**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

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| DEMOCRATIC NATIONAL COMMITTEE, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>REPUBLICAN NATIONAL COMMITTEE, et al.,<br><br>Defendants. | **Civil Action No: 81-3876 (DRD)** |

# POST-HEARING BRIEF ON BEHALF OF PLAINTIFF DEMOCRATIC NATIONAL COMMITTEE IN OPPOSITION TO DEFENDANT REPUBLIC NATIONAL COMMITTEE'S MOTION TO VACATE OR MODIFY THE CONSENT DECREE

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## PRELIMINARY STATEMENT

Defendant Republican National Committee (hereinafter "Defendant" or "RNC") requested an evidentiary hearing before this Court to present evidence to support its claim that the consent orders entered by this Court in 1982 and 1987 (hereinafter the "1982 Order" and "1987 Order" respectively, and collectively the "Decree" or "Consent Decree") should be vacated.[1] To support vacatur of the Consent Decree under FED. R. CIV. P. 60(b), the RNC had to prove by clear and convincing evidence either: (1) a change in the factual circumstances; (2) a change in the law that legalizes what the decree was designed to prevent; (3) unforeseen obstacles to implementation of the decree; or (4) that continued enforcement of the decree would be detrimental to the public interest. At the outset of the two-day hearing, Defendant promised to establish significant changes in the legal and factual circumstances relevant to the Consent Decree, and to demonstrate that the Decree had become onerous, unworkable and inconsistent with "public policy" despite having functioned effectively for 27 years. Defendant failed to deliver on that promise and, consequently, has failed to meet the heightened burden of proof for vacatur or modification of the Consent Decree under federal law.

Defendant's "proof" consisted of the testimony of a single witness, a lawyer on the RNC's payroll, who did little more than protest the RNC's good faith, suggest that voters who fear suppression stay home on Election Day, and, incredibly, argue repeatedly that the race of the RNC's Chairman and Chief Administrative Officer – both of whom are African American – should constitute conclusive proof that the RNC would not undertake activities that have the effect of minority voter suppression throughout the United States. Defendant offered no credible

[1] In the interest of brevity, Plaintiff refers the Court to, and incorporates herein by reference, the Statement of Facts and Procedural History contained in its Brief filed January 19, 2009 [D.I. # 55].

evidence to support vacatur or modification of the decree under FED. R. CIV. P. 60(b). In fact, Defendant's own briefs reinforce the need for the Consent Decree by confessing the RNC's continuing interest in pursuing overbroad "ballot security" measures that have the "significant effect" of "deter[ring] qualified voters from voting." The RNC's sole witness similarly conceded the need for the Decree when he admitted that the activities the RNC proposes to engage in if the Decree is vacated could result in the disenfranchisement of qualified voters.

In contrast, Plaintiff Democratic National Committee (hereinafter "Plaintiff" or "DNC") presented the testimony of three experts which established not only that the RNC's arguments are demonstrably invalid, but also that the remedy in the Consent Decree is unique and answers a continuing and urgent need to protect the rights of minority voters in the United States. The testimony presented during the hearing clearly demonstrates that the Decree's core elements – including the "effects test" enunciated in Section 2(e) of the 1982 Order and the "pre-clearance" requirement added by the Court in 1987 – remain essential to the purpose and continued efficacy of the Decree. The self-interested conjectures of the RNC's partisan witness cannot overcome the clear and unrefuted findings of three scholars that no change in the law or factual circumstances has occurred to warrant dissolution of the existing decree regime, and that no new obstacles or "public interest" considerations outweigh the clear and proven public interest in continuing the Consent Decree's 27-year record of success in protecting the rights of minority voters. Indeed, modern technology makes the decree all the more necessary, because a voter caging effort of national scope could wreak havoc on a massive scale if pursued using the deeply flawed methodologies used by Republicans in Montana, Ohio, and elsewhere in recent years.

Equitable principles also compel denial of Defendant's motion and continuation of the Decree. The RNC's appeal to the court's "equitable power" to vacate the Decree is improper in

light of its own failure to live up to the most basic maxims of equity. Equity commands that "one who seeks equity must do equity," yet the RNC has never availed itself of the opportunity to clarify the scope of the Decree as described herein and, in fact, has demonstrably violated the terms of the Decree on multiple occasions. Moreover, although "equity aids the vigilant, not those who slumber on their rights," for nearly three decades the RNC did not seek to clarify the terms of the Decree despite its present claim that it has been burdened by the Decree for decades.

As the Court reasonably posited, there may be aspects of the Decree that warrant re-examination and clarification over time. To the extent that the Decree's clarity is at issue, the appropriate remedy is for the Court to clarify its terms, not vacate the Decree *in toto*. An opportunity for clarification presented itself during closing arguments, when the Court, considering the scope of the Decree, invited the parties to address in their post-hearing briefs "the hypothetical that poll watchers do perform perfectly normal poll watching challenging functions not designed … to scare people away," and, if so, why "can't [such challengers] be placed in racially minority districts[?]" 2 Tr. 183:2-6.[2] The short answer is that they can – as long as their presence and tactics do not, in purpose or effect, discourage qualified voters from voting there. Congress and the Courts have consistently recognized the need to consider the effects of alleged discrimination, because demanding proof of subjective intent too often denies the protection of our laws to people with legitimate grievances.

However, the Court's "hypothetical" fact pattern is but one necessary element of the factual inquiry the Court must pursue when faced with a motion for relief under the decree.

[2] Transcripts of the May 5, 2009 and May 6, 2009 evidentiary hearing before the Court shall be filed with the Court following the Court Reporter's review of errata and her final certification of the transcript. A courtesy copy of the rough transcript shall be sent directly to the Court for use herewith. In the interest of brevity, citations to the May 5 and 6, 2009 transcripts will be in the form "1 Tr.. __:__" and "2 Tr. __:__," respectively.

A party seeking relief must also demonstrate that the effort in question is designed to or would have the significant effect of discouraging qualified voters from voting. The need to distinguish plans with suppressive impact from those without is precisely why the Court's pre-Election Day review of such plans is necessary.

Accordingly, for these reasons and the reasons set forth in more detail below, Plaintiff Democratic National Committee respectfully requests that Defendant's motion be denied in its entirety. In the alternative, if the Court finds that modification of the Decree is appropriate, Plaintiff proposes that the Court clarify the Decree according to the guidelines set forth at the conclusion of Point II. B., below.

## THE EVIDENTIARY HEARING

The Court heard testimony in a two-day evidentiary hearing held on May 5 and 6, 2009. Defendant proffered a single witness, Thomas Josefiak – an attorney who has quite literally been on the Defendant's payroll for nearly two decades. Mr. Josefiak was an in-house lawyer at the RNC for fifteen years, less one year away as counsel to the Bush-Cheney re-election campaign; for more than eleven years, he was the RNC's Chief Counsel. *See* 1 Tr. 47:8-22. Even since recently returning to the private sector, he continues to be "of counsel" to the RNC. *Id.* at 47:22-24. The DNC offered testimony from three experts: Professor F. Chandler Davidson, whose academic work over more than four decades has focused on minority voting rights; Professor Lorraine Minnite, whose comprehensive studies of voter fraud are the subject of a forthcoming peer-reviewed book; and Justin Levitt of the Brennan Center for Justice at New York University, a non-partisan think tank. *See* 1 Tr. 154:21-155:1, 155:17-156:6; 2 Tr. 46:21-47:17 and 79:4-13.

The RNC's "case" was a study in self-contradiction. Defendant argued repeatedly that the requirements of the Decree were "onerous," yet Mr. Josefiak testified that the RNC's effort

to act consistently with the consent decree "has nothing to do with the consent decree," but is instead a function of "the practical reality" that the RNC must appeal to voters of color in order to win elections. 1 Tr. 65:6-22. Counsel asserted that this Court's decision in the 2004 Malone matter has "a significant chilling effect on the RNC" while making the contradictory claim that the decision is no longer binding. *Cf.* 2 Tr. 159:1-3 *with* 1 Tr. 17:1-13, 13:1-3 ("the only violation that has . . . stood was . . . the technical violation in 1990"). Defendant asked the Court to eliminate the pre-clearance requirement of the 1987 Order, calling it "particularly onerous," 1 Tr. 10:17, even though Mr. Josefiak admitted that the RNC has never sought pre-clearance and, therefore, that its position concerning the notice requirement has been informed by pure conjecture rather than experience. 1 Tr. 109:19-110:3, 124:17-22. Indeed, virtually all of the RNC's arguments on the alleged burdens imposed by the Decree were premised on their own tactical decision to err quite dramatically on the side of caution by avoiding "*anything that has any direct relation with a voter anywhere near a polling place*," including activities clearly outside the language and intent of the Decree. 1 Tr. 114:13-15 (emphasis added); *see also id.* 112:25-113:5 ("providing individuals to be in polling places . . . to observe"), 114:8-12 ("To . . . have RNC volunteers outside of the polling places . . . to provide [voters with] . . . information on candidates and issues"), 114:12-13 ("To generally . . . be around and monitor the activities of polling places").

In perhaps its most brazen appeal, the RNC even offered a multimedia presentation featuring photographs of President Barack Obama, Attorney General Eric Holder, RNC Chairman Michael Steele and RNC Chief Administrative Officer Boyd Rutherford – all of whom are African American. On the subject of the racial identity of the current RNC chairman, Josefiak testified "[t]he obvious speaks for itself," 1 Tr., 63:24, assuming a person's race can be

treated as proof of his position on a political or strategic issue. The RNC is thus asking the Court to adopt Defendant's fundamentally skin-deep assumption that Chairman Steele "is not going to . . . suppress any minority voter" because he is Black, and that with "an African American Attorney General, that the laws . . . [against] voter suppression are going to be actively pursued by this Justice Department." *Id.* 65:22-66:2. The RNC's position implicitly concludes that an individual's race – "[t]he obvious" – can be treated as a proxy for his view point on the issue of minority voter suppression.

The RNC is stuck in a self-contradiction that lays bare the continuing need for the Decree. Defendant left unchallenged Prof. Davidson's scholarly opinion that racially-polarized voting is as prevalent today as ever, 2 Tr. 9:4-12, but appealed to the image of a post-racial nation and a post-racial RNC where the Consent Decree is unnecessary. The RNC's witness treated race as determinative of a political viewpoint when he referred to Barack Obama as "their [African Americans'] candidate," yet also testified that Chairman Steele heads the opposing political party. This inherent contradiction was exhibited again when the RNC's witness testified that "there is no way that [the African American Chairman of the RNC] is going to be in any position to suppress any minority voter," 1 Tr. 63:25 – 64:2, yet admitted that the party is "[q]uite frankly . . . in this process, particularly at the national level, to win elections." 1 Tr. 56:21, 57:16-17. In any event, Defendant is asking the Court to assume that those who are in the business of winning elections will forego favored tactics with the purpose or substantial effect of deterring qualified minority voters simply because of the tactician's race. There is no basis for that assumption, of course, and the RNC did not and could not offer any.

The real story of the Evidentiary Hearing is that the facts of the case, presented to the Court by nationally recognized scholars, demonstrate the continued need for the Consent Decree,

thereby undercutting the RNC's motion herein and explaining why the RNC so woefully failed to meet its evidentiary burden. As the testimony and exhibits demonstrated, the impetus for voter suppression remains and the RNC's operatives have indeed succumbed by assisting state party organizations to create over-broad "caging" lists to target voters on election day. Changes in law since 1982 have not altered the factual or legal landscape in ways that affect either the appropriateness or the practicality of the Decree. And finally, public policy favors maintenance rather than vacatur or modification of the decree, because it is a fulfillment of Congress' consistently-expressed concern for the rights of qualified voters to exert their rights of suffrage on Election Day. *See infra* at Point II.A.

Even if the RNC's self-serving and contradictory presentation held any merit, every one of the Defendants' concerns about the Decree can be addressed without vacating it. The DNC denies that any of the RNC's assertions about the Decree's "onerousness" or inconsistency with the contemporary political landscape presents adequate grounds for vacatur of the decree. For the most part, their purported factual support crumbles in the face of scholarly analysis, or the arguments themselves are premised upon tactical decisions that the RNC makes for reasons only it knows. However, to the extent the Court may wish to respond to the concerns expressed by the RNC, every single one of the challenges the RNC identifies can be addressed in whole or in part by *modifying* the Decree rather than dissolving it *in toto*. *See infra,* at Point II.B. The answer to these challenges cannot lie in dismantling crucial protections that have functioned effectively for years – and which the RNC could not establish to be no longer needed or bypassed by changes in legal and factual circumstances.

## LEGAL ARGUMENT

### POINT I

### THE PROVISIONS OF THE CONSENT DECREE — PARTICULARLY THE "EFFECTS TEST" AND "PRE-CLEARANCE REQUIREMENT" — ARE APPROPRIATE, DO NOT CONSTITUTE AN UNDUE BURDEN, AND REMAIN NECESSARY TO PROTECT THE RIGHTS OF MINORITY VOTERS.

During the closing colloquy of the hearing, the Court made the following request of the parties:

> I think an interesting point in your post trial briefs would be the hypothetical that poll watchers do perform perfectly normal poll watching challenging functions not designed . . . to scare people away or anything like that, can't be placed in racially minority districts.

2 Tr. 183:2-6. Earlier in the colloquy, the Court had remarked:

> [M]y practical sense suggests that you ought to be able to put your poll watchers where they're going to do the most good without discriminating. [If I] didn't put poll watchers in Short Hills, I just put them in Newark, or I just put them in East Orange or Irvington, you would consider that to be violative . . . ?

*Id.*, 181:2-4, 11-13. The answer to this important question can be found within the language of the Consent Decree itself. By its terms, the Decree does not prohibit all RNC activity directed exclusively or predominantly at minority precincts. Accordingly, as long as the RNC's presence and tactics don't, in purpose or effect, discourage qualified voters from voting, the Decree does not prevent their presence or activity. By entering into the Consent Decree negotiated between the parties and approved by the Court, the RNC agreed 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 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 or purpose[.]

1982 Order at § 2(e) (emphasis added). It is the final clause of this section (not the italicized one) that was discussed at the Evidentiary Hearing as the "Effects Test." The Effects Test is only a part – and, indeed, not necessarily the first part – of the Court's inquiry, and does not absolve a party seeking relief under the Consent Decree from demonstrating that the operation in question is designed to discourage, or will have the effect of discouraging, qualified voters from voting. Thus, in addition to determining that the racially-disparate targeting of ballot security activities toward "Newark, or . . . East Orange or Irvington" but not "Short Hills," 2 Tr.183:2-6, has occurred, the Court must consider the other facts at bar. To prevail on an application under the decree, the DNC would have to demonstrate at least that the challenged activity of the RNC or New Jersey Republican State Committee ("NJRSC") otherwise met the Decree's definition of "ballot security" activity and had the purpose or substantial effect of deterring qualified voters from voting. The Court has never treated that burden lightly. *See generally Democratic Nat'l. Committee v. Republican Nat'l. Committee*, Civil Action No.: 81-3876 (DRD).

Were the RNC to design an election day operation that involved mere poll watching and electioneering, or even pursued a challenge program that was community-based and not dependent upon the sort of "garbage" caging lists seen in Cleveland or Jacksonville in 2004 or Montana in 2008, the Court could properly find that the activity was not precluded by the Consent Decree, despite disproportionate racial impact and in the absence of a significant effect of deterring qualified voters from voting.. *See* 2 Tr. 118:18-120:6 (describing a Republican challenge targeted at a voter whose mailing address differed by "a single comma" from her registration information); *see also* Witness and Exhibit List of DNC for Evidentary Hearing Exh. (hereinafter "Exh.") 27 [D.I. # 66]. But if the RNC uses its flawed caging tactics, and recruits

"veterans, policemen, security personnel, firefighters etc." who were "willing to volunteer at inner city (more intimidating) polling places" – as did the Wisconsin Republican Party last year[3] – these facts would support a finding that the RNC's actions had the purpose or effect of voter suppression.

Thus, while the Court's "hypothetical" fact pattern does indeed cut to the core of the question about the appropriate scope of an Effects Test, it does not end the present inquiry into the continuing need for a Consent Decree to protect the rights of minority voters. The DNC does not assert, and has never asserted, that *any* RNC activity directed exclusively or predominantly at minority precincts would violate the Decree. Clearly, the RNC may operate lawfully within minority precincts: It can make sure that lines are flowing freely and machine errors are dealt with quickly in crowded urban precincts, or engage in other standard poll-watcher functions, provided that it does so within the limits of applicable state law. But such were not the purposes of the non-forwarding letters the RNC sent to Ebony Malone and other voters in Cleveland, nor of the electronic lists titled "caging" and "caging_1" developed and circulated by RNC employee Tim Griffin in 2004, and the Court should not entertain any such misimpression.

Only if it also finds that the RNC's or NJRSC's proposed activities are not in fact "perfectly normal poll watching functions" but rather have the intent or effect of deterring qualified voters from voting, must the Court consider the question posed by the final clause of the decree, the "Effects Test." The application of the Effects Test connects the Decree's prohibition on voter suppression back to society's interest in protecting *minority* voters, as

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[3] *See* Certification of Angelo J. Genova, Esq. ("Genova Cert.") submitted with DNC's Opposition Br. [D.I. # 55-1] at Exh. 19 (Flaherty, Mary Pat, "A Wis. Call for GOP Poll Watchers Draws National Notice," *The Washington Post* (Oct. 14, 2008); *see also* Foley, Ryan J., "GOP seeks police, veterans to work Milwaukee polls" (Associated Press, Oct. 15, 2008), available at http://www.madison.com/tct/news/309718 (last accessed June 19, 2009).

enunciated in the Voting Rights Act ("VRA"). Effects tests are essential to the functioning of anti-discrimination laws precisely because proof of intent is usually unavailable to the aggrieved party. For every rare occasion when a party or campaign admits trying or hoping to "keep the black vote down" as did the 1986 Republican ballot security memorandum in Louisiana – or to "suppress the Detroit vote" as did Republican state legislator John Pappageorge of Michigan in 2004, *see* Exh. 27 ("The Long Shadow of Jim Crow") at 2, 5-6 – there will be many more where the intent is indicated only by the targeting of an otherwise facially neutral ballot security effort.

Because it is often difficult to prove the subjective intent of actors who unlawfully discriminate, the Courts and Congress have recognized the need to look at the effect of a challenged act to ensure that persons with legitimate grievances are not left without the protection of the law. The U.S. Supreme Court recognized the important function of effects tests as recently as this week, when it noted that the VRA abolished "literacy tests and similar voting qualifications" because "[a]lthough such tests may have been facially neutral, they were easily manipulated to keep blacks from voting." *Northwest Austin Municipal Utility District Number One v. Holder*, --- U.S. ---, slip op. at 3 (June 22, 2009) ("*NAMUDNO*"). In amending and re-authorizing Section 2 of the VRA in 1982, the U.S. Senate observed "that the difficulties faced by plaintiffs forced to prove discriminatory intent through case-by-case adjudication create a substantial risk that intentional discrimination barred by the Fourteenth and Fifteenth Amendments will go undetected, uncorrected and undeterred unless the results test proposed for section 2 is adopted." 1982 Senate Report at 40 (footnote omitted), U.S. Code Cong. & Admin. News 1982, p. 218, *quoted and discussed in U.S v. Marengo County Comm'n,* 731 F.2d 1546, 1557-58 (11th Cir.), *cert. denied,* 469 U.S. 976 (1984); *see also U.S. v. Blaine County, Mo.*, 363 F.3d 897, 907 (9th Cir. 2004) (Congress incorporated an effects test in the VRA "because

requiring proof of intent would cause the perpetuation of earlier, purposeful racial discrimination, regardless of whether the practices they prohibited were discriminatory only in effect.") (*quoting City of Rome v. United States*, 446 U.S. 156, 177 (1980)) (internal quotation marks omitted). Likewise, in the employment context, the Supreme Court has observed that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). In the area of voter suppression, "ballot security" activities can function as just such "built-in headwinds" for qualified voters, affecting not only the challenged voter but also the voters in line behind him and those voters who decide against voting because of what they see or hear about at the polling place. *See* 2 Tr. 103:11-104:21. Like the effects test in other contexts, the test in the Decree also has the salutary benefit for the Court and RNC of permitting an aggrieved party to proceed without needing "to label the [Defendants] as racists." *See* Hartman, RACIAL VOTE DILUTION AND SEPARATION OF POWERS: AN EXPLANATION OF THE CONFLICT BETWEEN THE JUDICIAL "INTENT" AND THE LEGISLATIVE "RESULTS" STANDARDS, 50 GEO. WASH. L. REV. 689, 711-12 (1982), *quoted in Marengo County Comm'n*, 731 F.2d at 1559.

It is for precisely these reasons that effects tests are applied across many areas of federal anti-discrimination law. Indeed, as the *Blaine County* court noted, Congress acted in 1982 on a record reflecting the inadequacy of an intent test "because purposeful discrimination could be hidden underneath false trails planted in the legislative record." *Id.*, at 908; *see also NAMUDNO*, slip op. at 3. This rationale, and the unique power of a test focused on effects that cannot be hidden over intent that can, has been recognized by federal courts enforcing the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"),

the Equal Credit Opportunity Act ("ECOA"), the Federal Housing Act ("FHA"), and Title VII of the Civil Rights Act of 1964, among others. *See, e.g.*, *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003) (under ADA, "a facially neutral employment practice may be deemed [illegally discriminatory] without evidence of the employer's subject intent to discriminate") (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 645-646 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, § 105, 42 U.S.C. §2000e-2(k)); *Smith v. City of Jackson*, 544 U.S. 228 (2005) (recognizing "disparate impact" cause of action under ADEA); *Griggs*, 401 U.S. 424 (facially neutral test with discriminatory impact barred by Civil Rights Act); *Doe v. City of Butler*, 892 F.2d 315, 323 (3d Cir. 1989) ("Plaintiff may make out a claim under the FHA using a theory of disparate impact without providing proof of discriminatory intent."); *Guerra v. GMAC LLC*, 2009 WL 449153, at *2 n.3 (E.D. Pa. Feb. 20, 2009) (noting that "the Third Circuit . . . has recognized disparate impact liability under the FHA" and district courts within the circuit have "recognized disparate impact liability under the ECOA").

The need for the Effects Test in the Decree is underscored by the fact that the RNC can offer at least three different facially-neutral rationales for a ballot security program targeted at minority communities. First, the RNC asserted that it would target its ballot security activities at "low-income and minority communities" because that is where "ACORN and its allies," against whom allegations of fraudulent voter registration have been lodged, "have been operating" voter registration drives. *Id.* 187:16-18. Second, whether in connection with allegations about ACORN or otherwise, the RNC has asserted that low-income and minority communities are "where . . . much of the concern about voter registration fraud and voter fraud arises." *Id.* 187:19-21. Third, as the Court observed, the RNC or NJRSC may also be motivated to target urban areas with large Black and Latino populations because they are "areas where [voters a]re

likely to vote Democratic." *Id.* 179:15. Each of these is a facially neutral rationale for a ballot security program that would have a disparate impact on minorities.

The Consent Decree was entered because this Court recognized in 1982 and 1987 what Justice Anthony Kennedy wrote most recently just a few months ago:

> [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.

*Bartlett v. Strickland*, --- U.S. ---, 129 S.Ct. 1231, 1249 (2009).

Moreover, contrary to the RNC's assertions, the Supreme Court itself just acknowledged that in the area of voting rights, "litigation is slow and expensive," and vulnerable to the continued contrivance of new rules and methods for denying minorities their right to vote. *NAMUDNO*, slip op. at 2 (discussing Congress' motivation in passing the VRA). As Plaintiff demonstrated during the Evidentiary Hearing, not even the VRA provides the immediate relief voters may need on election day; as Professor Davidson observed, the Consent Decree "[ha]s actually worked."

> It has – in cases where vote caging was under way, and that was pretty clear as in 2004[,] it has enabled this Court to intervene quickly and to put an end to the process before it plays itself out.

2 Tr. 11:1-6. The Decree's functionality makes it unique. In contrast, "the Voting Rights Act is just typically not able to react quickly to the kind of situation that [may] occur[] at a polling place." *Id.* 10:3-6. The prosecution of the New Black Panther Party for Self Defense in Philadelphia was not even commenced until more than two months after election day and long after the voters who were scared away had been irretrievably denied their suffrage. *Id.; see also* 2 Tr. 11:20-24 (Davidson: "[T]ypically a Section 5 case takes years or many, many months to

run its course. And so it doesn't seem to me that that would be a very effective deterrence for this kind of behavior.").

Even the remedy prescribed by the 1982 Order alone was inadequate to protect the rights of minority voters in Louisiana in 1986. *See* 2 Tr. 34:11-16 (noting that recourse was had "after the damage had been done"). Thus the parties agreed upon, and this Court created, a "pre-clearance requirement" to further strengthen the practical protection the Decree offers to voters on election day. *See* Genova Cert. Exh. 7, ¶ C (Settlement Stipulation and Order of Dismissal, July 27, 1987). While the RNC now describes this provision as "a particularly onerous portion of the decree," 1 Tr. 10:17, it has never even attempted to utilize it. Defendant's witness offered mere conjecture that the "20 day [preclearance period] . . . would be more than 30 days or maybe even 45 days," and that the process would necessarily involve "allowing the opposition party access to our plans and strategies." *Id.* 97:2-5, 103:1-2. Underlying the RNC's entire position on this issue are the flawed assumptions that this Court is unable to deal with emergent election-related matters expeditiously, and the scope of disclosure under the pre-clearance provision would amount to opening the RNC's entire playbook to the DNC and its allies. Neither assumption is true. As this Court demonstrated by its resolution of the 2004 Ebony Malone matter in less than a week, and the DNC's 2008 motion in a single day on November 3, "20 days" does *not* mean "30" or "45" – it frequently does not even mean close to 20. Furthermore, having never attempted to seek pre-clearance, the RNC does not know what small quantum of tactical disclosure might meet the Court's standard nor the protections this Court might be willing to afford such disclosures.

The testimony of all three scholars at the Evidentiary Hearing supported the conclusion that the Consent Decree answers a *continuing* need to protect minority voters as only the Decree

can. Voter suppression is not going away. *See* 1 Tr. 171:9-11. Because racially polarized voting continues, the impetus for the Republican Party to attempt to suppress minority votes remains. *See* 2 Tr. 7:11-16, 9:4-12. If anything, new database technologies, non-existent in the 1980's, provide opportunities for widespread mischief, with thousands of eligible voters challenged over typographical errors and other "garbage." *See* 2 Tr. 113:13-114:15. Indeed, these new technologies provide increased reason to hold the RNC to a consent decree that does not bind state affiliate non-parties: the increased capabilities of a nationally coordinated suppressive effort increases the scale of the potential harm.[4]

In sum, the DNC's response to the Court's hypothetical inquiry about the placement of RNC challengers in Newark and its urban environs to the exclusion of Short Hills or other suburban communities necessarily is: "It depends." As argued above, placing poll watchers in high-performing Democratic districts might be appropriate on its face for that reason, but were the RNC to hire large persons with intimidating physiques or pursue an over-broad challenge effort with the effect of delaying voters and discouraging some from voting at all, then its otherwise appropriate behavior would become a violation of the Decree. That is precisely why the Effects Test is an essential element of the Decree, but also why it has never been the sole inquiry applicable to an enforcement action thereunder and the Court has never treated it as such. Rather, the Effects Test is a fundamental part of the Decree for the reasons set forth in federal jurisprudence on discrimination from the ADA to Title VII. Without an effects test, too many legitimate claims for voter protection will fail for want of a smoking gun like the "caging" e-mail attachments of 2004 or the RNC's "keep the black vote down" memorandum in Louisiana in 1986.

[4] This is true even if the harm is not intended, but is nevertheless a "substantial effect" of the "ballot security" program in question.

Likewise, the pre-clearance requirement is an appropriate recognition of what scholars and the Carter-Baker Commission have observed: No existing statute, including 42 U.S.C. 1973i under which this action was first brought, offers adequate protections to voters before and on election day. Parties do not enter into consent decrees either blindly or lightly: when the RNC agreed to abide by the Consent Decree, it recognized that the Decree was meaningful, and it remains so today. The Court's hypothetical, and the issue it raises, illuminate the character of the activities proscribed by the Consent Decree but do not put in doubt its continued importance in protecting against minority disenfranchisement tactics. For all of these and the reasons presented during the Evidentiary Hearing, Defendant's motion to vacate or modify the Consent Decree should be denied.

## POINT II

## THE MOTION SHOULD BE DENIED BECAUSE THE RNC HAS FAILED TO ESTABLISH ANY BASIS ON WHICH VACATUR IS APPROPRIATE UNDER RULE 60(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

### A. The RNC Has Not Met Its Heavy Burden To Prove That Extraordinary Circumstances Warrant Vacatur Under Rule 60(b).

The legal standard against which the RNC's application must be tested has been set forth in papers already filed, and the DNC will not re-argue it here.[5] This Court gave the RNC an opportunity, through written submissions and at an evidentiary hearing where Defendant could have called any number of witnesses, to meet its burden of presenting clear and convincing evidence of any one of the four factors applicable to claims for relief under FED. R. CIV. P. 60(b):

[5] The Supreme Court's most recent encounter with Rule 60(b) has no bearing on the burden Defendant must meet or the analysis this Court is to undertake, as it is applicable to institutional reform litigation related decrees where federalism concerns are often present. *See Horne v. Flores*, --- U.S. ---, --- S.Ct. --- (June 25, 2009). Institutional reform litigation "while not precisely definable, typically requires the courts to scrutinize the operation of *large public institutions*." Theodore Eisenberg and Stephen C. Yeazell, THE ORDINARY AND THE EXTRAORDINARY IN INSTITUTIONAL LITIGATION, 93 HARV. L. REV. 465, 467 (January 1980) (emphasis added). *Horne* involved a public defendant, and the Supreme Court's decision was animated by federalism concerns not present here. *See generally id.*, Slip Op. at 10-15, 17. Although the Horne court adopts a flexible approach to Rule 60(b)(5) motions, it expressly limits this approach to institutional reform litigation related decrees. *Horne* at 13 ("But in recognition of the features of institutional reform decrees, we have held that courts must take a 'flexible approach' to Rule 60(b)(5) motions *addressing such decrees*.") (emphasis added). To the extent *Horne* may apply, its holding favors the *DNC's* position by concluding that a court's Rule 60(b)(5) analysis should consider the presence or absence of the underlying factors that animated the original decree rather than the narrower question of whether compliance has (even arguably) occurred. *See id.*, Slip Op. at 18-19 (district court should have determined "whether changed circumstances warranted modification of the original order," rather than merely inquiring "whether petitioners had satisfied the original . . . order"). Testimony at the Evidentiary Hearing revealed both (a) that Defendant's assertions that significant changes in fact or law warrant dissolution of the Decree lacked merit, and (b) that the key factors that motivated the Court and the parties to enter into the Decree – in particular, the risk of minority voter suppression, whether an intended or inadvertent effect of flawed Republican "ballot security" efforts – remain extant in 2009.

(1) a change in the factual circumstances; (2) a change in the law that legalizes what the decree was designed to prevent; (3) unforeseen obstacles to implementation of the decree; or (4) that continued enforcement of the decree would be detrimental to the public interest.[6] The RNC not only failed to meet its substantial burden, but in fact failed to show by any standard the basis for vacatur.

**1. The RNC has failed to prove any change in legal or factual circumstances to support vacatur of the Decree.**

The RNC was unable to prove a change in the factual circumstances sufficient to warrant vacatur of the decree. It demonstrated that new laws have been passed, but the weight of the factual and expert evidence in the record indicates that those new laws do not have the fraud-inducing effect the RNC asserts. It demonstrated that more minorities are voting than in 1981, but rates are still below the level at which those groups exist in the population at large, and the implication that increasing voting rates necessarily indicates that suppression no longer occurs is obviously flawed. The experience of the National Commission on the Voting Rights Act and the conclusions and policy recommendations of the Carter-Baker Commission both undercut the RNC's assertions of a problem solved. Likewise, none of the new laws the RNC cited function to undercut the legal propriety or factual need for the Consent Decree, much less to create a

[6] Courts in the Third Circuit have held that, "[p]arties moving under Rule 60(b) bear the heavy burden of proving that extraordinary circumstances are present to justify such extraordinary relief." *U.S. v. Dansbury*, 1996 WL 592645, at *2 (E.D. Pa. Oct. 15, 1996). Circuit courts that have considered the issue have indicated that the "clear and convincing evidence" standard applies to Rule 60(b) motions in litigation between private parties. *See, e.g., Info-Hold, Inc. v. Sound Merchandising, Inc.*, 538 F.3d 448, 454 (6th Cir. 2008) ("[R]elief under Rule 60(b) is circumscribed by public policy favoring finality of judgments and termination of litigation. Accordingly, the party seeking relief under Rule 60(b) bears the burden of establishing the grounds for such relief by clear and convincing evidence."); *McFadden v. Erin Int'l. Corp.*, 15 F.3d 1087 (9th Cir. 1994) ("To prevail under Rule 60(b), McFadden must demonstrate [grounds for vacatur] by clear and convincing evidence"); *In re Burnley*, 988 F.2d 1, 3 (4th Cir. 1992) ("under rule 60(b), the party moving for relief must clearly establish the grounds therefor," which grounds "must be clearly substantiated by adequate proof") (internal quotation marks omitted; citing cases).

direct conflict that would warrant vacatur or preemption of the decree by virtue of any new statute.[7]

**a. New laws have not dramatically changed the playing field when it comes to ballot access and security.**

At the hearing, Defendant attempted to present evidence to support its written assertion that "legal developments since the Decree was entered . . . have altered voting procedures in a fashion that underscores the RNC's legitimate interest in detecting and preventing voter fraud." RNC Moving Br. at 17 [D.I. # 57]. The RNC posited that three federal laws – the National Voter Registration Act of 1993 ("Motor Voter" or "NVRA"), the Bipartisan Campaign Reform Act of 2002 ("McCain-Feingold" or "BCRA"), and the Help America Vote Act of 2002 ("HAVA") – in combination with various changes in voting procedures at the state level during the same period have dramatically increased the risk of voter fraud and made the RNC's intended ballot security efforts necessary. The DNC demonstrated clearly at the Evidentiary Hearing that there is no factual support for this claim.

The RNC's assertion that NVRA "ha[s] increased the potential for voter fraud to an extent that did not exist" in 1982 or 1987 reflects its misunderstanding of the statute. As Mr.

[7] In its reply brief, Defendant cited *Henderson v. Morrone*, 214 Fed. Appx. 209 (3d Cir. 2007) and *Brown v. Phila. Housing Authority*, 350 F.3d 338, 348 n. 6 (3d Cir. 2003) for the proposition that "there need not be a 'conflict' to justify vacatur of a consent decree; a 'significant change' with no attendant conflict constitutes sufficient grounds for vacatur." However, both cases are easily distinguishable from the one at bar. First, the statement in *Brown* was only dictum, as the court held that the case was moot and it lacked subject matter jurisdiction. *See* 350 F.3d at 348 n.6. Furthermore, as discussed in *Henderson*, the relevant changes in law in *Brown* gave broader and more comprehensive protection to plaintiffs than had been available under the consent decree, destroying its utility. *See Henderson*, 214 Fed. Appx. at 215 n.3. The "new" laws cited by the RNC do not give broader and more comprehensive protection than the Consent Decree. Thus, even if the Court were to accept the RNC's argument that the new laws create an environment that is more conducive to fraud, because they do not provide "broader and more comprehensive protection" to DNC and voters they do not lessen the utility of the Consent Decree herein.

Levitt explained, NVRA "expanded the opportunity for individuals to register" but "it did so with safeguards to try to prevent that expansion of opportunity from being realized with increased incidence of voter fraud." 2 Tr. 86:14-18. As both Congress and Mr. Levitt observed, Motor Voter "drives voter registration to . . . agencies . . . which have their own requirements for identification and for otherwise verifying the identity of an individual." 2 Tr. 86:24-87:6; *see also* Exh. 17 (S. Rep. 103-6 at p. 5-11 (Feb. 25, 1993)). The NVRA was also "the first federal requirement that states [enact] a general program of . . . cleaning up the rolls," which was "a significant step in directing states for the first time in a mandatory requirement . . . that they get their voter registration [regimes] in shape." *Id.* 88:11-20. The law also "both created and enhanced . . . criminal penalties for fraudulent use of the voter registration system." *Id.* 88:24-25.

The RNC also argued that the BCRA created a situation where the Republican Party was limited to using "hard" money for voter registration efforts, whereas the Democratic party "outsourced" its voter registration functions to organizations not restricted by BCRA. *See* 1 Tr. 74:25-75:7. In fact, the playing field was no less level after BCRA than before it, because the restrictions of BCRA applied equally to both political parties. Moreover, the restrictions continued to be inapplicable to the same broad swath of organizations that were unaffected by federal campaign spending restrictions before BCRA. As Mr. Levitt testified, the "League of Women Voters has been able to register people since its inception," and the sources of funds available to it to do so have not changed. 2 Tr. 95:21-96:2. Likewise, "[t]he same funding sources that were available to 527s and the like before [BCRA]" remained unchanged. *Id.* 96:15-17. In response to the RNC's "outsourcing" claim, Mr. Levitt, who studied and observed the presidential campaigns of 2004 and 2008 as part of his scholarly and non-partisan advocacy

work, expressed his expert opinion: "I have not seen evidence of that practice, and don't believe that the structure of the law creates any incentive in that regard." *Id.* 95:1-3.

The RNC's claim is particularly peculiar when considered in the light of the Presidential election just past. The Democratic Presidential campaign, in conjunction with the national and state parties, conducted the most comprehensive voter registration program in history – all of it paid within the limits of McCain-Feingold. *See* Michael P. McDonald and Thomas Schaller, *Voter Mobilization in the 2008 Presidential Election*, in THE CHANGE ELECTION: MONEY, MOBILIZATION AND PERSUASION IN THE 2008 ELECTIONS at 93 (David B. Magleby, Ed., 2009) (reporting that the Obama voter mobilization effort was "centralized and coordinated by the campaign, rather than by surrogate or independent organizations . . .") The fact of this unprecedented program lays waste to the "outsourcing" allegation made by the Defendant, and underscores the weakness of the "evidence" of changed circumstances it presented to this Court. Indeed, the sheer quantities of money that both sides' presidential campaigns raised in 2008 seems to belie the idea that one party or another relies, or needs to rely, upon any voter registration organization that would not otherwise be engaging in the very same conduct. *See* FEC, "2008 Presidential Campaign Financial Activity Summarized: Receipts Nearly Double 2004 Total" (Washington, D.C., June 8, 2009).[8]

Finally, the RNC also argued in its papers that HAVA, diminished the risk of disenfranchisement the Consent Decree was meant to prevent by creating a right to vote using a provisional ballot to voters challenged at the polls. This is, first and foremost, a narrow view of the impact of Election Day "ballot security" activities. *See infra* at 28-29 n.15 (describing three vectors of harm resulting from challenge programs). It ignores the distinction between being

[8] *See* http://www.fec.gov/press/press2009/20090608PresStat.shtml (last accessed Jun. 19, 2009).

entitled to a provisional ballot on the one hand, and actually receiving such a ballot and having it counted on the other. *See* 2 Tr. 107:24-108:7. It also ignores the myriad of ways in which the passage of HAVA undercuts the RNC theory that voter fraud poses a new or different problem than it did when the Decree was entered. By passing HAVA, Congress took "several steps to decrease even the low incidence of voter fraud," by requiring that statewide voter registration databases be kept in electronic form ("SVRS") and requiring authorities, including federal prosecutors and various state and local authorities, to provide relevant data on convictions, deaths, and other factors affecting voters on the SVRS. 2 Tr. 90:2-3. HAVA also requires first-time voters to show identification at the time of registration or when they first vote. *Id.* 92:19-20; *see id.* 93:12-17. These safeguards and others dramatically undercut the RNC's assertion that new voting mechanisms at the state level, such as early voting and expanded access to absentee voting, increase the risk of voter fraud. *Cf.* 1 Tr. 80:8-9. Once again, RNC's evidentiary submission belies the case it has labored to make.

**b. Many Election Day ballot security activities are a disproportionate response to the exceedingly rare phenomenon of voter fraud.**

By its very nature, the RNC's idea of a "ballot security" initiative is premised upon the notion that a material number of individuals who are not entitled to vote in fact show up and attempt to cast a ballot on election day. Indeed, the RNC's opening brief in this matter is premised in substantial part upon the assertion that "[m]ajor changes in voting procedures since 1987 have facilitated new potential avenues of voter fraud which the RNC has a legitimate interest in combating." RNC Moving Br. at 1 [D.I. # 43]. In fact, the sole scholar to have undertaken a comprehensive academic study of allegations of voter fraud – including not only reviews of press accounts but also public records research, direct inquiries to government, and

on-site interviews of affected individuals[9,10] – has concluded that voter fraud occurs at a rate that is "statistically zero." 2 Tr. 63:23-25; *see also id.* 64:2-4 ("a rare event").

Prof. Lorraine Minnite's research revealed that over the course of a vigorous three-year effort by the U.S. Justice Department (under Attorneys General John Ashcroft and Alberto Gonzales) to identify and prosecute incidents of voter fraud during election cycles in which nearly 200 million votes were cast,[11] only 95 people had been indicted. Only 40 of these were voters, and of those only 26 were convicted by trial or plea. 2 Tr. 59:4-18; *accord* Exh. 21. Even if some non-responding prosecutors among the 2,400 county prosecutors polled by Ms. Minnite pursued state-level prosecutions for voter fraud, the evidence still shows that the incidence of voter fraud is exceedingly small. *See id.*; *see also* THE TRUTH ABOUT VOTER FRAUD at 13, Exh. 24 (noting that rates of proved voter fraud ranged from 0.000009 percent to 0.0003 percent where data were available).

Indeed, even the RNC's own flawed methodologies appear to have revealed that of 950 "questionable" addresses on a proposed voter caging list, only 10 were "highly suspicious." *See* Exh. 2 (Cino Dep.) at 94:7-16; Exh. 5 (Nov. 1, 2004 Hearing Tr. at 66:9-12). Compare these data with the size of the RNC's proposed 2004 caging lists in Cuyahoga County, Ohio and

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[9] *See* 2 Tr. 53:16-54:17.

[10] The RNC's counsel asserted that "neither of the witnesses that came here to talk about voter fraud, didn't *[sic]* look at the state level." 2 Tr. 155:1-2. As noted, and on the contrary, Dr. Minnite testified that she polled county prosecutors and conducted qualitative research on site. *See* 2 Tr. 54:9-14, and Exh. 21.

[11] At least 73, 844, 526 votes were cast in the 2002 general election, as were at least 24,227,443 votes in the 2004 federal primary election and at least 122,294,345 more in the 2004 presidential cycle, according to official Federal Election Commission reports. *See* "2002 Primary and General Election Votes Cast For U.S. Congress" (Table) at http://www.fec.gov/pubrec/fe2002/pgcong.htm; "Official Primary Election Results for United States President" (Table) at http://www.fec.gov/pubrec/fe2004/2004pres.pdf; "2004 Presidential Popular Vote Summary For All Candidates Listed On At Least One State Ballot" (Table) at http://www.fec.gov/pubrec/fe2004/tables.pdf (all last accessed June 23, 2009).

Jacksonville, Florida. In Ohio, the RNC was poised to challenge approximately 35,000 voters on Election Day. Exh. 2 (Cino Dep.) at 44:14-18. The Jacksonville caging lists contains thousands more voters. *See* Exh. 9. As Mr. Levitt testified, lists like these are often generated through the use of rudimentary data-comparison methods that result in large amounts of "garbage" – non-matching results that in fact may be the result of as little as a misplaced comma, and which jeopardize eligible voters when used for a challenge. *See* 2 Tr. 119:10-120:6; *see generally* Exh. 24, THE TRUTH ABOUT VOTER FRAUD. In the end, RNC "ballot security" efforts are like a "sledgehammer" being used to swat a fly – which would be fine "if the sledgehammer didn't meet anything on the other side of the fly. . . . [But i]n swinging the sledgehammer, you often . . . hurt a lot of voters in the process." 2 Tr. 115:24-116:5.

In short, there is very little fire to be found behind the smoke of highly-publicized voter fraud allegations. *See generally* 2 Tr. 97:16-18, 98:4-7 (Levitt noting that review of court submissions and other documents indicate that "many allegations of voter fraud . . . turn out not to reveal voter fraud upon further examination"). Just as important, "none of the cases that [Dr. Minnite] looked at that were prosecuted at the federal level were discovered by voter challengers observing fraud."[12] *Id.* 62:23-25. In other words, Defendant's proposed remedy – to allow the RNC to once again to direct and coordinate state party challengers in urban polling places, no matter what the impact on eligible voters, particularly minorities – is not even a solution to the fictional problem behind Defendant's motion.

[12] "There are some forms of misconduct [and] irregularity that are real. . . . But far more often when allegations of fraud are logged, they turn out to be either clerical errors by poll workers, or by registrars, or other election officials, or mistakes by the voter, or by those various poll workers. Sometimes there's a flaw in the methodology that assumes voter fraud exists when it doesn't . . ." 2 Tr. 100:8-16 (Levitt).

**2. Compliance With The Decree Has Not Become Impossible Or Impracticable; Rather, The Motivations To Violate The Decree Remain And Demonstrate Its Enduring Utility As A Unique Protection Of Voters' Rights.**

None of the RNC's evidence proved any unforeseen obstacle to its performance of its obligations under the Decree. Instead the sum and substance of the RNC's evidence on this point appears to be a presentation of the following logical progression: The RNC agreed to the terms of the Consent Decree. By virtue of an unwillingness and/or tactical decision not to test the clearly stated and understood limits of the Consent Decree, it opted to avoid "*anything that has any direct relation with a voter anywhere near a polling place*," no matter how obviously beyond the decree's definition of "ballot security" activities. 1 Tr. 114:13-15 (emphasis added). Therefore, the RNC must be saved from its own irrational and excessive caution by dissolution of the Decree. This position is preposterous, and not worthy of serious consideration by the Court now as is the RNC's contention that the decree is void *ab initio* – particularly because the RNC has never, in the 22 years since the 1987 Order, sought any clarification, much less modification, of its terms. *See* DNC Opposition Br. [D.I. # 55] at 28-31.

**a. Voter suppression and the impetus for Republicans to suppress minority votes continue to be a factor in U.S. society, as evidenced by, among other things, the RNC's participation in vote caging in recent years.**

Professor F. Chandler Davidson, whose academic life's work addresses racial politics and voter suppression, testified "that [the social and political climate in the U.S.] is still at a point where voter suppression can be expected. . . . [A]s the events with Miss Malone indicated in 2004, we have that same problem that we had that led to this consent decree." 2 Tr. 7:11-16. Prof. Davidson described not only the history of voter suppression, including 14 incidents that

occurred during the time period covered by the Consent Decree,[13] but also noted, having attended 9 of 10 hearings of the National Commission on the Voting Rights Act,

> as we were listening to Asian Americans, Pacific Islanders, Native Americans, . . . African Americans, or Latinos, there were many complaints about problems they encountered at the polling place, including false information they handed out, including harassment, and in some cases intimidation. . . . [I]t was just a litany of complaints along those lines from one hearing to the next across the nation.

2 Tr., 7:21-8:8. Among specific recent examples, Prof. Davidson noted "Republican efforts to suppress the Vietnamese American vote in Alabama" when "[t]here was a Vietnamese American running for mayor." *Id.*, 8:22-9:9.[14]

As for the RNC specifically, Prof. Davidson testified that he had reviewed discovery materials in the Ebony Malone matter that was before this Court in 2004, and concluded that the RNC "[was] planning a caging operation" targeted at African American precincts that was consistent with other examples of caging Davidson had studied over the years.[15] 1 Tr. 167:22-168:11.

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[13] Prof. Davidson emphasized that his paper did not address the *only* acts of voter suppression identified in his research, but "only [the] ones that we could find that had enough information to really make us comfortable in describing and then drawing conclusions." 1 Tr. 158:8-14.

[14] Plaintiff does not mean to imply that the RNC played a role in the Alabama incidents or others described by witnesses before the National Commission on the Voting Rights Act, but rather that race-based voter suppression still exists. This, in turn, demonstrates that the impetus to suppress minority votes still exists, as does the risk that a national political party will engage in voter suppression activity.

[15] Prof. Davidson describes vote caging operations at 1 Tr. 159:10-24, and the reasons for its effectiveness at *id.* 165:7-24. The flaws and risks inherent in caging operations were described by Mr. Levitt as follows:

> [Caging] lists are often compiled using methodologies that are flawed, and contain many of the same problems that we just spoke of. . . . If poll watchers are only [provided] with a list of these individuals and told: "challenge X or Y person because we've reviewed their information and their information appears to be incorrect," there are I would say three substantial risks. One, they will challenge that individual and cause that individual to have to vote either a provisional ballot or not vote a ballot at all. Two, they will slow up the process too for that individual and anyone

The impetus to engage in racially-targeted voter suppression is a reflection of the phenomenon of racially polarized voting, "where one race votes very heavily for one candidate and another race votes very heavily for another candidate." 2 Tr. 9:4-12. Multiple scholars have concluded that racially polarized voting "continu[es] into the 21st century." *Id.* The result is a continuing impetus for the Republican Party and its candidates to attempt to suppress the votes of Blacks and Latinos, or to carry out general suppression programs against opposing voters with the substantial effect of suppressing eligible Black and Latino voters. Indeed, "[a]lmost all of the cases that we found in the period [from 1982 to 2003] were carried out by Republicans." 1 Tr. 165:4-5.

For much of its existence, the Consent Decree has been effective in deterring suppression by the RNC. Yet as recently as 2004, the RNC acted on this impetus.[16] The evidence presented in connection with the intervention of Ebony Malone, which remains of record in this case, convinced this court that there had been "coordination between the RNC and the Ohio Republican Party" and that "the participation and assistance of the RNC" in the attempt to challenge Cuyahoga County voters "was a clear violation of the 1987 consent decree." Nov. 1, 2004 Trans. at 67:8-13. The RNC's assertions that its collusion with the Ohio Republican Party amounted to an excessive effort to comply with the law is without credibility. *See id.* at 66:24-67:2. When the documentary record indicates that RNC operatives were expressing concern about having their "fingerprints" on the activity, the RNC clearly knew what it was doing and why. *See* Exh. 3 (Oct. 30, 2004 Decl. of Caroline Hunter [D.I. # 21-5] at Exh. 1

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> else in line. And three, that the general program of challenges will become known before Election Day and serve as its [own] deterrent for people who either can't afford to be slowed down … or who have no desire to subject their voting to a barrage of questions about their eligibility.

2 Tr. 103:9-104:9.

[16] As the DNC noted during the hearing, four years is not long ago in the world of electoral politics; it is a single cycle, and when the highest-stakes political race in the world occurs only quadrennially, acts taken four years ago are recent enough to be described as *current* evidence of a political party's conduct.

(Bates Stamped RNC 000147) (emails between the Bush/Cheney 2004 campaign and RNC employees)). This Court reached that very conclusion, and whether its November 1, 2004 decision and the Third Circuit panel's affirmance thereof are treated as precedential or if the Court merely notes the evidence supporting those opinions as of record herein, the conclusion could not have been stated more clearly by Prof. Davidson:

> There was obviously a vote caging project. It was under way, and I suppose if it hadn't been for the consent decree, it would[] have been carried forward to its conclusion.

2 Tr. 5:15-18. Despite his assertions that the RNC would not tolerate voter-suppressing activity, Josefiak admitted that the RNC did not terminate any employees as a result of the party's caging effort in Cuyahoga County, and that "Tim Griffin" – who, as RNC Research Director, circulated lists of Jacksonville, Florida voters called "caging" and "caging_1" in October 2004 – "worked at the RNC on a daily basis." 1 Tr. 131:17-25, 133:5-6; *see* Ex. 9. Not even by moving the goalpost – as Defendant's counsel attempted to do when he asserted that "[t] here is no objective evidence of *wide-scale effect* of voter suppression on the minority community in this country," 2 Tr. 160:20-22 (emphasis added) – can Defendants prevail. The Court has never demanded, and should not demand, proof that voter suppression has reached "wide scale" (itself an ill-defined term) before acting under the Decree; any voter suppression ought to be met with the full weight of the law.

In a further and deeply troubling move, the RNC seeks to place the burden of avoiding voter suppression *on the voters themselves*. Defendant's counsel asserted that "[i]f a voter . . . believes that he or she is going to be interfered with on Election Day, they *[sic]* could vote before Election Day or that voter can fill out an absentee ballot and vote by mail." 1 Tr. 20:20-24. Mr. Josefiak twice asserted that intimidated voters should resort to self-help rather than the protections of the Consent Decree, even suggesting that an aggrieved voter "go to the Justice

Department web site" and "contact . . . the public integrity section[] of the Civil Rights Division . . ." 1 Tr. 59:6-17. Discussing new state laws permitting no-excuse absentee voting and early voting, he added: "Well, when you have these kinds of alternate methods it takes again the onus of having to be there on Election Day and [if] for whatever reason, there is a feeling that there is a problem, there are other ways to exercise your right. . . . It allows all flexible, including minority voters to cast their vote, other than to have to go to the normal precinct to do so."[17] 1 Tr. 82:2-9. The RNC's motion should fail for a host of reasons, but it is particularly striking to hear the RNC, with its well-known recent and distant history of targeting minority voters with "ballot security" operations, laying responsibility for making it to the ballot box at the feet of the very voters it would target.

**b. The Voting Rights Act alone remains inadequate to protect the rights of minorities on election day.**

There is, of course, another federal law at issue herein: the Voting Rights Act itself, under which this action was brought. As Mr. Josefiak was forced to admit, the relevant portions of Sections 2 and 11 of the VRA are unchanged since the Consent Decree was first entered in November of 1982. And while he asserted that "enforcement of the law has become more aggressive," 1 Tr. 111:10-19, Mr. Josefiak was unable to support this assertion with reference to any significant number of prosecutions or private actions under the Act.

Despite all it has achieved, the VRA alone is inadequate to protect the rights of voters on election day; this was demonstrated not only by Dr. Davidson's own analysis of voter suppression activities over the years but also his experience as a member of the National Commission on the Voting Rights Act in 2005, when he heard "a litany of complaints [about

[17] Even while implying that minority voters can and should avoid intimidation by voting away from the polling place, Josefiak presented no evidence as to which demographic groups are using the alternative voting procedures. *See* 1 Tr. 142:15-22.

voter suppression and other problems at the polling place] . . . across the nation." 2 Tr. 8:6-8; *see generally* 1 Tr. 157:19-159:17. The Carter-Baker Commission, whose report Defendant introduced, clearly reached the same conclusion when it urged the creation of new protections against voter suppression. Exh. 26 at 8; 1 Tr. 126:10-14. Indeed, even Mr. Josefiak admitted that the Consent Decree aims to accomplish the same goal, at least with respect to the RNC, that the Carter-Baker commission says is missing from current federal law. *See* 1 Tr. 126:10-127:9; Exh. 26 at 8.

The VRA provides an important remedy for aggrieved voters, but it is not one that is usually available quickly enough to protect one's vote on election day. Dr. Davidson testified that the VRA alone "really hasn't" been a deterrent to voter suppression activities, "especially where we're talking about situations that occur shortly before an election." 2 Tr. 9:23-10:1. "The Voting Rights Act is just typically not able to react quickly to the kind of situation that [may] occur[] at a polling place." *Id.* 10:3-6. Thus, the RNC's reference to the federal complaint against the New Black Panther Party for Self Defense misses the mark. *See* RNC Exh. 68-69; 2 Tr. 43:12-44:1. It was not until January 2009 – more than two months after election day – that the Department of Justice was even able to file that complaint, much less obtain relief, under the VRA. *Id.* By that time, the opportunity for those intimidated in Philadelphia to cast a vote in the presidential election had long since and irretrievably passed. *See also NAMUDNO* slip op. at 2 ("litigation is slow and expensive"); 2 Tr. 11:20-24 (Davidson: "[T]ypically a Section 5 case takes years or many, many months to run its course. And so it doesn't seem to me that that would be a very effective deterrence for this kind of behavior."). Likewise, while the federal government continues to send observers into the field on election day pursuant to the VRA,

> if you're not fortunate enough to . . . vote in a precinct where there is an observer there to make sure nothing untoward happens, there's the possibility that something will. And I just . . . can't think of how the Justice Department . . . under the Voting Rights Act could make a quick move there that would accomplish what has been accomplished under this consent decree.

*Id.* 10:15-22. Rather, it is only the Consent Decree that "enable[s] a rapid response to the kinds of vote suppression activities that we have observed in 1981, and 1986, and 2004." *Id.* 12:6-11.

**3. The consent decree is not void as inconsistent with public policy, but rather is a fulfillment of Congress' consistent and ongoing effort to protect the right of eligible Americans to vote freely and safely.**

Finally, it is self-evident that there is no public interest in permitting voter suppression, whether intentional or "merely" as a substantial effect of a facially neutral "ballot security" effort. The RNC will surely couch this fourth prong of the Rule 60(b) test in other terms, appealing to the Court's sense of "fair play" as between rival political parties. But this is the wrong lens through which to consider the question. The Court is urged to consider instead the intent of Congress and the courts as reflected in so many of the statutes and cases cited over the course of this litigation. The animating principle behind not only the VRA, but also the Motor Voter Act and HAVA, has been to protect and expand access to the ballot, for those who are entitled to it: minorities who have historically been excluded by laws and practices, facially neutral and otherwise; people eligible to vote but not registered, for whom the effort can be made easier by combining the registration process with their normal activities as drivers and recipients of public aid; and eligible voters who are challenged at the polls and now receive a provisional ballot instead of merely being turned away. This focus on the rights of individuals is the real public interest at play here, and it favors maintaining rather than vacating the Decree.

For all of these reasons, the RNC's motion to vacate or modify the decree should be denied.

**B. In The Alternative, All Of The Concerns Raised By The RNC Can Be Remedied By Modification, Not Vacatur, Of The Decree.**

Equity demands that the RNC be denied the ability to obtain vacatur of the Decree based on alleged "onerous" sections that it has never sought to clarify, challenge, or even test. Although the RNC protests that the Decree forces it to abandon participation in the "72-hour program" that its state affiliates execute on election day, it has never tested this proposition by seeking either pre-clearance for a proposed election day program or clarification from the Court of the terms it now calls vague and unworkable. Its appeal to the Court's "equitable power" to vacate the Decree is improper in light of its own failure to live up to the most basic maxims of equity. Equity commands that one who seeks do equity, yet the RNC has never availed itself of the opportunity to clarify the Decree and, in fact, has demonstrably violated its terms on multiple occasions. Moreover, although "equity aids the vigilant, not those who slumber on their rights," for nearly three decades the RNC did not seek to clarify the terms of the Decree despite its present claim that it has been burdened by the Decree since its entry.

However, should the Court find certain of the RNC's concerns valid, the Court should note that the challenges the RNC has lodged are all answerable by solutions short of vacatur. Defendant essentially admitted as much when it showed the Court a PowerPoint slide listing three proposed amendments to the Decree:[18]

1. Clarify the standing requirement so that only the DNC or New Jersey Democratic State Committee may seek relief under the Decree.

2. Modify the pre-clearance requirement in the 1987 Order.

3. Make clear that certain activities are not prohibited.

[18] Because the RNC expressly declined to file its multimedia presentation slides or include them in its evidence binders, the list here is not a verbatim recitation of the RNC's modification requests.

While reiterating its contention that the RNC has failed abjectly to meet the heavy burden it must meet to warrant any sort of relief under Rule 60(b), the DNC would not object to the Court's entry of an order effecting one or a combination of the following modifications to the Consent Decree:

1. **Permit only the DNC and NJDSC to seek relief under the order.**

The DNC signaled its receptiveness to this modification in its opposition papers filed on January 19, 2009. The DNC would not object to an amendment or supplemental order providing that only the DNC and NJDSC may seek future relief under the Order.

2. **Modify the pre-clearance requirement and provide for an "attorneys' eyes only" process to protect RNC tactical information from disclosure to the DNC.**

The RNC's proposal to eliminate the pre-clearance requirement would too severely undercut the intent of the Decree to be the sole *ex ante* protection for voters facing an organized voter suppression initiative by the RNC or NJRSC. In 2004 and 2008, this Court has demonstrated its ability to deal exceedingly quickly with applications under the Order, even when discovery is required. Plaintiff proposes that the pre-clearance period be modified to permit the RNC to apply to the court for pre-clearance as few as seven (7) days before election day, or on even shorter notice if the RNC could demonstrate that it had just become aware of information necessitating a particular election day ballot security program. (This provision is a response to Mr. Josefiak's assertion that "even if we came in with some plan within that 20-day period, a week out or three days out, that plan may very well change." 1 Tr. 97:10-14.) To the extent that the 1987 Order appears to require notice to the DNC before an application is filed in Court, the DNC would also find acceptable a provision permitting the RNC to seek pre-clearance from the Court and simultaneously to serve the DNC with copies of its application therefor.

The RNC also argues that the pre-clearance requirement would "let the other side have not only a say in what's going on but an acknowledgement of what's going on; and, quite frankly . . . an opportunity to counter that somehow." 1 Tr. 103:1-9. While the DNC does not view this concern as credible, it also notes that elimination of the pre-clearance requirement is not the only solution to this concern. The prerogative of the RNC to keep its ballot security plans secret from the DNC can be protected by the entry of an "attorneys' eyes only" protective order, permitting only the DNC's outside counsel and their staff (as well as consulting and testifying experts) to review the RNC's pre-clearance application and participate in the attendant Court proceedings. Such an order could be effectuated either in conjunction with such other modifications to the Decree as the Court may now wish to make, or could be entered with the consent of the DNC and NJDSC at such time as the RNC makes its pre-clearance application.

3. **Amend the definition of "ballot security" in the 1987 Order to make clear that challenges to provisional ballots, and other challenges subject to an adversarial decision process and lodged other than on election day in the presence of the challenged voter(s), are not prohibited unless their purpose or effect is to deter qualified voters from voting.**

The evidence submitted by the parties and adduced at the hearing makes clear that the Consent Decree is essential as the only recourse for voters during a specific period – *i.e.*, between when they are determined by the relevant state authority ("registrar") to be qualified to vote and when their vote is in fact cast, whether by machine or other balloting mechanism. Prior to that time frame, voters and electoral integrity are both protected by existing registration regimes. A registrar must accept and process a properly completed voter registration form that is accompanied by the required proof of identity under HAVA. If the RNC wished to challenge voters, that challenge could be submitted to the registrar and decided pursuant to applicable law; provided that the voter and the DNC had the opportunity to be heard in the matter, the voter's rights could be adequately protected by that adversarial process. Likewise, *after* voting, when

provisional and absentee ballots are being tested and a determination made whether each may be counted, the voter has acted and each side has the opportunity to be heard by the person or panel empowered to decide whether each vote be counted. These processes, inasmuch as they permit the RNC's challenges to be tested by an adversarial proceeding and do not involve the confrontation of voters on election day, are beyond the ambit of the Consent Decree.

For these reasons, the DNC does not object to the RNC's proposal that the Court clarify that challenges to provisional ballots lodged after such ballots have been cast are not within the scope of "ballot security" activity. However, related activity – such as a pre-Election Day attempt to publicize the proposed provisional ballot challenges which has the purpose or effect of discouraging qualified voters from voting – may be within the scope of "ballot security" activity prohibited by the Decree.

For this same reason, the RNC's request for a broad exclusion of "poll-watching and ballot security programs that are consistent with state and federal law" from the Decree would excessively and unnecessarily dilute its protective power. As the Court noted in 2004, an act by the RNC may not be illegal under applicable law but may nevertheless violate the Consent Decree. Nov. 1, 2004 Trans. at 67:11-14. The RNC's interests in this regard are adequately protected when the Court puts the DNC and NJDSC to their proofs; Plaintiffs would have to demonstrate both disparate effect and that the purpose or effect of the activity is to prohibit qualified voters from voting. There is simply no way to escape a certain degree of qualitative judgment on the question of whether an activity constitutes voter suppression: What the RNC's operatives said, and how, and to whom, and even their appearance are all relevant to the question of whether or not Defendants have crossed the line from "security" to suppression. For this

reason, the RNC's proposed revision regarding "consisten[cy] with state and federal law" is an impracticable means to address the conduct the Consent Decree was intended to prevent.

In a similar vein, the RNC's suggestion that the Court exclude "communications between the RNC and state parties regarding lawful ballot security programs" from the ambit of the Order is a canard. No one has ever asserted that the RNC cannot communicate candidly with its state affiliates about the Consent Decree and its limitations, right up to the point where the RNC becomes a participant in, or an aider and abettor of, a ballot security program that violates the Consent Decree. Again, the RNC's proposed language would swallow up the Decree. Communications regarding the limitations imposed by the Decree are permissible, but such communications are already required of the RNC by the 1987 Order, making an amendment to that effect in 2009 unnecessary.

Finally, this inquiry into the range of permissible activities under the consent decree is one that is particularly difficult to entertain in the abstract. The modification of the pre-clearance requirement to which the DNC would consent, above, more than adequately protects the RNC's right to have these questions considered in a more practical fashion when they come to the court with a specific plan. The DNC therefore respectfully proposes that, with the exception of an exclusion from the definition of "ballot security" of challenges that are subject to an adversarial decision process, the Court not act at this time on the RNC's third enumerated request for amendment of the Decree.

## CONCLUSION

Despite the opportunity granted to them by the Court's two-day evidentiary hearing, the RNC has failed to establish any basis in law or fact for modifying or vacating the Consent Decree, or to rebut the evidence presented by the DNC that the dangers of minority voter suppression are still present in society, and that the decree's legacy of success ought to be continued. Accordingly, Plaintiff respectfully requests that this court deny Defendant's Motion to Vacate or Modify the Consent Decree in its entirety. In the alternative, Plaintiff respectfully requests that the Court maintain the decree with some or all of the possible modifications described herein.

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