IN THE UNITED STATES DISTRICT COURT
FOR THE 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

MEMORANDUM IN SUPPORT OF INTERVENOR'S MOTION FOR A PRELIMINARY INJUNCTION

Date of Argument: November 1, 2004

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INTRODUCTION

Intervenor submits this Memorandum to address the three issues raised by the Court on October 29, 2004. These issues are: (1) the RNC's participation in the efforts to use lists of returned mail to challenge newly registered voters; (2) whether these voter challenge efforts will have a disparate impact on racial or ethnic minorities; and (3) whether such challenges will clog the voting process on election day in predominately minority precincts, and intimidate and disenfranchise minority voters.

I. THE RNC PARTICIPATED ACTIVELY IN THE EFFORT TO USE LISTS OF RETURNED MAIL TO CHALLENGE NEWLY REGISTERED VOTERS

The evidence shows convincingly that the Defendant Republican National Committee ("RNC") participated actively in a joint effort with the Ohio Republican Party ("Ohio RP") to use returned mailings to challenge the rights of thousands of newly registered voters to cast their ballots in the upcoming election.

The joint effort was done to combat "vote fraud" and was thus a "ballot security effort" under paragraph A of the 1987 Consent Decree, for which prior approval from this Court was required. Indeed, both the original Consent Decree entered in 1982 and the second Consent Decree entered in 1987 arose out of mass mailings to registered voters and the use of returned undelivered mail to develop lists to challenge voters.

On August 10, 2004, the RNC mailed over 49,000 letters to newly registered voters in Cuyahoga County, Ohio (Cleveland). (Ex. 1, Cino Dec. at ¶ 4; Ex. 2, Cino Dep. Tr. at 75:5-7). The mailing was done by the RNC. (Cino Dep. Tr. at 75:19-22.) But it was done in such a way that the undeliverable mail was returned not to the RNC, but to the *Ohio RP*. (*Id.*)

There were 3,353 letters from this mailing that were returned undelivered. (*Id.* at 75:8-10.) The Ohio RP made a list of them and sent it to the RNC, so that both the RNC and the Ohio RP had the list. (Cino Dep. Tr. at 75:11-76:3, 102:11-19.) The RNC claims that the purpose of the mailing was simply to "welcome all newly-registered voters in Cuyahoga County." (Cino Dec. at ¶ 4.) But when this list of undelivered mail was received by the RNC, the RNC analyzed it for *voter fraud*. (Cino Dep. Tr. at 79:5-15.) This is made clear by the lists themselves. We attach hereto as Exhibits 3, 4, 5 and 6, lists and analyses of lists made by the RNC of the voters whose mail was returned undelivered. (Cino Dep. Tr. at 82:18.) Exhibit 3 is a list of about 950 names and addresses sorted by zip code. It shows an "info key" with designations "CF (couldn't find); VR (verified address); P (photo); B (business); O (other)." (*Id.*) And Exhibit 3 bears the note on its first page: "OH Highly Suspicious."

The RNC's Rule 30(b)(6) witness, Maria Cino, Deputy Chairman of the RNC, admitted that RNC personnel took the list and tried to develop proof of vote fraud. (Cino Dep. Tr. at 84:15-85:1.)[1] People were sent to look at, or photograph, the addresses to determine whether the voter lived at the address given. (Cino Dep. Tr. at 87:7-13, 88:21-22.) The results of these investigations are recorded in the lists opposite the voter's name under a column headed "INFO/NOTES." (*See* Exs. 3, 5 and 6).

This document reflects that, after reviewing 950 of the voters, the RNC concluded that 50-80 were "suspicious" and 10 were "highly suspicious." (Ex. 4;

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[1] At times Ms. Cino, the Deputy Chair of the RNC and the 30(b)(6) witness, tried to avoid the word "fraud," and used the phrase "voter irregularities." (Cino Dep. at 84:15-18, 85:12-15) But after being confronted with the lists, she acknowledged, that the RNC was looking for "vote fraud." (Cino Dep. at 85:1).

Cino Dep. Tr. at 94:7-12.)[2] Thus, although the RNC has tried to depict their mass mailing as an effort to woo new voters, and "collect data" (Cino Dep. Tr. at 81), it was plainly also part of an effort to develop a basis to challenge voters. And Ms. Cino conceded this fact after being confronted with the lists, although she maintained that the vote fraud information would be used only after the election. (*See, e.g.*, Cino Dep. Tr. at 88:8-12; 124.)

Then on September 9, 2004, the Ohio RP did an expanded mass mailing, using the exact same letter that the RNC had used in August. (Cino Dec. Exs. 3, 4).[3] These letters were sent not only to newly registered voters in Cuyahoga County (Cleveland), but also to newly registered voters in Franklin County (Columbus), Summit County (Akron), Hamilton County (Cincinnati), and Montgomery County (Dayton). (Cino Dec. at ¶ 5.)

The Ohio RP received back 15,238 of these letters as undeliverable. (Cino Dec. at ¶ 5.) This information was shared with the RNC, and the list of these voters was prepared and sent by the Ohio RP to the RNC. (Cino. Dep. Tr. at 75:11-76:3, 102:11-19; 106.) Ms. Cino testified that people at the RNC thought this volume of returned mail might be evidence of voter fraud, but that they were aware of the consent decree, thought that they could not use the lists for any purpose, and were warned not to discuss it. (Cino Dep. Tr. at 106-107; 108-109.)

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2 The document bears the heading "Highly Suspicious List – Ohio". There were from seventeen to twenty others mass mailings to newly registered voters in other "battleground" states (Cino Dep. Tr. at 74); and we infer other highly suspicious lists were done for these other states.

3 The letters differed only in that the Ohio RP letter was signed by the Ohio RP instead of the RNC. As already mentioned, the letters in both mailings bore the return address of the Ohio RP.

This second list was produced to Intervenors by the RNC after the Cino deposition, and it turns out to have been subject to the same kind of "vote fraud" analysis as the first list -- the one made up from the mailing done by the RNC. The second list, separated by county. It is also sorted by zip code. Like the first list, this list reflects that further investigation has been done with regard to some of the voters. And notations such as "no mail receptacle," "moved" and "vacant" appear in a column headed "other comments" opposite the listed voter's name.

Thus, in August the RNC sent out a mass mailing which it used to look for vote fraud, and shared the results with the Ohio RP. And in September the Ohio RP sent out a larger mass mailing and shared the results with the RNC, which the RNC used to look for vote fraud.

Ms. Cino testified repeatedly that RNC personnel did not discuss vote fraud with the Ohio RP because the Consent Decree forbade it from doing so. (Cino Dep. Tr. at 47) ("due to the fact that we signed the consent decree, that is something we could not be involved in"); (Cino Dep. Tr. at 28) (RNC has not tried to develop any "strategies" to combat vote fraud "because of the consent decree"); (Cino Dep. Tr. 109) (RNC aware of the consent decree and was "warned not to discuss" doing something about voter irregularities.) However, emails produced at the very end of the deposition seem to show that RNC personnel were discussing voter fraud strategies on a regular basis, among themselves, and with state party officials including officials in Ohio.

These emails are collected in Exhibit 7 hereto. Exhibit 7 contains several emails with the subject line "Voter Reg. Fraud Strategy conference calls." (Ex. 7, RNC000179 – RNC000185.) One is dated September 30, 2004, well after lists had been compiled and analyzed from both mailings – the RNC mailing and the Ohio RP mailing. (*See* Ex. 10, RNC000184-185; Cino Dep. Tr. at 145:2.) This email is from an RNC official and it states:

"Team,

We've been asked to schedule the remaining HAVA/Voter Reg Fraud Strategy conference calls by Week's end.
NV
OH
NM
PA"

It is clear that the Ohio RP was to be a part of the strategy call because the e-mail also states:

"RNC Coordinators – Please discern the *State Chairman's* availability" Ex. 7 (emphasis added.).

Moreover, there are numerous other emails in Exhibit 7 that bear the subject line "Cuyahoga Returned List." These are sent or received on October 5, 2004 shortly before the decision was made to make a massive challenge list. These emails clearly reflect conversations about efforts to combat "voter fraud", that if carried out would be covered by the pre-approval requirement of the second consent decree. These emails reflect that RNC personnel have received the returned mailing list from the Cuyahoga County's Election Board's own mailing.[4] And the RNC personnel discussed voter fraud strategy with officers of the Ohio RP and with the Bush campaign.[5]

Several emails suggest cross-checking requests for absentee ballots against the list of returned mail in NV, FL, PA and NM as well as Ohio. These emails are sent to officials of both the RNC and the Ohio RP. (*See, e.g.*, Ex. 8 at RNC000172) (emails from and to representatives of the RNC, the Ohio RP and Bush-Cheney '04).

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4 *See, e.g.*, Ex. 7, RNC000173 (email at bottom of page).

5 *See, e.g.*, Ex. 7, RNC000173, email October 5, 2004 from Shawn Reinschmiedt of the RNC to Mike Magan and a Mr. Mauk of the Ohio RP and others.

A later email from Mr. Griffin, head of Research/Communications for the RNC, states:

"Chris MC says this:

> Jack Christopher and I have already tasked our IT person with creating a match list between the BoE [Board of Elections] return mail list and the AB request list . . . I can't speak to the other states, but if they don't have flagged voter rolls, *we run the risk of having GOP fingerprints* . . ." (Ex. 8, RNC000152) (emphasis added.)

Ms. Cino said she did not know about these emails until shortly before the deposition. (Cino Dep. Tr. at 146:16-147:2.) And she had never questioned any of these people about voter registration strategy calls they may have had with the Ohio RP. (Cino Dep. Tr. at 146.)

In any event, according to the declaration of Ms. Cino, the Ohio RP, beginning on or about October 7, 2004, obtained lists of mail sent by the Ohio County Board of Elections to new registrants that had been returned undeliverable. (Cino Dec. ¶ 6.) According to Ms. Cino, the Republican Party of Ohio then challenged some 35,000 newly registered voters whose mail was returned, based "*primarily* on the County Board of Elections Mailings." (Cino Dec. ¶ 10.) She denied that the Ohio RP's own mailings had been used, and denied any collaboration with the RNC. (Cino Dec. ¶ 6.)

However, the *Washington Post* reported on October 23, 2004 that "[t]he Ohio Republican Party challenged the eligibility of 35,000 newly registered voters yesterday." (*See* Ex. 9). The article states that "most of the 35,000 voters live in urban, Democratic areas, party spokesman Jason Mark said." (*Id.*) Then the article reports that "[l]ocal party officials, joined by Republican National Committee Chairman Ed Gillespie at a news conference, said the voters were mainly registered by "shadowy" Democratic-leaning groups and were chosen after *the GOP sent them*

mail that was returned as undeliverable." (emphasis added). Ms. Cino confirmed the accuracy of this news report. (Cino Dep. Tr. at 44:18.)

Similarly, a press release issued on October 22, 2004, by the Ohio RP confirmed the 35,000 challenges, and claimed that they were based on mail returned *to the party*. The press release says:

> Bennett [Ohio RP Chair] was joined at a news conference earlier this week by Republican National Committee Chairman Ed Gillespie, where he *displayed thousands of pieces of undeliverable mail to* newly registered voters. The mail was *returned to the party* at an unprecedented rate . . . .

(Ex. 10 (emphasis added)).

Ms. Cino relied mostly on news articles to support her testimony that the Ohio RP had not used its own mailing to develop its challenge list. She had not spoken to anyone at the Ohio RP. (Cino Dep. Tr. at 67:22-69:3.) But the news articles quoted from above suggest that the mailings used to develop the list had been sent by the party.

Regardless of whose set of returned-as-undeliverable mail was used to develop the list, the evidence convincingly shows coordination between the RNC and the Ohio RP, and it shows "participation" and "assistance" by the RNC in the efforts to identify and challenge newly registered voters. These actions are in direct violation of the consent decree, and, as set forth below, they have a disparate impact on minority voters.

The RNC and the Ohio RP obtained lists of returned mail from newly registered voters in August and September and shared those lists with each other. The RNC analyzed both for voter fraud. Contrary to the claim by the 30(b)(6) witness that the RNC and the Ohio RP never spoke to each other about vote fraud strategy, there are numerous e-mails showing that they did. The 30(b)(6) witness

just never talked to the people who sent and received them. And at a mid-October press conference the RNC Chair and the Ohio RP Chair jointly announced the plan to challenge 35,000 voters based on returned mail.

The RNC participated in the plan to develop lists of newly registered voters whose mail was returned undelivered and to challenge those voters.

II. THE CHALLENGES ARE OVERBROAD AND HAVE A DISPARATE IMPACT ON MINORITY RACIAL AND ETHNIC GROUPS

A. Overbreadth

The fact that a person's mail is returned undelivered does not mean that the person is ineligible to vote. It may mean that the person has changed his or her address, or is transient. But it does not by any stretch provide a basis for concluding that the voter is ineligible to vote.

This point was starkly illustrated during the recent hearings that were triggered by the *pre-election* challenges to the 35,000 voters. The challenged voter testified that mail was properly delivered to the correct address, but that she refused the mail. (*See* Ex. 11, Summit County Hearing Tr. at 12:21-13:2.) The challenger then tried to explain why she had made the challenge. But she could not. She testified that her sole basis for challenging the voter was the fact that she was told by a Republican Party official that the mail was returned as undeliverable. (*Id.* at 6:5-6:20.) The challenger had never been to the voter's residence, did not know who the challenged voter was, did not send any mail to the challenged voter, and never even saw any mail that was returned as undelivered. (*Id.* at 5:6-7:7.)

> Mr. Pry [Summit County Board of Elections Member]: Now, you've Indicated that you signed this based on some personal knowledge.
> Mr. Hutchinson [BOE Member]: No.

Mr. Arshinkoff [BOE Member]: Reason to believe. It says, "I have reason to believe." It says it on the form.
Mr. Jones [BOE Member]: It says, "I hereby declare under penalty of election Falsification, that the statements above are true as I verily believe."
Mr. Arshinkoff: It says here, "I have reason to believe."
Mr. Hutchinson: It says what it says.
Mr. Arshinkoff: You want her indicted, get her indicted.
Mr. Pry: That may be where it goes next.
Mr. Hutchinson: Yeah, give it a try.

The challenger then refused to provide further testimony and invoked the Fifth Amendment to the U.S. Constitution, fearing that she may be indicted for election falsification. (*Id.* at 7:15-13.)

The foregoing example is not an isolated one. Another challenger lodged some 200 challenges based on the fact that mail was returned as undelivered, even where he did not know any of the challenged voters, never visited their residences, and never saw one piece of unreturned mail. (*Id.* at 38:16-40:17.) These challenges were dismissed with prejudice for want of proof. (*Id.* at 63:9-10.) Members of the Summit County Board of Elections were "appalled," described these challenges as an "absolute travesty," and considered them an "attack[] [on] the fundamental right of people's right to vote." (*Id.* at 31:13-23.)[6]

B. Disparate Impact

The evidence shows that many more newly registered mailings was returned from precincts that were predominantly minority than from predominately White precincts. This is presumably because people who live in the inner city are more likely to be transient and change their addresses than those who live in

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6 One of the Board Members advised that he planned to request the Summit County Prosecutor to investigate whether the challengers should be prosecuted for election falsification. (*Id.* at 66:22-67:3.)

predominately White suburbs. Whatever the reason, Intervenor's expert Philip Klinkner demonstrates the disparate impact. (*See also* Ex.12, Lott Analysis.)

Professor Klinkner obtained the challenge lists for Cuyahoga County and Hamilton County. Cuyahoga County is the largest in Ohio – it is where the City of Cleveland is located. Cincinnati is located in Hamilton County. He was able to obtain data showing the voting precinct in which each challenged voter lived. He also obtained data showing the racial breakdown of the voting age population in each voting precinct in both counties. (Klinkner Dec. ¶ 3.)

Then Professor Klinkner examined whether there was a correlation between the number of challenged voters in a precinct and the racial make up of the precinct. He found:

> "a strong and statistically significant relationship between the number of challenged voters and the race of the precincts in which they were challenged. In other words, it is substantially more likely that challenges will occur in precincts that are more heavily black. . . ."

(*Id.* ¶ 2.)

For example, in Cuyahoga County voters in the most heavily black precincts (90%-100%) are nearly three times as likely to be challenged compared to voters in the most heavily non-black precincts (0-10%). (*Id.* ¶ 2.) In Hamilton County, voters in the most heavily black precincts are nearly eight times as likely to be challenged compared to voters in the most heavily non-black precincts. (*Id.* ¶ 4.)

Professor Klinkner's results do not change in a material way when he uses the econometric techniques that Defendant RNC's expert argued in his deposition that Professor Klinkner should have used. (*Id.* ¶¶3, 5.) Professor Klinkner's conclusions are set forth in (hopefully) lucid form in his declaration, and they establish that the challenges from the list at issue in this case will have a racially disproportional impact.

The RNC's analysis of the returned mailings was done based on mailings by the RNC and by the Ohio RP. (*See supra*.) The RNC seems to take the position, however, that if it relied on the State Board of Election's mailings it could escape the reach of the Consent Decrees. Thus, the RNC says: "In view of . . . the fact that the names being challenged were drawn overwhelmingly from County mailings that were returned as undeliverable – rather than RNC mailings – the Republican Party of Ohio initiated statutory challenges to voter registrations." (*See* Def. Opp. Memo to Proposed Intervenors' Emergency Mot. to Intervene at 5.) But the racially discriminatory *impact* of these challenges does not depend at all on whose mailings the list was based on. And the RNC had already sorted by zip codes the letters, returned as undeliverable, that had been sent by it and the Ohio RP. The RNC had sent people to take photos of the addresses. (*See* Cino Dep. Tr. at 87:7-13, 88:21-22.) The RNC knew where the returned mail had come from and undoubtedly knew that the challenges would fall disproportionately on inner city minorities before it decided to challenge based on the County Election Board returned mailings.

In any event, both Section 2 of the Voting Rights Act of 1965 and the Consent Decrees entered in this case focus on *effect* not purpose. *See e.g. Ortiz v. City of Philadelphia Office of City Commissioner*, 28 F.3d 306, 309 (3d Cir. 1994) ("Congress made clear that a violation of § 2 could be established by proof of discriminatory result alone.")

Similarly, this Court's Consent decree focuses on "purpose *or significant effect*". (*See* 1982 Settlement Agreement at Section 2(e).) And the same section of the Settlement Agreement states:

> the *conduct of such activities disproportionately in* or directed towards districts have a substantial proportion of racial or ethnic of populations shall be considered relevant evidence of the existence of such a factor and purpose.

(*Id.*)

The 35,000 challenges program will fall disproportionately on African-American precincts and on African Americans. The RNC undoubtedly knew this before the challenges efforts were conducted. Their sorting by zip codes and subsequent investigations would make this clear. These challenge efforts were aimed at "vote fraud" and constitute a "Ballot Security" effort under the definition in paragraph A of the 1987 Consent Decree. It therefore required prior approval of this Court under paragraph C of that Decree. It may be enjoined for that reason alone. Moreover, it would not qualify for approval because the voter challenge effort has a clear and known discriminatory impact.

III. THE 35,000 VOTER CHALLENGE PROGRAM WILL LIKELY CAUSE LONG DELAYS AT THE POLLS AND INTIMIDATE VOTERS

The eleventh hour pre-election challenges to the 35,000 newly registered voters on October 22, 2004, overwhelmed the County Boards of Elections. They were required under state law to give notice to each challenged voter, and hold a hearing *before the election* and adjudicate the voter's right to vote. This not only placed a huge burden on the challenged voters' right to vote. It also proved impossible. A federal court has entered a restraining order effectively ending these pre-election challenges. All this has been reported in the past and is a matter of public record.

However, a Republican Party spokesperson has said that they will now simply make their challenges to the voters on the 35,000 person list at the polls on Election Day. *See* Ex. 14, Jo Becker, *Judge Rebuffs GOP Effort to Contest Voters in Ohio*, Washington Post (Oct. 28, 2004). This will impose an unacceptable burden on the election process, and risk intimidating and disenfranchising voters, particularly in predominately minority precincts.

First, this has been conceded by the Secretary of State of Ohio. The Secretary of State issued a statement on October 29, 2004 regarding challengers at Ohio's polling places. He stated that "[a]s Secretary of State it is my responsibility to conduct Ohio's elections in a manner as open and accessible as possible." (*See* Ex. 15, Declaration of Timothy Burke ("Burke Dec."), Chair of the Hamilton County Board of Elections, at ¶¶ 36, 37.) The Secretary of State then "instructed the Attorney General to offer the following recommendation to the federal courts in Hamilton and Summit counties for resolution of these matters now: All challengers of all parties shall be excluded from polling places throughout the State." (*Id.*) The Attorney General has rejected the proposal, and massive election day challenges may therefore still be made. (*Id.* ¶ 38.)

A challenge to a voter on election date by a partisan pollwatcher can be made on six different grounds, one of which is that the voter does not live in the precinct. (Burke Dec. ¶¶ 1, 10.) The challenger need not provide evidence in support of the challenge. He need only designate the statutory ground -- *e.g.*. "lack of residency in the precinct." (Burke Dec. ¶ 11.)

Once made, the challenge automatically triggers a process that imposes burdens on the challenged voter and the "presiding judge," one of the four poll *workers* whose main job is to help move voters through the voting process. (Burke Dec. ¶ 12.)

Thus, the presiding judge must administer an oath to the challenged voter and ask her three specified questions directed to her right to vote. (Burke Dec. ¶¶ 15-16.) And the voter must sign the oath, which contains the statement "WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE." (Burke Dec. ¶ 52.)

If the voter declines to sign the oath or answer questions, then *all* of the poll workers must meet and decide by majority vote whether the voter may vote. (Burke

Dec. ¶ 18.) If the poll workers decide the voter is not entitled to vote, a provisional ballot will be provided and filled out. However, under state law it is unlikely to be counted. (Burke Dec. ¶¶ 19-20.)

If the challenged voter answers the questions correctly and clearly fills out the oath, the presiding judge acting alone may permit the voter to vote. (Burke Dec. ¶ 16.) Hamilton County and other counties have decided that the presiding judge *will* permit the voter to vote a regular ballot under those circumstances. (Burke Dec. ¶¶ 29-31.) However, state law and the Secretary of State's guidance provide that additional questions may be asked by the presiding judge; and the voter may be deemed "ineligible" "if for any other reason a majority of the judges (the other poll workers) believes the person is not entitled to vote." (Burke Dec. ¶¶ 33-35.)

Mr. Burke states the following about the effect of election day challenges on the election process:

> 41. I am not confident that myself or my fellow board members, or the election judges, are prepared to deal with the high number of challengers we are expecting.
>
> 42. Traditionally, in Hamilton County, parties have named their precinct executives (who are also known as central committee members) as challengers, but to my memory neither of the parties have ever used challengers in the polling places to challenge voters.
>
> 43. Moreover, during the course of the trainings, our election judges were asked whether any of them have ever experienced challengers making challenges in their polling places. The near unanimous response has been "no." For the overwhelming majority of our poll workers, even those who have worked at polling places for more than 30 years, this election would mark the first time they have ever encountered a challenger making challenges in a polling place.

44. It is therefore my belief that none of our presiding judges have ever had to administer a 10-U form in the past, or facilitate the resolution of challenges by challengers. Likewise, none of our non-presiding judges have ever participated in the resolution of challenges by challengers before.

45. Despite the training we are providing, I am very concerned that our election judges will be confused by the challenge process, that their time and attention will be consumed by processing challenges, and that the filing of challenges will disrupt voting on election day.

46. When a challenge is made, the attention of the presiding judge must be devoted to the challenge instead of to the processing of voters. In the event that a challenged voter's answers to the 10-U questions produce uncertainty about their eligibility to vote, or in the event that a challenged voter does not sign the 10-U oath, all four election judges (i.e., all the poll workers) may also have to get involved in processing the challenge. This would effectively shut down the processing of voters until the challenge is resolved.

47. Repeated challenges made at a polling place will accordingly have the effect of slowing down the processing of all voters, even those who are not themselves challenged.

48. This slowing down of the process will lead to long lines at the polling place, lines that will discourage many voters from voting.

Mr. Burke states the following about the effect of election day challenges on minority voters:

49. The challenge process is also likely to intimidate voters – both those who are themselves challenged (whether or not they are eligible to vote) and voters who are not challenged.

50. Most voters will have heard news reports that hundreds of challengers will be in polling places to combat "voter fraud." The claims of voter fraud have often been associated with people who have moved since they registered to vote. This, in and of itself, may discourage some eligible voters from turning out on election day, particularly voters who have moved since they registered and yet remain fully eligible to vote.

51. Those voters who do come to the polls will observe challengers questioning the eligibility of other voters ahead of them in line, often on the ground that they are not a resident of that precinct. This may discourage many voters from voting, particularly new voters who may not know for sure in which election precinct they live.

52. Moreover, voters who are challenged will be required to have an oath administered to them and they must sign a form which states in bold letters **"WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE."** I have no doubt that this form will discourage eligible voters from voting.

* * * * *

53. I believe that low-income and minority voters are most likely to be dissuaded from voting as a result of these challengers.

54. First, I have examined the challenger designations filed by the Republican Party, and it is clear that Republican challengers will be concentrated in highly African American precincts. For the reasons stated above, the presence of these challengers on election day will likely have the effect of reducing the number of African American voters in this election.

55. Moreover, my experience tells me that the African-American community is most likely to be intimidated by a combination of the claims of voter fraud and the presence

of challengers at the polls because, if challenged, they may very well feel that they themselves are being accused of voter fraud.

56. In these communities, where residents are more likely to have had negative encounters with the law and law enforcement, the prospect of having to effectively run a gauntlet of challengers – challengers sent to combat "fraud" – will have the effect of discouraging African Americans from voting.

57. Likewise, the prospect of having to sign a form that warns in bold letters of a **"FELONY OF THE FIFTH DEGREE"** is likely to scare voters – even those fully eligible to vote - and dissuade them from voting.

58. I am also extremely concerned about challenges based on residency because of the nature of the questions contained in Form 10-U and the potential for misunderstanding by either the presiding judge or the prospective voter. For example, question (c)(3) on the 10-U form asks "When you came into this precinct, did you come for a temporary purpose merely or for the purpose of making it your home?"

59. The United States Sixth Circuit Court of Appeals has already clearly ruled that a college student is entitled to register and vote where they are going to college even though any parent sending a child to college certainly hopes that the stay at college is "for a temporary purpose." Thus, voters may be eligible to vote even if they think they are living in a precinct temporarily.

60. I believe that the language of this question has a great potential to be misunderstood and misapplied everywhere, but particularly in low-income communities with lower levels of educational achievement and where residents are likely to be tenants rather than homeowners and move more frequently.

Intervenors respectfully submit that the RNC's conduct violates the consent decree. And they further submit that the use of a list of 35,000 newly registered voters to make massive challenges on election day, which challenges clearly lack a proper factual basis, imposes an unacceptable risk and an unacceptable burden on the right to vote of all who live in Districts where the challenges will be focused.

IV. THE CONSENT DECREE HAS BEEN VIOLATED AND THE COURT SHOULD ORDER THE RNC AND OHIO RP *POLL WATCHERS* NOT TO USE THE LISTS TO CHALLENGE ON ELECTION DAY

The RNC has agreed that it "shall not engage in, and shall not assist or participate in, any ballot security program unless the program (including the method and timing of any challenges resulting from the program) has been determined by this court to comply with the provisions of the Consent Order and applicable law." (Ex. 16, Final Consent Decree at 2). The Decree defines "ballot security" efforts to include any "efforts to prevent or remedy vote fraud." (*Id.*) This agreement was memorialized on July 27, 1987. (*Id.*) The Final Consent Decree was an amendment to this Court's original Consent Order, which was entered on November 1, 1982. (Ex. 17, 1982 Consent Order.)

The 1982 Consent Order specifically binds the RNC and its "agents, servants and employees." (*Id.* at ¶ 4.) And the Final Consent Order permits the RNC to "deploy persons on election day to perform normal poll watcher functions," but only "so long as such persons do not use the results of any other ballot security effort, unless the other ballot security effort complies with the provisions of the Consent Order and applicable law and has been so determined by this Court." (Ex. 16, Final Consent Decree at 2.)

The Final Consent Decree defines "ballot security" efforts to include "ballot security or other efforts to prevent or remedy vote fraud." (*Id.*) The evidence

shows that the RNC has engaged in, assisted in and participated in a ballot security program that has not been determined by this Court to comply with the First Consent Order, and that does not in fact comply with that order because of its discriminatory impact. The evidence also shows the RNC and the Ohio Republican Party intend to deploy poll watchers as their agents, armed with the results of this unapproved ballot security program.

A. The Poll Watchers are Agents

An agency relationship exists "when one party exercises the right of control over the action of another, and those actions are directed towards the attainment of an objective which the former seeks." *Gen. Acquisition, Inc. v. GenCorp, Inc.*, 766 F. Supp. 1460, 1469 (S.D. Ohio 1990) (applying Ohio law); *Bulletin Broadfaxing Network, Inc. v. Times Mirror Co.*, 1992 U.S. Dist. LEXIS 6399 at *24 (D.D.C. May 13, 1992) (applying District of Columbia Law) ("the agent takes action on behalf of the principal and subjects himself to the orders of the principal."). A principal need not exercise direct control over the agent; rather, "it suffices that such a right exists." *Gen. Acquisition, Inc.*, 766 F. Supp. at 1469. This right of control "need not extend to every aspect" of the relationship between the principal and the agent. *Gen. Acquisition, Inc.*, 766 F. Supp. at 1469. The RNC and the Ohio RP clearly possess the authority to control and direct the acts of the poll watchers they have trained and reunited. *See Heitmanis v. Austin*, 677 F. Supp. 1347, 1358 (E.D. Mich. 1988) ("It is well established that the rules and policies of a national political party take precedence over contrary state political party rules.") (citing *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 (1981)).

The evidence shows that the distinction between the RNC and the Ohio Republican party is tenuous at best. The RNC's governing body is a Committee made up of the Chairman of, and two other representatives of, each State

Republican Party. (Cino Dep. at 12.) The RNC provides funding to the state parties. (*Id.* at 19:12-20:3). It trains state party personnel. (*Id.* at 17; 32:16-22). The RNC helps the state party develop communication and public relations plans and strategies. (*Id.* at 20:15-21:4.) They have a joint mission -- to get Republican candidates elected, and the relationships are especially close in a Presidential election year with national candidates on the ballot.

The RNC is heavily involved in pollwatcher activities. The RNC issues guidelines and manuals to the state party on poll watching activities. (Cino Dep. at 34:14-35:4;) (Ex. 18, at RNC 00012-32.) The RNC's poll watcher instructions include instructions on "(c)hallenging voters on Election Day." (Ex. 19, at RNC 000135.) They also include specific questions to be asked of voters at the polls. (*Id.* at RNC 000144.)

The RNC also organized and participated in conference calls with the Ohio RP outlining state poll-watching plans and anticipated election day problems. (Ex. 20, at RNC 000174.) Part of the agenda for one of these calls "with national" (referred in email traffic as the "HAVA Election Preparation Call #2," which was scheduled to occur this past Wednesday) includes confirming the number of pollwatchers. (Ex. 21 at RNC 000131-134.) Here, the RNC participated in mass mailings and analyzing the voter fraud potential in the undelivered mail. (Cino Dep. at 75:17-76:3.)

This evidence shows that in efforts to challenge newly registered voters whose mail is returned as undelivered the RNC and the Ohio RP acted jointly, and the poll watchers are agents of both.

Moreover, the RNC and the Ohio Republican Committee have repeatedly held themselves out to be one and the same. For example, the RNC sent letters to newly registered voters of Cuyahoga County in envelopes bearing the return address of the Ohio Republican Party. (Cino Dep. Tr. at 76:17-22). The RNC also

announced on television that "*We're* going to have poll watchers in areas where we believe that Democrats may try to steal the election." (Ex. 22, Shapiro Perl Dec.)[7]

To enforce the Consent Decree, Intervenors ask that the Court find that the Decree has been violated by the RNC, and order the RNC to send an immediate written message to its poll watchers in Ohio not to make any election challenges based on the list at issue in this case.

B. The Ohio Republican Party is Acting in Concert with the Republican National Committee to Violate the Consent Decree

Injunctions and consent decrees issued by this Court are binding upon and can be enforced against "the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those person in active concert or participation with them who received actual notice of the order by personal service or otherwise." Fed. R. Civ. Pro. R. 65(d). In enforcing its consent decree, the Court "may hold in contempt those who act in concert with named parties to frustrate an injunctive decree or to avoid compliance with it." *EEOC v. Int'l Longshoremen's Assoc.*, 541 F.2d 1062, 1064 (4th Cir. 1976).

Parties bound by a consent decree violate that decree when they utilize third-party surrogates to evade the confines of the decree. *Regal Knitwear Co. v. NLRC*, 324 U.S. 9, 14 (1945) ("[D]efendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding."); *United States v. Schine*, 260 F.2d 552, 553 (2d Cir. 1958) (finding violation of consent decree by party who admitted that it could not engage

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[7] A tape of this conversation is being provided to counsel for the RNC and will be available in court Monday.

proscribed activity, but argued that "independent corporations" it owned were not prevented from engaging in that same activity.).

Moreover, third parties who were not parties to the original action from which a consent decree was issued can still be held to have violated that decree and be subject to orders enforcing it. *See Northwest Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1355-56 (3d Cir. 1989) (third parties who trespassed upon health-clinic could be enjoined from acting under prior injunction issued against trespassing defendants with whom they acted in concert); *Kansas City Royals Baseball Corp. v. Major League Baseball Players Assoc.*, 532 F.2d 615, 632 (8th Cir. 1976) (National and American Baseball Leagues, unincorporated associations comprised of individual baseball clubs, could be enjoined by a consent decree issued in an action against an individual club). Therefore, the poll watchers and the Ohio RP can be enjoined from violating the consent decree even though they were not parties to the original action. In extending its injunction against the University of Alabama which prohibited the university from denying an African-American student the right to enroll, the Northern District of Alabama held that Governor George Wallace, a non-party to the injunction, could not obstruct the operation of the injunction. *United States v. Wallace*, 218 F. Supp. 290, 291 (N.D. Ala. 1963). "Thoughtful people, if they can free themselves from tensions produced by established principles with which they violently disagree, must concede that the governor of a sovereign state has no authority to obstruct or prevent the execution of the lawful orders of a court of the United States." *Id.* The Republican Party of Ohio, likewise, has no authority to obstruct this Court's order.

V. STANDARDS FOR ISSUANCE OF A PRELIMINARY INJUNCTION

Intervenor is entitled to a preliminary injunction if she establishes: "(1) a reasonable probability of success on the merits; (2) that irreparable injury will result if the motion is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that granting preliminary relief will be in the public interest." *Telco Communications, Inc. v. Barry*, 731 F. Supp. 670 (D. N.J. 1990) (citing *Ecri v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987)).

A. Intervenors Are Likely to Succeed on the Merits

To satisfy the preliminary injunction standard "it is not necessary that the moving party's right to a final decision after trial be wholly without doubt; rather, the burden is on the party seeking relief to make a prima facie case showing a reasonable probability that it will prevail on the merits." *Oburn v. Shapp*, 521 F.2d 142, 148 (3d Cir. 1975). Intervenor is likely to succeed on the merits.

First, the RNC participated with the Ohio Republican Party in voter fraud strategy, and the efforts to develop a list of returned mailings to challenge newly registered voters. Second, that list disproportionately targeted and impacted African American voters. And third, the consequences flowing from mass challenges on election day could be catastrophic.

B. Irreparable Injury

In cases such as this, where it is alleged that Intervenors' constitutional rights are being violated, courts generally have presumed irreparable injury. *See, e.g.*, 11 C. Wright and A. Miller, Federal Practice and Procedure: Civil §2948 at 440 (1973 ed.); *Ellrod v. Burns*, 427 U.S. 347, 373 (1976) ("loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury"). This principle has been applied repeatedly to the right to vote. *See, e.g.*,

United States v. Berks County, 250 F. Supp. 2d 525, 540 (E.D. Pa. 2003) (harm is irreparable because "voters denies equal access to the electoral process cannot collect money damages after trial for the denial of the right to vote.") *Charles H. Wesley Educ. Found. v. Cox*, 324 F. Supp. 2d 1358, 1368 (N.D. Ga. 2004) ("[No monetary reward can remedy the fact that [plaintiff] will not be permitted to vote in the precinct of her new residence'); *Dillard v. Greensboro*, 870 F. Supp. 1031, 1035 (M.D. Ala. 1994) ("The injury alleged by the Plaintiffs is denial of the right to participate effectively in the political process . . . . Given the fundamental nature of the right to vote, monetary remedies would be inadequate compensation for the Plaintiffs").

It is clear that Intervenor and others similarly situated are at risk of being prevented from voting on election day because of the delays and chaos that will ensue if the RNC is permitted to challenge the individuals on the List.

C. Relative Harm to the Parties

It is also clear that the fundamental right to vote cannot be outweighed by hypothetical instances of fraud that may occur as the RNC is likely to insist. Indeed, the Sixth Circuit upheld an Ohio district court's grant of a temporary restraining order putting a halt to pre-election day challenges "After considering the difficulties posed by competing concerns of not discouraging or preventing legal voting, on the one hand, and minimizing false registrations and election fraud, on the other hand." *Miller v. Blackwell*, Nos. 04-4299/4300/4301 (Oct. 29, 2004) (*See* Ex. 23.) Thus, as more fully explained below, the RNC should be found in violation of the Consent Decree and preliminarily injunction should issue to prevent any challenges from taking place based on the List.

The RNC urges this Court that its efforts are designed to prevent voter fraud. However, the RNC has not provided any evidence that this fraud is anything more

than conjecture. And even if it could it would be of no moment, as the Sixth Circuit just upheld a temporary restraining order "[a]fter considering the difficulties posed by competing concerns of not discouraging or preventing legal voting, on the one hand, and minimizing false registrations and election fraud, on the other hand." *Miller v. Blackwell*, Nos. 04-4299/4300/4301 (Oct. 29, 2004) (*See* Ex. 23.) In any event, there are sufficient official state poll worker staff who are trained to detect fraud and no evidence has been presented that these officials will do anything other than what is required by state law.

The potential harm a preliminary injunction portends for the RNC appears to be that it "distract[s] the [RNC] with litigation and...prevent[s] it from engaging in routine election activity." (Def. Opp. to Mot. to Intervene at 1). Requiring the RNC to adjust their election strategy and not use the impermissible ballot security lists causes only a minimal administrative burden, which is outweighed by intervenor's right to vote. *See United States v. Berks County*, 250 F. Supp. 2d at 541 (administrative expenses incurred by defendants "are far outweighed by the fundamental rights at issue.")

D. The Public Interest

The public interest would clearly be served by an injunction that would prohibit the Republican National Committee from employing these methods of voter intimidation and disenfranchisement through their "ballot security program. The public—both in Ohio and the nation as a whole—has a vested interest in ensuring that the catastrophic mistakes of the 2000 presidential election are not repeated. The public interest is served by issuance of a preliminary injunction when that order will ensure "that all citizens may participate equally in the electoral process serves the public interest by reinforcing the core principles of our democracy." *United States v. Berks County*, 250 F. Supp. 2d at 541.

Moreover, the public interest is not served by allowing the RNC to so blatantly resurrect prohibited practices in violation of this Court's order and renders the Consent Decree to which they are bound meaningless.

CONCLUSION

For the foregoing reasons, Intervenors request that the Court:

(a) Find that the RNC has, to a high probability, violated the Consent Decree;

(b) Preliminarily enjoin the RNC to issue immediate written instructions to poll watchers in Ohio that the Court has forbidden use of the returned mail lists to make challenges on election day;

(c) Grant such other relief as this Court deems appropriate.

* * *

Respectfully submitted,

John W. Nields /LK
John W. Nields
Patricia G. Butler
Laura S. Shores
Ari N. Rothman
HOWREY SIMON ARNOLD & WHITE LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Craig H. Livingston /LK
Craig H. Livingston
BALL LIVINGSTON, L.L.P.
661 Franklin Avenue
Nutley, New Jersey 07110
(973)661-4545

Judith A. Browne /LK
Judith A. Browne
Edward Hailes
Advancement Project
1730 M St., NW, Suite 910
Washington, D.C. 20036
(202) 728-9557

Of Counsel:
Mary Joyce Carlson
James & Hoffman P.C.
1101 17th St., N.W., Suite 510
Washington, D.C. 20036
(202) 496-0555

Dated: October 31, 2004

Counsel for Intervenor

CERTIFICATE OF SERVICE

I hereby certify that, on this 31th day of October, 2004, true copies of the foregoing Memorandum in Support of Intervenor's Motion for a Preliminary Injunction were served by hand upon each of the parties listed below:

Angelo Genova
Genova Burns & Vernoia
Eisenhower Plaza II
Suite 2575
354 Eisenhower Parkway
Livingston, NJ 07039

Bobby R. Burchfield
John G. Horan
M. Miller Baker
Jason A. Levine
Richard W. Smith
McDermott Will & Emery LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005

Lynne K. Kramer
Attorney for Intervenor