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**

REPLY BRIEF OF DEFENDANT REPUBLICAN NATIONAL COMMITTEE IN SUPPORT OF MOTION TO VACATE OR MODIFY CONSENT DECREE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

In its 2008 decision upholding an Indiana law requiring photo identification for in-person voting, the United States Supreme Court addressed the issue of voter fraud and concluded:

> It remains true . . . that flagrant examples of [in-person voter] fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor – though perpetrated using absentee ballots and not in-person fraud – demonstrate that *not only is the risk of voter fraud real but that it could affect the outcome of a close election.*
>
> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. . . . *While the most effective method of preventing voter fraud may well be debatable, the propriety of doing so is perfectly clear.*

Crawford v. Marion County Elections Bd., 128 S. Ct. 1610, 1619 (2008) (citations omitted) (emphasis added). Consistent with *Crawford*, the Republican National Committee ("RNC") seeks only the ability to assist States in combating the worsening problem of voter fraud through methods that are legal but are hampered or barred by the Consent Decree, an anachronistic 27-year old injunction that should now be vacated.

In its defense of the Decree, the Democratic National Committee ("DNC") falls back on rhetorical tactics that cannot survive scrutiny. For example, the DNC devotes six pages of its brief to cataloging alleged acts of vote suppression by "Republicans," but *none* of this purported activity was undertaken or supported by the RNC, the *only* entity subject to the Consent Decree. *See* DNC Br. at 10-15. Indeed, the DNC's effort to impute the conduct of individuals and state or county party committees to the RNC fails on the face of the Decree, which recognizes that the RNC has no "right of control over other state party committees, county committees, or other national, state and local party organizations of the same party, and their agents servants and employees." 1982 Consent Decree § 4. The DNC also disproves its own hyperbolic claim that

the RNC seeks the "systematic disenfranchisement of legitimately registered voters" (DNC Br. at 1) through the admission that the DNC itself has only alleged violations of the Consent Decree *twice* in the last 22 years, with only one minor, technical infraction found – in 1990 (*id.* at 7-8). In addition, the DNC devotes five pages of its brief to setting up and knocking down allegations of voter fraud that were not ultimately proved (*id.* at 17-21), but these straw men do not alter the fact that changed legal circumstances since 1987 have created new avenues for voter fraud that the RNC and the public have a legitimate interest in combating. *Crawford*, 128 S. Ct. at 1619.

Most noteworthy in the few substantive pages of its opposition brief, the DNC *concedes* that modification of the Consent Decree to bar enforcement action by non-party intervenors – such as Ebony Malone in 2004 – is appropriate. *See* DNC Br. at 4, 26. The DNC also: (1) relies upon an incorrect standard for analyzing whether "changed legal circumstances" warrant dissolution of the Consent Decree (*id.* at 16); (2) disregards the role that the 27-year duration of the Decree should play in deciding whether its continued existence is equitable (RNC Br. at 9-10); and (3) misrepresents the RNC's contentions about the lack of correlation between the Consent Decree and the Complaint that precipitated it (DNC Br. at 28-31; RNC Br. at 17-22). For these reasons, among others discussed below, the RNC urges the Court to vacate the Decree.

ARGUMENT

I. CHANGED LEGAL AND FACTUAL CIRCUMSTANCES WARRANT DISSOLUTION OF THE CONSENT DECREE.

A. The Laws Touching Upon Voting Have Changed Significantly Since the Consent Decree Was Amended in 1987.

Relief from a consent decree is appropriate under Federal Rule of Civil Procedure 60(b)(5) if the moving party can show "a significant change in either factual conditions or the law." RNC Br. at 9 (quoting *Agostini v. Felton*, 521 U.S. 203, 215 (1997)). In its opposition brief, the DNC sets forth a much more stringent standard, arguing that *"[t]he* 'relevant factor' is

'whether the conduct previously enjoined has become legal due to a change in the law.'" DNC Br. at 16 (quoting *Bldg. & Consr. Trades Council of Philadelphia & Vicinity v. NLRB*, 64 F.3d 880, 888 (3d Cir. 1995)). This assertion is incorrect. In the DNC's cited decision, the Third Circuit listed multiple factors bearing upon whether to modify or vacate a consent decree, and noted that "[c]ourts which have faced similar issues also have identified as *a relevant factor* whether the conduct previously enjoined has become legal due to a change in the law." 64 F.3d at 888 (emphasis added). In other words, rather than "*the* relevant factor," as the DNC claims, a change in the law that legalizes conduct proscribed by a consent decree is only "*a* relevant factor."[1] Relatedly, the Third Circuit has explained that the "changed legal circumstances" rationale for dissolving a consent decree does *not* require that the decree conflict with a later change in the law. As the Third Circuit ruled in *Henderson v. Morrone*, 214 Fed. App'x 209 (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*." *Id.* at 215 (emphasis added). *See also Brown v. Philadelphia Housing Auth.*, 350 F.3d 338, 348 n.6 (3d Cir. 2003) (same). The DNC misstates the law on this crucial point.

As set forth in the RNC's opening brief (at pages 10-14), four legal developments since the Consent Decree was amended in 1987 have made voting and registration more conducive to fraud, thus underscoring the legitimacy of the RNC's anti-fraud efforts and the need to vacate the Decree. *First*, the "Motor Voter Law" of 1993 permits voter registration by mail or in conjunction with driver's license renewals or welfare applications, and also restricts states'

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[1] The DNC's position would lead to the absurd result that consent decrees enjoining otherwise legal conduct could *never* be modified due to changed legal circumstances. This is pertinent here, given the Court's conclusion in 2004 that conversations between the RNC and Ohio Republican Party officials were impermissible under the Decree even though they were "*not* . . . *illegal* under Ohio or federal law." *See* Tr. at 66-67 (Nov. 1, 2004) (emphasis added).

ability to purge certain types of ineligible voters from registration lists. *See* 42 U.S.C. §§ 1973gg-4, 5(a)(4), 6(d). By their very nature, these provisions facilitate multiple simultaneous registrations, and opportunities to vote multiple times in given elections. *See Crawford,* 128 S. Ct. at 1617 (noting that the Motor Voter Law led to "inflated lists of registered voters," including 19 counties in Indiana with registration totals exceeding 100% of the voting-age population).

Second, the Bipartisan Campaign Reform Act of 2002 ("BCRA") prohibited national political parties from soliciting, receiving, or spending so-called "soft money," with the result that the DNC and Democratic candidates, in particular, "outsourced" much of their voter mobilization function (which was previously paid for with "soft money") to ideologically-aligned interest groups. *See* 2 U.S.C. § 441i; *see also* RNC Br. at 12-13. In turn, non-party groups such as ACORN engaged in unprecedented voter registration and get-out-the-vote activities in 2004 and 2008, leading to less accountability and transparency in the process, and creating an environment more conducive to registration fraud. As this Court 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).[2]

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[2] The DNC asserts that Democratic party committees and the Obama campaign registered and mobilized more voters than did third parties in 2008 (DNC Br. at 21-22 n.1), but this ignores the prominent role played by groups such as ACORN, which alone registered *1.3 million* new voters in 2008. *See* Press Release, "ACORN and Project Vote Help 1.3 Million Apply to Register to Vote" (Oct. 6, 2008) (Ex. 1 hereto). During this same election cycle, eight ACORN workers in Missouri alone were indicted on election fraud charges over their voter registration activities. *See* Press Release, U.S. Attorney's Office E.D. Mo. (Apr. 2, 2008) (Ex. 2 hereto). Further, as a "community development" group, ACORN now is eligible to receive massive amounts of government funding from the *$1 billion* allocated to the federal "Community Development Fund" by the new economic stimulus legislation, thus enabling ACORN to expand greatly its voter registration efforts – and heightening the need for the RNC's vigilance against voter fraud. *See* American Recovery and Reinvestment Act of 2009, Div. A. Title XII, at 34, 111th Cong. 1st Sess., Conf. Report (*available at http://www.appropriations.house.gov*) (last visited February 17, 2009).

Third, the Help America Vote Act of 2002 ("HAVA") required that voters with questionable registrations be allowed to cast "provisional" ballots, the validity of which are determined after Election Day by state officials. *See* 42 U.S.C. § 15482. This mechanism eliminates the traditional safeguards against multiple registrations and voting.[3]

Finally, the rise of alternative voting procedures in the 1990s, such as early voting, voting by mail, and "no-excuse" absentee balloting greatly broaden the opportunity for third parties to request and cast ballots for other individuals without their permission. *See* RNC Br. at 13-14. Coupled with the mail-in registration of the Motor Voter Law, voters in most states now can register to vote, request a ballot, and cast a vote without ever proving their existence. *Id.*

It is logically inescapable that these legal changes have created an environment that is more conducive to voter fraud than previously existed.

The DNC does not – and cannot – deny that these legal changes have occurred, nor does the DNC substantively dispute that voter fraud is easier to commit as a result. Instead, the DNC responds that because the RNC has not offered a laundry list of examples of voter fraud, the phenomenon must not exist. *See* DNC Br. at 17. In support of this specious argument, the DNC provides five pages of voter fraud allegations that were not ultimately substantiated, leading it to dub voter fraud "mythical." *Id.* at 17-21. This contention is risible.

The RNC did not encumber its opening brief with an encyclopedic enumeration of voter fraud examples because the dissolution of the Consent Decree does not require this; rather, it requires only "a significant change in either factual conditions or the law," which indisputably

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[3] The DNC disputes that the Consent Decree would bar the RNC from challenging "provisional" ballots cast under HAVA by describing this as a "normal poll watch" function permitted by the Decree (DNC Br. at 22), but this is *not* true if – inadvertently – a "significant effect" of challenges is to "deter qualified voters from voting." 1982 Consent Decree § 2(e).

has occurred in the arena of voter registration and voting procedure. *See Agostini*, 521 U.S. at 215. Contrary to the DNC's remarkable claim that ballot-box and voter registration fraud never occurs, the non-partisan Commission on Federal Election Reform – co-chaired by former President of the United States Jimmy Carter and former Secretary of State James Baker – found in September 2005:

> The November 2004 elections also showed that *irregularities and fraud still occur*. In Washington, for example, where Christine Gregoire was elected governor by a 129-vote margin, the elections superintendent of King County testified during a subsequent unsuccessful election challenge that ineligible ex-felons had voted and that votes had been cast in the names of the dead. . . . In Milwaukee, Wisconsin, investigators said they found clear evidence of fraud, including more than 200 cases of felons voting illegally and more than 100 people who vote twice, using fake names or false addresses, or voted in the name of a dead person. Moreover, *there were 4,500 more votes cast than voters listed.*

Commission on Federal Election Reform, "Building Confidence in U.S. Elections" § 1.1 at 4 (Sept. 2005) (Ex. 3 hereto) (citations omitted) (emphasis added). As the Commission further found: "*While the Commission is divided on the magnitude of voter fraud . . . there is no doubt that it occurs.*" *Id.* § 2.5 at 18 (emphasis added).[4]

In sum, there can be no serious dispute that voter fraud is a problem affecting elections in the United States, or that the legal changes described by the RNC have opened new avenues for fraudulent voting and registration. These changes are more than adequate to warrant dissolution

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[4] By way of other specific examples, in *Crawford*, the Supreme Court identified and relied upon instances of judicially-determined voter fraud in upholding an Indiana law requiring photo identification for in-person voting. *See* 128 S. Ct. at 1619 n.12. Tracing this issue back to the November 2000 election, the Missouri Secretary of State issued a report in 2001 finding that 1,384 votes were cast illegally in St. Louis County alone. Jo Mannies, *Blunt Urges Penalties in Allegedly Illegal Voting*, St. Louis Post-Dispatch, July 26, 2001, at A1 (Ex. 4 hereto). Further, the RNC is aware of public reports of at least 60 convictions or guilty pleas and 95 charges or indictments for voter fraud across 23 states for the years 2007 and 2008 alone. *See http://www.gop.com/votefraud.htm* (last visited February 17, 2009).

of the Consent Decree, to facilitate the RNC's full involvement in otherwise *legal* efforts to combat voter fraud.[5]

B. Changes in the Law Since 1987 Have Led to Significant Changes in Factual Conditions Pertaining to Voting.

As noted above, relief from a consent decree is appropriate under Rule 60(b)(5) if the moving party can show a "significant change in either factual conditions or the law." *Agostini,* 521 U.S. at 215. Plainly, the legal changes affecting voter registration and voting procedure since 1987 have led to significant changes in the factual conditions surrounding voting, insofar as voter fraud is *factually* easier to accomplish now.

The DNC asserts that factual conditions have not changed since 1987 because the RNC "and its affiliated State and county parties" have continuously sought to engage in "systematic efforts at disenfranchisement targeted at minority communities." DNC Br. at 10. The DNC devotes six pages of its opposition brief to listing acts of "disenfranchisement" (*id.* at 10-15), but *none* of the cited examples involves the RNC. On the contrary, the DNC cites newspaper articles and reports produced by ideologically-aligned groups that rely upon allegations against "a Republican donor," "Republican Party activists," "Republican workers," and state and county Republican party committees. *Id.* Even if the allegations presented by the DNC were wholly accurate (a highly debatable proposition), they have no bearing on the RNC. The Consent Decree itself invalidates the DNC's effort to conflate the RNC with all "Republican" individuals

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[5] In response to the RNC's contention that the Court's legal interpretations of the Consent Decree ran afoul of the First Amendment (RNC Br. at 14-17), the DNC contends in part that "there is no kind of communication forbidden by the Decree." DNC Br. at 25. In fact, the Court in 2004 ruled that "continuing discussions" between the RNC and the Ohio Republican Party regarding voter fraud constituted a violation of the Decree, even though the discussions were *not* illegal. *See* Tr. at 66-67 (Nov. 1, 2004). This effective bar on perfectly legal discussions between the RNC and state parties regarding voter fraud and fraud prevention amounts to a *prior restraint* on the RNC's political speech, in contravention of the First Amendment. *See* RNC Br. at 15-16; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

and groups, 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. Further, the DNC's suggestion that the RNC has been engaged in a conspiracy of disenfranchisement over the last two decades fails in view of the fact that the DNC itself has alleged violations of the Consent Decree only *twice* since 1987, securing only *one* finding – in 1990 – of a technical violation that did not result in any penalty. *See* DNC Br. at 7.[6]

In short, the DNC's effort to render the RNC "guilty by association" – and to freeze the facts to the status quo of 1987 – cannot stand, and must be rejected.

II. CONSIDERATIONS OF EQUITY AND PUBLIC POLICY ALSO WARRANT DISSOLUTION OF THE CONSENT DECREE.

Under Rule 60(b)(5), a federal district court may also set aside an order if "applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). Equitable considerations supporting relief from a consent decree include "the length of time since entry of the injunction; whether the party subject to its terms has complied or attempted to comply in good faith with the injunction; and the likelihood that the conduct or conditions sought to be prevented will recur absent the injunction." *Bldg. & Const. Trades Council*, 64 F.3d at 888.

As the Court is aware, the original Consent Decree was imposed 27 years ago; it was amended to become more restrictive 22 years ago. Although the DNC appears to believe that eternal consent decrees are appropriate, even the United States Department of Justice limits the duration of its consent decrees as a matter of policy and practice. As the RNC explained in its opening brief – a point the DNC now *ignores* – the Antitrust Division presumptively limits its

[6] As noted in the RNC's opening brief, several third-party intervenors filed enforcement actions under the Consent Decree since 1987, but *none* of these suits resulted in a penalty being assessed against the RNC either. *See* RNC Br. at 6-8 & Exs. 4-8 thereto.

consent decrees to ten years, and recent consent decrees entered by the Civil Rights Division under the Voting Rights Act generally expire in eight years or less (subject to extension "for good cause shown"). *See* RNC Br. at 9-10 & nn. 5-6. The Consent Decree here has been effective through *fourteen* federal election cycles and *seven* Presidential elections. Given the changed circumstances described above, it is time to vacate the Decree on durational grounds.

Further, with respect to the remaining equitable considerations noted above, the RNC has set forth its method of good faith compliance through the unrebutted (and unaddressed) Declarations of Deputy Counsels Caroline Hunter and Heather Sidwell, which explain in detail the RNC's strict adherence to the terms of the Decree. *See* RNC Br. at 8 & Exs. 10-11 thereto. These good faith efforts, and the vanishingly small prospect that the "conduct . . . sought to be prevented will recur" absent the Consent Decree, are underscored by the *de minimis* record of infractions of any sort by the RNC since 1987.

The Court has also interpreted the Consent Decree to have a far more substantial impact on the RNC's activities than it reasonably expected upon agreeing to the Decree. *See* RNC Br. at 22-23. The DNC has *agreed* with the RNC on this point with respect to the Court permitting non-parties to intervene and seek enforcement of the Decree on a nationwide basis. Accordingly, the DNC "has no objection to modifying the Decree to exclude further enforcement by third-party intervenors." DNC Br. at 26.[7] As for the other unexpected impacts of the Consent Decree, the DNC denies that the Court in 2004 extended the Decree to restrict the RNC's communications with state Republican parties (DNC Br. at 25-26), but the Court plainly ruled

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[7] This cynicism underlying this concession by the DNC is revealed by the fact that, in 2004, it *supported* the effort of intervenor Ebony Malone to enforce the Consent Decree, to the extent that the DNC verbally sought – and was denied – permission to join in Ms. Malone's suit at the last possible moment, during the hearing on the merits. *See* Tr. at 55-59 (Nov. 1, 2004).

that "continuing discussions" between the RNC and the Ohio Republican Party regarding voter fraud constituted a violation of the Decree, even though the discussions were *not* illegal. *See* Tr. at 66-67 (Nov. 1, 2004). The DNC similarly denies that the Court's imposition of a "disparate impact" test on the RNC's activities in 2004 was unexpected (DNC Br. at 26), but the Consent Decree merely deems a disparate impact to be "relevant evidence" bearing on whether race was a factor in an RNC ballot security program, *not* to serve as the *sine qua non* of a violation. *See* 1992 Consent Decree § 2(e). Because the RNC did not acquiesce in or anticipate these interpretations, it is no longer equitable for the Decree to have prospective application.

Public policy considerations support dissolution of the Consent Decree under Rule 60(b)(5) as well. *See, e.g., 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"). The public has a strong interest in protecting the integrity of the voting process, preventing voter fraud, and the reporting of criminal activity (such as voter fraud) to state authorities – all of which are compromised by the limitations and pre-clearance requirements of the Consent Decree. *See* RNC Br. at 24-25; *Crawford*, 128 S. Ct. at 619. The DNC does not now dispute these public policies, but instead reiterates its arguments that voter fraud is a myth, and that the RNC must remain subject to the Consent Decree because it is part of a continuing conspiracy to "disenfranchise" voters. *See* DNC Br. at 27. As shown above, these unsubstantiated arguments lack credibility. They do not defeat the public policy rationale for vacating the Decree.

III. THE CONSENT DECREE IS VOID *AB INITIO*.

Finally, Rule 60(b)(4) empowers a court to vacate a void judgment. *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. Bd. of Educ.*, 575 F.2d 417, 422 (3d Cir. 1978). Indeed, the Supreme Court has held that 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).

As the RNC explained in its opening brief (at pages 18-22), given the allegations of the DNC's original Complaint, the Court lacked authority in 1982 to enter (or later broaden) an injunction encompassing *all* efforts by the RNC to counter voter registration and ballot box fraud in all local, state, and national elections – including even conduct that is "not in and of itself illegal." Tr. at 66-67 (Nov. 1, 2004). The DNC admits that its animating Complaint was predicated on acts taken by the RNC "under color of state law" (DNC Br. at 28), yet the Consent Decree extends to the RNC's *private* activities touching upon the prevention of vote fraud. The Supreme Court in *Frew* rejected the imposition of relief extending beyond the bounds of the parties' dispute, holding that a consent decree must "*come within the general scope of the case made by the pleadings.*" 540 U.S. at 437 (emphasis added). Because the Consent Decree goes far beyond the DNC's "state action" pleadings to encompass strictly private action by the RNC, and also imposed nationwide injunctive relief where the Complaint did not support a broad injunction affecting any person other than the single complaining individual identified in the Complaint, the Decree is void *ab initio* and should be vacated. *Id.*[8]

CONCLUSION

For the foregoing reasons, as well as those set forth in its opening brief, the RNC urges the Court to grant its motion to vacate the Consent Decree or, alternatively, to modify it to: (1) exclude enforcement by non-party intervenors; (2) eliminate the 20-day notice and pre-clearance

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[8] The DNC attempts to avoid this conclusion through reliance on several court decisions apparently upholding consent decrees that provide relief beyond what courts could have awarded in the absence of negotiated decrees, but all of these decisions *pre-date* the Supreme Court's decision in *Frew*, which is the latest and controlling ruling on this topic. *See* DNC Br. at 29-31.

requirement; and (3) re-define the term "ballot security program" to exclude mere discussions between the RNC and state and local party committees about their "ballot security" programs.

Respectfully submitted,

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