UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DEMOCRATIC NATIONAL COMMITTEE, *et al.*, ***Plaintiffs*,** **v.** **REPUBLICAN NATIONAL COMMITTEE, *et al.*,** ***Defendants.***	**Civil Action No. 81-3876** **Judge Dickinson R. Debevoise**

DEFENDANT REPUBLICAN NATIONAL COMMITTEE'S MEMORANDUM IN SUPPORT OF ITS MOTION TO VACATE OR MODIFY CONSENT DECREE

Mark D. Sheridan
DRINKER BIDDLE & REATH
500 Campus Drive
Florham Park, N.J. 07932
Telephone: (973) 549-7336
Facsimile: (973) 360-9831

Bobby R. Burchfield
Jason A. Levine
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 756-8000
Facsimile: (202) 756-8087

Counsel for Defendant
Republican National Committee

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INTRODUCTION

Much has changed in politics and voting procedures since this Court first entered the Consent Decree in this case in 1982. In addition, the courts have clarified aspects of the statutes on which the original plaintiffs brought their lawsuit, making clear that the relief granted was inappropriate or, at the least, much too broad. For these and other reasons, pursuant to Federal Rule of Civil Procedure 60(b), the Republican National Committee ("RNC") requests that the Court dissolve the Consent Decree. As explained below, this relief is in the public interest and is necessary for the RNC to protect its constituency and the general public by attempting to ensure that only legitimate votes are cast and counted. This Motion is *not* about whether there has or has not been voting fraud in past elections. Rather, it is about whether a 26-year old Consent Decree – which the Democratic National Committee ("DNC") has used for tactical political reasons, in far-flung states, on the eve of every recent federal election – remains a prudent exercise of judicial authority.[1]

Most significantly, the Decree has been overtaken by legal and factual developments over the last two decades that have rendered it an anachronism. The Government currently abjures temporally open-ended consent decrees, and this case illustrates the wisdom of this policy. Major changes in voting procedures since 1987 have facilitated new potential avenues of voter fraud, which the RNC has a legitimate interest in combating, but which the Decree prohibits it from doing. The National Voter Registration ("Motor Voter") Act of 1993 liberalizes voter registration to such a degree that voters may register simultaneously in multiple states without

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[1] Voter registration and ballot box fraud are crimes no less severe than voter intimidation. Registration fraud and multiple voting are punishable under federal law by up to five years in prison and a $10,000 fine, and manipulation of electoral results is punishable by up to five years in prison and a $5,000 fine. *See* 42 U.S.C. §§ 1973i(c), 1973i(e) & 1973j(b).

photographic identification, and it restricts states' ability to purge voter registration lists of persons who have lost their eligibility to vote. The Bipartisan Campaign Reform Act of 2002 ("BCRA") has led the Democratic Party to "outsource" its voter registration activities to independent groups that lack the sort of accountability previously attributable to the DNC. The Help America Vote Act of 2002 ("HAVA") permits voters to cast "provisional" ballots, which can be submitted by ineligible voters and counted without verification. In addition, since the 1990s, states have greatly expanded the use of alternative voting procedures such as early voting, voting by mail, and no-excuse absentee ballots, all of which strip layers of oversight by elections officials from the voting process. Further, First Amendment jurisprudence has evolved since 1987 to confer significant protections on political parties' right to freedom of association, which the Court's most recent interpretation of the Decree infringes.

In addition, the Consent Decree is grievously overbroad, such that it reaches private action when the animating complaint was based on state action, and it has been given nationwide injunctive effect when no case supporting prospective relief on any basis (let alone a nationwide basis) was ever made. Accordingly, the Decree is void *ab initio* and should be vacated pursuant to Rule 60(b)(4) for two reasons. First, the predicate for subject matter jurisdiction in the original Complaint was state action in the form of RNC payment to off-duty uniformed law enforcement officers who served as poll watchers. But the 1982 Decree encompasses *all* RNC anti-fraud activities, regardless of whether those activities meet the test for state action. Indeed, the 2008 dispute involved *no* state action at all. Second, the original plaintiffs provided no sound basis for obtaining prospective relief. The Court accordingly lacked jurisdiction to order or permit injunctive relief in the form of the Decree.

Further, the Decree has been interpreted in an expansive fashion that confounds the RNC's reasonable expectations when it entered the Decree. Specifically, the RNC did not contemplate, and had no reason to expect: (1) that the Decree would be construed to restrict the RNC's ability to discuss voter fraud prevention efforts with state Republican party committees, absent pre-clearance of such discussions by the Court; (2) that a "disparate impact" on minorities through an anti-fraud initiative, without any evidence of a discriminatory intent or purpose, would constitute a violation of the Decree; or (3) that non-parties would be allowed to intervene to enforce the Decree nationwide. Had the RNC known that the Court would interpret the Decree so expansively, the RNC would *not* have agreed to it in 1982, *or* its modification in 1987.

Finally, the Decree should be vacated as a matter of public policy under Rule 60(b)(6) because the public has a strong interest in detecting and preventing voter fraud. As currently interpreted, the Decree severely hampers the RNC's efforts to advance this important public interest.

STATEMENT OF THE CASE

A. The 1982 Consent Decree.

In December 1981 the DNC, the New Jersey Democratic State Committee, and two minority voters from New Jersey filed suit in this Court against the RNC and others. *See Democratic Nat'l Comm. et al. v. Republican Nat'l Comm. et al.*, No. 81-3876 (D.N.J. 1981).[2] The lawsuit alleged that the defendants had engaged in unlawful and racially motivated Election

[2] The suit also named as defendants the New Jersey Republican State Committee ("NJGOP"), the RNC's political director, Alex Hurtado, the RNC's regional political director responsible for New Jersey, Ronald Kaufman, and an RNC employee who directed the National Ballot Security Task Force in New Jersey, John Kelly. The Court has not enforced the Decree against the NJGOP since its entry in 1982, however, and none of the individual defendants have been employed by the RNC for many years. Moreover, the 1987 modification of the Decree applied only to the RNC. Accordingly, the RNC alone submits this motion.

Day activities in connection with the 1981 New Jersey state elections. In particular, the Amended Complaint alleged that the RNC and NJGOP compiled a "vote challenge" list predominantly composed of African Americans, and deployed off-duty deputy sheriffs and police officers as poll-watchers in predominantly minority precincts. *See* Amended Complaint ¶¶ 23, 26-27. Plaintiffs alleged violations of the Fourteenth and Fifteenth Amendments to the U.S. Constitution and several federal statutes. *Id.* ¶¶ 36-44. The suit sought monetary damages and injunctive relief. *Id.* ¶¶ 48-49.

Without conceding wrongdoing, and without any judicial determination of liability, defendants agreed to the Consent Decree that was entered by the Court on November 1, 1982. *See* Ex. 1. Among other provisions, defendants agreed that "in the future, in all states and territories of the United States," they would:

- "comply with all applicable state and federal laws protecting the rights of duly qualified citizens to vote for the candidate(s) of their choice" (1982 Consent Decree § 2(a));
- "refrain from giving any directions to or permitting their employees to . . . interrogate prospective voters as to their qualifications to vote prior to their entry to a polling place" (*id.* § 2(d));
- "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" (*id.* § 2(e));
- "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 . . . in connection with any ballot security activities" (*id.* § 2(f));
- "refrain from having private personnel deputized as law enforcement personnel in connection with ballot security activities" (*id.* § 2(g)); and

- "agree that they shall, as a first resort, use established statutory procedures for challenging unqualified voters" (*id.* § 3).[3]

B. The 1987 Modification of the Consent Decree.

In 1986 the DNC sued the RNC for allegedly violating the Decree in Louisiana. *See Democratic Nat'l Comm. et al. v. Republican Nat'l Comm. et al.*, No. 81-3876 (D.N.J. 1986). This time, no state action was alleged. This action culminated in another settlement entered by this Court on July 27, 1987, between *only* the DNC and the RNC, which fully incorporated the 1982 Consent Decree and added the following "pre-clearance" requirement:

> 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 d*etermined by this Court to comply with the provisions of the [1982] Consent Order* and applicable law. *Applications* by the RNC for determinations 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 [1982] Consent Order and applicable law.

1987 Consent Decree § C (emphasis added). *See* Ex. 2.

The 1987 modification broadly defined "ballot security" programs to encompass *any* efforts by the RNC to prevent or remedy voter fraud. *See id.* § A. The only exception to the pre-clearance requirement was for "normal poll watch functions so long as [persons employed by the RNC] 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 the Court. *Id.* § B. The 1987 Order markedly expanded the scope of

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[3] Notably, the Consent Decree stated that it "is expressly understood and agreed that *the RNC and the [NJGOP] 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." 1982 Consent Decree § 4 (emphasis added).

the Decree by requiring pre-clearance of many activities regardless of whether they had the "purpose or significant effect" of deterring minority voters. *Cf.* 1982 Consent Decree § 2(e). Moreover, the pre-clearance provision presupposed that the RNC would have 20 days' notice of potential voter fraud prior to an election.

C. Subsequent Litigation Under the Consent Decree.

On five occasions since 1987, the DNC and its allies have asserted violations of the Consent Decree.

First, in 1990, the DNC filed suit in this Court over RNC activities in North Carolina. The Court *rejected* the DNC's claims and *denied* the DNC any relief, noting only that the RNC had technically violated the Decree 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." *See* Nov. 5, 1990 Order, *Democratic Nat'l Comm. et al. v. Republican Nat'l Comm. et al.*, No. 86-3972 (D.N.J. 1990) (Ex. 3).

Second, in 2002, the court *rejected* a claim by the New Jersey Democratic State Committee that an electronic mail message from an official of the campaign of Republican Douglas Forrester for the United States Senate was a violation of the Decree by the NJGOP. *See* Oct. 31, 2002 Order, *New Jersey Democratic State Comm. v. New Jersey Republican State Comm.*, No. 81-3876 (D.N.J. 2002) (Ex. 4).

Third, on the eve of Election Day 2004, United States Senator Tom Daschle filed suit in South Dakota seeking a temporary restraining order against his Republican opponent, John Thune, and the South Dakota Republican Party to prevent the alleged intimidation and harassment of Native American voters in violation of federal law and the Consent Decree. The court granted the temporary restraining order against individuals acting on behalf of Mr. Thune

but made no mention of the Consent Decree or any findings with respect to its alleged violation. *See Daschle v. Thune et al.*, No. 04-4177 (D.S.D. 2004) (Ex. 5).

Fourth, also on the eve of Election Day 2004, intervenors Ebony Malone and Irving Agosto, minority voters in Cleveland, Ohio, sued the RNC for injunctive and declaratory relief under the Decree because of a statewide "voter challenge list" compiled by the Ohio Republican Party ("ORP"). *See Democratic Nat'l Comm. et al. v. Republican Nat'l Comm. et al.*, No. 81-3876 (D.N.J. 2004). The Court approved intervention, permitted expedited discovery, and ruled – the afternoon before Election Day – that the RNC had violated the Decree, even though its action "was not in and of itself illegal under Ohio or federal law." *See* Tr. of Proceedings ("Tr.") at 66-67 (Nov. 1, 2004). The Court enjoined the RNC from using the challenge list. *Id.* at 68. Although a divided panel of the Third Circuit denied the RNC's request for a stay, the court sitting *en banc* vacated the panel's decision and granted the stay on Election Day. *See Democratic Nat'l Comm. et al., v. Republican Nat'l Comm. et al.*, No. 04-4186, 2004 U.S. App. LEXIS 22689 (3d Cir. Nov. 2, 2004) (*en banc*) (Ex. 6). Intervenor Malone unsuccessfully asked the United States Supreme Court, via application to Circuit Justice Souter, to vacate the stay. *See Democratic Nat'l Comm. et al., v. Republican Nat'l Comm. et al.*, 543 U.S. 1304 (2004) (Souter, J.) (Ex. 7). Because Intervenor Malone voted without incident on Election Day, the Third Circuit dismissed the RNC's appeal as moot on December 20, 2004. Ex. 8. This Court entered a stipulated dismissal of the *Malone* action of February 3, 2005.

Finally, just *today*, literally on the eve of Election Day 2008, the DNC filed suit against the RNC (and others) in this Court, alleging that the defendants had retained private investigators in New Mexico for the purpose of engaging in "ballot security" activities – including voter challenges – in violation of the Consent Decree. *See Democratic Nat'l Comm. et al. v.*

Republican Nat'l Comm. et al., No. 81-3876 (D.N.J. Nov. 3, 2008) (Ex. 9) (DNC Brief in Support of Order To Show Cause). As the RNC explained in an affidavit pursuant to Court order, the DNC's allegations are *false*, and the conduct at issue in fact has nothing whatsoever to do with "ballot security" or voter challenges as contemplated by the Decree. *See* Affidavit of Todd Stefan (Nov. 3, 2008). Accordingly, the Court immediately denied the DNC's request for relief.

D. The RNC's Efforts To Comply With the Consent Decree.

As the RNC previously explained in the *Malone* matter, it has made extraordinary efforts to comply with the Consent Decree. For example, in the 2004 election cycle, RNC Chief Counsel Jill Holtzman Vogel and Deputy Counsel Caroline Hunter were specifically charged with ensuring full compliance with the Decree. *See* Decl. of Caroline Hunter ¶ 2 (Ex. 10). Likewise, in the 2008 election cycle, RNC Deputy Counsel Heather Sidwell was charged with this function. *See* Decl. of Heather Sidwell (Nov. 3, 2008) (Ex. 11).

ARGUMENT

Pursuant to Federal Rule of Civil Procedure 60(b), a district court may vacate or modify a consent decree for several reasons. The Rule provides, in pertinent part:

> 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: … (4) the judgment is void; (5) . . . applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). *See also Henderson v. Morrone*, 214 Fed. Appx. 209, 215 (3d Cir. 2007) ("there need not be a conflict between a consent decree and a subsequent change in the law,

[rather] a significant change with no attendant conflict constitutes sufficient grounds for vacatur."); *Brown v. Phila. Hous. Auth.*, 350 F.3d 338, 348 n.6 (3d Cir. 2003) (same).[4]

I. CHANGED LEGAL CIRCUMSTANCES SUPPORT VACATUR OF THE CONSENT DECREE.

Relief from a consent decree is appropriate under Rule 60(b)(5) if the moving party can show "a significant change either in factual conditions or in the law." *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (citation omitted). A court may recognize "subsequent changes in either statutory or decisional law," and commits reversible error by refusing to modify a consent decree in view of such changes. *Id.* *See also Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380 (1992) ("sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtained at the time of its issuance have changed, or new ones have since arisen.").

The longevity of a consent decree is also a factor in the decision whether changed circumstances warrant lifting a decree under Rule 60(b)(5). *See, e.g.*, *Building & Constr. Trades Council v. NLRB*, 64 F.3d 880, 888 (3d Cir. 1995) (considering "the length of time since entry of the injunction"). Since original entry of this Decree, the United States Department of Justice has begun to limit the duration of its consent decrees as a matter of policy and practice. The Antitrust Division Manual, for example, provides that standard consent decrees are presumptively to expire "on the tenth anniversary of [their] entry by the Court." *See* United States Dep't of Justice, Antitrust Division Manual, ch. 4, at 60 (available at

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[4] In the Third Circuit a district court must hold an evidentiary hearing before vacating or modifying the requirements imposed by a consent decree. *See Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 674 F.2d 976, 981 (3d Cir. 1982) (citing *Mayberry v. Maroney*, 529 F.2d 332 (3d Cir. 1976)).

http://www.usdoj.gov/atr/foia/divisionmanual/ch4.htm).[5] Further, recent consent decrees entered by the Department of Justice pursuant to the Voting Rights Act tend to expire in eight years or less (subject to motions for extension "for good cause shown").[6] This Decree, entered *26 years* ago and effective through *fourteen* federal election cycles and *seven* Presidential elections, was obtained not by the Government but by the RNC's principal political adversary. For this reason, and because legal and factual circumstances have plainly changed since 1982, the time has come to vacate the Decree.

A. Legal Circumstances Have Changed Since 1987.

There can be no doubt that both the RNC and the DNC have a strong interest in ensuring that only legitimate votes, by properly registered voters, are cast and counted. Yet history demonstrates that voting irregularities and fraud are possible. For example, in the *Malone* matter, the Court observed that by mid-October 2004 "there were widespread reports in the press and elsewhere that thousands of voter irregularities had occurred during the Ohio registration campaign," and that there were "*certainly sufficient data to cause the Republican Party concern and explain vigorous efforts to prevent improperly registered voters from casting ballots on*

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[5] *See, e.g., United States v. Altivity Packaging, LLC,* No. 1:08CV00400 (EGS) (D.D.C. July 15, 2008) (consent decree to expire ten years from date of entry); *United States v. Mittal Steel Co.*, No. 1:06CV01360 (ESH) (D.D.C. May 23, 2007) (same); *United States v. Cingular Wireless Corp.*, No. 1:04CV01850 (RBW), at 14 (D.D.C. Nov. 3, 2004) (same); *United States v. American Airlines, Inc.*, No. 92-2854 (JDB) (Sept. 23, 2004) (seven year duration) (all available at http://www.usdoj.gov/atr/cases.html).

[6] *See, e.g., United States v. Salem County, New Jersey*, No. 1:08CV03276 (JHR), at 9 (D.N.J. July 29, 2008) (consent decree in effect through March 31, 2011); *United States v. Galveston County, Texas*, No. 3:07CV00377 (JDR), at 11 (S.D. Tex. July 20, 2007) (duration through December 31, 2010); *United States v. Brown*, No 4:05cv-33TSL-AGN ¶ 10 (S.D. Miss. Feb. 17, 2005) (duration through December 31, 2012); *United States of America v. Yakima County*, No. CV-04-3072-LRS ¶ 12 (E.D. Wa. Sept. 3, 2004) (duration through December 31, 2006) (all available at http://www.usdoj.gov/crt/voting/litigation/caselist.php).

Election Day." *See* Tr. at 64 (Nov. 1, 2004) (emphasis added). The Court further recognized that much of the questionable conduct "appear[ed] to emanate from groups such as ACORN and ACT, which were aggressively supported by the Democratic Party." *Id.* Reflecting the problems noted by the Court in 2004, legal developments since the Decree was entered in 1982 (and modified in 1987) have altered voting procedures in a fashion that underscores the RNC's legitimate interest in detecting and preventing voter fraud.

1. The "Motor Voter Law" of 1993.

In 1993, Congress passed the National Voter Registration Act, 42 U.S.C. §§ 1973gg, *et seq.*, commonly known as the "Motor Voter Law." This law requires that anyone renewing a driver's license, or applying for welfare or unemployment compensation, must be offered the chance to register to vote on the spot. *See* 42 U.S.C. § 1973gg-5(a)(4). States also are required to permit mail-in voter registrations. *Id.* § 1973gg-4. Further, the law restricts a state's ability to purge voter registration lists of persons who have died, moved, or become ineligible to vote due to criminal conviction, and requires that such persons remain on the rolls for at least *eight years* before they can be removed. *Id.* § 1973gg-6(d). Despite their commendable intentions, these provisions of the law have increased the potential for voter fraud to an extent that did not exist (and was not reasonably foreseeable) when the RNC agreed to the Decree. In a statement to the Senate Committee on Rules and Administration, Todd Gaziano, Director of the Center for Legal and Judicial Studies at the Heritage Foundation, succinctly explained the problem created by the Motor Voter Law:

> *Regardless of the intent of the Motor Voter law, it has helped create the most inaccurate voting rolls in our history.* Citizens are registered in multiple jurisdictions at the same time, and very few states have effective procedures to ensure that those registered even are citizens. If you compound our sloppy voting rolls with the fact that over 15 percent of Wisconsin college students in one survey admitted voting more than once (several voted at least five times) and that

> absentee voter fraud has plagued many recent contests, *you can almost guarantee that illegal voting may provide the margin of victory in a close contest.*

See Election Reform: Hearings Before the Senate Comm. on Rules and Admin., 107th Cong., Mar. 14, 2001 (statement of Todd Gaziano) (emphasis added) (Ex. 12).

2. The Bipartisan Campaign Reform Act of 2002.

BCRA, which amended the Federal Election Campaign Act, 2 U.S.C. §§ 431 *et seq.*, also resulted in an increased likelihood of voter fraud. In particular, BCRA – which became effective in November 2002 – prohibits national political parties such as the DNC and RNC from soliciting, receiving, or spending corporate, union, or large individual donations, often called "soft money." 2 U.S.C. § 441i. Prior to BCRA political parties could not legally use these funds for direct candidate support, so they instead used so-called "soft money" for voter registration and get-out-the-vote activities. The DNC and Democratic candidates for high elected office have responded to BCRA by "outsourcing" their voter mobilization functions to ideologically-aligned independent groups. *See, e.g.*, Gromer Jeffers, Jr., *GOP Outplayed Democrats on the Ground*, DALLAS MORNING NEWS, Nov. 5, 2004 (quoting Democratic consultant Bill Carrick, who noted that "[w]e outsourced our get-out-the-vote effort because we feared we would take a financial hit by doing it alone."); James Zogby, *Amway vs. Outsourcing: How George Bush Won*, ZOGBY INTERNATIONAL, Nov. 5, 2004 ("The Kerry [get-out-the-vote] operation had essentially been, in a word, outsourced" to Democratic interest groups and labor unions) (Ex. 13).

As a result, organizations such as ACORN have engaged in unprecedented voter registration and get out the vote activity during the 2004 and 2008 election cycles, leading to less accountability and transparency in the process. *See, e.g., FBI Investigates ACORN For Voter Fraud*, ASSOC. PRESS, Oct. 17, 2008 (noting ACORN report that it had registered 1.3 million new voters for the 2008 election). As the Court itself observed in 2004, significant voting

irregularities "appear[ed] to emanate from groups such as ACORN and ACT, which were aggressively supported by the Democratic Party." Tr. at 64 (Nov. 1, 2004). Reports of similar irregularities attributable to ACORN have appeared in 2008 as well.

3. The Help America Vote Act of 2002 Has Caused Confusion Over "Provisional" Ballots.

In 2002, Congress enacted the Help America Vote Act, 42 U.S.C. §§ 15301 *et seq.* ("HAVA"), which requires that voters who do not appear to be properly registered to vote on election day must be permitted to cast "provisional" ballots, the validity of which are to be determined later by state officials. *See* 42 U.S.C. § 15482. This fact alone demonstrates that the Consent Decree is obsolete. Challenged voters are not barred from voting, but cast a provisional ballot that is subsequently examined for validity, with *administrative challenges permitted* in the form of citizen complaints. *Id.* § 15512. As currently interpreted, the Consent Decree would *bar* the RNC from exercising its rights to challenge improper provisional balloting under HAVA. Further, "provisional" voting raises serious concerns about voter fraud because the traditional safeguards against multiple registration and voting do not apply.

4. The Rise of Alternative Voting Procedures Has Also Expanded Opportunities for Voting Fraud.

During the 1990s, many states instituted or greatly expanded their use of alternative voting procedures, including early voting, voting by mail, and absentee balloting. As of the 2008 election cycle, 31 states allowed some form of early voting prior to Election Day. *See* National Conference of State Legislators, *Absentee and Early Voting* (Oct. 9, 2008) (Ex. 14). In addition, 28 states in 2008 had "no-excuse" absentee ballot procedures that permit voters to vote by absentee ballot for any reason, and in Oregon, *all* voters can cast ballots by mail. *See id.* Moreover, the number of voters taking advantage of early voting has dramatically increased in recent years. "In 2000, an estimated 12.7 million people – roughly 12 percent of voters – cast

their ballots early. In 2004, that number doubled to about 25 million, or about 20 percent of 122 million voters." Domenico Montanaro, *Can Early Voting Ease Election Day Drama?*, MSNBC.COM, Sept. 24, 2008. In 2008, "[e]lection officials across the country estimate[d] that [the] number [of early voters] could rise to about 40 to 50 percent of voters in some states and one third overall. So, if this year's national turnout tops 140 million, as many as 45 to 50 million votes could be cast early." *Id. See also* Stephen Ohlemacher, *Democrats Dominate Early Voting in Key States*, ASSOCIATED PRESS, Oct. 30, 2008 (reporting that roughly one-third of voters were expected to vote early in 2008).

The increased use of alternative voting methods has also increased opportunities for voter fraud. When combined with the mail-in registration permitted by the Motor Voter Law, no-excuse absentee ballots and vote-by-mail systems allow an individual to register to vote, request a ballot, and cast a vote without ever appearing before a county official to establish her existence. These procedures also permit third parties to request and cast ballots for other individuals without their permission.

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The Consent Decree prevents the RNC from *any* involvement in detecting and reporting these new avenues of voter fraud. Indeed, apart from its burdensomeness, the pre-clearance requirement mandates that the RNC give its political adversaries a detailed road map of its procedures weeks before implementing them, assuring an ample opportunity to evade detection.

B. First Amendment Jurisprudence Now Protects the RNC's Communications With State Parties.

The initial Consent Decree in 1982 recognized that the RNC is not responsible for the actions of state Republican parties, stating that "it is expressly understood and agreed that the RNC . . . [has] 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." 1982 Consent Decree § 4. In 1990, over the RNC's objection, the Court found that the RNC had technically violated the Decree 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." Nov. 15, 1990 Order.

The Court's 2004 ruling in the *Malone* case appears to be inconsistent with the 1990 ruling:

> 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 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 Cuyahoga 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: Cuyahoga 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.

Tr. at 66-67 (Nov. 1, 2004) (emphasis added). The emails cited by the Court, however, (a) generally described the desirability of compiling data on apparent voter registration fraud, and (b) identified 502 returned post-registration mailings from the Board of Elections of one Ohio county to voters who had been registered to vote by ACORN and ACT. The Court deemed these discussions impermissible under the Decree even though they were "*not . . . illegal under Ohio or federal law*." *Id.* (emphasis added).

In other words, the Court has interpreted the Decree to *bar* the RNC from engaging in perfectly legal discussions about voter fraud and fraud prevention with state Republican parties. This ruling amounts to a *prior restraint* on the RNC's political speech, and accordingly runs afoul of long-standing First Amendment principles. *See, e.g., Bantam Books, Inc. v. Sullivan*, 372

U.S. 58, 70 (1963); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). At the other extreme, the 1990 ruling, imposing an inconsistent obligation on the RNC to notify state parties of the Decree – even though state parties are not covered by the Decree – is "forced speech" in violation of the First Amendment. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *Pacific Gas & Elec. Co. v. Public Utilities Comm'n.*, 475 U.S. 1 (1986).

Moreover, the Court's ruling in *Malone*, although vacated and of no precedential effect (*Munsingwear,* 340 U.S. 36), suggests that the RNC is in a "damned if you do, damned if you don't" dilemma. On the one hand, if the RNC avoids all discussions with state parties about voter fraud, it risks a contempt citation for failing to inform the parties about the Decree pursuant to the 1990 Order. On the other hand, if the RNC has legal counsel monitor its discussions with state parties concerning election day activities to promote compliance with the Decree, then the RNC risks being held complicit with the state parties in fraud prevention activities, in violation of the Decree's pre-clearance procedures.

In addition, the Court's ruling is contrary to recent legal developments that have enhanced the First Amendment protections for political parties, particularly the right to freedom of association among party committees through speech. *See, e.g., Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) (political speech by political party committees is "core First Amendment activity."). *See also Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989) ("partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments"); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214-15 (1986) (same). According to Professor Laurence Tribe, courts have found violations of a political party's right of association where laws interfere "with an activity integral to the association in the sense that the association's

protected purposes would be significantly frustrated were the activity disallowed." Laurence Tribe, AMERICAN CONSTITUTIONAL LAW § 12- 26, at 1016 (2d ed. 1988). The RNC's communications with its state counterparts are "integral" to their association, yet are hampered by the Consent Decree as currently interpreted.

Moreover, the pre-clearance procedures effectively undermine any fraud prevention effort by the RNC. Just as accounting firms safeguard their auditing procedures, effective fraud detection depends on the ability, in compliance with federal and state law, to focus efforts in ways not known to or anticipated by the perpetrators of the fraud.

The Court's interpretation of the Consent Decree in the *Malone* matter is subject to strict scrutiny and cannot stand in view of cases requiring any such abridgement to be "narrowly tailored to serve a compelling state interest." *Eu*, 489 U.S. at 231; *Tashjian*, 479 U.S. at 217. Here, the Decree is not narrowly tailored, since it applies to *all* anti-fraud activities. And, since the Decree is being applied to activities that are consistent with state and federal law, there is no compelling state interest to support this infringement of speech and association.

II. THE CONSENT DECREE IS VOID *AB INITIO* AND SHOULD BE VACATED.

Rule 60(b)(4) empowers a court to vacate a judgment that is void. *See* Fed. R. Civ. P. 60(b)(4). A judgment is void if the rendering court lacked subject matter jurisdiction over the dispute. *See, e.g., Marshall v. Board of Educ.*, 575 F.2d 417, 422 (3d Cir. 1978) (determining that a judgment may be void, and therefore subject to relief under Rule 60(b)(4), if the court that rendered it lacked subject matter jurisdiction); *Frett-Smith v. Vanterpool*, 511 F.3d 396, 403 (3d Cir. 2008) (affirming order vacating judgment and dismissing the complaint for lack of subject matter jurisdiction). *See also generally* 11 *Wright, Miller & Kane, Federal Practice and Procedure* § 2682, at 328-329 (1995) (judgments are "void" in the absence of subject matter jurisdiction). Indeed, because a federal consent decree must "spring from, and serve to resolve, a

dispute within the court's subject-matter jurisdiction," the absence of jurisdiction automatically voids the decree. *Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (citing *Local 93, Int'l Assoc. of Firefighters v. Cleveland*, 478 U.S. 501, 525 (1986)); *Brown,* 350 F.3d at 347 (directing district court to vacate consent decree for lack of subject matter jurisdiction). Here, the Consent Decree is void because the Court lacked subject matter jurisdiction to enter it in 1982, or to broaden it to have nationwide effect in 1987. Subsequent legal developments have confirmed the Court's lack of ongoing subject matter jurisdiction.[7]

A. The Original Consent Decree Improperly Extended to the RNC's Private Conduct.

The *gravamen* of the original complaint in this matter was the alleged use by the RNC of state election and law enforcement officials in ways claimed to intimidate, harass, and deter Black and Hispanic voters from voting. As alleged in the Amended Complaint, "the defendants' actions and those of their employees and agents . . . were undertaken under color of state law and constitute state action." Amended Complaint ¶ 30. Yet, the injunctive relief entered by this Court in 1982, and expanded in 1987, goes far beyond actions undertaken "under color of state law," and encompasses *all* efforts of the RNC to counter voter registration and ballot box fraud in all local, state, and national elections. As this Court observed in its November 1, 2004 ruling,

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[7] The fact that the RNC agreed to the Consent Decree and has not previously challenged the Court's subject matter jurisdiction is irrelevant. In accordance with Fed. R. Civ. P. 12(b)(1), "it is well-settled that a party can never waive lack of subject matter jurisdiction." *Brown,* 350 F.3d at 346; *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (same); *Okereke v. United States*, 307 F.3d 117, 120 n.1 (3d Cir. 2002) (same). The Third Circuit recently noted that subject matter jurisdiction is an issue of such significance that its potential loss is an "extraordinary circumstance," holding that the law of the case doctrine did not bar a merits panel from revisiting a motions panel's assumption that subject matter jurisdiction was present. *Council Tree Communications, Inc. v. FCC*, 503 F.3d 284, 292 (3d Cir. 2007).

the Decree now sweeps in and prohibits conduct that is "*not in and of itself illegal* under Ohio or federal law." Tr. at 66-67 (Nov. 1, 2004).

The original plaintiffs' Amended Complaint in 1982 stated claims pursuant to the Fourteenth and Fifteenth Amendments (Count No. 1), 42 U.S.C. §§ 1971(a)(1) & (2) (Count No. 3), and 42 U.S.C. § 1983 (Count No. 4). By their plain terms, these provisions prohibit only actions taken "under color of state law" or by the state itself. The allegations of the 1981 complaint mirror the state action requirement. The allegations cannot be read to support injunctive relief so broad as to encompass *every* private activity of the RNC touching upon prevention of vote fraud. *Frew* held that a consent decree must "come within the general scope of the case made by the pleadings; and must further the objectives of the law upon which the complaint was based." 540 U.S. at 437. Further, Count 3 provides no basis for subject matter jurisdiction because 42 U.S.C. § 1971(a) is subject to exclusive enforcement by the Attorney General. *See* 42 U.S.C. §§ 1971(c) & (d) .

Count No. 5 of the Amended Complaint alleged violation of 42 U.S.C. § 1985(3), which – in plaintiffs' words – " prohibits two or more persons, whether or not acting under color of state law, from acting jointly to deprive any person or class of persons of equal protection of the laws." Amended Complaint ¶ 44. In the years since entry of the Consent Decree, however, the United States Supreme Court has made clear that Section 1985(3) makes private conspiracies actionable only to the extent that the conspiracies interfere with a constitutional right protected against *private* action.[8] Because the Fourteenth and Fifteenth Amendment guarantees of equal

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[8] *See United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 833 (1983) (private conspiracy to violate First Amendment rights is not actionable under Section 1985(3) because the First Amendment does not protect against private action); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 274 (1993) (private conspiracy to hinder access to abortion is not

protection and voting rights protect against *state* action, not *private* action, a claim of a private conspiracy to deprive persons of voting rights does not lie.

Finally, Count No. 2 of the Amended Complaint alleged violation of 42 U.S.C. § 1973i(b), which states in pertinent part that "no person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person from voting or attempting to vote . . ." But, as shown, the allegations in the 1981 complaint focused on and sought relief for actions taken under color of state law, not for the private actions of the RNC or NJGOP.

Accordingly, a decree purporting to govern *all* anti-fraud activity of the RNC in *every* local, state, and federal election throughout the United States, whether under color of state law or not, was inappropriate. The 1987 Decree relied upon and expanded the 1982 Decree, and is equally invalid.

B. The Plaintiffs Failed To Allege or Show Entitlement to Prospective Relief.

As noted above, in the Amended Complaint filed by the DNC in 1982, plaintiffs sought monetary damages and injunctive relief for several federal causes of action. Irrespective of whether plaintiffs pleaded sufficient grounds to establish jurisdiction over their claims for damages (which were not awarded), plaintiffs did *not* establish this Court's subject matter jurisdiction over the claims for injunctive relief that were ultimately embodied in the Consent Decree. *See Brown v. Fauver*, 819 F.2d 395, 400 (3d Cir. 1987) (recognizing that "a given plaintiff may have standing to sue for damages yet lack standing to seek injunctive relief.").

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actionable under Section 1985(3) because the constitutional right to privacy does not protect against private action).

Injunctive relief, of course, is the substance and purpose of the Consent Decree. *See In re Masters Mates & Pilots Pension Plan*, 957 F.2d 1020, 1025 (2d Cir. 1992) ("A consent decree is no more than a settlement that contains an injunction."); *United States v. City of Hialeah*, 140 F.3d 968, 974 (11th Cir. 1998) ("A consent decree will always contain injunctive relief because, by definition, a consent decree obligates the defendant to stop alleged illegal activity."). Simply put, plaintiffs failed to allege that there was a realistic threat that *any* of them – whether the DNC members from New Jersey, the members of the New Jersey State Democratic Committee, or the individual voter plaintiffs – would again be subject to the same activity by defendants. Thus, there was no basis for prospective injunctive relief.

For a district court to have subject matter jurisdiction over a claim for *injunctive* relief, a plaintiff must show that she is immediately in danger of sustaining some direct injury as a result of the challenged conduct. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Gratz v. Bollinger*, 539 U.S. 244, 284 (2003) ("To seek forward-looking, injunctive relief, petitioners must show that they face an imminent threat of future injury."). Further, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea*, 414 U.S. at 495-96. Subject matter jurisdiction, therefore, exists only where the threatened injury is "real and immediate," not "conjectural" or "hypothetical." *Id.* at 494; *see also Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (lower court lacked subject matter jurisdiction over claim for prospective injunctive relief because of the "speculative nature of [the plaintiff's] claim that he will again experience injury as the result of [the police] practice even if it continued."); *Fauver*, 819 F.2d at 400 (denying prospective injunctive relief where plaintiff failed to "'establish a real and

immediate threat that he would again be [the victim of the allegedly unconstitutional practice.]'") (brackets in original) (citation omitted).

Here, plaintiffs failed to allege, let alone demonstrate, that *any* of them might realistically be subject to the purportedly illegal conduct by defendants again in the future. *See generally* Amended Complaint ¶¶ 21-34. It was entirely conjectural and speculative whether, in the absence of relief, the RNC would have hired off-duty policemen to provide ballot security in future New Jersey elections, or whether such officers, if hired, would have turned plaintiff voters away from the polls in future elections. "Such an accumulation of inferences is simply too speculative and conjectural to supply a predicate for prospective injunctive relief." *Shain v. Ellison*, 356 F.3d 211, 216 (2d Cir. 2004). Accordingly, the Consent Decree should be vacated because plaintiffs' claim for prospective *injunctive* relief was (and is) not justiciable.

III. AS INTERPRETED AND APPLIED THE CONSENT DECREE IS CONTRARY TO THE RNC'S REASONABLE EXPECTATIONS WHEN IT ENTERED THE DECREE.

Under Rule 60(b)(5), a federal district court may set aside a final judgment or order if "applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). The Court has interpreted the Consent Decree to have a far more substantial impact on the RNC's activities than the RNC reasonably understood when it agreed to the Decree.

First, in its now-vacated 2004 Order, the Court extended the Decree to restrict the RNC's communications with state Republican parties about anti-fraud measures of the state parties. *See* Tr. at 66-68 (Nov. 1, 2004). This extension was contrary to the terms of the Consent Decree itself, which specifically recognizes that the RNC has "*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." 1982 Consent

Decree § 4 (emphasis added). It was also inconsistent with the 1990 Order, which requires the RNC to inform state parties about the Decree.

Second, the Court permitted non-parties such as Ebony Malone to intervene and seek enforcement of the Consent Decree on a nationwide basis. This ruling was contrary to Supreme Court and Third Circuit precedent, which *bars* enforcement suits by non-parties to a consent decree, even in civil rights cases. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975) ("[A] well-settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it."). *Accord Coca-Cola Bottling Co. v. Coca-Cola Co.*, 988 F.2d 386, 401-02 (3d Cir. 1993) (rejecting non-party standing to enforce consent decree in the absence of provisions clearly permitting such enforcement); *Bennett v. Atlantic City*, 288 F. Supp. 2d 675, 683 (D.N.J. 2003) (ruling that civil rights plaintiffs lacked standing to enforce a consent decree to which they were not parties); *Antonelli v. New Jersey*, 310 F. Supp. 2d 700, 712 (D.N.J. 2004 (same, relying on *Bennett*). The ruling also disregarded the text of the Decree itself, which lacks any provision that would permit enforcement by a non-party, the necessary predicate to such a suit in a civil rights context. *See, e.g., Coca-Cola Bottling Co. v. Coca-Cola Co.*, 654 F. Supp. 1419 (D. Del. 1987).

Third, the Court predicated the RNC's alleged violation of the Consent Decree in 2004 on a likely "disparate impact" on certain minority voters in Ohio, as opposed to any discriminatory intent. *See* Tr. at 66-67 (Nov. 1, 2004). Under the Decree, however, such a disparate impact is merely "relevant evidence" bearing on whether race was a factor in an effort to deter qualified voters from voting." 1982 Consent Decree § 2(e) (emphasis added). Moreover, the caselaw in effect at the time of the Decree required a statistical showing not just of

an impact on minorities, but a "disproportionate impact." *EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188, 192 (3d Cir. 1980). There was no such showing in the *Malone* case.

Notwithstanding the dismissal of the *Malone* case pursuant to *Munsingwear, Inc. v. United States*, 340 U.S. 36 (1950), this Court's interpretations of the Consent Decree suggested the Court's *future* implementation of the Decree will constrain the RNC's actions far beyond its expectations in 1982 or 1987. Because the RNC did not acquiesce in or anticipate these interpretations, it is no longer equitable for the Decree to have prospective application. *See* Fed. R. Civ. P. 60(b)(5).

IV. PUBLIC POLICY REQUIRES THAT THE CONSENT DECREE BE VACATED OR MODIFIED.

Under Rule 60(b)(6), a court may grant relief from judgments for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). Here, substantial reasons of public policy militate against continued enforcement of the Consent Decree. *Evans v. Jeff D.*, 475 U.S. 717, 727 n.13 (1986) (noting that if performance of a consent decree violates public policy, "the entire agreement is unenforceable").

Just as there is a public interest in allowing qualified voters to vote, the federal and state governments, as well as the general public, indisputably have a strong interest in protecting the integrity of the electoral process and preventing voter fraud. *See, e.g., Marston v. Lewis*, 410 U.S. 679, 679 (1973) (upholding state registration deadline because of state's interest in protecting the electoral process from possible fraud). Voter fraud has a degrading effect on the democratic process, both through loss of voter confidence and illicit impact on close elections. The Court itself acknowledged in *Malone* that its interpretation of the Consent Decree operated to prohibit the RNC from using, without pre-clearance, lawful procedures to challenge voters and prevent voter fraud. *See* Tr. at 66-67.

It appears that the Court's ruling would also encompass attempts by the RNC to notify state authorities of apparent voter fraud. The duty to report felonies to the authorities is an established tenet of Anglo-Saxon law dating back to the 13th century. *Roberts v. U.S.*, 445 U.S. 552, 557 (1980). "[A]ny bargain for the purpose of stifling a criminal prosecution, whether or not the bargain is criminal, is always contrary to public policy and unenforceable." 15 *Corbin on Contracts* § 83.1, at 251 (2003). Such unenforceable contracts "can take various forms, including . . . *promises not to give evidence to the authorities or to conceal evidence*." *Id.* at 253 (emphasis added). Here, because the Consent Decree restricts the RNC's ability to combat voter fraud whether it is acting alone or in cooperation with state parties or law enforcement authorities, the Decree violates public policy and must be vacated.

CONCLUSION

For the foregoing reasons, the RNC urges this Court to grant its motion to vacate the Consent Decree pursuant to Federal Rules of Civil Procedure 60(b)(4)-(6) or, alternatively, to modify the Consent Decree to: (1) exclude enforcement by non-party intervenors; (2) eliminate the 20-day notice and pre-clearance requirement; and (3) re-define the term "ballot security program" to exclude mere discussions between the RNC and state and local party committees about those committees' "ballot security" plans.

Respectfully submitted,

Mark D. Sheridan
DRINKER BIDDLE & REATH
500 Campus Drive
Florham Park, N.J. 07932
Telephone: (973) 549-7336
Facsimile: (973) 360-9831

Bobby R. Burchfield
Jason A. Levine
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 756-8000
Facsimile: (202) 756-8087

Counsel for Defendant
Republican National Committee

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