the "normal poll watch functions" to which it does not apply, and will add a more extensive definition of "ballot security."

The final consideration weighing in favor of modification involves the fact that the Consent Decree does not include a date on which the obligations it imposes on the RNC will terminate. In failing to include such an expiration date, the parties have created a situation in which the RNC is, at least nominally, bound by those obligations in perpetuity,

regardless of whether it continues to engage in voter suppression efforts or has any incentive to do so. That situation is inherently inequitable. For example, if at any point in the future the RNC succeeds in attracting minority voters in such numbers that its candidates receive the majority of votes cast by those populations, it will have no incentive to engage in anti-fraud measures that have the effect of deterring those voters from casting their ballots. Under the Consent Decree as currently written, though, the RNC would be required to preclear any such measures with this Court, while the DNC would be free to implement ballot security programs without doing so. In an effort to avoid similar situations, the Civil Rights Division of the DOJ – the government entity charged with enforcing the VRA – imposes a time limit of eight years on its consent decrees, which may be extended for good cause. See (Def.'s Br. Supp. Mot. Vacate 10 n.6) (citing various examples). The Court believes that such a provision is justified in this case. Therefore, the Consent Decree will be modified to specify that it will terminate eight years from the date of this ruling. If in the interim the DNC proves by a preponderance of the evidence that the RNC has engaged in further suppression efforts, the termination date will be extended to eight years from the date of the last violation of the Consent Decree.

III. CONCLUSION

For the foregoing reasons, the RNC's Motion to Vacate the Consent Decree is denied. The Consent Decree will be modified as follows:

(1) Only the parties to the Consent Decree may bring suit to redress a violation of that agreement.

(2) The preclearance period shall be shortened from 20 to 10 days. The RNC shall be required to notify the DNC and this Court of any proposed ballot security measures at least 10 days before instituting such measures so that this Court may determine their legality and whether they comply with the other terms of the Consent Decree.

(3) "Ballot Security," as used in the Consent Decree, shall include any program aimed at combating voter fraud by preventing potential voters from registering to vote or casting a ballot. Such programs include, but are not limited to, the compilation of voter challenge lists by use of mailings or reviewing databases maintained by state agencies such as motor vehicle records, social security records, change of address forms, and voter lists assembled pursuant to the HAVA; the use of challengers to confront potential voters and verify their eligibility at the polls on either Election Day or a day on which they may take advantage of state early voting procedures; the recording by photographic or other means of voter likenesses or vehicles at any polling place; and the distribution of literature informing individuals at or near a polling place that voter fraud is a crime or detailing the

penalties under any state or federal statute for impermissibly casting a ballot.

(4) "Normal poll-watch function" shall include stationing individuals at polling stations to observe the voting process and report irregularities unrelated to voter fraud to duly-appointed state officials. Such observers may report any disturbance that they reasonably believe might deter eligible voters from casting their ballots, including malfunctioning voting machines, long lines, or understaffing at polling places. Such observers may not question voters about their credentials; impede or delay voters by asking for identification, videotape, photograph, or otherwise make visual records of voters or their vehicles; or issue literature outlining the fact that voter fraud is a crime or detailing the penalties under any state or federal statute for impermissibly casting a ballot.

(5) The Consent Decree shall not apply to any initiative undertaken by the RNC that does not have as at least one of its purposes the prevention of either fraudulent voting or fraudulent voter registration. Such programs include any effort undertaken by the RNC, or by any state or local Republican entity with which it coordinates, to increase the number of individuals that cast a ballot in any election, including registering voters pursuant to applicable state statutes or encouraging voters to visit the polls ("get out

the vote") on either Election Day or a day on which they may take advantage of state early voting procedures.

(6) The Consent Decree shall expire, and the entirety of its terms shall become null and void, on December 1, 2017, eight years after the date of this modification. If during the period between today's Order and December 1, 2017, the DNC proves by a preponderance of the evidence that the RNC has violated the terms of the Consent Decree, the Decree shall be extended for eight years from the date of that violation.

The Court will enter an Order implementing this Opinion.

s/ Dickinson R. Debevoise
DICKINSON R. DEBEVOISE, U.S.S.D.J.

Dated: December 1, 2009

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 81-3876 (DRD)

[Filed December 1, 2009]

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,	)
Plaintiffs,	)
v.	)
REPUBLICAN NATIONAL COMMITTEE, ET AL.,	)
Defendants.	)

O R D E R

This matter having come before the Court on a motion by Defendant, the Republican National Committee ("RNC") to vacate or modify a Consent Decree entered into by the parties as part of a settlement for voter intimidation claims brought by the Plaintiff, the Democratic National Committee ("DNC"); and the Court having considered the submissions of the parties, along with the testimony of witnesses oral arguments made at an evidentiary hearing; and for the reasons set forth in the Opinion of even date;

IT IS on this 1st of December 2009, ORDERED that the RNC's Motion to Vacate the Consent Decree is DENIED. The Consent Decree is modified as follows:

(1) Only the parties to the Consent Decree may bring suit to redress a violation of that agreement.

(2) The preclearance period shall be shortened from 20 to 10 days. The RNC shall be required to notify the DNC and this Court of any proposed ballot security measures at least 10 days before instituting such measures so that this Court may determine their legality and whether they comply with the other terms of the Consent Decree.

(3) "Ballot Security," as used in the Consent Decree, shall include any program aimed at combating voter fraud by preventing potential voters from registering to vote or casting a ballot. Such programs include, but are not limited to, the compilation of voter challenge lists by use of mailings or reviewing databases maintained by state agencies such as motor vehicle records, social security records, change of address forms, and voter lists assembled pursuant to the HAVA; the use of challengers to confront potential voters and verify their eligibility at the polls on either Election Day or a day on which they may take advantage of state early voting procedures; the recording by photographic or other means of voter likenesses or vehicles at any polling place;

and the distribution of literature informing individuals at or near a polling place that voter fraud is a crime or detailing the penalties under any state or federal statute for impermissibly casting a ballot.

(4) "Normal poll-watch function" shall include stationing individuals at polling stations to observe the voting process and report irregularities unrelated to voter fraud to duly-appointed state officials. Such observers may report any disturbance that they reasonably believe might deter eligible voters from casting their ballots, including malfunctioning voting machines, long lines, or understaffing at polling places. Such observers may not question voters about their credentials; impede or delay voters by asking for identification, videotape, photograph, or otherwise make visual records of voters or their vehicles; or issue literature outlining the fact that voter fraud is a crime or detailing the penalties under any state or federal statute for impermissibly casting a ballot.

(5) The Consent Decree shall not apply to any initiative undertaken by the RNC that does not have as at least one of its purposes the prevention of either fraudulent voting or fraudulent voter registration. Such programs include any effort undertaken by the RNC, or by any state or local Republican entity with which it coordinates, to increase the number of individuals that cast a ballot in any

election, including registering voters pursuant to applicable state statutes or encouraging voters to visit the polls ("get out the vote") on either Election Day or a day on which they may take advantage of state early voting procedures.

(6) The Consent Decree shall expire, and the entirety of its terms shall become null and void, on December 1, 2017, eight years after the date of this Order. If during the period between today's Order and December 1, 2017, the DNC proves by a preponderance of the evidence that the RNC has violated the terms of the Consent Decree, the Decree shall be extended for eight years from the date of that violation.

s/ Dickinson R. Debevoise
DICKINSON R. DEBEVOISE, U.S.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-4615

[Filed April 27, 2012]

DEMOCRATIC NATIONAL COMMITTEE; NEW JERSEY DEMOCRATIC STATE COMMITTEE; VIRGINIA L. FEGGINS; LYNETTE MONROE	)
v.	)
REPUBLICAN NATIONAL COMMITTEE; NEW JERSEY REPUBLICAN STATE COMMITTEE; ALEX HURTADO; RONALD C. KAUFMAN; JOHN KELLY	)
Republican National Committee, Appellant	)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civ. Action No. 2-81-cv-03876)
District Judge: Honorable Dickinson R. Debevoise

Present: McKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, and STAPLETON*, Circuit Judges.

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ Joseph A. Greenaway, Jr.
Circuit Judge

Dated: 27 April 2012

---

* Judge Stapleton's vote is limited to panel rehearing only.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. Action No. 81-3876

Hon. Dickinson R. Debevoise

[Filed November 1, 1982]

DEMOCRATIC NATIONAL COMMITTEE, NEW JERSEY DEMOCRATIC STATE COMMITTEE, VIRGINIA L. PEGGINS, and LYNETTE MONROE,

Plaintiffs,

v.

REPUBLICAN NATIONAL COMMITTEE, NEW JERSEY REPUBLICAN STATE COMMITTEE, ALEX HURTADO, RONALD C. KAUFMAN and JOHN A. KELLY,

Defendants.

CONSENT ORDER

This matter having been brought before the Court by Plaintiffs Democratic National Committee ("DNC"),

New Jersey Democratic State Committee ("DSC"), Virginia L. Peggins and Lynette Monroe, and by Defendants Republican National Committee ("RNC"), New Jersey Republican State Committee ("RSC"), John A. Kelly, Ronald Kaufman and Alex Hurtado, for the entry of a Consent Order disposing of all claims which have been raised and which could have been raised by way of complaint, counterclaim or crossclaim in the above-entitled matter, and the parties having consented to the entry of this order, and the Court having found good cause, it is on this 1st day of November, 1982.

ORDERED that the annexed settlement agreement between certain plaintiffs and certain defendants, without any finding by this Court of, and without any admission of, liability or wrongdoing by them or by any other person or entity be, and the same hereby is adopted by this Court as its final order in the above-entitled matter; and it is

FURTHER ORDERED that, as a result of the amicable resolution of this matter, Plaintiffs' Amended Complaint be, and the same hereby is, dismissed with prejudice and without costs as against all named Defendants.

/s/ Dickinson R. Debevoise
Dickinson R. Debevoise, U.S.D.J.

CONSENT AS TO FORM AND ENTRY:

SONOSKY, CHAMBERS, SACHSE & GUIDO

By: /s/ Kenneth Guido, Jr.
Kenneth Guido, Jr.

BAUMGART & GENOVA

By: /s/ Angelo J. Genova
Angelo J. Genova

Attorneys for Plaintiffs

SHANLEY & FISHER

By: /s/ Thomas F. Campion
Thomas F. Campion
Attorneys for Defendants
Alex Hurtado and Ronald C. Kaufman

STERNS, HERBERT & WEINROTH

By: /s/ Richard K. Weinroth
Richard K. Weinroth
Attorneys for Defendant
Republican National Committee

STRYKER, TAMS & DILL

By: /s/ William J. Heller
William J. Heller
Attorneys for Defendant
New Jersey Republican State Committee

/s/ Philip D. Kaltenbacher
Philip D. Kaltenbacher
Chairman, Republican State Committee

JOHN J. BARRY, ESQ.

/s/ John J. Barry
Attorney for Defendant
John A. Kelly

SETTLEMENT AGREEMENT

WHEREAS, the Democratic National Committee ("DNC"), New Jersey Democratic State Committee ("DSC"), Virginia L. Peggins and Lynette Monroe, Plaintiffs, have instituted an action in the United States District Court for the District of New Jersey, Civil Action No. 81-3876, against the Republican National Committee ("RNC"), New Jersey Republican State Committee ("RSC"), John A. Kelly, Ronald Kaufman and Alex Hurtado, Defendants; and

WHEREAS, the parties wish to resolve amicably all matters raised or which could have been raised in the pleadings in the above-entitled matter,

NOW THEREFORE, in consideration of the foregoing, in consideration of the mutual covenants and conditions herein contained, and for other good and valuable consideration, the parties hereto agree as follows:

1. The undersigned plaintiffs agree to consent to the entry of an order dismissing their Amended Complaint against all Defendants, without costs, with all parties bearing their own attorneys' fees.

2. The RNC and RSC (hereinafter collectively referred to as the "party committee") agree that they will in the future, in all states and territories of the United States:

(a) comply with all applicable state and federal laws protecting the rights of duly

qualified citizens to vote for the candidate(s) of their choice;

(b) in the event that they produce or place any signs which are part of ballot security activities, cause said signs to disclose that they are authorized or sponsored by the party committees and any other committees participating with the party committees;

(c) refrain from giving any directions to or permitting their agents or employees to remove or deface any lawfully printed and placed campaign materials or signs;

(d) refrain from giving any directions to or permitting their employees to campaign within restricted polling areas or to interrogate prospective voters as to their qualifications to vote prior to their entry to a polling place;

(e) refrain from undertaking any ballot security activities in polling places or election districts where the racial or ethnic composition of such districts is a factor in the decision to conduct, or the actual conduct of, such activities there and where a purpose or significant effect of such activities is to deter qualified voters from voting; and the conduct of such activities disproportionately in or directed toward districts that have a substantial proportion of racial or ethnic populations shall be considered relevant evidence of the existence of such a factor and purpose;

(f) refrain from attiring or equipping agents, employees or other persons or permitting their agents or employees to be attired or equipped in a manner which creates the appearance that the individuals are performing official or governmental functions, including, but not limited to, refraining from wearing public or private law enforcement or security guard uniforms, using armbands, or carrying or displaying guns or badges except as required by law or regulation, in connection with any ballot security activities; and

(g) refrain from having private personnel deputized as law enforcement personnel in connection with ballot security activities.

3. The party committees agree that they shall, as a first resort, use established statutory procedures for challenging unqualified voters.

4. This Settlement Agreement, and the terms of the Consent Order to be entered pursuant thereto, shall bind the DNC, DSC, RNC, and RSC, their agents, servants and employees, whether acting directly or indirectly through other party committees. It is expressly understood and agreed that the RNC and the RSC have no present right or control over other state party committees, county committees, or other national, state and local political organizations of the same party, and their agents, servants and employees.

5. The parties to this Settlement Agreement shall ask that the New Jersey legislature institute an examination of the provisions of the New Jersey

Election Laws to determine whether present laws are adequate to insure the integrity of the electoral process and the physical security of poll workers and their property in New Jersey.

6. All parties agree that they shall bear their own costs and attorneys' fees and further agree that they shall not seek to recover same in any action or proceeding instituted after the execution of this Settlement Agreement and the Consent Decree to be entered pursuant thereto. No party to this Agreement shall undertake any further legal action arising out of events surrounding the November 1981 general election in the State of New Jersey or arising out of the filing of this Lawsuit, except as specified in paragraph 7 below.

7. The undersigned Plaintiffs, as Releasors, for and in consideration of the mutual covenants and conditions hereof, and in further consideration of the sum of One Dollar ($1.00), lawful money of the United States of America to the Releasors in hand paid by all Defendants, the receipt of which is hereby acknowledged, have remised, released and forever discharged, and by these presents do remise, release and forever discharge the Defendants-Releasees of and from all obligations, causes of action, claims or demands, at law or in equity, which arose out of ballot security activities during the 1981 general election in New Jersey that Releasors asserted or could have asserted against the Releasees in Civil Action No. 81-3876 in the United States District Court for the District of New Jersey, provided that nothing in this agreement shall prevent plaintiffs from seeking relief, at law or equity, for a violation of the terms of this

settlement agreement or the related consent order incorporating the terms hereof. More particularly, but not by way of limitation, the undersigned plaintiffs expressly agree to abandon and to waive all claims to monetary relief asserted or which could have been asserted against the defendants.

8. It is expressly understood and agreed that this Settlement Agreement, and the Consent Order incorporating that terms hereof, do not constitute any finding or admission of liability or wrongdoing by any defendant and do not constitute any finding or admission of merit or lack of merit to the allegations raised by the plaintiffs. This agreement is not an admission that any of the activities which the party committees have agreed not to undertake were undertaken by any of the party committees or by any party to this lawsuit or by any other person or entity. This agreement is not an admission of civil or criminal liability or responsibility on the part of any participant in it.

Dated November 1, 1982.

DEMOCRATIC NATIONAL COMMITTEE

By /s/_____

By /s/_____

REPUBLICAN NATIONAL COMMITTEE

By /s/_____

NEW JERSEY DEMOCRATIC STATE COMMITTEE

By /s/_____

NEW JERSEY REPUBLICAN STATE COMMITTEE

By /s/_____

/s/ Philip D. Kaltenbacher
Philip D. Kaltenbacher
Chairman, Republican
State Committee

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. Action No. 86-3972

Hon. Dickinson R. Debevoise

[Filed July 29, 1987]

DEMOCRATIC NATIONAL COMMITTEE,

Plaintiff,

v.

REPUBLICAN NATIONAL COMMITTEE,

Defendant.

SETTLEMENT STIPULATION AND
ORDER OF DISMISSAL

Whereas, on November 1, 1982, this Court entered a Consent Order in Democratic National Committee, et. al. v. Republican National Committee, et. al., Civil Action No. 81-3876 ("Consent Order"). The Democratic National Committee ("DNC"), Republican National Committee ("RNC") and others were parties to the settlement agreement incorporated in and adopted as

the Consent Order. The Consent Order remains in full force and effect;

Whereas, during the course of the case, the parties have engaged in extensive discovery from each other and third parties. More than 50 depositions have been taken and thousands of documents have been examined;

Whereas, the RNC and DNC recognize the importance of encouraging citizens to register and vote and the importance of not hindering or discouraging qualified voters from exercising their right to vote;

Whereas, the RNC and DNC recognize the importance of preventing and remedying vote fraud where it exists;

Whereas, the RNC and DNC recognize the importance of neither using, nor appearing to use, racial or ethnic criteria in connection with ballot integrity, ballot security or other efforts to prevent or remedy suspected vote fraud;

It is therefore ordered upon the agreement and stipulation of the parties and all prior proceedings herein that as to the RNC and DNC the Consent Order is amended to specifically provide:

A. "Ballot security" efforts shall mean ballot integrity, ballot security or other efforts to prevent or remedy vote fraud.

B. To the extent permitted by law and the November 1, 1982 Consent Order, the RNC may deploy

persons on election day to perform normal poll watch functions as long as such persons do not use or implement the results of any other ballot security effort, unless the other ballot security effort complies with the provisions of the Consent Order and applicable law and has been so determined by this Court.

C. Except as provided in paragraph B above, the RNC shall not engage in, and shall not assist or participate in, any ballot security program unless the program (including the method and timing of any challenges resulting from the program) has been determined by this Court to comply with the provisions of the Consent Order and applicable law. Applications by the RNC for determination of ballot security programs by the Court shall be made following 20 days notice to the DNC which notice shall include a description of the program to be undertaken, the purpose(s) to be served, and the reasons why the program complies with the Consent Order and applicable law.

Until further order of the Court, the Court retains jurisdiction to make the determination set forth above.

Except as provided herein, the RNC and DNC respectfully request that the above-captioned case be dismissed with prejudice upon the order of the Court with each to pay its own costs.

IT IS SO STIPULATED:

/s/ David Boies
David Boies
Rodney L. Stenlake
G. Elaine Wood
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York 10005
(212) 422-3000

/s/ Douglas S. Eakeley
Douglas S. Eakeley
Robert J. Gilson
RIKER, DANZIG, SCHERER,
HYLAND & PERRETTI
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07950
(201) 538-0800

Attorneys for Plaintiff
Democratic National Committee

/s/ William H. Schweitzer
William H. Schweitzer
Lee T. Ellis, Jr.
BAKER & HOSTETLER
Suite 1100
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 861-1500

/s/ James M. Altieri
Thomas F. Campion
James M. Altieri
STANLEY & FISHER
131 Madison Avenue
Morristown, New Jersey 07950
(201) 285-1000

Attorneys for Defendant
Republican National Committee

AND IT IS SO ORDERED this 27th day of July, 1987.

/s/ DickinsonR. Debevoise
Dickinson R. Debevoise, U.S.D.J.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. Action No. 86-3972

Hon. Dickinson R. Debevoise

[Filed November 5, 1990]

DEMOCRATIC NATIONAL COMMITTEE,

Plaintiff,

v.

REPUBLICAN NATIONAL COMMITTEE,

Defendant.

Robert A. Bauer, Esq.
arry J. Reingold, Esq.
Judith L. Corley, Esq.
Hilary Harp, Esq.
PERKINS COIE
1110 Vermont Avenue, N.W.
Washington, DC 20005
(202) 887-9030

Angelo J. Genova, Esq.
GENOVA, BURNS & SCHOTT
Eisenhower Plaza II
354 Eisenhower Parkway
Livingston, NJ 07039
(201) 533-0777

Attorneys for Plaintiff Democratic National Committee

ORDER

Based on the factual findings of the Court as stated in open court this 5th day of November, 1990, it hereby is ORDERED that:

1. The Democratic National Committee, following expedited discovery ordered by this Court, has failed to establish that the Republican National Committee conducted, participated in, or assisted ballot security activities in North Carolina as alleged in the Democratic National Committee's motion to reopen. The Democratic National Committee may make further application for additional discovery in a reopened proceeding, concerned with ballot security activity in North Carolina, based on events occurring prior to the close of the 1990 elections.

2. The Republican National Committee, by failing to include in ballot security instructional and informational materials guidance to state parties on unlawful practices under the consent decree or copies of such decree for their review, has violated said decree and shall in all such materials include such guidance or copy of the decree. The materials submitted to this court for review are otherwise found to be directed

toward lawful ballot integrity programs and preparation.

3. Subject to the right to make additional application pursuant to paragraph 1, this matter is closed.

SO ORDERED this 5th day of November, 1990.

/s/ D.R. Debevoise
D.R. Debevoise, U.S.D.J.

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.81-3876(DRD)

[Filed October 31, 2002]

THE NEW JERSEY DEMOCRATIC STATE COMMITTEE,	)
Plaintiff,	)
v.	)
THE NEW JERSEY REPUBLICAN STATE COMMITTEE,	)
Defendant.	)

O R D E R

Plaintiff having moved for an order reopening the above-captioned matter, directing the defendant to seek the court's approval of the Republican Party's New Jersey candidate for U.S. Senate's Ballot Fairness Plan, allowing the plaintiff to conduct expedited discovery; and enjoining the defendant from permitting the Republican Party's candidate for U.S. Senate in New Jersey from implementing the Ballot Fairness

plan until and unless such plan is approved by this court and the court having considered the submissions and arguments of counsel; and for the reasons set forth in the bench opinion delivered this date;

IT is this 31st day of October 2002;

ORDERED as follows:

1. Plaintiff's motion to reopen the above captioned matter is granted to the end that the court will be available on Election Day, November 5, 2002, to hear and resolve any charges that the November 1, 1982 Consent Order as modified by the 1987 Settlement and Order of Dismissal amending the Consent Order is being violated.

2. In all other respects plaintiff's motion is denied.

/s/Dickinson R. Debevoise
DICKINSON R. DEBEVOISE
U.S.S.D.J.

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 81-3876(DRD)

[Filed November 1, 2004]

DEMOCRATIC NATIONAL COMMITTEE, et al.	)
Plaintiffs,	)
v.	)
REPUBLICAN NATIONAL COMMITTEE, et al.	)
Defendants.	)

O R D E R

Intervener, Ebony Malone, having moved for an order enjoining defendant, Republican National Committee, from using or permitting to be used a challenger list originally containing 35000 names prepared by the Republican Party in the State of Ohio for use at the November 2, 2004 election, and for the reasons set forth in a bench opinion of even date;

IT is this 1st day of November, 2004;

ORDERED as follows:

1. The Republican National Committee, its officers agents and employees are enjoined and restrained from using for challenging purposes on November 2, 2004 a list originally of 35000 names prepared for that purpose by the Republican Party in the State of Ohio;

2. The Republican National Committee shall instruct its challengers in the State of Ohio not to use such list or any part thereof for challenging purposes at the November 2, 2004 election.

/s/Dickinson R. Debevoise
DICKINSON R. DEBEVOISE
U.S.S.D.J.

[Handwritten note:
Filed 11/1/04
4:35 P.M.
/s/Dickinson R. Debevoise
USSDJ]

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION 81-3876(DRD)

[Dated November 1, 2004]

DEMOCRATIC NATIONAL COMMITTEE, et al.,	)
Plaintiffs,	)
-vs-	)
REPUBLICAN NATIONAL COMMITTEE, et al.,	)
Defendants.	)

TRANSCRIPT OF PROCEEDINGS

M O T I O N

Pages 1 - 86

Newark, New Jersey
November 1, 2004

B E F O R E:

HONORABLE DICKINSON R. DEBEVOISE,
SENIOR UNITED STATES DISTRICT JUDGE

A P P E A R A N E S S:

EDWARD A. HAILES, ESQ.,
Attorney for the Intevenor Malone

JOHN W. NIELDS, ESQ.
Attorney for the Intevenor Malone

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

/s/Mollie Ann Giordano
MOLLIE ANN GIORDANO
Official Court Reporter

MOLLIE ANN GIORDANO, C.S.R., NEWARK, N.J.
(973) 645-1221

[p.2]

APPEARANCES - continued

GENOVA, BURNS & VERNOIA
BY: ANGELO J. GENOVA, ESQ. and
PETER J. CAMMARANO, III, ESQ.,
Attorneys for the Plaintiff

DUGHI, HEWITT & PALATUCCI
WILLIAM J. PALATUCCI, ESQ.,
Attorney for the Defendant

McDERMOTT, WILL & EMERY
BY: BOBBY R. BURCHFIELD, ESQ.
Attorney for the Defendant

BELL, GAGE & HARBECK
BY: DORORTHY A. HARBECK, ESQ.,
Attorney for the Defendant

[p.3]

THE COURT: First I would ask you if either of you received the opinion of Judge DeLott?

MR. NIELDS: We don't have the opinion. I had portions of the it read to me.

THE COURT: Well, I'm having copies of it made. We'll bring it in for you. She's enjoined all challenges to the voting place. We still might as well go forward.

MR. NIELDS: It's been appealed as I understand.

THE COURT: Okay.

Yes, well, I think it raises many of the same issues, and as far as the factual matter and concern, that covers a lot of the same grounds. All right. Well then, Mr. Burchfield.

MR. NIELDS: Your Honor, I have one house keeping or maybe two housekeeping things. I had thought, mistakenly, I apologize to my opposing counsel and the Court, that we had attached to our papers the second list, the list that had been done from the mailings by the Republican Party of Ohio in September, and he discovered that we attached the first list, the list that had been made up from the mailing by the RNC in August.

THE COURT: Right.

MR. NIELDS: And I -- we in our brief made reference -- what happened was this was not produced to us prior to the 30B(6) deposition, and it turned out it was mentioned on an e-mail as being on someone's computer, and so

[p.4]

we asked for it, and they produced it, Saturday. Yeah, yesterday.

THE COURT: All right. What use will that be to me at this juncture.

MR. NIELDS: I've described it in my argument and in our papers.

THE COURT: Oh, you've referred to it?

MR. NIELDS: Referred to it, and I think it should be in the record and available to the Court.

THE COURT: All right.

MR. NIELDS: And I have said, and my papers have said in my argument, it reflects the same kind of analysis that's in the column way off to the right and Mr. Burchfield may want to dispute that, so I thought your Honor should have it.

We also have a tape. We have a tape of a -- that we referred to in our papers and offered in our papers to hand up to the Court, an argument if your Honor wants it.

THE COURT: I don't think I'll have time. I have to do something by sometime before the end of the day. So I don't think we'll have time to listen to the tape.

All right. Mr. Burchfield.

MR. BURCHFIELD: Your Honor, let me -- let me again by simply noting -- noting perhaps it it's just me, my confusion about exactly what it is the plaintiff or the intervenor, Miss Malone, is asking for here. I think you alluded to this.

[p.5]

She's not here as a representative of a class. She's here on an individual capacity. And that is the basis upon which on Thursday you allowed her to participate. Is she seeking enforcement of the consent decree through something in the nature of contempt, citation? If that is the case, under clear Third Circuit precedent, she must demonstrate all in her case by clear and convincing evidence. The citation in that, your Honor, you're very familiar with that, Harris vs. City of

Philadelphia, 47 F. 3rd, 1311, Third Circuit 1995, 47 F. 3rd, 1311.

THE COURT: That's if she's seeking contempt.

MR. NIELDS: Exactly. And that would be -- if that's what she means by enforcement of the decree.

Second, is she seeking a preliminary injunction here? And if she is seeking such an injunction, given the strict requirements of the entry of an injunction in federal court, she would be entitled to an injunction only running to herself, not to a class. And if she is -- she is able to vote on tomorrow without impediment by the Ohio Republican Party, then that would be the extent of the injunction, I would respectfully submit to you.

Thirdly, is she seeking some sort of modification of the consent decree to expand the scope of the consent decree to cover the activities in Ohio of the Ohio Republican Party based upon the assumptions that the Republican National Committee is

[p.6]

involved in those activities, so it would be a wide scale modification of the consent decree. And, again, there are some questions about the propriety of that.

You also have before you our requests to modify the consent decree to confirm that these activities are appropriate, normal poll watching activities that your Honor has sanctioned in the 1987 version of the consent decree because they are consistent, as is shown

in state law. The State law may not be good law, but it is state law and the challenges are predicated upon that.

Now, with that as a background, is she here seeking enforcement which requires clear and convincing evidence, or is she seeking broad scale relief?

THE COURT: You say enforcement, I thought you say contempt requires clear and convincing evidence.

MR. NIELDS: Contempt does require clear and convincing.

MR. BURCHFIELD: Your Honor, I guess it may just be me, I'm concerned that there may not be much difference between those two. If your Honor issues an order indicating that the Republican National Committee is not in compliance with the decree, and a further order indicating what it must do to bring itself into compliance with the decree, that sounds pretty close to civil contempt to me.

THE COURT: I think contempt is when you're seeking a

[p.7]

penalty. Enforcement of the order is not a penalty, just doing what you're supposed to be doing anyway.

MR. BURCHFIELD: It would have to be a somewhat expanded interpretation of the decree. In any event, I want to register my concerns. It's a little

unclear what Miss Malone is seeking and what the Court could do for her.

THE COURT: Well, let me have Mr. Nields confirm what my understanding is. She seeks to obtain an order requiring the Republican National Committee not to use the list as a basis for challenges, and to instruct the Ohio State Committee and poll watchers not to challenge on the basis of that list. That is what she's seeking.

MR. BURCHFIELD: Well, your Honor, as you will see as we go forward here today, I dispute whether she's entitled to that relief and whether that relief would be appropriate. If she does demonstrate entitlement -- and I'll get to that in a few minutes. I want to proceed by making essentially five points, and I will try to encompass within these five points, six points, your Honor. The issues that Mr. Nields has so eloquently raised this morning on behalf of his client.

Point number one is, we are in a situation here where there has been extensive media report and evidence of voter registration irregularities, particularly in Ohio, but not just in Ohio. You see, you have before you the affidavit of Mr. Ryan Smith, who has gathered together evidence, media articles

[p.8]

showing criminal investigations and significant concerns about invalid registration, forced registration, dead people being registered, and so forth throughout the State of Ohio. It is a palpable concern within the Republican Party that there are serious irregularities

going on. It is therefore, I would submit to your Honor, it would be surprising if there had not been discussions within the RNC about what if anything the RNC can do about it. I will come to those e-mails and explain to you how there's nothing in those e-mails that demonstrates anything inconsistent with the decree. In fact, I will show you that the RNC has been very vigilant to make sure.

Secondly, you will see in Miss Dillingham's affidavit, which I know you're familiar with because we refer to it several times this morning already. Miss Dillingham's affidavit expresses concern about Project Vote. In paragraph 18 through 21 she indicates several examples that she knows of from her personal knowledge in which Project Vote has submitted irregular at least voter registration this election cycle in Cuyahaga County. And it is interesting that Miss Malone -- some of Miss Malone's registration we have reason to believe were submitted as part of the Project Vote effort, so there is palpable evidence, credible evidence out there of voter registration irregularities. What the intervenor wants you to do is to completely immobilize, not just the Republican National Committee, but the Ohio Republican Party from taking

[p.9]

any action, even within the parameters of the state law to challenge people who were suspicious registrants on Election Day. That's a pretty extreme remedy, especially in light of what we know is going on out there in the real world.

Second major point, intervenor Malone simply has no case or controversy here. There is a flag on her voter registration. Miss Dillingham's affidavit says so. We have presented the records of the Cuyahaga County Board of Elections that prove it. I've blown that up. It's right here on the board.

And as I referred to earlier this morning, the first blow-up is the cover page where you plug in Ebony Malone's name. Bonnie S. Malone, born on 5/1/84, is the intervenor here. She's on the bottom of that list. If you punch in that name, you get the information that we've set forth in Miss Dillingham's affidavit of the four registrations by Miss Malone in the last year and a half at two different addresses, none of which match the address that she's indicated in her declaration. We do understand at her deposition she corrected the address that she'd given in her declaration, and now she seems to be saying that she does in fact live at 7829 Summit, or whatever it is that she says in her declaration.

In any event, the key point here, your Honor, is as of October 4, 2004, mail was returned to the Board of Elections, official correspondence that they send to every

[p.10]

newly-registered voter marked "undeliverable" to the Board of Elections, and they have changed her status on their records from A, for active, as it was shown in December, 2004, to I for inactive. The result of that Miss Dillingham says under the process of Cuyahaga County, the Board of Elections personnel will in fact

challenge her. And Miss Dillingham lays out for you exactly what that challenge will entail.

Now, it is interesting, your Honor, that there are now four affiants in this case regarding the procedure. There is Miss Dillingham, who submitted a very extensive, very detailed declaration. There is Mr. Mattson, who submitted a very extensive and very detailed declaration with regard to Stark County of Ohio. And then there is Mr. Berg who submitted, in our view, a somewhat conclusory affidavit. And then there is Mr. Anthony, the affidavit that was submitted this morning by the intervenor. And Mr. Anthony, interestingly enough, confirms what Miss Dillingham says and let me explain that.

Mr. Anthony is speaking about Franklin County, and he says if you have his declaration, which I just got this morning, I assume that your Honor has it.

THE COURT: Well, I just got it this morning too. I had it here.

MR. BURCHFIELD: Your Honor, Mr. Anthony says, paragraph 4: It is sometimes the case that the county will send mail to voters and have the mail returned as

[p.11]

undeliverable. Five: When this happens the voter's name will be placed in the signature box that is used by election judges on Election Day. And skipping down to paragraph 8: If the voter states the address is different, but my address is still within the same precinct, the

voter is given a new registration form to complete and is then allowed to cast a regular ballot. Such a voter does not go through the challenge process outlined in RNC 3525, nor does such a voter complete a form. There is no provision of state law requiring that such a voter be challenged and put through the 10-U voter procedure, as what happened in the voter -- personally 3505.20. So the difference appears to be that in Cuyahaga County in which Miss Dillingham's testimony is uncontroverted, that a voter challenged by the Board of Elections, will have to fill out the 10-U form, which Mr. Nields does not like, versus Franklin County, where the voter has to fill out a new voter registration form.

Well, if you look -- if you look behind Mr. Matthew's declaration, and that is --

THE COURT: Excuse me. Where is his declaration?

MR. BURCHFIELD: It is in our submission, your Honor, in behind tab E of the pile of paper that we served on you yesterday.

THE COURT: All right.

MR. BURCHFIELD: And if you look behind tab 1 of Mr.

[p.12]

Matthew's declaration, you find the voter registration form that Mr. Anthony says a voter challenged by BOE has to fill out in Franklin County. And you will see at the bottom of that, of that voter registration form, your

Honor, the same warning that appears and of such concern to Mr. Nields on the form 10-U. On the bottom of that form it says: Whoever commits election falsifications is guilty of a felony of the 5th degree, and indeed that is the law of Ohio. Whether you fill out a false voter registration form, or whether you fill out a false form 10-U, or whether you vote under an assumed name, if you commit voter registration -- voter fraud, you're guilty of a felony in Ohio, as you are in most states. That's stated on the form.

So, your Honor, at the end of the day, the disagreement here about whether the BOE challenges differ substantially among the counties really is a tempest in a teapot. But most importantly, I would emphasis to your Honor, for the purpose of Article 3 standing here, the person to look at is Miss Malone and the county to look at is Cuyahaga. And the evidence we have in Cuyahaga County, if Miss Malone shows up at the poles on Tuesday, and she has confirmed she is going to do, she will have. to confront -- she will be challenged by a Board of Elections official and go through essentially the same process she would go through if she were challenged by a Republican Party of Ohio polling --

THE COURT: She'll have to go ten feet away and sign

[p.13]

the 10-U form?

MR. BURCHFIELD: In Cuyahaga County, that's correct, from Miss Dillingham's affidavit.

So, your Honor, the basic point here is there's nothing you can do for her that will keep her from suffering that harm, if that is a harm. And we doubt it is a harm, because she has testified in her affidavit, in her deposition on Saturday, that her only concern is the inconvenience. And on page -- on pages 99 and 100, she was asked -- she was asked a series of questions, and she said: "Did the challenge to your registration convince them," she's talking to members of her family, "that they should not vote, to your knowledge? No, it didn't convince them. It further convinced them to the point of voting, rather than discouraging them from voting. It encouraged them to vote; correct? Yes, it encouraged them to vote just on the principler if you know all the technicalities going on about the election."

And then skipping down to page 100. "Even after that discussion about the fact that it would be a long, drawn out process, they still indicated to you that they were encouraged to vote; correct?

"ANSWER: Yes. That just encouraged them further to push things through and vote."

The suggestions, counsel's arguments, as eloquent as they are, about deterring people from voting through this

[p.14]

process, simply do not stand up for their own client, who is of course, since this isn't a class action, the focus of the court here. So she,s going to be challenged, number one, and nothing that this Court will do with

regard to the Republican National Committee is going to change that, with all due respect, your Honor.

Number two, even if she was going to be challenged, she's admitted to going out and voting.

Number three, as we will show later on, with respect to the long lines to vote she's committed to cast her ballot tomorrow, and that's good. But it certainly doesn't indicate that there's a live case or controversy here with regard to this particular plain.

Again, let me just reemphasize. To the degree that there are variations within the counties of Ohio in terms of how they deal with people who are flagged on the registration list, the one that matters for your purposes, your Honor, this morning is Cuyahaga County, and Miss Dillingham's affidavit has not been refuted. In fact, it's confirmed by Mr. Matthews, and it is supported, essentially in all of it's essentials, by Mr. Anthony.

Now, your Honor, you've heard -- that's the end of the case, I would submit, your Honor. If there's no case or controversy, if it's not justiciable, that's the end of this case. Because let me go forward, because there --

[p.15]

THE COURT: That's a good idea.

MR. BURCHFIELD: There has been some pretty serious allegations about my client this morning, and I do want to respond to those.

With regard to the Republican National Committee's involvement in this, Mr. Nields walked you through in some detail some e-mails that were produced by the RNC. And he tries to make those e-mails sound as though they show complicity by the RNC in the activities of the Ohio Republican Party here. They do nothing of the sort.

Let me begin, your Honor, with the e-mail that is behind tab 7, that was referred to you by --

THE COURT: Hold on.

MR. BURCHFIELD: This is Mr. -- this is the intervenor's exhibits, your Honor. And this is the e-mail in which, at page 1 -- at the next to last page. Do you have that in front of you?

THE COURT: One eighty-four?

MR. BURCHFIELD: On eighty-four is the next to last page. Mr. Nields directed you to the fact that the RNC is going to have a conference call with the number of state parties involving HAVA, the Help America Vote Act, voter registration fraud strategy. And what he didn't refer you to, your Honor, is the next page, the very last page, which says: suggested participants. And the two first named suggested

[p.16]

participants there are Carolyn Hunter and Jill Holtzman Vogel of the RNC counsel's office, who are charged with enforcement of your Honor's consent decrees.

Miss Hunter's declaration, which you have in front of you, makes clear that she frequently participates in meetings, briefings, and telephone calls at which issues of "get out to vote," voter registration, Election Day poll watching and so forth are discussed. And her reason for doing so is to make sure that she advises the people on the call to comply with the consent decree.

So rather than being evidence of RNC complicity in an effort to violate the consent decree, this e-mail, consistent with Miss Hunter's declaration, demonstrates the RNC's efforts to comply with the decree.

And the instructions that are given to RNC personnel are that if state parties are engaging in a valid security effort, the RNC personnel can not be involved in it. Is the RNC discussing the political aspects of wide-scale voter fraud? Absolutely, your Honor. They're talking about it everyday because it's a persuasive problem, and it is a political problem as well as a legal problem. But just because they talk about it and they're on conference calls about it, doesn't mean that they're engaged in any sort of effort to violate the consent decree. And I would submit to your Honor that that is not a reasonable inference to draw from this e-mail.

[p.17]

With regard to the next e-mail, your Honor, number 8, and I would also say, your Honor, the e-mail behind exhibit 7 has no correlation whatsoever to the current efforts by the Ohio Republican Party to challenge voters based upon the undelivered mail list. There's no

link between those e-mails and the direct controversy, whatsoever. Other than the -- other than the phrase "voter registration fraud," which is, as I've said, prevalent in the media. Behind the tab 8 is another series of e-mails, and Mr. Nields walked you threw these in some extensive detail.

Let me focus on a couple of the things in these e-mails. Number one, you will see scattered g throughout here various -- in various e-mails, you will see members of the RNC counsel's office. Those people would be Miss Hunter, Miss Holtzman Vogel, Miss Karen Cross, and there are others. But sometimes they're on these other e-mails, sometimes they're not. Many times they are. Let me focus you, however, most intently on the page with the last three base numbers, 00148.

THE COURT: One forty-eight?

MR. BURCHFIELD: One forty-eight. And at the top e-mail, it says Jack Christopher and I have already tasked our IT person with creating a match list with the BOE's return mail list, Board of Elections return mail list, not the RNC's return mail list, not the Ohio re Republican Party, the official return mail list sent on a racially neutral basis from the

[p.18]

Board of Elections of Ohio, and the absentee ballot request list. Again, that is an absentee ballot request list kept by the state listing the people who have requested absentee ballots.

THE COURT: Who is Jack Christopher?

MR. BURCHFIELD: Jack Christopher is a lawyer out in Ohio. He works for the Ohio Republican Party.

THE COURT: Why isn't that dealing with voter fraud, the fraud in this case being the double voting -- some usually vote the registration and the absentee ballot?

MR. BURCHFIELD: Well, the concern in these e-mails is that, and it is the fact that people -- there suspicious registrants are not even waiting until the day of the elections to go to the poles, they are getting the absentee ballots. They are going to the polling stations and getting the absentee ballots in advance of the elections to submit now.

Revealing is the next sentence: Jack thought this would be a good idea to have to referenced as part of the larger testimony harder press strategy. This is not evidence that they are -- that the RNC is involved in a ballot challenge program. And, in fact, Miss Hunter's declaration states unequivocally that there's no ballot challenged program based upon this. It is widely known, and quite obvious, your Honor, that if -- if in fact there is a post-election dispute about the election, there is going to be a lot of PR, as there is

[p.19]

already, there's going to be a lot of debate among the party leaders about what happened to cause the controversy, and this is indications of a press strategy to address that situation.

This does not evidence any sort of ballot security program within the context of the consent decrees. And more importantly, it doesn't relate to the current challenges by the Ohio Republican Party. And even more importantly, your Honor, for purposes of Article 3 standing, it doesn't relate to Miss Malone because she isn't one of the people that's requested an absentee ballot. So this e-mail -- this e-mail proves nothing. And that is relevant to us here.

The next e-mail that Mr. Nields called your attention to -- let me see for a moment. One moment, your Honor. Mr. Nields also referred you to list voters, or analyses that the RNC did of returned mail from the RNC's -- from the RNC's August mailing that went to Cuyahaga County. And those exhibits are behind tab 3, tab 4, and tab 5. And I think also behind tab 6.

The bottom line answer to this, your Honor, is it is not inconsistent with the consent decree for the RNC to analyze voter registration -- voter return mail, so long as it doesn't use it for a valid security program. And the evidence here is undisputed, ever since we were here last week and Miss Cino said the RNC mailing from August has not been used as part of the Ohio's Republican Party's challenge. That is, your Honor,

[p.20]

undisputed.

They argue suspicious. It may be suspicious to them. The RNC did, and Miss Cino testified that they did it as part of the -- if there was a challenge of the election, we did it to deal with the PR war, if there is a

challenge. These names that were returned from the RNC mailing are not on the current challenge list as a result of the RNC mailing. There may be duplicates because people were sent the Board of Elections mailing or the same people may have been sent -- there maybe some overlap, but this mailing is not part of the Ohio Republican Party challenges.

Mr. Nields also says they he has some documents that were produced on Saturday -- I correctly note there was some documents produced on Saturday that the RNC analyzed in the same way that it analyzed the August mailing, and what he's just handed up to your Honor, I understand what this is and I'll explain it to you. If you need an affidavit on it, I think we can get you one. This is an analysis --

THE COURT: When you are saying this?

MR. BURCHFIELD: These are the documents that Mr. Nields handed up to you a few moments ago as analyses of the mailings by the Ohio Republican Party to five counties in Ohio of mailing sent in September. These are the undeliverable addresses from that mailing.

THE COURT: Okay.

[p.21]

MR. BURCHFIELD: And there are a couple important things about this. First is, I understand that this analysis was done not by the Ohio Republican Party, but by Lori White. Not by the Republican National Committee, but by Lori White of the Ohio

Republican Party. She transmitted it, and she compiled this list from notes on the undelivered mail envelopes. Not by doing any sort of driving around and looking at the places. She did send this list to Chris McInernie of the Republican National Committee, who has, I understand, done nothing with it. Mr. Nields also suggests that this -- this list was zip code sorted on the face of it, your Honor, that is not correct.

If you look at the -- I've had only a few minutes to look at this. If you look at the document with the first page baits number RNC 000418, and you look at the first series of zip codes at the top of that page, 45231, if you look down, there is a blank there beside -- and there's a designation out to the right-hand side, zip unreadable. Are you with me?

THE COURT: I don't have the pages in front of me, but I'm with you.

MR. BURCHFIELD: In concept. Your Honor, it may make sense for you to get the papers in front of you. I think Mr. Nields just handed them up to you.

THE COURT: Do you want me to refer to those papers?

MR. BURCHFIELD: I think that would be helpful.

[p.22]

THE COURT: All right. Which ones do you want me to look at?

MR. BURCHFIELD: The ones with baits number on the first page, 000418.

THE COURT: All right. I have that.

MR. BURCHFIELD: That hypothesis that we're addressing is Mr. Nields claims that this list was zip code sorted, and he further speculates that the zip code sorting would have been done by minority precincts. He said the same thing about the RNC analysis of the August mailing. There is no evidence, your Honor, in this record that any sort of minority-based sorting, zip code sorting was done on the RNC analysis. And I think it is quite unfortunate that he would even suggest such a thing. There is no evidence of that whatsoever in this case.

The question is whether this document, first page, RNC 000418, prepared by Lori White of the Ohio Republican Party is zip code sorted, as Mr. Nields suggested. It is not. If you look at the first series of zip codes at the top of the page, you will see the zip code 45231, that series ends. Then if you look down the page at the first entry for zip unreadable on the far right, are you with me so far, your Honor? You will see 45231 reappears there for a few entries, non-sequentially. And then if you look at the page, at the last entry on page RNC 000420, the very last entry on that page, you will see the same zip code, 45231. If you look at the page and you just

[p.23]

thumbed through it, your Honor, looking clearly through that very first zip code on the first page, I

didn't go through the -- I'm trying to rebut the premise that this is zip code sorted. If you look at the page with RNC 00438, and you go one, two, three, four, five, six, seven, eight, nine lines up, you will see another 45231 standing alone amongst a variety of 45206 zip codes. The reason these appear in zip code sequence, your Honor, I think it is a well-founded speculation, is that the postal service delivers undeliverable mail back from whence it came in bundles. Those bundles frequently result from the postal service doing their own sorting of the zip codes. So the suggestion either that this document is the RNC's analysis, or that it's sorted in any sort of improper way, is just flatly untrue.

I think I've responded to all of the exhibits that Mr. Nields referred to as evidence for the suggestion that internal documents of the RNC demonstrates complicity in the Ohio voter registration challenge.

He next talked about the press conference. The evidence on the press conference here is clear. It's set forth in Miss Cino' s supplemental affidavit, which is included in our materials delivered to you yesterday behind tab B. And Miss Cino addresses that press conference in paragraphs 4 through 6. The essence of her testimony about that press conference is this. And I'll give you a minute to find that. It's tab B.

[p.24]

THE COURT: I have that.

MR. BURCHFIELD: In paragraphs 4 through 6, it describes the substance in that press conference in great detail. And what she says is that Mr. Gillespie

had a long standing commitment to be in Ohio on October 19th and 20th, first to speak to the Franklin County Republican concern, which is a big deal out there, I understand. And second, also a big deal, to meet with the editorial board of the Columbus Dispatch in connection with their evaluation of the which candidate the Columbus Dispatch was going to endorse for president. Ultimately they endorsed President Bush. They wanted to meet with Mr. Gillespie and he obliged. They knew about the trip. And they asked Mr. Gillespie if he would participate in a press conference about the widespread allegations of voter registration problems in Ohio. And Mr. Gillespie did so, and he told the Ohio Republican Party: I can speak generally about the corrosive effect about vote fraud, and voter fraud on democracy, but I am prohibited by the consent decree about taking part in any planning about challenges on that.

He appeared at the press conference anti-press conference, the Ohio Republican Party put out its evidence that there were forged registrations, that that were -- there were registrations of someone who had been dead for 20 years. I think they had the hopper of all of the returned Ohio Republican Party mailings there. Mr. Bennett talked about

[p.25]

that. Mr. Gillespie said voter fraud is a big problem in this country, everyone ought to be concerned about it. There was a question from the press: What are going to do about it? Mr. Bennett said: We are considering our legal options.

There was no plan by the Ohio Republican Party to initiate this challenge at that point in time. That plan was developed, announced two days later on October 22nd.

If you look at Miss Cino's deposition, which is included behind tab 2 of the -- of the intervenor's submission yesterday, I'll give you a chance to get that, your Honor.

THE COURT: Yeah.

MR. BURCHFIELD: When you get there, I'm at page 48 of that, of that transcript. Are you with me?

THE COURT: Page 48?

MR. BURCHFIELD: Page 48.

THE COURT: All right.

MR. BURCHFIELD: Are you with me? The first question on the page is: "Did Mr. Gillespie express any opinion about whether that was a sensible thing to do?" This is referring to Mr. Bennett's discussion about possible challenges to the fraudulent voter registration. "Did Mr. Gillespie express any opinion about whether that was the sensible thing to do?

"ANSWER: Mr. Gillespie is very well versed and aware of our consent decree."

What other conversation did Mr. Gillespie have with

[p.26]

Mr. Bennett, or any other Republican Party? That's it, question about Ohio, that was it. That is not the sort of complicity or participation that your Honor includes in the consent decree.

The other point on the next page I would note is Mr. Nields is asking Miss Cino about a Wall Street Journal article dated -- from the Columbus Dispatch, I'm sorry, dated October 23rd, 2004. And that article -- are you with me again? I'm sorry.

THE COURT: Yeah, I'm on that.

MR. BURCHFIELD: I faked you out there. Page 49, it refers to a Columbus Dispatch article from October 23rd, 2004, which is three days after the press conference. And the question starts off, and yet another sign of how fiercely, your Honor, it will be contested in the November 2nd -- Republican tested, newly registered voters yesterday, that would be the 22nd, and that was two days after Mr. Gillespie was in Ohio at the press conference. And that confirms the position that the Republican National Committee has taken all along, which there was no plan announced at that October 20 press conference, and that came about two days later, when the Ohio Republican Party announced and initiated the challenges that bring us here today. So Mr. Gillespie's appearance at that press conference does not provide the sort of evidence that the intervenor needs to show complicity by the RNC in this voter challenge.

[p.27]

And, your Honor, let me make one other point about the -- about the RNC's -- well, let me just see if I can summarize where we are on the key facts with regard to the RNC's alleged responsibility here.

I would state -- I would state, number one, Congress recently recognized in the Bi-partisan Reform Act in the McCain Feingold Building. I argued in the U.S. Supreme Court on behalf of the RNC, national parties are different and separate from state parties. The McCain Feingold state treats national parties differently. And in that instance prohibits them from receiving any non-heavily regulated money.

State parties, on the other hand, being different, can receive non-Federal regulated money for certain purposes. So there's a statutory basis, and there are others as well, but there's a statutory basis recently recognized by Congress that the RNC is not the same as the Ohio Republican Party. And accordingly, it would be inappropriate to assume that everything the RNC does is attributable to the Republican Party and visa versa.

Secondly, the RNC mailing from August, 2004 to Cuyahaga County, newly registered voters has not been used in anyway in the challenge that is at issue here.

It is further important to note, your Honor, that Miss Malone, the intervenor, was not on either the Republican National Committee mailing list or the Ohio Republican Party

[p.28]

mailing list. She is on the list of undeliverables, because of the Board of Elections mailing, which is exactly why she's on this chart here, as a flag voter in Cuyahaga County.

Third point, neither before, during, or after, the October 20 press conference, did RNC Chairman Gillespie discuss a plan to challenge registration with the Ohio Republican Party. That's in the deposition passage I've just read to you. It's in her supplemental declaration, paragraph 6. And as we've just seen from the Ohio, from the Columbus Dispatch article, the plan wasn't even announced or initiated until two days later on the 22nd.

Fourth point. RNC counsel do in fact participate in meetings, briefings, and conference calls regarding poll watching, which is specifically allowed under the decree; get out to vote efforts, which are not covered by the decree, and voter registration for the purpose of insuring a compliance with the decree. And Miss Hunter details those efforts in her declaration, paragraph 2, behind tab C of our submission yesterday.

Fifth point, your Honor, and I'm being a little bit duplicative, and I apologize for that. The e-mails that indicate cross tabulation of undeliverable mail to new registrants and request for absentee ballots is not relevant here. A, because it's not -- that's not included in the current Ohio Republican Party challenge to voters in Ohio. B,

[p.29]

a voter who has submitted an absentee ballot cannot be intimidated if that ballot is challenged after it is submitted, your Honor. And in that sense, even if there were programs, it would in our view fall outside the spirit of the decree.

And finally, the undisputed evidence is there is -- there has been no challenge based upon that cross tabulation of absentee ballots with undeliverable mail to new registrants.

And six, your Honor, finally, the RNC has not initiated, controlled, directed, or funded the Ohio Republican Party programs of voter challenges. That is from Miss Hunter's declaration, paragraph 3. That was behind tab D of our submission. She says: To the best of my knowledge, after due investigation, the RNC is not initiating, controlling, directing, or funding any programs of voter challenges as described above, including the effort by the Ohio Republican Party to challenge voter registration by Ohio as alleged by intervenors in this matter.

Now, your Honor, if -- unless you have some questions about -- for me about the RNC's alleged participation in this program, I will turn now to the second issue you had listed, which is whether the challenges would -- will so disrupt the voting in Ohio that it will deter people from voting.

THE COURT: Yes. Why don't you go ahead to that.

MR. BURCHFIELD: Point number one, your Honor, is Cuyahaga County has a hundred and eighty thousand, two hundred

[p.30]

and twenty-one voter files flagged for challenge by the Board of Elections on Election Day. If all of those one hundred and eighty thousand people were to show up and be challenged, there might be a problem. But the fact is, if only a few of them, only a small percentage of them do, just as it is likely that a good number of these 35,000 people, now down to 23,000, will show up on Election Day.

If they do, even if they do, miss Dillingham and Mr. Matthews, are confident that the poll workers in Cuyahaga County where Miss Malone votes, and in Stark County where Mr. Matthews is the Director of the Board of Elections, they're confident that they can be processed efficiently, without undue disruption of voting. And the process, as we've discussed later, your Honor, when there is -- when there is a challenge, and, again, put to the side for a minute the fact that many of these people, if not all of them on the list of 23,000, that used to be 35,000, now 23,000, even if it were the case, that those people were not going to be dealt with initially by the Boards of Elections, the process would be if a -- one of the challengers at the polling place places the challenge, that person is taken out of the line and asked some questions. And they either -- they are either given a 10-U to fill out, or a new voter registration form, or if they answer the questions appropriately, then maybe put back in the line to cast

a regular ballot. They may be sent to another polling place.

[p.31]

Both Miss Dillingham and Mr. Matthews believe that's not going to be unduly disruptive to the voting in the State of Ohio. Again, Miss Dillingham is Deputy Director in the largest county in Ohio where Miss Malone lives, and this is her testimony.

I would go further to say, your Honor, if you're making a determination of whether the testimony provided by declaration from Miss Dillingham and Mr. Matthews is more accurate versus that from Mr. Berg, I would ask you to consider the following factors. Miss Dillingham and Mr. Matthews are both staff -- full-time staff employees of the Board of Elections. Mr. Berg is the Democratic County Chairman for Franklin County. Yes, he serves on the Board of Elections as the Democratic appointee, but he is not there day to day training the staff members, and he is not there carefully going through the procedures, I would respectfully submit to you.

Second, Miss Dillingham has 14 years, and Mr. Matthews has 13 years working at their respective Boards of Elections full-time versus Mr. Berg, who has been involved part-time for 12 years.

Third, the declarations of Miss Dillingham and Mr. Matthews contained detailed descriptions of the process, including the flagging process and the flagging process is not even mentioned in Mr. Berg's

declaration. Mr. Berg's declaration is largely conclusory.

So in evaluating relevance and believability and

[p.32]

weight, your Honor, we respectfully submit that not only the quantity but the quality of the evidence indicating that there will be no problem is substantial.

Second point, your Honor, Miss Malone in particular, but likely many of the other challenged registrants on the Ohio Republican Party's list will be challenged in advance by the County poll pursuant to the flags. They're not going to be -- they're not going to be harmed, and I don't think it's appropriate or credible to say that once they've gone through there voting process by the County poll workers, that they're going to be challenged again. I think short trip would be made of those challenges. There's an edict from the Secretary of State that any poll challenger who tries to intimidate or harass the voter would be promptly removed from the polling station by the presiding officer. So I think the notion that the challengers are going to be repetitively challenging the same people that have already been cleared by the Board of Election workers, that's just not credible.

Third point, neither Miss Dillingham nor Mr. Matthews expect disruption from challenges. The Dillingham declaration says that in paragraph 26, the Matthews' declaration says that in paragraph 19.

Four, the number of challenges has already declined from 35,000 statewide to 23, 000 statewide. That is in comparison to the one hundred and eighty thousand flagged

[p.33]

voters that will be challenged -- that are susceptible to challenge by the Board of Elections.

THE COURT: The hundred and eighty was in Cuyahaga County alone?

MR. BURCHFIELD: Exactly. There are -- there are less than a sixth as many statewide on the Ohio Republican Party list as there are on the Board of Elections list in Cuyahaga County alone.

THE COURT: Well, is there any breakdown as to the counties in which the 35,000, or the 23,000 are listed? And do we know to which counties the returns relate? I suppose they have to be -- well, what counties do they apply to?

MR. BURCHFIELD: That's Exhibit J behind our submission. We looked at that this morning. county.

THE COURT: All right. Well --

MR. BURCHFIELD: Which brakes it don't county by county.

THE COURT: Let me look at that again. All right.

MR. BURCHFIELD: And as you can see --

THE COURT: Why do the two numbers say Cuyahaga forty-three sixty-one and thirty-five forty? What's the significance of that?

MR. BURCHFIELD: That's in the -- our returned mail matched. And, your Honor, I'm engaging in some degree of inference here. Our return mail, I note that that's the Ohio

[p.34]

Republican Party. There are only entries to -- the matched number, I would infer, means thirty-five hundred and forty of the ones returned from -- from the ORP mailing match, are within the 17,717 in the Cuyahaga Board of Elections mailing. As I read that, there are only about 820 additional ones that are unique to the Ohio Republican Party mailing.

THE COURT: All right. And would you have included those in the challenge list that you have?

MR. BURCHFIELD: They are included in the challenge list.

THE COURT: Yes. The challenge list would include the 35,427 developed by the county challenges, plus the --

MR. BURCHFIELD: Plus the non-unique deliveries.

THE COURT: All right.

MR. BURCHFIELD: Undeliverables from the Ohio

Republican Party, and that would be the sum of the -- that would be -- well, it's the difference between the numbers minus the numbers in parenthesis in that third column.

THE COURT: All right. And what is SOS?

MR. BURCHFIELD: Secretary of State confirmed, and I think at the time this was prepared, your Honor, that maybe the number. And again I'm inferring this. That maybe the number of registrants that have already been confirmed and cleared by the Secretary of State, the Board of Elections throughout the State. But there, again, I confess that's just the way I read

[p.35]

it.

THE COURT: All right. I'm going back to our return mail, Cuyahaga County, forty-three sixty-one. Was that your returned mail or --

MR. BURCHFIELD: That is -- that is the Ohio Republican Party undeliverable mail from its five-county mailing in September.

THE COURT: Okay.

MR. BURCHFIELD: None of the numbers on this page relate to the Republican National Committee's mailing from August.

THE COURT: This is the September mailing?

MR. BURCHFIELD: The Ohio Republican Party mailing was in September, that is correct.

THE COURT: And of the 43,061, 35,040 also appeared on the state, of the county board?

MR. BURCHFIELD: That's the way I read it, your Honor. But again I am to some degree just inferring. I can have someone ask, ask the client if we have him on the RNC who knows the answer to that, and I'll try to report to you after the next break.

THE COURT: I don't think it makes that much difference.

MR. BURCHFIELD: But by -- almost of necessity, a large bulk of the undelivered mail sent by the Ohio Republican

[p.36]

Party will be duplicative of the undeliverable mail sent by the Board of Elections.

THE COURT: All right.

MR. BURCHFIELD: So, your Honor, the declarants Dillingham and Matthews are not -- are not concerned, are not in a tither about these impending challenges because the Ohio Republican Party challenges are such a small percentage of the -- of the challenges that they may have to be dealing with anyway, and they're largely duplicative of them, as Miss Malone's situation demonstrates. So there is -- there simply is no substantial evidence that these challenges are going to

cause the Ohio voting tomorrow to break down and become the fiasco they the intervenors claim.

THE COURT: And I guess which Judge DeLott found would -- Judge DeLott found would concur?

MR. BURCHFIELD: Your Honor, I am generally aware of that situation out there. I suspect the record in that case is much different than it is here, and I also suspect that these are issues of state law and so forth that are not before this Court. But the evidence that you have before you is that the Cuyahaga County Deputy Director of Elections is telling you she does not think this is going to cause a breakdown in the system. And she's got the -- she's the one who is going to have to deal with half of the challenges.

THE COURT: All right.

[p.37]

MR. BURCHFIELD: Your Honor, the next point that I would make is that there's no disparate impact that has been shown here. And before I talk about the facts on that, I want to talk for a moment about the law.

In Judge Altsort's opinion in the Greyhound case that we cite in our brief, the E.E.O.C. versus Greyhound, the E.E.O.C. challenged Greyhound's no beard policy. It challenged it on the basis of a large percentage of black males have a disease called pseudo follicus barbae, a facial disease. If they shave, it's irritated and the E.E.O.C. said a no beard policy falls -- has a disparate impact on the black male employees

and, therefore, we prohibit you to enforce. And if you have any questions, I'm -- I'm really happy to answer. You've got a hard job, and I appreciate that.

The Third Circuit reversed, and it said to have a disparate impact, you have to analyze the impact of both on the allegedly disfavored group, and on the alleged favored group. There may be skin diseases or discomforts or other problems that the white male population has that make the no beard policy hurtful to white males as well. So the Court sent it back.

That's the situation we have here, your Honor. Professor Klinker ran his regression analysis, including the following variables. Census data of African Americans within the -- within the precincts, registered voters within the

[p.38]

precincts, and new registrants. And he concludes that -- and challenges to those registrants within those precincts. And he concludes using that data that challenges correlate to increasing African American percentages. But as Mr. Lott did, Dr. Lott did, if you include white males in the regression analysis, in Hamilton County, which is the only county for which we have that data, you find out that there's -- that there's a negative correlation between increasing black percentages in the precincts and the challenges. It's a statistically insignificant negative correlation. And accordingly, it's not evidentially significant. But that demonstrates the problem with Mr. Klinker's analysis.

THE COURT: Well, what about forgetting Mr. Klinker and Dr. Lott, and just looking at one of the particular counties affected, and in which your mail survey remains, which are counties with high minority population.

MR. BURCHFIELD: Well, your Honor, the counties that -- the challenges are statewide. Mr. Klinker chose two counties that have high African American populations, and he ran his regression analysis using only an African American variable. It's a very flawed analysis. You're right, it further takes our eye away from where it should be, because the challenges are statewide, they're not just in Cuyahaga and Hamilton County. And when Mr. Lott ran the analysis statewide, again he found no statistical correlation between the

[p.39]

challenges and race.

Now, I think Mr. Nields must recognize this, because now he's saying: Let's forget about all this fancy regression analysis. Let's just look at the facts that there seems to be a lot of challenges with some of the black precincts. You can't just look at the black precincts standing alone, that's the Greyhound case. You've got to do the regression analysis, and that's what Dr. Lott has done, and it compellingly shows that there's no correlation.

As flawed as it is, Professor Klinker's declaration on its face helps refute his conclusions. If you look at his declaration, supplemental declaration, which I say for the first time this morning, and I -- you know, your

Honor, I would be misleading you if I told you I fully understand all of this. But some things on here are fairly apparent. If you look at page 2 of his supplemental declaration --

THE COURT: Let me hold on a minute. Let me see if I can locate it. Let me call your attention to the chart on page 2, which shows in -- and you would have to be a statistician, and you would have to do a sophisticated regression analysis to do -- to make much sense out of this, but this chart shows the -- in the left or far left hand column, that is the ordering of precincts by the percentage of black population. The second column is the number challenged in precincts falling within thin those percentages. The third is the number of

[p.40]

total registered voters. The fourth is the number of new registrants. The fifth-is the number challenged as a percentage of total voters. And the last column is the percentage challenged as a percentage of new voters. In other words, total challenges divided by the new registrants in those precincts. And what you see here is, if you go down to the most heavily African American precincts, you find that the challenges for most -- where -- for the most new voters, are 19,069 new voters in those most heavily African American precincts. Seventeen point six percent of those had been challenged. But the higher level of challenges are in, as a percentage, are in precincts that have 17 to 80 percent, in fact, the 17.6 percent, or the 90 to 100 percent is not statistically significantly more than the 10 to 20 percent, or the 20 to 30 percent African American.

So on the face of it, this does not demonstrate statistically disparate impact, putting aside what the legal significance of it did, if it did. If you look at page 4, which is the chart for Hamilton County, the only other county in the state that Mr. Klinker looked at, you will see there -- again, that the most registrants, most new registrants are in the -- in the 0 to 10 percent range. The second most registrants are in the 90 to 100 percent range. But that's again -- that's not the highest -- it's not even -- it's the third highest number of percentages of challenges in the 50 to

[p.41]

60 percent minority community. That's one of the lower percentages of challenges. And in other words, there is no statistical correlation as the percentage of African Americans in the precincts goes up, there's no statistical correlation between that fact and the fact that there are more challenges. In fact, as Mr. -- as the regression analysis shows, the result is exactly the opposite.

Now, all of that I think is important to bear in mind because the evidence that the plaintiffs have come forward with for disparate impact is Mr. Klinker. They have never come forward with any evidence to show that the mailing by the Ohio Republican Party or the Republican National Committee, for that matter, that's not part of the challenge. They never came forward with any evidence that it was anything other than race neutral. It was sent to all newly registered voters in the five counties. They have not shown that the selection of the person to challenge was anything other than race neutral. They're challenging all of them, an all the

newly registered voters that have undeliverable mail either from the BOE mailings, or from the Ohio Republican Party's mailings, and they have not shown any mailings, any other suggestion that there's any racial or ethnic motivation here.

So in that sense, there's no disparate impact, and the record on that is white, and I -- we would submit is pretty clear.

[p.42]

Your Honor, I'm coming down the stretch, and I know you're happy to hear that.

THE COURT: Plenty of time.

MR. BURCHFIELD: Let me try to wrap up by .just talking about some of the legal principles here. And I may want to take a moment if I could to speak with my colleague, Mr. Smith, and see if he has anything further he wants me to say.

Justicibility, as I indicated, the legal issues, Miss Malone is not going to be held regardless of what this Court does. She's going to be challenged tomorrow. She seems to be perfectly steered for that, and willing to go through it. She's more committed to vote now than ever before. And so if this Court grants the relief the plaintiff seeks, the intervenor seeks, it's not going to affect her. If you deny it, it's not going to affect her. She's going to be challenged either way by the Board of Elections.

THE COURT: That's assuming there's no disruption in the polling place.

MR. BURCHFIELD: Assuming there's no disruption in the polling places. But, again, Miss Dillingham, the expert on Cuyahaga County where Miss Malone is going to vote, says she's not concerned about disruption. The Chairman of the Democratic Party in Franklin County, he says he's concerned about disruption in his county. That may or may not be true. I happen to think it's not tru,e. But so far as Miss Malone is

[p.43]

concerned, Cuyahaga County's Deputy Director, full-time Deputy Director of the Board of Elections is saying they've got a 180,000 challenges. She's aware of the Ohio Republican Party's intent to challenge. And she says: I'm not worried about this disrupting the process.

Your Honor, I would respectfully submit it would be sheer speculation to disregard her affidavit on that point. She's been there for 14 years.

Compliance with the decree, we've -- I would submit to your Honor, respectfully, that there's been no Republican National Committee involvement in the Ohio Republican Party's challenge. I've gone through the specific e-mails. I've gone through the press conference on October 20th. Indeed, it's telling that the citation that the intervenor has in her brief about complicity in the violation of the consent decree relates to George Wallace's efforts to prevent the registration

of African Americans at the University of Alabama in 1963.

The RNC does not stand in the same position with regard to the Ohio Republican Party, with regard to the University of Alabama in 1963, and it certainly hasn't done anything that is analogous to George Wallace standing in the door when Medger Evers tried to register until Governor Wallace was taken away by the U.S. Marshals.

THE COURT: You got your permits confused.

MR. BURCHFIELD: Your Honor, that's the case they

[p.44]

cited, it's not the case I cited.

THE COURT: I'm not sure Medger Evers is the University -- it was not Medger Evers, he was murdered in Mississippe.

MR. BURCHFIELD: I'm sorry, your Honor. There will be no breakdown there will be no breakdown in the election in Ohio with these challenges. The weight and persuasiveness of credible evidence that we reviewed I think demonstrates that. There is no disparate impact. Even if there were -- even if the Ohio election process were to be disrupted, and that maybe the issue that Judge Delott is focussing on now, whether it's going to disrupt the election process. That's Ohio's concern, that's not the concern of this consent decree, so long as

there' s no disparate impact, and I believe we indicated that there's not one.

And finally, your Honor, to the degree that your Honor believes that there's an adverse effect, that your Honor believes that this activity is within the scope of the consent decree, and that the RNC is involved in it, we have asked for modification of the consent decree so that the activity can go forward based upon a finding that there's no disparate impact, this is racially neutral, that this is in compliance with state law, and that this can be undertaken without serious disruption to the Ohio election process.

THE COURT: Thank you.

[p.45]

MR. BURCHFIELD: May I take a moment?

THE COURT: Just a moment to visit him.

MR. BURCHFIELD: Your Honor, Mr. Smith just wanted me to emphasize, and I believe I have covered this, and it's an important point, that is that the Ohio Republican Party is not a party to the consent decree. And an order restraining the RNC would not, by its nature, restrain the Ohio Republican Party any restraints on the Ohio Republican Party, which is not present before the Court right now, we believe would be inappropriate.

THE COURT: Yeah, unless they are acting in concert with the Republican National Committee.

MR. BURCHFIELD: As we believe the evidence shows that they are not.

THE COURT: All right.

Yes, Mr. Nields, what response do you wish to make?

MR. NIELDS: Thank you, your Honor.

I'm going to make -- I will be brief, but I have responses to several things that have been said, and I'm going to take them more or less in order.

First, Mr. Burchfield was talking about the e-mails that are -- have the subject line voter registration fraud strategy conference calls. And I would note the following about those. They would seem to be relevant to the subject matter of our case.

[p.46]

The 30B(6) witness didn't know anything about them, and had made no inquiries into them. Several affidavits have been provided subsequent to the surfacing of these e-mails in the case. None of them say what they were about or what went on. All we've heard is argument of counsel.

The 30B(6) witness testified that nobody at the RNC would discuss fraud strategy with anybody from the Ohio Republican Party. They did whatever procedures were supposed to be in place to make sure that didn't happen, wouldn't work. This string of e-mails talks

about numerous conference calls on this subject over a period of time.

Second, Mr. Burchfield referred to the other string of e-mails, the one that is headed: Cuyahaga returned list. He said -- he pointed to a -- he pointed to an e-mail at the top of the second page of the exhibit. Your Honor was asking him about it, about Jack Christopher, who turned out to be at the Ohio Republican Party sending e-mails about having an IT person create a match list between the BOE's return mail list and the AB request list. And he said: It was just about press strategy. That was just for the purpose of developing press strategy, not challenges.

You go to one e-mail up above that, on the first page of the exhibit, and it says -- it says: I would think we are less worried about fingerprints if we have decent evidence that fraudulent ballots are being cast. I think the intent is to

[p.47]

take the list and challenge absentee ballots. This whole thing was about developing a plan to challenge. This was just the kind of anti-fraud strategy program and efforts that are covered by the Court's consent decree.

The 30B(6) witness didn't know anything about any of those conversations either. And after they surfaced in the case, the Republican National Committee has filed several affidavits by people at the RNC, none of them address what was going on in those e-mails. Other than commenting on them, or interpreting them,

I'm talking about nobody who participated in them, and no 30B(6) witness talked to any of those people.

Then Mr. Burchfield says that I was incorrect about the sorting for zip codes. I was-- there are zip code clusters in the five lists that -- five county lists that had been developed based on the Ohio Republican Party's mailings. But I wasn't wrong about the sorting for zip codes done by the RNC on its list.

They are sorted by zip codes, in order. That's how they sorted that list. It's -- it's one of the documents that is in front of your Honor. It has the -- this is highly suspicious, and you'll see that's exactly what they have done. They know exactly where these challenge voters live in the city.

They say that this list wasn't used, your Honor. Counsel says this list wasn't used. It may be that they got

[p.48]

other lists that were bigger and longer, and maybe they -- and used those. It doesn't mean that they didn't use the fruits of this work that they did, which told them where the challenged voters would be. And it also taught them that they weren't going to be able to come up with very significant particularized evidence of unqualified voters. That if they were going to have any impact, they were going to have to do major challenges.

Mr. Burchfield said that the Cuyahaga procedures must be different or are different from other procedures.

THE COURT: Well, if you take Miss Dillingham's declaration, that would seem to be true.

MR. NIELDS: Except that she relies on the election law. She doesn't say that there are some special Cuyahaga procedures. She says -- she purports to be relying on the election law, which does not provide for this. And it's inconsistent in the practice, and the practice is inconsistent with the election law, and we submit is forbidden by the election law.

THE COURT: What about the basis -- we say the practice is forbidden. You mean the practice -- election board judge in the flag situation, taking the person aside and questioning?

MR. NIELDS: Treating it as a challenge, requiring that the 10-U form be used, taking the person aside. Exactly

[p.48]

our expert, we've submitted his affidavit, says that is -- there is nothing in the law that requires it, and that is not the procedure to be followed under Ohio election law.

THE COURT: Well, is there a statute or anything to that effect?

MR. NIELDS: He says there is nothing in the law that provides for the kind of procedure that Miss Dillingham is following. And she claims that what she's following is the Ohio election law. That's in her affidavit.

THE COURT: You would suppose that this is the way they do it in Cuyahaga County.

MR. NIELDS: Or it's the way it's sometimes been done somewhere in Cuyahaga County.

THE COURT: Well, she's, what, the -- special on the board. She's -- she ought to know.

MR. NIELDS: She ought to know, yes. But she is stating that what is being done is there by the Ohio election law and it's not. We think she's wrong about that. And, your Honor, maybe more to the point, Judge DeLott, after actually hearing from witnesses --

THE COURT: Including Mr. --

MR. NIELDS: She says the sheer number of people present in and around the polling place, the unprecedented number of neutrally registered voters, and the presence of inexperienced challenges lacking any -- limited by precinct

[p.50]

workers who have never before had to deal with such a situation, creates an extraordinary and potentially disastrous risk of intimidation and delay. Such intimidation and delay are virtually certain, given the complete confusion among designated challengers, and even between the two top officials of Ohio as to how this process will actually work, voter intimidation severely burdens the right to vote, and prevention of such intimidation is a compelling state interest.

THE COURT: But I gather her opinion is based on deprivation of the right to vote, not on a racial impact theory.

MR. NIELDS: Deprivation of the right to vote caused by the confusion and delays, including the disagreement between the election officials, just such as what we've got here in this court, and that is our position as to how our client and other people who live in her precinct will be injured, your Honor. That's how their vote will be denied. And on the issue of disparate impact, I would say just two things, I believe. Maybe it's going to be three.

First of all, the Ohio Republican Party when it did its mailing, picked the five big counties, the five counties with major cities in them. That's where they did their work. Those counties, your Honor, have seventy-three percent of the African American population of Ohio. And they have 34 percent of the white population of Ohio.

[p.51]

THE COURT: Yeah, but the -- we're not necessarily challenging the mailings. And the results of the mailings seem to have been virtually subsumed by the statewide mailings of the State Board.

MR. NIELDS: Virtually, although if you see them, the overwhelming majority of return mails and new registrations are in those five counties. Overwhelming

THE COURT: Yeah, but that just happens to be the case.

MR. NIELDS: Well, it is the case. But it was the RNC who made the decision to take that population and challenge them.

THE COURT: But they could have -- they could do it in any event. It didn't require their mailing, they can just do it right from the state mailing, but the challenges apparently are across the board.

MR. NIELDS: Well, there are two points, your Honor. I think the, technically the point at issue is that within these counties, within these counties, the challenges are going to be, many more of the challenges are going to be made in high African American precincts. Way more. Way more.

THE COURT: How do we know?

MR. NIELDS: We know that because Mr. Klinker has done the analysis, and that's what his analysis has established. It can be seen, it can be understood by a layman simply from the

[p.52]

charts that he is in the very beginning of his affidavit. He is then subjected back to all of the different types of regression analysis that their expert said he should, and every single analysis comes out exactly the same. way. There is a strong correlation between numbers of challenges and percentage of African Americans. And

THE COURT: Yeah. But if -- let's say a neutral body sent out mailings to all the voters in an area, and it resulted in the return, the returns happen to be higher

in African American districts, that's still a -- and they challenged all the return mailings, why isn't that a neutral, neutral action?

MR. NIELDS: Because the effect of the action falls disproportionately on a minority, and under Voting Rights Act Law, and we've cited cases, and under your Honor's consent decree, that is what matters. That is what matters. There is a large number of first time African American voters who are going to go to the polls this year, and for the first time there is a colossal challenge to their right to vote. That is no way for this country to greet huge numbers -- disproportionate numbers of first time African American voters. There will be a discriminatory effect and under Voting Rights Act Law, and your Honor's consent decree, that is unlawful and it triggers the consent decree.

THE COURT: Well, suppose we take the County Board's mailings, their mailings resulted in what they resulted in,

[p.53]

their returns, and the returns happen to be higher in African American districts than in others. Is their flag procedure thereby illegal and discriminatory?

MR. NIELDS: There's no problem, your Honor, with the flag procedure, as we understand it, as we understand the flag procedure. And there would not be a problem with a procedure that took all newly registered voters and treated them the same way, as long as there wasn't a danger that you were going to prevent them from voting. What makes -- what's

happening here perniciously, is that it's being done on a massive scale, without any effort to zero in on who actually is and isn't entitled to vote. It is a massive over broad challenge. That's point one.

And point two is it is going to lead to confusion and chaos in the polling places, just as Judge DeLott found and that chaos and confusion is going to fall desperately on African American precincts and African American communities. That's the problem. That's the problem. If this were five returned mailings, and five challenges, we might look at it but it wouldn't interfere with the right to vote. But 35,000 challenges --

THE COURT: Thirty-seven hundred.

MR. NIELDS: Well, 23,000, whatever's left of it. They started off with it, and the system has been able to kickback only -- if it ever got more, it only got a beginning

[p.54]

of a process. There's now a huge 23,000 over broad category of people, only a tiny percentage of which is properly challengeable. And all of them are going to be challenged and the consequence of that, as Judge DeLott has found, is chaos in the polling places and interference with everyone's right to vote in those polling places. And those polling places are disproportionately African American. And that you can't do. This country just isn't going to do that to those people in those precincts in that way. It violates the law and it violates the Court's consent decree and we ask the Court -- your Honor, to take action.

THE COURT: What would the decree in this case add to Judge DeLott's order? An injunction in this case adds to the effect of Judge DeLott's order.

MR. NIELDS: Well, if Judge DeLott's order is upheld on appeal, I think it would match it. In other words, I think it would not add anything, it wouldn't do any harm, it wouldn't add anything. But that ruling, we don't know what's going to happen on appeal. And this Court has a different party, in a different case, and it's a different issue. The issue is whether the RNC is acting in compliance with the consent decree, it's not the issue that's over there. The outcome maybe the same, but it's a different issue. If we've established that they are about to act contrary to the consent decree, and we believe we've established that, procedurally,

[p.55]

because they didn't ask for approval and substantively because of the impact of what they're doing is going to have, we would submit that it's improper and appropriate for your Honor to enter the relief request.

THE COURT: All right. Well, I'll reserve decision.

MR. NIELDS: I want to say one other thing.

THE COURT: Not for very long.

MR. NIELDS: We have just learned about a list that the RNC developed from mailings very similar to this, made to Florida. It was covered in the Miami Herald just yesterday. And we would request to be permitted to take very brief discovery about that this afternoon.

THE COURT: I think it's a little late.

MR. NIELDS: Okay.

THE COURT: Late in the game.

Mr. Genova.

MR. GENOVA: May I, your Honor, from here, your Honor?

THE COURT: Yeah.

MR. GENOVA: Your Honor, I want to alert the Court that my client, the Democratic National Committee, having had the benefit of the discovery in this proceeding, chooses to join in the application of the movant in this matter. I'm prepared to argue the merits and Mr. Nields has covered most of it. I'll defer to the Court in terms of its schedule, but I want to alert the Court to that fact.

[p.56]

THE COURT: That you're moving to intervene?

MR. NIELDS: It's not even a motion to intervene, we're a party to the litigation. We're a party to the litigation and your Honor had a question as to the role of the party. I want to clarify for the Court clearly, the party has been persuaded by the evidence it believes has been adduced during the course of discovery that there's been a violation of the consent decree to which it is a party, and that for that reason we are joining in the application that's being brought by the movant.

THE COURT: All right.

Mr. Burchfield, what's your comment about that?

MR. BURCHFIELD: Your Honor, I -- obviously the Republican National Committee strongly objects to that. Counsel for the Democratic Party has been here from the outset, and he was here last week. And you asked him why the Democratic National Committee was not involved in this action. And they have waited until literally within less than 24 hours before the election is to go forward to try to pick up the pieces here. We have gone forward with our case and our brief has largely focussed on the lack of any injury to the named plaintiff here. And, accordingly, we think that intervention, that the effort by the Democratic National Committee to enter at this late stage is completely inappropriate and completely unfair. They've been on notice and it should be -- we urge

[p.57]

your Honor not to allow it.

I would also add, your Honor, that there's a procedural difficulty that relates back to the point I raised before, which is the intervenor here and the Democratic Party to the degree that they want to join this proceeding, have not named the Ohio Republican Party as a party to this proceeding. And even if it were to show complicity, my understanding is that the Court can enjoin the Ohio Republican Party, unless they have the opportunity to appear and be heard, and they have not been served, they have not been notified, and they

have not -- certainly not appeared in this matter to protect their interest

THE COURT: All right.

Mr. Nields, what's your thought about that?

MR. NIELDS: Your Honor, the injunction applies to the RNC and its agents and so forth. It is absolutely -- here's what we ask the Court to do. We ask the Court to enter the order directed to the RNC to instruct the poll watchers that are acting as their agents in the poll not to use the list in this election. That's our relief.

THE COURT: Are you asking for instructions to the Ohio Democratic Committee?

MR. NIELDS: Again, I don't think we need it. But we would ask that you instruct the RNC to give the same instruction to the Ohio Republican Committee.

[p.58]

THE COURT: Why wouldn't the Ohio poll workers be even more remote than the Ohio Democratic Committee?

MR. NIELDS: They were recruited, trained, and organized by the RNC, as well as the Ohio Republican Party, and we want the -- RNC to instruct their agents in the field, we want your Honor to make a finding that the consent decree has been violated, and that the list should not be used, and then direct the RNC to send that message to the poll workers in the field.

THE COURT: All right. Well, I'll consider what to do.

MR. BURCHFIELD: Your Honor, if I may, I have one more piece of data, and I hope this is helpful to you. Dr. Lott, who's sitting here in the courtroom, has just now calculated the average number of challenges in precincts that are 80 percent black based upon Professor Kinker's data. And the average number of challenges per precinct that is 80 percent black in Hamilton Country would be 17 challenges during the course of a 12-hour voting day. And the average number of challenges in 80 percent black precinct in Cuyahaga County would 18.8 challenges, about 19 challenges over the course of a 12-hour voting date -- 12- or 13-hour voting day.

THE COURT: What was the first county?

MR. BURCHFIELD: Hamilton County, and the other

[p.59]

County -- that, your Honor, I would respectfully submit is not a threat to break down the election process.

THE COURT: All right.

Yes, Mr. Genova.

MR. GENOVA: Does your Honor wish to hear me on the merits?

THE COURT: I think not. I think it's a little late to come into the matter substantively. And you are a party, but I think that should have been done a little earlier and briefed, and all the rest of it. So I think we'll just go to work on what's been made available so far.

MR. NIELDS: Fine, your Honor.

THE COURT: All right. Why don't we aim to reassemble at 3:30, and it's now one o'clock standard time. All right.

(Recess)

THE COURT: I'll put an opinion on the record, reserving the right to correct any matters in the transcript of a non-substantive nature before it's distributed.

Ebony Malone, a resident of Cleveland, Cuyahaga County, Ohio, moved to intervene in this action for the purpose of enforcing the 1987 consent decree entered into between the plaintiff Democratic National Committee, DNC, and the defendant Republican National Committee, RNC. The Court granted the motion on Thursday, October 28, established an accelerated and abbreviated discovery schedule, and scheduled for Monday,

[p.60]

November 1, a hearing on the intervenor's application for an order enjoining the use of a list of 35,000

registered voters, as a basis for challenging Ohio voters during the November 2nd, 2004 election.

The action in which the consent decree was entered was commenced in 1981. The DNC charged in that action that the RNC and its affiliated state organizations had engaged in a systematic program to discourage or prevent African Americans from voting. Going through the so-called ballot security tests, the defendants assembled a list of registered voters in predominantly African American districts. They sent mailings to the voters emphasizing the criminal penalties for fraudulent voting. They marshaled at the voting places men in uniform and posted signs citing the penalties for illegal voting.

On November 1, 1982, the Court entered a consent order which adopted and attached the settlement agreement between the Republican and Democratic National and State Committees, and dismissed the action. The settlement agreement included among its provision an agreement to "refrain from undertaking any ballot security activities in polling places or election districts where the racial or ethnic composition of such districts is a factor in the decision to conduct or the actual conduct of such activities there, and where a purpose or significant effect of such activities is to deter qualified voters from voting; and the conduct of such activities

[p.61]

voters from voting; and the conduct of such activities disproportionately in or directed toward districts that have a substantial proportion of racial or ethnic

populations shall be considered relevant evidence of the existence of such a factor and purpose.

With respect to challenging the right of any persons to vote, paragraph 3 of the settlement agreement provided: Three: "The party committees agree that they shall, as a first resort, use established statutory procedures or challenging unqualified voters." From time to time, after entry of the consent order, the DNC proceeded under the settlement agreement to challenge alleged violation of the provision.

On July 27th, 1987, the DNC and the RNC executed a settlement stipulation and order of dismissal. It recited that the November 1, 1982 consent order "remains in full force and effect." And further provided: A. "Ballot security" efforts shall mean ballot integrity, ballot security or other efforts to prevent or remedy vote fraud.

B. To the extent permitted by law, in the November 1, 1982 Consent Order, the RNC maybe deploy persons on Election Day to perform normal poll watch functions, so long as such persons do not use or many implement the results of other ballot security effort, unless the other ballot security effort complies with the provisions of the consent order and applicable law and have been so determined by this Court.

[p.62]

C. Except as provided in paragraph B above, the RNC shall not engage in, and shall not assist or participate in, any ballot security program, unless the program, (including the method and timing of any

challenges resulting from the program), as been determined by this Court to comply with the provisions of the consent order and applicable law. Applications by the RNC for determination of ballot security programs by the court shall be made following 20 days notice to the DNC, which notice shall include a description of the program to be undertaken, the purposes to be served, and the reasons why the program complies with the consent order and applicable law.

Until further of the Court, the Court retains jurisdiction to make the determinations set forth above.

It is the intervenor's claim that ballot security programs which is now under way in Ohio violates both the 1982 and 1987 consent orders in that the racial composition of the districts in which it is being conducted is a factor in implementing the program, and the purpose and significant effect of the programs is to deter qualified voters from voting.

The program arose out of the extensive drive in Ohio to registered voters, and the fact that Republican mailings and County Board of Elections mailings to newly registered voters resulted in a remarkably large number of the mailings being

[p.63]

returned as undeliverable. This, and instances of alleged fraudulent registration in Ohio and elsewhere, led Republican Party officials to conclude that there must have been a substantial amount of fraudulent registration. They sought means to prevent persons who are not legally registered from voting.

On or about August l0th, 2004, the RNC mailed a letter welcoming all newly registered voters in Cuyahaga County, Ohio to the political process and urging them to support the Republican ticket. Deputy Chairman of the RNC, Maria Cino, testified that the purpose of the mailing was to welcome newly registered voters, and for the purpose of possible post election legal proceedings. Of the 49,552 letters mailed, approximately 3,353 were returned as undeliverable. The intervenor was not on the mailing list for with letter.

On September 9th, 2004, the Republican Party of Ohio sent letters to newly registered voters in five Ohio counties: Cuyahaga, Franklin, Summit, Hamilton, and Montgomery. These counties were selected because they were the counties with the largest anticipated increases in voter registration. Of all the letters sent out, 15,238 were returned as undeliverable. Intervenor was not on the mailing list to receive this letter. It is the practice of Ohio County Boards of Elections to send informational packages to newly registered voters, informing them of the location of their polling stations and other useful

[p.64]

information. These mailings were sent out in various times during 2004. These mailings were sent without participation of the RNC or the Ohio Republican Committee.

By mid October, 2004, approximately 35,247 of the county board mailings had been returned as undeliverable. Intervener was on the County Board of

Election's mailing list and one or more of her registrations was returned as undeliverable.

By mid October there were widespread reports in the press and elsewhere that thousands of voter irregularities had occurred during the Ohio registration campaign. These irregularities were described in detail in the press clippings and other materials of the RNC submitted with their papers in opposition to the intervenor's motion. There was certainly sufficient data to cause the Republican Party concern and explain vigorous efforts to prevent improperly registered voters from casting ballots on Election Day. Officials of the Ohio Republican Committee, by e-mail and otherwise, kept the RNC informed of the many allegations of registration fraud and the need to do something about it, particularly as the questionable conduct appears to emanate from groups such as ACORN and ACT, which were aggressively supported by the Democratic Party. The RNC was cognitive of the limitations that the 1987 consent decree placed upon its ability to engage in ballot fraud activities. In her Declaration, Caroline

[p.65]

Hunter, Deputy Counsel, at the RNC, described the steps she and Chief Counsel Jill Holtzman Vogel take to educate RNC divisions and State Republican Party Committees about the consent decree, and advising compliance. They also have advised RNC leadership, including Chairman Ed Gillespie, that the RNC cannot initiate, control, direct or fund voter challenger programs such as the one undertaken by the Ohio Republican Committee. Miss Hunter states in a conclusory Way that: "To the best of my knowledge,

after due investigation, the RNC is not initiating, controlling, directing, or funding any programs of voter challenges as described above, including the effort by the Ohio Republican Party to challenge voter registration in Ohio as alleged by intervenors in this matter."

Miss Hunter's information and belief is belied by the evidence developed during the brief period of discovery that was permitted in this case. The RNC mailed the more than 49,000 letters to newly registered voters in Cuyahaga County. The undeliverable mail, however, was returned not to the RNC, but to the Ohio Republican Party. The Ohio Republican Marty made a list of the 3,353 returned letters and sent it to the RNC. There, the RNC analyzed the list for fraud. This is made clear by copies of the list introduced in evidence during Miss Cino's deposition. Now, analysis of the list shows a semblance of 950 names and addresses sorted by zip code. An "info key," had the designations "CF (couldn't find); VR (verified

[p.66]

address); P (photo); B (business); and O (other) . "The list bears a note as it's first page: "OH (standing, no doubt for Ohio), "highly suspicious."

Miss Cino admitted that RNC personnel took the list and tried to developed proof of vote fraud. People were sent to look at or photograph addresses to determine whether a voter lived at the address given. The results of these investigations are recorded in the lists opposite the voter's name under a column headed: "Info/notes." The RNC documents reflect that after

viewing 950 of 2,943 returned mailings. The RNC concluded that 50 to 80 were "suspicious" and 10 were "highly suspicious." This suggests that 60 to 90 of the original 3,353 return mailings raised greater or lesser suspicions of fraud. Even though nominally the Ohio Republican Party sent out the November 9, 2004 letter, of which 15,238 were returned, the Ohio Republican Party prepared a list of the voters where letters were returned and sent to the RNC. The RNC subjected the second list to the same kind of fraud analysis as it subjected the first list. Despite Miss Cino's testimony that RNC's personnel did not discuss fraud in the Ohio Republican Party because of the strictness of the consent decree, the e-mails produced during the Cino deposition disclose continuing discussions of the voter fraud strategies by RNC personnel and Republican officials in Ohio: The RNC seeks to portray these communications as being related to fraud

[p.67]

in general, or other topics unrelated to the voter fraud program being developed in Ohio. The e-mails reflect that the RNC received the return mailing list from the Cuyahaga County Elections Boards' mailing and that there were state and RNC discussions that not only have cross checking requests for absentee ballots against the list of returned mail, but also each communication was headed: "Re: Cuyahaga return list." This and other evidence demonstrates quite clearly coordination between the RNC and the Ohio Republican Party and the Ohio Voter Fraud Program, and the participation and assistance of the RNC. While this was not in and of itself illegal under Ohio or federal law, it was a clear violation of the 1987 consent

decree in that advanced Court approval was not obtained.

The RNC argued that the evidence of voter fraud developed so late in the election process that devising a plan and obtaining approval was not feasible. The results of the August 10th, 2004 mailing might well have permitted timely application for approval, and, if not, surely a good faith belated request for approval would have been addressed. We have here a battle of the experts. The intervenor's expert statistician Professor Klinker found "A strong and statistically significant relationship between the number of challenged voters and the race of the precincts in which they were challenged. In other words, it is substantially more

[p.68]

likely the challenge will occur in precincts that are more heavily black." The RNC's expert Professor Lott finds Professor Klinker's work "extremely primitive and obviously fraud." For the moment I will hold in abeyance resolution of this difference of opinion and proceed with the recital of events.

The concern that a large number of persons had been fraudulently registered, the Ohio Republican Committee assembled a list of approximately 35,000 people. The names, according to the RNC, were derived primarily from the list of persons whose County mailings ad been returned as undeliverable plus some other names that the Ohio Republican Committee added. It is evident that the Republican Party cross-checked their list against the County Board's lists, and

with respect to the five counties to which the September mailing was sent, added the names the party had derived from the County Board lists. The committee planned to challenge all of the voters on the list.

Intervenor is a 20-year old African American citizen of the United States. In her declaration, she stated that in or about November of 2003, she registered to vote in downtown Cleveland for a voter registration drive. At the time she lived at 12700 Shaker Boulevard, apartment 417, Cleveland. She received her voter registration card for that address in about January, 2004. In her declaration, intervenor also states that in or about February, 2004, she moved to her current address at

[p.69]

7908 Euchlid Avenue, apartment 503, Cleveland. In her deposition she corrected this statement and stated that she had moved at a later date. In what must have been a burst of enthusiasm, she completed a voter registration application for her current address, during a voter registration drive in downtown Cleveland about three times between February, 2004, and September, 2004. She states: "I registered to vote three times because I wanted to make sure that I was registered to vote in the November election. I have not received a voter registration card from my current address."

Intervenor's registration excesses are reflected in the record of the Cuyahaga Board of Educations. According to the Board's electronic database, first, the board received a registration application for intervenor

on October 8th, 2003, listing her address at 7829 Euchlid Avenue, apartment 503, in Cleveland, 7908 Euchlid Avenue, apartment 503, her present address. I did not list 12700 Shaker Boulevard, apartment 417, Cleveland, where she had stated she lived during the fall of 2003. Either the Board or intervenor made an error in recording the street number. In any event, the Board mailed intervenor a voter registration card which she acknowledges receiving. Second, on June 4th, 2004, the Board received a registration application for intervener which listed her address as 12700 Shaker Boulevard, apartment 417, Cleveland, the address which intervenor states in her declaration she

[p.70]

moved in or about February of 2004. "The Board sent intervenor a registration card which the intervenor denies having received."

On August 3rd, 2004, the Board received a registration application from intervenor which listed her address as 7829 Euchlid Avenue, apartment 503, Cleveland, not 7908 Euchlid Avenue, apartment 503, her present address. On August 10th, 2004, the Board received a registration application for intervenor listing her address as 12700 Shaker Boulevard, apartment 417, Cleveland, once again, the address in which intervenor states she moved on or about February, 2004, or on such later date as she mentioned in her deposition. The Board accepted the registration and sent intervenor a voter registration card to the Shaker Boulevard address.

On October 8th, 2004, the Board received one of the above referenced voter registration cards back in the mail, as undeliverable. Following established procedures, the Board listed intervenor's registration as "inactive" for the reason "Undelivered mail." Intervenor's registration is "flagged for questioning when she votes."

In October, 2004, intervenor learned that she was on the list of 35,000 names that the Republican Party challenged. Because she was not included in the August 10th and September 9th Republican Party mailings, her name was undoubtedly derived from the County Board mailings. Though further refinement of

[p.71]

the list of 35,000 has now been reduced to approximately 27,000 challenges. Ohio revised code Section 3503.24 sets forth a procedure by which a challenge to a voter's eligibility maybe made.

"Any qualified elector of the county may challenge the right to vote of any registered elector not later than 11 days prior to the election. Upon receiving such challenge, the elector must set a time and date for a hearing before the County Board of Elections and send notice to the challenged voter. The notice must be sent by first class mail no later than three days before the day of any scheduled hearing, and the hearing must be held no later than two days prior to any election. Finally, if the Board decides that the voter is in fact not entitled to have his or her name on the voter registration list, the Board must remove that person's name from the list."

The Ohio Republican Committee decided to challenge the right to vote of the persons on their list. On October 22nd, it filed challenges the eligibility of approximately 35,000 Ohio newly registered voters in 65 counties. This list, as noted, has since been reduced to about 27,000 names. The challenges alleged that the voters were ineligible to vote because a non-forwardable mailing list that was sent to each of the voters from the Ohio Republican Committee was returned demonstrating that these voters intended to vote in a precinct

[p.72]

in which they were eligible to vote. The Republican Party now asserts that the list was derived previously from the County Board's list of return mailings with some additional names of their own.

Compliance with Section 3503.24 would be virtually impossible in most counties. Between October 22nd, when the challenges were filed, and the November 2nd election, the counties had to set a time and date for a hearing before the County Board of Elections, and send notice to the challenged voters no later than three days before the date of any hearing. The hearing had to be held no later than two days prior to November 2nd. The only address to which the notice could be sent was the address from which a prior notice had been returned as undeliverable. As recited in an October 27th, 2004 Order of the United States District Court for the Southern District of Ohio in Amy Miller vs. J. Kenneth Blackwell, case number C-1-04-735, the Ohio counties attempted to comply with the statute. As of the date of the District Court's order, the counties had sent notice

or attempted to send notice to between 14 or 17,000 challenged voters within their respective counties. Advising them the voter registrations had been challenged, and that a hearing would be held on their eligibility pursuant to the Ohio code. The hearings had been set for various times, ranging from the afternoon of October 27, 2004, at 4:30p.m., to Saturday, October 30th at 8 a.m.

[p.73]

In the Miller case, two voters, and the Ohio Democratic Party sued the Ohio Secretary of State and the County Boards of Election, and the Board's members of Lawrence, Scioto, Cuyahaga, Franklin, Medina and Trumbell Counties. The plaintiffs, who were registered voters residing in the precincts in which they were registered, and against whom a challenge had been filed, alleged that both the timing and the manner in which the defendants intended to hearings regarding the preelection challenges to the plaintiff voters, voter registration, violated the National Voter Registration Act and the Due Process Clause of the United States Constitution.

On October 27th, the District Court issued a temporary restraining order enjoining the defendant County Boards of Elections from issuing notices or conducting hearings regarding the preelection challenges to voter eligibility pending the Court's decision on the plaintiff's application for a preliminary injunction.

On October 28th, the Ohio Attorney General and the Franklin County Board of Elections appealed a

temporary restraining order seeking to proceed with the hearings on October 29th, and through the weekend. The Court of Appeals for the Sixth Circuit denied a request to stay the District Court's order. And after the temporary restraining order was issued preventing the Republican Party from challenging persons on the list through the hearing process, the party officials

[p.74]

announced that they would, through their challengers, challenge the 35,000 listed persons directly at the polls as they sought to vote. The intervenor contends that the challenging process contemplated by the Republican Party would totally disrupt voting at the polling places, preventing or discouraging voters from voting. This would affect not only voters on the list but would affect all other voters who would have to wait while the challenges are resolved. Some might not be able to remain at the polling places and not be able to vote at all. Many might be deterred from even trying to vote when faced with such an oppressive situation.

To complicate the situation, on Friday, October 29th, J. Kenneth Blackwell, Ohio's Secretary of State, issued an instruction to the State's Attorney General to recommend to the Federal Court that as a resolution of the matters pending before it, that all challenges of all parties be excluded in polling places throughout the state. Each Attorney General rejected the Secretary of State's recommendation. While the hearing on the intervenor's motion in the present case was under way, the Court and counsel were advised that the Southern District of Ohio granted the motion of the plaintiffs in

that case for an order enjoining all defendants in that case from allowing any challengers other than election judges and other electors into the polling places throughout the State of Ohio on Election Day. Spencer against Blackwell, case number

[p.75]

C-1-04-738, November 1, 2004. The Court held that the presence of challengers in the circumstances would impose a severe burden on the right to vote of individual voters, outweighing interest of the state and preventing election fraud. The challenge procedures which would have the effect are described fully in that case, and it would only be touched upon in this opinion. The parties have each submitted the declarations of knowledgeable persons describing the voting process and evaluating the effect of permitting the Republican Party of challenges to be made. Intervenor's declarants are: Timothy Burke, Chair of the Hamilton County Board of Elections, and Co-Chair of the Hamilton Country Democratic Party; and William Anthony, Chairman of the Franklin County Board of Elections. The RNC declarants are: Gwen Dillingham, Deputy Director of the Board of Education; and Jeff Matthews, Director of the Board of Elections in Cuyahaga County; and Jeff Matthews, Director of the Board of Elections of Stark County. Each declarant sets forth his or her understanding of the procedures established under Ohio law. They disagree about some of the procedures. Section 503.07 of the Election Code provides that anyone who will be 18 years old or more the next ensuing November election, who is a citizen of the United States, and who, if he continues to reside in the precinct to the next election, will at that time have

fulfilled the requirements as to length of residence to qualify him as an elector may

[p.76]

register in that precinct. No person is entitled to vote who is not registered nor may any person vote in a precinct in which he has not resided for at least 30 days prior to the election. Section 3503.06. The deadline for registration applications is 30 days preceding an election i.e. October 4th of this year. Change of address applications are permitted according to the same procedures and deadlines as our registration application.

County Boards o£ Elections are required to review voter applications. Section 3503.12. If the Board receives an application and are satisfied with the truth of it, the Board will notify the applicant of his registration and the precinct in which he is to vote. Section 3503.19. The Board sends the applicant a registration card at the address listed in the voter application card. If the card is returned as undeliverable, the registration is "flagged." If the voter thereafter appears at the polling locations where he is registered to vote, the voter's registration is automatically challenged by the Board booth workers at the polling place. The board worker will ask the person where he or she resides and will examine the Board's registration records to determine if the Board's records match the person's current residence. Miss Dillingham recites that if the address matches and the voter is in the proper precinct, then the voter will be required to complete, sign and submit a 10-U form confirming

[p.77]

that the voter's address has not changed. The voter will then be allowed to vote. Mr. Anthony recites that if the voter's statement of address corresponds to the entry in the signature book, the matter ends and the voter signs the book and casts a registered ballot. If the address does not match, then the Board member will attempt to locate the proper precinct in which the voter must vote and will direct him there. The voter will then be allowed to vote in the proper precinct using a provisional ballot. The provisional ballot will require the voter to provide his or her prior registered address and his or her current address. The voter will also be required to sign the provisional ballot.

According to Miss Dillingham, as of October 30th, there were 180,221 separate registrations in Cuyahaga County alone that are flagged for challenges as "inactive." She estimates that 90 to 95 percent of them are flagged because mail sent by the Board to the voter's last known address were returned as undeliverable. If any of these 180,221, persons attempt to vote on November 2nd, their registration will be challenged by booth workers as required by the Election Code. The procedure described above will be followed. Addressing the potential problems of the Republican challenge list and the flag registration, Miss Dillingham states, "based on my many years' experience in monitoring and administering elections, and in my understanding of the allegations made by the

[p.78]

intervener, I do not expect any abnormal disruption of the election of November 2nd, 2004.

Based on my past experience, despite the large numbers of registration flags for challenge, few of those registrants actually show up to vote on Election Day. I am confident that election officials in Cuyahaga County can and will efficiently process voters on Election Day despite the large number of registrants flagged for challenge."

Referring to the intervener, Miss Dillingham notes that she is flagged for challenge if she attempts to vote in the precinct where she is currently registered; namely, her Shaker Boulevard address. If she attempts to vote in any other district, she will be able to vote only by filling out a provisional ballot. The automatic challenge to intervenor's registration by the Board will occur whether or not the Republican Party challenges her.

Timothy Burke, Chairman of the Hamilton County Board of Elections foresees a different picture. He described four poll workers or judges are assigned each polling place hired by the Board of Elections, two Democrats and two Republicans. The Presiding Judge is in charge and is selected by the political party of the candidate for governor who carried this precinct in the previous election. The political parties can designate challenges to be physically present at each polling place whom can challenge voters for any six reasons, including that the

[p.79]

perspective voter is not a resident of the precinct. If a challenge is made as to residency which is the relevant challenge category in this case, the Presiding Judge employs the form 10-U entitled: "The affidavit-Oath Examinations of Person Challenged."

Under Secretary of State instructions, Presiding Judge removes the voter and the challenger from the line, takes them 10 feet away, and administers to the challenged voter the relevant questions and has him execute the 10-U form.

If the challenged voter answers the questions in the 10-U Form in a manner indicating that he is qualified to vote, the Presiding Judge alone determines that the person is eligible and allows the person to cast the ballot. If the person is on this registration list, he will cast a regular ballot. If not, he vote on a provisional ballot.

If the voter does not answer the questions contained in the 10-U form, or if the Presiding Judge finds that the answers indicate that he is not qualified to vote in the precinct, or if the challenged voter does not sign the oath, then all four judges must rule on the challenge. If the voter is challenged on the ground that he no longer lives in the precinct, then the voter is entitled to vote in the precinct where he now lives, and the Presiding Judge will so inform him.

Burke describes the procedures which would be followed if the voters were challenged based on impersonating a voter,

[p.80]

but that situation is not likely to occur in the case of the Republican Party proposed challenges, which are based on undelivered mail and these residency considerations. Burke sees a likelihood of confusion and disruption in the polling places by reason of the fact that, "to my memory, neither of the parties have ever used challenges in the polling place to challenge voters," and further, "that none of our Presiding Judges have ever had to administer a 10-U form in the past, or facilitate the resolution of challenges by challengers."

Burke sees disruption and delay resulting from Presiding Judges being called away to administer the execution of 10-U forms or, in other situations, all four judges being called upon in cases where the challenged voter doesn't sign the 10-U form. In a word, "repeated challenges made at a polling place will accordingly have the effect of slowing down the processing of all voters, even those who are not themselves challenged. This slowing down of the process will lead to long lines at the polling places, lines that will discourage many voters from voting."

Burke observes that this challenge process will intimidate voters. The presence of challengers, the fact that challenged voters are taken aside and questioned in the context of all the news reports of fraud will discourage voters. The oath that is administered in the 10-U form with its threat of the conviction of the felony of the fifth degree, and the case

[p.81]

of falsehood will scare voter. All of this, according to Burke, will have a heightened impact on African Americans.

Burke's analysis was adopted in today's opinion in Spencer vs. Blackwell, which describes the potential burden and the sources of the burden in considerable detail.

Now, the decision in this case, the Court has jurisdiction to enforce its Consent Decree issued in a civil rights case brought pursuant to 42 U.S.C. Section 1971, 1973, 1983, and 1985. The RNC contends that the intervenor's claims are not justiciable because the Court cannot give her effective relief.. Article III of the United States Constitution limits the federal judicial power to cases that or controversies. A case or controversy requires, first, the injury of fact. Second, a casual relationship between the injury and the challenged conduct. And third, a likelihood that the injury will be reduced by a favorable decision. A plaintiff must have standing to pursue their case. The Lujan against Defenders of Wildlife, 504 U.S. 555, 560 - 61, 1992. The RNC contends that nothing is going to alter the fact that intervenor will be challenged come Election Day. Because she is flagged, the board workers will challenge her, and she will have to proceed to the same procedure that would follow the challenge of a challenger, that is the taking a seat and completing the 10V form. Her right to vote is no way impaired. This is a question of whether the simple existence of a flag requires a

[p.82]

voter to go through the 10-U procedure, or whether she answers the board member that she resides at the present district, she resides at the precinct, she'll be allowed to vote that morning.

The more serious injury the intervenor would suffer from the multiple challenges, the disruption of the voting process, from which she, like the rest of the voters, would suffer.

There is a casual relationship between this disruption, and the challenged conduct, and the Court has a means to prevent it. This potential disruption was the basis of today's decision in Spencer against Blackwell, therefore has standing.

I conclude that the RNC has violated the consent decree. It engaged in a ballot security effort as described above, even though the Ohio Democratic Committee was out front in the implementation of the challenging program, as described above from at least the time of the RNC, August 10th, 2004 letter until recent days the RNC participated with the Ohio Republican Committee in the devising and implementation of the program.

Procedurally, the RNC is in clear violation inasmuch as it failed to obtain the vast determination that the ballot security program complies with the provisions of the consent decree. Further, the program violates the substantive

[p.83]

provisions of the decree. It undertook ballot security activities in polling places or election districts where the racial compositions in such districts in the decision to conduct, or the actual conduct of such activities there, and where a purpose or significant effect of such activities is to deter qualified voters vote. The RNC's original mailing in the Ohio State Committee's September 9th mailing were directed to counties having the State's major cities and largest concentration of minority voters. There is a large portion of transient voters moving, like intervenor, from apartment to apartment.

The RNC's organization of names on the first list by zip code had knowledge of the significance of the areas in which the voters lived. In fact, the evidence shows that many more mailings to newly registered voters were returned to precincts. They were predominantly minorities from predominantly White precincts.

This makes it fair more likely that the disruptive effects of the mass challenging the Republican party imposed to undertake would take effect in precincts where minority voters predominate, interfering with and discouraging voters from voting in those districts.

Having reached this conclusion that the RNC has violated the consent decree procedurally and subsequently, it is propose to grant the relief the intervenor seeks, and

[p.84]

enjoining the RNC from using the list, which it assembled in Ohio from challenging voters and to order the RNC to direct challenges not to use that list or any portion of it to challenge voters in the polls during the November election.

Intervenor is faced with irreparable harm and that her constitutional right to vote is threatened. Intervenor shows success on the merits. The relief entered does not prevent the RNC or public authorities from pursuing voter fraud by other means. The return of mail does not implicate fraud. There could be many reasons for that to happen, the RNC's study of the returns from its August l0th mailing showed a relatively small number of returns which it found suspicious and only ten that were going to be highly suspicious.

The public interest is always served by encouraging people to vote, and to prevent violations of a party's constitutional right to vote.

And an appropriate order will be entered. Anybody have a form of order? You may want one for appeal purposes.

MR. BURCHFIELD: We do, your Honor.

THE COURT: You need an order before you file appeal.

MR. BURCHFIELD: We do, your Honor.

MR. NIELDS: Your Honor, I apologize, we do not have a form of order in hand. We can prepare one as rapidly as possible.

THE COURT: I can go type one, if you two want to sit

[p.85]

down and agree on one, I'll type it up. It will be a very simple order.

MR. NIELDS: Your Honor --

MR. BURCHFIELD: What I would envision is something fairly short and quick, we do not have much time.

THE COURT: They'll leave the courthouse before you know it, my secretary will leave the courthouse.

MR. NIELDS: I think we're on a deadline.

(Matter concluded)

* * * *

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4186

[Filed November 1, 2004]

Democratic National Committee, et al.	)
v.	)
Republican National Committee, et al.	)
Ebony Malone, Intervenor	)
Republican National Committee, Appellant	)

BEFORE: SLOVITER, NYGAARD, AND FISHER, Circuit Judges.

OPINION

Submitted on Motion for Stay Pending Appeal

Sloviter, J.,

This matter is before us on the emergency motion of Republican National Committee (RNC) for Stay pending Appeal and for expedited Consideration. It appeals from the Order of the District Court, Judge Dickinson R. Debevoise of the District of New Jersey, entered late this afternoon following a hearing today, which enjoined the RNC and its "agents, officers, and employees," "from using for challenging purposes on November 2, 2004 a list originally of 35,000 names prepared for that purpose by the Republican Party in the State of Ohio," and further providing that the RNC "shall instruct its challengers in the State of Ohio not to use such list or any part thereof for challenging purposes at the November 2, 2004, election."

The RNC claims that the Intervenor Ebony Malone, who initiated this matter before the District Court, is subject to challenge because of irregularities in her registration "which will cause Board of Election officials to challenge her registration, regardless whether the RNC or the Ohio Republican Party (ORP) makes such a challenge." The Motion states that Malone's claim is non-justiciable because the relief provides her no effective redress in that the County Board of Elections can officially challenge Malone's vote by operation of Ohio law because official correspondence to her was returned "undeliverable." The RNC further argues that it has not violated the Consent Decrees which are the basis for this action.

In 1981 the Democratic National Committee filed suit against the RNC and the New Jersey Republican State Committee alleging that they violated the

Fourteenth and *Fifteenth Amendments*, inter alia, which was resolved by a consent decree entered into in 1982 which provided that the RNC will refrain from undertaking any ballot security activities in polling places or elections districts where the racial or ethnic composition of such districts is a factor in the decision to conduct, or the actual conduct of, such activities there and where a purpose or significant effect of such activities is to deter qualified voters from voting; and the conduct of such activities disproportionately is directed toward districts that have a substantial proportion of racial or ethnic populations shall be considered relevant evidence of the existence of such a factor and purpose.

The scenario set forth above was repeated in 1986 when the DNC brought a new action alleging RNC's breach of the 1982 Consent Decree and once again this action was settled by a new Consent Decree entered in 1987. The RNC states that the 1982 Consent Order remains in full force and effect, but the 1987 Consent Decree allows the RNC to deploy persons on election day to perform normal poll watch functions so long as such persons do not use or implement the results of any other ballot security effort. In the motion before us, the RNC emphasizes that the 1987 Consent Order restricts the RNC, but not any state party, from participating in any ballot security program unless it had been determined by the court to comply with the provisions of the Consent Order and applicable law.

Malone and other proposed intervenors brought suit against the RNC alleging they are newly registered minority voters in Ohio who learned that their names are on a 35,000 person list of challenged voters, which

she claims appears to have been compiled and used in violation of the Consent Decrees referred to above. They claimed that the fact that their names are on the challenge list places in jeopardy their right to vote on election day. The District Court scheduled an evidentiary hearing for this morning, November 1, 2004. Although the Democratic National Committee does not appear on Malone's original motion, it appeared at this morning's hearing and in support of Malone.

Following the hearing, the District Court entered an order rejecting the RNC's claim that Malone's claims are not justiciable, stating:

> The RNC contends that nothing is going to alter the fact that intervenor will be challenged come Election Day. Because she is flagged, the board workers will challenge her, and she will have to proceed to the same procedure that would follow the challenge of a challenger, that is the taking a seat and completing the 10U form. Her right to vote is no way impaired. This is a question of whether the simple existence of a flag requires a voter to go through the 10U procedure, or whether she answers the board member that she resides at the present district, she resides at the precinct, she'll be allowed to vote that morning.
>
> The more serious injury the intervenor would suffer [is] from the multiple challenges, the disruption of the voting process, from which she, [like] the rest of the voters, would suffer.

> There is a causal relationship between this disruption, and the challenged conduct, and the Court has a means to prevent it. This potential disruption was the basis of today's decision in Spencer v. Blackwell, [and the intervenor] therefore has standing.

The District Court then proceeded to summarize its findings, stating:

> I conclude that the RNC has violated the consent decree. It engaged in a valid security effort as described above, even though the Ohio Democratic Committee was out front in the implementation of the challenging program, as described above from at least the time of the RNC, August 10th, 2004 letter until recent days the RNC participated with the Ohio Republican Committee in the devising and implementation of the program.
>
> Procedurally, the RNC is in clear violation inasmuch as it failed to obtain the vast determination that the ballot security program complies with the provisions of the consent decree. Further, the program violates the substantive provisions of the decree. It undertook valid security activities in polling places or election districts where the racial composition in such districts in the decision to conduct, or the actual conduct of such activities there, and where a purpose or significant effect of such activities is to deter qualified voters vote. The RNC's original mailing in the Ohio State Committee's September 9th mailing were

> directed to the counties having the State's major cities and largest concentration of minority voters. There is a large portion of transient voters moving, like intervenor, from apartment to apartment.

The RNC's organization of names on the first list by zip code had knowledge of the significance of the areas in which the voters lived. In fact, the evidence shows that many more mailings to newly registered voters were returned to precincts. They were predominantly minorities from predominantly white precincts.

> This makes it fare more likely that the disruptive effects of the mass challenging the Republican party imposed to undertake would take effect in precincts where minority voters predominate, interfering with and discouraging voters from voting in those districts.

> Having reached this conclusion that the RNC has violated the consent decree procedurally and subsequently, it is proposed to grant the relief the intervenor seeks, and enjoining the RNC from using the list, which it assembled in Ohio from challenging voters and to order the RNC to direct challenges not to use that list or any portion of it to challenge voters in the poles during the November election.

> Intervenor is faced with irreparable harm and that her constitutional right to vote is threatened. Intervenor shows success on the merits. The relief entered does not prevent the RNC or public authorities from pursuing voter

> fraud by other means. The return of mail does not implicate fraud. There could be many reasons for that to happen, the RNC's study of the returns from its August 10th mailing showed a relatively small number of returns which it found suspicious and only ten that were going to be highly suspicious.
>
> The public interest is always served by encouraging people to vote, and to prevent violations of a party's constitutional right to vote.

The RNC concedes that we must review the decision of the District Court for abuse of discretion. After consideration of the record that was before the District Court we believe there is ample support for the factual findings of the District Court. For example, the emails between the RNC and Michael Magan for the Ohio Republican Party, Exhibit 1, show collaboration and cooperation between the RNC and the ORP. Were time not of the essence, we would set forth more evidence in the record, but this opinion is drafted with less than eight hours before the opening of the polls in Ohio. Moreover, we feel obliged to note that this opinion falls far short of the quality of opinions for which this court is noted. Nonetheless, we are satisfied that the District Court did not commit an error of law or abuse its discretion. Accordingly, the RNC's motion for a stay pending appeal is denied.

DISSENT

Fisher, J., dissenting.

I dissent and would grant the Republican National Committee's ("RNC") motion for a stay pending appeal because I believe that Intervenor Ebony Malone lacks standing to bring her claims.

We have summarized the constitutional standing requirements as follows:

> (1) the plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Storino v. Borough of Point Pleasant Beach, 322 F.3d 293, 296 (3d Cir. 2003) (citations omitted). "Plaintiffs bear the burden of proving standing." *Id.* (citations omitted).

In her declaration, Ms. Malone stated that she was "worried" that she would be "unable to vote on Election Day" and that she was "concerned that challenges made to voters at my precinct may slow down the

electoral process and discourage other voters from casting a ballot." Subsequently, however, Ms. Malone testified at her deposition that she believed she would be able to vote as a result of efforts undertaken on her behalf by ACORN. She also testified at her deposition that she would "stay and vote, no matter how long it takes[.]" In other words, any delay or discouragement caused by any challenges to voters will not prevent Ms. Malone from exercising her right to vote. Thus, Ms. Malone's own testimony undermines her case for standing - she admits that she will be able to, and will in fact, vote today.

I also agree with the RNC that, at least insofar as Ms. Malone alleges that a challenge to her voting qualifications will impair her voting rights, this is unredressable in light of the apparent certainty that she will be challenged by election officials entirely independent of the RNC and its challenge list. Indeed, if the Sixth Circuit preserves a decision from the District Court for the Southern District of Ohio just issued yesterday, all "private" challenges will be outlawed in Ohio, conclusively mooting at least this dimension of Ms. Malone's alleged injury.

Accordingly, I dissent.

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4186

Decided November 2, 2004
Filed November 2, 2004

Democratic National Committee, et al.	)
	)
v.	)
	)
Republican National Committee, et al.	)
	)
Ebony Malone, Intervenor	)
	)
Republican National Committee, Appellant	)

PRESENT: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES, SMITH, FISHER AND VAN ANTWERPEN, Circuit Judges.

OPINION

SUR PETITION FOR REHEARING EN BANC

The petition for rehearing filed by the Republican National Committee having been submitted to all available circuit judges in active service, and a majority of those judges having voted to grant rehearing en banc, it is hereby

ORDERED that rehearing en banc is granted, the opinion and order of this Court dated November 1, 2004 is vacated and the November 1, 2004 order of Judge Debevoise is hereby stayed.

By the Court,

/s/Anthony J. Scirica
Chief Judge

Dated: November 2, 2004

APPENDIX L

Supreme Court of the United States

No. 04A378

[Filed November 2, 2004]

DEMOCRATIC NATIONAL COMMITTEE et al.,	)
v.	)
REPUBLICAN NATIONAL COMMITTEE et al.,	)
Ebony Malone, Intervenor.	)

Justice SOUTER, Circuit Justice.

The individual Ohio voter who intervened in this case claimed that the Republican National Committee threatened to violate a consent decree, by challenging Ohio voters named on a list of 35,000 individual names compiled by Republican officials in Ohio in cooperation with the Republican National Committee. She alleged that her right to vote and that of other minority voters would be jeopardized by the anticipated challenges from the Republican side. Yesterday, the District Court found such a threatened violation and issued the

injunction requested, a stay of which was denied by a divided panel of the Court of Appeals for the Third Circuit late last night. Following the action that was subject to Justice STEVENS's opinion in chambers earlier today in *Spencer v. Pugh*, *ante*, 543 U.S. 1301, 125 S.Ct. 305, 160 L.Ed.2d 213, 2004 WL 2434710 (2004), the Republican National Committee moved for rehearing or rehearing en banc, the latter of which was granted this afternoon by order staying the injunction. No. 04-4186, 2004 U.S.App.LEXIS 22689 (C.A.3, Nov. 2, 2004). The intervenor alone has now applied to me in my capacity as Circuit Justice for the Third Circuit for a stay of the en banc order itself, which would effectively reinstate the injunction. Since making the application, she has filed a further pleading disclosing that she has already voted without challenge. Under the circumstances, I have decided against referring the application to the full Court and now deny it.

It is so ordered.

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4186

[Filed December 20, 2004]

DEMOCRATIC NATIONAL COMMITTEE, et al.	)
v.	)
REPUBLICAN NATIONAL COMMITTEE, et al.	)
EBONY MALONE, Intervenor	)
REPUBLICAN NATIONAL COMMITTEE, Appellant	)

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 81-cv-3876
(Honorable Dickinson R. Debevoise)

PRESENT: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES, SMITH, FISHER and VAN ANTWERPEN, *Circuit Judges*

O R D E R

On November 1, 2004, the District Court entered a preliminary injunction with respect to an action filed pertaining to the November 2, 2004 election. On November 2, 2004, an *en banc* Court stayed the District Court's Order.

During the pendency of this appeal, however, the Intervenor voted in the November 2, 2004 election without challenge. For this reason, the foregoing appeal is dismissed as moot and the November 1, 2004 Order of the District Court is vacated. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

This case is remanded to the District Court with directions to consider whether there remain open issues to be addressed or whether the underlying action is also moot.

By the Court,

/s/ Anthony J. Scirica
Chief Judge

Dated: December 20, 2004
nmb/cc: Bobby R. Burchfield, Esq.
Angelo J. Genova, Esq.
John W. Nields, Jr., Esq.

APPENDIX N

United States District Court
District of New Jersey

Civil Action No. 81-3876

Judge Dickinson R. Debevoise

[Filed February 3, 2005]

Democratic National Committee, *et al.*, *Plaintiffs*,	)
v.	)
Republican National Committee, *et al.*, *Defendants*.	)

JOINT STIPULATION OF DISMISSAL

In accordance with (1) the Order issued on December 20, 2004 by the *en banc* U.S. Court of Appeals for the Third Circuit, (2) this Court's letter to counsel dated December 27, 2004, and (3) the decision of the United States Supreme Court in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), Intervenor Ebony Malone, plaintiff Democratic National Committee ("DNC"), and defendant Republican

National Committee ("RNC"), hereby stipulate and agree that the pending action initiated by Intervenor against the RNC should be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii). *See Munsingwear*, 340 U.S. at 39. The parties hereto further agree that this Joint Stipulation of Dismissal, and its entry by the Court, shall not prejudice or affect the right of the DNC or the RNC to take future action in connection with the Consent Decrees entered by the Court in the above-captioned matter.

January 31, 2005

Respectfully submitted,

/s/John W. Nields, Jr.
John W. Nields, Jr.
Patricia G. Butler
Howrey Simon Arnold & White LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Counsel for Intervenor Ebony Malone

/s/Angelo Genova
Angelo Genova
Genova, Burns & Verona
Eisenhower Plaza II
Suite 2575
354 Eisenhower Parkway
Livingston, NJ 07039

Counsel for Plaintiff
Democratic National Committee

/s/Jason A. Levine
Bobby R. Burchfield
Jason A. Levine
McDermott Will & Emery LLP
600 Thirteenth. Street, N.W.
Washington, D.C. 20005-3096
Telephone: (202) 756-8000
Facsimile: (202) 756-8087

Counsel for Defendant
Republican National Committee

SO ORDERED: Dickinson R. Debevoise

DATE: February 3, 2005

APPENDIX O

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
MINUTES OF PROCEEDINGS

AMENDED MINUTES OF PROCEEDINGS

NEWARK **DATE:** NOVEMBER 3, 2008

JUDGE: DICKINSON R. DEBEVOISE
COURT REPORTER: Mollie Giordano
DEPUTY CLERK: Ellen McMurray
Civ # 81-3876 (DRD)

TITLE OF CASE: Democratic Nat'l Comm. v. Republic Nat'l Comm.

APPEARANCES:

Angelo J. Genova, Esq for plaintiff
Paul Josephson, Esq for plaintiff
Mark D. Sheridan, Esq for defendant

NATURE OF PROCEEDING: OTSC

Hearing on plaintiff's application for a preliminary injunction.
Court ordered that affidavit be submitted.

Recess from 1:00 to 3:00 p.m.

Continued hearing on preliminary injunction.
Ordered plaintiff's application denied.

Hearing adjourned at 4:30 p.m.

Time Commenced 12:00 p.m.
Time Adjourned: 4:30 p.m.

Ellen McMurray
Deputy Clerk

APPENDIX P

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

July 17, 2012

Mr. Bobby R. Burchfield
McDermott Will & Emery LLP
600 Thirteenth Street, NW
Washington, DC 20005

Re: Republican National Committee, et al
v. Democratic National Committee, et al.
Application No. 12A53

Dear Mr. Burchfield:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Alito, who on July 17, 2012 extended the time to and including September 24, 2012.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by

/s/Sandy Spagnolo
Sandy Spagnolo
Case Analyst

[*Notification List omitted in printing of this appendix*]

* * *